"So Closely Intertwined": Labor and Racial Solidarity

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Abstract

Conventional wisdom tells us that labor unions and people of color are adversaries. Commentators, academics, politicians, and employers across a broad range of ideologies view the two groups' interests as fundamentally opposed and their relationship as predictably fraught with tension. For example, commentators assert that unions capture a wage premium that mostly benefits white workers while making it harder for workers of color to find work; that unions deprive workers of color of an effective voice in the workplace; and that unions are interested in workers of color only to the extent that they can showcase them to manufacture the appearance of racial diversity.

Like much conventional wisdom, the narrative of rivalry between unions and people of color is flawed. In reality, labor unions and civil rights groups work together to advance a wide array of mutual interests. This work ranges from lobbying all levels of government to protesting working conditions across the country. Moreover, unions can improve the lives of workers of color—whether or not they are union members—through activities that range from bargaining for better wages and working conditions to providing services like job training and continuing education to under-resourced communities.

We aim to replace the conventional wisdom with a narrative that more accurately describes the occasionally complicated but ultimately hopeful relationship between labor and race. In developing this narrative, we anchor our conclusions in an interdisciplinary literature that includes insights from legal, economic, psychological, and sociological scholarly research. This extensive body of scholarship indicates that union membership has significant benefits for workers of color in the form of higher wages and improved benefits, more racially congenial workplaces, and deeper cross-racial understanding. We complement this robust scholarly literature with real-world examples of union success at improving the well-being of workers and communities of color. In contrast to many other commentators, then, our account is largely optimistic, though we emphasize that there is still work for the labor movement to do.

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We are grateful to the following people, each of whom provided helpful feedback on previous versions of this paper: Robert Chang, Alan Chen, Marion Crain, Ellen Dannin, Owen Davies, Carmen Gonzalez, Justin Pidot, James Gray Pope, Nantiya Ruan, Ahmed White, and the participants in ClassCrits V and the 2012 conference of the Interuniversity Research Centre on Globalization and Work. We also thank the editors of the George Washington Law Review for their careful and diligent work on this Article.

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INTRODUCTION

> "As I have said so many times, and believe with all my heart, the coalition that can have the greatest impact in the struggle for human dignity here in America is that of the Negro and the forces of labor because their fortunes are so closely intertwined."[1]

On March 18, 1968, Martin Luther King, Jr. traveled to Memphis to march in support of striking sanitation workers.[2] Hundreds of workers—whose protest was ignited after two of their brethren were crushed to death while operating a faulty garbage truck—carried

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1 Letter from Martin Luther King, Jr., to Louis Simon, Manager, Amalgamated Laundry Workers Joint (Jan. 16, 1962), *available at* http://www.thekingcenter.org/archive/document/letter-mlk-louis-simon.

2 MICHAEL K. HONEY, GOING DOWN JERICHO ROAD: THE MEMPHIS STRIKE, MARTIN LUTHER KING'S LAST CAMPAIGN 1–2, 292 (2007) [hereinafter HONEY, GOING DOWN JERICHO ROAD].

picket signs reading "I *Am* A Man."[3] Alongside them marched an interracial coalition of ministers, union leaders, students, and community members.[4] After unexpected vandalism and police violence cut the march short, King left Memphis,[5] and city officials grew confident that they would easily break the strike.[6]

King soon concluded that he could not abandon the strikers, however, not least because he considered their campaign to be a microcosm of his own Poor People's Campaign—failure in the former could increase the likelihood of failure in the latter.[7] Moreover, the strike had become "a broad human rights confrontation in which almost every aspect of Negro life in Memphis [was] . . . at issue."[8] Thus, King returned to Memphis, where, on April 3, he delivered his "I've Been to the Mountaintop" speech, telling listeners that "masses of people are rising up. And wherever they are assembled today . . . the cry is always the same—'We want to be free.'"[9] King was shot and killed the next day.[10] One might say, then, that King died defending not only civil rights but also labor rights and, moreover, perhaps he would not have drawn a sharp distinction between the two.[11]

The Memphis sanitation workers' heroic struggle to gain union recognition and a collective bargaining agreement is emblematic of countless recent and historical examples of productive coalitions be-

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3 *Id.* at 1–2, 335.

4 *Id.* at 335–36.

5 *Id.* at 344–47, 378.

6 *See id.* at 367–72, 382–85.

7 *See id.* at 380.

8 Paul Valentine, *The Memphis Strife: Rights Confrontation*, WASH. POST, Mar. 31, 1968, at A1.

9 Dr. Martin Luther King, Jr., I've Been to the Mountaintop (Apr. 3, 1968), *available at* http://www.afscme.org/union/history/mlk/ive-been-to-the-mountaintop-by-dr-martin-luther-king-jr. King's speech was named for its closing paragraph, which eerily presaged his own death:

> Well, I don't know what will happen now. We've got some difficult days ahead. But it doesn't matter with me now. Because I've been to the mountaintop. And I don't mind. Like anybody, I would like to live a long life. Longevity has its place. But I'm not concerned about that now. I just want to do God's will. And He's allowed me to go up to the mountain. And I've looked over. And I've seen the promised land. I may not get there with you. But I want you to know tonight, that we, as a people, will get to the promised land. And I'm happy, tonight. I'm not worried about anything. I'm not fearing any man. Mine eyes have seen the glory of the coming of the Lord.

Id.

10 HONEY, GOING DOWN JERICHO ROAD, *supra* note 2, at 433–35.

11 Dr. King's mindset is apparent in the "I've Been to the Mountaintop" Speech, in which he continually draws on both civil rights and labor rights narratives, moving fluidly between topics such as slavery and freedom, fairness and injustice, the Memphis strikers' demands, and the broader civil rights movement. *See* Dr. Martin Luther King, Jr., *supra* note 9.

tween labor unions, civil rights groups,[12] and workers of color. Civil rights groups have worked arm-in-arm—often literally—with unions during organizing campaigns, and union organizing campaigns are themselves more likely to succeed in diverse or majority-minority workplaces.[13] Likewise, civil rights groups and unions work together to get out the vote, influence elections, and lobby on a broad spectrum of issues ranging from labor and employment discrimination law reform to consumer protection.[14]

Despite this compelling evidence of cooperation between unions and civil rights groups and convergence between labor interests and civil rights interests, conventional wisdom touted by commentators, academics, politicians, and employers across a range of ideologies holds that civil rights organizations and workers of color should align themselves with organized labor warily, if at all.[15] This skepticism results in part from organized labor's history of racial exclusion.[16] But history does not completely explain the conventional wisdom. Rather, its adherents also claim an array of other sources of present day friction between unions and workers of color.[17] Some charge that unions and their members—often assumed to be predominantly white, despite significant variation among unions—ignore or fear workers of color.[18] They claim that unions benefit workers of color peripherally, if at all, while simultaneously showcasing them to create the appearance of diversity, a troubling practice that one of us has elsewhere described as "racial capitalism."[19] Others argue that the situation is even worse: unions affirmatively demand solidarity from workers of color while simultaneously depriving them of the ability to meaningfully address workplace discrimination.[20] Still others maintain that union-supported legislation, such as the minimum wage, actually dis-

12 For purposes of this paper, we use the phrases "civil rights movement" and "civil rights groups" to refer to organizations dedicated to advancing racial equality, such as the National Association for the Advancement of Colored People ("NAACP"), Mexican American Legal Defense and Educational Fund ("MALDEF"), Asian Americans for Civil Rights and Equality ("AACRE"), and similar organizations.

13 *See infra* Part III.B.

14 *See infra* Part III.D.

15 *See infra* Part I (describing the current narratives negatively characterizing the relationship between unions and minorities).

16 *See infra* Part I.B.

17 *See infra* Part I.C.

18 *See infra* Part I.C.

19 Nancy Leong, *Racial Capitalism*, 126 HARV. L. REV. 2151, 2153, 2190 n.200 (2013); *see also infra* Part I.C.

20 *See infra* Part I.B.

advantages workers of color, and that unionized public employees such as teachers and prison guards harm communities of color through their malfeasance and indifference.[21]

Like much conventional wisdom, the pervasive narratives describing unions and people of color as rivals are flawed. In fact, labor unions and civil rights groups work together to advance a broad array of mutual interests, work that ranges from lobbying all levels of government to protesting working conditions at workplaces across the country.[22] Unions improve the lives of workers of color in other ways as well by providing services ranging from continuing education to free legal assistance.[23]

Moreover, the race-related critique of labor eclipses the other side of the story: the occasionally complicated but ultimately hopeful relationship between labor and race. In developing this narrative, we anchor our conclusions in both theory and practice. As to the former, we rely on interdisciplinary literature that includes insights from legal, economic, psychological, and sociological research. This literature suggests that union membership has significant benefits for workers of color in the form of both higher wages and improved relationships with white workers. As to the latter, we also note real-world examples of union efforts to improve the well-being of workers and communities of color. In contrast to the work of many other commentators, then, our account is largely optimistic, though we recognize that there is still work for the labor movement to do.[24]

Reevaluating these dominant narratives regarding unions and people of color is particularly critical in this challenging economic climate. The Great Recession has technically ended,[25] but the subsequent jobless recovery[26] has left the U.S. unemployment rate hovering near eight percent[27] and the poverty rate above fourteen percent.[28] Moreover, unemployment and poverty disproportionately affect racial

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21 *See infra* Part I.B.

22 *See infra* Part III.D.

23 *See infra* Part III.D.

24 We do not undertake the project of examining the narrative surrounding the relationship between labor unions and other historically disadvantaged groups—such as women and LGBT workers—although we think it an appropriate one for future work.

25 Don Lee, *Recession's Over, Economists Say to a Skeptical Public*, L.A. TIMES (Sept. 21, 2010), http://articles.latimes.com/2010/sep/21/business/la-fi-recession-over-20100921.

26 Chrystia Freeland, *Jobless Recovery Leaves Middle Class Behind*, N.Y. TIMES (Apr. 12, 2012), http://www.nytimes.com/2012/04/13/us/13iht-letter13.html.

27 *Labor Force Statistics from the Current Population Survey*, BUREAU OF LABOR STATISTICS (last updated June 1, 2012, 4:54 PM), http://data.bls.gov/timeseries/LNS14000000 [hereinafter *Labor Force Statistics*].

minorities. Poverty rates among black and Hispanic Americans are more than twice the rates among white or Asian Americans,[29] and the unemployment rate is dramatically higher among racial minorities—for example forty percent of young black men were unemployed in 2012.[30] This dire situation presents a clear need for intervention, and accordingly it is worth reassessing the conventional wisdom that unions are unlikely to improve the lives of workers of color.

Our shared scholarly enterprise of creating a more full-bodied narrative about the relationship between labor unions and civil rights groups is a microcosm of the large-scale reassessment that we believe is critically important. As scholars grounded, respectively, in labor law and in critical race theory, our initial orientation to many topics differs, and this Article reflects our efforts to reconcile our views by critically examining our respective baseline assumptions.

Ultimately, we are forthright that we do not agree on every nuance of the conclusions that one may draw regarding the relationship between labor and race. Where we disagree, we highlight our disagreement in the hope of prompting further productive discussion, both among academics and among labor unions and organizations dedicated to racial equality.[31] Far more importantly, however, we reach consensus on the major conclusions of the Article. Building consensus is worthwhile—indeed, it is necessary to a functioning de-

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28 U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2012, at 464 tbl.711 (2012), *available at* http://www.census.gov/compendia/statab/2012/tables/12s0711.pdf.

29 *Id.* at 464 (showing black and Hispanic poverty rates of close to twenty-five percent and white and Asian poverty rates near twelve percent); Suzy Khimm, *The Great Recession in Five Charts*, WASH. POST (Sept. 13, 2011, 12:52 PM), http://www.washingtonpost.com/blogs/ezra-klein/post/the-great-recession-in-five-charts/2011/09/13/gIQANuPoPK_blog.html.

30 UNIV. CAL. BERKELEY LABOR CTR., DATA BRIEF: BLACK EMPLOYMENT AND UNEMPLOYMENT IN APRIL 2012, at 3 (2012), *available at* http://laborcenter.berkeley.edu/blackworkers/monthly/bwreport_2012-05-07_48.pdf.

31 We are indebted to critical race theory for establishing a rich tradition of dialogic methodology and showcasing its benefits. *See* Rachel Anderson, Marc-Tizoc González & Stephen Lee, *Toward a New Student Insurgency: A Critical Epistolary*, 94 CALIF. L. REV. 1879, 1880 (2006); Robert S. Chang & Adrienne D. Davis, *Making Up Is Hard to Do: Race/Gender/Sexual Orientation in the Law School Classroom*, 33 HARV. J.L. & GENDER 1, 1–2 (2010); Robert S. Chang & Adrienne D. Davis, *The Adventure(s) of Blackness in Western Culture: An Epistolary Exchange on Old and New Identity Wars*, 39 U.C. DAVIS L. REV. 1189, 1189–90 (2006); Richard Delgado, *Rodrigo's Book of Manners: How to Conduct a Conversation on Race—Standing, Imperial Scholarship, and Beyond*, 86 GEO. L.J. 1051, 1051 (1998) (book review). Scholars in a wide range of disciplines beyond critical race theory have likewise employed the technique of transparent discussion to produce a fuller account of the issue under discussion. *See, e.g.*, Richard Stith & J.H.H. Weiler, *Can Treaty Law Be Supreme, Directly Effective, and Autonomous—All at the Same Time? (An Epistolary Exchange)*, 34 N.Y.U. J. INT'L L. & POL. 729, 729 (2002).

mocracy—even when such consensus is incomplete.[32] When infighting so frequently divides groups whose interests are, in fact, closely aligned, we think it vital to direct attention to existing frameworks for agreement and how to maximize their utility.[33] Put another way, incomplete consensus on the details of shared goals creates a healthy opportunity for discourse, not a division fatal to the larger shared enterprise.

This Article proceeds in three parts. Part I details four narratives that comprise the conventional wisdom that unions thwart the interests of workers of color and their communities. Part II describes the narratives' genesis in the troubled historical relationship between unions and workers of color and explains their persistence as a product of both that history and other contemporary factors. Part III argues that the conventional wisdom is flawed, and that scholarly research and practical experience show that unions, civil rights groups, and workers of color can and do work together in productive alliances towards their many shared goals. Part III also proposes measures that unions can take to further improve both their relationship with workers of color and others' perceptions of that relationship.

I. Conventional Wisdom

> "The claim that organized labor has been a force for racial egalitarianism can only be called a myth."[34]

As many employers, politicians, media outlets, and academics tell it, the relationship between unions, workers of color, and their advocates is fraught with racial tension. This tension arises in a variety of contexts: on the shop floor, in the union hall, and in communities of color. In each of these contexts, the story goes, white union leadership and membership prioritize their own interests to the detriment of workers of color. This Part explores this story by describing four conventional narratives about the relationship between labor and race and exploring the content of each narrative.

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32 *See, e.g.*, Cass R. Sunstein, Commentary, *Incompletely Theorized Agreements*, 108 Harv. L. Rev. 1733, 1735-36 (1995). Fittingly, incompletely theorized agreements are common in the practice of labor law as well. Provisions in collective bargaining agreements sometimes include language that is intentionally ambiguous in order to allow the parties to arrive at an agreement, particularly when the provision governs an event that may not ever arise. *See* Archibald Cox, *The Legal Nature of Collective Bargaining Agreements*, 57 Mich. L. Rev. 1, 3–4 (1958).

33 *See, e.g.*, Race and Labor Matters in the New U.S. Economy 7–10 (Manning Marable, Immanuel Ness & Joseph Wilson eds., 2006).

34 Paul Moreno, *Unions and Discrimination*, 30 Cato J. 67, 67 (2010).

In so doing, we do not claim that the relationship between unions and racial minorities is never problematic, that existing problems are only problems of image and perception, or that that no concrete steps are necessary to improve relationships between unions and racial minorities. Rather, we seek to explain the misalignment between the narratives we discuss in this Part and the mutually beneficial relationship that many unions and civil rights groups appear to enjoy—a relationship described in Part III. Our goal in distinguishing perception from reality is twofold: to lay the groundwork for an improved narrative about unions and race and to provide a framework for the concrete change that still needs to take place.

A. "Interests of White and Nonwhite Workers Are Fundamentally Opposed."

> "[A] basic conflict exists between labor-union concepts and civil-rights concepts. Something has to give."[35]

The narrative that the interests of white and nonwhite workers are fundamentally opposed permeates our national understanding of the relationship between labor and race.[36] The assumption underlying this narrative is that employment is a zero-sum proposition: any increase in benefits to nonwhite workers will harm white workers, and vice versa.[37]

In part, this narrative of competing interests results from awareness of broader social and cultural forces of interracial tension. Racism remains a serious blight on American society. At the interpersonal level, implicit bias continues to impair interracial interactions,[38] while the perspectives born of racially disparate experiences

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35 Thomas O'Hanlon, *The Case Against the Unions*, FORTUNE, Jan. 1968, at 170 (quoting John Doar, former U.S. Assistant Attorney General, Civil Rights Division, Department of Justice).

36 *See generally id.* at 170–73 (describing the relationship between unions and blacks as contentious from 1964 onward).

37 *See id.* at 170 ("At stake in the battle is white supremacy in broad areas of employment.").

38 *See* Katharine T. Bartlett, *Making Good on Good Intentions: The Critical Role of Motivation in Reducing Implicit Workplace Discrimination*, 95 VA. L. REV. 1893, 1895–98 (2009); Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CALIF. L. REV. 945, 952–53 (2006); Jerry Kang & Mahzarin R. Banaji, *Fair Measures: A Behavioral Realist Revision of "Affirmative Action,"* 94 CALIF. L. REV. 1063, 1072–75 (2006) (describing studies linking implicit attitudes with discriminatory behavior); Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1499–50 (2005); Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1213–16 (1995).

Considerable social science evidence also supports the importance of implicit bias. *See* Ian

tend to result in aggregate racial differences in the way people perceive the world, a phenomenon that Russell Robinson has termed "perceptual segregation."[39] The residue of broad historical segregation means that most Americans still live in racially homogenous neighborhoods[40] and attend de facto racially segregated schools,[41] precluding many natural opportunities for interracial interaction and understanding.[42] Additionally, many individuals experience what Camille Gear Rich describes as "racial fatigue"—although they are not overtly and explicitly biased, they are overwhelmed by the enormous amount of discourse on race in society and impatient for a promised post-racial future.[43]

This overarching social backdrop creates a paradigm in which the default assumption is that white and nonwhite workers' interests are in conflict.[44] That is, the negative racial dynamics that exist in society as a whole—including explicit and implicit bias, discrimination, and de facto segregation—inform the prevailing social understanding of the interests of white and nonwhite workers, both individually and at the institutional level.[45]

These assumptions manifest themselves in certain reflexive reactions to policies such as affirmative action, which serves as a flash point for the narrative of racial conflict.[46] Socioeconomically disad-

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Ayres & Joel Waldfogel, *A Market Test for Race Discrimination in Bail Setting*, 46 STAN. L. REV. 987, 989–93 (1994); Ian Ayres, *Fair Driving: Gender and Race Discrimination in Retail Car Negotiations*, 104 HARV. L. REV. 817, 818–20 (1991); Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination*, 94 AM. ECON. REV. 991, 991–92 (2004).

39 Russell K. Robinson, *Perceptual Segregation*, 108 COLUM. L. REV. 1093, 1098 (2008).

40 Leland Ware, *The Demographics of Desegregation: Residential Segregation Remains High 40 Years After the Civil Rights Act of 1964*, 49 ST. LOUIS U. L.J. 1155, 1164 (2005).

41 Paul M. Ong & Jordan Rickles, *The Continued Nexus Between School and Residential Segregation*, 15 BERKELEY LA RAZA L.J. 51, 51 (2004).

42 *See, e.g.*, Elizabeth F. Emens, *Intimate Discrimination: The State's Role in the Accidents of Sex and Love*, 122 HARV. L. REV. 1307, 1311 (2009).

43 *See* Camille Gear Rich, *Decline to State: Diversity Talk and the American Law Student*, 18 S. CAL. REV. L. & SOC. JUST. 539, 550–51, 563–66 (2009).

44 *See* ROBERT A. LEVINE & DONALD T. CAMPBELL, ETHNOCENTRISM: THEORIES OF CONFLICT, ETHNIC ATTITUDES, AND GROUP BEHAVIOR 215–16 (1972) (developing account of realistic group conflict theory, which states that in-group bias increases in response to threats such as scarce resources); *see also* Victoria M. Esses, Lynne M. Jackson & Tamara L. Armstrong, *Intergroup Competition and Attitudes Toward Immigrants and Immigration: An Instrumental Model of Group Conflict*, 54 J. SOC. ISSUES 699, 718–21 (1998).

45 *See* Esses, *supra* note 44, at 700–01 (relating one of the author's personal experiences encountering implicit racism towards immigrants).

46 *See* Rich, supra note 43, at 542–46. The Supreme Court heard argument this Term in a case raising the constitutionality of affirmative action in public higher education. Fisher v. Univ. of Tex. at Austin, 631 F.3d 213, 216 (5th Cir. 2011), *cert. granted*, 132 S. Ct. 1536 (2012).

vantaged white people often perceive affirmative action and similar policies as offering advantages to people of color who are no more disadvantaged than they are.[47] And the current discourse, which focuses on fault and privileges the existing baseline, does little to foster empathy by white workers or to facilitate more nuanced ways of thinking about affirmative action.[48]

Entertainment reinforces this narrative by portraying the employment context as a site of interracial conflict. Consider the moment in the film *Crash* when a deeply frustrated John Ryan, portrayed by Matthew Dillon, tells a black health insurance claims processor, "I can't look at you without thinking about the five or six more qualified white men who didn't get your job."[49] Dillon further explains that his father saved enough to start his own company and had

> [T]wenty-three employees, all of them black. Paid 'em equal wages when no one else was doing that. For thirty years he worked side by side with those men, sweeping and carrying garbage. Then the city council decides to give minority-owned companies preference in city contracts. And overnight, my father loses everything.[50]

This narrative emerges on the small screen as well. Recall the episode of *30 Rock* in which Liz's boyfriend's confidence that he will land a coveted executive position dissipates the moment he sees one of his competitors, a black man in a wheelchair.[51] That this joke can be communicated on a purely visual level speaks to the baseline perception of race as a mechanism of competition in the workplace. The ubiquity of this trope—the white person losing out as the result of unfair competition from minority workers—was even parodied in an episode of *South Park* in which "immigrants from the future" arrived in South Park and began competing for employment with the existing residents.[52]

Politicians likewise frequently exploit the zero-sum narrative by building their platforms around the idea that "they" are taking "our" jobs. Particularly during difficult economic times, when workers suffer more anxiety regarding their job security,[53] politicians garner sup-

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47 *See* Camille Gear Rich, *Marginal Whiteness*, 98 CALIF. L. REV. 1497, 1522–23 (2010) [hereinafter Rich, *Marginal Whiteness*].

48 *See, e.g.*, *id.* at 1586.

49 CRASH (Bob Yari Productions et al. 2004).

50 *Id.*

51 *30 Rock: Cleveland* (NBC television broadcast Apr. 19, 2007).

52 *South Park: Goobacks* (Comedy Central television broadcast Apr. 28, 2004).

53 *See* Eden B. King, Jennifer L. Knight & Michelle R. Hebl, *The Influence of Economic*

port for positions that tend to advantage white workers by creating an "us versus them" mentality. For example, Jesse Helms memorably launched an "eleventh hour" campaign spot about affirmative action in his successful run for U.S. Senate against Harvey Gantt.[54] The ad featured a white man's hands crumpling a job rejection letter as an announcer narrated: "You needed the job, and you were the best qualified. But they had to give it to a minority because of a racial quota. Is that really fair? Harvey Gantt says it is."[55] More recently, politicians have characterized immigrants and people of color as taking jobs properly belonging to "real" Americans[56] or as strikebreakers.[57] The resulting narrative portrays white workers and workers of color as rivals, rather than as groups whose interests are fundamentally aligned. This aspect of the narrative fractures solidarity not only between white workers and workers of color, but also among workers of color as a group.[58]

This pervasive cultural mythology leads to the perception that white and nonwhite interests are fundamentally at odds by positing a fundamental tension between what is good for white workers and what is good for nonwhite workers. In these narratives, there must be a winner and a loser; white and nonwhite workers cannot win together.

B. "Unions Benefit Only White Workers."

> "Above all, unions made it difficult for blacks to earn a living."[59]

Conditions on Aspects of Stigmatization, 66 J. SOC. ISSUES 446, 453 (2010) (presenting research showing that white research subjects instructed to imagine that they were human resource assistant managers rated a hypothetical white male job applicant more positively and a Hispanic female applicant more negatively when the economy was expected to decline; the reverse occurred when the economy was expected to improve).

54 Lloyd Grove, *The Ballot of Harvey Gantt*, WASH. POST, May 24, 1996, at D1.

55 *Id.* at D4.

56 *See* Ruben Navarrette, Jr., Op-Ed., *Latinos Won't Forget Romney's 'Anti-Immigrant' Talk*, CNN (Jan. 31, 2012, 8:29 AM), http://www.cnn.com/2012/01/31/opinion/navarrette-immigration-gop/index.html. This is a narrative that the media has adopted as well. *See, e.g.*, Miriam Jordan, *Immigrants Benefit as Economy Recovers*, WALL ST. J., Oct. 30, 2010,at A2.

57 *See generally Claims of Racial Division Undermine Point*, YALE DAILY NEWS (Sept. 12, 2003), http://www.yaledailynews.com/news/2003/sep/12/claims-of-racial-division-undermine-point/.

58 David A. Harris, *Immigration and National Security: The Illusion of Safety Through Local Law Enforcement Action*, 28 ARIZ. J. INT'L & COMP. L. 383, 383 & n.3 (2011) (citing news sources advancing the narrative that unauthorized immigrants take low-wage jobs from Americans, particularly minorities).

59 *Glenn Beck* (Fox News television broadcast June 23, 2010).

The previous section described a general view in which white and nonwhite workers' interests are fundamentally opposed. This section describes a related narrative, which holds that introducing unions into this world of opposing interests benefits white workers either exclusively or primarily. This narrative is rooted in history[60] and it accepts that unions' historically uneasy relationship with workers of color continues into the present.[61]

In large part, the narrative that unions only benefit white workers is predicated on the assumption that unions are predominantly white,[62] and is bolstered by the "very durable" perception that "working class whites are more prejudiced than whites from other classes."[63] As discussed in Part III below, this assumption ignores two phenomena: first, the increasing numbers of unions in which the majority of members are workers of color;[64] and second, the ability of motivated unions to fight racism among white workers. Nonetheless, the natural outgrowth of this assumption is that the interests of workers of color inherently conflict with the interests of organized labor.[65] These base-

60 We will discuss the origins of this narrative in greater detail in Part II.A, *infra*, which examines the historical relationship between unions and people of color.

61 *See infra* Part III (discussing how this narrative has at the very least overreached in continuing to characterize the relationship as negative and providing examples of recent positive interactions).

62 *See* Marion Crain, *Whitewashed Labor Law, Skinwalking Unions*, 23 BERKELEY J. EMP. & LAB. L. 211, 213 (2002) ("Historically, the labor movement served the interests of workers who were race- and gender-privileged.").

63 *See* Martha R. Mahoney, *Class and Status in American Law: Race, Interest, and the Anti-Transformation Cases*, 76 S. CAL. L. REV. 799, 835 (2003) [hereinafter Mahoney, *Class and Status in American Law*]; *see also* Symon Hill, *'The White Working Class' Aren't Racists*, GUARDIAN (Oct. 15, 2009, 6:30 AM), http://www.guardian.co.uk/commentisfree/2009/oct/15/white-working-class-denham (describing narrative that working class whites are more likely to be racist than other whites).

64 We continue to debate between ourselves the extent to which numerical representation of people of color should affect whether a union is viewed as a "predominantly white institution." One of us views numerical representation as largely dispositive of the issue—that is, a union in which a majority of the workers are nonwhite logically cannot be considered a predominantly white union, assuming that the union functions according to democratic principles, such as those guaranteed in the Labor Management Reporting and Disclosure Act ("LMRDA"), 29 U.S.C. § 411(a)(1) (2006). The other author views numerical representation as only one of a range of cultural factors, including whether nonwhite individuals occupy meaningful leadership positions, the extent to which the union advocates for interests that disproportionately affect people of color, and whether the intra-union culture is one congenial to white and nonwhite people alike. Under the latter view, a union might be viewed as a "predominantly white institution" even if a majority of the membership is nonwhite so long as the leadership is largely white, the union does not promote the interests of nonwhite workers, or the intra-union culture continues to privilege white workers.

65 *See The Supreme Court: 2008 Term—Leading Cases*, 123 HARV. L. REV. 153, 337 (2009)

line assumptions write union members and leaders of color out of the labor movement and in the process assume the ultimate conclusion—that interests of workers of color are not reflected in the labor movement.

A variety of factors contribute to the creation and perpetuation of this narrative. For example, much discourse centers on the allegedly harmful effect of both union-supported minimum wage laws and the union wage premium[66] on workers of color, particularly black workers.[67] This particular discourse also has a political dimension: a popular trope among conservative commentators is the notion that blacks who vote for Democrats vote against their self-interest because of the Democratic Party's ties to labor and because "[s]harp increases in the minimum wage price unskilled workers out of the labor market, a dislocation that falls most heavily on young black males."[68] Indeed, the founder of the National Black Chamber of Commerce accuses President Obama of "selling out blacks for union favor."[69]

In addition to their focus on wages, academics and media commentators also criticize other common collectively bargained workplace policies. Seniority protections, for example, are targets of criticism because they can entrench the effects of past discrimination by offering additional workplace protections to white workers who were hired sooner or promoted faster than their nonwhite counter-

(stating without analysis that "union leaders have also sought to preserve the advantage of a small—and very often homogenous—set of employees").

66 The "union wage premium," which is discussed in detail in Part III, refers to the increased pay and benefits negotiated by unions on behalf of members. *See* LAWRENCE MISHEL & MATTHEW WALTERS, ECON. POL'Y INST. HOW UNIONS HELP ALL WORKERS 3–5 (2003), *available at* http://www.epi.org/page/-/old/briefingpapers/143/bp143.pdf.

67 *See, e.g.*, WALTER E. WILLIAMS, RACE AND ECONOMICS 31–58 (2011); Jeff Poor, *Walter E. Williams Explains How Unions Scheme to Keep Blacks out of High-Paying Jobs*, DAILY CALLER (May 12, 2011, 12:09 AM), http://dailycaller.com/2011/05/12/walter-e-williams-explains-how-unions-scheme-to-keep-blacks-out-of-high-paying-jobs/.

68 Peter Kirsanow, *Blacks, Democrats, and Republicans*, NAT'L REV. ONLINE (Mar. 15, 2011, 3:08 PM), http://www.nationalreview.com/content/blacks-democrats-and-republicans.

69 Harry C. Alford, *President Obama Is Selling Out Blacks for Union Favor*, NAT'L BLACK CHAMBER OF COM., http://www.nationalbcc.org/index.php?option=com_content&view=article&id=1176:president-obama-is-selling-out-blacks-for-union-favor&catid=63:beyond-the-rhetoric&Itemid=8 (last visited June 1, 2013).

parts.[70] The Supreme Court has also repeatedly addressed this result of union seniority protections in the Title VII context.[71]

Finally, a powerful academic discourse asserts that unions are prone to racial hostility or indifference to workers of color.[72] This portrayal is sometimes historical.[73] One strand of the discourse emphasizes the past racism of many unions, linking such practices to modern problems.[74] For example, David Bernstein focused on union-supported depression-era and New Deal legislation, arguing that those laws harmed nonwhite workers by interfering with freedom of contract following the *Lochner* era.[75] Likewise, progressive historian John Hope Franklin documented the belief that "wage differentials based on race rather than training, experience, or efficiency threatened to destroy not only the New Deal recovery program but any hope of having a really egalitarian labor movement in the United States."[76]

Other scholars have levied critiques that lay claim to the aspirations of the civil rights movement and adopt the rhetoric of critical race theory.[77] These scholars are markedly skeptical about unions' motivations in relation to nonwhite workers. For example, Harry Hutchison argues that unions harm black workers by preventing them from freely negotiating the terms of their employment and thereby

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70 *See, e.g.*, GERTRUDE EZORSKY, RACISM AND JUSTICE: THE CASE FOR AFFIRMATIVE ACTION 2–4, 24–27, 45–46 (1991); DAVID M. LEWIS-COLMAN, RACE AGAINST LIBERALISM: BLACK WORKERS AND THE UAW IN DETROIT 35 (2008); THOMAS J. SUGRUE, SWEET LAND OF LIBERTY: THE FORGOTTEN STRUGGLE FOR CIVIL RIGHTS IN THE NORTH 91 (2008); Mike Causey, *A Big Raise Could Be a Blessing and a Curse*, WASH. POST., Aug. 28, 1998; Gary Crooks, *Reaffirmative Action*, SPOKESMAN-REV., May 17, 2009, at 8B; Janny Scott, *Who Gets to Tell a Black Story?*, N.Y. TIMES, June 11, 2000 at 11; Lena H. Sun & Gabriel Escobar, *On Chicken's Front Line; High Volume and Repetition Test Workers' Endurance*, WASH. POST, Nov. 28, 1999.

71 *See, e.g.*, United Air Lines, Inc. v. Evans, 431 U.S. 553, 554 (1977); Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 328 (1977); Franks v. Bowman Transp. Co., 424 U.S. 747, 750 (1976).

72 *See, e.g.*, David E. Bernstein, *Roots of the 'Underclass': The Decline of Laissez-Faire Jurisprudence and the Rise of Racist Labor Legislation*, 43 AM. U. L. REV. 85, 90–91, 96–118 (1993) (describing union actions to discriminate against blacks through legislation and even entitling one section "The Racist History of American Labor Unions").

73 *See, e.g.*, Susan D. Carle, *How Myth-Busting About the Historical Goals of Civil Rights Activism Can Illuminate Future Paths*, 7 STAN. J. C.R. & C.L. 167, 170–71 nn.7–9 (2011).

74 *See, e.g.*, HERBERT HILL, BLACK LABOR AND THE AMERICAN LEGAL SYSTEM 29 (1985).

75 *See, e.g.*, Bernstein, *supra* note 72, at 87.

76 JOHN HOPE FRANKLIN, RACIAL EQUALITY IN AMERICA 87–88 (1976).

77 *See, e.g.*, Harry Hutchison, *Toward a Critical Race Reformist Conception of Minimum Wage Regimes: Exploding the Power of Myth, Fantasy, and Hierarchy*, 34 HARV. J. ON LEGIS. 93, 94, 97, 98–99, 133–34 (1997).

becoming more competitive in the job market.[78] In critiquing the proposed Employee Free Choice Act ("EFCA"),[79] Hutchison argued that "the enactment of EFCA would vitiate the aspirations of African Americans and slow the rate of racial progress while reifying illusory claims offered by union hierarchs."[80]

Recent legal developments have also prompted pessimism from scholars about the relationship between labor and race. In *14 Penn Plaza LLC v. Pyett*,[81] the Supreme Court held enforceable a collective bargaining agreement that (according to the Court) waived employees' right to bring discrimination claims in federal court, instead permitting only arbitration.[82] As a result, some fear unions may bargain away the chance to enforce statutory rights against discrimination in court at the expense of workers of color, who are most likely to wish to avail themselves of those rights.[83] Deborah Widiss described the problem as twofold: "there is a real danger that union leaders may themselves hold discriminatory bias and accordingly fail to support individual employees adequately in the grievance and arbitration process" and, perhaps more importantly, "since maximizing benefits to the collective membership is the paramount duty of unions, a union, acting entirely in good faith, might bargain away the right to litigate employment discrimination claims in court in return for an employer concession that is valued more highly by the membership as a whole."[84]

The Supreme Court's view of union activity as articulated in *Emporium Capwell Co. v. Western Addition Community Organization*[85] buttresses narratives of this kind. *Emporium Capwell* involved unsanctioned picketing by two black workers seeking to remedy systemic workplace discrimination.[86] The Court held that the picketing was not protected by the NLRA because the union had agreed to submit individual grievances to arbitration.[87] It stated that "[i]n establishing a regime of majority rule, Congress sought to secure to all members of

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78 *See id.*

79 Employee Free Choice Act of 2009, H.R. 1409, 111th Cong. (2009).

80 Harry G. Hutchison, *Employee Free Choice or Employee Forged Choice? Race in the Mirror of Exclusionary Hierarchy*, 15 MICH. J. RACE & L. 369, 376 (2010).

81 14 Penn Plaza LLC v. Pyett, 556 U.S. 247 (2009).

82 *Id.* at 265, 273–74.

83 *See, e.g.*, *The Supreme Court 2008 Term—Leading Cases*, *supra* note 65, at 335–38.

84 Deborah A. Widiss, *Divergent Interests: Union Representation of Individual Employment Discrimination Claims*, 87 IND. L.J. 421, 422–23 (2012).

85 Emporium Capwell Co. v. W. Addition Cmty. Org., 420 U.S. 50 (1975).

86 *Id.* at 55–56.

87 *Id*. at 55, 70.

the unit the benefits of their collective strength and bargaining power, in full awareness that the superior strength of some individuals or groups might be subordinated to the interest of the majority."[88]

Taking *Emporium Capwell* and *Pyett* in combination, then, some academics have raised the possibility of a worst-case scenario in which majority-white unions commit employment discrimination claims to arbitration, and then fail to vigorously prosecute those claims, while also eliminating union members' rights to engage in self-help through collective action.[89] For example, Gary Minda and Douglas Klein warn:

> There is a long history of civil rights violations by both employers and unions in this country and that history speaks volumes about the danger of allowing employers and unions to voluntarily agree to channel public statutory rights to a private decision-making forum that, for all practical purposes, they control.[90]

In the face of this narrative, Michael Green offers some cautious optimism that union-led arbitration can still vindicate the rights of workers of color,[91] though within the confines of a system in which "white male [union] leadership has concentrated on class justice, and black and other identity groups within the unions have emphasized racial justice."[92]

Even those scholars who see labor unions as potentially beneficial to people of color tend to qualify their optimism, presenting unions as a force to be managed rather than a vehicle for genuine solidarity with people of color. For example, Ruben Garcia has argued that labor unions can adequately represent the interests of workers of color through the "exclusive representative rule," but emphasized that his conclusion hinges on minority caucuses gaining more power within

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88 *Id.* at 62 (footnote omitted).

89 Kenneth M. Casebeer, *Supreme Court Without a Clue:* 14 Penn Plaza LLC v. Pyett *and the System of Collective Action and Collective Bargaining Established by the National Labor Relations Act*, 65 U. MIAMI L. REV. 1063, 1079 (2011); Roger B. Jacobs, *Supreme Court Tips Against Individual Rights—Again*, 27 HOFSTRA LAB. & EMP. L.J. 267, 300–01 (2010); Gary Minda & Douglas Klein, *The New Arbitral Paradigm in the Law of Work: How the Proposed Employee Free Choice Act Reinforces Supreme Court Arbitration Decisions in Denying Free Choice in the Workplace*, 2010 MICH. ST. L. REV. 51, 60 (2010).

90 Minda & Klein, *supra* note 89, at 60.

91 *See* Michael Z. Green, *Reading* Ricci *and* Pyett *to Provide Racial Justice Through Union Arbitration*, 87 IND. L.J. 367, 368–71 (2012) [hereinafter Green, *Reading* Ricci *and* Pyett].

92 *Id.* at 405.

unions.[93] Marion Crain has offered a more optimistic perspective on the benefits of unions for people of color, but argued that conventional union organizing continues to submerge racial issues and stifle the concerns of racial minorities.[94]

Of course, a few academics—most notably, Cynthia Estlund—have focused on the beneficial aspects of the workplace in promoting racial harmony, choosing to emphasize the salutary aspects of unionized working environments for people of color.[95]

Still, the dominant academic narrative is one in which the interests of unions advantage white workers at the expense of workers of color.[96] Indeed, even when academic discourse does not directly address a perceived hostility between the two movements, it is notable that, in the large volume of scholarship aimed at improving working conditions for people of color, commentators rarely advocate unions as a possible solution.[97]

C. "Unions Lack Racial Empathy."

> "It's nice to see that the [United Auto Workers] readily admits that, at least for them, the civil right [sic] movement is about exploiting the color of someone's skin in order to bolster union coffers."[98]

To the extent that unions do appear to promote or prioritize the interest of workers of color, prevailing narratives suggest that unions'

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93 *See* Ruben J. Garcia, *New Voices at Work: Race and Gender Identity Caucuses in the U.S. Labor Movement*, 54 HASTINGS L.J. 79, 82–83, 157–61 (2002).

94 *See* Marion Crain, *Colorblind Unionism*, 49 UCLA L. REV. 1313, 1315 (2002); Marion Crain & Ken Matheny, *"Labor's Divided Ranks": Privilege and the United Front Ideology*, 84 CORNELL L. REV. 1542, 1619 (1999); *see also* Leroy D. Clark, *Movements in Crisis: Employee Owned Businesses—A Strategy for Coalition Between Unions and Civil Rights Organizations*, 46 HOW. L.J. 49, 51–52 (2002) (acknowledging tension in labor–civil rights relationship but positing worker-owned businesses as point of potential coalition).

95 *See* CYNTHIA ESTLUND, WORKING TOGETHER 69–74 (2003) (describing "real stories of integrated workplaces").

96 *See generally* Matthew W. Finkin, *The Road Not Taken: Some Thoughts on Nonmajority Employee Representation*, 69 CHI.-KENT L. REV. 195 (1993) (discussing how the current legal regime influences employer and union interactions with ethnic minorities); Eileen Silverstein, *Union Decisions on Collective Bargaining Goals: A Proposal for Interest Group Participation*, 77 MICH. L. REV. 1485 (1979) (describing how unions function under a "majority rule" system and showing how this system can harm minority groups, including racial groups).

97 *See, e.g.*, Economic Justice: Beyond the Civil Rights Paradigm?, Panel Discussion at the 2012 International Conference on Law and Society (June 8, 2012) (discussing race and economic justice without mentioning labor unions).

98 John Ransom, *When All Else Fails, UAW Tries Racism*, TOWNHALL.COM (JUNE 29, 2012), http://finance.townhall.com/columnists/johnransom/2012/06/29/wehn_all_else_fails_uaw_tries_racism/page/full/.

underlying motivations are cynical or self-interested. One of us has previously identified the phenomenon of racial capitalism—the process of deriving social or economic value from racial identity.[99] Given the current distribution of power in America, racial capitalism generally involves white individuals and predominantly white institutions deriving value from associations with nonwhite people.[100]

With respect to unions, racial capitalism might take a variety of forms that parallel other workplace contexts. Such racial capitalism might consist of literature that displays people of color, particularly when disseminated by unions that have come under criticism for their hostility to people of color.[101] It might involve placing token minorities in powerful positions to imply that the union cares more about issues affecting racial minorities than it actually does.[102] It might involve giving lip service to racial minority caucuses within unions as a way of improving race relations without prioritizing substantive changes that affect minority workers. Additionally, purely strategic and self-interested affiliations with racial minorities might also constitute racial capitalism.[103] The concern inherent in each of these scenarios is the implication that, by merely displaying workers of color, unions can dodge difficult racial issues.

It is often difficult, of course, to separate racial capitalism from straightforward portrayals of diverse workforces or attempts to create genuine interracial solidarity.[104] For example, a union might include

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99 *See* Leong, *Racial Capitalism*, *supra* note 19, at 2153–54.

100 *Id.* at 2155.

101 *See, e.g.*, *Saluting the Fallen*, FOPCONNECT, http://www.fopconnect.com/article/salutingthefallen/ (last visited June 1, 2013). The slideshow associated with the lead story prominently features officers who appear in six of the twenty-three photos in which the race of the people featured is identifiable, and also includes a photo of Barack Obama.

102 *Cf.* Patrick S. Shin & Mitu Gulati, *Showcasing Diversity*, 89 N.C. L. REV. 1017, 1041–44 (2011) (explaining the negative effects of "showcasing" minority hires, including causing the paradoxical effect that individuals will assume that all such hires or promotions are unqualified on the merits).

103 For example, predominantly white businesses sometimes hire nonwhite workers to enhance their reputation as inclusive institutions or as a means of insulating themselves from liability in discrimination suits. *See, e.g.*, Leong, *Racial Capitalism*, *supra* note 19, at 2197–98. In theory, labor unions could solicit and display nonwhite members for the same reason.

104 *See id.* at 2193–94, 2195–97.

Indeed, this difficulty has permeated our own discussions. Consider, for example, the Black History Month event organized by the SEIU in 2011. *SEIU Celebrates Black History Month 2011*, SEIU.ORG, http://www.seiu.org/a/ourunion/seiu-celebrates-black-history-month-2011.php (last visited June 1, 2013). We are both troubled by the overt exoticism of the visual narrative: the featured picture depicts a black woman with her face painted with a colorful map of the African continent. *Id.*; *see generally* Leong, *Racial Capitalism*, supra note 19, at 2193–97. One of us questions the theme's title ("African Soul: From Africa to the World") but prefers to focus on

people of color in a video promoting its message to communicate that it prioritizes workplace issues affecting minorities,[105] or it might support a robust black or minority caucus because its leadership believes that giving voice to such issues is important.[106]

Corporate, political, and media narratives are particularly swift to cast union behavior as racial capitalism.[107] The response to recent union attempts to frame labor rights as civil rights is a particularly trenchant example. Commentators accused unions of "try[ing] to link the labor movement to Martin Luther King, Jr. and the civil rights struggle of the 1960s" and of "[m]aking ridiculous comparisons to slavery."[108]

Likewise, the United Auto Workers' ("UAW") recent selection of the Nissan plant in Canton, Mississippi as its major southern organizing target also prompted charges of racial capitalism.[109] One might instead view the UAW's efforts to organize the eighty-percent black Canton workforce as an attempt to build interracial solidarity, particu-

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the kickoff event—"Civil Rights and the Labor Movement: Past v. Present"—which captures the attitude toward civil rights that we applaud. *See SEIU Celebrates Black History Month 2011*, *supra*. The other finds the event more broadly problematic—for example, the concept of Black History Month suggests that it is appropriate to channel racial education and awareness into a single month—and questions why the SEIU devotes energy and resources to publicizing a brief annual event rather than institutionalizing an ongoing conversation regarding race and racism. Leong, *Racial Capitalism, supra* note 19, at 2217–18.

Moreover, even when we agree that a particular portrayal constitutes racial capitalism, our individual reactions suggest that reasonable minds can differ as to whether the portrayal is preferable to available alternatives. In the Fraternal Order of Police (FOP) slideshow referenced previously, for example, one of us believes that portraying officers of color is the best of imperfect alternatives because it reflects the real existence of diversity in the workforce, and because it is preferable to, for example, an all-white slide show. *See Saluting the Fallen*, *supra* note 101. The other thinks, given the stance of the FOP on issues of paramount importance to communities of color such as racial profiling, an all-white slideshow would force that particular union to own and visually communicate its collective ideology. *See infra* notes 404–22 and accompanying text.

105 *See, e.g.*, Steelworkers, *USW The Fighting Spirit*, YOUTUBE (Aug. 15, 2011), https://www.youtube.com/watch?v=B5CtBOSKscU&feature=player_embedded.

106 For example, the SEIU has provided robust support for AFRAM, its black caucus. *See The History of AFRAM*, SEIU AFRAM, http://aframseiu.org/history.html (last visited June 1, 2013).

107 We do not deny that, like most institutions, some unions do engage in racial capitalism. *See infra* Part III.

108 Harry Alford & F. Vincent Vernuccio, Op-Ed., *U.S. Unions: Uncivil on Civil Rights*, FORBES (June 17, 2012, 6:42 PM), http://www.forbes.com/sites/realspin/2012/06/17/u-s-unions-uncivil-on-civil-rights/. This claim is particularly ironic given Martin Luther King, Jr.'s unwavering support for labor and belief in the importance of coalition between labor interests and civil rights. *See, e.g.*, *Labor Movement*, THE KING CENTER, http://www.thekingcenter.org/archive/theme/4793 (last visited June 1, 2013) (archive of King's statements regarding labor).

109 *See, e.g.*, Ransom, *supra* note 98.

larly given that those efforts are coordinated with and supported by the NAACP.[110] Some media outlets, however, have largely cast the unionization effort in far more cynical terms of racial capitalism, labor self-interest, and race-baiting.[111] Reporters and pundits have criticized, both implicitly and explicitly, the UAW's selection of the Canton plant as an attempt to appropriate the positive image of the civil rights movement. For example, members of the media cast union leaders' announcement of the organizing effort at a press conference, standing alongside NAACP President Derrick Johnson, as a strategic maneuver intended to have a powerful symbolic effect.[112]

Likewise, the acrimonious litigation in *Smithfield Foods v. United Food & Commercial Workers International Union*[113] provides an example of corporate contribution to the narrative of unions as racial capitalist organizations. In its complaint, for example, Smithfield alleged that the United Food & Commercial Workers International ("UFCW") "exploit[ed] the genuine social and political concerns of third parties with diverse interests often completely unrelated to labor concerns, by tailoring allegations to specific audiences, including but not limited to: pandering to civil rights organizations by characterizing the target employer as 'racist.'"[114]

Similarly, after employees at Carrington South Health Care Center in Youngstown, Ohio voted to join the SEIU, the employer charged the union with "playing the race card" to win minority workers' support.[115] The employer cited what it called "racist propaganda," in the form of three cartoons circulated with union literature that depicted white bosses mistreating blacks or racially diverse groups of employees.[116]

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110 Joe Atkins, *UAW Targets Mississippi Nissan Plant for Its Southern Campaign*, FACING SOUTH (June 25, 2012, 10:32 AM), http://www.southernstudies.org/2012/06/uaw-targets-mississippi-nissan-plant-for-its-southern-campaign.html.

111 *See id.*; Deepa Seetharaman & Bernie Woodall, *UAW Sets Sights to Organize Nissan Plant in U.S. South*, CHI. TRIB. (June 8, 2012), http://articles.chicagotribune.com/2012-06-08/classified/sns-rt-us-uaw-nissanbre8571fc-20120608_1_nissan-plant-canton-plant-plant-workers.

112 *See* Atkins, *supra* note 110.

113 Smithfield Foods Inc. v. United Food & Commercial Workers Int'l Union, 585 F. Supp. 2d 815 (E.D. Va. 2008). As an associate at Bredhoff & Kaiser, PLLC, Charlotte Garden participated in the Smithfield litigation on behalf of the UFCW International Union and the individual defendants.

114 Complaint ¶¶ 48, 56, 68, 116, Smithfield Foods Inc. v. United Food & Commercial Workers Int'l Union, 585 F. Supp. 2d 815 (E.D. Va. 2008) (No. 3:07cv641) [hereinafter Complaint, *Smithfield Foods*].

115 DAVID R. ROEDIGER, COLORED WHITE: TRANSCENDING THE RACIAL PAST 185 (2002).

116 *Id.*; *see also* Carrington S. Health Care Ctr., Inc. v. NLRB, 76 F.3d 802, 803–04, 807 n.4

Buttressing the narrative that unions lack racial empathy, employers and other commentators frequently charge that unions view workers of color simply as more dues-paying bodies.[117] In recent years, these concerns have been articulated most vocally in relation to immigration. To illustrate, John McCain accused labor unions—in particular, the SEIU—of opposing Arizona S.B. 1070[118] because they "want to have [undocumented workers] declared legal to recruit them into unions."[119] Relatedly, Governor Jan Brewer advanced a creative twist on this argument by claiming that unions "support illegal immigration because it serves their interests to have a permanent class of people who are financially dependent on the government."[120] Her argument appears to be that illegal immigrants are more likely to be unskilled; unskilled workers are more likely to require government services; government is among the largest employers of union workers; and therefore unions support illegal immigration.[121]

This narrative describes unions' alignment with civil rights goals cynically, assuming at the outset that unions care exclusively about economic gain—both their own (in the form of dues) and their members' (in the form of member-specific employment benefits). It dismisses the possibility that unions might be mobilized by genuine concern for the issues important to civil rights groups. Simultaneously, it insinuates that civil rights groups are mistaken in their view[122] that unionization is beneficial to workers of color. Notably, this narrative not only evokes stereotypes about conniving and self-interested union leaders, but also stereotypes of people of color (and, by extension, civil rights organizations) as naïve, unintelligent, overly idealistic, and easily duped.

(6th Cir. 1996) (remanding to NLRB for hearing on whether cartoons impermissibly influenced election).

117 *See, e.g.*, Byron York, *Illegal Immigrants, Unite!*, NAT'L REV., May 8, 2006, at 17–18; Rich Lowry, *Liberal Sellout*, NAT'L REV. ONLINE (Apr. 11, 2006, 7:51 AM), http://www.nationalreview.com/content/liberal-sellout/ ("Unions . . . count[ ] on signing up immigrants to make up for dwindling native membership.").

118 Support Our Law Enforcement and Safe Neighborhoods Act of 2010, S.B. 1070, 49th Leg., 2d Reg. Sess. (Ariz. 2010) (codified at 2010 Ariz. Sess. Laws 450).

119 Jordan Fabian, *McCain: Unions Trying to Legalize, Recruit Illegal Immigrants*, THE HILL (July 28, 2010, 3:40 PM), http://thehill.com/blogs/blog-briefing-room/news/111461-mccain-unions-trying-to-legalize-recruit-illegal-immigrants.

120 Jan Brewer, *Barack Obama, President of the SEIU*, NAT'L REV. ONLINE (Nov. 10, 2011, 4:00 AM), http://www.nationalreview.com/content/barack-obama-president-seiu.

121 *Id.*

122 *See, e.g.*, *NAACP Stands with Public Employee Unions Against Proposed Cuts*, NAACP, http://www.naacp.org/action-alerts/entry/naacp-stands-with-public-employee-unions-against-proposed-cuts/ (last visited June 11, 2013).

Similar assumptions about labor's motives emerge in Supreme Court opinions. For example, in *Carey v. Brown*,[123] the Court considered a state statute that permitted labor picketing in front of private homes, but forbade other picketing.[124] Rejecting the statute on equal protection grounds,[125] the Court distinguished labor picketing from the civil rights picketing at issue in the case, calling the latter "picketing on issues of broader social concern,"[126] and citing Thomas Emerson for the proposition that "nonlabor picketing is more akin to pure expression than labor picketing and thus should be subject to fewer restrictions."[127]

The Court has used similar language to distinguish the goals of the civil rights movement and the labor movement on other occasions, stating, for example, that "[t]he interests of the contestants in a labor dispute are primarily economic."[128] In other words, the Court assumes that the labor movement's primary goal is to improve wages and benefits for current union members, implicitly rejecting the possibility of other union or worker goals. It makes the opposite assumption about the civil rights groups: that they are interested in securing democratic rights for people of color, rather than also pursuing economic justice.

Commentators and political stakeholders are also quick to read promotion of people of color to leadership positions as showcasing or tokenism. When Linda Chavez-Thompson was elected executive vice president within the AFL-CIO in 1995, at least one media outlet reported that some union officials had opposed her selection.[129] The *Los Angeles Times* described a "bitter, whispered campaign" that referred to her as a "token."[130] That the media seized upon a narrative involving tokenism, rather than one involving garden-variety intra-organization disagreement, is a testament to the force of the narrative

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123 Carey v. Brown, 447 U.S. 455 (1980).

124 *Id.* at 457.

125 *Id.* at 470–71.

126 *Id.* at 465.

127 *Id.* at 466.

128 Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 762 (1976); *see also* NAACP v. Claiborne Hardware Co., 458 U.S. 886, 913 (1982) (distinguishing labor boycotts from civil rights boycotts by stating that "[w]hile States have broad power to regulate economic activity, we do not find a comparable right to prohibit peaceful political activity such as that found in the boycott in this case."); Charlotte Garden, *Labor Values Are First Amendment Values: Why Union Comprehensive Campaigns Are Protected Speech*, 79 FORDHAM L. REV. 2617, 2632 (2011) [hereinafter Garden, *Labor Values*].

129 Stuart Silverstein, *Working Within Two Cultures*, L.A. TIMES, Oct. 27, 1995, at D1.

130 *Id.*

associating unions with racial indifference. Collectively, these narratives portray unions as cynical and lacking in racial empathy.

D. "Unions Don't Care About Communities of Color."

> "As long as teachers [sic] unions have influence in the black community and in institutions pledged to black empowerment, and black parents are not financially empowered to opt out of failing public schools, black males are doomed."[131]

A final narrative argues that unions lack concern not only for workers of color, but also for the communities within which those workers live and with which the unions interact. This narrative is the most visible in the context of teachers' unions, though it is also present in other contexts, including police and prison guards' unions.

First, teachers' unions are often blamed for various problems within the communities of color whose members they educate. For example, a recent article tracing the wealth and achievement gap between white individuals on the one hand, and black and Hispanic individuals on the other, targets the educational system as an explanation for the difference.[132] The article then explains that teachers' unions are responsible for the lack of meaningful reform of the system:

> Union leaders have thwarted attempts to deploy staff in a more efficient manner and to offer incentive-based compensation. Their solution to every problem in education is more money. And of course, any increase in resources is channeled toward either hiring more teachers, thus creating more loyal union members, or increasing compensation for teachers, ideally in a way tied to length of service and not quality of performance.[133]

The article concludes that "[r]educing the influence of the teachers' unions seems to be an important first step . . . . Doing so gives schools the political breathing room they need to deploy their resources with the interests of students, as opposed to union leaders, foremost in mind."[134] Implicit in this narrative is that teachers' unions are motivated solely by economic self-interest, not by the well-being

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131 Anthony B. Bradley, *Teachers Unions and Civil Rights Groups Block School Choice for Black Students*, ACTON INST. (Aug. 25, 2010), http://www.acton.org/pub/commentary/2010/08/25/teachers-unions-and-civil-rights-groups-block-scho.

132 *See* Reihan Salam & Tino Sanandaji, *Closing the Achievement Gap*, NAT'L REV, Nov. 14, 2011, at 34, 34–36.

133 *Id.* at 36.

134 *Id.*

of the students—particularly students of color from disadvantaged communities, whom they are paid to educate.

This narrative is echoed throughout our culture. Politicians[135] and commentators[136] utilize this narrative in their rhetoric. The narrative is also reflected in several recent films. For example, the documentaries *Waiting for 'Superman'*[137] and *The Lottery*[138] both tout charter schools as remedies for failing public school systems and identify teachers' unions as the primary impediments to needed reforms. Both films focus heavily on public schools in communities of color, portraying parents in these communities as desperate to enroll their children in charter schools in order to give them better chances in life. Likewise, the film *Won't Back Down* has a similar message about teachers' unions as impediments to reform.[139]

The narrative that unions do not care about the communities with which they interact is particularly fraught with respect to police and prison guard unions, which are frequently critiqued for racial indifference. For example, some commentators—including Supreme Court Justice Anthony Kennedy—charge that correctional officers' unions effectively lobby to keep incarceration rates up, disproportionately impacting communities of color.[140] Others critique police unions for

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135 *E.g.*, Bradley Blackburn, *New Jersey Governor Chris Christie Calls His State's Teachers Union 'Political Thugs,'* ABC NEWS (Apr. 6, 2011), http://abcnews.go.com/Politics/jersey-governor-chris-christie-calls-teachers-union-political/story?id=13310446#.Tr165_Qr2so; *see also* Ellen Dannin, *Privatizing Government Services in the Era of ALEC and the Great Recession*, 43 U. TOL. L. REV. 503, 511 (2012) (discussing legislative efforts aimed at reducing the role of teachers' unions by privatizing education); Charlotte Garden, *Teaching for America: Unions and Academic Freedom*, 43 U. TOL. L. REV. 563, 565 (2012) (discussing state and local education reforms aimed at reducing teacher job security).

136 *See, e.g.*, Steven Brill, *The Rubber Room: The Battle Over New York City's Worst Teachers*, NEW YORKER, Aug. 31, 2009, at 30; Fran Tarkenton, Op-Ed., *What if the NFL Played by Teachers' Rules?*, WALL ST. J., Oct. 3, 2011, at A17; Joel Klein, *We're Firing the Wrong Teachers*, DAILY BEAST, (May 23, 2010, 9:09 PM), http://www.thedailybeast.com/articles/2010/05/24/our-antiquated-school-rules.html (arguing that teacher seniority protections harm students of color); David Sirota, *The Bait and Switch of School "Reform,"* SALON (Sept. 12, 2011, 1:39 PM), http://www.salon.com/2011/09/12/reformmoney/.

137 WAITING FOR 'SUPERMAN' (Participant Media et. al. 2010).

138 THE LOTTERY (Great Curve Films 2010).

139 WON'T BACK DOWN (Walden Media 2012).

140 *See, e.g.*, Sharon Dolovich, *State Punishment and Private Prisons*, 55 DUKE L.J. 437, 533 & n.374 (2005) (citing media accounts of the political influence of a California correctional officers union); Editorial, *Justice Kennedy on Prisons*, N.Y. TIMES, Feb. 16, 2010, at A6; David Rudovsky, *A Closing Keynote: A Comment on Mass Incarceration in the United States*, 11 U. PA. J. CONST. L. 207, 208 (2008); MakingContact, *Maintaining a Police State? The Undue Power & Influence of Police and Prison Guard Unions*, DAILY KOS (Aug. 7, 2012, 10:57 AM), http://www.dailykos.com/story/2012/08/07/1117654/-Maintaining-a-Police-State-The-Undue-Power-Influence-of-Police-and-Prison-Guard-Unions ("Similar to prison guards, police unions [sic] advocacy

their resistance to anti-racial profiling legislation and their rush to defend police officers accused of profiling or using excessive force.[141]

Thus, public sector unions are often criticized for protecting their members at the expense of the public. In this narrative, unions prevent supervisors from effectively disciplining (or even firing) ineffective members, all while union lobbying arms seek policies that will keep union members working—even if those policies harm communities of color.

* * *

The four narratives detailed in this Part represent the conventional wisdom regarding the relationship between organized labor and civil rights organizations. The next Part discusses the historical events that led to these narratives, and, relatedly, the reasons that the narratives persist today.

II. Looking Back, Thinking Ahead

> "History doesn't repeat itself; it rhymes."[142]
> "Who controls the past controls the future; who controls the present controls the past."[143]

This Part looks behind the conventional wisdom regarding labor unions and civil rights to examine its origins. One source is simply history: the relationship between labor unions and people of color has a troubled past that we survey in this Part. Other factors, however, also account for the narratives' persistence. This Part concludes that the conventional narrative is in need of reframing, and explains why that is so.

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for their members has helped perpetuate cycles of criminalization and incarceration that plague America's low income neighborhoods, especially communities of color.").

141 *See, e.g.*, Kami Chavis Simmons, *New Governance and the "New Paradigm" of Police Accountability: A Democratic Approach to Police Reform*, 59 Cath. U. L. Rev. 373, 374–75 (2010) (asserting that "police unions nationwide predictably defended" the officer who arrested Harvard Professor Henry Louis Gates, Jr.); David Alan Sklansky, *Police and Democracy*, 103 Mich. L. Rev. 1699, 1827 (2005) (stating that black officers have broken with established police unions in welcoming civilian review, restrictions on racial profiling, and residency requirements); MakingContact, *supra* note 140.

142 This quote has been attributed to Mark Twain, though others have suggested the attribution is apocryphal. Marc D. Charney, *Word for Word: When Congress Last Rose to Impeach, Mark Twain Rose to the Occasion*, N.Y. Times, Dec. 20, 1998, at WK7 ("Mark Twain may well have said that history doesn't repeat itself; it rhymes. Or maybe someone else did.").

143 George Orwell, 1984, *reprinted in* Animal Farm & 1984, at 324 (Christopher Hitchens ed., 2003).

A. *Historical Foundations*

> "A General Boycott has been declared upon all CHINESE and JAPANESE Restaurants, Tailor Shops and Wash Houses. Also all persons employing them in any capacity."[144]

Any discussion of barriers between labor unions and civil rights groups or workers of color more generally must acknowledge the labor movement's history of exclusion. Yet this history does not coincide with the birth of the modern American labor movement, which was relatively progressive regarding race. Early labor organizations, like the Knights of Labor—"[t]he largest and most influential of Gilded Age labor organizations"—sought to build political solidarity among "new immigrants, blacks, and women alongside old immigrants and old-stock Americans."[145]

The Knights were not alone in their philosophy of (relative) inclusiveness. The Industrial Workers of the World (IWW), founded in 1905,[146] sought to form "one big union"[147] that would include all workers, regardless of race, sex, or national origin.[148] IWW founding member Eugene V. Debs[149] articulated an anti-racist and inclusive philosophy in a short article entitled *The Negro and the Class Struggle*, explaining working-class white Americans' racism as the product of capitalist manipulation:[150]

> As a socialist party we receive the negro and all other races upon absolutely equal terms. We are the party of the working class, the whole working class, and we will not suffer ourselves to be divided by any specious appeal to race prejudice; and if we should be coaxed or driven from the straight road

144 Butte Miners' Union, *Boycott: America v. Asia* (1881), *reprinted in* AGITATE! EDUCATE! ORGANIZE!: AMERICAN LABOR POSTERS 66 (Lincoln Cushing & Timothy W. Drescher eds., 2009).

145 WILLIAM E. FORBATH, LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT 12–13 (1991). The Knights did, however, simultaneously seek to limit prospective immigration, for example by supporting the notorious Chinese Exclusion Act. Jennifer Gordon, *Transnational Labor Citizenship*, 80 S. CAL. L. REV. 503, 531–32 & n.98 (2007).

146 FORBATH, *supra* note 145, at 48.

147 Ahmed A. White, *The Crime of Economic Radicalism: Criminal Syndicalism Laws and the Industrial Workers of the World, 1917–1927*, 85 OR. L. REV. 649, 679 (2006) (IWW's goal was formation of "one big union," a phrase that the union also used as a slogan).

148 JAMES SMETHURST, THE AFRICAN AMERICAN ROOTS OF MODERNISM 135 (2011).

149 White, *supra* note 147, at 664.

150 Eugene V. Debs, *The Negro and the Class Struggle*, 4 INT'L SOCIALIST REV. 257, 258–59 (1903) (explaining that racist attitudes of poor whites were "held in lowest contempt by the master class, yet esteeming themselves immeasurably above the cleanest, most intelligent and self-respecting negro").

> we will be lost in the wilderness and ought to perish there, for we shall no longer be a socialist party.[151]

Additionally, unlike the Knights, the IWW did not draw the line at workers who were already present in the United States.[152] These stances came at some cost to the IWW—as Ahmed White has observed, "none of this enhanced the IWW's reputation in establishment quarters."[153]

Even the early American Federation of Labor endorsed a socialist platform that called for increased workplace regulation to benefit all workers.[154] That commitment, however, was short-lived and most of the AFL soon lost interest in "the enactment of old age pensions, compulsory health insurance, minimum wage legislation, unemployment compensation, and (after 1914) maximum hours for men."[155] In its place, craft unions belonging to the AFL adopted a strategy of focusing narrowly on improving wages and benefits for their own members through bargaining.[156] They accomplished this largely by restricting membership to those with the most leverage—skilled tradesmen, who could not be easily replaced in the event of a work stoppage—and "effectively excluding the vast majority of blacks, women, and new European immigrants."[157] Many AFL unions adopted constitutional provisions excluding blacks from membership, and restricted opportunities to enter training or apprenticeship programs to whites.[158] Where unions exercised total or near-total control over an entire trade or industry, these policies meant that minority workers

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151 *Id.* at 259. Debs's beliefs, however, did not prevent the American Railway Union from excluding nonwhite workers during Debs's presidency. Gus Tyler, *Contemporary Labor's Attitude Toward the Negro*, *in* THE NEGRO AND THE AMERICAN LABOR MOVEMENT, 358, 359 (Julius Jacobson ed., 1968).

152 *Compare* White, *supra* note 147, at 680 ("The IWW was explicitly integrationist at a time of intense racism, inclusive of immigrants at a time of significant xenophobia, and remarkably committed to feminist ideals."), *with* Gordon, *supra* note 145, at 531–32 & n.98 (discussing the Knights' efforts to exclude immigrants).

153 Ahmed A. White, *A Different Kind of Labor Law: Vagrancy Law and the Regulation of Harvest Labor, 1913–1924*, 75 U. COLO. L. REV. 667, 702 (2004).

154 FORBATH, *supra* note 145, at 14.

155 *Id.* at 55 ("[B]y 1910, Gompers and other national AFL leaders were also condemning . . . broad, class-based wage and hours legislation and state-financed social insurance . . . ."); Derek C. Bok, *Reflections on the Distinctive Character of American Labor Laws*, 84 HARV. L. REV. 1394, 1423 (1971). However, a "substantial minority of trade unionists remained attached to the vision of a broad, inclusive movement." *Id.* at 97.

156 *See* Mary Ann Mason, *The Burden of History Haunts Current Welfare Reform*, 7 HASTINGS WOMEN'S L.J. 339, 340 (1996).

157 ERIC FONER, THE STORY OF AMERICAN FREEDOM 135–36 (1999).

158 Crain & Matheny, *supra* note 94, at 1579 & n.184.

were often totally excluded, even by those employers who might not have otherwise discriminated.[159] Even when exclusion was not total, unions and employers frequently maintained separate seniority and promotion lines for black workers, limiting them to the least desirable jobs.[160]

The AFL's strategic decision to ignore vast swaths of American workers and the decline of the inclusive Knights of Labor and IWW left a vacuum into which the Congress of Industrial Organizations ("CIO") stepped in 1935.[161] The CIO (which began as the Committee for Industrial Organizing of the AFL, only later becoming the separate Congress of Industrial Organizations)[162] pursued a strategy of "'wall to wall' organization of all employees in the basic mass production industries of steel, autos, glass, and rubber—not just the skilled craftsmen."[163] It "pledged to organize all workers regardless of race, gender, nationality, or political beliefs."[164] CIO unions operating according to this model expanded, though not as quickly as AFL unions. Further, interracial CIO unions that failed to overcome their white members' prejudices were at risk of raids by whites-only AFL locals.[165] Facing these competing pressures, one CIO union, the United Mine Workers of America, arrived at what came to be known as the "UMW Formula": its locals hired black organizers, and appointed a black vice president and minor officers, but a white president, secretary, and treasurer.[166] One could argue that this practice of tokenism exemplifies the narrative of racial capitalism discussed in the previous Part.[167]

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159 *See id.*

160 *Id.*

161 FONER, *supra* note 157, at 198–99.

162 Ahmed A. White, *The Depression Era Sit-Down Strikes and the Limits of Liberal Labor Law*, 40 SETON HALL L. REV. 1, 10 (2010).

163 Kenneth G. Dau-Schmidt, *The Changing Face of Collective Representation: The Future of Collective Bargaining*, 82 CHI.-KENT L. REV. 903, 908 (2007).

164 HONEY, GOING DOWN JERICHO ROAD, *supra* note 2, at 13.

165 Sophia Z. Lee, *Hotspots in a Cold War: The NAACP's Postwar Workplace Constitutionalism, 1948–1964*, 26 LAW & HIST. REV. 327, 352 (2008).

166 TERRY BOSWELL ET AL., RACIAL COMPETITION & CLASS SOLIDARITY 118 (2006) (characterizing the UMW formula as "a concrete demonstration of union commitment to racial inclusiveness designed to appeal to black workers alienated from the union by racially inclusive but empty rhetoric").

167 One of us views the UMW Formula as a clear instance of racial capitalism. The other views it as having some characteristics of tokenism, but nonetheless sees it as an ultimately positive first step aimed at achieving genuine solidarity between white and black miners during a period of deeply entrenched segregation.

At the same time, employment segregation meant that some jobs were held nearly exclusively by black workers, who were sometimes organized by black trade unionists. The most well-known black union was the Brotherhood of Sleeping Car Porters, led by black labor and civil rights leader A. Philip Randolph.[168] After a decade-long struggle, the Brotherhood succeeded in organizing porters at the Pullman company in 1935, and then won a contract on their behalf two years later.[169] That success also brought to an end the AFL's resistance to allowing the Brotherhood full Federation membership—before 1935, Randolph's repeated attempts to join the AFL had resulted in only a partial membership.[170] That year, Randolph also appealed—without success—to AFL leadership to require member unions to permit black workers to join.[171] This was the first of many such appeals.[172]

The 1940s brought change but little progress. In 1944, the Supreme Court held that unions owed a duty of fair representation to black workers in union-represented bargaining units.[173] The Court, however, did not require unions to admit black workers as members.[174] Likewise, the NLRB expressed its disapproval of discriminatory unions but did not refuse to certify such unions.[175] Thus, many unions, particularly those affiliated with the AFL, continued to relegate black workers to powerless "auxiliary locals."[176]

More promising was the CIO's 1946 announcement of Operation Dixie, "a million-dollar campaign to organize southern workers, support equal rights for blacks, and eliminate reactionary politicians through a voting coalition of black and white working-class voters."[177] But the CIO's progressive vision was imperiled by the Labor Manage-

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168 Jennifer Gordon & R.A. Lenhardt, *Rethinking Work and Citizenship*, 55 UCLA L. REV. 1161, 1207 (2008).

169 William J. Adelman et. al., *The Pullman Strike: Yesterday, Today, and Tomorrow*, 33 J. MARSHALL L. REV. 583, 615–16 (2000) (transcript of lecture by Eric Arnesen); Kenneth W. Mack, *Rethinking Civil Rights Lawyering and Politics in the Era Before* Brown, 115 YALE L. J. 256, 340–41 (2005).

170 WILLIAM H. HARRIS, A GUIDE TO THE MICROFILM EDITION OF THE RECORDS OF THE BROTHERHOOD OF SLEEPING CAR PORTERS: SERIES A, PART 3, at x-xi (William H. Harris ed., 1994), *available at* http://cisupa.proquest.com/ksc_assets/catalog/1550_RecsBroSleepCarPorSerAPt3.pdf.

171 *See id.* at xi.

172 *See, e.g.*, *infra* notes 187–201 and accompanying text.

173 Steele v. Louisville & Nashville R.R., 323 U.S. 192, 202–03 (1944).

174 *Id.* at 204.

175 Lee, *supra* note 165, at 337.

176 *See id.* at 338.

177 HONEY, GOING DOWN JERICHO ROAD, *supra* note 2, at 17.

ment Relations Act of 1947 ("LMRA"),[178] which limited union power in several ways.[179] In addition to prohibiting certain union tactics, the LMRA legitimated state right-to-work laws,[180] and required union leaders to disavow membership in the communist party.[181] These restrictions proved extremely challenging to the progressive forces within the CIO, particularly as the beginning of the Cold War gave conservative union leaders cover to push out more radical unionists.[182] And, "[t]he loyalty oath meant that the very left-leaning union members who were most likely to advocate racial equality were purged from many unions."[183] Additionally, southern states—in which segregation already made interracial union organizing difficult[184]—rapidly adopted right-to-work statutes, further undermining union efforts.[185] Thus, while the CIO continued Operation Dixie until 1954, it was generally deemed a failure.[186]

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178 Labor Management Relations Act ("LMRA") of 1947, Pub. L. No. 80-101, 61 Stat. 136.

179 Risa Lauren Goluboff, "*Let Economic Equality Take Care of Itself*": *The NAACP, Labor Litigation, and the Making of Civil Rights in the 1940s*, 52 UCLA L. REV. 1393, 1466 (2005).

180 LMRA § 14(b), 29 U.S.C. § 164(b) (2006). "Right to work laws" forbid unions and employers from agreeing to require union membership as a condition of employment. *See* Goluboff, *supra* note 179, at 1475.

181 LMRA § 101, 61 Stat. at 146, *repealed by* Labor-Management Reporting and Disclosure Act of 1959, Pub. L. No. 86-257, § 201(d), 73 Stat. 519, 525 (1959).

182 Ellen Schrecker, *Labor and the Cold War: The Legacy of McCarthyism*, *in* AMERICAN LABOR AND THE COLD WAR 7, 10–11 (Robert W. Cherny et al. eds., 2004).

183 Goluboff, *supra* note 179, at 1466; *see also* HONEY, GOING DOWN JERICHO ROAD, *supra* note 2, at 19 (noting that the CIO "purg[ed] eleven unions with nearly a million members for having Communists in their leadership," among other steps).

184 The CIO explained this difficulty in an amicus brief filed on behalf of the petitioners in *Brown v. Board. of Education*:

> The CIO's interest is also direct and personal. The CIO, through its constituent organizations, is endeavoring to practice non-segregation and non-discrimination in the everyday functioning of union affairs. Repeatedly in the past this endeavor has been obstructed by statutes, ordinances, and regulations which require segregation in public dining places, public meeting halls, toilet facilities, etc. These laws attempt to require CIO unions to maintain "equal but separate" facilities in their own semi-public buildings, despite the avowed desire of the membership to avoid segregation in any form.

Brief for Congress of Industrial Organizations as Amicus Curiae Supporting Petitioners at 1-2, Brown v. Bd. of Educ., 347 U.S. 483 (1954) (No. 1).

185 Wage & Hour Division, *Table of State Right-to-Work Laws as of January 1, 2009*, U.S. DEP'T OF LAB. (last updated Dec. 2008), http://www.dol.gov/whd/state/righttowork.htm#.UHsUomk5x80 (showing that many southern states rapidly adopted right-to-work laws between the years 1947 and 1955).

186 Melvyn Dubofsky, Book Review, 59 INDUS. & LAB. REL. REV. 513, 514 (2006) (reviewing TIMOTHY J. MINCHIN, FIGHTING AGAINST THE ODDS: A HISTORY OF SOUTHERN LABOR SINCE WORLD WAR II (2005)); Raymond L. Hogler, *The Historical Misconception of Right to Work Laws in the United States: Senator Robert Wagner, Legal Policy, and the Decline of American Unions*, 23 HOFSTRA LAB. & EMP. L.J. 101, 105 (2005).

After Operation Dixie, the AFL and CIO merged in 1955 and the new federation required member unions to eliminate racially discriminatory membership policies.[187] Additionally, the AFL-CIO "established a Civil Rights Department charged with remedying errant locals."[188] The Civil Rights Department's effectiveness was limited, however, and discriminatory unions were slow to change. By the AFL-CIO's 1959 biennial convention, several unions still had discriminatory constitutions and segregated locals in place, in contravention of Federation policy.[189] At the convention, A. Philip Randolph, then the only black Federation vice president, engaged in a heated debate with Federation president George Meany over what to do about the recalcitrant unions.[190] Randolph proposed resolutions to expel two discriminatory unions from the AFL-CIO.[191] Meany, however, argued against this intervention, reasoning that expelling the discriminatory unions would not force them to integrate (and would eliminate the AFL's ability to encourage them to do so), and that the black members of some segregated locals did not want integration.[192] This led to a heated exchange, during which Meany "accused Mr. Randolph of seeking to throttle the thinking of Negro unionists," and demanded "Who the hell appointed you the guardian of all the Negroes in America?"[193]

Meany's position prevailed, and the AFL-CIO's efforts to eliminate race discrimination by the remaining handful of discriminatory affiliate unions were no more successful in the following years.[194] Apparently doubting that they would ever change voluntarily, the AFL-CIO publicly supported the Civil Rights Act of 1964,[195] which included a provision outlawing discrimination by unions. During congressional testimony, Meany stated:

> [W]e have said repeatedly that to finish the job [of eradicating employment and union discrimination] we need the help of the U.S. Government . . . . When the rank-and-file membership of a local union obstinately exercises its right to be

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187 Lee, *supra* note 165, at 361.

188 *Id.*

189 *See* ANDREW E. KERSTEN, A. PHILIP RANDOLPH: A LIFE IN THE VANGUARD 152 (2007).

190 *Id.*

191 *Id.* at 153.

192 *Id.* at 153–54.

193 *Id.* at 152 (quoting A.H. Raskin, *Meany, in a Fiery Debate, Denounces Negro Unionist*, N.Y. TIMES, Sept. 24, 1959, at 1).

194 Lee, *supra* note 165, at 364.

195 Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241.

> wrong, there is very little we in the leadership can do about it, unaided.[196]

Shortly after Title VII took effect, four AFL-CIO-affiliated unions and the Building and Construction Trades Council of St. Louis were named as defendants in the Department of Justice's first "pattern or practice" lawsuit.[197] In that case, the Eighth Circuit determined the unions had continued to deny black workers membership even after the Civil Rights Act's enactment, and had "discouraged their members from working on construction jobs on which Negro craftsmen or Negro contractors were employed" due to the black workers' non-affiliation with AFL-CIO unions.[198] The St. Louis locals were not alone: the Eighth Circuit noted in its opinion that "[s]even other actions similar to the instant one have been instituted by the Attorney General against the Building Trades' Unions,"[199] and many similar cases followed.[200] Furthermore, even unions that did not intentionally discriminate against workers of color were sometimes named as defendants in Title VII cases because of their roles in maintaining seniority systems that had the effect of entrenching the effects of prior discrimination.[201]

B. Explaining the Persistence of Narrative

> "Because familiarity is such an important test of acceptability, the acceptable ideas have great stability. They are highly predictable . . . . I shall refer to these ideas henceforth as the conventional wisdom."[202]

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196 H.R. REP. NO. 87-1370, at 4 (1962), *reprinted* in EEOC, LEGISLATIVE HISTORY OF TITLES VII AND XI OF CIVIL RIGHTS ACT OF 1964, at 2155, 2158 (1968); *see also* Charles B. Craver, *The National Labor Relations Act at 75: In Need of a Heart Transplant*, 27 HOFSTRA LAB. & EMP. L.J. 311, 314 (2010) (cataloging employment discrimination statutes passed with the support of the labor movement).

197 United States v. Sheet Metal Workers Int'l Ass'n, Local Union No. 36, 416 F.2d 123, 123 (8th Cir. 1969); Michael D. Sorkin, *Woodrow 'Woody' Zenfell: Government Engineer Oversaw Construction of Arch, Fought to Get Blacks Hired on the Project*, ST. LOUIS POST-DISPATCH, Feb. 9, 2012, at A17.

198 *Sheet Metal Workers Int'l Ass'n*, 416 F.2d at 128.

199 *Id.* at 125 n.2.

200 *See, e.g.*, Carson v. Am. Brands, Inc., 450 U.S. 79, 79 (1981); Woods v. Graphic Commc'ns, 925 F.2d 1195, 1198 (9th Cir. 1991) (describing how union opposed disciplinary action against white members who were guilty of racial harassment).

201 *See, e.g.*, Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 325–26 (1977) (holding that union's role in maintaining seniority system that perpetuated pre-Civil Rights Act discrimination was not violation of Title VII).

202 JOHN KENNETH GALBRAITH, THE AFFLUENT SOCIETY 8 (3d ed. 1976). In popularizing the term "conventional wisdom," Galbraith provided two illustrative examples. The first in-

Most present-day unions' relationships with workers of color have improved significantly. Yet the conventional wisdom we described in Part I remains strong.[203] Several factors account for the persistence of the four narratives we identified.

One such factor is that the historical foundation continues to affect present thinking. As previously discussed, many proponents of the conventional narratives rely on history to support their claims.[204] The argument is that racist practices in the past by some unions inevitably infect current union behavior.[205]

Another reason is simply that some unions still discriminate against workers of color. For example, a New York longshoremen's union recently refused even to send a representative to a hearing called by the Waterfront Commission of New York Harbor to investigate discriminatory hiring practices, asserting that the Commission "had no authority to demand that all hiring be done without discrimination."[206] This came after the union, ordered by the Commission to generate a diverse pool of candidates for temporary jobs, offered a list of thirty-seven candidates, of whom thirty-three were white men.[207]

The case involving the New York longshoremen is not the only example of a union exercising control over hiring in a manner resulting in a predominantly white workforce, though the union's overt defiance is remarkable. Discrimination has persisted in some union hiring halls for decades, despite significant federal interventions designed to end it.[208] Unions also continue to be named as defendants in race dis-

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volves a speaker before the Chamber of Commerce; the second, a speaker before the AFL-CIO. *Id.* at 7. Galbraith's choices illustrate the conventional wisdom's pull in the labor context.

203 *See supra* Part I.

204 *See supra* notes 73–88 and accompanying text.

205 *See generally Rahm Emanuel, Trade-Union Racism, and the Burden of History*, CHI. MAG. (Oct. 4, 2012, 3:45 PM), http://www.chicagomag.com/Chicago-Magazine/The-312/October-2012/Rahm-Emanuel-Trade-Union-Racism-and-the-Burden-of-History/. We find this claim surprising, particularly as it often comes from individuals who, in other contexts, dismiss America's bitter history of slavery, Jim Crow, and racial discrimination, and contend that it ought to have no bearing on matters such as antidiscrimination legislation and affirmative action doctrine.

206 Patrick McGeehan, *Longshoremen's Union Defiant over Diversity Plan*, N.Y. TIMES, Mar. 21, 2012, at A17.

207 Patrick McGeehan, *Told to Diversify, Dock Union Offers a Nearly All-White Retort*, N.Y. TIMES, Dec. 1, 2011, at A31.

208 In addition to filing lawsuits against discriminatory unions, the federal government has also attempted prophylactic approaches. The most well known of these is the Philadelphia Plan, which the Office of Federal Contract Compliance imposed first in Philadelphia and then nationwide in the late 1960s. The plan required federal construction contractors to "provide hiring plans that achieved designated levels of minority group representation within each component of a given construction project," as well as required both contractors and unions "to adopt specific goals and timetables to correct the racial imbalances in their workforces." Matthew J. Lindsay,

crimination cases brought by both their members and employees.[209] Moreover, we do not dispute that unions sometimes mistreat workers of color in more subtle ways, such as by engaging in tokenism or racial capitalism.[210]

Although we unquestionably condemn the present-day racial discrimination and mistreatment we have described in the preceding paragraphs, we emphasize that this behavior does not reflect the practices of all, many, or most unions.[211] We have highlighted instances of racist behavior by unions in order to acknowledge that some of the conventional wisdom derives from awareness of that behavior, not to present that behavior as typical of all unions. We will examine the predominantly racially progressive behavior of many unions in more detail in Part III.

Still, present-day discrimination is only one of several reasons why the conventional wisdom persists. First, it is in the interests of employers who are opposed to bargaining with an organized workforce to distance workers of color from labor unions; this "divide and conquer" approach is a frequent component of union avoidance strategies.[212] Thus, it is unsurprising that some of the institutions advancing the conventional wisdom are employers and their consultants[213] as well as media outlets that tend to sympathize with employers and their goals, and libertarian commentators who gener-

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How Antidiscrimination Law Learned to Live with Racial Inequality, 75 U. CIN. L. REV. 87, 98–100 (2006); *see also* William B. Gould, *The Seattle Building Trades Order: The First Comprehensive Relief Against Employment Discrimination in the Construction Industry*, 26 STAN. L. REV. 773, 778–80 (1974) (describing Philadelphia Plan).

209 *See, e.g.*, Baumgarten v. Bd. of Equalization, 301 F. App'x 711 (9th Cir. 2008) (naming SEIU as defendant); Patterson v. United Steelworkers of Am., 381 F. Supp. 2d 718 (N.D. Ohio 2005) (naming United Steelworkers as defendant). Nor are these claims limited to race discrimination. *See* Vandermark v. City of New York, 391 F. App'x 957 (2d Cir. 2010) (naming SEIU as defendant in an age discrimination suit); Laramee v. Jewish Guild for the Blind, 72 F. Supp. 2d 357 (S.D.N.Y. 1999) (naming various unions, including the SEIU and the AFL-CIO, as defendants in a disability discrimination case).

210 *See infra* Part III.C.

211 *See infra* Part III.

212 Eric A. Posner, Kathryn E. Spier & Adrian Vermeule, *Divide and Conquer*, 2 J. LEGAL ANALYSIS 417, 437 (2010).

213 *See generally* UNIONFACTS.COM, http://web.archive.org/web/20120729173116/http://www.unionfacts.com/cuf/vitals (last visited July 29, 2012) (noting that America's top thirty unions are primarily led by white males). The Center for Union Facts website is maintained by Richard Berman, a lobbyist and "union avoidance" consultant to employers facing union drives. *Case Studies*, BERMAN & CO., http://www.bermanco.com/case-studies/ (last visited June 5, 2013); *see also infra* notes 289–303 and accompanying text.

ally disdain unionization and are prone to criticize unions on any available basis.[214]

Another reason the conventional wisdom persists is the unlikely agreement between progressive commentators and academics concerned about race discrimination on the one hand, and employers and their supporters on the other, which arises where union discrimination is concerned. Put another way, anti-racist progressives who are engaged in the important and necessary project of identifying racist practices wherever they occur sometimes justifiably criticize unions.[215] In those situations, intentionally or not, such anti-racist progressives become part of a "strange bedfellows" coalition with institutions that are opposed to unions for other reasons.[216] That coalition then creates the impression of bipartisan consensus, which is particularly difficult to rebut—that is, in this era of polarized politics,[217] bipartisan consensus is so rare that when it exists it is likely to go unchallenged.[218] And unions are particularly poorly positioned to rebut the consensus, given that they have stake in the outcome.

Theoretical explanations also have a role to play in the persistence of the conventional narrative, particularly among intellectuals. For progressives, Antonio Gramsci's influential conception of cultural hegemony as a means of social control may contribute to this thinking.[219] Gramsci argued that within a capitalist system the bourgeoisie engages in a sort of "passive revolution" by allowing organizations such as unions to facilitate social change.[220] This technique allows for the appearance of social change without actually destabilizing existing structures of power.[221] Gramsci's intellectual influence, therefore,

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214 *See supra* notes 59, 74–80 and accompanying text; *infra* notes 224–34 and accompanying text.

215 *See, e.g.*, Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1375 n.168 (1988).

216 *See id.* We do not refer to literal coalitions here, but rather to the fact that the same positions are adopted by multiple sources.

217 *See, e.g.*, PEW RESEARCH CTR., PARTISAN POLARIZATION SURGES IN BUSH, OBAMA YEARS 1 (2012), *available at* http://www.people-press.org/2012/06/04/partisan-polarization-surges-in-bush-obama-years/ (finding that Americans' "values and basic beliefs are more polarized along partisan lines than at any point in the past 25 years").

218 *Cf.* Amy Goodman, *On Gun Laws, It's Bipartisan Consensus, Not Gridlock, That's the Problem*, TRUTHDIG (Aug. 9, 2012), http://www.truthdig.com/report/item/on_gun_laws_bipartisan_consensus_not_gridlock_is_the_problem_20120809/ (stating that bipartisan resistance to gun control prevents Congress from enacting tougher legislation).

219 *See generally* THE ANTONIO GRAMSCI READER: SELECTED WRITINGS 1916–1935 (David Forgacs ed., 2000) (publishing a collection of Gramsci writings).

220 *Id.* at 247.

221 *Id.*

may account for some progressive scholars' view of unions as subject to many of the same cultural pathologies as employers and those in power more generally.[222]

Additionally, much of the academic research supporting the conventional wisdom is generated at think tanks and universities funded by individuals and entities with well-established anti-union practices and philosophies. For example, the well-known conservative philanthropists David and Charles Koch spend millions each year to support the libertarian Cato Institute, the American Legislative Exchange Council ("ALEC"), and a number of other groups that are sharply critical of unions.[223] This research is often used to promote anti-union public policy, implemented by politicians who are supported financially by the very same individuals and groups.[224] Of course, unions and other progressive groups also fund think tanks,[225] though on a much smaller scale.[226]

To summarize, this section has examined the reasons for the persistence of the conventional wisdom. Historical discrimination necessarily informs the relationship between the unions and workers of color today. Moreover, it also informs observers' perceptions of that relationship, making the conventional wisdom unusually sticky, even as relationships between unions and workers of color have evolved. In this Part, we have also emphasized other factors, such as employers' self-interest and unlikely coalitions between racial progressives and employers. Looking ahead, however, we think it more useful to reevaluate the conventional narratives in light of current realities, with the ultimate goal of strengthening coalitions between labor and civil rights. We justify our priorities in the next Section.

C. The Need to Reassess

> "[I]ndustrial unions were the first to stand up against lynching and segregation. People need to know that it was the

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222 *See, e.g.*, Crenshaw, *supra* note 215, at 1334–36, 1350–56.

223 Judith Davidoff, *Walker's Plan to End Bargaining Has Deep Roots in GOP*, CAP TIMES (Feb. 23, 2011, 10:00 AM), http://host.madison.com/ct/news/local/govt-and-politics/walker-s-plan-to-end-bargaining-has-deep-roots-in/article_b4b509b4-3ed0-11e0-b97e-001cc4c03286.html.

224 *See* Jonathan D. Salant, *Koch Funneled $1.2 Million to Governors Battling Unions*, BLOOMBERG (Feb. 23, 2011, 5:55 PM), http://www.bloomberg.com/news/2011-02-23/koch-funneled-1-2-million-to-elect-governors-battling-unions.html.

225 For example, labor unions provide twenty-nine percent of the Economic Policy Institute's funding. *About*, ECON. POL'Y INST., http://www.epi.org/about/ (last visited June 2, 2013).

226 *See generally* Jane Mayer, *Covert Operations*, NEW YORKER, Aug. 30, 2010, at 44 (detailing the extent of the Koch brothers' support of conservative groups and determining that this support occurs on an unparalleled level).

> Steel Workers Organizing Committee—this union—that was founded on the principle of organizing all workers without regard to race. That's why the labor movement—imperfect as we are—is the most integrated institution in American life."[227]

Before substantively evaluating the conventional wisdom described in Part I, it is worth considering what is at stake in this project. In other words, why does it matter if the degree of conflict between unions, workers of color, and civil rights groups is overstated? Undoubtedly there is value to seeking a more descriptively accurate understanding through academic discourse, but is there more to the project than that?

Recent economic and political events have intertwined labor and race more closely than ever. Though the Great Recession officially ended in 2009,[228] its effects linger in the form of the "jobless recovery"[229] (though the unemployment rate fell from a high of ten percent in 2009 to near eight percent in 2012[230]) and an increasing poverty rate.[231] But the recession has not affected all Americans equally. When it began in 2007, unemployment rates rose more quickly for blacks than whites.[232] This is especially concerning when one considers that unemployment rates for blacks and Latinos are generally higher than those for whites even under normal economic conditions.[233] Moreover, the recession's formal end brought minimal relief for blacks.[234] Even when geographical areas or particular industries begin to recover lost jobs, those jobs often do not go to minority

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227 Richard Trumka, Sec'y-Treasurer, AFL-CIO, Remarks at the United Steelworkers Convention (July 1, 2008), *available at* http://www.usw.org/media_center/speeches_interviews?id=0003.

228 Lee, *supra* note 25 (stating that recession officially ended in June 2009).

229 Freeland, *supra* note 26.

230 *Labor Force Statistics*, *supra* note 27.

231 KRISTIN SEEFELDT ET AL., AT RISK: AMERICA'S POOR DURING AND AFTER THE GREAT RECESSION 15–16 (2012), *available at* http://www.indiana.edu/~spea/pubs/white_paper_at_risk.pdf (stating "[d]ue to the severity and length of the Great Recession and the slow pace of the recovery, it is projected that the rate of poverty in the United States will continue to increase through at least 2011").

232 SYLVIA ALLEGRETTO & STEVEN PITTS, THE END OF THE RECESSION? HOW BLACKS MIGHT FARE IN THE JOBLESS RECOVERY 4–5 (2010), *available at* http://laborcenter.berkeley.edu/blackworkers/end_recession10.pdf.

233 UNIV. CAL. BERKELEY LABOR CTR., DATA BRIEF: BLACK EMPLOYMENT AND UNEMPLOYMENT IN APRIL 2012, at 10 (2012), *available at* http://laborcenter.berkeley.edu/blackworkers/monthly/bwreport_2012-05-07_48.pdf.

234 *Id.*; *see also* Economic News Release, Bureau of Labor Statistics, Employment Status of the Civilian Population by Race, Sex, and Age (June 7, 2013), *available at* http://www.bls.gov/news.release/empsit.t02.htm (showing 13.5% black unemployment rate as of May 2013).

workers.[235] This situation may be partially attributable to employers' recession-time decisions to cancel programs designed to increase employee diversity.[236] Finally, poverty rates among black and Hispanic Americans are also more than twice the rate for white Americans—above twenty-five percent, compared to around ten percent for whites.[237]

These statistics are of obvious concern to civil rights groups, but they also strike at core labor values in three ways. First, it is axiomatic that when a unionized worker loses her job, it hurts not only that union worker, but all union workers: as the saying goes, "an injury to one [is] an injury to all."[238] Second, general principles of labor economics hold that wages tend to stagnate in the face of large reserves of unemployed workers.[239] Under these conditions, unions will likely find it difficult to win wage increases for represented workers, and it may become easier for employers involved in labor disputes to find replacement workers. Third, although union strength is depleted whenever unemployment rises, the loss is particularly great in the case of black workers, who have been "the strongest supporters of unions since the 1930s."[240] Unions are much more likely to win NLRB elections in majority-minority workforces: unions are elected in only forty percent of elections held in bargaining units of one to forty-nine percent workers of color, whereas they win fifty-six percent of elections in units of more than seventy-five percent workers of color.[241] Thus,

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235 *See, e.g.*, Patrick McGeehan, *Blacks Miss Out as Jobs Market Rebounds in City*, N.Y. TIMES, June 21, 2012, at A1 (showing that 49.6% of black, non-Hispanic New Yorkers were employed in the past twelve months, compared to 52.7% of Hispanics, 56.6% of Asians, and 57.5% of whites, as well as higher unemployment rates for blacks (14%) and Hispanics (10.9%) than Asians (5.3%) or whites (6.8%)).

236 Karen Sloan, *The Recession Is Undermining Diversity Initiatives*, NAT'L L.J. (Feb. 4, 2010), http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202442007974.

237 SEEFELDT ET AL., *supra* note 231, at 16.

238 *See Preamble to the IWW Constitution*, INDUS. WORKERS OF THE WORLD, http://www.iww.org/en/culture/official/preamble.shtml (last visited June 2, 2013).

239 *See* Kevin D. Hoover, *Philips Curve*, *in* THE CONCISE ENCYCLOPEDIA OF ECONOMICS 392 (David R. Henderson ed., 2008).

240 Michael Honey, *Race, Labor, and the City in the Obama Era: King's Unfinished Agenda*, LABOR: STUD. IN WORKING-CLASS HIST. OF THE AMS., Spring 2010, at 7, 11 [hereinafter Honey, *Race, Labor, and the City*]; *see also* Kate Bronfenbrenner & Robert Hickey, *Changing to Organize: A National Assessment of Union Organizing Strategies*, *in* REBUILDING LABOR: ORGANIZING AND ORGANIZERS IN THE NEW UNION MOVEMENT 17–18 (Ruth Milkman & Kim Voss eds., 2004).

241 Bronfenbrenner & Hickey, *supra* note 240, at 36–38. The effect is even greater when the bargaining unit is more than seventy-five percent *women* of color—such units vote for union representation eighty-two percent of the time. *Id.*

when proposed bargaining units include people of color in significant numbers, union organizing is more likely to succeed.

Conversely, if the consequences of unionization for workers of color are largely positive,[242] then the anti-union narratives that comprise the conventional wisdom benefit employers who wish to both avoid having to deal with a union-represented workforce and to disadvantage workers of color.[243] Additionally, the Republican Party benefits from a weakened labor movement and the accompanying reduction in unions' work on behalf of mostly Democratic candidates,[244] who are also the candidates most frequently supported by civil rights groups.[245]

This is not to say that labor unions should be immune from critiques leveled by people of color and their supporters—indeed, we criticize some union practices in this Article, and argue that others should be expanded.[246] Likewise, we support many of the well-reasoned and necessary interventions that others have suggested in order to strengthen the alignment between workers of color and their unions.[247] Nonetheless, our point is that a reevaluation of the potential for unions to benefit workers of color will, in the aggregate, help both groups.

Put simply, a dominant narrative that ignores the ways that unions benefit workers of color while focusing on areas of tension is likely to have negative consequences for both. Specifically, if workers of color are repeatedly told that they cannot trust unions to further their interests, they will become more skeptical about voting for a union or becoming a full dues-paying member of one.[248] Employers play a supporting role in this dynamic when they seek to defeat union

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242 *See infra* Part III.C.

243 *See supra* Part I.C.

244 *See* Kirsanow, *supra* note 68 (describing how altering only five percent of the black vote could cripple the Democratic Party and the importance of certain labor issues to the black population); Jonathan Oosting, *Coalition Files Suit Over Michigan Redistricting, Alleging 'Racial Gerrymandering' Designed to Disenfranchise Detroit Voters*, MLIVE (last updated Dec. 8, 2011, 7:01 PM), http://www.mlive.com/news/detroit/index.ssf/2011/12/minority_coalition_files_lawsu.html (reporting on a lawsuit alleging that Republicans engage in illegal redistricting to reduce the number of minority districts in Michigan).

245 See *infra* Part III.D.2.

246 *See*, *e.g.*, *infra*, notes 254–72 and accompanying text.

247 *See supra* Part I.B.

248 Workers who are covered by a union contract cannot be required to join a union or pay the full amount of union dues; rather, they can at most be required to pay the "agency fee," which represents the costs of bargaining, grievance administration, and a few other union activities. In "right to work" states, workers covered by union contracts need not pay even the agency fee, though they are still covered by the union contract. *See* Charlotte Garden, *Citizens, United*

drives by tapping into the conventional wisdom—for example, by falsely telling employees of color that union organizers have made racist statements.[249]

Two important results flow from such practices. First, 'no' votes based on incorrect or overstated rhetoric about unions and race might turn out to be the deciding ones in union representation elections.[250] Second, and relatedly, the conventional wisdom could become a self-fulfilling prophecy if workers of color exit the labor movement in significant numbers, leaving only white workers to vote on contract proposals and direct their unions. Of course, this scenario assumes unions could continue to exist at all without critical support from workers of color—a questionable assumption at best.[251]

Thus, we aim to offer a counter-narrative to the conventional wisdom because we believe that such a narrative will work to the joint benefit of workers of color and the labor movement.

III. More Closely Intertwined

> "Labor's problems are our problems and our problems are labor's problems."[252]
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> "Organizing is an educational process. The best educational process in the union is the picket line and the boycott. You learn about life."[253]

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and Citizens United*: The Future of Labor Speech Rights?*, 53 Wm. & Mary L. Rev. 1, 33–34, 36–37 (2011).

249 *See* Ishikawa Gasket Am., Inc., 337 N.L.R.B. 175, 179, 184 (2001) (describing how an employer circulated "a deliberately racist leaflet that would appear to have been prepared by the Union," after which the union lost the election); Andel Jewelry Corp., 326 N.L.R.B. 507, 507 (1998) (Fox, dissenting) (communicating how an employer told employees that the Union "was challenging the eligibility of [forty-five] employees on the basis of their ethnic background"). In other notable cases, employers have exploited racial dynamics in other ways, for example by informing employees that the AFL-CIO was opposed to racial segregation. Allen-Morrison Sign Co., 138 N.L.R.B. 73, 73–75 (1962); *see also* Sewell Mfg. Co., 138 N.L.R.B. 66, 66–67 (1962) (employer fought union drive by distributing photo of white union organizer dancing with black woman, among other racially charged efforts).

250 This risk is acute, particularly given the importance of support from workers of color to successful organizing drives. *See* Bronfenbrenner & Hickey, *supra* note 240, at 36–37 (discussing the likelihood of unions winning NLRB elections).

251 *See id.*

252 Letter from Martin Luther King, Jr. to Jimmy Hoffa, President, Int'l Bhd. of Teamsters (Apr. 12, 1965), *available at* http://www.thekingcenter.org/archive/document/letter-mlk-teamsters-president-jimmy-hoffa-0.

253 Interview by John Moyer with César Chávez, Founder, United Farm Workers, in California (1970), *available at* http://www.historyandtheheadlines.abc-clio.com/ContentPages/ContentPage.aspx?entryId=1665620&currentSection=1665275&productid=41.

This Part evaluates in greater detail the four conventional narratives we identified in Part I. First, we articulate the ways in which each narrative is flawed. Some aspects of the narratives are simply false or seriously misleading, especially those that elide the many productive relationships between unions, workers of color, and civil rights groups that already exist. Others are based on accurate premises, but may yield positive as well as negative consequences for workers of color. We then replace or supplement the conventional narrative with a more accurate and nuanced account. Finally, we explore how best to mitigate the negative consequences associated with each narrative within the confines of labor law as it stands now.

This is not to suggest agreement with labor law's status quo. To the contrary, we agree that labor law undermines coalitions between labor and race.[254] For example, differing legal regimes that apply to labor unions' and civil rights groups' protest tactics have left unions unable to participate fully in some civil rights-led boycotts.[255] In one notable example, when Martin Luther King, Jr. asked the Teamsters to participate in "a boycott of materials going in and out of the State of Alabama," Jimmy Hoffa replied that the law likely would not allow cooperation, as similar boycotts had already led to "law suits in excess of 40 million dollars having been filed against us."[256] Likewise, legal reforms designed to facilitate or even require unions to "promote a workplace free of discrimination"[257] would almost certainly benefit workers of color.

Nonetheless, we focus on the possibilities under existing law because of the longstanding difficulty of catalyzing even relatively minor worker-friendly reforms to existing labor law.[258] Even a well-coordinated litigation strategy designed to reverse employer-friendly interpretations of the NLRA[259] and overcome the judiciary's hostility

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254 For more information on how labor law can undermine the race-labor relationship, see generally Marion Crain & Ken Matheny, *Labor's Identity Crisis*, 89 CALIF. L. REV. 1767 (2001).

255 *See* Letter from James R. Hoffa, President, Int'l Bhd. of Teamsters, to Martin Luther King, Jr. (Mar. 29, 1965), *available at* http://www.thekingcenter.org/archive/document/letter-james-r-hoffa-mlk. *See generally* James Gray Pope, *Labor-Community Coalitions and Boycotts: The Old Labor Law, the New Unionism, and the Living Constitution*, 69 TEX. L. REV. 889 (1991).

256 Letter from James R. Hoffa to Martin Luther King, Jr., *supra* note 255.

257 Crain & Matheny, *supra* note 254, at 1840.

258 *See* William R. Corbett, *"The More Things Change, . . .": Reflections on the Stasis of Labor Law in the United States*, 56 VILL. L. REV. 227, 236 (2011) (observing that "in the United States changes in political power result in little or no change in *labor law*"); Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527, 1540–43 (2002).

259 *See generally* ELLEN DANNIN, TAKING BACK THE WORKERS' LAW: HOW TO FIGHT THE

towards unions[260] would still likely take years to complete. While future labor lawyers, legislators, or NLRB members may be able to break the current gridlock—and we hope that they will—this Article's focus is on improvement that can take place even without legal reform. Our project is to identify the ways that unions already benefit people and communities of color, and to propose ways that they might further improve under existing law.

A. White and Nonwhite Workers' Interests Converge

> "Our needs are identical with labor's needs—decent wages, fair working conditions, livable housing, old age security, health and welfare measures, conditions in which families can grow, have education for their children and respect in the community."[261]

Adherents to the conventional wisdom claim that where white workers win, workers of color lose, and vice versa.[262] But under the right conditions, white and nonwhite workers can, and do, win together. Moreover, recognizing this possibility makes it more likely to occur.

One might describe the relationship between white and nonwhite workers as a classic example of Derrick Bell's theory of interest convergence, which posits that progress for nonwhite people occurs only when it also benefits white people.[263] Yet although the theory has

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ASSAULT ON LABOR RIGHTS (2006) (laying out a specific strategy to overturn cases running counter to labor policies).

260 George Schatzki, *It's Simple: Judges Don't Like Labor Unions*, 30 CONN. L. REV. 1365, 1366 (1998) ("[T]he life view of all or virtually all judges (and academics, for that matter) is inconsistent with, at least, the theoretical foundations for the labor movement and its most easily observed spoils of war, mandatory collective bargaining.").

261 MARTIN LUTHER KING, JR., If the Negro Wins, Labor Wins, Speech Before the AFL-CIO Fourth Constitutional Convention (Dec. 11, 1961), *in* ALL LABOR HAS DIGNITY 31, 38 (Michael K. Honey ed., 2011).

262 *See supra* Part I.A.

263 *See* Derrick A. Bell, Jr., Brown v. Board of Education *and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980). Bell's theory has been extraordinarily influential across a range of legal disciplines. For a small sample, see Devon W. Carbado & Mitu Gulati, *The Law and Economics of Critical Race Theory*, 112 YALE L.J. 1757, 1764 (2003) (book review) (law and economics); Sheryll D. Cashin, *Shall We Overcome? Transcending Race, Class, and Ideology Through Interest Convergence*, 79 ST. JOHN'S L. REV. 253, 271 n.67 (2005) (identity); Gabriel J. Chin, *The Civil Rights Revolution Comes to Immigration Law: A New Look at the Immigration and Nationality Act of 1965*, 75 N.C. L. REV. 273, 283–85 (1996) (immigration law); Richard Delgado, *Rodrigo's Roundelay:* Hernandez v. Texas *and the Interest-Convergence Dilemma*, 41 HARV. C.R.-C.L. L. REV. 23, 63 (2006) ("all of Latino history"); Stephen M. Feldman, *Principle, History, and Power: The Limits of the First Amendment Religion Clauses*, 81 IOWA L. REV. 833, 869–72 (1996) (book review) (religious liberties); Michael Z. Green, *Addressing Race*

greatly influenced many areas of legal scholarship, surprisingly little research has analyzed how Bell's theory applies to the relationship between white workers and workers of color.[264] Our view is that the theory usefully describes that relationship in at least some ways.[265] That is, white and nonwhite workers' interests *do* converge to a great extent—indeed, to a greater extent than often acknowledged—that we need not reach the issue of what might happen were their interests to diverge. Labor and civil rights organizers often recognize and explicitly invoke their common interests in order to promote class-based solidarity. Accordingly, our concern is pragmatic: to identify existing narratives—and develop additional ones—that acknowledge this reality and facilitate further convergence of interests between white and nonwhite workers.[266]

Labor-related narratives of interest convergence focus on the community of interest between workers of color and working-class whites. This narrative is compelling at both a theoretical and a practical level. As Camille Gear Rich has compellingly demonstrated, "marginal whites"—those who, for a range of reasons, occupy lower social status and cannot always or even usually access the benefits of white privilege—experience disadvantage analogous in some ways to

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Discrimination Under Title VII After Forty Years: The Promise of ADR as Interest-Convergence, 48 How. L.J. 937, 940 (2005) (alternative dispute resolution); Cynthia Lee, *Cultural Convergence: Interest Convergence Theory Meets the Cultural Defense*, 49 Ariz. L. Rev. 911, 939 (2007) (criminal law); Rhonda V. Magee, Note, *The Master's Tools, from the Bottom Up: Responses to African-American Reparations Theory in Mainstream and Outsider Remedies Discourse*, 79 Va. L. Rev. 863, 908–09 (1993) (reparations). More recently, the theory has also attracted criticism that it treats racial groups monolithically and constrains nonwhite groups' agency. *See* Justin Driver, *Rethinking the Interest-Convergence Thesis*, 105 Nw. U. L. Rev. 149, 165–71, 175–79 (2011).

264 To our knowledge, only one legal academic article has discussed interest convergence in relation to unions and nonwhite people. *See* Green, *Reading* Ricci *and* Pyett, *supra* note 91, at 368–70.

265 Whether relying on interest convergence as an organizing strategy is normatively desirable is a more complex question that is beyond the scope of this Article. That is, the decision whether to implement a policy that benefits nonwhite people should not hinge on whether that policy also benefits white people. Indeed, there may be circumstances in which allocating benefits to nonwhite people is morally required even if it harms white people. With respect to the relationship between the labor movement and people of color, however, the interests of the two groups are so closely aligned that we need not confront the question of what to do when they are not.

266 Because, in our view, the long-term class-based interest convergence between white workers and workers of color is robust, we do not address here another implication of Bell's interest convergence theory, if that theory were applied in its entirety—that if the interests of white workers and workers of color diverged, white workers and institutions (including many labor unions) would promote only white interests.

that experienced by racial minorities.[267] Many marginally white people are members of the working class and therefore belong to the subset of white individuals most likely to be members of unions.[268] Like nonwhite people, these marginal whites occupy positions of reduced social power.[269] This commonality means that policies and practices that benefit one group often benefit the other. Furthermore, as we will show, the interests of marginal whites and people of color overlap to a great degree and perceptions of competition are, in many instances, empirically unfounded. Thus, the social marginality of both "marginal whites" and people of color provides fodder for solidarity, not division.

Against this theoretical backdrop, a range of concrete examples rebut the notion that white and nonwhite workers' interests diverge. Consider union-supported minimum-wage laws. Some commentators have argued that such laws harm nonwhite workers by diminishing the number of jobs available, particularly for unskilled and young workers, who are disproportionately people of color.[270] They also argue that the minimum wage reduces the opportunities for workers of color to get jobs by offering to work for less than incumbent white workers—a move aimed at employers willing to put the bottom line above their own racial animus.[271] Thus, as the story goes, unions' support for the minimum wage was targeted at eliminating an important self-help strategy available to unemployed workers of color, one that led to results that were perhaps not ideal, but preferable to unemployment.[272]

At the outset, there is no firm consensus about the short- and long-term economic effects of minimum wage laws.[273] But even with

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267 Rich, *Marginal Whiteness*, *supra* note 47, at 1507–09.

268 *See* John Russo, *Right-to-Work Laws and Working-Class Voters: Another Teachable Moment*, WORKING-CLASS PERSP. (Feb. 13, 2012), http://workingclassstudies.wordpress.com/tag/union-households/; John Russo, *The Youngstown Election Report: Notes on Unions and White Working-Class Voters*, WORKING-CLASS PERSP. (Nov. 17, 2008), http://workingclassstudies.wordpress.com/2008/11/17/the-youngstown-election-report-notes-on-unions-and-white-working-class-voters/.

269 Rich, *Marginal Whiteness*, *supra* note 47, at 1507.

270 *See, e.g.*, Bernstein, *supra* note 72, at 120–21; Hutchison, *supra* note 77, at 109–11.

271 *See, e.g.*, Bernstein, *supra* note 72, at 121; Hutchison, *supra* note 77, at 124.

272 *See, e.g.*, Hutchison, *supra* note 77, at 128, 131–32.

273 One of us finds persuasive the empirical research supporting the claim that minimum wage laws do not depress employment rates; the other remains agnostic in light of current evidence. For a small sample of the voluminous research reaching contrary conclusions on the issue, compare LIANA FOX, ECON. POL'Y INST., MINIMUM WAGE TRENDS: UNDERSTANDING PAST AND CONTEMPORARY RESEARCH 1 (2006), *available at* http://www.epi.org/publication/bp178/ (summarizing research to argue in favor of "growing view among economists that the minimum wage offers substantial benefits to low-wage workers without negative effect"),

that uncertainty in mind, we find the social consequences of minimum wage laws are an independent and persuasive argument in favor of such laws. The opportunity to offer to undercut other workers at the subminimum wage level would not serve the interests of nonwhite workers, even if it were true that the alternative for some subset of those workers would be unemployment. First, today's workers might not pursue such a strategy.[274] Second, even if they did, it is not clear that employers would act rationally by setting aside discriminatory animus to hire workers of color, particularly absent an emergency, such as a strike.[275]

Third, the claim that nonwhite workers should offer their labor at reduced wages acknowledges employer bias and—rather than attempting to rectify that bias—concedes that nonwhite labor is simply less valuable. This argument is deeply troubling: to the extent that the burdens of unemployment fall disproportionately on racial minorities, the cause is structural inequality and entrenched bias. These pathologies are exacerbated by allowing workers to offer their labor at reduced rates. Scapegoating minimum wage laws rather than addressing the deeper problems of racism and inequality thus fails as a matter of social justice. Put another way, even if eliminating minimum wage laws would result in reduced unemployment—a result that we do not concede, given the ongoing and unresolved academic dispute—any gain in employment for people of color in the short term would come

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Charles L. Betsey & Bruce H. Dunson, *Federal Minimum Wage Laws and the Employment of Minority Youth*, 71 AM. ECON. REV. 379, 379 (1981) (arguing that employment declines among minority youth are the result of cyclical factors rather than minimum wage laws), David Card & Alan B. Krueger, *Minimum Wages and Employment: A Case Study of the Fast-Food Industry in New Jersey and Pennsylvania*, 84 AM. ECON. REV. 772, 792 (1994) (finding no evidence of reduced employment in fast-food industry following increase in New Jersey state minimum wage), and David Card & Alan B. Krueger, *Minimum Wages and Employment: A Case Study of the Fast-Food Industry in New Jersey and Pennsylvania: Reply*, 90 AM. ECON. REV. 1397, 1397–98 (2000), with PAMELA VILLARREAL, NAT'L CTR. FOR POLICY ANALYSIS, MINIMUM WAGE MYTHS 4 (2012), *available at* http://www.ncpa.org/pdfs/ib105.pdf ("Minimum wages are politically popular, but distort the labor market and hurt the people they intend to help."), Dan Fuller & Doris Geide-Stevenson, *Consensus Among Economists: Revisited*, 34 J. ECON. EDUC. 369, 378, 384 (2003) (claiming that "substantial consensus" exists among economists that minimum wages increase unemployment among young and unskilled workers while acknowledging that "recent research and debate concerning the effect of a minimum wage increase on employment have shifted economists' opinion toward less agreement"), and David Neumark & William Wascher, *Minimum Wages and Employment: A Case Study of the Fast-Food Industry in New Jersey and Pennsylvania: Comment*, 90 AM. ECON. REV. 1362, 1363, 1391 (2000) (arguing that New Jersey state minimum wage increase resulted in decreased employment in the fast-food industry).

274 *See* Richard Michael Fischl, *Labor Law, the Left, and the Lure of the Market*, 94 MARQ. L. REV. 947, 947–48 (2011).

275 *See generally* Part I.A; *supra* notes 38–43.

with the far more serious long-term consequences of ignoring racial pathology and giving up on the notion of a universal living wage. The minimum wage, then, should serve as a point of unification rather than division among white and nonwhite workers; unions' support for the minimum wage (or for higher wages for bargaining unit members) does not disqualify them as genuine advocates for workers of color.

Relatedly, antidiscrimination laws provide a valuable mechanism for demonstrating that white and nonwhite workers interests converge, despite narratives to the contrary. One prevalent narrative is that whites grow frustrated with such provisions, viewing them as providing special job protections for people of color.[276] The culturally pervasive story goes something like this: "I was fired instead of her because she's black and they didn't want to get sued."[277]

This view, however, is narrow and misguided. Antidiscrimination law protects white people and nonwhite people alike, though white workers may not be aware of this fact.[278] Moreover, whites are increasingly in the minority in a meaningful number of workplaces.[279] To the extent that numerical racial minorities are more likely to experience race discrimination, Title VII protections will become increasingly valuable to white workers as well as workers of color. Therefore, we argue that antidiscrimination provisions such as Title VII represent a win for workers of all races rather than a zero-sum situation, and should be viewed as a valuable protection by white workers as well as workers of color.

Moreover, courts have created a prime opportunity for solidarity by allowing plaintiffs to sue under Title VII for discrimination directed at someone of a different race.[280] In many instances, such claims involve white plaintiffs alleging loss of interracial association in

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276 *See supra* notes 54–69 and accompanying text.

277 *See supra* notes 49–65 and accompanying text.

278 *See, e.g.*, Good v. Univ. of Chi. Med. Ctr., 673 F.3d 670, 674 (7th Cir. 2012); *see also* Angela Onwuachi-Willig & Mario L. Barnes, *By Any Other Name?: On Being "Regarded as" Black, and Why Title VII Should Apply Even if Lakisha and Jamal Are White*, 2005 WIS. L. REV. 1283, 1326–27.

279 Julie A. Kmec, *Minority Job Concentration and Wages*, 50 SOC. PROBS. 38, 43–45 (2003). Further, birthrate statistics suggest that workplaces in which whites hold a minority of jobs are likely to become more common, rather than less. *See* Frank Bass, *Nonwhite U.S. Births Become the Majority for First Time*, BLOOMBERG (May 17, 2012, 5:10 PM), http://www.bloomberg.com/news/2012-05-17/non-white-u-s-births-become-the-majority-for-first-time.html (estimating that whites will become a numerical minority in America after 2040).

280 *See* Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205, 208–09 (1972). Camille Gear Rich notes that the status of Title VII interracial solidarity cases is not entirely certain, with the circuits divided over the issue. Rich, *Marginal Whiteness*, *supra* note 47, at 1535 & n.112 (collecting cases).

the workplace, so-called "interracial solidarity" cases.[281] In other instances, whites sue to recoup economic losses caused by racist policies intended to disadvantage nonwhites.[282] That such cases exist at all undermines the prevailing myth that discrimination claims pit whites and nonwhites against one another. Publicizing these cases could help reinforce a norm and a counter-narrative of racial solidarity at work.

Finally, even the classic wedge issue of affirmative action should unite, rather than divide, white and nonwhite working class Americans. Although many affirmative action programs of the 1960s and 1970s focused explicitly on remediating past race discrimination, scholars and other commentators have pushed for class-based affirmative action as well, and have recognized how the two forms of disadvantage reinforce one another.[283] Many schools explicitly consider economic disadvantage in their admissions decisions.[284] Such class-based programs undoubtedly benefit many white union members and their families. Class-based affirmative action attracted scholarly attention[285] recently with the rise of programs such as the Texas ten-percent plan.[286] Thus, contrary to the beliefs of many white workers, affirmative action can benefit them. Further, contrary to the beliefs of many nonwhite workers, whites sometimes benefit from affirmative action policies, and therefore could become one logical base of support for such programs,[287] and can even help to articulate support for

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281 Blanks v. Lockheed Martin Corp., 568 F. Supp. 2d 740, 744 (S.D. Miss. 2007) (collecting cases in which white plaintiffs have been permitted to sue under Title VII and § 1981 based on the loss of the benefit of interracial association in the workplace); *see also* Rich, *Marginal Whiteness*, *supra* note 47, at 1534–58 (examining Title VII interracial solidarity cases).

282 *See, e.g.*, EEOC v. T. I. M. E.-D.C. Freight, Inc., 659 F.2d 690, 691–92 (5th Cir. 1981) (per curiam).

283 RICHARD D. KAHLENBERG, THE REMEDY: CLASS, RACE, AND AFFIRMATIVE ACTION 209 (1996); Richard H. Fallon, Jr., *Affirmative Action Based on Economic Disadvantage*, 43 UCLA L. REV. 1913, 1916 (1996); *see also* Richard D. Kahlenberg, *Class-Based Affirmative Action*, 84 CALIF. L. REV. 1037, 1037–38 (1996). *But see* Deborah C. Malamud, *Assessing Class-Based Affirmative Action*, 47 J. LEGAL EDUC. 452, 471 (1997).

284 Fallon, Jr., *supra* note 283, at 1933.

285 *See, e.g.*, Richard H. Sander, *Class in American Legal Education*, 88 DENV. U. L. REV. 631, 632 (2011); Richard H. Sander, *Experimenting with Class-Based Affirmative Action*, 47 J. LEGAL EDUC. 472, 472 (1997).

286 The so-called ten percent plan was legislatively enacted and guaranteed admission to the University of Texas to the top ten percent of each high school graduating class. *See* 1997 Tex. Gen. Laws 304.

287 John A. Powell, *The Many Faces of Affirmative Action*, EQUITY, INCLUSION, AND DIVERSITY, http://diversity.berkeley.edu/many-faces-affirmative-action (last visited June 2, 2013) ("High schools in Texas, and throughout the entire country, are deeply and persistently segregated by race, ethnicity, and class. This demographic fact assures, under the Top Ten Percent

affirmative action plans as a means of rectifying disadvantage rather than promoting the flimsy concept of diversity.[288]

Perhaps one of the clearest demonstrations of the convergence of racial interests lies in the responses of some employers and anti-union constituencies to displays of racial solidarity in the union organizing context. These stakeholders respond to solidarity with attempts to dilute unions' power by manipulating existing racial divisions,[289] activating white anxieties about losing jobs, status, and privilege to minority immigrants.[290] Further, these stakeholders encourage nonwhite people to see unions as self-interested.[291] In other words, these anti-union tactics are bad for white workers and workers of color, regardless of their impact on union drives.

How can unions and civil rights organizations replace the pervasive and false zero-sum narrative with a more accurate and inspiring one of interests that frequently converge? One solution is simple education: unions can help to correct misconceptions about antidiscrimination statutes such as Title VII and minimum wage laws and can highlight the ways that affirmative action benefits working-class

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plan, that some Black, Latino and poor White students will gain admission to UT that otherwise would not.")

288 *See, e.g.*, Leong, *Racial Capitalism*, *supra* note 19, at 2171–74.

289 John Logan, *Consultants, Lawyers, and the 'Union Free' Movement in the USA Since the 1970s*, 33 INDUST. REL. J. 197, 212 (2002) (observing that union avoidance consultants "have frequently used racial divisions at the workplace to undermine employee support for unionisation"); *see also* Jason Greer, *Leveraging Diversity as a Union Avoidance Tool*, BUKISA (Dec. 24, 2011), http://www.bukisa.com/articles/639571_leveraging-diversity-as-a-union-avoidance-tool (recounting an anecdote in which, following a union drive, "[t]he company realized that they left themselves vulnerable to the Teamsters due to their inability to fully understand and leverage the awesome power of diversity").

290 For example, one consulting firm observes on its website—which is devoted to the firm's services aimed at helping companies avoid unionization—that "[e]thnic workers, particularly Hispanics, represent a tremendous untapped resource. They are fast becoming the primary group of production workers." *See Services*, INDUS. REL. CONSULTANTS, INC., http://www.irconsultants.com/services.html (last visited June 2, 2013). The firm also bills itself as "Hispanic Workforce Specialists." *Id.* Given the context of the site's focus on "union avoidance," the clear implication is that Latino workers can be employed to avert unionization.

291 *Compare* Jayne O'Donnell, *Got a Nasty Fight? Here's Your Man*, USA TODAY, http://www.usatoday.com/money/companies/2006-07-31-lobbyist-usat_x.htm (last updated July 31, 2006 8:31 AM) (profiling lobbyist and "union avoidance" consultant Richard Berman, whose Center for Union Facts website "accused labor unions of discriminating against minorities"), *with* Richard Berman, *Industry Should Rally Against Teachers Union Sharks to Ensure a Well-Educated Workforce*, NATION'S RESTAURANT NEWS, Oct. 23, 2006, at 20 ("It's been reported that teachers' union president Al Shanker once said, 'I'll start representing kids when kids start paying union dues.' Whether or not he actually said it, it's the sad truth all the same. Teachers unions' apathy towards children is an inconvenient truth. Why don't we make it an irrelevant one instead?").

whites. They can also work to convince white members that class solidarity is ultimately more productive than, and should replace, racial prejudice.[292] Similarly, unions and civil rights organizations can adopt the strategy of uniting against a common enemy: when industry leaders or conservative political figures support policies that disadvantage both groups, the two groups' members can raise their members' consciousness of their shared goals. Moreover, unions and civil rights organizations can educate their respective constituencies about the belief in coalition cherished by many revered figures of the labor and civil rights movements—for example, Martin Luther King, Jr. and Mother Jones.

We are not so naïve as to think that any of these measures will be a panacea for the entrenched narrative of opposed interests. But taking steps to correct the narrative will lay the groundwork for rounding out the remaining narratives about unions and civil rights groups, to which we now turn.

B. Unions Benefit Nonwhite Members

> "The duality of interests of labor and Negroes makes any crisis which lacerates you, a crisis from which we bleed."[293]

According to the conventional wisdom, injecting unions into a zero-sum world exacerbates the disadvantages and discrimination that workers of color face.[294] Here, we respond to that narrative as it applies to workers of color who are part of a workplace organizing drive, belong to a union, or are covered by a union contract.[295] In that context, the conventional wisdom suggests that unions compel workers of color to submerge race issues in favor of class-based solidarity, often while simultaneously disadvantaging them through the application of facially race-neutral policies such as seniority rules.[296] Although we acknowledge that these problems can occur and can harm workers of color, the inverse is also true. As this Part demonstrates, union membership yields significant benefits for workers of color, especially by

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292 For example, during the 2008 presidential election, AFL-CIO president Richard Trumka appealed to union members to put aside racial prejudice and vote for Barack Obama by arguing that now-President Obama's economic policies would better serve union members. *See* Steven Greenhouse, *Combative Union Leader Steps From the Shadows*, N.Y. TIMES, July 3, 2009, at B1 (describing the efforts of labor federation leader Richard Trumka).

293 KING, JR., *supra* note 261.

294 *See supra* Part I.A.

295 This argument is addressed more generally with respect to nonunion workers of color and to communities of color in Part III.D.

296 *See, e.g.*, Crain, *supra* note 94, at 1323–26.

providing multiple avenues of redress for workers who have suffered discrimination at the hands of their employers.

As an initial matter, we note that many workers of color reject this narrative, as reflected by the significantly greater rate at which workers of color desire to join labor unions as compared with white workers.[297] In its most muscular form, then, the conventional narrative asks us to adopt the paternalistic view that workers of color who want to join a union have misjudged their own self-interest, and suggests that white workers who do not want to unionize are acting altruistically.

1. Organizing Drives

The conventional wisdom leaves out the role that unions play in fighting employer discrimination, often beginning with the organizing campaign. Organizing campaigns are most successful when union organizers and their allies pursue a range of tactics and when they seek to organize diverse or majority-minority workforces.[298] During these campaigns, professional union organizers and pro-union employees often mobilize around allegations of employer racism, seeking community support for workers who face discrimination at work.[299] For example, organizers of the "Justice at Smithfield" campaign frequently invoked employer racism to explain both why employees wanted union representation and why the larger community should support the union drive.[300] This is far from a novel organizing technique; decades ago, farmworkers' unions obtained national support for a grape boycott and strike after noting that growers divided workers by race, giving better jobs and pay to Filipino pickers than Mexican pickers.[301] Moreover, even when organizing drives don't begin

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297 *See* Manning Marable & Joseph Wilson, *Black Leadership and Organized Labor: From Workplace to Community*, *in* RACE AND LABOR MATTERS IN THE NEW U.S. ECONOMY 27, 32 (Manning Marable et al. eds., 2006) (citing 1989 study in which fifty-six percent of African Americans, forty-six percent of Hispanics, and thirty-five percent of non-Hispanic whites answered "yes" to the question "Would you join a union at your place of work?").

298 *See* Bronfenbrenner & Hickey, *supra* note 240, at 19–20, 37; *see also supra* notes 240–251 and accompanying text; *infra* note 311 and accompanying text.

299 Unions have also sought to provide attorneys for employees to file discrimination suits. Labor law, however, precludes this practice when it comes too close to a union election. Catherine L. Fisk, *Union Lawyers and Employment Law*, 23 BERKELEY J. EMP. & LAB. L. 57, 60 (2002). While we agree with Fisk's call to permit unions to assist employees with discrimination claims at any time, we emphasize here that unions have other strategies available as well.

300 Complaint, *supra* note 114, ¶¶ 48, 56, 68.

301 *See* Memoranda from Greg Harris, Dir. Pub. Affairs, Cong. of Racial Equality, to CORE Chapters (Dec. 17, 1965), *available at* http://www.farmworkermovement.org/essays/essays/MillerArchive/008C%20Memos%20to%20CORE%20Chapters.pdf (stating that "Filipino

with a focus on race, employers seeking to defeat union efforts by exploiting racial divisions may force the issue.[302]

Therefore, union organizing drives can provide outlets for workers to band together to voice their experiences of discrimination in a way that forces employers to respond. And, in the context of the "superordinate goal" of an organizing campaign, employees' allegations of race discrimination may resonate more strongly with other employees who have not themselves experienced discrimination but who are engaged in the same unionizing effort.[303]

Civil rights groups are directly involved in many organizing campaigns, providing concrete evidence of solidarity benefitting workers across racial lines. One famous example is the support that Martin Luther King, Jr. and the Southern Christian Leadership Council provided to striking Memphis sanitation workers during the days before King was killed.[304] That strike not only ultimately succeeded—leading to the city's recognition of the sanitation workers' union, American Federation of State, County, and Municipal Employees (AFSCME) Local 1733, which still exists today[305]—but also "opened the way to public employee unions, as police officers, teachers, and other municipal workers, white and black, male and female, unionized to improve wages and conditions."[306]

More recent examples of civil rights and racial justice groups' participation in union organizing campaigns abound, particularly during "comprehensive" campaigns,[307] such as the SEIU's well-known

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workers are preferred by the growers. They are supposed to be better workers than Mexicans, their short, broad-shouldered physique is said to be more adaptable to the fields. When they walk on the field, they automatically receive [five cents] more per hour than Mexicans . . . . Competition between Filipinos and Mexicans is encouraged by the growers.").

302 *See, e.g.*, Crain, *supra* note 62, at 225–26 (describing Kmart's attempts to divide workers along racial lines during unionizing drive); Michael Z. Green, *Finding Lawyers for Employees in Discrimination Disputes as a Critical Prescription for Unions to Embrace Racial Justice*, 7 U. PA. J. LAB. & EMP. L. 55, 93 (2004); Mahoney, *supra* note 63, at 838 (describing Kmart organizing drive, including incident in which "the company sued black workers and black ministers" in response to organizing activity, after which "white workers held a press conference, demanding to know why they had not been sued too").

303 *See infra* Part III.C.

304 *See generally* HONEY, GOING DOWN JERICHO ROAD, *supra* note 2 (detailing the events of the strike from the point of view of the strikers as well as King and his circle).

305 Honey, *Race, Labor, and the City*, *supra* note 240, at 10. The AFSCME Local 1733 still exists today. *See Memphis AFSCME Local 1733*, AFSCME, http://www.afscmelocal1733.org (last visited June 2, 2013).

306 Honey, *Race, Labor, and the City*, *supra* note 240, at 10.

307 Comprehensive campaigns "may be broadly defined as union attempts to influence company practices that affect key union goals . . . by generating various forms of extrinsic pressure on the company's top policymakers." James J. Brudney, *Collateral Conflict: Employer*

Justice for Janitors campaign[308] or the Steelworkers' Clean Carwash campaign.[309] One hallmark of these campaigns is the involvement of community groups such as civil rights organizations and black churches in pressuring employers to respect their employees' labor rights.[310] These campaigns are effective: research shows that comprehensive campaigns employing a broad range of tactics are more likely to succeed than "traditional" union campaigns.[311] Further, the effect is enhanced in bargaining units comprised mostly of people of color: campaigns employing more than five organizing tactics succeed eighty-three percent of the time among proposed bargaining units of fifty to seventy-five percent people of color, and seventy-eight percent of the time among units of seventy-five to one hundred percent people of color.[312] One hypothesis that would explain this result is that these campaigns succeed because they address the overlapping concerns of a diverse group of workers along various axes of identity.[313]

2. Contract Administration

If an organizing drive culminates with certification of a union as the collective bargaining representative of a group of employees, then the next step is negotiating a contract. At this stage, the conventional wisdom often critiques labor union exclusivity, the principle that a duly elected union is the sole bargaining representative of employees in the bargaining unit.[314] The corollary is that subgroups of workers within the bargaining unit—saliently, workers of color in a majority white unit—cannot demand that their employers bargain with them

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Claims of RICO Extortion Against Union Comprehensive Campaigns, 83 S. CAL. L. REV. 731, 738 (2010).

308 *See*, Preston Rudy, "*Justice for Janitors," Not "Compensation for Custodians": The Political Context and Organizing in San Jose and Sacramento*, *in* REBUILDING LABOR: ORGANIZING AND ORGANIZERS IN THE NEW UNION MOVEMENT 133 (Ruth Milkman & Kim Voss eds., 2004).

309 *See*, Steven Greenhouse, *A Wash and Wax, and a Union?*, N.Y. TIMES, Sept. 7, 2010, at B1.

310 *Id.* at 743 (during comprehensive campaigns, "[t]he union is assumed to form alliances or coalitions with religious groups and activist organizations interested in pursuing social justice or human rights objectives."); Garden, *Labor Values*, *supra* note 128, at 2622; Michael M. Oswalt, *Steeple Solidarity: Mainline Church Renewal and the Union Corporate Campaign*, 50 J. CATH. LEGAL STUD. 227, 252 (2011) (describing union "alliances with civic, community, and other activist groups to broaden labor's rhetoric, constituencies, and even goals. Notably included in this category are religious leaders and organizations, including synagogues and churches.").

311 Bronfenbrenner & Hickey, *supra* note 240, at 26–29.

312 *Id*. at 36.

313 *See, e.g.*, John A. Powell, *The Race and Class Nexus: An Intersectional Perspective*, 25 LAW & INEQ. 355, 402–04, 417–18 (2007).

314 *See*, 29 U.S.C. § 159(a)–(b) (2006); *supra* notes 89–91.

separately.[315] This means that unions may be unmotivated to address systemic workplace discrimination even as their presence as a certified collective bargaining representative deprives workers of color of the right to engage in collective self-help.[316] Although this problem could arise, particularly within the subset of unions that include few members or leaders of color, this view misses the many additional workplace benefits and protections that union representation typically affords workers of color.

To begin, union-represented workers of color benefit from the union wage premium. In 2011, black workers who were represented by unions made $173 per week more than black workers who were not and $21 per week more than white non-represented workers.[317] Hispanic union-represented workers made $284 per week more than Hispanic non-represented workers and $57 more than white non-represented workers.[318] Further, the union wage premium is greatest for low-skilled workers, who are often the worst paid and most vulnerable.[319] Unionized jobs thus can provide an avenue for workers of color to close the wage gap with respect to nonunion white workers and a better chance for low-skilled workers of all races to earn a living.

Unionized workers of color also benefit from contractual protections against firings, demotions, and other adverse employment actions. Collective bargaining agreements ("CBAs") typically include two clauses with particular relevance here. The first is a "for cause" termination provision, which modifies the "at-will employment" default by stating that workers can be terminated only for "just cause" or upon commission of one of a list of specified offenses.[320] According to one study, upwards of ninety-five percent of union contracts con-

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315 *See* Emporium Capwell Co. v. W. Addition Cmty. Org., 420 U.S. 50, 69–70 (1975).

316 *See id.* at 76 (Douglas, J., dissenting).

317 News Release, Bureau of Labor Statistics, Union Members—2011, at 6 (Jan. 27, 2012), http://www.bls.gov/news.release/archives/union2_01272012.pdf.

318 *Id.*

319 Brigham R. Frandsen, Why Unions Still Matter: The Effects of Unionization on the Distribution of Employee Earnings 24 (Jan. 30, 2012) (unpublished manuscript), *available at* http://www.ewi-ssl.pitt.edu/econ/files/seminars/120224_sem_Brigham%20Frandsen.pdf ("The empirical results suggest that unionization has a large positive effect on earnings at the bottom of the distribution, but a declining effect farther up the distribution. The results are consistent with an interpretation that unions impose a wage premium that is large for lower-skilled workers and declines with skill level, and at the same time are able to enforce employment protections for employees within the bargaining unit.").

320 *See, e.g.*, Pauline T. Kim, *Bargaining With Imperfect Information: A Study of Worker Perceptions of Legal Protections in an At-Will World*, 83 CORNELL L. REV. 105, 107 (1997) (noting that at-will employment permits workers to be fired for any reason except a reason forbidden

tain such clauses.[321] Second, CBAs also typically forbid workplace discrimination. The same study found that by 1995, nearly ninety percent of CBAs contained provisions forbidding such discrimination.[322] These clauses differ in their definitions of discriminatory practices. Some simply track existing law by "bar[ring] discrimination on the same bases as the law in their agreements."[323] Some unions, however, have begun advocating for much broader nondiscrimination provisions, either in the sense that they cover more categories of people, or that more employer conduct is defined as discrimination.[324] For example, in 2011, the UAW adopted a resolution pledging to seek CBA provisions barring discrimination based on "race, sex, religion, creed, color, national origin, age, size or stature, disability, sexual orientation, marital status, political affiliation or union activity," as well as education for employees about their "rights and responsibilities to eliminate discrimination and advance equal justice under the law."[325]

Alleged violations of either of these provisions typically trigger grievance processes that culminate in arbitration to which the union and employer are parties.[326] The discriminatee is not a party, and does not drive—or pay for—the process.[327] As discussed in Part III.B, these grievance processes, until recently, could only supplement an employee's legal recourse under employment discrimination law.[328]

The Supreme Court reversed course in 2009, however, holding that CBAs could commit union members to arbitration exclusively.[329] Particularly where it does not displace judicial remedies,[330] labor arbi-

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by law, such as race, even if the reason is "arbitrary or unjust," and contrasting at-will employment with "just cause" provisions typically negotiated by unions).

321 Kenneth G. Dau-Schmidt & Timothy A. Haley, *Governance of the Workplace: The Contemporary Regime of Individual Contract*, 28 COMP. LAB. L. & POL'Y J. 313, 319 (2007).

322 *Id.*

323 Ann C. Hodges, *Fallout from* 14 Penn Plaza v. Pyett*: Fractured Arbitration Systems in the Unionized Workplace*, 2010 J. DISP. RESOL. 19, 52.

324 *See* Ariana R. Levinson, *What the Awards Tell Us About Labor Arbitration of Employment Discrimination Claims*, 46 MICH. J. L. REFORM 789, 841–43 (2013); *see also UAW Resolution: Building a Global Middle Class in a Just Society*, UAW (March 2011), http://www.uaw.org/page/uaw-resolution-building-global-middle-class-just-society [hereinafter *UAW Resolution*].

325 *UAW Resolution*, *supra* note 324.

326 See Levinson, *supra* note 324, at 841–44.

327 *See id*.

328 Alexander v. Gardner-Denver Co., 415 U.S. 36, 48–51 (1974).

329 14 Penn Plaza LLC v. Pyett, 556 U.S. 247, 274 (2009).

330 It remains to be seen how many employers will successfully negotiate for an arbitration process that displaces employees' judicial remedies. However, it appears that, so far, there are relatively few such agreements. Levinson, *supra* note 324, at 839–43. In this regard, it is worth noting that many employers in nonunion environments require their employees to commit to using an arbitral forum for all of their employment disputes as a condition of employment. *See*

tration of employment discrimination claims has a number of benefits for aggrieved workers (including white workers).[331] First, whereas litigation is expensive and time-consuming for the employee, the costs of labor arbitration are borne by the union and employer, and the process is much shorter.[332] Second, there is some evidence that employees are more likely to win in front of a labor arbitrator than a federal judge,[333] and in many cases employees who lose in arbitration will have the option of a "second bite at the apple" in court.[334] Third, unions are sometimes willing to bring to arbitration cases even they think are lost causes in order "to permit employees to tell their side of the story and to make a strong point to the employer that certain conduct is unacceptable in the eyes of the employees," to "let employers know that certain actions resulting in apparent discrimination are not acceptable," or maybe to avoid an allegation that the union has shirked its duty of fair representation.[335] Coupled with the fact that arbitration rarely involves a summary judgment stage,[336] this means

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Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 123 (2001) (concluding that employment arbitration agreement waiving employee's right to judicial forum in employment discrimination case was enforceable). In the nonunion case, it is the employee him or herself who agrees to arbitration, rather than the union as bargaining representative. However, that will often be a distinction without a difference—particularly, in a bad economy few workers have sufficient leverage to negotiate out of an arbitration clause, and many workers lack the sophistication to even attempt such a maneuver.

331 Labor arbitration should be distinguished from arbitration in other contexts, as there are important differences between the two. For example, employees who are required to arbitrate employment disputes without union representation are often placed at a disadvantage both because of resources mismatch and because the employer is much more likely to be a repeat player. *See generally* Kathryn A. Sabbeth & David C. Vladeck, *Contracting (Out) Rights*, 36 FORDHAM URB. L.J. 803 (2009) (critiquing mandatory arbitration of employment and consumer disputes).

332 Levinson, *supra* note 324, at 842–43.

333 *Compare id.* at 837 (finding union won thirty-six percent of disability discrimination cases included in sample), *with* Amy L. Allbright, *2010 Employment Decisions Under the ADA Titles I & V—Survey Update*, 35 MENTAL & PHYSICAL DISABILITY L. REP. 394 (2011) (reporting a 1.8% win rate in federal court cases reported in Westlaw), *and* Ruth Colker, *Winning and Losing Under the Americans with Disabilities Act*, 62 OHIO ST. L.J. 239, 248 (2001) (reporting a success rate in ADA appellate employment discrimination cases reported in Westlaw of twelve percent); *see also* Michael Selmi, *Why Are Employment Discrimination Cases So Hard to Win?*, 61 LA. L. REV. 555, 558–61 (2001) (discussing similarly low win rates for Title VII plaintiffs who pursue their cases in court); Green, *Reading* Ricci *&* Pyett, *supra* note 91, at 412–13 (arguing that arbitrators are equipped to handle racial justice claims, and that arbitral fora may be preferable to judicial ones, because of federal plaintiffs' extremely low win rates).

334 *E.g.*, Alexander v. Gardner-Denver Co., 415 U.S. 36, 39–43 (1974) (describing procedural background of case, in which employee's union processed arbitration claim based on race discrimination, and then employee filed Title VII lawsuit based on same conduct).

335 Levinson, *supra* note 324, at 838, 849.

336 *Id.* at 838.

that even employees who are likely to lose will have a chance to tell their story and present evidence to a neutral factfinder. This alone can have meaningful positive consequences for grievants.[337]

For cause and nondiscrimination CBA clauses have more subtle benefits as well. Union members who suspect that they have been fired because of their race will often allege that the employer has breached not just the nondiscrimination clause, but also the "for cause" termination clause.[338] The availability of this remedy, which benefits workers who have been treated shabbily—whether or not that treatment was also discriminatory—has special relevance to this Article for three reasons.

First, there is the applicable burden of proof. Unlike in an employment discrimination lawsuit, where the burden of proof is on the plaintiff,[339] the burden of proving just cause for termination typically falls on the employer.[340] Thus, whereas Title VII plaintiffs who lack proof of their employers' discrimination are exceedingly likely to lose, they may nonetheless win a union grievance.

Second, for cause provisions help alleviate what Richard Michael Fischl calls the "square peg/round hole problem."[341] The misalignment that Fischl identifies is that of the discharged employee who "has a claim that may be compelling as a matter of simple fairness," but cannot quite meet the requirements of Title VII and the other statutes that provide exceptions to the general rule of at-will employment.[342] For example, employees who (correctly) sense that racial animus was at play in the work environment may nonetheless lack proof of dis-

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337 Tom R. Tyler, *Citizen Discontent with Legal Procedures: A Social Science Perspective on Civil Procedure Reform*, 45 AM. J. COMP. L. 871, 882–83 (1997) (discussing disputants' perception that "the process by which their case is handled," including an opportunity to be heard, is more important than winning).

338 *See, e.g.*, *Alexander*, 415 U.S. at 42–43 (describing employee's allegations that he was terminated in violation of both "just cause" and nondiscrimination provisions of CBA).

339 Burger v. N.Y. Inst. of Tech., 94 F.3d 830, 833 (2d Cir. 1996) (citing St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 511 (1993)).

340 Martin H. Malin, *The Evolving Schizophrenic Nature of Labor Arbitration*, 2010 J. DISP. RESOL. 57, 78 (stating that "the typical CBA requires just cause for discipline and discharge, provisions that arbitrators have uniformly interpreted place on the employer the burden to prove its justification for the adverse action, whereas antidiscrimination and other statutes merely prohibit basing such adverse action on the employee's protected status or conduct and place the burden on the employee to prove the employer's improper motive.").

341 Richard Michael Fischl, *'A Domain into Which the King's Writ Does Not Seek to Run': Workplace Justice in the Shadow of Employment-at-Will*, *in* LABOUR LAW IN AN ERA OF GLOBALIZATION 253, 261 (Joanne Conaghan et al. eds., 2002).

342 *Id.* at 261.

crimination.[343] Nonetheless, in an at-will world, they may decide to take a chance on a Title VII claim because it is the only available avenue of relief. Fischl reasons that:

> [T]he need to repackage unjust dismissal claims as discrimination claims needlessly racializes many employment disputes while at the same time trivializing the real but subtle and complex role of racial domination in the workplace. It leads employers and their lawyers to conclude that minorities and *their* lawyers are dishonest—a perception that is itself in large part the product of the same dominant cultural understandings that construct the law's ill-suited 'round hole' in the first place.[344]

In other words, at-will employment encourages employees who have been terminated unjustly to bring Title VII claims that are often doomed to fail for reasons other than the presence or absence of racial animus in the workplace. These failed cases, which carry their own financial and emotional costs, lead employers and judges to conclude that Title VII plaintiffs and their attorneys are not to be trusted.[345] However, "just cause" termination provisions can provide a way out by offering a remedy to employees who were unfairly terminated, but who would not prevail under Title VII.

Workplace identity performance demands illustrate the role of "just cause" in fighting race discrimination. "[I]dentity performance describes the extra work that outsiders, often women and people of color, have to perform to send the message that they fit in."[346] Unstated identity performance expectations may implicate employees' appearances or behaviors, and complying with such expectations may require workers of color to expend significant mental energy and money while compromising the way that they would ordinarily present themselves.[347] Additionally, recent research shows that suppression of racial or other identity leads to greater perceived

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343 *Id*. at 262.

344 *Id*.; *see also* Nancy Leong, *Judicial Erasure of Mixed-Race Discrimination*, 59 AM. U. L. REV. 469, 533–39 (2010) (collecting examples in which antidiscrimination law channels claims into certain frameworks and provides a poor fit for certain types of claims).

345 *See* Fischl, *supra* note 341, at 262.

346 *See* Tristin K. Green, *Work Culture and Discrimination*, 93 CALIF. L. REV. 623, 651 (2005) [hereinafter Green, *Work Culture and Discrimination*]; *see also* Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259, 1260–62 (2000) (arguing that pressure on women and minorities to combat stereotypes by performing "extra" identity work is itself a form of employment discrimination); *see generally* DEVON W. CARBADO & MITU GULATI, ACTING WHITE (2013).

347 *See* Dianne Avery & Marion Crain, *Branded: Corporate Image, Sexual Stereotyping, and*

discrimination, less job satisfaction, and greater job turnover.[348] Yet when workers fail or refuse to meet identity performance demands, or they simply do not detect them, and they are fired or demoted as a result, their subsequent employment discrimination lawsuits typically fail.[349] However, "for cause" protections, or nondiscrimination clauses that extend beyond the limits of Title VII, could protect some of these workers, particularly if unions are able to convince arbitrators of the unfair consequences of racial identity performance demands.[350]

Third, "just cause" protections apply equally to white workers and workers of color, despite the fact that white workers might wrongly believe that they cannot benefit from nondiscrimination protections.[351] Once educated about this doctrinal reality, white workers may be more easily motivated to ensure that "for cause" provisions are applied robustly. Consequently, they could be more willing to support coworkers' grievances by participating as witnesses, providing support in the lunchroom, and the like.

Another iteration of the charge that unions benefit primarily white bargaining unit members is that seniority-based employment protections—which are at the core of union solidarity[352]—entrench past discrimination.[353] This is undoubtedly true in many instances; seniority was particularly problematic in the years just after Title VII was passed, when it served to entrench the effect of rampant legal discrimination.[354]

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the New Face of Capitalism, 14 DUKE J. GENDER L. & POL'Y 13, 15–16 (2007); Green, *Work Culture and Discrimination*, *supra* note 346, at 651.

348 Juan M. Madera, Eden B. King & Michelle R. Hebl, *Bringing Social Identity to Work: The Influence of Manifestation and Suppression on Perceived Discrimination, Job Satisfaction, and Turnover Intentions*, 18 CULTURAL DIVERSITY & ETHNIC MINORITY PSYCHOL. 165, 168-69 (2012).

349 *See* Katie R. Eyer, *That's Not Discrimination: American Beliefs and the Limits of Anti-Discrimination Law*, 96 MINN. L. REV. 1275, 1282–83 (2012).

350 *See* Avery & Crain, *supra* note 347, at 35 (observing that unions have grieved inequitable or disproportionate sanctions imposed on employees for violating employer dress codes, though unions generally accept the appearance and grooming codes themselves).

351 *See, e.g.*, Crain, *supra* note 62, at 230.

352 *See* Michael J. Zimmer, *Title VII: Treatment of Seniority Systems*, 64 MARQ. L. REV. 79, 80 (1980) ("Labor has been the strongest proponent of seniority").

353 *See supra* notes 70–84 and accompanying text.

354 *See, e.g.*, Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 324 (1977); Franks v. Bowman Transp. Co., 424 U.S. 747, 748 (1976); Martha R. Mahoney, *What's Left of Solidarity?: Reflections on Law, Race, and Labor History*, 57 BUFF. L. REV. 1515, 1571 (2009) (stating that "[w]hen race discrimination at work became illegal in the 1960s, the previous legal regime had left minority workers with disproportionately low seniority and union leadership disproportionately white").

However, some unions have taken affirmative steps to mitigate the discrimination-related effects of seniority. For example, they have bargained for affirmative action programs[355] and have fought legislative efforts to ban affirmative action.[356] In many ways, unions are uniquely positioned to help undo the pernicious continuing effects of race discrimination through bargaining because of their perceived legitimacy in the eyes of white workers and their right to compel employers to come to the bargaining table in the first place. For example, unions have argued that discriminating employers should be required not only to reinstate the person who has suffered discrimination, but also to "hold harmless" workers who might be displaced by the reinstatement.[357] This strategy shifts the full weight of the employment discrimination remedy onto employers, and maintains solidarity between workers who have suffered discrimination and workers who have received unfairly preferential treatment, but who nonetheless have come to rely upon their jobs. Such a strategy could also make reinstatement a more realistic remedy by reducing friction between the discriminatee and his or her coworkers. Additionally, enshrining programs designed to combat past discrimination or underrepresentation of minority workers in CBAs protects those programs from being unilaterally discontinued by employers facing difficult economic times, as occurred during the Great Recession.[358]

Thus, union representation holds significant promise for workers of color. CBA provisions that protect against discrimination and terminations without cause are perhaps the clearest examples, but far

355 *See, e.g.*, United Steelworkers of Am. v. Weber, 443 U.S. 193, 198 (1979); Mahoney, *Class and Status in American Law*, *supra* note 63, at 839 (describing union attempts to "integrate leadership or to protect integration against the impact of layoffs" that were "held back by law"); *Teachers Renew Support for Affirmative Action*, N.Y. TIMES, July 6, 1997, at A11 (National Education Association "agreed to urge local unions to endorse the preferential hiring of women and minorities in education to address past discrimination or insure diversity among employees"); *UAW Resolution*, *supra* note 324.

356 *Civil and Human Rights*, UAW, http://www.uaw.org/page/civil-and-human-rights (last visited June 2, 2013).

357 *See*, Motion for Leave to File Brief for Local 862, United Auto. Workers, as Amicus Curiae out of Time and Brief of Amicus Curiae at 3, Franks v. Bowman Transp. Co., Inc., 424 U.S. 747 (1976) (No. 74-728) (arguing for discrimination remedy that would require employers to reinstate discriminatees while also guaranteeing jobs of white workers previously hired or promoted under discriminatory hiring scheme); *see also* Iris A. Burke & Oscar G. Chase, *Resolving the Seniority/Minority Layoffs Conflict: An Employer Targeted Approach*, 13 HARV. C.R.-C.L. L. REV. 81, 83 (1978) (advocating "full payroll" remedy).

358 Sloan, *supra* note 236; *Law Firm Diversity Progress Stalled by Economy, According to Survey Results*, VAULT BLOGS (Sept. 29, 2010), http://blogs.vault.com/blog/vaults-law-blog-legal-careers-and-industry-news/law-firm-diversity-progress-stalled-by-economy-according-to-survey-results/.

from the only ones. Additionally, unions can take steps to remedy less obvious workplace harms, such as identity performance demands and the ongoing effects of prior discrimination. While unions have not yet done all they can in these areas, the examples discussed herein provide a blueprint for unions seeking to fully support members of color during organizing, at the bargaining table, and in arbitration.

C. Unions Foster Racial Empathy

> "The labor movement has always been at its strongest and its best when it identified with the unemployed, with the fight against racism, the fight against sexism and the wider fight for civil rights."[359]

The conventional wisdom casts unions as perpetrators of racial capitalism.[360] In this narrative, unions are predominantly white institutions that are cynically motivated to derive economic value from nonwhite presence without any interest in bettering the lives of nonwhite individuals or improving relations between white and nonwhite individuals.[361]

In contrast to this narrative, unions and their members repeatedly demonstrate that they care about racial justice, and psychological and sociological research shows that the structure of unions themselves can encourage racial empathy. Individuals' capacity for empathy and solidarity is not predetermined; rather, that capacity is generated when people mentally recategorize one another in terms of commonalities, like "parent" or "union member".[362] Even tapping one's hands in time with another person increases empathy,[363] leading to an in-

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359 Jon Jeter, *Black Labor's Laborious Road Ahead*, THE ROOT (Sept. 2, 2010, 5:07 PM), http://www.theroot.com/views/black-labors-laborious-road-ahead?page=0,1 (quoting Roger Toussaint, Head of New York's Transit Workers Union Local 100).

360 *See supra* Part I.C.

361 *See supra* Part I.C.

362 *See, e.g.*, MARK H. DAVIS, EMPATHY: A SOCIAL PSYCHOLOGICAL APPROACH 116–18 (1996); Raymond S. Nickerson, Susan F. Butler & Michael Carlin, *Empathy and Knowledge Projection*, *in* THE SOCIAL NEUROSCIENCE OF EMPATHY 44, 47–48 (Jean Decety & William Ickes eds., 2009).

363 *See* Piercarlo Valdesolo & David DeSteno, *Synchrony and the Social Tuning of Compassion*, 11 EMOTION 262, 262–65 (2011) (finding that simply tapping one's hands in time with another participant increased feelings of empathy). This literature is a subset of a much larger body of scholarship on minimal group formation and group solidarity more generally. *See generally* John F. Dovidio & Samuel L. Gaertner, *Stereotypes and Evaluative Intergroup Bias*, *in* AFFECT, COGNITION, AND STEREOTYPING 167 (Diane M. Mackie & David L. Hamilton eds., 1993); Samuel L. Gaertner & John F. Dovidio, *The Aversive Form of Racism*, *in* PREJUDICE, DISCRIMINATION, AND RACISM 61 (Samuel L. Gaertner & John F. Dovidio eds., 1986); Myron Rothbart &

crease in prosocial behavior.[364] Similarly, research indicates that defining oneself by a group identity other than race leads to improved attitudes toward and treatment of people of other races.[365] Marginal whites, who do not have all of the advantages of white privilege, are more susceptible to this effect than other white individuals.[366]

This effect is intensified in the context of group alliances. A considerable body of literature supports the idea that building group alliances leads to greater empathy and cohesion among group members.[367] Research has identified a concept known as "identity fusion," which "occurs when people experience a visceral feeling of oneness with a group."[368] When it occurs, group identity can supersede individual self-interest.[369] That is, when individuals experience strong identity fusion, the allegiance to the fused group trumps other priorities.[370] "[B]y channeling their feelings of agency into the agendas that they share with the group, highly fused persons are able to act in accordance with a meaning system that extends beyond their own needs and desires."[371]

But not all groups are created equal. Those groups that promote superordinate goals almost universally diminish group conflict and im-

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Scott Lewis, *Cognitive Processes and Intergroup Relations: A Historical Perspective*, *in* SOCIAL COGNITION: IMPACT ON SOCIAL PSYCHOLOGY 347 (Patricia G. Devine et al. eds., 1994).

364 *See* Valdesolo & DeSteno, supra note 363, at 264–65.

365 *See* Charles Jaret & Donald C. Reitzes, *The Importance of Racial-Ethnic Identity and Social Setting for Blacks, Whites, and Multiracials*, 42 SOC. PERSP. 711, 711, 733 (1999) (noting that contemporary studies on whiteness "uncover a mix of pride, denial, and ambivalence in the way people incorporate a sense of being white into their self-concepts").

366 *See* Jennifer L. Eichstedt, *Problematic White Identities and a Search for Racial Justice*, 16 SOC. FORUM 445, 453 (2001) (discussing whites' experiences of certain kinds of subordination and the potential for those experiences to generate empathy for other kinds of subordination). For a discussion of marginal whiteness, see *supra* notes 47–48 and accompanying text.

367 *See* Robert B. Cialdini et al., *Reinterpreting the Empathy-Altruism Relationship: When One into One Equals Oneness*, 73 J. PERSONALITY & SOC. PSYCHOL. 481, 490 (1997); Naomi Ellemers et al., *Motivating Individuals and Groups at Work: A Social Identity Perspective on Leadership and Group Performance*, 29 ACAD. OF MGMT. REV. 459 (2004); Nick Hopkins et al., *Helping to Improve the Group Stereotype: On the Strategic Dimension of Pro-Social Behavior*, 33 PERSONALITY & SOC. PSYCHOL. BULL. 776 (2007); William B. Swann, Jr. et al., *Identity Fusion and Self-Sacrifice: Arousal as a Catalyst of Pro-Group Fighting, Dying, and Helping Behavior*, 99 J. PERSONALITY & SOC. PSYCHOL. 824, 839 (2010); William B. Swann, Jr. et al., *When Group Membership Gets Personal: A Theory of Identity Fusion*, 119 PSYCHOL. REV. 441, 441–42 (2012) [hereinafter Swann, *When Group Membership Gets Personal*].

368 Swann, *When Group Membership Gets Personal supra* note 367, at 442.

369 *Id.* ("The union with the group is so strong among highly fused persons that the boundaries that ordinarily demarcate the personal and social self become highly permeable.").

370 *See id.*

371 *Id.* at 452.

prove relationships among group members.[372] As one would expect, this documented effect also flows from union efforts to bring workers together to strive for improved working conditions.[373] Research supports the idea that unions do indeed shift attitudes about race. One study found that union members were less racist than nonunion members.[374] For example, black union members tended to have more progressive attitudes toward immigration than blacks who were not union members; and black and Latino union members expressed more positive attitudes toward one another, suggesting that unions fostered interracial solidarity among nonwhite groups.[375]

Anecdotal evidence also supports the notion that superordinate goals can reduce or trump racism.[376] Martha Mahoney tells the story of the Grass Roots Organizing Work ("GROW") Project, in which organizers succeeded in convincing white workers that "[i]f they wanted to make any progress with their union, they had to work on a basis of genuine equality with black workers."[377] The outcome "was not only organizational growth for the union but also surprisingly rapid and dramatic change in racial beliefs."[378]

The compilation of this psychological and sociological information suggests that by encouraging members to focus on their shared struggle against their employer (their superordinate goal) unions can affirmatively promote cross-racial empathy. While unions can still do more to actively encourage this transformation, the many circumstances in which unions have displayed racial empathy and succeeded in fostering empathy among their members provide an important correction of the dominant narrative.

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372 *See* Muzafer Sherif, *Superordinate Goals in the Reduction of Intergroup Conflict*, 63 AM. J. SOC. 349, 349–50 (1958); *see also* Jay W. Jackson, *Realistic Group Conflict Theory: A Review and Evaluation of the Theoretical and Empirical Literature*, 43 PSYCHOL. REC. 395, 395 (1993) ("[I]ntergroup hostility is produced by the existence of conflicting goals (i.e., competition) and reduced by the existence of mutually desired superordinate goals attainable only through intergroup cooperation.").

373 *See* ESTLUND, *supra* note 95, at 71–76.

374 *See* Ann Shirley Leymon, *Unions and Social Inclusiveness: A Comparison of Changes in Union Member Attitudes*, 36 LAB. STUD. J. 388, 401 (2011) (finding that, over time, union members' attitudes toward civil rights leaders and black militants became more positive, and also that union members' attitudes toward "illegal aliens" and Asians were growing more positive at a faster rate than nonunion members).

375 *See id.* at 397, 402–03; *see also* ROBERT H. ZIEGER, FOR JOBS AND FREEDOM: RACE AND LABOR IN AMERICA SINCE 1865, at 230 (2007).

376 *See* ESTLUND, *supra* note 95, at 71–74.

377 Mahoney, *Class and Status in American Law*, *supra* note 63, at 837.

378 *Id*. at 837–38.

In addition to these positive effects flowing from group identification among rank-and-file members, unions also foster racial empathy through activity at the leadership level. Many unions have proactively placed people of color in leadership positions. For example, the AFL-CIO sequentially elected Linda Chavez-Thompson and Arlene Holt Baker to serve as Executive Vice President, one of its top three leadership positions,[379] while the SEIU includes among its current leadership Elisio Medina as International Secretary-Treasurer, Gerald Hudson as the International Executive Vice President, and Valarie Long as Executive Vice President.[380] As noted previously, scholars have cautioned against the mere "showcasing" of people of color.[381] The leaders mentioned here, however have, by all accounts, assumed powerful and substantive responsibilities within their respective organizations—that is, regardless of the ultimate benefits of pure showcasing, the instances of leadership discussed here extend far beyond showcasing.[382] While we cannot claim that *every* instance of including people of color at the union leadership level transcends showcasing, in some instances such inclusion is robust and genuine.[383]

Unions have also created integral roles for minority caucuses within unions. For example, the SEIU has encouraged formation and participation of various minority caucuses, such as its African-American caucus.[384] Such instances of inclusion yield both the thin benefits associated with showcasing as well as thicker benefits.[385] For example, white rank-and-file union members develop admiration for accom-

379 Kevin Galvin, *Chavez-Thompson, Sweeney, Trumka New AFL-CIO Leaders*, KY. NEW ERA, Oct. 26, 1995, at 7A; *Arlene Holt Baker*, AFL-CIO, http://www.aflcio.org/About/Leadership/AFL-CIO-Top-Officers/Arlene-Holt-Baker (last visited June 2, 2013) (noting that Holt Baker succeeded Chavez-Thompson); Stephen Franklin, *Labor's Message Heard in Clear New Voice*, CHI. TRIB. (Oct. 30, 1995), http://articles.chicagotribune.com/1995-10-30/business/9510300037_1_labor-federation-local-labor-leader-linda-chavez-thompson.

380 *About SEIU*, SEIU, http://www.seiu.org/our-union/ (last visited June 2, 2013). Moreover, more than fifty percent of SEIU members are in local unions led by a woman or a person of color. *SEIU History*, SEIU, http://www.seiu.org/a/ourunion/seiu-history.php (last visited June 2, 2013).

381 *See supra* Part I.C.; *see also* Shin & Gulati, *supra* note 102, at 1043–44. Others have suggested that even mere showcasing yields positive benefits by improving perceptions of the showcased person's identity group and by providing role models for other members of that identity group. Katharine T. Bartlett, *Showcasing: The Positive Spin*, 89 N.C. L. REV. 1055, 1056–57, 1061–62 (2011); *see also* Frank McCoy, *The Top Black Labor Union Leaders*, THE ROOT, http://www.theroot.com/multimedia/top-black-labor-union-leaders (last visited June 2, 2013).

382 *See, e.g.*, Franklin, *supra* note 379 (describing the assertiveness of Chavez-Thompson and her importance to others).

383 *See, e.g.*, *id.*

384 *See, e.g.*, SEIU AFRAM, http://aframseiu.org/ (last visited June 2, 2013).

385 *See* Bartlett, *supra* note 381, at 1055–57.

plished nonwhite leaders, and these positive feelings regarding their leaders affect their perceptions of the leader's group.[386]

Taken as a whole, the information presented in this Section reveals that the claims that unions lack or preclude racial empathy are overstated. We think it important to acknowledge that academic narratives have played a role in casting unions as lacking racial empathy, and that such narratives have an important role to play in creating a more accurate and nuanced narrative.[387] We hope that more balanced academic treatment will filter into national discourse and union policy in the future.

D. Unions and Communities of Color Benefit One Another

"All other things depend on work to-day."[388]

One of the most encouraging narratives regarding unions and racial minorities involves the ways in which unions can and do benefit communities of color. Such relationships are historically fraught; and, of course, many points of tension remain today.[389] Still, the many instances in which unions benefit communities of color represent cause for optimism.

1. Better Communities

First, the solidarity and improved racial relations described in the previous subsections already operate to improve race relations beyond the workplace. Scholars such as Elizabeth Emens have noted that structural features like workplace and residential segregation often prevent cross-racial relationships and friendships.[390] Given the frequency of such segregation, the improved racial integration facilitated by unions has enormous potential to erode racial tension away from work. The effect of workplace conditions extends far beyond the

386 *See id.* at 1061–62.

387 *See, e.g.*, *supra* notes 70–84 and accompanying text.

388 NEVIL SHUTE, RUINED CITY 188 (1973).

389 *See, e.g.*, Bernstein, *supra* note 72, at 90–118 (describing "The Racist History of American Labor Unions"); Jill Quadagno, *Social Movements and State Transformation: Labor Unions and Racial Conflict in the War on Poverty*, 57 AM. SOC. REV. 616, 616, 620 (1992) (describing the relationship between unions and racial minorities in history as difficult and at odds). For a recent example of this tension, see Mark Naymik, *Rift over Minority Hiring Among Trade Unions Gets Some Attention with Bigger Issues Still Unresolved*, CLEVELAND.COM, http://www.cleveland.com/naymik/index.ssf/2011/11/rift_over_minority_hiring_amon.html (last updated Nov. 10, 2011, 6:45 AM).

390 *See* Emens, *supra* note 42, at 1343–44, 1366–73. Structural separation of races also extends outside the workplace. *See generally* Ware, *supra* note 40 (describing the factors that led to and effects of residential segregation of blacks).

confines of the workday. As Zachary Kramer puts it, "[w]hat happens to employees inside the workplace can bleed into their private lives."[391] In light of this reality, Cynthia Estlund argues the workplace presents an opportunity for improved cross-racial interactions with repercussions far beyond the workplace.[392] Likewise, Vicki Schultz has argued that work is capable of transforming workers' identities, building community, and providing the basis for equal citizenship.[393] Improved relations within the workplace can thus translate to improved relations outside the workplace.

Beyond the effects that flow directly from improved race relations in the workplace itself, unions also benefit communities of color more directly. At the most literal level, unions make positive contributions to the physical places where people of color live. Unions sometimes exert influence in litigation to improve housing for their constituencies. One high-profile example is the seminal case of *Shelley v. Kraemer*,[394] which involved to the constitutionality of racially restrictive covenants.[395] The Congress of Industrial Organizations filed an amicus brief arguing that "[m]any thousands of members of applicant labor organizations are Negroes. Restrictive covenants have imposed upon these Negro workers unbelievable hardships in obtaining adequate housing. Restrictive covenants have also imposed upon our Negro members enforced physical isolation from decent jobs and forced them to take undesirable employment."[396] The union recognized the permeability between work and home, explaining that "[t]he effect of these covenants upon our own members has not been confined to depriving them of adequate shelter at reasonable prices and endangering their livelihood. These covenants have forced our members into slum areas which breed vice, disease and delinquency."[397] Although *Shelley* provides perhaps the most high-profile example, unions have litigated in order to preserve fair and decent housing options for workers in other cases as well.[398] Then, in the

391 *See, e.g.*, Zachary A. Kramer, *After Work*, 95 CALIF. L. REV. 627, 627 (2007).

392 ESTLUND, *supra* note 95, at 68–76, 79–84.

393 Vicki Schultz, *Life's Work*, 100 COLUM. L. REV. 1881, 1886–92 (2000).

394 Shelley v. Kraemer, 334 U.S. 1 (1948).

395 *Id.* at 4.

396 Brief of the Congress of Industrial Organizations et al. as Amicus Curiae at 3, Shelley v. Kraemer, 334 U.S. 1 (1948) (No. 72).

397 *Id.*

398 For example, two labor federations, the AFL-CIO and the Alliance for Labor Action, joined with a long list of civil rights groups to file an amicus brief in *James v. Valtierra*, 402 U.S. 137 (1971), a case concerning the constitutionality of a requirement that the electorate approve

wake of the current housing crisis, labor unions helped fight evictions and foreclosures of both union and nonunion households.[399]

Moreover, union-dominated sectors often serve important functions within living spaces occupied by members of communities of color. For example, a recent report found that firefighters spent a relatively small amount of time fighting fires and considerable time on projects such as providing emergency assistance, community beautification, and other service functions.[400] These critical functions both serve the relevant communities and further improve relations between union members and communities. Further, in conjunction with improving their organizing efforts, unions fight suburban sprawl, a phenomenon widely identified as economically harmful for communities of color because it drives jobs farther from the urban areas where people of color are more likely to live.[401]

Unions' roles in communities of color extend beyond physical spaces. For example, unions provide members with lawyers to combat problems that plague day-to-day life.[402] These problems can be employment related, such as discrimination and unemployment matters, or other civil matters, such as housing and matrimonial issues.[403]

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construction of low-income housing projects by majority vote. Brief of The National Urban Coalition et al. as Amici Curiae, James v. Valtierra, 402 U.S. 137 (1971) (No. 154).

399 *See e.g.*, Roger Bybee, *Detroit Union Applies Its Radical History to Fighting Foreclosures with Direct Action*, AlterNet (Apr. 22, 2012), http://www.alternet.org/story/155100/detroit_union_applies_its_radical_history_to_fighting_foreclosures_with_direct_action?page=0%2C0 (describing UAW local union's successful effort to prevent the eviction of a couple by surrounding the home with dozens of cars and picketing outside the foreclosing bank); *Foreclosures*, Long Island Fed'n of Lab., http://longislandfed.org/issues/819 (last visited June 2, 2013) (calling on Chase Bank to put a moratorium on home foreclosures); Jennifer John, *Labor Leaders Call for 2-Year Moratorium on Foreclosures*, UAW, http://www.uaw.org/story/labor-leaders-call-2-year-moratorium-foreclosures (last visited June 2, 2013) (announcing UAW's intention to withdraw hundreds of millions of dollars from Chase to protest bank's refusal to implement two-year moratorium on foreclosures in Michigan); *Save My Home Hotline*, Union Plus, http://www.unionplus.org/home-mortgage-programs/mortgage-foreclosure-help (last visited June 2, 2013) (describing assistance program for union members facing foreclosure).

400 Alex Tabarrok, *Firefighters Don't Fight Fires*, Marginal Revolution (July 18, 2012, 5:30 AM), http://marginalrevolution.com/marginalrevolution/2012/07/firefighters-dont-fight-fires.html.

401 Greg LeRoy, *Race, Regionalism, and the Future of Organized Labor*, 15 Race, Poverty, & Env't 16 (2008).

402 *See, e.g.*, Metro. Wash. Council, AFL-CIO, Claimant Advocacy Program, *available at* http://www.dclabor.org/ht/action/GetDocumentAction/i/389; *Benefits*, DC 37 AFSCME, http://www.dc37.net/benefits/freelegal.html (last visited June 2, 2013); UAW Legal Services Plan, http://www.uawlsp.com/ (last visited June 2, 2013).

403 *See* LeRoy, *supra* note 402, at 16.

In addition to legal assistance, unions have taken stands against problems particular to communities of color, such as racial profiling. In New York City, several unions joined in a statement arguing that current policies "continue to fail to address the central fact that each year hundreds of thousands of New Yorkers are illegally and unjustly stopped-and-frisked simply because they are people of color."[404] In Alabama, the SEIU joined forces with civil rights groups to urge Daimler, an automobile manufacturer, to support the repeal of Alabama's racial profiling law.[405] This action parallels union support for a federal anti-racial-profiling statute at the national level.[406]

Although mainstream police unions, such as the NFOP, are opposed to anti-racial profiling statutes,[407] police unions are no longer a monopoly. As one commentator explained:

> Nowadays the mainline police unions, still typically called "benevolent associations," share the stage with a range of other organizations, many highly vocal, representing the interests of minority officers. At both the local and national level, these organizations often take positions at dramatic variance from the position of the benevolent associations—not just on hiring and promotion policies, but on issues like racial profiling, police brutality, civilian oversight, and internal discipline.[408]

These various other organizations frequently partner with minority organizations outside of law enforcement, attacking the culture of the "thin blue line" and decreasing the insular nature of the police

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404 *See, e.g*, Kate Taylor, *Citing Discrimination in Stop-and-Frisk Practice, Coalition Calls for Reforms*, N.Y. TIMES CITY ROOM (June 27, 2012, 7:22 PM), http://cityroom.blogs.nytimes.com/2012/06/27/citing-discrimination-in-stop-and-frisk-practice-coalition-calls-for-reforms/ (quoting statement joined by 1199 SEIU, a building workers' union, and the Retail, Wholesale, and Department Store Union).

405 *See* Press Release, SEIU, Daimler and Its Shareholders Urged to Seek Repeal of Alabama's Racial Profiling Law (Apr. 2, 2012), *available at* http://www.seiu.org/2012/04/daimler-and-its-shareholders-urged-to-seek-repeal.php.

406 *Cf. Education, Civil and Human Rights, Fair and Open Elections*, *in* AFL-CIO LEGISLATIVE GUIDE: 112TH CONGRESS (2011–2012), at 7.6 (2011), *available at* http://www.aflcio.org/content/download/1733/15599/file/legislative_guide_full.pdf (calling on Congress to pass the End Racial Profiling Act).

407 *Legislation Opposed by the National Fraternal Order of Police*, FRATERNAL ORDER OF POLICE, http://www.fop.net/legislative/oppose.shtml (last visited June 2, 2013) (noting NFOP opposition to racial profiling legislation); *S. 989/H.R. 2074, the "End Racial Profiling Act,"* FRATERNAL ORDER OF POLICE, http://www.fop.net/legislative/endrpact.shtml (last visited June 19, 2013).

408 David Alan Sklansky, *Is the Exclusionary Rule Obsolete?*, 5 OHIO ST. J. CRIM. L. 567, 578 (2008).

force.[409] Emblematic of this, organizations such as the International Association of Chiefs of Police, the National Organization of Black Law Enforcement Executives, and the Fraternal Order of Police have expressed opposition to racial profiling.[410] Such organizations also affect traditional police unions, forcing them to reexamine their resistance to racial reform.[411] Ultimately, the fact that so many unions are willing to prioritize racial justice over inter- and intra-union solidarity emphasizes the widespread union concern for issues of racial fairness and highlights the fact that unions can help work positive change in communities of color.

Beyond providing legal assistance and lending support on national issues, unions also help fulfill dreams of a better life through education and accumulation of human capital. Such education can be either directly job related or more broadly targeted. For example, the AFL-CIO sponsors pre-employment training programs in the building trades, which include: "building trades core coursework, orientations to green jobs/weatherization, and hands-on training at the area's union apprenticeship schools. In addition to the certifications, the core curriculum consists of blueprint reading, orientation to the industry, construction math, and an introduction to tools and materials."[412]

Moreover, the program also includes "job readiness training, placement counseling, and support from staff beyond employment placement."[413]

The Las Vegas Culinary Union Training Center likewise provides both job training and broader educational opportunities such as English classes and GED classes.[414] Additionally, as of 2007, the New York City Construction Apprentice Program has placed over seven hundred individuals into apprenticeships, with significant benefits to workers of color.[415] Eighty-seven percent of those placements went to

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409 *Id.*

410 GARRINE P. LANEY, CONG. RESEARCH SERV., RL32231, RACIAL PROFILING: ISSUES AND FEDERAL LEGISLATIVE PROPOSALS AND OPTIONS 7–8 (2004).

411 Sklansky, *supra* note 408, at 578 ("In many cases . . . competition from these rival organizations of officers has forced mainstream police unions to rethink their own resistance to reform initiatives.").

412 *Community Services Agency: Building Futures Apprenticeship Outreach & Recruitment Project*, AFL-CIO WASH. D.C. METRO. COUNCIL, http://www.dclabor.org/ht/d/ProgramDetails/i/257/ (last visited June 2, 2013).

413 *Id.*

414 *High Road Partnerships Case Studies: Culinary Union Training Center*, AFL-CIO WORKING FOR AM. INST., http://www.workingforamerica.org/documents/HighRoadReport/appendix2.htm (last visited June 2, 2013).

415 *Unions on the Cutting Edge: A Workforce Trained for the 21st Century*, AM. RIGHTS AT

individuals from the African-American, Hispanic, and Asian communities, and "a five-year follow-up survey showed that 81 percent remain actively employed in the industry."[416] The benefits of such programs are both economic and psychological: they improve workers' financial prospects while at the same time instilling greater confidence in their role in society more generally.[417]

Finally, unions' unique role in K–12 education highlights their positive investment in the future of communities of color. First, teachers' unions are one of the strongest voices against standardized tests.[418] Teachers' unions oppose standardized tests because of a range of factors, including practical concerns—like the punishment imposed on teachers who do not deliver the required standardized test results[419]—as well as pedagogical concerns—such as the fact that standardized tests divert educational resources away from other programs and are used to disproportionately track blacks and Latinos into remedial programs.[420] Moreover, if teachers' unions oppose high stakes testing out of self-interest, it is significant that punitive measures frustrate talented teachers and cause them to leave the profession,[421]

WORK, http://www.americanrightsatwork.org/dmdocuments/ARAWReports/unions_on_the_cutting_edge_a_workforce_trained_for_the_21st_century.pdf (last visited June 2, 2013) (describing wide array of union-initiated training programs).

416 *Id.*; *see also* FRED B. KOTLER, PROJECT LABOR AGREEMENTS IN NEW YORK STATE: IN THE PUBLIC INTEREST 29 (2009), *available at* http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1021&context=reports.

417 *See* Pamela K. Adelmann, *Occupational Complexity, Control, and Personal Income: Their Relation to Psychological Well-Being in Men and Women*, 72 J. APPLIED PSYCHOL. 529, 529–30 (1987) (detailing how paid employment increases personal well-being and confidence level).

418 *See* Paul Riede, *New York State Teachers Union Opens New Offensive Against 'Obsessive' Testing*, SYRACUSE.COM (Mar. 27, 2013, 4:45 AM), http://www.syracuse.com/news/index.ssf/2013/03/post_803.html; Valerie Strauss, *Teacher Boycott of Standardized Test in Seattle Spreads*, WASH. POST (Jan. 26, 2013, 11:39 AM), http://www.washingtonpost.com/blogs/answer-sheet/wp/2013/01/26/teacher-boycott-of-standardized-test-in-seattle-spreads/; Kevin Zeese, *Chicago Teachers Union Launches Campaign Against 'High-Stakes' Standardized Testing, Supports Seattle Teachers Boycott*, OCCUPY WASH., D.C. (Feb. 3, 2013), http://m.october2011.org/fb_cb/157849590953202/blogs/kevin-zeese/chicago-teachers-union-launches-campaign-against-high-stakes-standardized-testing-.

419 *See* Jack Gerson, *NCLB: Bad for Teachers, Bad for Kids*, 37 UNITED TEACHERS L.A. 14 (2007) (focusing on standardized tests as one of many ineffective proposed remedies for improving low-achieving schools).

420 *See How Standardized Testing Damages Education*, FAIRTEST, http://www.fairtest.org/how-standardized-testing-damages-education-pdf (last updated July 2012) (explaining that minority children are more likely to be retained in a grade or placed in unnecessary remedial programs because of standardized tests and there are better methods of evaluating students).

421 *The Dangerous Consequences of High-Stakes Standardized Testing*, FAIRTEST (Dec. 17, 2007, 1:50 PM), http://www.fairtest.org/facts/Dangerous%20Consequences.html.

which is particularly unfortunate given that the greatest attrition occurs in low-performing schools in disadvantaged communities.[422] Additionally, unions have played a role in highlighting possible race discrimination in school districts' efforts to fire staff.[423]

Teachers' unions also intervene in curricular debates, frequently taking positions supportive of communities of color on controversial issues. Consider, for example, the debate over the value of "ethnic studies," "Latino studies," and "black studies" curricula. Such curricula have met with resistance and backlash from right-wing groups.[424] The National Education Association (NEA), however, has devoted considerable resources to demonstrating the value of ethnic studies programs.[425]

Finally, teachers' unions can be partners in reform efforts. For example, the American Federation of Teachers has partnered with an array of corporations and nonprofits to transform educational quality in an Appalachian school district.[426] The program aims to make capital improvements to school buildings, while also helping families outside the classroom by providing "better access to health care, drug prevention and treatment programs, better transportation, and more recreation."[427] In the future, this program could serve as a model for educational reform efforts undertaken in partnership with—rather than in opposition to—teachers' unions.[428]

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422 *See id.*; *see also* Donald Boyd et al., *Explaining the Short Careers of High-Achieving Teachers in Schools with Low-Performing Students*, 95 AM. ECON. REV. 166, 166 (2005).

423 Joyce Purnick, *A Spat With Schools in the Middle*, N.Y. TIMES, July 10, 2003, at B1 (describing lawsuit filed by New York City teachers' union, alleging that layoffs of 864 paraprofessionals disproportionately affected black and Latino employees).

424 *See, e.g.*, Gregory Rodriguez, Op-Ed, *Why Arizona Banned Ethnic Studies*, L.A. TIMES (Feb. 20, 2012), http://www.latimes.com/news/opinion/commentary/la-oe-rodriguez-ethnic-studies-20120220,0,773799.column; Paul Teitelbaum, *Arizona Youth Occupy Boardroom: 'Save Ethnic Studies,'* WORKERS WORLD, (May 5, 2011, 8:31 PM), http://www.workers.org/2011/us/arizona_youth_0512/.

425 *See generally* CHRISTINE E. SLEETER, NAT'L EDUC. ASSOC., THE ACADEMIC AND SOCIAL VALUE OF ETHNIC STUDIES: A RESEARCH REVIEW (2011), *available at* http://www.nea.org/assets/docs/NBI-2010-3-value-of-ethnic-studies.pdf.

426 Lyndsey Layton, *Teachers Union Leads Effort that Aims to Turn Around West Virginia School System*, WASH. POST (Dec. 15, 2011), http://www.washingtonpost.com/local/education/teachers-union-leads-effort-that-aims-to-turn-around-west-virginia-school-system/2011/12/14/gIQA5pxywO_story.html.

427 *Id*.

428 *See id.*; *see also* AFL-CIO LEGISLATIVE GUIDE, *supra* note 406, at 7.1–7.2 (calling for a range of reforms, including improved funding for early childhood education).

2. *Stronger Activism*

Unions and civil rights groups work together to pursue social change in many areas. These are not limited to core concerns of the two movements, but extend to an array of seemingly peripheral subjects. This work reflects the extent of the two sets of groups' general agreement on what conditions benefit white workers and people of color.

To begin, unions often participate in grassroots organizing related to causes traditionally identified with the civil rights movement. For example, the United Auto Workers (UAW) backed Cesar Chavez's fledgling farmworkers movement, and was integral to Martin Luther King's 1963 March on Washington for Jobs and Freedom.[429] Nearly fifty years later, the UAW, NAACP, and other civil rights groups sponsored the similar One Nation, Working Together march on Washington.[430] Unions are also active participants in actions designed to protect voting rights[431] or to get out the vote.[432]

Along with their support in traditional civil rights causes, unions likewise have been active participants in the immigrant rights movement, particularly since the AFL-CIO endorsed amnesty for unauthorized immigrants in 2000.[433] For example, labor unions,[434] immigration advocates, civil rights groups, and others came together in the Immi-

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429 Harold Meyerson, *Destroying What the UAW Built*, WASH. POST, Dec. 17, 2008, at A17.

430 Vince Piscopo, *'Jobs, Justice and Peace' March Commemorates King's 1963 Visit to Detroit*, UAW (Aug. 4, 2010), http://www.uaw.org/articles/jobs-justice-and-peace-march-commemorates-king%E2%80%99s-1963-march-detroit.

431 *See, e.g.*, David Garrick, *Escondido: City Wants Labor Union Removed from Voting-Rights Lawsuit*, SAN DIEGO UNION-TRIB. (Jan. 31, 2012, 7:00 PM), http://www.utsandiego.com/news/2012/Jan/31/escondido-city-wants-labor-union-removed-from/all/ (describing city's motion to exclude the San Francisco Building and Construction Trades Council from a lawsuit alleging discrimination against Latino voters, and observing that the Council was funding the lawsuit); Doris Nhan, *Labor, Civil Rights Groups: Voter Rights Must Be Protected*, NAT'L J. NEXT AM. (June 12, 2012, 12:23 PM), http://www.nationaljournal.com/thenextamerica/politics/labor-civil-rights-groups-voter-rights-must-be-protected-20120612; Ryan J. Reilly, *Meet the 'Super-Voters' Who Could Be Disenfranchised By Pa. Voter ID Law*, TPM (Aug. 9, 2012, 12:00 AM), http://tpmmuckraker.talkingpointsmemo.com/2012/08/pennsylvania_voter_id_law_disenfranchises_hall_of_fame_voters.php (describing an analysis conducted by AFL-CIO of effects of proposed voter identification law).

432 *See, e.g.*, Steven Greenhouse, *Labor Leaders Plan Door-to-Door Effort for Obama*, N.Y. TIMES, Mar. 12, 2012, at A13.

433 Scott Cummings, *Law in the Labor Movement's Challenge to Wal-Mart: A Case Study of the Inglewood Site Fight*, 95 CALIF. L. REV. 1927, 1944 (2007).

434 Both the SEIU and UNITE/HERE, each of which represents substantial numbers of immigrant workers, acted as organizers of the Immigrant Workers Freedom Ride. *See Comprehensive Immigration Reform: Labor Movement Perspectives: Hearing Before the Subcomm. on Immigration, Citizenship, Refugees, Border Sec. and Int'l Law of the H. Comm. on the Judiciary*,

grant Workers Freedom Ride, where they advocated for immigration reform including legal amnesty, workplace protections for immigrants, and more family-reunification visas.[435] The event, which drew tactical inspiration from the Freedom Rides of the 1960s civil rights movement, involved an eighteen-bus caravan that carried nine hundred immigrants and allies across the nation.[436] Immigrants are also helping to reinvigorate the labor movement: for example, Ruth Milkman has shown that "Latino immigrants—undocumented and documented alike—have been far more receptive to unionization than most native-born workers."[437]

Conversely, civil rights groups have also helped fight recent attempts by some states to reform public sector labor laws which sharply limit unions' power or eliminate unions altogether.[438] These laws threaten to have a tremendous impact on the labor movement, not least because there are now more unionized public sector than private sector workers.[439] Moreover, these changes also threaten workers of color, because the public sector constitutes what one researcher called "the single most important source of employment for African Americans."[440] Thus, black workers will suffer disproportionately as jobs are cut and wages and benefits decrease following the ouster of public sector unions.[441]

110th Cong. 7 (2007) (statement of Fred Feinstein, University of Maryland School of Public Policy, on behalf of SEIU and UNITE/HERE).

435 Steven Greenhouse, *Rally in Queens Will Seek Legalization of Illegal Immigrants*, N.Y. TIMES, Oct. 3, 2003, at B3.

436 *See id.* ("This week's bus caravan aims to copy the 1961 rides by drawing attention to a group at the bottom that often faces discrimination.").

437 RUTH MILKMAN, L.A. STORY: IMMIGRANT WORKERS AND THE FUTURE OF THE U.S. LABOR MOVEMENT 189 (2006).

438 *See generally* Martin H. Malin, *The Legislative Upheaval in Public-Sector Labor Law: A Search for Common Elements*, 27 A.B.A. J. LAB. & EMP. L. 149 (2012); *NAACP Passes Resolution Supporting Union Workers' Right to Collective Bargaining*, NAACP (Feb. 25, 2011), http://www.naacp.org/press/entry/naacp-passes-resolution-supporting-union-workers-right-to-collective-bargai/.

439 News Release, Bureau of Labor Statistics, *supra* note 317, at 1.

440 STEVEN PITTS, RESEARCH BRIEF: BLACK WORKERS AND THE PUBLIC SECTOR 1 (2011), *available at* http://laborcenter.berkeley.edu/blackworkers/blacks_public_sector11.pdf; *see also* Timothy Williams, *Public Sector Sheds Jobs; Blacks are Hit Hardest*, N.Y. TIMES, Nov. 29, 2011, at A16.

441 These cuts have already begun in earnest. *See* Ben Baden, *Public Sector Job Cuts Threaten Recovery*, U.S. NEWS & WORLD REP. (July 8, 2011), http://money.usnews.com/money/careers/articles/2011/07/08/public-sector-job-cuts-threaten-recovery (nearly 500,000 local government jobs lost between 2008 and mid-2011). Additionally, many state governments asserted that public sector labor reform was necessary because of fiscal emergencies, though others asserted either that the fiscal emergencies were invented, or that they would not be addressed through divesting public sector unions of bargaining rights. Malin, *supra* note 438, at 163–64; Paul M.

Unions and civil rights groups also engage in lobbying and public outreach regarding many overlapping issues. For example, civil rights groups supported the Employee Free Choice Act,[442] which would have eased the process of union organizing and bargaining for a first contract.[443] Some, but not all, civil rights groups oppose public education reforms such as increasing reliance on charter schools or school vouchers,[444] which unions also generally oppose.[445] For their part, unions worked against voter ID laws and other attempts to disenfranchise people of color,[446] as well as for affordable housing[447] and marriage equality.[448]

Further, labor and civil rights groups generally agree in their assessment of national politicians. The NAACP and the AFL-CIO each assess all federal senators and representatives each year,[449] and their 2011 scorecards reveal significant overlap between the votes upon which the two groups evaluated legislators.[450] For example, both

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Secunda, *The Wisconsin Public-Sector Labor Dispute of 2011*, 27 A.B.A. J. LAB. & EMP. L. 293, 296 (2012) (noting that Wisconsin Democrats argued that the Budget Repair Bill, which imposed significant new restrictions on most public sector unions, "really had nothing to do with fixing the state's budget").

442 Employee Free Choice Act of 2007, H.R. 800, 110th Cong. (2007).

443 *NAACP Calls for Passage of the Employee Free Choice Act*, NAACP, http://www.naacp.org/action-alerts/entry/naacp-calls-for-passage-of-the-employee-free-choice-act (last visited June 2, 2013); Press Release, Leadership Conference on Civil Rights, Civil Rights Group Touts Employee Free Choice Act (Apr. 2, 2009), *available at* http://www.civilrights.org/press/2009/efca.html.

444 Fernanda Santos, *N.A.A.C.P. on Defensive as Suit on Charter Schools Splits Group's Supporters*, N.Y. TIMES, June 11, 2011, at A16.

445 *See* ROSLYN M. BROCK, BENJAMIN TODD JEALOUS & HILARY SHELTON, NAACP FEDERAL LEGISLATIVE CIVIL RIGHTS REPORT CARD, 112TH CONGRESS, FIRST SESSION 13 (2011), *available at* http://naacp.3cdn.net/cb0f6053dfa585f0ff_dom6vrdc6.pdf (proclaiming the NAACP against a bill authorizing school vouchers and urging others to vote against it); Martin H. Malin & Charles Taylor Kerchner, *Charter Schools and Collective Bargaining: Compatible Marriage or Illegitimate Relationship?*, 30 HARV. J.L. & PUB. POL'Y 885, 886 (2007) (describing labor unions as against charter schools).

446 *See* Oosting, *supra* note 244; *supra* notes 431–32 and accompanying text.

447 *See supra* notes 394–99 and accompanying text.

448 *See* Mike Hall, *AFL-CIO Backs Marriage Equality in DOMA Case Brief*, AFL-CIO (July 11, 2012), http://www.aflcio.org/Blog/Political-Action-Legislation/AFL-CIO-Backs-Marriage-Equality-in-DOMA-Case-Brief.

449 Other labor and civil rights groups also evaluate federal lawmakers; the AFL-CIO and NAACP are representative examples. *See, e.g.*, *Legislative Report Card for the 112th Congress (2011-2012): Description of Votes Scored*, NAT'L EDUC. ASS'N, http://www.nea.org/home/50435.htm (last visited June 2, 2013).

450 *Compare* BROCK ET AL., *supra* note 445, *with 2011 Full Senate Scorecard & 2011 Full House Scorecard*, AFL-CIO, http://www.aflcio.org/Legislation-and-Politics/Legislative-Voting-Records?act=3&termyear=2011&location=Senate (last visited June 2, 2013).

groups included in their scores a number of labor issues,[451] along with votes on consumer protection,[452] health care,[453] environmental protection,[454] job creation,[455] and school reform[456] among others. Given this degree of overlap, it is unsurprising that the two groups overwhelmingly agree in their support of or opposition to most legislators.[457] Both groups tend to support Democratic over Republican lawmakers, and usually urge their membership bases to support Democrats in state and federal elections,[458] making both union members and racial minorities key parts of the Democratic base.

In the union context, this support for Democratic candidates also influences the views of the rank-and-file membership: union members were significantly more likely to support President Obama over Republican candidate John McCain than nonunion workers in 2008.[459] Likewise, in 2012, working class whites in union households provided

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451 Both the AFL-CIO and NAACP opposed a ban on expenditures to enforce the Davis-Bacon prevailing wage law, opposed a ban on collective bargaining by Transportation Security Administration employees, opposed curtailing remedies that could be ordered by the NLRB, and opposed a ban on implementation of project labor agreements. *Compare* BROCK ET AL., *supra* note 445, at 4, 15, 17, *with 2011 Full Senate Scorecard* & *2011 Full House Scorecard*, *supra* note 450.

452 Both groups supported the confirmation of Richard Cordray as director of the Consumer Financial Protection Bureau. *Compare* BROCK ET AL., *supra* note 445, at 7, *with 2011 Full Senate Scorecard* & *2011 Full House Scorecard*, *supra* note 450.

453 Both groups supported passage of the Affordable Care Act, and opposed a subsequent bill that would have repealed it. *Compare* BROCK ET AL., *supra* note 445, at 14 *with 2011 Full Senate Scorecard* & *2011 Full House Scorecard*, *supra* note 450.

454 Both groups opposed banning the EPA from regulating greenhouse gases under the Clean Air Act. *Compare* BROCK ET AL., *supra* note 445, at 4, *with 2011 Full Senate Scorecard* & *2011 Full House Scorecard*, *supra* note 450.

455 Both groups supported a host of job creation mechanisms, including funding for public sector employees, transportation employees, and others. *Compare* BROCK ET AL., *supra* note 445, at 5–6, *with 2011 Full Senate Scorecard* & *2011 Full House Scorecard*, *supra* note 450.

456 Both groups opposed creating a system of private school vouchers for the District of Columbia. *Compare* BROCK ET AL., *supra* note 445, at 13, *with 2011 Full Senate Scorecard* & *2011 Full House Scorecard*, *supra* note 450.

457 *Compare* BROCK ET AL., *supra* note 445, at 18–29 (listing legislators with either a "for" (F) or "against" (A) NAACP designation), *with 2011 Full Senate Scorecard* & *2011 Full House Scorecard*, *supra* note 450 (providing a yearly and lifetime approval rating for each legislator).

458 *Compare* BROCK ET AL., *supra* note 445, at 18–29 (providing "for" (F) designations for more Democrats), *with 2011 Full Senate Scorecard* & *2011 Full House Scorecard*, *supra* note 450 (providing more Democrats with higher yearly and lifetime ratings).

459 Nate Silver, *The Effects of Union Membership on Democratic Voting*, N.Y. TIMES FIVETHIRTYEIGHT (Feb. 26, 2011, 7:00 AM), http://fivethirtyeight.blogs.nytimes.com/2011/02/26/the-effects-of-union-membership-on-democratic-voting/ (finding that "64 percent of union members in the Annenberg data set voted for Barack Obama. By contrast, if these same voters were not members of unions but every other demographic characteristic were held constant, the analysis predicts that 52 percent of them would have voted for Mr. Obama anyway.").

key boosts for President Obama in the swing states of Ohio and Wisconsin; notably, intense battles over public sector union reform had recently taken place in both states, leading to massive political mobilization of union members.[460] Importantly, in 2008, union leadership made overcoming some union members' reluctance to vote for a black candidate a priority.[461] AFL-CIO secretary-treasurer (now president) Richard Trumka repeatedly spoke at union meetings about the election, asserting that "[t]here's no evil that's inflicted more pain and more suffering than racism—and it's something we in the labor movement have a special responsibility to challenge."[462] Trumka and other union leaders also tasked union members to undertake the difficult job of talking to each other explicitly about race in the lead-up to the election.[463]

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Abundant scholarly research and real world evidence makes clear that the conventional wisdom described in Part I is inaccurate or, at the very least, overstated. Consequently, we replace that conventional wisdom with four new narratives describing a richer, stronger, and ultimately more optimistic relationship between organized labor, workers and communities of color, and civil rights organizations. We expect that this improved understanding of the relationship between labor and race will ultimately improve the relationship itself.

CONCLUSION

> I have asserted a firm conviction . . . that working together we can move beyond some of our old racial wounds, and that in fact we have no choice if we are to continue on the path of a more perfect union.
>
> For the African-American community, that path . . . also means binding our particular grievances . . . to the larger aspirations of all Americans—the white woman struggling to

460 Peyton M. Craighill & Scott Clement, *Can Unions Save the White Working Class Vote for Democrats?*, WASH. POST (Nov. 20, 2012, 2:05 PM) http://www.washingtonpost.com/blogs/the-fix/wp/2012/11/20/can-unions-save-the-white-working-class-vote-for-democrats/; Frank Newport, *Majority of Union Members Favor Obama; A Third Back Romney*, GALLUP (June 11, 2012), http://www.gallup.com/poll/155138/Majority-Union-Members-Favor-Obama-Third-Back-Romney.aspx?utm_source=tagrss&utm_medium=rss&utm_campaign=syndication.

461 *See* Greenhouse, *supra* note 292.

462 *Id.* (internal quotation marks omitted).

463 *See id.*

> break the glass ceiling, the white man whose [sic] been laid off, the immigrant trying to feed his family . . . .
> In the white community, the path to a more perfect union means acknowledging that what ails the African-American community does not just exist in the minds of black people; that the legacy of discrimination—and current incidents of discrimination, while less overt than in the past—are real and must be addressed.[464]

This Article has described the conventional wisdom regarding the relationship between unions and civil rights groups as well as the relationship between white and nonwhite workers. Popular and academic discourse reflects an understanding of those relationships as tense, adversarial, and intractably opposed.

Empirical evidence and social science research, however, reveals that these narratives are generally overstated and, in some instances, almost entirely unsupported. Both within and beyond the legal system, the interests of white and nonwhite workers generally align. Moreover, unions promote the interests of nonwhite workers and communities, contrary to the conventional wisdom that incorrectly associates unions solely with white workers.

This improved understanding of the relationship between unions and civil rights organizations accomplishes several goals. It offers a more honest and nuanced accounting of historically disadvantaged groups within our society. It insulates workers from employers and political interests that might attempt to frustrate progress by exploiting racial divisions. It emphasizes the positive consequences of current racial justice initiatives by labor interests and provides a road map for future initiatives. And, perhaps most importantly, it brings us closer to a society that the leaders of both the labor and civil rights movements envisioned—one in which the interests of workers and racial minorities are closely intertwined for the good of all.

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464 Senator Barack Obama, A More Perfect Union (Mar. 18, 2008), *available at* http://my.barackobama.com/page/content/hisownwords.