The Quest for Industrial Democracy and the Struggle Against Racism: Perspectives from Labor Law and Civil Rights Law*

This Article is occasioned by the state of crisis which the labor and civil rights movements have simultaneously entered. It attempts to develop new ways of understanding the historical origins of the present crises. My purpose is to contribute to the discussion of class and race in American life by exploring a series of parallels, convergences, and connections between labor law and civil rights law. The particular focus of the Article is on certain limitations of collective bargaining law as an instrument for achieving democracy in the workplace and upon certain limitations of civil rights law as a process for achieving an end to racial domination.

My central argument is that there is a basic structural similarity between the limitations contained within each of the two bodies of law. This suggests that we might be able to identify a set of interconnected reasons why the labor and civil rights movements now find themselves in such difficulty.

Part I sets forth the scope and boundaries of what this Article attempts to achieve. Parts II and III attempt to specify and describe the "homology"—the matched structure—of the problematical aspects of labor law and of civil rights law. Part IV will illustrate the preceding arguments through a close reexamination of the great labor and civil rights case of Steele v. Louisville & Nashville Railroad Co. 1 Part V explores some implications of the argument which concern the intertwined

* 323 U.S. 192 (1944).
futures of the movement for workplace democracy and the movement for racial equality.

Both the labor and civil rights movements consist of extremely complex arrays of groupings and social forces. Both are now entering a period of reconstitution and redefinition. The understanding to be gained from the study of the interlocked ideological underpinnings of class and race domination is a potential asset to both movements as they each seek to make sense of their present situation and future path.

A generation ago, W.E.B. Du Bois taught that the destiny of American labor is ineluctably bound up with the fate of the struggle against racism:

The South, after the [Civil] war, presented the greatest opportunity for a real national labor movement which the nation ever saw or is likely to see for many decades. Yet the labor movement, with but few exceptions, never realized the situation. It never had the intelligence or knowledge, as a whole, to see in black slavery and Reconstruction, the kernel and meaning of the labor movement in the United States.2

The hopes of the labor movement and the aspirations of this nation's oppressed minorities remain inextricably linked, and it is in that light that this essay is written. Labor and civil rights activists could enrich one another's efforts and learn from each other's failures. The weaknesses of each cause affect the other; each struggle is in effect a limiting point of its counterpart. Neither movement has a chance to break out of its current malaise without championing the goals of the other. It is hoped that in cooperation, an exchange of knowledge and resources, and mutual reinforcement, the two movements may find a path to progress, an opportunity jointly to transform for the better their shared destiny.

I

INTRODUCTION

Despite great strides in recent years among government employees and agricultural, service, health-care, and southern workers, the American labor movement is on the defensive today in virtually every arena.3 Union membership has been steadily declining as a percentage of the

paid workforce. Sophisticated management consultants have developed a highly refined “technology” for defeating union organizational campaigns. At the negotiating table, management demands wage and other concessions as the price of continued operation of obsolete plants. Unions are now negotiating the surrender of hard-earned gains in return for precarious guarantees of job security. The proliferation of diversified conglomerates, the rise of the multinational corporation, and the spectacular pace of automation pose intractable barriers to labor’s progress on the most basic economic issues of collective bargaining.

In politics, organized labor has recently suffered set-back after devastating set-back, most notably the defeat of its 1980 presidential candidate and failure to obtain passage of the Labor Reform bill of 1978. The isolated, beleaguered state of organized labor is mirrored in its defensive legal posture. The Burger Court has declined to expand and, in important cases, has substantially cut back upon employee rights.

At the same time, the civil rights upsurge of the 1960s appears stalled. An unfavorable political climate, hostile or indifferent elected officials, continued economic deterioration at the national level, internal schism, and uncertainty about strategic direction have combined to slow the tempo of the civil rights movement.

5 See generally Center to Protect Worker’s Rights, From Brass Knuckles to Briefcases: The Changing Art of Union-Busting in America (Nov. 1979) (pamphlet).
7 See generally note 3 supra.
8 Id.
9 See, e.g., NLRB v. Yeshiva Univ., 444 U.S. 672 (1980) (university faculty are not statutory “employees” and therefore are not entitled to the benefits and protections of the National Labor Relations Act) ; National League of Cities v. Usery, 426 U.S. 833 (1976) (extension of minimum wage and overtime hours protections to state and local government employees found to be an impermissible exercise of congressional power) ; Emporium Capwell Co. v. Western Addition Community Org., 420 U.S. 50 (1975) (holding unprotected concerted activity by dissenting employees protesting alleged race discrimination).
This impasse is again reflected in a defensive legal posture. The Burger Court is steadily undercutting earlier civil rights victories. As Derrick A. Bell, Jr., has written in surveying the Court's recent work, "[r]acial justice—or its appearance—may, from time to time, be counted among the interests deemed important by the courts and by society's policymakers," but "the fourteenth amendment, standing alone, will not authorize a judicial remedy providing effective racial equality for blacks where the remedy sought threatens the superior societal status of middle and upper class whites."  

Recent civil rights decisions have imposed heavy burdens upon plaintiffs, such as difficult requirements of proof of motive, intentionality, and causation, and have severely cut back on remedial latitude. Attempts to establish


These developments in civil rights law have a close parallel in recent decisions of the National Labor Relations Board and the United States Court of Appeals that have increased the General Counsel's burden of proof in cases alleging discharge or other discrimination against an employee for engaging in union activity. The leading case is Wright Line, 251 N.L.R.B. No. 150, enforced, 662 F.2d 899 (1st Cir. 1981), cert. denied, 102 S. Ct. 1612 (1982). Stringent proof requirements were employed years ago to preempt one of the most interesting developments at the intersection of labor law and civil rights law. In United Packinghouse, Food & Allied Workers v. NLRB, 416 F.2d 1126 (D.C. Cir. 1969), cert. denied, 396 U.S. 903 (1969), the District of Columbia Circuit held that a "policy and practice of invidious discrimination [against employees] on account of race or national origin is a violation of Section 8(a)(1) [of the National Labor Relations Act]." Id. at 1138. The effect of this decision was to put the free and relatively speedy machinery of the NLRB at the disposal of victims of invidious discrimination. The decision was soon to be virtually obliterated by the introduction of a rule that complainants must show "actual evidence . . . of a nexus between the alleged discriminatory conduct and the interference with . . . rights protected by the Act." Jubilee Mfg. Co., 202 N.L.R.B. 272 (1973), aff'd per curiam sub. nom. United Steelworkers v. NLRB, 504 F.2d 271 (D.C. Cir. 1974). This obligation of proof of "nexus" has proved to be an insuperable barrier.

claims of legal entitlement to substantive equality have been rebuffed, and the Supreme Court resists fully acknowledging, let alone remedi-
ing, the legacy of past race discrimination.

While occasioned by this apparent political impasse, this Article is primarily concerned with the analysis of legal doctrine as such rather than the history or current situation of the labor and civil rights move-
ments. In particular, the Article focuses on the aspects of labor law and civil rights law that present the greatest difficulties to the achievement of industrial democracy and racial equality. It will argue that the weaknesses in each field turn on two important legal constructs: the distinction between substance and process, and the distinction between public and private. Because it underwrites the ideal of formal justice, the substance/process dichotomy is clearly linked to the question of class domination. Its foremost expression in American legal culture is the doctrine of "freedom of contract." The public/private dichotomy is closely linked to issues concerning the role of government. Its foremost expression in our tradition is the question of "state action" which has been, of course, a preeminent issue in American race law. Labor law and civil rights law are bound together by the centrality within each of the substance/process and public/private distinctions.

A further argument is that the substance/process and public/private dichotomies are themselves linked—conceptually and as a matter of intellectual history. In particular, the claim is that the public/private distinction—i.e., the belief that it is possible to conceive of the realm of social and economic intercourse as being fundamentally distinct and separated from the realm of government and public policy—is basic to the ideological justification via the substance/process distinction of class hierarchy and racial domination.

While less ambitious than political or social history proper, the approach of this Article nonetheless provides a limited but valuable


15 A remarkable exemplification of the Court's blindspot toward the history of discrimination occurs in the Court's opinion in United Air Lines v. Evans, 431 U.S. 553 (1977), which stated: "A discriminatory act . . . which occurred before the Civil Rights Act of 1964 was passed . . . may constitute relevant background evidence . . . but separately considered . . . is merely an unfortunate event in history which has no present legal consequences." Id. at 558. In this connection it may be useful to recall Herbert Marcuse's words:

Remembrance of the past may give rise to dangerous insights, and the established society seems to be apprehensive of the subversive contents of memory. Remembrance is a mode of dissociation from the given facts, a mode of "mediation" which breaks, for short moments, the omnipresent power of the given facts. Memory recalls the terror and the hope that passed.

lens through which to view the labor and civil rights movements. The ways we think about social problems shape our conceptions of what is historically possible, our images of freedom and justice. A growing body of literature argues that legal thought is an important constitutive component of the modern American political imagination. Legal discourse often serves to legitimate the prevailing social order. It can induce us to believe that existing arrangements and institutions are rational and just, or at least inevitable, and thereby inhibit us from perceiving the contingency of present arrangements and institutions or the ways in which they are maintained by human choice and coercive force. Legal discourse as legitimating ideology is therefore itself a form of political domination and a barrier to progressive change. In turn, radical criticism of traditional legal discourse might help to create needed intellectual space and to nurture the ideas and images of freedom that must inform any movement for social change.

It follows that inquiry into the prevailing legal ideas about workplace governance and racial equality—for all its limitations—ought to suggest inferences about the politics of labor and of civil rights. The Article will attempt to draw out certain political observations. Although it is not my purpose to establish or defend these propositions, the underlying values and assumptions upon which they are based undeniably supply a motive force for the inquiry. Accordingly, a preliminary statement of political premises might assist the reader to evaluate the argument and provide necessary background.

An initial premise is that in significant part the weaknesses of the modern American labor movement stem from the narrowness of its politics, from its failure (at least since World War II) to link up the struggle to improve working conditions with a broader, over-arching vision of how to construct a better society. One of the most important manifestations of labor's abdication on the political level is the unions' failure to make the elimination of racism a central goal and an unwaivering commitment.17


Although notable instances of interracial worker solidarity occurred during
The labor movement can break out of its isolation only if it begins
to offer comprehensive, alternative conceptions of how work, society,
and politics ought to be organized, new conceptions of how the values
of equality, participation, and the full realization of each person's poten-

tial can achieve primacy in our social life. The labor movement can take steps in this direction only if it opposes all forms of unnecessary and destructive hierarchy. To put a fine point on it, there can be little hope for the labor movement to fully live up to its promise in contributing to the democratization and enhancement of the quality of American life unless it resolutely confronts the racism and racial domination so pervasive in our institutions, including the labor movement itself.\(^8\) Steele \textit{v. Louisville & Nashville Railroad Co.} will be highlighted because it is symbolic of this set of issues. Steele exemplifies how union racism feeds into a bureaucratized collective bargaining system that is ultimately inadequate to the needs of all workers.\(^9\)

A related political premise is that, for reasons deeply rooted in its history, the civil rights movement has not adequately incorporated the perspectives of social and economic class analysis. Civil rights law reflects a similarly limited perspective. It promises formal equality of opportunity within a social system that systematically generates substantive inequality. To an extraordinarily disproportionate degree, blacks are confined to an underclass status within what is an already highly stratified system of economic domination. Thus, efforts to improve conditions for blacks must ultimately confront the problem of class domination. To be fully successful, efforts at racial remediation must be part of a total effort at social reconstruction, as, once again, the Steele litigation teaches. As an indispensable first step in linking the struggle for racial justice to a broader strategy for social change, the civil rights movement must challenge prevailing conceptions of formal equality.

\(^8\) See 109 Lab. Rel. Rptr. 21, 38–39 (BNA) (1982) (report of address by Mr. Kirkland), he has on other occasions failed to accord priority to the claims of minority workers. See Raskin, \textit{Unionist In Reaganland}, supra note 3, at 84–88. During the course of a revealing personal interview, Kirkland did not include the concerns of minority employees on a list of major challenges facing the labor movement. Id.

\(^9\) This Article focuses on the problem of racism in relationship to the labor movement and labor law. It should be clear that the labor movement cannot possibly advance even on its own terms, much less make the political gains referred to in the text, unless and until it also directly confronts the pervasive sexism in American life, particularly the exclusion of American women from equal employment opportunity. Ruth Milkman has persuasively argued that the single most important change in the composition of the labor force as a whole in the post [World War II] period has been the dramatic rise in female labor force participation, and the failure of the labor movement to come to terms with this development is an important part of the explanation for its present stagnation.


\(^{10}\) See text accompanying notes 123–53 infra.
The quest for industrial democracy was a central aspiration of the Wagner Act and of modern collective bargaining law generally. Dean Shulman wrote: "Collective bargaining is . . . the means of establishing industrial democracy as the essential condition of political democracy, the means of providing for the workers’ lives in industry the sense of worth, of freedom, and of participation that democratic government promises them as citizens." And Professor Meltzer writes: "A commitment to democracy [was] central to the rationale for unionization and collective bargaining . . . . [O]f all the considerations that [were] invoked in favor of legal protection of unions in the 1930’s, their contribution to industrial democracy remained the most widely accepted justification." But while the cases and commentaries are replete with professions of faith in "industrial democracy," such statements are usually phrased in vague and general terms. The legislative history and the cases are quite ambiguous about what the self-professed ideal of "industrial democracy" is intended to mean in concrete terms. The concept of "industrial democracy" has been invested with a wide range of meanings, colored by differences in political outlook and aspiration.
It is possible, however, to describe and specify the nature of the system of industrial governance that has actually grown up under the aegis of American collective bargaining law. Collective bargaining law has made and can continue to make a significant contribution to enhancing the collective power of workers and their democratic participation in enterprise governance. Nonetheless, as an overall matter, the critical perspective regards the existing system of industrial governance as falling well short of our conceptions of industrial democracy. Rather, collective bargaining law has in practice evolved a complex of legal and managerial arrangements that in many ways institutionalizes, co-opts, and dissipates worker collective action. The labor laws formalize and channel industrial dispute-resolution. They narrowly circumscribe the legitimate boundaries of collective action. And they reinforce managerial control over enterprise goals and over the organization of the work process by sharply restricting the legally recognized scope of worker participation in industrial decisionmaking.

Two central developments of contemporary labor law doctrine have contributed to producing this pattern in collective bargaining, which in

to experience work in that way; that democratic, participatory self-management of the workplace by workers and community members is both a feasible and a just ideal; and that the highest aspiration of a democratic culture is to generate and nurture in all people the capacity for self-governance of the institutions that affect their lives, both inside and outside the workplace.

While granting that Congress probably did not "intend" this version of "industrial democracy" in 1935, the rhetoric of the times was sufficiently general and stirring that many who believed in and sacrificed to make the Wagner Act work were moved by some of these ideals and found overtones of them in their understanding of what the statute meant. Conventional accounts of the history of the Wagner Act have not adequately portrayed working people's perceptions of and attitudes toward the Act. See Klare, Judicial Deradicalisation, supra note 20, at 289-90.


26 This Article is informed by the perspective of a newly emerging body of scholarship which I have elsewhere called "critical labor jurisprudence." See Klare, Ideology, supra note 20, at 450-58, where major themes of this work are described and citation is provided to several scholars' contributions.

27 See generally id.

28 While calling attention to the cooptative and repressive features of collective bargaining law, my writings have also emphasized a complexity that I do not wish to be muted here because of the brevity of this presentation. Namely, though I believe the statement in the text fairly reflects an ultimate direction in the law of collective bargaining, in any particular doctrinal setting the law may strongly evince other and even contradictory tendencies and directions. And moreover collective bargaining as actually practiced exhibits aspects contradictory to those I claim guide the development of its legal doctrine.
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turn embodies a narrowly restrictive model of "industrial democracy." These are: (A) the primacy of contractualism; and (B) the emphasis on institutionalizing industrial conflict.

A. Contractualism

Governmental regulation guarantees certain employment standards, such as statutory minimum wage and maximum hour protections. However, the primary source of rights and of law in the organized, private sector workplace is the collective bargaining contract. Federal interest in the enforceability of the collective bargaining contract is one of the most important emphases of post-World War II labor law. Likewise, the Supreme Court has repeatedly proclaimed that the National Labor Relations Board should concern itself with establishing the ground rules of the collective contracting process and not with its substantive outcomes.

Emphasis on the contractual origin of employment rights has several significant consequences. First, it makes the quality of working life and the remuneration of labor turn on the vagaries of the market and of the parties' relative bargaining power rather than upon considerations of substantive justice. Second, contractualism provides a legal mechanism by which employees "waive," for a price, their statutory right to engage in collective action, notably the right to strike. Third, the collective bargaining contract serves several managerial functions, such as fostering long-range economic planning and immunizing management from

30 See United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960). "[The collective agreement] calls into being a new common law—the common law of a particular industry or of a particular plant." Id. at 579.
32 See notes 58-66 and accompanying text infra.
34 See, e.g., General Cable Corp., 139 N.L.R.B. 1123 (1962). In General Cable, the NLRB relied upon "the necessity to introduce . . . a greater measure of stability of labor relations into our industrial communities as a whole to help stabilize in turn our present American economy" and "the imperative for long-range planning" in adopting the three-year "contract-bar" rule governing timeliness of representation petitions. Id. at 1125-26.

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concerted worker protest against its initial administration of the rules of the shop. The contractualist focus of federal labor regulation places unions in the uncomfortable position of performing certain managerial and disciplinary functions.

In addition, the collective bargaining contract has become an institutional form through which employees surrender their statutory rights to co-participation with management in enterprise governance. This results in part from development of the so-called "subjects of bargaining" doctrine. While employee representatives are invited to participate through collective negotiations in establishing working conditions, the law limits this participation by distinguishing between "mandatory subjects" (as to which the employer has a duty to bargain in good faith) and "permissive subjects" (as to which the employer is under no legal obligation to consult with employee representatives). The many issues of concern to employees that are mandatorily bargainable, e.g., wages and hours, primarily touch employees' lives in their capacity as sellers of labor-power. But crucial issues that affect employees as producers, e.g., how the work process should be organized and what should be made, are not within the purview of mandatory bargaining. Indeed, such crucial subjects of industrial governance as capital investment and disinvestment decisions are beyond the scope of employee participation through collective bargaining. As a general rule, the more fundamental an industrial decision—the closer it lies to the "core of entrepreneurial control" and the more profoundly it influences workers' lives—the more likely the decision is vested in the exclusive discretion of manage-


36 See, e.g., Smith v. Hussmann Refrigerator Co., 619 F.2d 1229 (8th Cir. 1980), cert. denied sub nom. Local 13889, United Steelworkers v. Smith, 449 U.S. 839 (1980). "By negotiating the modified seniority clause to control promotion decisions, the union has limited management in an area regarded by management as one of its most important prerogatives. This limitation on management has shifted some of the burden for making promotions onto the union." 619 F.2d at 1240. See generally Feller, supra note 35, at 760–71.

37 See, e.g., Republic Steel Corp. v. UMW, 570 F.2d 467 (3d Cir. 1978) : [Unions] simply must bear certain obligations if [they are] to continue to be entitled to the rights and benefits accorded by our national labor policy. To the extent that any union . . . refuses to enforce appropriately authorized union discipline upon recalcitrant members [e.g., wildcat strikers] that union can be said to have abrogated a proportion of valued rights granted to the union under our national labor policy.

Id. at 479.


Finally, because the so-called "management prerogatives" clause is a mandatory subject, employers are able to use their bargaining leverage to obtain a sheltered area of unreviewable prerogative beyond the reach of employee input during the term of a contract, as to both major and routine workplace issues.

B. The Institutionalization of Industrial Conflict

The law systematically channels industrial conflict into formalized dispute-resolution mechanisms, notably grievance-arbitration. Employees are guaranteed "the right ... to engage in ... concerted activities for the purpose of ... mutual aid or protection...." Nonetheless, the law has steadily narrowed the allowable scope of employee self-help for purposes of redress of industrial grievances. Employees must utilize rule-structured, legalistic processes to carry on class conflict with employers, rather than relying on the strength of their own collective action. This breeds a relationship of dependency by the labor movement on government and discourages the autonomy and self-reliance of working people.

The emphasis on formalized industrial dispute-resolution teaches that the workplace is not a forum for workers to express their creative potential and capacity for self-governance. Rather, the workplace is a

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40 Lynd, supra note 39, at 403 ("[I]n general it can be said of board and court application of Fibreboard that the more seriously an investment decision affects the lives of workers, the less likely it is to be held subject to the duty to bargain"). For a summary of the law in this area, see R. GORMAN, BASIC TEXT ON LABOR LAW 509-23 (1976).

41 A "management prerogatives" or "management rights" clause is a provision in a collective bargaining contract typically reserving to management the right to make certain types of decisions—e.g., whether to subcontract out work formerly performed in-house—during the term of the contract. Absent such a clause, the employer might have a duty to bargain with the union over such decisions or the employer's decisions might be subject to arbitral review.

42 NLRB v. American Nat'l Ins. Co., 343 U.S. 395 (1952) (holding, in effect, that a "management rights clause" is a mandatory subject of collective bargaining).

43 Id.

44 See, e.g., Boys Mkts., Inc. v. Retail Clerks Union Local 770, 398 U.S. 235 (1970), where the Court stated, "[a]s labor organizations grew in strength and developed toward maturity, congressional emphasis shifted from protection of the nascent labor movement to the encouragement of collective bargaining and to administrative techniques for the peaceful resolution of industrial disputes." Id. at 251 (emphasis added).


46 "Self-help" in the labor context usually means resort to economic weapons, e.g., the lockout in the case of the employer, or concerted activity such as the strike in the case of the union.

47 See Klare, Judicial Deradicalization, supra note 20, at 281 n.53.
place that must be governed.\textsuperscript{48} In contemporary management thinking, which has profoundly influenced the development of the law, it is believed that no complex enterprise can operate without a “web of rules”\textsuperscript{49} establishing a hierarchy of command, responsibility, and function.\textsuperscript{50} Whatever it provides by way of workplace due process, grievance-arbitration also serves the important managerial function of continuously identifying problem areas and filling in the gaps in the rule-system of the particular enterprise. Because it to some extent possesses the imprimatur of employee consent and participation, grievance-arbitration has the added advantage of legitimating the governance system and authoritarian hierarchy of the workplace. In turn, the mystique of grievance-arbitration as a “proved technique”\textsuperscript{51} for achieving industrial peace is used to justify stripping employees of statutory rights to self-help through concerted action.\textsuperscript{52}

\textbf{C. The Conceptual Structure of Collective Bargaining Law}

The remainder of Part II is concerned to show that the substance/procedure and public/private dichotomies provide the philosophical underpinnings of collective bargaining law. The preference for “administrative techniques”\textsuperscript{53} for industrial conflict-resolution imparts the basic message that maintenance of the process of collective bargaining is more important than any particular outcome, more important even than certain rights embodied in the National Labor Relations Act. The single-minded focus on conflict-resolution naturally propels attention to the question of process (\textit{e.g.}, formal adjudication vs. use of economic weapons) and suppresses the possibility that worker concerted activity might have a substantial value for its own sake (because, \textit{e.g.}, it imparts a sense of dignity and self-respect, facilitates cooperative action and participation, and otherwise promotes democratic values). Indeed, an underlying assumption of collective bargaining law is that the formal procedures for resolving workplace disputes are value-neutral, that is, that it is possible to conceive of “process” as being radically distinct from substance.

The opposite is true. The character of the processes favored by labor law, such as grievance-arbitration, has been profoundly shaped by the

\begin{footnotes}
\item[50] Id.
\item[52] See, \textit{e.g.}, Boys Mkts., Inc. v. Retail Clerks Local 770, 398 U.S. 235 (1970) (strike over arbitrable grievance enjoinable, notwithstanding statutory prohibition against enjoining peaceful strikes, in order to reinforce arbitral system).
\item[53] See note 44 supra.
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substantive managerial and political objectives that influenced theorists and judges to promote such procedures. Likewise, the procedures deeply influence the substantive content of labor relations, as, e.g., excessive reliance on grievance-arbitration arguably encourages a defensive, non-combative spirit in labor's ranks.

Likewise, contractualism in the labor context fosters the idea that industrial democracy resides in the collective bargaining process itself. The appearance of "due process" in the negotiations that determine the quality of working life endows the working conditions established through bargaining with an aura of legitimacy, no matter how onerous they may be. In fact, substance and process are inextricably linked here as well. The top-heavy asymmetry of power common in the employer-employee relationship plainly skews the outcomes of collective bargaining toward management. And we have seen that "core" issues are removed from the bargaining table at the outset. Yet the rhetoric of contractualism disguises these problems, thereby promoting the belief that it is possible to conceive of industrial justice in procedural terms.

One such rhetorical device involves a curious contradiction residing within the contractualist stance. The very idea of contractualism is that a just outcome results from fair negotiating processes based upon the relative, that is unequal bargaining power and market strengths of the parties. Yet it is perceived that this claim is morally convincing only if the parties are assumed initially to stand in a rough relationship of equality. The cases are therefore at some pains to advance the notion of an initial position of parity, while simultaneously claiming that bargaining power is the measure of entitlement.

A more important, indeed essential, conceptual underpinning of the idea of procedural justice in labor law is the public/private distinction.

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54 See generally Klaré, Ideology, supra note 20, at 458-68; Stone, supra note 48. A classic example of this proposition is the defense of the well-settled "obey and then grieve" rule provided in a leading textbook. A. Cox, D. Box & R. Gorman, Labor Law: Cases & Materials 571-72 (8th ed. 1977). This rule ordinarily requires an employee who claims that he or she is being given an order in violation of the contract to perform the work as ordered and subsequently seek redress through the grievance procedure. This rule is said by the authors to self-evidently reflect the objectives of "industrial justice and plant efficiency." Id. at 571. The consequence of the rule, as it is nearly universally enforced by arbitrators, is to guarantee that management's version of disputed work rules prevails until the grievance procedure runs its course.

55 See generally C. Spencer, Blue Collar (1977).

56 See notes 39 & 40 and accompanying text supra.

57 See, e.g., American Ship Bldg. Co. v. NLRB, 380 U.S. 300, 317 (1965) (the National Labor Relations Act "protect[s] employee organization in counter-vailance to the employers' bargaining power, and . . . establish[es] a system of collective bargaining whereby the newly coequal adversaries might resolve their disputes").

The imagery of "public" and "private" was a central component of the campaign to win legislative and business support for collective bargaining: "The basic theory of the [National Labor Relations Act] in its original form, as today, was that the arrangement of substantive terms and conditions of employment was a private responsibility from which the government should stand apart." While employers were hostile to government intervention in management affairs, emphasis on the residual primacy of private ordering under the statutory scheme reassured them that ample territory would remain under the sovereign command of private managerial prerogative. As for unions, fear of governmental intervention in labor relations—a justifiable fear in light of the repressive, anti-union role of the courts in the pre-New Deal period—was invoked to induce worker support for a system based on "free" bargaining.

Given this background, the public/private distinction was destined to become a major organizing principle of labor law doctrine in the post-War period. Thus, on the one hand, Congress determined in the National Labor Relations Act that the public has an interest in promotion of the practices and procedures of collective bargaining. For this reason, public regulatory power may properly be utilized to establish the collective bargaining relationship through union representation elections and enforcement of the duty to bargain in good faith. In the 1950s and 1960s the Supreme Court went farther and insisted that there is a general public interest in avoiding interruptions of production caused by the mid-contract grievance strike. Accordingly, there was said to be a universally shared interest in promoting the use of grievance-arbitration to avoid industrial strife. On the other hand, it is fundamental to the statutory scheme that the substantive matters of collective bargaining are for the most part in the private domain and of no concern to government:

The object of [the National Labor Relations] Act was not to allow governmental regulation of the terms and conditions of employment, but rather to ensure that employers and their employees could work together to establish mutually satisfactory conditions . . . . It is implicit in the entire structure of the Act that the [National Labor Relations] Board acts to oversee and referee the process of collective bargaining, leav-

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59 A. Cox, D. Bok & R. Gorman, supra note 54, at 84; see also Cox, The Right to Engage In Concerted Activity, 26 Ind. L.J. 319, 322-23 (1951).
60 See generally I. Bernstein, The Lean Years, 190-243 (1972).
62 Id. § 9(c), 29 U.S.C. § 159(c) (1976).
63 Id. § 8(a) (5), (b) (3), 29 U.S.C. § 158(a) (5), (b) (3) (1976).
64 See, e.g., United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 584 (1960) (labor, capital and, implicitly, the public, share common interest in the "goal of uninterrupted production," id. at 582).
ing the results of the contest to the bargaining strengths of the parties . . . . One of [the] fundamental policies [of the Act] is freedom of contract. While the parties' freedom of contract is not absolute under the Act . . . [a] fundamental premise on which the Act is based [is] private bargaining under governmental supervision of the procedure alone, without any official compulsion over the actual terms of the contract.6

Apart from minimal labor standards guarantees and occasional executive controls on inflation, public regulatory power theoretically stays out of the bargaining process itself.

As these doctrinal references indicate, there is a logical force in the appeal to the public/private distinction to underwrite the procedural conception of industrial justice, quite apart from any apologetic ambitions. For the very notion of a negotiation and contracting process based on the relative market strengths of the parties assumes the existence of a realm of social life, "the market," that is at least relatively immune from the intervention of public policy. To enlarge upon the famous Walsh metaphor,66 because public/private imagery is constantly being refined, the precise location of the "office door" is always shifting. Yet without the fiction that there is an "office door"—a threshold beyond which public policy does not trespass—it is simply impossible to sustain the belief that some core of working conditions (the "substance") is established on the basis of the desires, needs, skills, strengths, and weaknesses of the parties.

III

THE LIMITS OF CIVIL RIGHTS LAW

A. The Legacy of Racism In Post-Reconstruction Constitutional Law

The conceptual distinctions we observed in labor law between substantive and process oriented conceptions of justice and between the public and private spheres are defining attributes of American legal culture.67 These central themes are rooted in the tradition of liberal political theory that dates from the emergence of modern capitalism.

When the employees have chosen their organization, when they have selected their representatives, all the bill proposes to do is to escort them to the door of their employer and say 'Here they are, the legal representatives of your employees.' What happens behind those doors is not inquired into and the bill does not seek to inquire into it.

Id. (comments of Senator Walsh, Chairman of the Senate Committee on Education and Labor).

66 See note 65 supra.

67 See generally Frug, supra note 16; Kennedy, Form and Substance In Private Law Adjudication, 89 HARv. L. REV. 1685 (1976).
They took hold in American law well before the Civil War. Their vitality in modern jurisprudence owes much to the late nineteenth century race cases. They continue to present ideological barriers in the struggle against systemic racial domination. Analysis of the contrast between the thirteenth and fourteenth amendments conveniently spotlights the continuing momentum of the substance/process and public/private distinctions at the level of constitutional analysis.

The command of the thirteenth amendment, that slavery shall not exist within the United States, is absolute. Read broadly, it encompasses all "badges and incidents" of slavery and affirmatively declares that certain concrete conditions of life are incompatible with our notion of freedom. The thirteenth amendment establishes, without qualification, that "badges and incidents" of slavery are intolerable in a democratic social order. It is immaterial whether the offending practices are traceable to public or private action. In short, on a straightforward reading suggested by recent case law, the thirteenth amendment transcends the substance/process and public/private distinctions. Perhaps this is why it continues to play a distinctly secondary role to that of the fourteenth amendment.

Whether or not the great promise of the recent cases, that the thirteenth amendment will emerge as a major tool in the struggle for equality, will eventuate will of course turn upon how the phrase "badges and incidents" is defined. This question presents in a microcosm the contrast between the substantive and formal conceptions of justice. On the one hand, the phrase could be read narrowly to refer only to legal disabilities, namely the legal disabilities attached to slave status. On a broader reading, "badges and incidents" would encompass the entire

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70 See text accompanying notes 75-88 infra.
72 See The Civil Rights Cases, 109 U.S. 3 (1883). Justice Bradley wrote that: Congress did not assume, under the authority given by the Thirteenth Amendment, to adjust what may be called the social rights of men and races in the community; but only to declare and vindicate those fundamental rights which appertain to the essence of citizenship . . .

. . . The Thirteenth Amendment has respect, not to distinctions of race, or class, or color, but to slavery . . .

. . . Mere discriminations on account of race or color were not regarded as badges of slavery.

Id. at 22-25.
complex of social, cultural, economic, and legal institutions constituting
the system of antebellum racial domination.\textsuperscript{73} From this stance, "badges
and incidents" comprehends all the symptoms of oppression traceable
to a social order based on racial domination. On this reading, the thir-
teenth amendment condemns racism as such, including its manifesta-
tions in economic hierarchy and class domination.

This reading clearly goes beyond anything the Court has ever held.
Yet there are significant internal tensions in the Supreme Court's re-
cent treatment of the thirteenth amendment. An interpretation under
which the Constitution guarantees an end to substantive social and
economic inequality founded upon racial domination, besides being
desirable in its own right, might be the only way to make sense of the
Court's major thirteenth amendment pronouncements.\textsuperscript{74}

\textsuperscript{73} This reading is suggested by Justice Harlan's dissent in the \textit{Civil Rights
Cases}. Justice Harlan's opinion repeatedly insisted that the thirteenth amendment
was conceived as a response to the victimization of blacks as a \textit{race}; he empha-
sized that the institution of slavery was grounded on a belief, elevated before the
Civil War to a constitutional principle, in the racial inferiority of blacks. Harlan
can be taken to have suggested that "slavery," within the meaning of the thirteenth
amendment, connotes "racial domination." \textit{See id.} at 32-36 (Harlan, J., dissent-
ing). On the other hand, Justice Harlan did appear to limit the equality proclaimed
and to be protected by the 13th amendment to equality in legal rights. \textit{Id.} at 36,
57-58. Professor Denise Carty-Bennia first called my attention to the significance
of this aspect of Justice Harlan's opinion.

\textsuperscript{74} There are substantial contradictions in the Court's approach in \textit{Runyon v.
McCrary}, 427 U.S. 160 (1976). \textit{Runyon} holds that § 1 of the Civil Rights Act of
1866, 42 U.S.C. § 1981 (1976), "is violated if a private offeror refuses to extend
to a Negro, solely because he is a Negro, the same opportunity to enter into con-
tracts as he extends to white offerees." 427 U.S. at 170-71 (footnote omitted). The
statute provides that "[a]ll persons within the jurisdiction of the United States
shall have the same right...

A key problem is posed by Justice White's dissent. Although much of his dis-
sent ignores the historical significance and purposes of the 13th amendment,
Justice White does pose a very challenging question for the Court: exactly what
"right" was infringed in this case? 427 U.S. at 193-95 (White, J., dissenting).
Justice White pointedly argues that except as against a public utility, common
carrier or the like, there is no "right" to make a contract with an unwilling
partner:

Whites... have... no right to make a contract with an unwilling
private person, no matter what that person's motivation for refusing to
contract. Indeed it is and always has been central to the very concept
of a "contract" that there be "assent by the parties who form the con-
tract to the terms thereof." The right to make contracts, enjoyed by
white citizens, [is] therefore always a right to enter into binding agree-
ments only with willing second parties. Since the statute only gives
Negroes the "same rights" to contract as is enjoyed by whites, the
language of the statute confers no right on Negroes to enter into a
contract with an unwilling person no matter what that person's moti-
vation for refusing to contract. What is conferred by 42 U.S.C. § 1981
In any event, the purpose of this discussion is primarily to expose the implications of an erosion of the substance/process dichotomy, and its integral connection to the public/private distinction. The point is the right—which was enjoyed by whites—"to make contracts" with other willing parties and to "enforce" those contracts in court.

*Id.* at 194 (White, J., dissenting) (emphasis in original) (citations omitted).

Justice White's position is a classic and internally consistent presentation of the view that the "badges and incidents" of 13th amendment concern are restricted to the legal disabilities of slave status (or perhaps, of all antebellum blacks). His view is that the "right" protected by § 1981 is the legal capacity to contract (with a willing partner). Leaving Justice White's point unanswered, the *Runyon* majority nowhere purports to show that there ordinarily exists a "right" to impose a contract on an unwilling partner.

But the Court must be taken to have rejected Justice White's argument, and therefore to have given a broader interpretation to congressional power under the 13th amendment. At the very least the Court held that where a seller offers his or her product to the public in the market, blacks are entitled to buy on a nondiscriminatory basis. Logically, the Court must have conceived of the contracting process, insofar as it is the mechanism for the distribution of goods and services, as a semi-public system. *Runyon* appears to hold that blacks are legally entitled to nondiscriminatory access to this "privately ordered" system because it in fact performs the quasi-public function of resource allocation. And, therefore, logically the Court must have implicitly held that "badges and incidents" go beyond mere legal disabilities to include at least some forms of economic discrimination.

Another view of the case is that § 1981 aims more at a defendant's choices and motivations than at equality of access for the plaintiffs. In this view, the law deems race-discrimination in contracting behavior as morally intolerable and, for that reason, illegal. Since the defendants were not privileged to behave in a racist manner, the black plaintiffs had a right to enter contracts with them. This analysis of *Runyon* also creates a moral momentum that explodes the logic of freedom of contract. *Runyon* suggests that there must, at some point, be a communal right to impose unwanted contracts in the service of the norm of racial equality.

Both explanations of the *Runyon* decision rest upon substantive formulations of the reach of the statute and of the 13th amendment, i.e., formulations of the "badges and incidents" concept going beyond mere legal disabilities. Both explanations assume that Congress has the power under section two of the 13th amendment, exercised in § 1981, to eradicate racial domination in all its social and economic, as well as purely legal, aspects. These views commit the Court to eliminating all the manifestations of racism, including both the oppressive life circumstances of the victims and the racially motivated conduct of perpetrators.

One senses, upon articulating the logic of *Runyon*, that the Court probably did not intend to go so far. Dean Bell argues that Justice Powell's special concurrence, which attempts to blunt the force of *Runyon*, and other recent pronouncements of the Court "reflect an unspoken conclusion that, during any given period, there is a real if unascertained limit to the gains blacks can wrest from white society." D. Bell, *Race, Racism and American Law* 123 (2d ed. 1980). Nonetheless, there is ultimately no way to explain the Court's repudiation of Justice White's emphasis on formal equality without concluding that the majority reads § 1981 to require nondiscriminatory access to commercial offerings made to the public or, in other words, that it treats the private market place as a public utility. The latent teaching of *Runyon* is that moral progress is impossible absent a substantive conception of justice. *See also* text accompanying notes 89-104 infra.
that a global assault upon racism-derived social inequality is even conceivable under the thirteenth amendment only because of the absence of a "governmental action" requirement.

By contrast, fourteenth amendment jurisprudence illustrates the conceptual limitations imposed on civil rights law by the substance/process and public/private dichotomies. In its eagerness to eviscerate the promise of the equal protection clause, the Supreme Court established a century ago that "[i]ndividual invasion of individual rights is not the subject-matter of the [fourteenth] amendment." That is, private conduct violative of the norm of equality is not prohibited by the federal constitution, or, put another way, the constitutional promise of equality does not forbid inequality, even systemic social and economic hierarchy, that cannot be traced to action by government.

Of course, both race and class domination are ultimately supported by law. Furthermore, theoretically, the Civil Rights Cases left it open to the states to act directly against social and economic practices that foster inequality. To complete its denigration of the fourteenth amendment, therefore, the Supreme Court linked a formal conception of justice to the "state action" doctrine; i.e., it brought together the public/private and substance/process distinctions. This was achieved both in race cases and in cases dealing with economic inequality.

The latter, the "liberty of contract" cases, held it unconstitutional for the states to legislate a redistribution of power within the system of class hierarchy. Implicit was the notion that gross social and economic inequality in the "private" sphere is perfectly compatible with the equality decreed by the fourteenth amendment. Put another way, constitutional equality was seen as formal or procedural. The justice envisioned by the fourteenth amendment was the uniform application of general rules, not equality in regard to the substantive conditions and circumstances of life:

[S]ince it is self-evident that, unless all things are held in common, some persons must have more property than others, it is from the nature of things impossible to uphold freedom of contract and the right of private property without at the same time recognizing as legitimate those inequalities of fortune that are the necessary result of the exercise of those rights. But the Fourteenth Amendment... gives to each of these an equal sanction; it recognizes 'liberty' and 'property' as coexistent human rights, and debars the States from any unwarranted interference with either.

75 The Civil Rights Cases, 109 U.S. 3, 11 (1883).
76 See text accompanying notes 93-104 infra.
78 Coppage v. Kansas, 236 U.S. 1, 17 (1915).
In the race context, *Plessy v. Ferguson* fused the public/private and substance/process dichotomies. On its face *Plessy* purports to distinguish between equality in legal capacity and all other forms of social and economic equality:

> If the two races are to meet upon terms of social equality, it must be the result of natural affinities, a mutual appreciation of each other’s merits and voluntary consent of individuals . . . . If the civil and political rights of both races be equal one cannot be inferior to the other civilly or politically. If one race be inferior to the other socially, the Constitution of the United States cannot put them upon the same plane.

Moreover, although not decided on “state action” grounds, *Plessy* struggled to maintain the public/private distinction:

> The object of the amendment was undoubtedly to enforce the absolute equality of the two races before the law, but in the nature of things it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to either.

The parallel between *Plessy* and the liberty of contract cases is that by using the formal conception of justice to relegate the problem of racism to the “social,” i.e., “private” realm beyond law, *Plessy* contributed a theoretical basis for effectively foreclosing the option of resort by race discrimination victims to state law. Moreover *Plessy* itself acknowledged the interpenetration of state and civil society. Louisiana’s railway segregation statute was sustained in part on the theory that the states possessed the discretion in fashioning discriminatory public conveyance laws to refer to “the established usages, customs and traditions of the people . . . .” That is, Louisiana was permitted to refer to “customs and usages” as a source of law, to ratify the established structure of social intercourse. But the custom in question could not refer to racial segregation of public conveyances, which was a relatively new phenomenon at the time of *Plessy*. Rather, the customs Louisiana was permitted to enact into positive law encompassed the entire local system of racial domination, a system that had evolved over generations with the active involvement of law, including the law of slavery.

79 163 U.S. 537 (1896).
80 *Id.* at 551–52.
81 *Id.* at 543 (emphasis added).
82 *Id.* at 550.

> History and an appreciation of current institutions (whose meaning is partly a product of history) show that racial segregation in places of
The impact of the public/private and substance/process distinctions embodied in early fourteenth amendment doctrine endures. The difficulties of modern civil rights litigation demonstrate that over-dependent reliance on governmental power to accomplish progressive social change can never get to the root of the problem, because inequality is as much a problem of social life as of the uses of public power. These points are illustrated by cases like *San Antonio Independent School District v. Rodriguez* and *Personnel Administrator of Massachusetts v. Feeney*. In *Rodriguez*, an entire system of social and economic domination, inextricably bound with and nurtured by public policy, was in effect held to be “private.” *Rodriguez* teaches that de facto discriminatory treatment originating in the harsh reality of social inequality is beyond the reach of the Constitution. The case stands for the proposition that government will not be held responsible for the destructive effects of economic and racial oppression, even though government is deeply implicated in establishing and supporting that system. In general, such public accommodation cannot be viewed as merely a series of isolated private decisions . . . or even as a wide-spread private custom unrelated to governmental action . . . The custom is infused with official action both in its origin and implementation . . . The very history of the caste system belies the claim of legal innocence . . . The State is responsible for the momentum its action has generated . . .

*Id.*

85 411 U.S. 1 (1973) (public school financing scheme based on combination of local property taxes and state contributions yielded unequal per-pupil expenditures in different districts; held, the scheme does not violate the equal protection clause of the 14th amendment). 86 442 U.S. 256 (1979). 87 An underlying message of *Rodriguez* is that the poor and minority groups may not look to the Constitution as a source of substantive entitlements (e.g., to education, housing, health care). There is an important labor law analogue in the narrowing of constitutionally protected interests in public employment. The Court has indicated that it regards employment opportunity as in some sense connected with fundamental conceptions of liberty. See, e.g., *Hampton v. Mow Sun Wong*, 426 U.S. 88, 102 (1976) (ineligibility for employment in a major sector of the economy treated as of “sufficient significance to be characterized as a deprivation of an interest in liberty”); *Board of Regents v. Roth*, 408 U.S. 564, 572 (1972) (treating right to engage in one’s vocation as “liberty interest”) (dictum). But the pattern of the Court’s actions belie its words. It steadfastly declines to consider Justice Marshall’s moving plea that public employment opportunity is a constitutional right. See, e.g., *id.* at 588 (Marshall, J., dissenting) (“every citizen who applies for a government job is entitled to it unless the government can establish some reason for denying the employment”). Moreover, the trend has been to severely cut back on the job interests and expectations of public employees that will be deemed of sufficient constitutional significance to merit due process protections. See, e.g., *Bishop v. Wood*, 426 U.S. 341 (1976) (discharge of permanent public employee found to implicate neither a property interest nor a liberty interest within the meaning of the 14th amendment’s due process clause). The brutal positivism of *Rodrigues, i.e.*, the view that
equality as is guaranteed by the Constitution is limited to the purely formal equality of neutral formulation and impartial administration of public regulations. As the Court said in *Feeney*: “[it is a] settled rule that the Fourteenth Amendment guarantees equal laws, not equal results.”

Taken together, the *Rodriguez* doctrine ratifying the existing social and economic hierarchy and the *Feeney* doctrine denying that substantive equality is a constitutional norm represent the limits of the liberal legalist ideology of “equal opportunity.”

**B. The Connection of Procedural and Market-Based Conceptions of Justice**

We have observed the strong connection of the substance/process and public/private distinctions in late nineteenth century constitutional cases justifying and bolstering race and class domination. Earlier we saw how the two distinctions combine in contemporary labor law to yield a workplace governance system that promotes managerial hegemony and narrowly constrains workers’ rights. This section is devoted to summarizing the conceptual links between the two distinctions, with particular reference to the race cases.

The Supreme Court’s objective in the *Civil Rights Cases*, *Plessy*, and their progeny was, of course, to limit the scope of legal protection against racism. The Court desired to find a rationale to avoid establishing and imposing constitutional standards of proper behavior toward blacks upon those holding social and economic power. The state action doctrine—*i.e.*, the public/private distinction—was invoked for this purpose. The content of constitutionally protected equality was further narrowed by restricting “equal protection” to the question of legal entitlements and capacities (*i.e.*, to the public sphere). This restriction made sense only if one were capable of believing that it is possible for a people to have formal equality in the legal process while in every other aspect of life they are brutally disadvantaged. In sum, the Court’s desire to justify systemic inequality within a constitutional regime and political culture that ostensibly exalts the norm of equality links the public/private and substance/form dichotomies.

those in need must look to positive legislative enactments, not to constitutional norms for relief from their plight, is reflected in the positivism of the public employee due process cases. *See*, *e.g.*, *id.* at 355–57 (White, J., dissenting) (suggesting that Court has now accepted the previously rejected view of Justice Rehnquist in *Arnett v. Kennedy*, 416 U.S. 134 (1974), that the constitutional protection of “property interests” in public employment may be circumvented by state or federal statute); *but see* Flagg Brothers, Inc. *v*. Brooks, 436 U.S. 151 (1977) (Stevens, J., dissenting) (a majority of the Court has never adopted the position of Justice Rehnquist in *Arnett*).

It was not inevitable that the state action doctrine would become a preeminent legal device for limiting the scope of civil rights protections. In a brilliant recent reexamination of the Civil Rights Cases, Ira Nerken has established that the public/private distinction was invoked and developed to square judicial thinking about the problem of racism with the prevailing nineteenth century theory of liberty of contract. The perverse genius of the Civil Rights Cases is the vivid parallel they drew between the Lockean theory of the "natural," pre-governmental origins of property and contract and the laissez-faire notion of the self-regulating market, on the one hand, and a similar approach to civil rights on the other, namely that racist practices are part of the natural or "social" sphere of life and therefore the ways in which private power is deployed to harm the interests of blacks should not be amenable to governmental scrutiny. Nerken writes:

State action and liberty of contract were doctrinal fortresses erected to protect the prerogatives of the propertied economic actors, seen as responsible for economic progress, against the demands of the oppressed for social progress. The blindness of these Justices to the social costs of lending full, undiscriminating support of judicial power to private entrepreneurs without regard to the effects of their activities on the victims was characteristic of judges during the greater part of the 19th century. Caveat emptor, the fellow servant rule, and the contributory negligence rule are among the better known examples of this bias. Each was of a piece with the... approach set forth in the Civil Rights Cases and Coppage, throwing back on the individual primary responsibility for avoiding the effects caused by economic actors....

There is, then, a sense underlying many of the legal theories developed during most of the 19th century that any private actor who is good enough to open his property to the public by putting it into the lines of commerce should not be discouraged by imposing even the most limited of social duties on his conduct. He need not take special care to protect consumers from harmful merchandise, employees from harm, travelers from collision, or blacks from abject discrimination. The law was too busy protecting the private actor to protect private individual victims from the antisocial by-products of the actor's activity.

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89 Nerken, A New Deal For The Protection of Fourteenth Amendment Rights: Challenging The Doctrinal Bases of the Civil Rights Cases and State Action Theory, 12 Harv. C.R.-C.L. L. Rev. 297, 298-99 (1977) ("much of the doctrinal power which sustained state action theory from its inception was power derived from one of the most forceful concepts of nineteenth century judicial theory: liberty of contract. On the now discredited liberty of contract theory state action rose but did not fall").

90 Id. at 330-32 (footnotes omitted).
Historical and textual evidence, notably the Court's analogy to the contract impairment clause,⁹¹ establish the central role of liberty of contract thinking in the process by which the state action doctrine was conceived and articulated in the Civil Rights Cases.⁹² That is, as a matter of intellectual history there was a fusion of the public/private distinction and the substance/process distinction (as the latter was embodied in the contractualist ideal that justice results from enforcing "fairly bargained" transactions). Likewise, Nerken reveals the structural correspondence between laissez-faire economic teachings (promote socially useful risk-taking by limiting legal liability and duty) and nineteenth century civil rights thinking (promote the "natural" relationship of the races, i.e., white supremacy, by limiting or eliminating any legal duties of private actors to treat others on a nondiscriminatory basis).

Just as the public/private and substance/process distinctions jointly nurture the ideological precept that equality is possible in an environment of crushing social and economic hierarchy, the two conceptions are linked to each other in that the ideal of "free" and unregulated contractual allocation of resources is plausible only upon a theory that denies the governmental origins of contract. That is, the ideal of "private contract" is coherent only if we deny the constitutive role of law in structuring and shaping the texture of social life. Put another way, the dichotomy between public and private is latent within the substance/process distinction.

The New Deal political upheaval generally and the 1930s Legal Realist movement in particular shattered forever the possibility of denying the governmental origins of contract and the role of law (including "private law") in partially constituting the structure of social and economic hierarchy. One of the lasting achievements of Realist criticism was to demonstrate that public regulatory power is implicated in every instance of actual or contemplated contract enforcement;⁹³ that "private property" cannot even be defined without reference to the actions of government;⁹⁴ and that economic power is often not very different in its impact and effects from governmental power.⁹⁵ Though the contract system is often denominated a "private ordering," legal rules shape the distribution of wealth and the permissible modes of

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⁹¹ Id. at 307-14.
⁹² Id. at 304-32.
⁹³ See Fuller, Consideration and Form, 41 Colum. L. Rev. 799, 806-07 (1941); Cohen, The Basis of Contract, 46 Harv. L. Rev. 553, 585-92 (1933).
bargaining conduct, thereby creating a "public," regulatory impact on
the substantive outcomes of so-called private ordering. In more gen-
eral terms, it became widely understood in the 1930s that the practices
classifying the "private sphere" of social and economic life are inex-
tricably linked to and partially constituted by the rule of law. By the
same token law is imbued with, when not captured by, the power
relationships of social life. The law simply does not stand apart from
the hierarchy of social life. Law and politics are implicated in the class
and racial domination that characterize American society. There is
no "core" or "infrastructure" of social or economic life that can be
meaningfully described without reference to the role of law.

These insights fed into the general political crisis of the New Deal to
produce one of the great transformations in our legal history. For
present purposes the significance of the anti-Lochner turn of the late
1930s lies in the recognition that it is appropriate and constitutional
for public power to be directed toward ameliorating the effects of class
domination. A parallel but much more muted upheaval occurred in the
civil rights arena, beginning with the White Primary Cases and cul-
minating with Shelley v. Kraemer. Shelley consolidated in the race
context the Realist insight that "private law" is a delegation to private
actors of a portion of the sovereign power, and that therefore the actions
of private actors implicate constitutional norms of equality.

The implications of Shelley were—and are—staggering. Carried
to its logical conclusion, Shelley dissolves the public/private distinction
so fundamental to liberal jurisprudence. Perhaps for this reason Shelley
has been a disfavored case, whose impact has been diluted by time:

98 Cf. I. MacNeil, Contracts: Exchange Transactions & Relations 346
(2d ed. 1978).

One form of social control is the power of contract itself—the power
society confers on each party to a contract to invoke legal sanctions
and protections. So indoctrinated are we in thinking of this form of
control as freedom of contract that we easily fail to recognize its
fundamental character: control of human behavior imposed by human
institutions.

Id. (emphasis in original) (footnote deleted).

97 These themes are discussed in Klare, Law-Making As Praxis, Telos, Sum-
mer, 1979, at 123–35.

98 See generally Kennedy, The Structure of Blackstone's Commentaries, supra

99 See Klare, supra note 97.

100 See Terry v. Adams, 345 U.S. 461 (1953); Smith v. Allwright, 321 U.S.
649 (1944); United States v. Classic, 313 U.S. 299 (1941); Grovey v. Townsend,
295 U.S. 45 (1935); Nixon v. Condon, 286 U.S. 73 (1932); Nixon v. Herndon,

101 334 U.S. 1 (1948).

102 See generally Nerken, supra note 89, at 339–60; Tushnet, Dia-Tribe, 78
"characteristically," Professor Tribe tells us, "courts and commentators have viewed Shelley with suspicion." And so, the state action legacy of the Civil Rights Cases lives on as a barrier to justice for blacks, other minority groups and the poor.

To the extent that the civil rights movement seeks to do battle against the social-systemic oppression of black people, it necessarily pushes up against the obstacle of liberal legalism. It cannot hope to succeed in such a crusade without confronting and transcending the limitations of the proceduralist ideal of justice.

This political imperative necessarily implicates the civil rights movement in the struggle against class hierarchy as such. For the public/private and form/substance distinctions are not only ideological underpinnings of the system of racial domination: they are also critical ideological props to the class structure of contemporary capitalism, certainly in the labor law context.

To the extent that it is perceived as legitimate, our social system must be justified by some theory capable of setting definable limits on the proper exercise of public regulatory power, that is, a theory capable of suppressing the insight of the 1930s that public and private are inextricably linked, indeed define each other. The imperatives of legitimation require a theory that can explain both the propriety of pervasive governmental regulation of economic conduct in modern times and the desirability of denying public regulation of the use and distribution of society’s resources through popular control over investment decisions of societal consequence. Likewise, there must be a justification for a significant national commitment to the norm of equality in a social order.

103 L. Tribe, American Constitutional Law 1168 (1978); see also id. at 1156–57.

104 See, e.g., Flagg Bros., Inc. v. Brooks, 436 U.S. 151, 166 (1977) (Marshall, J., dissenting) (“I cannot remain silent as the Court demonstrates, not for the first time, an attitude of callous indifference to the realities of life for the poor”). See also Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974); Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972). These cases required proof of active state involvement in a challenged practice in order to overcome the “state action” threshold triggering constitutional guarantees. The cases “seem difficult if not impossible to defend in principled terms.” L. Tribe, supra note 103, at 1172.

The Burger Court’s retrenchment on the “state action” doctrine has had a pronounced effect on important issues at the intersection of labor and civil rights law. The National Labor Relations Board once held that it had an obligation under the Constitution to deny certification to a union guilty of a pattern of race discrimination. Bekins Moving & Storage Co., 211 N.L.R.B. 138 (1974). Relying on the “active involvement” doctrine of Jackson and Moose Lodge, the Board recently overruled Bekins. See Handy Andy, Inc., 228 N.L.R.B. 447, 449–50 (1977). Note that the Board’s Handy Andy decision was also influenced by the fact that the Bekins doctrine could be and was used solely as a delaying tactic to evade collective bargaining obligations by employers lacking a genuine concern to remedy workplace race discrimination. See id. at 453.
that systematically generates and perpetuates inequality of awesome and brutalizing proportions. All significant attempts to generate justificatory theories of these kinds are ultimately founded on the substance/procedure and public/private distinctions. Thus, to the extent the civil rights movement is impelled by its own internal logic to confront the limits of liberal jurisprudence, it thereby challenges the ideological bases of the system of class hierarchy.

IV

THE CONVERGENCE OF LABOR AND CIVIL RIGHTS LAW

The interlocking fate of labor and civil rights law is dramatically illuminated by the great case of Steele v. Louisville & Nashville Railroad Company. Regrettably, Steele is not as well remembered as it deserves to be. Its contribution to modern civil rights law has been obscured by time. On occasion it has been literally forgotten by the Supreme Court.

In Steele the Supreme Court created one of the fundamental legal theories applicable to unionized workplaces, the cause of action for breach of the duty of fair representation (DFR). For our purposes the case is an exceptional illustration of the unfortunate consequences of the public/private distinction for civil rights thinking and of the origins of the Supreme Court’s contribution to the institutionalization of industrial conflict-resolution. The case is also emblematic of the unfortunate consequences of organized labor’s failure to hew a broader political vision, in particular a politics that unequivocally condemns racism.

Steele began as a civil rights case, brilliantly litigated by Charles Houston. Blacks had worked on southern railroads from the very be-


\[106\] In an astonishing aside Justice Rehnquist recently remarked that: “[T]he unfair representation claim made by an employee against his union . . . is more a creature of ‘labor law’ as it has developed since the enactment of § 301 [in 1947] than it is of general contract law.” United Parcel Serv. v. Mitchell, 451 U.S. 56, 63 (1981). Justice Rehnquist apparently forgets that the DFR cause of action about which he spoke originated in 1944 in Steele, not in 1947. His neglect of or disinterest in the civil rights origins of Steele, although not central to disposition of the Mitchell case, is typical of the Court’s historical blind spot on matters of race. See note 15 supra; see also Klare, United-Parcel Service v. Mitchell: Of Docket-Clearing and Employee Rights, Section News (Nov. 1981), at 1 (publication of Labor Law Section of Massachusetts Bar Association).

\[107\] 323 U.S. at 202-03.

\[108\] Charles Houston was one of the architects of the NAACP’s early legal strategy and a mentor to Thurgood Marshall. At the time of the Steele case Houston was in private practice. Marshall and William Hastie appeared on behalf of the NAACP as amici curiae. For a discussion of Houston’s role in the case see R. Kluger, supra note 83, at 228-33."
ginning of the industry in the days of slavery. Significant numbers of blacks worked in operating positions on the railroads through the late nineteenth and early twentieth centuries. The railroads hired blacks at substandard wages, a tactic designed to depress the wages of white workers. Black hiring continued in light of this objective until the federal government established an equal wage policy on the railroads during World War I. Thereafter the railroads colluded with union efforts to eliminate black employment in the industry.\(^{109}\)

Jim Crow exclusionism was the dominant pattern of railroad unionism. The Brotherhood of Locomotive Firemen (BLF), the union defendant in *Steele*, maintained a “whites only” membership policy from its founding until 1963. By the mid-1920s the railroads’ practices and the hostility of the unions resulted in the virtual elimination of hiring of black railroad workers in most job categories. When *Steele* was filed in 1941, some high seniority black firemen still remained in the industry, supposedly represented for collective bargaining purposes by a union that excluded them from membership and from participation in its affairs.

In 1940–1941, the BLF negotiated agreements with southern railroads that systematically undercut black firemen’s seniority rights and aimed through other provisions to eliminate the remaining black firemen’s jobs.\(^{110}\) Several black firemen, including Bester William Steele, a railroad employee since 1910, challenged the legality of both the contracts and the union’s exclusionary membership policy. The *Steele* case established the basic principle that as a statutory, exclusive bargaining representative a union owes a judicially enforceable duty to fairly represent all members of the bargaining unit, whether or not they are members of the union.\(^{111}\) The Court therefore held that the black plaintiffs victimized by the BLF’s attempts to impair their job-rights had stated a cause of action against the union.\(^{112}\) The Court, however, declined to hold that the union’s exclusionary membership policy violated the statutory duty of fair representation or any other provision of law.\(^{113}\)

The brilliance of *Steele* as civil rights litigation is the manner in which it adumbrated the theories and strategies of the great post-World War II civil rights cases.\(^{114}\) The plaintiffs argued that the Railway Labor Act\(^{115}\) would violate the fifth amendment due process clause if it were

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\(^{110}\) See *Steele*, 323 U.S. at 195–96.

\(^{111}\) *Id.* at 202–03.

\(^{112}\) *Id.* at 207.

\(^{113}\) *Id.* at 204.


construed to permit the exclusive bargaining representative to discriminate invidiously in contracting for job rights. In creating the duty of fair representation the Court imaginatively construed the statute so as to avoid unnecessarily deciding constitutional issues. For our purposes, much of the interest of the case lies in specifying what those latent constitutional issues were.

The conventional view of the case assumes that the constitutional issue to be avoided was whether due process is violated by a congressional delegation to the union of the power to invade the employment rights of the black firemen. A problem with this view is that absent collective bargaining under the statute the black firemen had no job or seniority entitlements at all, much less entitlements to job benefits on a non-discriminatory basis, nor had they any right to compel their employer to bargain with them. As will be seen, the real constitutional issue in Steele is whether certain types of contracting activity imbued with racism are unconstitutional if promoted or permitted by government. This is, of course, the issue ultimately faced in Shelley v. Kraemer, with such significant implications.

Steele also foreshadowed Brown v. Board of Education. The two-pronged litigation strategy leading up to Brown was first, to challenge the "separate but equal" doctrine of Plessy by pushing claims of unequal treatment to the limit, and second, to argue that there can never be equal educational opportunity without desegregated schools. The two approaches were telescoped together in Steele. The firemen successfully attacked their unequal and unfair treatment at the hands of the union. They also advanced the view that they could never obtain "fair representation" if they were denied admission to union membership. Although their bid for open admission failed, it is a key to the enduring significance of Steele as a labor law case.

The Steele fair representation principle proved disappointing as a weapon against race discrimination in employment. It provides assistance only to minority workers already employed in unionized jobs, not to those who cannot obtain work due to race discrimination. From the procedural and remedial standpoint the Steele theory is a weak tool for black plaintiffs. By contrast, the DFR concept established by Steele has become a prolific source of litigation in cases having nothing to do with race discrimination. It is of daily concern to union officials in countless situations entirely divorced from the civil rights context. DFR

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118 See text accompanying notes 141–43 infra.
117 See text accompanying notes 144–47 infra.
118 334 U.S. 1 (1948).
119 See text accompanying notes 102–04 supra.
120 347 U.S. 483 (1954).
121 See text accompanying notes 128–36 infra.
122 See generally Herring, supra note 109.
law has become today one of the primary vehicles of government intervention in the internal affairs of labor unions.

Thus, the contemporary meaning and legal significance of Steele has little to do with its civil rights origins. Steele is now chiefly cited not as a civil rights case but as the original source of DFR law, a fundamental component of the legal architecture of the organized workplace. The DFR principle plays a conspicuous role in rationalizing and legitimating collective bargaining as an institutionalized system of workplace management.

The result in Steele and the Government’s participation on the side of the plaintiffs can be referred in the short run to the need to counteract the political embarrassment of racism and labor strife on the home front during World War II. In terms of its current practical meaning, Steele is a case not so much about racism as about the needs of a collective bargaining system that seeks to induce employee consent to socially unnecessary domination in their working lives. To once again quote Dean Bell:

123 For example, Steele is cited in and the DFR principle is carefully woven into the elaborate fabric of argument in three cases prominent in the ideological tapestry of collective bargaining law. See Emporium Capwell Co. v. Western Addition Community Org., 420 U.S. 50, 63, 64, 70 (1975) (concerted employee protest against alleged race discrimination divested of statutory protection in order to “lubricate” the bargaining process with the principle of exclusive representation); NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 175, 180 (1967) (power of designated bargaining representative to protect against erosion of its status through reasonable discipline of members is integral to federal labor policy); Vaca v. Sipes, 386 U.S. 171, 177, 181, 182 (1967) (Court delineates relationship between statutory and contract rights of individual employees and relationship between courts and NLRB in enforcing DFR).

124 One suspects that the Steele Court’s motivation for allowing Jim Crow union membership policies to stand was racial accommodationism, the “go slow” policy of not pushing too far, too soon. The Court could hardly expect unions to abandon membership segregation at a time when, for example, segregation still existed in the United States Army.

125 See generally notes 20-66 and accompanying text supra. A similar argument is made with respect to Brown v. Board of Education itself in Bell, supra note 11, at 522-23. Bell demonstrates that on the normative level, the Brown case is about racism and racial equality. Id. Yet in terms of how the world is, in terms of the practical contemporary meaning of Brown insofar as that meaning can be derived from recent judicial activity in race cases, Brown and its progeny establish the principle that “[t]he interest of blacks in achieving racial equality will be accommodated only when it converges with the interests of whites.” Id. at 523.

Justice Murphy deserves to be honored for sharp insistence, in his Steele concurrence and elsewhere, on keeping the national focus on the evils of racism. In Steele, he stated that: “Racism is far too virulent today to permit the slightest refusal, in the light of a Constitution that abhors it, to expose and condemn it wherever it appears in the course of a statutory interpretation.” Steele, 323 U.S. at 209 (Murphy, J., concurring). See also Justice Murphy’s dissent in Korematsu v. United States, 323 U.S. 214 (1944). Justice Murphy stated that the wartime
American legal history suggests that . . . the most significant political advances for blacks resulted from policies which were intended and had the effect of serving the interests and convenience of whites rather than remedying racial injustices against blacks; this conclusion is justified even though the actions also had a Liberating effect.

. . . the major Liberating events in black history have, in fact, been motivated less by black suffering than by the pragmatic advantage they offered white society.126

If we look more to long run effect than to motive, and if we amend Dean Bell’s point to refer to the interests and advantages of the dominant economic class within white society, then Steele is a perfect exemplar of his thesis.

Two aspects of the Steele case should be emphasized. First, the Supreme Court was specifically asked but declined to hold that the statutory bargaining representative must admit blacks to membership.127 Second, Steele exemplifies the manipulation of the public/private dichotomy, and its contribution to the ideological foundations of advanced capitalist legal culture.

In holding that unions owe a duty of fair representation to all members of the bargaining unit, but that the duty does not require unions to allow all bargaining unit employees to become union members, the Court committed itself to a particular perspective on the question of internal union democracy. It is a necessary premise of the Court’s holding that it is possible for a labor organization to provide “fair representation” to employees whom it declines to admit to union membership policy of exclusion of persons of Japanese ancestry from the Pacific Coast fell into “the ugly abyss of racism,” id. at 233 (Murphy, J., dissenting). Justice Murphy concluded by saying: “I dissent, therefore, from this legalization of racism. Racial discrimination in any form and in any degree has no justifiable part whatever in our democratic way of life.” Id. at 242 (Murphy, J., dissenting). It is interesting to note that Justice Murphy was, as governor of Michigan, a witness to and pivotal participant in one of the most important labor confrontations in American history, the great General Motors sit-down strike of 1936-1937.

126 Bell, Racial Remediation: An Historical Perspective on Current Conditions, 52 Notre Dame Law. 5, 6-7, 22 (1976).

127 Compare Steele, 323 U.S. at 204, with Brief for Petitioner at 26, Tunstall v. Brotherhood of Locomotive Firemen & Enginemen, 323 U.S. 210 (1944) [hereinafter cited as Houston Brief], and Motion and Brief for Amicus Curiae National Association for the Advancement of Colored People at 2, 4, Steele & Tunstall v. Brotherhood of Locomotive Firemen & Enginemen, 323 U.S. 210 (1944) [hereinafter cited as NAACP Brief]. The United States, though aligned as amicus curiae on the side of the plaintiffs, refused to join their bid to have the Court require unions to desegregate. See Brief for Amicus Curiae United States, at 38, Steele & Tunstall v. Brotherhood of Locomotive Firemen & Enginemen, 323 U.S. 210 (1944); 1 H. Hilt, supra note 17, at 107 note *. I am indebted to Mr. James M. Nabrit, III, for kindly providing me with a copy of the difficult to obtain Houston Brief.
ship or, indeed, to union meetings. That is, the Court believed a union can adequately fulfill its duties as a bargaining agent without the participation and active involvement of represented employees in the union’s decision-making process and without inclusion of the represented in the leadership cadre who square off against the employer at the bargaining table.

This conception of fair representation without participation rests on a particular model of the collective bargaining process: a non-participatory conception, in which the bargaining agent stands at a distance from the rank-and-file. There is, of course, an alternative conception: that the only kind of labor union that can fairly and effectively represent employees is a union operating on the principle of participatory democracy. On this model, fair representation requires participation of the represented, and the statutory duty of fair representation itself implies a right to union membership on a non-discriminatory basis.128

The NAACP argued from this latter perspective over and over again in its Steele amicus brief. That largely forgotten brief is a remarkable document, illuminating the inextricable link between the struggle against racism and the quest for industrial democracy. The NAACP brief stated:

A labor organization which refuses because of race to admit to membership employees within a craft or class does not meet the requirements which the Railway Labor Act imposes as a condition precedent to any organizations [sic] qualifying to act as the exclusive statutory representative of such craft or class for purposes of collective bargaining. . . . Congress intended that only an organization which was organized to practice genuine collective bargaining could serve as such a representative. It is a basic conception of labor relations and of the trade union movement that collective bargaining is a system whereby all employees . . . participate by a democratic representative system of self-government in the determination of their conditions of employment. An organization which refuses to admit to membership all employees within the craft or class who are willing to abide by its reasonable rules or regulations is not practicing collective bargaining . . . .

. . . .

It is impossible for the Brotherhood to represent the Negro firemen fairly and impartially so long as they are barred from membership. Its action cannot be representative until the Negro fireman can go to meetings, know what problems the white firemen are discussing, let the white firemen hear his views and his problems, participate in framing the bargaining policy and proposals and in the nomination and election of union officers, bargaining and grievance committees. . . .

From the Declaration of Independence to date, the principle that the only legitimate government is one in which the gov-

The NAACP’s position was summed up in a section heading: “Collective bargaining is a system whereby all employees whose terms of employment are being fixed participate within the union in determining the terms of their employment.” Likewise, Charles Houston’s brief eloquently drew the connection between racial justice and economic justice:

The idea of the welfare of the group is inconsistent with a situation where the majority excludes the minority from any participation in the formation of policy or handling of grievances. In order to establish the welfare of the group industrial representation must be based on industrial democracy, upon the broadest possible participation by the employees in the craft or class in both the original formation of collective bargaining policy, the negotiation and consummation of the collective agreement, and the continuing function of the representative in policing the agreement.

The plaintiff’s position, that genuine collective bargaining requires internal union democracy, prevailed in a great California case decided shortly after Steele. The holding of James v. Marinship, that a closed shop and a closed union may not coexist, was essentially codified in the Taft-Hartley amendments to the Wagner Act. Nonetheless the federal courts continued to reject the basic principle that the duty of fair representation implies a right to union membership. In the mid-1970s, thirty years after Steele, the National Labor Relations Board and courts at last concluded that segregation in union membership violates the National Labor Relations Act, upon reasoning that may have been participate, has been one of the most basic tenets of our political philosophy.129

130 Id. at 17.
131 Houston Brief, supra note 127, at 33–34.
132 25 Cal. 2d 721, 155 P.2d 329 (1944). The California Supreme Court held that a labor union could not insist upon exercising quasi-monopolistic economic power under a closed shop agreement and at the same time discriminate in membership on the basis of race. Although decided under state law rather than the federal duty of fair representation doctrine, James is at least in part premised on the notion that only a participatory union can fairly represent its constituency: “It is difficult to see how a union can fairly represent all the employees of a bargaining unit unless it is willing to admit all to membership, giving them the opportunity to vote for union leaders and to participate in determining union policies.” Id. at 735, 155 P.2d at 337. NAACP counsel Thurgood Marshall entered an appearance on behalf of the plaintiff black employees in James.

evoke but does not clearly adopt the James principle. At the same time the judiciary clings to an antiparticipatory conception of collective bargaining and rejects the notion that the duty of fair representation gives rise to participatory rights other than, perhaps, the right to membership itself.

A second feature of Steele meriting detailed review is its treatment of the public/private issue, which appeared in two guises. Initially Steele presents the issue of whether unions as entities are “private” associations. The answer to that question was thought to dispose of the discrimination in membership problem. A second issue is whether union negotiating conduct takes on the imprimatur of “governmental action” implicating fifth amendment norms. If so, as the Court concluded, the statute had to be construed to imply the DFR in order to protect the Railway Labor Act from constitutional infirmity.

These two distinct incarnations of the public/private problem (i.e., whether unions are public or private entities, and whether union bargaining conduct has a quasi-governmental character) reflect two aspects of contemporary politics. The “entity focus” reflects the phenomenon of corporativism; i.e., the contemporary rise to prominence of vast, bureaucratic entities (corporations, unions, trade associations, universities) that are nominally private but that in fact routinely make decisions of societal consequence. The “conduct focus” reflects the per-

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135 See Locals 106 & 245, Glass Bottle Blowers Ass’n, 210 N.L.R.B. 943, 86 L.R.R.M. 1257, enforced sub. nom. NLRB v. Local 106, Glass Bottle Blowers Ass’n, 520 F.2d 693 (6th Cir. 1975). This case held that segregation of union membership on the basis of an invidious criterion—there, sex discrimination—violates § 8(b)(1)(A) of the National Labor Relations Act, 29 U.S.C. § 158(b)(1)(A) (1976). The case is frequently cited for the proposition that membership segregation violates the DFR:

[T]he NLRB has concluded that local unions segregated by race or sex violate the duty of fair representation. Separate representation cannot be equal representation.

... “Fair representation” may presuppose that persons will not be invidiously excluded from membership and by this exclusion denied a role in the internal union processes by which representational decisions are made.

M. Player, Federal Law of Employment Discrimination in a Nutshell 31-32 (2d ed. 1981) (citation omitted). Unfortunately, neither the NLRB nor the Sixth Circuit adopted this theory to explain the result. Only one NLRB member invoked this principle. See NLRB v. Locals 106 & 245, Glass Bottle Blowers Ass’n, 210 N.L.R.B. at 944 n.5; 520 F.2d at 695 n.1. The NLRB had earlier held that racial segregation of local unions contravened the Labor Act, but it did not clearly do so on the basis of the reasoning of James. See Independent Metal Workers Union Locals 1 & 2, 147 N.L.R.B. 1573 (1964).

136 See, e.g., Aikens v. Abel, 373 F. Supp. 425 (W.D. Pa. 1974) (DFR does not require direct membership participation in the decision to waive the statutory right to strike).

137 See Steele, 323 U.S. at 204. Even Justice Murphy agreed that a union is a private association. Id. at 208 (Murphy, J., concurring).
vasiveness in advanced capitalism of governmental regulation of private economic conduct. While the two formulations of the problem diverge in emphasis, they are closely linked. A key to determining whether unions are public or private entities is the degree to which their existence and powers are fostered by government and the degree to which they take action affected with a public interest. Likewise, the key to the latent constitutional question in Steele is not so much the degree of government involvement in the union's collective bargaining conduct, but rather the semi-governmental, law-making character of collective bargaining activity carried on by nominally private entities.

Given the close linkage between the two formulations of the public/private problem in Steele one is entitled to express at least mild confusion that the Court came out differently on the questions of membership and bargaining conduct. For the purpose of membership unions were found to be private voluntary associations, and therefore were permitted to exclude blacks. However, when bargaining with employers, union conduct was deemed so close to the exercise of public power that constitutional norms applied and race discrimination was forbidden. The Court apparently found it possible to distinguish between the exercise by a statutory representative of its bargaining authority ("public") and the legal existence as such and the internal policy-making processes of unions ("private"). The ground rules and processes by which a union decides and is legally authorized to seek the elimination of jobs is so different from a union's actual efforts to achieve that goal that constitutional norms are implicated in the latter instance but not the former.

In the factual context of Steele no meaningful distinction of this kind can be made. This is particularly so if "publicness" is measured by social impact or consequence. Even if the test of "publicness" is the degree to which agencies of government have empowered unions or have "insinuated [themselves] into a position of interdependence" with them, it is difficult to support a constitutional distinction between Congress's involvement in promoting the union as a legal entity and its involvement in the union's conduct at the bargaining table. The politi-

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138 While the statute does not deny to such a bargaining labor organization the right to determine eligibility to its membership, it does require the union, in collective bargaining and in making contracts with the carrier, to represent non-union or minority union members of the craft without hostile discrimination, fairly, impartially, and in good faith. Id. at 204.


140 The statement in the text should not be construed as an argument that, indeed, internal union affairs are "public" business. Rather, my argument is that the "either/or" distinction between "public" and "private" is fundamentally incoherent and therefore susceptible to unprincipled manipulation. See generally Klare note 58 supra.
cal function of this aspect of the Steele case is to induce belief that the central economic decision-makers in American life should be treated as "private" even though the consequences of their "internal" decisions affect the distribution and use of society's resources and thereby the quality of all of our lives.

The Court leaves unclear the rationale for its conclusion that a union is private but its bargaining conduct is quasi-public. We must now focus more precisely on the "governmental action" reasoning of Steele. What indeed was the source of "governmental action" that gave rise to constitutional issues respecting the union's bargaining posture? It will not do to say that the governmental action consisted in the fact that the union's power to bargain on behalf of the black firemen derived from the statute, the Railway Labor Act. The powers of every business corporation derive from statute. If derivation of a power from statute were enough to make an entity subject to constitutional constraints, all corporations would have to answer to the due process and equal protection guarantees. Obviously this was not the law in 1944, nor is it the law today.

Perhaps the "governmental action" consisted in the fact that the exclusive representation provisions of the statute141 deprived the black firemen of the privilege of bargaining directly with their employers. The problem with this approach is that absent the statute that privilege existed only if the employer consented to negotiate with a union of black firemen. That is, the statute cannot be said to have deprived the black firemen of a privilege they really possessed in any but a fictional sense. The Steele Court gave a cursory and most unsatisfactory treatment to this theory. It said: "The minority members of a craft are . . . deprived by the statute of the right, which they would otherwise possess, to choose a representative of their own, and its members cannot bargain individually on behalf of themselves as to matters which are properly the subject of collective bargaining."142 Here the Court simply ignores the fact that there is no inherent "right" of a minority group or an individual to bargain; there is only a privilege to do so if the employer, in its unfettered discretion, is agreeable. Presumably because it was meaningless in practical terms, the Court did not really rely upon, or even clearly delineate, the only legal right "taken" from the black firemen by the Railway Labor Act, the chimerical "right" to bargain with an employer with the latter's consent.143 In short, reference

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142 323 U.S. at 200 (citation omitted).
143 The right of individuals or dissenters to treat directly with their employer, at least in the grievance context, was explicitly preserved by the Congress in the proviso to § 9(a) of the National Labor Relations Act, 29 U.S.C. § 159(a) (1976). Subsequent to Steele, the Court, per Justice Marshall, had occasion to consider
to the powers accorded the union under the Railway Labor Act is not, by itself, a satisfactory explanation why "governmental action" might be present in Steele, although admittedly this is the way the case is traditionally understood.

Steele hints at another approach, that governmental action is present in any context in which rules of law potentially ratify or annul the outcomes of private social and economic intercourse. This view, adopted four years later in Shelley v. Kraemer, ultimately see all behavior as touched by governmental action since all behavior is directly or indirectly influenced by past legal outcomes and is always to some extent premised upon expectations about future legal outcomes. In the Steele context, the Railway Labor Act set the stage for negotiation of the challenged contracts and the machinery of law was potentially available to insure their enforcement and administration. On the logic of Shelley we could easily find these factors sufficient to meet the governmental action requirement.

Although perhaps this is a consistent approach to Steele, the opinion does not really endorse it. The logic of Shelley very rapidly and completely explodes the public/private distinction. In Steele, however, one of the Court's objectives was precisely to renew the continuing vitality of the public/private separation as a theoretical hallmark of our jurisprudence. Thus, although in retrospect Steele pointed in the direction of Shelley, doubtless it was not the intention of the Court to endorse the Shelley theory in Steele.

The only coherent explanation of why governmental action might be present and therefore why constitutional questions are posed by Steele is the so-called "public function" strand of the state action doctrine. On this analysis collective bargaining activity is arguably imbued with the imprimatur of governmental action not because it is based upon or fostered by the statute, but because collective bargaining is by its very nature a law-making activity. The Court writes:

[T]he [bargaining] representative is clothed with a power

this "right" in Emporium Capwell Co. v. Western Addition Community Org., 420 U.S. 50 (1975). The Court indicated how insignificant it felt a right to treat with one's employer at the latter's consent was by denoting it a "right"—with quotation marks. See id. at 61 n.12.

While I agree with the Court that a right to treat with the employer only if the employer consents is no more than a "right," footnote 12 of Emporium Capwell is grievously wrong. Congress intended the § 9(a) proviso to grant a genuine right, not a "right." See generally Dunau, Employee Participation in the Grievance Aspect of Collective Bargaining, 50 Colum. L. Rev. 731 (1950); Lynd, The Right to Engage in Concerted Activity After Union Recognition: A Study of Legislative History, 50 Ind. L. J. 720 (1975).

144 323 U.S. at 201-03.
145 334 U.S. 1 (1948).
146 See generally L. Tribe, supra note 103, at 1163-67.
not unlike that of a legislature which is subject to constitutional limitations on its power to deny, restrict, destroy or discriminate against the rights of those for whom it legislates and which is also under an affirmative constitutional duty equally to protect those rights.

... We think that the Railway Labor Act imposes upon the statutory representative of a craft [under the construction now adopted by the Court] at least as exacting a duty to protect equally the interests of the members of the craft as the Constitution imposes upon a legislature to give equal protection to the interests of those for whom it legislates. Congress has seen fit to clothe the bargaining representative with powers comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents . . . \(^\text{147}\)

It is worth reemphasizing that the union’s status under the statutory scheme was not sufficient by itself to trigger constitutional norms. Otherwise the membership exclusion would of necessity have been struck down. Clearly the quasi-constitutional duty of fair representation as conceived in Steele does not attach to the union in all its dealings with bargaining unit employees but only when the union is engaged with the employer in establishing terms and conditions of employment. The Court at first seems to analogize the union itself, as a representative body, to a legislature. But reflection reveals that the analogy intended is between the process of collective bargaining and legislation. The “power” subject to constitutional limitations is not the decision-making power of the union in general, but its power to affect the job-rights of unit employees by the positions it takes in contract negotiations and grievance processing. In sum, the “governmental action” in Steele is the conduct of union and employer in making the “law of the shop.” This conduct is quasi-public not so much because it is required, engendered, and surrounded by governmental regulation, but because it is a type of activity that is governmental in nature.

The Court invoked the analogy of collective bargaining to legislation to solve the immediate problem of how to make a politically required incursion against racism in 1944 while stopping short of a full-scale illegalization of Jim Crow unionism. Once in place, the legislative analogy took on a life of its own for labor law purposes. Indeed, it was destined to become the pre-eminent justificatory metaphor employed in the Court’s development of the law of collective bargaining.\(^\text{148}\) As one of the earliest Supreme Court decisions to utilize the legislative metaphor, which by then had long had a place in the management literature,

\(^{147}\) Steele, 323 U.S. at 198, 202.

Steele represented a quantum leap forward in the Court's sophistication on matters of management theory. By the 1960s the "mini-government" rubric had become the theoretical lynchpin of the Court's bureaucratic conception of collective bargaining. Grievance arbitration was added to the mini-government model as an "adjudicative" function to complement the "legislative" function (contract negotiation).149 As the components of the industrial self-government model fell into place, workers were systematically deprived of their rights to engage in concerted self-help to redress their industrial grievances.150

The contemporary deployment of Steele's legislative metaphor is illustrated by Justice Douglas's comments in the famed Steelworkers Trilogy.151

The collective bargaining agreement states the rights and duties of the parties. It is more than a contract; it is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate . . . . The collective agreement . . . calls into being a new common law—the common law of a particular industry or of a particular plant.

. . . . A collective bargaining agreement is an effort to erect a system of industrial self-government.152

Here the Court utilizes the legislative metaphor to promote the "governmental function" theory of collective bargaining,153 but shifts from emphasis on the "publicness" of collective bargaining to an emphasis on its bureaucratic, rule-making character. The purpose of the legislative analogy in Steele was to emphasize the public character of collective bargaining, i.e., its impact on the rights and quality of life of millions of represented workers. This thrust is now suppressed. Today the legislative metaphor is invoked to legitimate, through the fiction of employee consent, the system for generating rules to govern the workplace hierarchically. Parliamentary imagery is now used to justify the necessity of hierarchical government in modern industrial operations through a command structure embodied in a system of rules.

The legislative analogy is the intellectual fountainehead of the institutionalized, bureaucratic vision of collective bargaining and workplace dispute-resolution. It underlies the contraction of the right to worker participation and self-help. It is at the root of a system of industrial relations that breeds the dependency of the working class upon govern-

149 See Klare, Ideology, supra note 20, at 467.
150 See notes 33, 47, 52 and accompanying text supra.
ment and upon formalized dispute-resolution mechanisms as opposed to encouraging working class self-reliance and self-activity. The legislative analogy by no means originated in Steele. But Steele launched the Supreme Court's long career in creative manipulation of the concept in the course of fashioning the legal and ideological architecture of the modern workplace. In this respect Steele symbolizes how labor's racism is a catastrophic obstacle to industrial freedom for all workers.

V

POLITICAL REFLECTIONS

Several political observations are suggested by the foregoing discussion, although this Article does not purport to demonstrate them.

It is suggested that there is a connection between the debilitation of the labor movement and its integration into a government sponsored system for the management and institutionalization of class struggle. This cooptation process has been greatly facilitated by the failure of the labor movement during and since the upheavals of the 1930s to advance and adhere to a totalistic, oppositional political vision and by its failure consistently to press for an end to all forms of social injustice. These points in turn suggest the central proposition that the labor movement cannot transcend the restrictive confines of a bureaucratized, process-oriented industrial governance system unless it makes an irreversible commitment to abolishing racism in all aspects of American life. On the other hand, the civil rights movement cannot escape the narrow confines of liberal reformism without confronting the question of structural inequality, that is to say the question of class domination. The discussion implies, in short, that on some levels the pursuit of economic and racial justice converge.

As we observe points of convergence it is also important to be attentive to the distinctness and unique histories of the phenomena of class and racial domination. While analysis of class and race hierarchy reveals related and linked attributes of the social order, it is not implied that class and race domination can be understood solely in common terms, much less that one phenomenon can be reduced to the other. The

154 It bears mention that the failure of the Marxist tradition, for the most part, to acknowledge the historical uniqueness of American racism as a mode of domination has severely limited Marxism's contributions to understanding American historical reality. I have elsewhere argued that:

[n]o comprehension of American reality is possible without an understanding of the way in which the suppression of internal minorities through racism and of the Third World through imperialism have decisively shaped every aspect of American society, culture, and politics . . . . American Marxism has missed the boat in regard to the problem of racism . . . . One might note in passing that it is no accident that what is probably the outstanding contribution of American Marxism, W. E. B. DuBois's monumental Black Reconstruction In America,
claim advanced here is merely that we can gain in our understanding of class and racial domination by viewing each problem in the reflected light of the other.

The focus of this discussion has been upon prevailing legal ideology as a component of political power. A methodology premised on the sustaining power of the dominant ideas and values naturally suggests that the articulation of and struggle for counter-hegemonic ideas and values might be a source of power for social change. That is, it suggests that those in opposition should seek common understanding and jointly forge alternative visions of how society ought to be organized. To the extent that the discussion points to the desirability of "convergence" at the political level it is less relevant to the question of alliances as such, important as these are. Rather it is more concerned with the need to elaborate shared conceptions of justice, conceptions that reflect common understandings of the meaning and institutional preconditions of freedom, yet that are at the same time informed by the distinct perspectives and unique historical experiences of minority groups and organized workers. Alliances are devoutly to be desired in the cause of progressive social change. But alliances forged primarily on the basis of group self-interest have a tendency to unravel when instrumental ends diverge. The full and unwavering commitment of organized labor to the struggle against racism can be won, if at all, only on the basis that that struggle is just, because it advances a vision of a better world in which we ex-

was written outside its mainstream by a black man who had plunged to the depths of this country's history of racism . . .


By the same token, class analysis has much to contribute to the struggle against racism. It offers a valuable account of the structural setting of American racism, that is, of the political and economic system in which it is embedded. Class stratification exists within minority communities, raising difficult questions for the civil rights movement. Moreover, the tradition of social theory from which class analysis derives has much of continuing relevance to contribute to the vision of freedom as the total emancipation of human potential. The more limited civil rights view of "equality of opportunity" within a system founded upon inequality and exploitation ought to be scrutinized in the light of this broader vision.

155 See text accompanying note 16 supra.
perience all forms of destructive hierarchy and domination as intolerable. The aspiration to create that better world is latent in the need of all workers for emancipation. Therefore the struggle should not be to advance group interests within the horizons of the established order, but rather to advance and defend entirely new ways of organizing social life, new conceptions of social relationships and of community, work, and democratic governance. It is hoped that the type of inquiry engaged in here—critical analysis of ideological artifacts like legal rules that define and reinforce prevailing social arrangements—has something to contribute to the effort to develop such alternative conceptions.

Conclusion

This Article primarily was concerned with analyzing the ideological content of legal doctrine and its contribution to shaping the contours of the American political imagination. The Article has attempted to show how legal ideas about workers' rights and racial equality legitimate and reinforce a view of justice that is hospitable to domination and inequality. The connection between the contemporary ideological underpinnings of class and racial domination suggests the need for the labor and civil rights movements to work out common political approaches and shared conceptions of justice.