
CLASS AND STATUS IN AMERICAN LAW: RACE, INTEREST, AND THE ANTI-TRANSFORMATION CASES

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I. INTRODUCTION

[C]lass is a cultural as much as an economic formation . . .¹

There has been a recent resurgence of interest in class in legal scholarship.² This development might have been predictable. Inequality in

1. E. P. THOMPSON, *THE MAKING OF THE ENGLISH WORKING CLASS* 13 (1964).

2. For example, the University of Pennsylvania Law School recently hosted a conference on "Law and the Disappearance of Class" (November 2001). Courses on class and the law are taught at least at four law schools: U.C. Berkeley (Boalt Hall), the University of Miami, the University of Michigan, and Santa Clara University. A recent book coauthored by a law professor emphasized the continuing political importance of the white working class. *See generally* RUY TEIXEIRA & DEL

America has grown sharply over the past two decades.³ Working people face job tenure insecurity, massive shifts in work structures, and heavy debt.⁴ Indigent families have begun experiencing the termination of assistance from the state.⁵ Revelations of corporate wrongdoing highlight the power of wealth. But the new interest in class is not rooted primarily in concern with the conditions of low wage workers or the unemployed. Rather, it is a new twist on the topic of race. Out of social discomfort and legal challenges to affirmative action, judges and scholars are seeking a way to confront inequality without confronting race.⁶

ROGERS, AMERICA'S FORGOTTEN MAJORITY: WHY THE WHITE WORKING CLASS STILL MATTERS (2000). There have been calls for more scholarship on class. *See, e.g.*, Angela Harris, *The Jurisprudence of Reconstruction*, 82 CAL. L. REV. 741, 777 (1994), and new work emphasizing the importance and transformative potential of multiracial experience among workers, Cynthia L. Estlund, *Working Together: The Workplace, Civil Society, and the Law*, 89 GEO. L.J. 1, 67 (2000) (noting that "[w]e may aspire to make the workplace a realm of equality on the basis of race, sex, and ethnicity, but the workplace remains a bastion of class inequality."). Many recent works discuss issues of affirmative action based on economic disadvantage. *See generally* RICHARD D. KAHLBERG, *THE REMEDY: CLASS, RACE, AND AFFIRMATIVE ACTION* 83–120 (1996); R. Richard Banks, *Meritocratic Values and Racial Outcomes: Defending Class-based College Admissions*, 79 N.C. L. REV. 1029 (2001); Richard H. Fallon, Jr., *Affirmative Action Based on Economic Disadvantage*, 43 UCLA L. REV. 1913 (1996); Deborah C. Malamud, *Assessing Class-Based Affirmative Action*, 47 J. LEGAL EDUC. 452 (1997) [hereinafter Malamud, *Assessing Affirmative Action*]; Deborah C. Malamud, *Class-Based Affirmative Action: Lessons and Caveats*, 74 TEX. L. REV. 1847 (1996) [hereinafter Malamud, *Lessons and Caveats*]; Richard H. Sander, *Experimenting with Class-Based Affirmative Action*, 47 J. LEGAL EDUC. 472 (1997).

3. *See* LAWRENCE MISHEL, JARED BERNSTEIN & JOHN SCHMITT, *THE STATE OF WORKING AMERICA, 2000/2001* 37–49 (2001) (noting that the last few decades have witnessed a historically large shift of economic resources from those at the bottom and middle of the income (or wage or wealth) scale to those at the top). "The result has been an increase in inequality such that the gap between the incomes of the well-off and those of everyone else is larger now than at any point in the postwar period." *Id.* at 48. Angela Harris argues:

Inequality is not just an accidental byproduct of capitalism. It's capitalism's major product. And in contemporary America, that inequality seems to be increasing. The richest Americans keep getting an increasing share of the nation's wealth, while the rest of us are competing for an ever smaller share of the pie.

Angela P. Harris, *Beyond Equality: Power and the Possibility of Freedom in the Republic of Choice*, 85 CORNELL L. REV. 1181, 1190 (2000).

4. *See* MISHEL, BERNSTEIN & SCHMITT, *supra* note 3, at 221–53 (discussing job instability and the growth of the contingent workforce); *id.* at 257–58, 278–80 (discussing burden of debt).

5. *See, e.g.*, Alexandra Marks, *Spike in Welfare Rolls Reignites Debate over Safety Net*, CHRISTIAN SCI. MONITOR, Feb. 7, 2002, at 2 ("An analysis done by the National Campaign for Jobs and Income Support, a grass-roots advocacy group in Washington, found that 150,000 people have already had their Temporary Assistance to Needy Families (TANF) checks reduced or terminated permanently as a result of the federal five-year time limit on benefits.>").

6. Proposals that call for grounding redistributive programs in "class" are attempts to address past injustice and present inequality without using racial categories to accomplish transformation. These programs are really concerned with status, rather than class in any relational sense, and do not usually address group relations of power at all. *See infra* text and accompanying notes Part D.1.

Class is important in its own right, but in the United States people usually do not talk much about it.⁷ The term is unfamiliar, packed with many different meanings,⁸ and uncomfortably radical. In law and popular discourse, the figure of the white working class person has appeared in recent years as the symbol for the need to end or change affirmative action.⁹ A searching examination of interest in white working people requires a closer look at class and the social construction of race. The concept of class seems tame only in comparison to the volatility of the discourse on race. It only remains tame if it is understood through a simplistic notion of individual status and divorced from conflict and from consciousness of shared interest among oppressed people—in other words, from groups and relationships of power.

This Article explores the relationship between class and race in the cases that limit structural transformation in the areas of work (the “affirmative action” cases) and political power (the “voting rights” cases). These are anti-transformation cases; although they occur in different contexts, taken together, they effectively protect both class and race privilege and limit structural gains for African Americans and other people of color.¹⁰ This Article makes a series of connected arguments about the complex relationship between race and class in these cases. First, there are many ways of understanding economic inequality, and all workers in the field of law should begin to think about what we mean when we use the term “class.” Second, the concept of *class* that we choose as a framework will affect our concepts of *race* and interest. Third, conservative concepts of class, status, and interest have been incorporated into the reasoning of

7. BENJAMIN DEMOTT, *THE IMPERIAL MIDDLE: WHY AMERICANS CAN'T THINK STRAIGHT ABOUT CLASS* 17 (1990) (discussing the lack of real exploration of class issues). Within a “mythology of classlessness,” *id.* at 29, talk establishing class superiority comes up all the time, but “[i]n theory, class is an unmentionable.” *Id.* See also BELLHOOKS, *WHERE WE STAND: CLASS MATTERS* vii (2000) (“As a nation we are afraid to have a dialogue about class even though the ever-widening gap between rich and poor has already set the stage for ongoing and sustained class warfare.”).

8. See, e.g., Ira Katznelson, *Working Class Formation: Constructing Cases and Comparisons*, in *WORKING CLASS FORMATION: NINETEENTH-CENTURY PATTERNS IN WESTERN EUROPE AND THE UNITED STATES* 16 (Ira Katznelson & Aristide R. Zolberg eds., 1986) [hereinafter Katznelson, *Working Class Formation*] (“As a concept, class has soaked up so much meaning that it has become bulky to use . . . [it] has been used too often in a congested way, encompassing meanings and questions that badly need to be distinguished from each other.”). *Id.* at 13–14.

9. See Frances Lee Ansley, *Stirring the Ashes: Race, Class, and the Future of Civil Rights Scholarship*, 74 *CORNELL L. REV.* 993, 1005 (1989) (noting with irony the emergence of the white worker in these arguments). See also KAHLENBERG, *supra* note 2, at 18 (arguing harm to whites and damage to coalition opportunities from affirmative action programs).

10. Most scholarly criticism has appropriately focused on defending minority interests. This article is not a substitute for those arguments but a companion project, exploring the way the Rehnquist Court treats interest in white working people.

legal cases. Finally, the concepts adopted in law yield results in the fields of work and politics that particularly harm people of color but that also harm class interests of white workers—the very parties who provide the excuse for the retreat from work toward racial transformation and social justice.

Both class and race are moving targets, their meanings forged through social processes and human relationships that change over time. Part II briefly reviews important aspects of white positioned perception to answer a famous riddle—why affirmative action programs seem threatening to white people whether or not they result in much actual change. Affirmative action disturbs settled norms even when whites have no conscious attachment to privilege or intent to discriminate. Whiteness as a dominant cultural norm explains both white discomfort with race-conscious programs and the role of the term “merit” in debates about affirmative action.

Part III turns to concepts of class and their interaction with white privilege. Two major aspects of class theory are important to issues of race and transformation in law. The first is the conceptualization of structural inequality. There are many possible ways of thinking about the economic, social, and political relationships involved in the production, control, and distribution of wealth. Among these, American law and popular discourse tend to choose a simplistic concept of socioeconomic status disconnected from group relations of power. The choice of theoretical framework has important consequences for analysis of race, because different models of structural inequality yield different concepts of the interest of whites in maintaining white privilege. Simplistic concepts of status tend to make white attachment to white privilege seem natural, inevitable, and unchangeable. Class-based solidarity, in contrast, creates a basis for identity that may diminish white working class attachment to race privilege or at least create openings for change.

The second important aspect of class is the relationship between structural frameworks of analysis and the way people understand collective interests and work for social change. Class identity is constructed not only from economic position or shared understanding but through shared action. America is filled with multiple obstacles to class solidarity, including residential segregation, employment discrimination, and racism as a persistent and pervasive ideology. Middle-class notions of working-class interest are particularly insidious: white working-class interest in protecting privilege is generally perceived as economic in nature and fundamentally selfish, while middle-class protection of privilege is characterized as moral in nature and concerned with appropriate societal protection of all

individuals. Because class is “a cultural as much as an economic formation,”¹¹ legal claims about interest *and* legal rules affecting relations between social groups both affect class formation in America.

Although law is part of the emphasis on race over class in America today, I do not argue that courts and legal scholars should “do class” instead of “doing race” in the jurisprudence of transformation. Using either race or class as the sole analytical framework for the interests of white working-class people results in a more conservative politics of identification and action than when both class and antiracism are analyzed together. If we only “do race,” white workers hear only about the qualities they share with whites from other classes and higher socioeconomic status—not about interdependence, mutuality, or the many ways in which people of color have brought militancy to the defense of labor. If we only “do class,” race will not correspondingly disappear from the experience of white workers. Because white privilege remains unnoticed by white people, struggles waged by people of color against oppression and exclusion will be experienced as disruptive and unjustified.

Parts IV and V explore class interest in the cases on affirmative action and voting rights. Recognizing class interest would have disrupted doctrinal reasoning in the cases from *Firefighters v. Stotts*¹² to *Adarand v. Peña*,¹³ transforming the ways in which cases on work can be said to be like other cases. Class would have provided a richer framework for analyzing the benefits and burdens of transformative programs for all those affected, including white workers.¹⁴ Attention to class issues would also have disrupted the leap from the cases on work to the cases on voting and political power. The political economy of the much-litigated Twelfth District in North Carolina favored working class mobilization and influence,¹⁵ but class played no part in the Court’s conception of the interest of white people in this district in *Shaw v. Reno*¹⁶ and its progeny.

11. THOMPSON, *supra* note 1, at 13.

12. 467 U.S. 561 (1984).

13. 515 U.S. 200 (1995).

14. For example, class interest is quite different for working people in the context of layoffs than in the award of municipal contracts. *See infra* notes 274–80 and accompanying text.

15. The Twelfth District linked industrial locations along an interstate highway in a state that had chosen to scatter industrial centers and urban areas. *See* PHILLIP WOOD, SOUTHERN CAPITALISM: THE POLITICAL ECONOMY OF NORTH CAROLINA, 1880–1980 163 (1986) (discussing how North Carolina promoted investment based on the rural and small-town base of its working class; state policy promoted decentralized development and a pattern of small urban centers). *See also infra* notes 331–69 and accompanying text. By bringing scattered industrial locations together, the district concentrated votes of industrial workers.

16. 509 U.S. 630 (1993).

The evolution of doctrine in both lines of anti-transformation cases depends on the absence of class as a cognizable category in American law. If working class interest were examined closely, the cases would have been reasoned and decided differently. The description of the interest of white workers in these cases consistently chooses race and status over solidaristic concepts of class: the “reverse discrimination” cases effectively name the *economic* interests of that group as white rather than as working class, and the “voting rights” cases name their *political* interests as white rather than as working class.

E.P. Thompson defined class not as a “structure” but as “something which in fact happens.”¹⁷ Arguments about interest are part of the construction of social groups. The anti-transformation cases help to construct a political theater in which “class”—in the sense of combined mobilization and consciousness—is less likely to “happen” at all. As law names interest and distributes power, it affects the ways individuals and groups understand their self interest and work toward it. Cultural perception and the direct exercise of power interact in law. These cases tell judges, politicians, administrators, and especially those seeking change: you may not integrate a work place this way, you may not shape an electorate that way. When law ignores class while claiming to protect white workers, it gives authority to the claim that whites are harmed by the advent of people of color. Workers in law and social justice need a new way to consider class and interest.

II. COLOR AND POWER EVASION AT WORK

During the 1990s, critical race theory described whiteness in ways that have now become familiar: race is a social construction within which whiteness is a distinctly constructed racial identity.¹⁸ Race is inherently relational, necessarily involving more than one social group and the

17. THOMPSON, *supra* note 1, at 9.

18. For an introduction to a literature that is still growing rapidly, *see generally* CRITICAL WHITE STUDIES: LOOKING BEHIND THE MIRROR (Richard Delgado and Jean Stefancic eds., 1997); BARBARA JEAN FLAGG, WAS BLIND, BUT NOW I SEE: WHITE RACE CONSCIOUSNESS AND THE LAW (1998); RUTH FRANKENBERG, WHITE WOMEN, RACE MATTERS: THE SOCIAL CONSTRUCTION OF WHITENESS (1993); IAN F. HANEY LOPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE (1996); WHITE REIGN: DEPLOYING WHITENESS IN AMERICA (Joe L. Kincheloe et al. eds., 1998); WHITENESS: THE COMMUNICATION OF SOCIAL IDENTITY (Thomas K. Nakayama & Judith N. Martin eds., 1999); STEPHANIE M. WILDMAN, MARGALYNNE ARMSTRONG, ADRIENNE DAVIS & TRINE GRILLO, PRIVILEGE REVEALED: HOW INVISIBLE PREFERENCE UNDERMINES AMERICA (1996).

relations between groups¹⁹ as they evolve over time. “Racial theory is shaped by actually existing race relations in any given historical period,” and always subject to contest and change.²⁰ Whiteness, according to Ruth Frankenberg, consists of several linked phenomena: a “location of structural advantage” and “race privilege”; a “‘standpoint,’ a place from which white people look at [themselves], at others, and at society”; and “a set of cultural practices.”²¹ The interaction between the material world and the ways we explain and understand it generate experience—and whiteness is continuously reconstructed through lived experience.²² This section describes the way positioned white perception and its interaction with structural privilege affect race-consciousness in the workplace.

A. INDIVIDUALISM, COLOR EVASION, AND POWER EVASION

As many scholars have noted, whites tend not to notice race when only whites are present—race becomes salient in relation to others.²³ Whiteness facilitates achievement, diminishes conflict, and grants access, while simultaneously diminishing awareness of one’s own race. One of the

19. The concept of race acquires meaning only in the context of historical development and existing race relations, and its meanings continue to change over time. See, e.g., Michael Banton, *The Idiom of Race: A Critique of Presentism*, in 2 RESEARCH IN RACE AND ETHNIC RELATIONS 21–22 (Cora Bagley Marret & Cheryl Leggon eds., 1980) (describing changing concepts of race); MICHAEL OMI & HOWARD WINANT, RACIAL FORMATION IN THE UNITED STATES: FROM THE 1960S TO THE 1990S 4 (2d ed. 1994) (same).

20. OMI & WINANT, *supra* note 19, at 11. Omi & Winant identify a transition in the 1920s and 1930s from biologicistic and social Darwinian views of race to an ethnicity-based paradigm which was in turn challenged in the 1960s by class- and nation-based paradigms of race. *Id.* at 14–16.

21. FRANKENBERG, *supra* note 18, at 1. Frankenberg defines “whiteness” as the cumulative way that race shapes the lives of white people. See *id.* Exploring whiteness has been difficult for whites in part because the concept was discussed openly throughout most of American history, primarily by advocates of white supremacy. Stephanie Wildman explores the ways in which the system of white privilege interacts with systems of privilege based on other identity categories to affirm its invisibility and power. See WILDMAN, *supra* note 18, at 7–24. See also Martha R. Mahoney, *Whiteness and Women*, in *Practice and Theory: A Reply to Catharine MacKinnon*, 5 YALE J.L. & FEMINISM 217, 238–44 (1993) (analyzing the subordination of women in the context of housework and caring for children, so that both race privilege and racial subordination can be made visible within the overall subordination of women).

22. See FRANKENBERG, *supra* note 18, at 2:

Discursive repertoires may reinforce, contradict, conceal, explain, or “explain away” the materiality or the history of a given situation. Their interconnection, rather than material life alone, is in fact what generates “experience,” and, given this, the “experience” of living as a white woman in the United States is continually being transformed.

23. See *id.* at 196 (observing that young white women described feeling “cultureless” and described whiteness as “formless” especially when comparing themselves to others whose identities are seemingly “marked by race, ethnicity, region, and class”).

privileges of whiteness is a freedom not to notice privilege.²⁴ Therefore, white people can reproduce white majorities without the conscious will to exclude—for example, by finding desirable friends, acquaintances, and job candidates to be others like themselves²⁵—without noticing the collective privilege that facilitates mobility²⁶ and comfort²⁷ in ordinary life.²⁸ However, whites sometimes do perceive racism in the expression of resentment against white privilege and sometimes even in the discomfort created by being forced to feel conscious of whiteness. Self-consciousness and hostility both intervene in the apparently natural dominant norm. In the logic of white privilege, making whites notice their own race seems racist.

Ruth Frankenberg identified three ways in which whites “think through race”: essentialist racism, color and power evasion, and race cognizance.²⁹ Essentialist racism is the old, familiar enemy: “race difference understood in hierarchical terms of essential, biological

24. See WILDMAN, *supra* note 18 at 2–5; FLAGG, *supra* note 18 at 1–2 (describing whiteness as transparent norm). The manifestations of privilege seem elusive and subtle to whites who seek to identify them. In an influential essay, Peggy McIntosh identified forty-six ways she experienced white privilege in daily life, including things that happen because she is white and things that do not happen—for example, the ability to shop alone, well assured she will not be followed or harassed. See Peggy McIntosh, *White Privilege and Male Privilege: A Personal Account of Coming to See Correspondences Through Work in Women’s Studies*, in POWER, PRIVILEGE AND LAW: A CIVIL RIGHTS READER 22, 25 (Leslie Bender & Dan Braveman eds., 1995). Cf. Regina Austin, “A Nation of Thieves”: *Securing Black People’s Right to Shop and to Sell in White America*, 1994 UTAH L. REV. 147, 150–53, 156–63 (discussing the impact of treating African Americans as potential thieves); Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 151 (explaining that in discrimination cases, race and sex are significant only as they disadvantage victims; privilege is implicit and not perceived).

25. See, e.g., Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1709, 1731–37 (1993); Rodney Thaxton, *Racism & Its Use of Myths*, MIAMI HERALD, May 17, 1992, at C1.

26. Since white neighborhoods minimize direct interaction by whites with people of color, the social construction of race becomes critical: life in segregated space shapes racial identification. The values implicit in contemporary housing segregation—values in which white neighborhoods and “good” neighborhoods often come together—are part of the construction of the meanings of race in America. See generally DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* (1992); John O. Calmore, *Racialized Space and the Culture of Segregation: “Hewing a Stone of Hope from a Mountain of Despair,”* 143 U. PA. L. REV. 1233 (1995); John O. Calmore, *Spatial Equality and the Kerner Commission Report: A Back-to-the-Future Essay*, 71 N.C. L. REV. 1487 (1993); Martha R. Mahoney, *Segregation, Whiteness, and Transformation*, 143 U. PA. L. REV. 1659 (1995).

27. See, e.g., Mahoney, *supra* note 21, at 234 (describing ways in which white privilege can be reproduced without intent or effort by participants in commercial transactions.)

28. See McIntosh, *supra* note 24, at 4 (describing how author was raised to see herself as an individual, not as part of a culture). See generally FLAGG, *supra* note 18 (exploring transparency of whiteness and difficulty for whites of noticing white privilege in daily life).

29. FRANKENBERG, *supra* note 18, at 14–15.

inequality.”³⁰ Law recognizes and rejects essentialist racism, but that is a very limited achievement, because most public discourse in America today is not characterized by essentialist racism. Race cognizance is the recognition of difference on the basis of cultural autonomy and empowerment for people of color.³¹ Race cognizance has been under attack in law, as the Rehnquist court has effectively equated the use of terms that classify by race with essentialist racism.³²

Color and power evasion are pervasive in public discourse in the United States. When whites are color evasive, they fail to notice their own color, the color of others, and any difference between them.³³ Color evasion treats noticing color or race as a manifestation of prejudice.³⁴ Although color evasion seems to many white Americans like courtesy, the idea that *noticing* race is *itself prejudiced* rests on a fundamental sense that race involves the inferiority of the “Other.”³⁵ White privilege is the product of a social history of racial power and subordination.³⁶ Adopted in

30. *Id.* at 14.

31. *See id.* at 14–15.

32. When racial classifications are described as inherently “odious,” the Court has treated the use of race as a category in law as the same as the social harm of racism. *See Shaw v. Reno*, 509 U.S. 630, 643 (1993); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 214, 215, 224 (1995); *infra* notes 252–255 & 307–317 and accompanying text. “The Court now largely finds racism wherever decision makers explicitly take account of race. But it is also increasingly true that the Court spies racism *only* where state actors consciously consider race.” Ian Haney-Lopez, *Institutional Racism: Judicial Conduct and a New Theory of Racial Discrimination*, 109 YALE L.J. 1717, 1836 (2000).

33. Color evasion is similar to the phenomenon Neil Gotanda calls the myth of “nonrecognition.” Neil Gotanda, *A Critique of “Our Constitution is Color-Blind,”* 44 STAN. L. REV. 1, 16–23 (1991).

34. *See* FRANKENBERG, *supra* note 18, at 145–46 (describing ways in which white women equated noticing race with being prejudiced and showed “selective consciousness of difference,” in which they both admitted and denied noticing race difference). Whites are often color evasive when discussing or characterizing people of color and when discussing white self-consciousness, the awareness of a white self in relation to people of color. *See id.* at 142–49.

35. Noticing race is not polite for whites, therefore, because “race” itself is not polite—because to whites “race” historically meant “Other,” inferior, stigmatized. *Id.* 142–43, 151–52. Frankenberg observes that, in this framework, “People of color are ‘good’ only insofar as their ‘coloredness’ can be bracketed and ignored, and this bracketing is contingent on . . . the virtue of a ‘noncolored’—or white—self.” *Id.* at 147.

36. The meaning of whiteness cannot be separated from racism. *See id.* at 1–2. Recently, many historians have described a process in which some immigrants from other countries “became white.” *See generally* THEODORE W. ALLEN, *THE INVENTION OF THE WHITE RACE* (1995); NOEL IGNATIEV, *HOW THE IRISH BECAME WHITE* (1995); DAVID ROEDIGER, *THE WAGES OF WHITENESS: RACE AND THE MAKING OF THE AMERICAN WORKING CLASS* (1991). Eric Arnesen has recently criticized this historical literature for, among other things, failing to demonstrate that European immigrants were not “white.” Eric Arnesen, *Whiteness and the Historian’s Imagination*, 60 INT’L LAB. AND WORKING CLASS HIST. 3 (2001). Certainly European immigrants became consolidated into a system of privilege in which structures of American racism worked to their advantage, and they became part of the continuation of those structures.

an effort to avoid being racist, color evasion implicitly preserves values drawn from essentialist racism. Power evasion is color evasion with a different edge: whites notice those differences which do not threaten white comfort or privilege but deny the connection between race and power.³⁷

Most whites understand racism as something that a second party does to or believes about a third party.³⁸ The second party is the bad racist actor, and the third party the subordinated person of a minority race—both are distinguished from the way whites understand themselves. Since the dominant norm of whiteness and the mechanisms of its reproduction are transparent to white people, whites perceive the problem of racism as intentional, individual prejudice. For more privileged white Americans, racism often appears to be something that working class whites (particularly Southerners) do to African Americans and other people of color. Blaming working class whites also tends to exonerate wealthier whites. In the absence of any more radical concept of class interest, the middle class may understand working class whites *only* as racists.³⁹ This dynamic permits middle class white people to sincerely regret the continued existence of racial hostility without feeling responsible for changing it.

In law, color and power evasion are manifested in the preference for color-blind or race-neutral policies. The call to do away with race in decisionmaking resonates for whites when combined with the assertion that immigrants have no historic guilt for black subordination. This argument simultaneously opposes racism and protects privilege. The call to “just stop talking about race” seems consistent with rejecting racism and attractive because positioned white perception continually misses the ongoing reproduction of race. Because whites tend to think of race as meaning “Other,” the call to stop making racial classifications can have moral authority. It seems to protect against racial injustice in general as well as protecting against the danger that affirmative action will create discrimination against themselves for being white.⁴⁰ Therefore, this

37. See FRANKENBERG, *supra* note 18, at 156 (asserting that whites evade recognizing differences that make whites uncomfortable through euphemism, self-contradiction, or other forms of denial).

38. See Martha R. Mahoney, *Constructing Solidarity: Interest and White Workers*, 2 U. PA. J. LAB. & EMP. L. 747, 750 (2000).

39. See Bob Zellner, Labor and Civil Rights, Address before the Law and Society Association in Philadelphia, Pennsylvania (May 1992).

40. For example, in the early 1990s a poll of young people between the ages of fifteen and twenty-four (called the “post civil-rights” generation) showed that sixty-eight percent of blacks felt that blacks were discriminated against on the basis of race; fifty-two percent of Hispanics felt Hispanics were discriminated against on the basis of race, and forty-nine percent of white people felt that whites

argument may appeal to whites who oppose racism and believe they are not racist.

B. WORK AND INSECURITY: UNSETTLING EVASION

I don't think there are 500 people in Louisiana that have either been adversely affected or benefited from affirmative action. But everyone who doesn't have a job or whose son cannot get into law school believes it's because of affirmative action." If affirmative action is so limited in its scope, why are so many white people so worked up about it?⁴¹

Affirmative action programs challenge the privilege to avoid seeing whiteness. Affirmative action changes the *transparent* quality of whiteness—even without significantly altering the racial makeup of a workplace—because it makes white people identify as white rather than as individuals with no race. Whiteness also suffers as a *dominant* norm, losing the crucial capacity to define expectation without notice or negotiation. No matter how voluntary a program or how modest its methods, affirmative action embodies an aspiration toward change. The conscious aspiration to integrate the workplace defeats color evasion, whether or not whites consciously seek to prevent access for people of color. Even before the population of a workplace changes, affirmative action identifies and counts whiteness, and—even worse—treats it as a problem. Whiteness, which had not been self-conscious, becomes less comfortable.

The process of counting the race and gender of workers also defeats *color evasion*. Although the counting process begins by counting minorities for “underinclusion,”⁴² it immediately threatens to reveal

were being discriminated against on the basis of race. See George E. Curry, *Young Find Race Relations Troubling*, CHI. TRIB., Mar. 17, 1992, at 2 (describing poll conducted by People for the American Way). A lesser number felt they had themselves been the objects of discriminatory actions. See *id.*

41. MICHAEL GOLDFIELD, *THE COLOR OF POLITICS: RACE AND THE MAINSPRINGS OF AMERICAN POLITICS* 7 (1997) (quoting former Louisiana governor Edwin Edwards in his 1991 campaign against David Duke). On the limited effect of affirmative action on opportunity, see Eleanor Holmes Norton, *Affirmative Action in the Workplace*, in *THE AFFIRMATIVE ACTION DEBATE* 44 (George E. Curry ed., 1996) (observing that the proportion of white men in the full-time civilian workforce declined 4.4% between 1979 and 1992, but African-American and Hispanic men declined more: African Americans declined by 5.5%, while Hispanics declined by 6.9%).

42. For example, in 1974 the Equal Employment Opportunity Commission (“EEOC”) identified factors described as the “essence” of affirmative action programs. They included the following: establishing company policy and commitment; assigning responsibility to a top official; analyzing the work force to identify areas where minorities and females are underutilized; goal setting; ensuring that job descriptions and hiring criteria reflect actual job needs; finding minorities and females who qualify or can become qualified to fill goals; ensuring that procedures do not have a discriminatory effect; getting minorities and females into “upward mobility and relevant training pipelines” to improve

overinclusion of whites. Whites then appear as a social group and whiteness loses the appearance of a natural phenomenon. This is a threatening process for whites who had not perceived the presence of a social group of privileged whites but only a set of individuals and their achievements.

Affirmative action does not stop at requiring whiteness to be *noticed*. Whiteness must also be *justified*. By counting, affirmative action programs strip legitimacy from the assumption that the current distribution of access, wealth, and work is a natural phenomenon.⁴³ The predominance of white people in a medical school class, secretarial pool, lunchroom, or office party loses that natural status which required no justification. This loss is disconcerting because part of being white is a sense of race-less comfort that is equated with human value and dignity. The lack of identification with a privileged group helps establish that any individual white person acquired her job through her own meritorious work. An emphasis on privilege threatens the concept of merit in whites and poses it against the merit of the “Other.” Reaffirming merit becomes an urgent need, so it should be no surprise that merit has become a rhetorical focus of debates over affirmative action.

In the *absence* of affirmative action programs, color evasion permits some diversity in the workplace to be unnoticed, accepted, or rationalized. After all, color evasion will avoid consciously noticing difference—the culture within which whites live and work is not really supposed to be *white* anyway. If minority coworkers are *not* brought in through affirmative action, color and power evasion can be reestablished. The dominant norm operates with the following irony. In the absence of any official program, white norms permit the inclusion of some people of color, since the *dominant* character of whiteness—its most important trait as a transparent positioned norm—does not require that the environment be *exclusively* white. But, in the absence of affirmative action programs, the dominant norm still works actively to limit change. Because a white-dominant environment feels inclusive to whites, whites are poorly equipped to gauge whether an environment is effectively inclusive and may overestimate diversity in the absence of a program of systematic inclusion.

access; developing systems to monitor and measure progress. See 1 U. S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, AFFIRMATIVE ACTION AND EQUAL EMPLOYMENT: A GUIDEBOOK FOR EMPLOYERS 3 (1974). Finally, the EEOC noted, “[i]f results are not satisfactory to meet goals, find out why, and make necessary changes.” *Id.*

43. See Harris, *supra* note 25, at 1777–81. See also Martha Minow, *Justice Engendered*, 101 HARV. L. REV. 10, 54–58 (1987) (criticizing assumptions that the status quo is “natural, uncoerced, and good”).

Counting and other systematic mechanisms of transformation threaten the dominant norm both by enforcing change and by stripping whiteness of its capacity to define dominance without notice. In a tidy coincidence, the same resistance that protects whiteness as a dominant norm also protects it as a numerical majority. Because the norm requires not-noticing race, white people who oppose affirmative action may not see themselves as denying access to people of color (a goal too close to the old enemy of essentialist racism) but as ending unfair preferences, a discourse that incorporates the “merit” defense while reestablishing the dominance of white norms.

In contrast to the difficulty of perceiving white privilege, white people do notice phenomena that threaten value and dignity, such as insults by the boss, or fear of loss of job. The existence of affirmative action as an employment policy destabilizes the state-of-nature, self-justifying condition of whiteness. The challenge to whiteness therefore feels like a challenge to value and dignity.⁴⁴ This is one of the most puzzling phenomena of our time. Why should identification with a privileged group pose a challenge to dignity and self respect? The problem is that race privilege includes “unearned” assets or power⁴⁵—thus the idea that one’s current assets are “unearned” is threatening.⁴⁶

White Americans responded to the challenge posed by affirmative action in several ways, including compliance,⁴⁷ transformation, resistance, and shifts in political and social discourse. One widespread response was a discursive strategy that invoked the concept of merit and defended the dominant norm with a circular argument: to the extent whiteness is dominant in a workplace or throughout society, it is the product of merit; merit, not unearned privilege, created the present allocation of work.⁴⁸ Old

44. For whites who consciously resist loss of race privilege, whiteness functions as it did under de jure segregation, as an identity that specifically reflects human value and dignity while denying that the excluded Other also has dignity and full humanity.

45. See McIntosh, *supra* note 24, at 23–27 (describing unearned assets the author gains from white privilege).

46. See, e.g., Stephanie Wildman, *Teaching and Learning toward Transformation: The Role of the Classroom in Noticing Privilege*, in WILDMAN, ARMSTRONG, DAVIS & GRILLO, *supra* note 18, at 165 (discussing white male professor who insists that he works hard to earn the respect of his class and resists seeing privilege that is in operation from the moment he enters the classroom).

47. See, e.g., Lauren B. Edelman, Howard S. Erlanger & John Lande, *Internal Dispute Resolution: The Transformation of Civil Rights in the Workplace*, 27 LAW & SOC’Y REV. 497, 511–19 (1993) (reviewing actions by complaint handlers who were management personnel of large employers).

48. Good things accrued by whites (such as homeownership) are best understood by whites as accrued through their own merit. See John E. Morrison, *Colorblindness, Individuality, and Merit: An Analysis of the Rhetoric Against Affirmative Action*, 79 IOWA L. REV. 313, 330–34 (1994) (reviewing various perspectives regarding the concept of merit). Success affirms merit: I got this nice home

beliefs about white superiority are deployed on a new battlefield.⁴⁹ Positioned white perception is crucial to understanding the success of the right-wing attack on affirmative action. The rhetoric that poses “preferences” against “merit” helps to affirm merit as an attribute of whiteness.⁵⁰

When arguments about affirmative action focus on *past* injustice, rather than the *present* reproduction of power, they encounter a well-developed set of defenses.⁵¹ Retrospective arguments fit relatively well with the idea that racism is something a second party does to a third party. A moral dilemma can now be asserted. The second party—the bad racist actor—is someone who operated in the past, perhaps fifty years ago (before *Brown v. Board of Education*) or even more than one hundred fifty years ago (during slavery). The third party—the “actual victim” of racism—also existed in the past, cannot really be made whole now, and may in fact be dead. As Cheryl Harris has shown, emphasizing the question of guilt leads

through hard work and thrift; it proves that I am meritorious if I also get other good things; I work hard, and I know it, so my sense of desert and of my own merit are repeatedly confirmed. An opposite rhetoric implies that people with merit are disadvantaged by those who advance through affirmative action, which is understood to mean advancing without merit. The second argument is also circular: anything gained by a person of color is suspect, potentially non-meritorious—because a person of color gained it.

49. See Randall Kennedy, *Persuasion and Distrust: A Comment on the Affirmative Action Debate*, 99 HARV. L. REV. 1327, 1330 (1986) (assessing claim that affirmative action harms blacks).

50. Because the background norm of whiteness is invisible, whites looking at affirmative action tend to see blacks as profiting by trading in blackness. Cheryl Harris specifically responds to this concern by noting several reasons that blackness is not the mirror image of whiteness: the reification of whiteness reflects centuries of privilege that are not present in the reification of blackness; whiteness still exists as an artifact that confers advantages over blackness; affirmative action does not carry with it an ideology of subordination—it can therefore remove the divisions that have historically perpetuated the subordination of working class whites; nor does it naturalize privilege or create expectations of future benefits for blacks since it cannot be implemented without conscious intervention, planning, and monitoring. See Harris, *supra* note 25, at 1784–86. For those defined outside the circle of whiteness, affirmative action is manifestly not trading in blackness but reallocating some of the privileges of whiteness—redistributing a few sticks from the “bundle of rights” in whiteness, or creating a property interest in equal opportunity. On the property right in whiteness, see *id.* at 1777–91; Derrick Bell, *Property Rights in Whiteness—Their Legal Legacy, Their Economic Costs*, in CRITICAL RACE THEORY: THE CUTTING EDGE 71, 75 (Richard Delgado and Jean Stephanic eds., 1995); Derrick Bell, *Xerxes and the Affirmative Action Mystique*, 57 GEO. WASH. L. REV. 1595, 1602–11 (1989) [hereinafter, Bell, *Xerxes and the Affirmative Action Mystique*].

51. I do not mean here to dispute the strengths of these arguments, to suggest an end to them, or to criticize the movement for reparations. Obviously, arguments that focus on present injustice also encounter defenses. My concern is with the ways in which white discursive strategies and positioned perception respond to reinforce white attachment to white privilege. See generally WHEN SORRY ISN'T ENOUGH: THE CONTROVERSY OVER APOLOGIES AND REPARATIONS FOR HUMAN INJUSTICE (Roy L. Brooks ed., 1999) (providing assessment of reparations movement and presenting arguments submitted by whites). Reparations arguments need not be understood as focusing only on the past—they may also link past injustice to the present reproduction of power and privilege.

to a focus on “innocent” whites, to the detriment of black aspirants.⁵² The claim of innocence⁵³ directly relates to the concept of merit: It is an assertion that a person has not gained position through unearned advantage.

Many whites who do not wish to be racist, believe they are not racist, and wish to avoid being perceived as racist, choose to focus on the harms of the past. The admission of past harm combined with the denial of redress in the present recognizes inequality while protecting wealth and self-respect. This white response includes many sub-narratives of innocence: “I wasn’t guilty because my family wasn’t here” (the immigrant story),⁵⁴ or “I suffered discrimination too and am not really as ‘white’ as you think” (the story of outsider ethnic and religious groups), and “my family has not been privileged and I am not privileged today” (the white working class story). Each of these stories has persuasive power because it turns some aspect of truth previously understood to contradict the story of participation in race privilege. Focusing on the past allows whites to avoid noticing the problem of the present reproduction of privilege.⁵⁵

The dynamics of privilege are important to legal reasoning about race. Law constructs the background rules of material existence and permits society to treat those rules as given—selectively releasing them from consciousness—while reckoning with problems and conflicts that are brought to the foreground through the selection of new legal conflicts.⁵⁶

52. Harris notes:

If affirmative action is cast as a bipolar corrective justice claim between a Black aspirant and a white applicant or incumbent, then denying relief to the Black aspirant logically follows. Although the claim for compensation for unjust loss may be valid, the white applicant or incumbent is innocent of the historical wrong for which the Black aspirant seeks relief and therefore should not be forced to yield position.

Harris, *supra* note 25, at 1782 n.310.

53. For a partial review of the Supreme Court’s concern for “innocent” nonminorities in affirmative action cases, see Kathleen M. Sullivan, *Sins of Discrimination: Last Term’s Affirmative Action Cases*, 100 HARV. L. REV. 78, 84 (1986) (examining paradigm of sin and innocence in Supreme Court decisions).

54. See Antonin Scalia, *Commentary: The Disease as Cure*, 1979 WASH U. L. Q. 147, 152. Kenneth Karst responds directly to this argument by arguing that immigrants joined the “firm of privilege.” KENNETH KARST, *BELONGING TO AMERICA: EQUAL CITIZENSHIP AND THE CONSTITUTION* 92–104 (1989).

55. Of course, many justifications for affirmative action do focus on the reproduction of power in the present. See, e.g., GERTRUDE EZORSKY, *RACISM AND JUSTICE: THE CASE FOR AFFIRMATIVE ACTION* 9–27 (1991) (emphasizing continuing discrimination in the present as well as continuing effects of past racism, and describing the importance of contemporary social networks to access to work). See generally CHARLES R. LAWRENCE III & MARI J. MATSUDA, *WE WON’T GO BACK: MAKING THE CASE FOR AFFIRMATIVE ACTION* (1997) (remarking that both the past and the present provide reasons to defend affirmative action).

56. See, e.g., Karl Klare, *The Public/Private Distinction in Labor Law*, 130 U.P.A. L. REV. 1358, 1358 (1982) (“The peculiarity of legal discourse is that it tends to constrain the political imagination

Law is therefore part of the construction of whiteness directly, by defining race, and indirectly, as it makes arguments about racial injustice, and as legal arguments confer and protect privilege.⁵⁷ The focus on the past in narratives of contemporary “innocence” is *power evasive*, allowing the Court to avoid dealing with contemporary power and the continuing process of racial formation.⁵⁸ Only by evading power could the meaning of “race” in the 1860s be held to define its meaning for civil rights today.⁵⁹ Color and power evasion affect law as they affect the rest of society, but their application particularly influences the terms of social debate.

An example of power evasion in law occurred in the cases in which white plaintiffs challenged employer decisions as racially discriminatory under Title VII. In *McDonnell Douglas Corp. v. Green*,⁶⁰ the Supreme Court created a burden-shifting formula requiring the plaintiff to establish a *prima facie* case of discrimination. The presumptions in the *McDonnell Douglas* test effectively recognized that race-based exclusion for people of color and race-based privilege for whites shaped access to work in the United States.⁶¹ If a minority applicant was qualified for a job, did not get it, and a white person got it instead, a court could presume that “these acts, if otherwise unexplained, are more likely than not based on the

and to induce belief that our evolving social arrangements and institutions are just and rational, or at least inevitable, and therefore legitimate.”).

57. See generally HANEY LOPEZ, *supra* note 18 (examining legal construction of white racial identity).

58. Power evasion marked the cases dealing with whether Arabs and Jews were protected by the Reconstruction-era civil rights acts. *St. Francis College v. Al-Khazraji*, 481 U.S. 604, 608–13 (1987); *Shaare Tefila Congregation v. Cobb*, 481 U.S. 615, 617–18 (1987) (discussing whether Arabs and Jews were “distinct races” and thus “within the protection of” civil rights statutes). In *St. Francis College*, the court string-cited eight books and a number of articles on race without serious analysis of their content. 481 U.S. at 610 n.4. The Court recognized that “race” is a troublesome and contingent category that changed over time, not a natural or fixed category. See *id.* at 610–13. It held, however, that interpretation of the statutes turned on the understanding of race at the time Congress enacted the bill. See *id.* Since Arabs and Jews were conceived as distinct races at that time, they could sue under civil rights statutes today. See *id.* at 613.

59. The term “race” has been used in law to stand for several different concepts. See generally Gotanda, *supra* note 33; Lawrence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L. J. 1063, 1074 (1980).

60. 411 U.S. 792, 802 (1973).

61. *Id.* at 802. The court recognized that direct evidence of discriminatory treatment can be difficult to produce. To establish a *prima facie* case of discrimination and shift the burden to the defendant to justify its actions, the plaintiff must show:

- (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainants qualifications.

Id.

consideration of impermissible factors.”⁶² Reverse discrimination cases posed the sharp question of whether failure to hire a white person could have the same meaning as failure to hire a person of color. Some circuits applied the *McDonnell Douglas* test without comment or modification in the reverse discrimination context.⁶³ Because the test was based on inferences drawn from discrimination prevalent in American society, other circuits have found it impossible to draw the same inferences from a white plaintiff’s race and situation, holding instead that a white plaintiff must additionally show “background circumstances [to] support the suspicion that the defendant is that unusual employer who discriminates against the majority.”⁶⁴

Courts are power evasive when they make the same assumptions about discrimination for whites as for people of color. Inferences about the meaning of a racial difference between job-applicant and job-occupant surely depend on the meaning and context of race. Belief in their own merit and discomfort with the loss of a dominant norm may make whites believe that affirmative action is responsible for the success of any person of color.⁶⁵ Because subordination and stereotypes are race-specific, formalism in these cases effectively protects white privilege.

62. *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978).

63. See, e.g., *Wilson v. Bailey*, 934 F.2d 301, 304 (11th Cir. 1991); *Young v. City of Houston*, 906 F.2d 177, 180 (5th Cir. 1990). See generally Angela Onwauchi-Willig, *When Different Means The Same: Applying a Different Standard of Proof to White Plaintiffs Under the McDonnell Douglas Prima Facie Case Test*, 50 CASEW. RES. L. REV. 53 (1999) (supporting argument in favor of different tests for white and minority plaintiffs with extensive evidence about discrimination in employment).

64. *Parker v. Baltimore & Ohio R.R. Co.*, 652 F.2d 1012, 1017 (D.C. Cir. 1981) (requiring showing of “background circumstances”). See also *Murray v. Thistledown Racing Club, Inc.*, 770 F.2d 63, 67 (6th Cir. 1985) (same); *Bennett v. Texas Bd. of Pardons & Paroles*, 670 F. Supp. 196, 198–99 (E.D. Tex. 1987); *Jones v. Slater Steels Corp.*, 660 F. Supp. 1570, 1575 (N.D. Ind. 1987). Cf. *Livingston v. Roadway Express, Inc.*, 802 F.2d 1250, 1252 (10th Cir. 1986) (disparate impact case). The Tenth Circuit created an alternative route to establishing a prima facie case to avoid disfavoring white plaintiffs. See *Notari v. Denver Water Dept.*, 971 F.2d 585, 589–90 (10th Cir. 1992).

65. See, e.g., Margaret Jane Radin, *Affirmative Action Rhetoric*, 8 SOC. PHIL. & POL’Y, Spring 1991, at 130, 139–40. Radin writes:

The dominant group will be able simultaneously to make women and people of color meet higher standards than those applicable to white males, and yet convince everyone, often including the beneficiaries of affirmative action themselves, that they are inferior. . . . if a black gets the job, it will be said to be ‘merely the result of affirmative action’; yet blacks will have to be spectacularly good to get the job, in the face of the stubborn conceptualization of them as not good at this sort of thing.

Id. at 139–40 (emphasis omitted).

III. CLASS, CONSCIOUSNESS, AND WHITENESS

“What is the meaning of ‘race’?” is an intellectually liberating question. The curtain is thrown back: an apparently natural category is revealed to be socially constructed, problematic in all aspects, and packed with many meanings. The question has proven productive in law as in many areas of social theory, opening a rich body of recent literature including examination of the role of law in defining “race” itself and in the construction, transformation, and protection of racial power.

In contrast, asking “What is the meaning of ‘class’?” feels more like falling off a cliff. Vast bodies of social and political theory have explored this question. The debates go back more than a hundred years and have lively current iterations. But the question is important in law even if it is difficult. The absence of explicit recognition of class in current legal discourse, and the implicit concepts of interest and inequality, shape legal decisions ideologically and doctrinally.

There are many modes of analyzing inequality. Concepts of class and status are related to concepts of the self-interest of white working people. A status-only approach to inequality yields a more conservative view of interest in which working class white people appear to be naturally attached to preserving white privilege—perhaps even more than wealthier whites. In concepts of class interest that are based on group relations of economic power, antiracist solidarity is an actual or potential interest of white workers, and class awareness and activism are vital to the transformation of white attachment to privilege

In law, conservative decisions and ideology have led to reasoning that is status-based rather than class-based. Even proposals for “class-based affirmative action” are concerned more with status than with class in any relational sense. These proposals shift the focus of law and policy to compensation for individual disadvantage rather than social justice and transformation. This Part of the Article explores the difficulty of addressing class in law.

A. CONCEPTS OF INEQUALITY AND SELF-INTEREST: CLASS AND “VULGAR STATUS”

The existence or non-existence of classes is one of the major stakes in the political struggle.⁶⁶

66. Pierre Bourdieu, *What Makes a Social Class? On the Theoretical and Practical Existence of Groups*, 32 *BERKELEY J. SOC.* 1, 9 (1987).

Historically, two major concepts of class and status divided social and political theory. One, associated with Max Weber, analyzes economic participation through a focus on distribution and the market and emphasizes status as an important aspect of structural inequality. The other, associated with Karl Marx, emphasizes class relations in a system of production and the exploitation of labor by capital.⁶⁷ My goal here is not to urge a choice between Marx and Weber in analyzing structure and agency and their interaction with law, but to contrast the gap between popular concepts of status in America and the ideas of class that appear in Marxism, left Weberian thought, and the labor movement. Many scholars agree that the two classic schools have over time converged to some extent⁶⁸ or at least moved toward each other.⁶⁹ Neo-Marxists⁷⁰ began

67. See, e.g., STEPHEN EDGELL, CLASS (1995); Norbert Wiley, *Introduction*, in THE MARX-WEBER DEBATE 7–11, 19–25 (Norbert Wiley ed., 1987); Vic Duke & Stephen Edgell, *The Operationalisation of Class in British Sociology: Theoretical and Empirical Considerations*, 38 BRIT. J. SOC. 445, 446–50 (1987); Mike Savage, *Class Analysis and its Futures*, 32 SOC. REV. 531, 535–41 (1994).

68. See, e.g., Loic J. D. Wacquant, *Making Class: The Middle Class(es) in Social Theory and Social Structure*, in BRINGING CLASS BACK IN: CONTEMPORARY AND HISTORICAL PERSPECTIVES 39, 50 (Scott G. McNall et al eds., 1991):

[There are] widening areas of overlap and convergence between Marxist and Weberian approaches [to the middle classes]. . . . Marxist sociologists. . . have produced less deterministic and more differentiated pictures of the middle class, and Weberian theorists. . . have developed more structural models emphasizing property and power. In any case, this emerging synthesis between ‘production-centered’ and ‘market-centered’ approaches seems far more convincing than any of these views taken alone. The ritual opposition of these two traditions of class theory is no longer meaningful and profitable.

Id. (citations omitted).

See also John R. Hall, *The Reworking of Class Analysis*, in REWORKING CLASS 1, 31 (John R. Hall ed., 1997) (“Once it is acknowledged that market capacities, class interests, and organizational exploitation become structured in diverse ways within capitalism, the theoretical gaps between Marxian and Weberian approaches are largely erased, and the Weberian analysis of structururations within capitalism becomes ever more salient.”); Wiley, *supra* note 67, at 23, 25 (noting that “what exists now is a kind of Marx-Weber truce, tending toward cautious interaction”). For additional exploration of the convergence of Marxist and Weberian thought, see Val Burris, *The Neo-Marxist Synthesis of Marx and Weber on Class*, in THE MARX-WEBER DEBATE, *supra* note 67; ROSEMARY CROMPTON, CLASS AND STRATIFICATION: AN INTRODUCTION TO CURRENT DEBATES 50–52 (2d ed. 1998); Franco Ferrarotti, *Weber, Marx, and the Spirit of Capitalism: Toward a Unitary Science of Man*, in A WEBER-MARX DIALOGUE 262, 270–71 (Robert J. Antonio & Ronald M. Glassman eds., 1985); McNall, et al., *Introduction*, in BRINGING CLASS BACK IN, *supra*, at 3; Erik Olin Wright, *Rethinking, Once Again, the Concept of Class Structure*, in REWORKING CLASS 41–71 (John R. Hall ed., 1997); Duke & Edgell, *supra* note 67, at 445–501.

69. Scholars do not agree, however, on the consequences of change. Is the convergence toward shared theoretical understandings? Or do the two systems of analysis still stand apart and lead in quite different directions despite their increased need to reckon with the insights of the other system? See generally Duke & Edgell, *supra* note 67 (comparing Marxist and Weberian approaches); Savage, *supra* note 67 (same).

70. Nor is the distinction between “neo-Weberian” and “neo-Marxist” always clear; scholars sometimes disagree as to how they would classify each other. For example, Duke and Edgell classify

emphasizing forms of exploitation beyond those tied to the relations of production⁷¹ and recognizing differences within and between classes that are more like occupational strata than earlier Marxist analyses.⁷² Neo-Weberians recognized difficulty in analyzing stratification, particularly when faced with contested issues involved in classification of the status of women.⁷³

In Marxist analysis, class remains primary—workers of all races share the experience of exploitation and depend upon each other for liberation. But Marxism is not the only concept of class that invokes solidarity as the shared interest of working people. Solidarity also fits within Weberian thought in which economic class is important to relationships of power.⁷⁴ If class is organized entirely or even partly by power relationships among groups involved in systems of production,⁷⁵ working people have very deep interests in building mutuality and overcoming divisions among themselves. Even without resolving debates about whether capitalism is *itself* the source of racial divisions and racist oppression,⁷⁶ the left and the labor movement have long argued that the interests of white workers are

John Goldthorpe as neo-Weberian, in part because he works with occupational schema that look very status based. See Duke & Edgell, *supra* note 67, at 445–50. Robert Erikson and Goldthorpe claim this characterization is not accurate or useful. ROBERT ERIKSON & JOHN H. GOLDTHORPE, *THE CONSTANT FLUX: A STUDY OF CLASS MOBILITY IN INDUSTRIAL SOCIETIES* 37 n.10 (1993) (explaining that they draw on both Marx and Weber in making employment relations crucial to delineating the structure of class positions and noting that they believe “the opposition between Marxian and Weberian conceptions of class that is by now enshrined in socio logy textbooks is in many respects exaggerated . . . to repeat, it is consequences, not antecedents, that matter”). See also Savage, *supra* note 67, at 536–37 (noting that the categorizations by Erikson and Goldthorpe depend in some ways on relation to employment relationships, not only on status).

71. See generally JOHN E. ROEMER, *A GENERAL THEORY OF EXPLOITATION AND CLASS* (1982) (analyzing exploitation of labor in capitalist countries and status exploitation in socialist countries).

72. See generally WRIGHT, *supra* note 68 (comparing class relationships).

73. EDGELL, *supra* note 67, at 32–33; Duke & Edgell, *supra* note 67, at 451–52.

74. This holds true even though economic class may be conceived differently than in Marxism and be analyzed more as a matter of stratification. See, e.g., CROMPTON, *supra* note 68, at 32–35. See also Wiley, *Introduction*, in *THE MARX-WEBER DEBATE*, *supra* note 67, at 18–21.

75. For example: “[Classes] are determined by their place in a historically specific ensemble of production relations and by their self-activity, which constitutes and reconstitutes these relations and their place within them.” McNall et al., *supra* note 68, at 3–4 (quoting MAURICE ZEITLIN, *ON CLASSES, CLASS CONFLICT, AND THE STATE: AN INTRODUCTORY NOTE* 3 (Maurice Zeitlin ed.)). Under the given analysis, working toward developing and defending shared class interests has historically been part of what constructs the working class itself. See *id.*

76. See GOLDFIELD, *supra* note 41, at 15 (describing the “divide and conquer” framework common to some Marxists and some labor unionists as one in which “racism is instilled by employers who attempt to forestall solidaristic, class-based organization on the part of their own employees and workers in general”).

disserved in important ways by racial division in general and by its impact on specific struggles.⁷⁷

Clearly, not all accounts of “class” are right and of “status” wrong. There are good reasons for the convergences in Marxist and Weberian thought. Obviously, status concepts have been crucial to the analysis of racial constructions and white privilege. Rather, this Article criticizes frameworks that recognize *only* status, especially simplistic or naturalized concepts of status, because this approach has important consequences in law.

1. Exploitation, Oppositional Groups, and Solidarity

Erik Olin Wright defined approaches to class as “relational” (focused on group relationships of power and exploitation) or “gradational” (focused on stratification and line-drawing based on occupation and market position). Both relational concepts and concepts that are at least in part related to production emphasize the need of working people for solidarity. For Marxists, class interest in white men and women as workers outweighs any advantage that exists in holding onto white privilege. Marxists do not always submerge race questions into class questions.⁷⁸ They have sometimes advanced theories that are closer to “national” concepts of race⁷⁹ and sometimes treated racism as a consciously developed capitalist ploy.⁸⁰ As to the self-interest of white workers, Marxist theories emphasize interest in a mobilized, conscious, self-activating working class. In this vision, whites are harmed as are all workers to the extent that they are divided from other workers. Racism is part of working class division; rejecting racism and white privilege, therefore, is part of working class interest.

If the relationship of social groups in a system of production is a factor of any significance in social analysis—a position many scholars associate with Weberian as well as Marxist traditions—then white workers have interests in opposing racism and building class-based solidaristic consciousness and action. Those interests are either actual (objective,

77. See *infra* text accompanying notes 132–157. See also Martha R. Mahoney, *What’s Left of Solidarity? Whiteness, Labor History, and Law* (2003) (unpublished manuscript in possession of Southern California Law Review) (discussing class consciousness and white privilege).

78. See OMI & WINANT, *supra* note 19, at 29–35 (examining Marxist influence on both “class” and “national” paradigms of race); GOLDFIELD, *supra* note 41, at 15 (describing the “class reductionist” idea that employers created race discrimination as a divide-and-conquer tactic as common to some Marxists and some non-Marxists in the labor movement).

79. See OMI & WINANT, *supra* note 19, at 29, 42–44.

80. See GOLDFIELD, *supra* note 41, at 15.

inevitable) or potential (contingent, capable of being mobilized). If control of capital and economic relationships of exploitation are even somewhat important in any theory, then solidarity is at least a potential interest of workers.

Pierre Bourdieu argues that classes are not predetermined or natural but instead the political product of struggles for group self-definition within “the social space.”⁸¹ Social groups may form around many different axes, engaging in class competition for control of political, cultural, symbolic, and economic capital on unequal terms.⁸² The representational battle to name interests is part of forming those interests—groups form and are recognized in part through the process of trying to define themselves.⁸³ In Bourdieu’s thought, therefore, there are no preexisting class relationships of power and exploitation. Yet even when the nature of classes is itself the subject of social contest, the possibility for economic solidarity—and for contests of power against those who possess capital—is one of the ways in which social groups may form. Therefore, there is at least a potential tension between some of the ways in which white working people experience “class” and the ways in which they gain from white privilege. When defining interests is part of a process of creating them, attachment to white privilege has the potential to defeat other forms of mobilization and group construction that could be advantageous for white workers. In other words, even in a postmodern analysis in which Marx’s concept of natural class interest is absent, the *possibility* of solidaristic group formation and action based on shared economic interest is sufficient to make attachment to white privilege problematic.

81. See Bourdieu, *supra* note 66, at 6. In Bourdieu’s analysis:

[C]onstructed classes can be characterized in a certain way as sets of agents who, by virtue of the fact that they occupy similar positions in social space (that is, in the distribution of powers), are subject to similar conditions of existence and conditioning factors and, as a result, are endowed with similar dispositions which prompt them to develop similar practices. . . .

. . . .

. . . [T]he movement from probability to reality, from theoretical class to practical class, is never given . . . the principles of vision and division of the social world at work in the construction of theoretical classes have to compete, *in reality*, with other principles, ethnic, racial or national, and . . . with . . . ordinary experience of occupational, communal and local divisions and rivalries.

Id. at 6–7.

82. See Bourdieu, *supra* note 66, at 11. See also PIERRE BOURDIEU, *DISTINCTION: A CRITIQUE OF THE JUDGMENT OF TASTE* 438–39 (1984) (asserting that groups are both unequally endowed with capital and unequally equipped to fight over it).

83. Bourdieu, *supra* note 66, at 9. Bourdieu emphasizes control of capital in several forms (cultural, symbolic, economic) and also the political nature of claims about class: “the existence or non-existence of classes is one of the major stakes in the political struggle.” *Id.*

White attachment to privilege is destructive to many aspects of class-based action and organization.⁸⁴ In a practical sense, white workers who seek to hold onto white privilege and whose identity is strongly defined by their whiteness are less likely to forge strong ties with workers of color. The ideology that supports white privilege will impede their ability to work with non-whites and will also make whites less trustworthy colleagues for people of color.

Some scholars emphasize the segmentation of the labor market and the extent to which white workers profit from access to better jobs.⁸⁵ In recent years, many historians have also emphasized the agency of white workers in the subordination of workers of color.⁸⁶ My argument does not depend, however, on the ways in which race privilege and the ideology that defends it have been part of the history of the white working class, nor on a choice between class-conscious solidarity or attachment to privilege as a natural defining interest of white workers. Because of the workings of white privilege, *all* whites profit to some extent from participation in a racist society; unless shared economic interest is understood to trump *all* race privilege, therefore, some combination of racism, privilege, and structural disadvantage within capitalism is the complex ground on which working people in the United States form social groups.

Rather, I am concerned with the way that law incorporates arguments about interest and affects the possibility and the strength of solidaristic class-based organization. If shared roles in a system of production are even *part* of the analysis, white privilege has destructive effects on the *potential* for transformative work among workers. The negative impact of white attachment to privilege is more obvious in left analyses which perceive the working class as having naturally solidaristic interests opposed to those of capital. However, to the extent that social groups *can and sometimes do* form around shared interests in economic relationships of power, racism and white privilege are destructive to that mobilization—whether group

84. See, e.g., Goldfield, *supra* note 41, at 31 (stating that the system of white supremacy and the ideology of white chauvinism have been detrimental for white workers in two ways: as an impediment to development of a “sustained, solidaristic, class-based labor movement,” and also it has often harmed the immediate economic interests of white workers”). The view that racism is costly to workers is consistent with E.P. Thompson’s emphasis on class as a “happening,” not a “thing.” THOMPSON, *supra* note 1, at 10.

85. See, e.g., Edna Bonacich, *The Past, Present, & Future of Split Labor Market Theory*, in 1 RESEARCH IN RACE & ETHNIC RELATIONS 17 (1979) (analyzing split labor market in which racial division is based on differential in price of labor—a “class” theory of race and ethnicity”).

86. See, e.g. BRUCE NELSON, *DIVIDED WE STAND: AMERICAN WORKERS AND THE STRUGGLE FOR BLACK EQUALITY* (2001) (emphasizing agency of white workers and extent to which they profited from racism).

formation is perceived through Bourdieu's approach or through neo-Marxist or traditional labor analyses. In contrast, status-only analyses create a different vision of white interest, and, as later Parts of this article will explain, these concepts have important consequences in law.

2. Contemporary Concepts of Status

When people in America refer to "class," they usually mean status rather than economic relations of power. They may refer to socioeconomic status in general or to the sort of status required through consumption.⁸⁷ A theoretical concept of status divorced from group relationships of power and exploitation also appears in the work of economist Robert Frank.⁸⁸ Drawing on evidence that dominant animals have higher levels of serotonin, Frank argues that the drive for status is inherent in human nature. He asserts that in humans the quest for status is measured against a local reference group, rather than against all people in society.⁸⁹

Frank recognizes inequality in bargaining power, and he is not opposed to all protection for workers or to governmental regulation in general.⁹⁰ In several ways, however, he rejects left concepts of class. Frank treats exploitation of workers as a problem arising from the lack of a functioning market. While employers might wish to exploit employees, he believes they are unable to do so because of competition for workers. Exploitation existed in the past in company towns, in which employers had too great a grip on labor, and could still exist in a modern town with only one major employer, such as a mining town.⁹¹ However, Frank assumes that any such mine would operate close to the margin of economic survival and could not be *exploiting* workers because it would have little economic

87. See generally PAUL FUSSELL, CLASS: A GUIDE THROUGH THE AMERICAN STATUS SYSTEM (1983) (analyzing "class" in the context of consumption and social status). See also DEMOTT, *supra* note 7, at 31–33 (criticizing Fussell's emphasis on consumption and taste, and Fussell's treatment of himself and some social groups as classless or outside the system of class).

88. ROBERT FRANK, CHOOSING THE RIGHT POND: HUMAN BEHAVIOR AND THE QUEST FOR STATUS 23–38 (1985). Legal scholars who apply Frank's theories include Richard McAdams and Cass Sunstein. See, e.g., Robert H. Frank & Cass R. Sunstein, *Cost-Benefit Analysis and Relative Position*, 68 U. CHI. L. REV. 323, 327–28, 337, 364–67 (2001); Richard H. McAdams, *Cooperation And Conflict: The Economics of Group Status Production And Race Discrimination*, 108 Harv. L. Rev. 1003, 1012–13 (1995); Cass R. Sunstein, *Human Behavior And The Law of Work*, 87 VA. L. REV. 205, 239, 267–68 (2001).

89. FRANK, *supra* note 88 at 22–38 (describing local reference groups against which status is measured).

90. Frank does not dispute the reasonableness of the minimum wage, *id.* at 144–46, and argues that status causes many competitions that the state can regulate for the good of society and its members. *Id.* at 244–69.

91. *Id.* at 44.

surplus to share with them.⁹² For Frank, profit from investment is as natural as status—if an investor could not make a profit, she would invest elsewhere⁹³—but it does not give rise to oppositional class interest or to exploitation. Frank sees employers as individual entities in competition for workers; if they tried to keep wages down, they would have to form an unstable cartel.⁹⁴ His analysis does not account for deskilling low-wage work, globalization, or other developments of the modern economy. And it is explicitly opposed to left explanations of class interest.⁹⁵

The concept of status as a natural drive, and the analysis of status *without* group relationships of power and exploitation, ultimately lead to conceiving of attachment to white privilege as natural. Even if individual whites do not seek the advantage of race privilege, because race is a social construction, they are more likely than people of color to be perceived by other whites as good prospective employees⁹⁶ and neighbors,⁹⁷ or to be perceived by banks and insurers as good credit risks.⁹⁸ I am not arguing that this concept of status is the same as essentialist racism. Open

92. *Id.*

93. For example, Frank suggests that the owner of capital might invest in some non-exploitive activity such as tree-growing in which she could sell lumber at the end of the year for money. FRANK, *supra* note 88, at 43. He does not explain, however, why tree-growing for profit is non-exploitive. Who plants, cultivates, and cuts the trees? Who turns trees to lumber? Unless Frank envisions trees without labor, why are trees free of exploitation? Frank's casual approach to non-exploitive profit allows him to avoid analyzing or explaining exploitation.

94. *Id.* at 42–43.

95. Frank concludes by stating that the problems with markets—including the failure of private firms to pay workers the marginal value of their products, and the fact that “the terms of the unregulated competitive labor market [are not] socially optimal”—does not have anything to do with “the power imbalances and other imperfections stressed by critics.” *Id.* at 268.

Instead, market outcomes fall short in the ways they do because individual goals and collective goals are in fundamental tension from the outset. Evolutionary forces saw to it that people come into the world with a drive mechanism that makes them seek to outrank others with whom they compete for important resources. But this drive mechanism, so useful in the individuals' struggle to survive, could hardly have been designed to yield greater disruption for society as a whole. The specific behavioral consequences of this drive mechanism, not the consequences of excessive market power, are what we regulate in the modern welfare state.

Id.

96. See, e.g., Joleen Kirschenman & Kathryn M. Neckerman, ‘We’d Love to Hire Them, But . . .’: *The Meaning of Race for Employers*, in THE URBAN UNDERCLASS 203, 203–04 (Christopher Jencks & Paul C. Peterson eds., 1990) (indicating that employers bluntly expressed overtly racial notions concerning the worthiness of prospective employees and preferred suburban to inner-city applicants).

97. See *supra* note 26.

98. See, e.g., *Nationwide Mut. Ins. Co. v. Cisneros*, 52 F.3d 1351 (6th Cir. 1995) (lawsuit alleging discrimination by mortgage insurance company); *NAACP v. Am. Family Mut. Ins. Co.*, 978 F.2d 287 (7th Cir. 1992), *cert. denied* 508 U.S. 907 (1993) (same).

expressions of race *prejudice* might lower, not raise, the status of whites.⁹⁹ White *privilege*, however, is status-enhancing as long as it includes enhanced chances of being perceived as honest, intelligent, or meritorious, or includes other practical advantages in obtaining access to employment, education, or other sources of wealth and privilege. If the human drive for status is a natural force, whites would remain attached to privilege as long as any racism persists. Whites of lower status might be more attached to white privilege than whites of more elite status, because they would have fewer advantages over others around them, and therefore fewer ways to generate serotonin.¹⁰⁰

Law is limited by concepts that treat status as natural and fail to recognize exploitation. Uncontested legal rules have the effect of making the distribution of power look natural. The emphasis on status can reveal the need for rules that protect against racial subordination but conceal the need for rules that facilitate solidarity.¹⁰¹ The failure of judges to perceive *either* class interest *or* the ongoing construction of white privilege is part of the reasoning that helps to defeat programs of racial transformation.

Status tends to be a zero-sum game.¹⁰² A gain in status for one group means a loss for other groups. In status-only frameworks, therefore,

99. *But cf.* THE BELL CURVE DEBATE (Russell Jacoby & Naomi Glauberman eds., 1995) (bringing together documents and criticism of RICHARD J. HERRNSTEIN & CHARLES MURRAY, THE BELL CURVE (1984) and summarizing debates about ethnic differences in intelligence.)

100. FRANK, *supra* note 88, at 23–25, 59.

101. The consequences of looking only at status are apparent in Richard McAdams' application of Frank's theory to antidiscrimination law. Criticizing economic arguments that antidiscrimination law is unnecessary because the "taste for discrimination" is costly, McAdams argues that whites as a social group have a shared interest in protecting white status. This is a sophisticated application of status concepts to the collective advantages of white privilege. However, McAdams misses the *process* by which whites have been consolidated to the defense of race privilege rather than class mobilization in American history. McAdams quotes a speech in which Henry Grady appealed to white southerners, arguing that white racial domination must be "compromised in no [material] necessity." McAdams, *supra* note 88, at 1006–08. The tension between Grady's view and class-based activism of the late nineteenth century is not considered in McAdams' account, which therefore understates the contingent, contested nature of social group mobilization (Bourdieu's version of class). While I agree with McAdams about the continued importance of antidiscrimination law, his approach to status makes it difficult to recognize other ways in which law works to defeat transformative work. *Cf.* Mahoney, *supra* note 38, at 754–57 (criticizing failure to recognize the tensions between Populist organizing and appeals to white supremacy in the South).

102. See J.M. Balkin, *The Constitution of Status*, 106 YALE L.J. 2313, 2328–29 (1997)

[S]tatus competition is intense because status is a relative good. One has more of it because others have correspondingly less. Status competition tends to be zero-sum, at least in the short run. . . . One cannot increase the status of one group without decreasing the status of another. High prestige is prestige over others and in distinction to others. Increased respect for lower status groups means a corresponding loss of respect for higher status groups because their identity has been constructed around their greater prestige and the greater propriety of their ways of living.

protecting white privilege appears to be a natural economic and social interest for white people, regardless of their wealth or class position. When shared class interest is not recognized, white working people have no *redistributive* interest in solidarity, and therefore any white privilege they relinquish is a loss rather than a shift which may lead to further gains.

“Vulgar Marxism” refers to a relatively crude economic determinism or reductionism with which virtually no legal theorists are willing to identify.¹⁰³ When concepts of status and stratification have been stripped of relation to power, capital, and economic exploitation, they capture the thought of Weber and his followers no better than economic reductionism captures Marx. The dominance of status concepts in American social thought explains the lack of a cognate term. We need a new term, perhaps “vulgar status,” or “status-only,” or “vulgar Weberian,” to describe simplistic concepts of socioeconomic status divorced from relations of capital, production, and power. It would be great progress if American theoreticians feared status vulgarity as much as vulgar Marxism.¹⁰⁴

Status alone also implies an understanding of the state and political power different than concepts of class that are related to the production of wealth. Vulgar status is consistent with a conservative notion of the state. The “empty state”¹⁰⁵ is a hollow shell containing gradations of status

Id. at 2328. Balkin applies this analysis to race relations in America:

[I]n a system of white supremacy, whites gain positive associations of honesty, reliability, industry, intelligence, and morality in comparison to blacks. To increase the status of blacks in society means that these positive associations must be weakened or eliminated. Whites can no longer expect a certain set of positive assumptions to be made about them simply because they are white. The social meanings of whiteness and blackness are subtly altered, and the social identities of individuals are thereby changed.

Id. at 2329.

103. *But cf.* Eben Moglen, *The Transformation of Morton Horwitz*, 93 COLUM. L. REV. 1042, 1044 (1993) (reviewing MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870-1960: THE CRISIS OF LEGAL ORTHODOXY* (1992)) (noting that “the once self-proclaimed ‘vulgar Marxist’ has gone post-modern”).

104. Of course, what we should really fear is losing sight of the production of wealth and power entirely, rather than fearing intellectual “vulgarity.”

105. The “empty state” is a metaphor for the political economy of the Rehnquist Court, deployed to deny state responsibility and blame the market—the shell is arranged around the private sector and not understood to define it. In the “empty state,” the line defining the public good is not merely arbitrarily drawn to insulate power but is defined as the sum of all the different private goods. *See* Kenneth Casebeer, *Running on Empty: Justice Brennan’s Plea, the Empty State, the City of Richmond, and the Profession*, 43 U. MIAMI L. REV. 989, 1002–19 (1989) [hereinafter Casebeer, *Running on Empty*]; Kenneth M. Casebeer, *The Empty State and Nobody’s Market: The Political Economy of Non-Responsibility and the Judicial Disappearing of the Civil Rights Movement*, 54 U. MIAMI L. REV. 247, 253–70 (1999) [hereinafter Casebeer, *The Empty State*].

stacked like layers in a cake.¹⁰⁶ The “haves” get larger, sweeter, more highly placed layers than the “have-nots.” The state has no more to do with interaction between layers than the cake pan does with the cake.¹⁰⁷ Robert Frank does acknowledge the importance of legal rules to the construction of economic interest and the distribution of rights and privileges; he states that legal rules originally based on concepts of exploitation are often justified as a way of regulating the quest for status. However, since Frank believes that exploitation does not exist, he does not recognize the role of the state in creating and protecting exploitation.

In contrast, economic and relational concepts of class based even in part on the organization of production necessarily involve some idea of the role of the state in maintaining constellations of economic power.¹⁰⁸ When social groups exist in contested relation to each other, the rules that allocate power between them are part of their relationship. The structures that govern relationships are important and cognizable, including the exercise of state power through judicial decisions. To reckon with class, race, and social change, legal theory and doctrine need to recognize concepts of class that go beyond status and serotonin.

The following sections explore the interaction between concepts of economic inequality and concepts of racial interest; subsequent Parts of this article explore the ways in which law adopts a conservative concept of economic inequality that has regressive effects for racial equality. I will use the term “status” to refer to economic and social inequality that does not consider relations of group power and exploitation and the term “class” to refer to economic inequality constructed through relationships of power and exploitation between social groups.

106. See, e.g., Sylvia Walby, *Gender, Class and Politics*, in *GENDER AND STRATIFICATION* 31 (Rosemary Crompton & Michael Mann eds., 1986) (describing “a tradition, more common in America than Britain, of studying social stratification by ranking individuals on a scale. This tradition is quite different from the more European tradition of defining classes in relation to each other, as one group of people who benefit at the expense of others”).

107. Perhaps the “empty state” has even *less* to do with shaping society, because, in the cake pan metaphor, the pan inevitably shapes the cake to some extent.

108. See Joel Rogers, *Divide and Conquer: Further Reflections on the Distinctive Character of American Labor Laws*, 1990 WIS. L. REV. 1, 26 (“[W]e may assume that whatever the particular terms of compromise achieved by workers and capitalists, they are to some important degree—even in the most voluntarist system—institutionalized and enforced by the state.”).

B. "MAKING CLASS": AGENCY, WHITENESS, AND THE MAKING OF CLASS AND CONSCIOUSNESS

[P]olitical and symbolic factors necessarily play a crucial role in the construction of . . . [class]: Class identities, practices, and "lived experience" are not "afterthoughts" tacked on preexisting classes; they enter into the very making of these classes.¹⁰⁹

Two roles of law, naming interest and distributing power, are important in a dynamic view of class, race, and struggle. This section describes their interaction. Sociologists and historians have long worked to articulate¹¹⁰ the relationship between economic and social structures,¹¹¹ on the one hand, and consciousness,¹¹² ideology, and struggle, on the other.¹¹³ However structural relations are described, they are experienced in the lives of people, individually and socially. The capacity for collective

109. Wacquant, *supra* note 68, at 51 ("Class lies neither in structures nor in agency alone but in their relationship as it is historically produced, reproduced, and transformed.")

110. See Savage, *supra* note 67, at 540 (citing generally CROMPTON, *supra* note 68) ("The relationship between structure and agency is one that has not been 'resolved' in any branch of sociological inquiry and . . . it is therefore wrong to 'gang up' on class analysis as if it is particularly at fault here.")

111. See, e.g., MICHAEL BURAWOY, *THE POLITICS OF PRODUCTION: FACTORY REGIMES UNDER CAPITALISM AND SOCIALISM* 39 (1985). In fact, Marxism does not require defining economic structure as the basis of all analysis. *Id.* ("Any work context involves an economic dimension (production of things), a political dimension (production of social relations), and an ideological dimension (production of an experience of those relations). These three dimensions are inseparable.")

112. See, e.g., Katznelson, *Working-Class Formation*, *supra* note 8, at 8:
Class formations . . . arise at the intersection of determination and self-activity: the working class "made itself as much as it was made." We cannot put "class" here and "class consciousness" there, as two separate entities, the one sequential upon the other, since both must be taken together—the experience of determination, and the "handling" of this in conscious ways. Nor can we deduce class from a static "section" (since it is a *becoming* over time), nor as a function of a mode of production, since class formations and class consciousness (while subject to determinate pressures) eventuate in an open-ended process of *relationship*—of struggle with other classes—over time.

(quoting E.P. Thompson, *The Poverty of Theory*, in E.P. THOMPSON, *THE POVERTY OF THEORY AND OTHER ESSAYS* 106 (1978))

113. Nor do Weberians think status is everything:
"[C]lasses' have often been treated—in some traditions of social theory—as though they were groups or collectivities: most commonly, in those traditions claiming a lineage from Marx. On the other hand, there are contrasting approaches—most notably associated with Max Weber and those who have followed him—in which the term "class" is used to refer to a category of aggregate qualities (chances in the market, or traits of occupations). Neither of these types of conceptualization seems satisfactory I therefore propose abandoning both of these approaches, suggesting that a theory of class can only be satisfactorily elucidated as involving the influence of an institutional order of "class society" upon the formation of collectivities. Such an understanding of class structuration implies connecting . . . a theory of class society, as an institutional form, with an account of how class relations are expressed in concrete types of group formation and consciousness.

ANTHONY GIDDENS, *CENTRAL PROBLEMS IN SOCIAL THEORY: ACTION, STRUCTURE, AND CONTRADICTION IN SOCIAL ANALYSIS* 109–10 (1979).

understanding, the sorting of possibility and decision, and the actions taken also happen through experience of real people. As E.P. Thompson said, “[H]istorical change eventuates, not because a given ‘basis’ must give rise to a correspondent ‘superstructure,’ but because changes in productive relationships are experienced in social and cultural life, refracted in men’s ideas and their values, and argued through in their actions, their choices, and their beliefs.”¹¹⁴

1. “Making Class” or Racialized Status Groups

The process of “making class” involves agency and cultural and economic relationships. In “making class,” therefore, white privilege is crucially important. If class is “a happening,” not “a thing,” then the very “happening” of class is shaped by both conscious and unconscious white choices. Since whiteness is *also* an interaction between the material world and our experience of it, class interest is one of the most important ways in which shared identity can affect the experience of self, identity, and interest for white working people. In other words, strong working class identity can help whites be less defined by their positioned perspective or by attachment to privilege.

Conversely, attachment to privilege diminishes solidaristic identification. Both privilege and positioned perception shape “men’s ideas and values . . . actions, choices, and beliefs” by distributing benefits and by justifying them. Whiteness can therefore facilitate the sense of “middle class” status expressed by many American workers.¹¹⁵ Race is part of the construction of class-as-status in America, and status-consciousness is part of what defeats the development of solidaristic consciousness.¹¹⁶

The lack of a language of class, the status/stratification concept of inequality, and the dynamics of racial privilege and subordination are all important to the ways Americans understand themselves and each other. In America today only two social “classes” (actually status groups) are usually discussed in the media and popular politics—a “middle class,” and an “underclass.” Each has a presumptive race. “Middle class” is presumptively white or non-African-American, a notion easily identified by distinguishing the frequency with which “black” qualifies “middle class” in

114. E.P. THOMPSON, MAKING HISTORY: WRITINGS ON HISTORY AND CULTURE 222 (1994).

115. See *infra* text accompanying notes 118–125.

116. In this dynamic sense, class experience “happens” in ways that include race experience as part of the formation of classes. This point can be overlooked when “race and class” are taken to mean “non-whiteness and lower-class status.”

ways that “white” or “Asian” do not. In contrast, the category “underclass” is presumptively non-white, and the term is particularly likely to be used to refer to African Americans.¹¹⁷ No “upper class” is ever discussed. There exists a status called “wealthy”, however, all but the very wealthiest of that group describe themselves as having “middle-class” values and lifestyles. And even the middle class is not very self-aware *as a class*:

[A]lthough they may sometimes speak of themselves as men or women of the ‘middle class,’ only with an effort of will—only by contrivance—can they imagine themselves to *be* members of a class. Normally they feel themselves to be solid individual achievers in an essentially classless society composed of human beings engaged in bettering themselves.¹¹⁸

“Class” consciousness is therefore both raced and a misnomer for most of America. It describes status rather than class categories. “Middle class” status becomes, effectively, a distinction between status above poverty level and below it.

A particular problem for consciousness of shared class interest in the United States today is the raced construction that links “underclass” and “unemployed and unemployable.” The same period in which a “black middle class” identity has been strengthened has seen the construction of the concept of a gendered and raced underclass, portrayed as dependent and criminal, not part of the working class but oppositional (trying to live off the working class or steal from it).¹¹⁹ The stereotypical link between race and unemployment is part of the division that makes the category “working class” seem disconnected from shared interest with racially subordinated communities.¹²⁰ Effectively, the focus on socioeconomic status and the racialization of perceptions of employability interact with the idea that two status categories (“middle class” and “underclass”) define the universe of “class” in America.¹²¹ “Middle class” status consciousness interacts with

117. See HERBERT J. GANS, *THE WAR AGAINST THE POOR: THE UNDERCLASS AND ANTIPOVERTY POLICY* 29–33 (1995).

118. DEMOTT, *supra* note 7, at 43.

119. I am not arguing that the “underclass” is actually unrelated to the working class, but that it is stereotypically constructed as unrelated and sometimes opposed to the working class. Thoughtful critiques of the use of the term “underclass” can be found throughout Gans’ study of attacks on the poor, see GANS, *supra* note 117, and *THE “UNDERCLASS” DEBATE: VIEWS FROM HISTORY* (Michael B. Katz ed., 1993) (presenting a critique of the use of the term “underclass”).

120. “Working class” is also a racialized concept in America; a concept of “working class” as presumptively white developed after Reconstruction and continued to affect class development until the present. See Michael Omi & Howard Winant, *Racial Formations in RACE, CLASS & GENDER IN THE UNITED STATES: AN INTEGRATED STUDY* 13, 18 (Paula Rothenberg ed., 4th ed. 1998).

121. Robert Reich tried to popularize the idea of an “overclass” as part of a vision of three classes in America: an overclass, an underclass, and an “anxious class.” GANS, *supra* note 117, at 52, 167

white race unconsciousness because both involve unselfconscious participation in an invisible norm that defines social expectation.

Of course, if everyone said “status” when status was what they meant, it would help clarify the debates about race and class.¹²² The use of the term “class” disguises the concepts of status that permeate American society, politics, and law. “Middle class” in common American parlance is really a status term popularly understood through consumer choices and capacities.¹²³ Many Americans identify with “middle class” status.¹²⁴

In addition, the American “mythology of classlessness” interacts with white privilege to discourage class awareness and class formation. Status is generally understood in law as an individual attribute¹²⁵ rather than as a social process. This approach allows white privilege to appear as an incidental feature of an individual life—a happenstance of skin color for which a privileged individual cannot be held responsible.

Status-based views of whiteness also disguise shared interest in working class solidarity. Whites of lower status are thought to have the greatest attachment to racism of any group, both in their objective needs (they need the help of white privilege most) and in their subjective

n.109 (1995). The “anxious class” is clearly a political appeal to people positioned in the center (therefore, fundamentally “middle class” in American parlance). It was not widely adopted.

122. Both terms—status and class—are used extensively in law; neither is used in law the way it is used in sociological theory.

123. See generally FUSSELL, *supra* note 87, at 97–127 (claiming middle-class status can simultaneously be a claim of self-respect; that is, if the only other choice popularly discussed is “underclass,” perceiving oneself as middle class is an indicator of both respectability and stability).

124. See DEMOTT, *supra* note 7, at 41–54. Some of this identification, however, may be a function of how studies are framed. See also MICHAEL ZWEIG, *THE WORKING CLASS MAJORITY: AMERICA’S BEST-KEPT SECRET* 57–59 (“As recently as 1996, a majority of Americans responding to a *New York Times* poll identified themselves as members of the working class rather than the middle class.”) In another recent survey, when offered two choices (working or middle class) fifty-three percent chose working class and forty-three percent middle class. *Id.* at 58.

125. See Rosemary Crompton & Michael Mann, *Introduction*, in *GENDER AND STRATIFICATION* 6–8 (Rosemary Crompton & Michael Mann, eds. 1986). Gender critiques of class theory also reveal inherent flaws in assessing “class” as an individual matter, while pressing theorists on the limits of both Marxist and Weberian theory in explaining women’s experiences. Rosemary Crompton and Michael Mann identify two major problems in analyzing gender and class. The first is the question of whether the individual or the household is the proper unit of social analysis. The second notes that the “life-chances associated with the same occupation may be very different depending upon whether it is carried out by a man or a woman.” *Id.* at 6. The first issue was more problematic for neo-Marxists, and the second for neo-Weberians. *Id.* For example, critiques of occupational stratification studies have been part of work on class and gender. In the past, sociological studies of stratification and mobility often grouped women in the occupational strata of their husbands. See also ERIKSON & GOLDTHORPE, *supra* note 70, at 232–39; Duke & Edgell, *supra* note 67, at 450–53 (discussing whether the appropriate unit of class analysis is the respondent/individual or the household/family); Walby, *supra* note 106, at 31–33 (noting the issue of whether a woman takes the same position in the ranking order as her husband).

attachment (they seek extra status most desperately). Focusing solely on status therefore reifies attachment to white privilege.

2. Agency and Consciousness—Class Lived Within Communities

Class is not just about structure or position but something dynamic that includes the ways people understand themselves and their lives. Therefore, there is a relationship between how people understand their situations and how they act which moves in both directions: action affects consciousness, and consciousness affects action. E.P. Thompson described class as a “happening,” not a thing. In the United States, the “happening” of class has always been affected and shaped, inside the workplace and beyond it, by the phenomena of subordination and privilege that constitute race.

The widespread American attachment to status-identification as “middle class” discourages the mobilization of class consciousness. “The middle class does not exist prior to its symbolic and political organization—it results from it.”¹²⁶ Rejecting analyses which do not recognize that social groups are contingent and forged in struggle, Bourdieu emphasizes how important this contest over the nature of class really is: “Knowledge of the social world and, more precisely, the categories that make it possible, are the stakes, par excellence, of political struggle, the inextricably theoretical and practical struggle for the power to conserve or transform the social world by conserving or transforming the categories through which it is perceived.”¹²⁷

Ira Katznelson emphasizes the importance of the separation of home and work to the development of class in America.¹²⁸ He divides “class” into four aspects: structure, ways of life, dispositions, and collective action.¹²⁹ These aspects are helpful for thinking about the development of

126. Wacquant, *supra* note 68, at 52.

127. Pierre Bourdieu, *The Social Space and the Genesis of Groups*, 14 *THEORY AND SOC'Y* 723, 729 (1985). Bourdieu elaborates: “[O]ne cannot group just *anyone* with *anyone* while ignoring the fundamental differences, particularly economic and cultural ones. But this never entirely excludes the possibility of organizing agents in accordance with other principles of division. . .” *Id.* at 726.

128. For a recent study applying Katznelson’s framework to a working-class community, see generally ROBERT BRUNO, *STEELWORKER ALLEY: HOW CLASS WORKS IN YOUNGSTOWN* (1999).

129. See Katznelson, *Working-Class Formation*, *supra* note 8, at 14. Katznelson distinguishes structural analysis of capitalist development (abstract analysis of structure, which he calls “experience-distant”) from the organization of society “lived by actual people in real social formations” (which he calls “experience-near”). *Id.* at 15–16. Class means “formed groups, sharing dispositions,” *id.* at 17, and it also refers to the collective actions that are taken by those groups. Katznelson draws these theoretical frameworks in order to avoid treating class actions as inauthentic because they do not follow a theoretical hierarchy of authenticity.

class and race in America. Part of the status-focus in America derives from “ways of life.” Residential segregation has become part of the story of class and consciousness. Access to homeownership for white working people¹³⁰ enhances the sense of “middle class” status; the consumer role “homeowner” helps define identity. Residential segregation cabins the experience of community for people of different races and affects access to work.

Katznelson’s concepts of class are also helpful in thinking about the role of law. Law is part of the “structure” of state and the relations of production. Law structures homeownership and the possibility of achieving it in a variety of ways; it shapes development of residential segregation, disputes over governance of public schools, the provision of municipal services, and responses to segregation. It protects or creates background rules governing “dispositions,” and it regulates or discourages collective action such as labor organizing, voting, demonstrating, and handing out leaflets at shopping malls. Distinguishing structure from lived experience also helps refine analysis of the different contexts in which class consciousness is forged and class actions happen. Of course, I do not mean to distinguish work as “structure” and home as “experience,” but instead to take Katznelson’s point that economic and political structure and the lived experience of life, work, and struggle for change vary widely for working class Americans. Activism may function differently at the workplace than in community struggles outside the workplace. Collective identities and common systems of meaning at work do not always produce collective action toward class interests. Significantly, in our segregated nation, the impact of white privilege on “class consciousness” may be experienced differently in the two locations, yet each context (home and work) may affect responses in the other.¹³¹

3. Solidarity Stories—White Privilege Contested

The idea of solidarity¹³² is in some trouble these days. Diversity, not solidarity, is the dominant framework for inclusive thinking about race.¹³³

130. Homeownership has been less available to minorities than to whites. *See generally* CHARLES ABRAMS, *FORBIDDEN NEIGHBORS* (1955) (providing study detailing how homeownership is unavailable to minorities); MASSEY & DENTON, *supra* note 26 (criticizing federal programs denying homeownership to minorities and explaining their impact on urban segregation).

131. *See generally* IRA KATZNELSON, *CITY TRENCHES: URBAN POLITICS AND THE PATTERNING OF CLASS IN THE UNITED STATES* (1981) (discussing patterns of working class Americans).

132. Adolph Reed explains, “Building solidarity [in the context of the labor movement] is about constructing and maintaining a *we* to fight in concert for common objectives.” Adolph Reed, Jr., *Building Solidarity*, *PROGRESSIVE*, Aug. 1, 1996, at 20, *reprinted in* ADOLPH REED, JR., *CLASS NOTES*

A searching examination of the relationship between class-based activism and race is beyond the scope of this Article. But the *possibility* of solidaristic class-conscious activism is fundamental to my argument that the anti-transformation cases tend to conceal class-based interests of white workers.

There are several reasons for the lack of awareness about solidarity and faith in its transformative potential. The structural weakness of the labor movement has made labor militancy less socially visible; therefore, when class does “happen” in some region or struggle so that solidarity is strong, it does not get much time on the evening news. The geographic divide between residence and work combines with residential segregation to obstruct the development of solidaristic political action.¹³⁴ Fear of undertaking multiracial solidaristic work may arise either from stereotypes of white workers or from actual experience of the effects of racism. Most important, white privilege and racist ideology among white workers and within organized labor also threaten solidarity.¹³⁵ Class-based solidarity as a unifying, galvanizing force among workers of different races may seem dated, unlikely, or even impossible.¹³⁶

207 (2000). Reed emphasized that trade unions are “the most racially integrated voluntary associations in American life” and necessitate mutual accommodation that can “break down racist, sexist, nativist, or homophobic tendencies.” *Id.* at 208 (noting that the labor movement has not always lived up to this potential).

133. See RICK FANTASIA, CULTURES OF SOLIDARITY: CONSCIOUSNESS, ACTION, AND CONTEMPORARY AMERICAN WORKERS 3–4 (1988) (describing widely held belief that American workers lack class consciousness and do not have a tradition of solidarity, and noting strong consciousness of solidarity in the United States during the 1930s). See also Charles R. Lawrence III, *Two Views of the River: A Critique of the Liberal Defense of Affirmative Action*, 101 COLUM. L. REV. 928, 941, 951–55 (2001) (stating that “[t]he case for diversity is a case for the integration of a privileged class,” and criticizing the failure of the diversity paradigm to address issues of historic and continuing racial discrimination).

134. See, e.g., WILLIAM FORM, SEGMENTED LABOR, FRACTURED POLITICS: LABOR POLITICS IN AMERICAN LIFE 6 (1995).

135. See Eric Arnesen, *Up from Exclusion: Black and White Workers, Race, and the State of Labor History*, 26 REV. IN AM. HIST. 146, 147 (1998) (reviewing literature on race and labor and noting “[t]hat organized labor often functioned to uphold whites’ access to employment and exclude non white workers has been a commonplace in the literature for much of this century”). See generally GOLDFIELD, *supra* note 41 (analyzing racism in the labor movement).

136. See, e.g., Marion Crain & Ken Matheny, “*Labor’s Divided Ranks*,” *Privilege and the United Front Ideology*, 84 CORNELL L. REV. 1542, 1543–44 (1999) (arguing that the “united front” mentality of Emporium Capwell is out of date, and that enforced collectivity within unions burdens women and people of color; advocating separate organizing based on race, national origin, and gender); Sherry Linkon & John Russo, *Can Class Still Unite: Lessons from the American Experience*, in CAN CLASS STILL UNITE?: THE DIFFERENTIATED WORK FORCE, CLASS SOLIDARITY, AND TRADE UNIONS 311, 312–17 (Guy van Gyes et al. eds., 2001) (describing demographic shifts in work force, changes in work structures, and debates about racism among workers and the role of identity politics). See also Marion Crain, *Colorblind Unionism*, 49 UCLA L. REV. 1313, 1336–39 (2000) (defending proposal for identity-

The concept that working class whites are more prejudiced than whites from other classes¹³⁷ is attractive to the middle class and has proven very durable.¹³⁸ Because of the structures of racial subordination, during most of American history, middle-class white Americans had relatively few opportunities to treat African Americans as their peers. In the context of home ownership, the elites that controlled access to loans, insurance, and development schemes created structures of segregation in urban and suburban life.¹³⁹ Another stereotype identifies white workers with white

based bargaining units). *But cf.* Linkon & Russo, *supra*, at 318–21 (describing success of 1997 strike against United Parcel Service by the International Brotherhood of Teamsters, which carried out internal education, reached out through gender- and race-based networks, and successfully framed the issue as a social justice struggle around economic restructuring; concluding class must not be framed in narrow economic terms, but labor organizing must encompass class and racial issues simultaneously); Mahoney, *supra* note 38, at 762 (criticizing separate bargaining units, given the increasing strength of minorities within the labor movement, and arguing that identity-based organizing may leave white workers organized around the most conservative aspects of identity).

137. Joel Williamson called this historical myth the “grit thesis” of racism and segregation in Southern history and emphasized that racism existed across classes. JOEL WILLIAMSON, *THE CRUCIBLE OF RACE* 294 (1984). “The whole idea of a specially vicious attitude toward blacks prevalent among lower-class whites is an upper-class myth” that served the interest of the elite. *Id.* at 295. *Cf.* WILLIAM WINPISINGER, *RECLAIMING OUR FUTURE: AN AGENDA FOR AMERICAN LABOR* 251 (1989) (“Television programming systematically glorifies white collar jobs no matter how menial, while blue collar workers are depicted as prejudiced buffoons. (This last is a vicious calumny; you’ll find far more racial and ethnic prejudice in the country club and the corporate boardroom than on the factory floor.)”).

138. Barbara Ehrenreich addresses this issue repeatedly in her study of middle class anxiety. For example,

[T]he myth of working-class intolerance and authoritarianism is one of the most cherished beliefs of American sociologists. Even when confronted with directly contradictory evidence, they will simply assert their class-based prejudices. For example, a 1966 study on occupational mobility and racial tolerance cited evidence that “the higher one’s class of origin or class of destination the more likely that one prefers to exclude Negroes from one’s neighborhood.” But the authors refused “to contemplate seriously” that such an unflattering finding could be true.

BARBARA EHRENREICH, *FEAR OF FALLING: THE INNER LIFE OF THE MIDDLE CLASS* 113 (1989) (quoting RICHARD F. HAMILTON, *CLASS AND POLITICS IN THE UNITED STATES* (1972)).

139. *See generally* MASSEY & DENTON, *supra* note 26 (discussing housing discrimination). *See also* Mahoney, *supra* note 26, at 1672 (explaining that redlining created economic disincentives to desegregation). Legal rhetoric has generally claimed to protect the interest of disadvantaged whites rather than treating them as scapegoats for racism. The idea of lower-status attachment to privilege appears only indirectly in the cases. For example, cases on school desegregation may treat white aversion to people of color as a “natural” phenomenon. *See Missouri v. Jenkins*, 515 U.S. 70, 111 (1995) (O’Connor, J., concurring) (suggesting that “natural, if unfortunate, demographic forces” or *desegregation* may have caused white departure to suburbs and race concentration in the Kansas City school district, despite factual findings in the district court that *segregation* had caused this pattern). White flight arguments are not explicitly based on class, but, because wealthy and upper middle-class students are often understood to “flee” to private schools, the naturalization of urban segregation implicitly supports the idea of working class attachment to privilege. The naturalized image of white flight is misleading. *See generally* JOHN HARTIGAN JR., *RACIAL SITUATIONS: CLASS PREDICAMENTS*

supremacist hate groups. Historical studies of the Ku Klux Klan have shown that it was not disproportionately composed of white workers.¹⁴⁰

While stereotypes account for some of the popular disinterest in solidarity, the continuing force of inequality and racism are more important obstacles.¹⁴¹ Scholars have analyzed the segmentation of the working class in the United States.¹⁴² Recent works in labor history have described the simultaneous construction of whiteness and class in America, emphasizing the role of white workers in establishing and defending white privilege.¹⁴³ Bruce Nelson and David Roediger, among others, emphasized the agency of white workers in claiming white superiority and discriminating against workers of color.¹⁴⁴ Unsurprisingly, left-led unions did better on

OF WHITENESS IN DETROIT (1999) (discussing a variety of white attitudes in an urban environment and different responses by whites to racial change).

140. See WILLIAM D. JENKINS, *STEEL VALLEY KLAN: THE KU KLUX KLAN IN OHIO'S MAHONING VALLEY* 77-79 (1990) (noting that lack of statistical data may taint findings); SHAWN LAY, *HOODED KNIGHTS ON THE NIAGARA: THE KU KLUX KLAN IN BUFFALO, NEW YORK* 11 (1995). Since so many people hold working class jobs, a majority of working class members would not necessarily comprise a disproportionate presence within the group. Jenkins, *supra*, used membership lists that included occupation and local directories to compute the percentage of all Klan members at six levels of manual and nonmanual job skills, and then compared these figures with the percentages of native-born white men and of all males in the local population. *Id.* at 82-84. Jenkins found that the white middle class had joined the Klan in greater numbers than their proportion of the area population, and that the lower skilled blue-collar workers were a lower percentage of Klan members than any other sector of the local population. *Id.* at 78-94. See also W.J. CASH, *THE MIND OF THE SOUTH* 344 (1941) (describing elite control of KKK); LEONARD L. RICHARDS, *GENTLEMEN OF PROPERTY AND STANDING: ANTI-ABOLITION MOBS IN JACKSONIAN AMERICA* 82 (1970) (describing mobs before the Civil War).

141. For example, after the enactment of civil rights laws, as minority workers fought for access to work, some unions continued to resist change. See, e.g., *infra* Part IV.A (discussing role of firefighters' unions).

142. See, e.g., DAVID M. GORDON, RICHARD EDWARDS & MICHAEL REICH, *SEGMENTED WORK, DIVIDED WORKERS: THE HISTORICAL TRANSFORMATION OF LABOR IN THE UNITED STATES* 206-10 (1982). But see KIM MOODY, *WORKERS IN A LEAN WORLD: UNIONS IN THE INTERNATIONAL ECONOMY* 143-79 (1999) (describing segmentation, racism, and changes in the organization of industry and society as divisive factors within the working class, but identifying the period of rapid transition within which unions and workers now operate as one which continues to push working people toward the need to defend their interests). Moody also argues for the continuing importance of solidarity:

A class or union 'identity' speaks to a real material need that draws people together. If the institutional bases of racism and sexism are not addressed this unity can collapse far more readily than it took shape. But the opportunity to forge unity is there in the reality and organizations of the class.

Id. at 178.

143. See generally Arnesen, *supra* note 135 (reviewing studies by many scholars). Cf. Arnesen, *supra* note 36, at 13-23 (questioning psychological focus of historical literature on whiteness). See also Mahoney, *supra* note 77 (exploring issues for legal theory in recent literature on labor and race).

144. See, e.g., NELSON, *supra* note 86, at 89-142 (describing resistance to integration and attachment to white privilege on docks and in steel mills); ROEDIGER, *supra* note 36, at 28-36, 170-73.

antiracism than most American trade unions; in general, outside the left, antiracist leadership was often inconsistent or nonexistent.¹⁴⁵

Rather than insist on the primacy of solidarity as a narrative in the history of working class organizing in the United States, it is important to recognize racism and simultaneously look at instances in which class-based mobilization directly and creatively confronted white privilege and racist ideology. One example comes from a project in rural Mississippi, where white civil rights organizers worked on building working-class solidarity based on racial equality during the late 1960s and early 1970s. Activists with years of experience in the Student Nonviolent Coordinating Committee (“SNCC”) created the Grass Roots Organizing Work (“GROW”) Project to reach white workers in the heart of the Deep South with a message of biracial unity and shared labor struggles.¹⁴⁶ Underlying the project was the belief that the achievements of the civil rights movement made it possible to approach white workers about interracial unity based on equality.

The GROW organizers sought to prove the possibility of class-conscious antiracist work. If, in Mississippi in the late 1960s, whites were willing to believe they could gain from the experience and militancy of black coworkers and willing to work together as equals, this would establish the possibility of antiracist class-conscious work at other times and places.¹⁴⁷ The changed conditions won through the achievements of the African-American civil rights struggle were crucial to building awareness among whites of shared needs. The organizers told white workers that they could maintain any attitudes they chose about black inferiority and white superiority, but, regardless of their beliefs, they had to completely change their behavior. If they wanted to make any progress with their union, they had to work on a basis of genuine equality with black workers. The organizers expected that shared interests would create changed behavior, although rhetoric would probably be the last vestige of white racism to change. The result was not only organizational growth for

145. See, e.g., GOLDFIELD, *supra* note 41, at 190–98; Arnesen, *supra* note 135, at 151; Michael Honey, *Anti-Racism, Black Workers, and Southern Labor Organizing: Historical Notes on a Continuing Struggle*, 25 LAB. STUD. J. 10, 15–16 (2000).

146. Only a few years after SNCC workers were murdered in Mississippi, the GROW project helped organize pulpwood cutters and, later, woodworkers at a Masonite plant in Laurel, Mississippi. On the Masonite strike, see JERRY LEMBCKE & WILLIAM M. TATTAM, *ONE UNION IN WOOD* 47 (1984). On the GROW project, see generally Zellner, *supra* note 39 (describing organizing challenges and successes).

147. The head of the Mississippi AFL-CIO warned the GROW organizers about Klan involvement in the woodcutters. See Zellner, *supra* note 39.

the union but also surprisingly rapid and dramatic change in racial beliefs. After a few years of work in a union, one former Klansman commented that he had now “joined the civil rights.”¹⁴⁸

Empowering minorities and building unity within labor are interrelated projects.¹⁴⁹ A recent example involved an organizing drive at a Kmart Distribution Center in North Carolina.¹⁵⁰ Black workers led the drive to organize the Greensboro Distribution Center, the only Kmart distribution center with a mostly-black work force, in which workers were paid an average of \$5.10 per hour less than workers in identical jobs in other areas. When Kmart obdurately resisted after the union won an election, union members planned a sit-in protesting company policy. Black ministers who had been supporting the drive decided to be arrested in their place, kneeling in prayer in the parking lot and helping to turn public opinion in Greensboro toward support for the workers. When the union won a contract, it was the first time any Kmart distribution center had been organized.

About a third of the workers at the distribution center were white, and they joined the unionizing effort. When the company sued black workers and black ministers, white workers held a press conference, demanding to know why they had not been sued too.¹⁵¹ Reverend Nelson Johnson and the other black ministers carefully described their campaign as one for “authentic community” or “sustainable community.” When the struggle was described as one for racial justice, white workers did not see it as their own; when racial justice was ignored, blacks felt the campaign was

148. *Id.* See also JASON BERRY, AMAZING GRACE: WITH CHARLES EVERS IN MISSISSIPPI 112–48 (1973) (discussing effects of previous organizing projects on Charles Evers’ first mayoral campaign). Cf. OSHA GRAY DAVIDSON, THE BEST OF ENEMIES: RACE AND REDEMPTION IN THE NEW SOUTH (1996) (former Klansman rejects white supremacy, sees that it has harmed white working class interest, and works with African Americans for equality and reform in Durham).

149. See, e.g., Elizabeth M. Iglesias, *Structures of Subordination: Women of Color at the Intersection of Title VII and the NLRA. NOT!*, 28 HARV. C.L.-C.R. L. REV. 395, 478–84, 497–99 (1993) (criticizing concepts of solidarity that permit subordination of minorities, and considering structural proposals to empower minority workers within labor unions, including cumulative voting and separate representation).

150. See LANI GUINIER, LIFT EVERY VOICE: TURNING A CIVIL RIGHTS SETBACK INTO A NEW VISION OF SOCIAL JUSTICE 239–43 (1998); PENDA HAIR, LOUDER THAN WORDS: LAWYERS, COMMUNITIES, AND THE STRUGGLE FOR JUSTICE 102–19 (2001); Penda Hair, *Prayer and Protest: Bringing a Community Vision of Justice to a Labor Dispute*, 2 U. PA. J. LAB. & EMP. L. 657, 670–73 (2000), Reverend Nelson Johnson, *Reflections on an Attempt to Build “Authentic Community” in the Greensboro Kmart Labor Struggle*, 2 U. PA. J. LAB. & EMP. L. 675 (2000).

151. The press conference was the product of strategic consultation between Reverend Nelson Johnson and other black ministers, and white ministers and workers. Rather than describe the suit as an issue of discrimination, even though only blacks had been sued, Reverend Johnson described it as an opportunity. See GUINIER, *supra* note 150, at 241.

unresponsive to their concerns. Black leadership sustained the drive throughout, but eventually white ministers, college professors, students, and businessmen joined in support work.¹⁵²

Fear of racism can itself be an obstacle. In one union drive in a community with a history of racial oppression and tension, labor organizers feared the effects of white racism and therefore chose not to feature black leadership in campaign literature. This strategy failed to overcome white reluctance to organize, and it left black workers with no sense that the union spoke for them; the union lost the election. In a subsequent drive at the same plant a few years later, organizers carefully brought both black and white workers into leadership, and they accepted leadership from each other. The second campaign became a significant victory for the union.¹⁵³

Mostly-white unions have sometimes voted to integrate leadership or to protect integration against the impact of layoffs—only to be held back by law.¹⁵⁴ In *Wygant v. Jackson Board of Education*,¹⁵⁵ a union collectively agreed to structure layoffs to retain later-hired minority teachers. In *Donovan v. Illinois Education Assoc.*,¹⁵⁶ a teacher's union created an appointment procedure to supplement its elected governing body to ensure the presence of at least eight percent minorities in the association's representative assembly. In both cases, the courts, not unions, blocked racial transformation programs. Once courts had blocked such programs, unions no longer attempted them—but only the unions' failure remained noticeable. The conditions for antiracist solidaristic work need protection in law.¹⁵⁷

152. This solidaristic approach to the interest of white workers is dramatically different from the way that the interest of whites appear in the anti-transformation cases. In *Shaw v. Reno* and its progeny, the Supreme Court implicitly treated white workers in this area of North Carolina as if their interest were defined by their race; the court held that the "message" sent to their representatives by the creation of this heavily industrial highway district was one of inattention to their needs. See discussion *infra* notes 312–69.

153. Interview with Monica Russo, District Manager for Amalgamated Clothing and Textile Workers Union, in Miami, Florida (Oct. 10, 1994).

154. See Arnesen, *supra* note 135, at 156 (calling for examination of the role of the state in shaping working-class race relations). The effect of law is both ideological and practical, making structural rules more or less obvious, and making alternative paths more or less possible.

155. 476 U.S. 267, 283 (1986) (holding race-based layoffs unconstitutional).

156. 667 F.2d 638, 642 (7th Cir. 1982) (holding seats for minorities unauthorized under the Labor Management Reporting and Disclosure Act). The structure would have avoided a zero-sum conflict with current leadership, and permitted minorities to run for any of the previously existing seats while guaranteeing at least some minority representation in leadership. See Iglesias, *supra* note 149, at 459–64 (discussing *Donovan*).

157. See Rogers, *supra* note 108, at 3 & n.6. (emphasizing the importance of legal rules to the construction of labor coalition and collective action).

This Article argues that submerging class interests in law allows a conservative vision of white working class interest to triumph. It does not argue for submerging race interest into class. Rather, it calls for a searching, contextual evaluation of class interest, bringing class back in to create a richer dialogue and to emphasize that the needs of workers—including white workers—remain unprotected in recent cases.

4. Class Accounts—Economic Interest, Morality, and the Claim of Harm to Whites

The rationales for limits on institutional programs of racial transformation include a “defense of others” attitude toward the newly discovered white working class. White middle class people may perceive the interest of working class whites in race privilege as economic, yet simultaneously perceive their own opposition to transformative programs as moral.¹⁵⁸ Morality is equated with individual interest and treated as *distinct from and even opposed to group interest*. When law adopts this vision of interest, it simultaneously supports the claim of harm to whites and diminishes class consciousness.

In much contemporary discourse, including debates in law, a general societal interest in racial equality is posed *against* the self-interest of white working people. This false dichotomy treats advancement within the working class as a zero-sum game in which redistribution is only possible among working class people, not between them and other classes. This view is a status-based account of white interest because, like Robert Franke’s economic vision, it excludes solidaristic transformation. The interest of white workers is asserted as one that trumps the moral ground of reparations or compensation for past harm for oppressed minorities. Using “racial preferences” then seems an immoral or inauthentic reason to decide between individuals.¹⁵⁹

Claims about morality and justice are part of the construction of class and identity, not merely secondary to them. Transformative work in law and in labor and community organizing depends on moral claims, not merely on economic claims. As E.P. Thompson explained, “[e]conomic

158. People of “middle-class” status sometimes assume that higher status includes higher levels of awareness; enlightened altruism and opposition to racism are assumed to be more common in those classes. The middle class rarely describes itself as afflicted with conflicts between moral claims and racial self-interest. Rather, the conflict between economics and social justice is ascribed to the working class.

159. This reasoning appeals to positioned white perception because of the ways in which challenges to whiteness make white people feel uncomfortable.

relationships are at the same time moral relationships; relations of production are at the same time relations between people, of oppression or of co-operation: and there is a moral logic, as well as an economic logic, which derives from these relationships.”¹⁶⁰ Thompson concluded that “the history of the class struggle is at the same time the history of human morality.”¹⁶¹

Consciousness and action for white working class people are a contested process: how much more difficult will attachment to privilege or the process of identification as white make it for whites to work in solidarity with people of color, and when will they see class interest in ways that lead to solidaristic behaviors and beliefs? Solidarity may include simply behavior—being willing to work together with people of color at all (“we are all in this together, we must work together, a rising tide lifts all boats”);¹⁶² commitment to egalitarianism (“we all deserve good treatment”); or the rejection of white supremacy as destructive and inauthentic—in other words, an antiracist position.

Consciousness is interrelated with action.¹⁶³ The social and political fight to name interests is therefore part of the construction of class. Law is a powerful way in which society names interests, validating political claims about harm and right. Law must simultaneously begin recognizing class interest and resisting the formalism that equates naming race with racism. Therefore, this Article is not arguing simply against certain ways of naming interests in law. Rather, it argues against deploying the institutional power of law in ways built on the premise of white working-class investment in white privilege and instead for directly confronting class issues. Law sets conditions under which shared work happens (or does not happen) as well

160. THOMPSON, *supra* note 114, at 75 (explaining that he has reconsidered his original view in which William Morris’ moral critique was dependent upon Karl Marx’s economic and historical analysis; “I see the two as inextricably bound together in the same context of social life”).

161. *Id.*

162. The GROW organizers believed that behavior would be the first thing to change for white working-class people in Mississippi, and that “rhetoric” (use of racist terminology) would be the last. *See Zellner, supra* note 39.

163. For a thoughtful discussion of the relationship between action and consciousness, see FANTASIA, *supra* note 133, at 8–16. Rick Fantasia argues against the many scholars who understand Marx to have described a dichotomy between a class “in itself”—formed in economic relation to capital—from a class “for itself”—acting on its own behalf. *See id.* at 8. Fantasia describes class as “a dynamic phenomenon in which particular classes have no independent being, but are functions of their relationships to other classes. . . . [C]lass consciousness essentially represents the cultural expression of the lived experience of class, an experience shaped by the process of interaction of these collectivities in opposition to one another.” *Id.* at 14.

as validating moral claims about the interests of justice and the nature of harm.

The anti-transformation cases are the fruit of a sustained political campaign to shift the civil rights paradigm in ways that take an identifiably white perspective. During the Reagan administration, politicians and the Justice Department sought to shift the paradigm for civil-rights cases away from remedying the subordination of people of color by the dominant white racial group—the focus of the civil rights movement—to individual rights and particularly to the protection of whites against “reverse discrimination.”¹⁶⁴ When the Justice Department brought reverse discrimination suits and switched sides in civil rights lawsuits, the result was twofold: to name harm to white people as a primary concern as a matter of justice, and to diminish desegregation of workplaces and access for minorities to business dealings with local governments. Ultimately, this logic led in recent voting rights cases to legal doctrines that treat whiteness as uniquely endangered and that effectively diminish political power for people of color, particularly African Americans. All white people, as a matter of morality and justice, should feel deeply concerned with these results. These decisions also create problems in terms of class consciousness and mobilization particular to working class people. Part IV of this Article will examine the ways class and whiteness interact in the cases on race, work, and power decided in the two decades after that shift in Justice Department strategy.

C. MAKING STATUS: THE DIFFICULTY OF DISCUSSING CLASS IN LAW

What is striking is the national facility at generating substitutes for the language of class; it approaches the incredible and is properly thought of as the sea on which the mythology of classlessness floats.¹⁶⁵

“Class” is generally invisible in American legal discourse. The term is used constantly (“class action,” “classification”) in reference to issues

164. During the Reagan administration, the Justice Department initiated and supported reverse discrimination suits in a systematic campaign against affirmative action. See THOMAS BYRNE EDSALL & MARY D. EDSALL, CHAIN REACTION: THE IMPACT OF RACE, RIGHTS, AND TAXES ON AMERICAN POLITICS (1991) 172–97. Drew Days argued at the time that a casualty of the Reagan-era “about-faces on civil rights” could be “the good will of millions of Americans.” Drew S. Days, *Turning Back the Clock: The Reagan Administration and Civil Rights*, 19 HARV. C.R.-C.L. L. REV. 309, 347 (1984) (arguing that a “substantial number of citizens” had accepted the need to solve discrimination and exclusion, but that voluntary compliance by the public was threatened by Reagan administration policies). See also J. MORGAN KOUSSER, COLORBLIND INJUSTICE: MINORITY VOTING RIGHTS AND THE UNDOING OF THE SECOND RECONSTRUCTION 456–67 (1997).

165. DEMOTT, *supra* note 7, at 109.

other than social and economic inequality and power.¹⁶⁶ When used in law with regard to economic inequality, the term usually refers to gradational rather than relational concepts. Legal discussions of structural inequality seldom use the term “class,” instead discussing “race,” “poverty,” “employee,” or “labor,” none of which adequately replaces the concept of class. In different ways, each of these terms addresses some questions of power, but none directly addresses the relationships of power between social groups. Since law more easily recognizes race and gender rather than class issues, the need to shape *legally* cognizable claims has also tended to diminish consciousness of and arguments about class. Recent proposals to use “class” instead of race as the basis for affirmative action have not explored the meaning of class in any relational sense and in reality concern more or less elaborated status-based criteria.¹⁶⁷

1. Inadequate Categories—“Race,” “Poverty,” “Labor,” and “Employee”

In a supposedly classless society, class is hard to address directly. In law and society, it is easier to recognize the existence of “poverty” than to recognize the processes that produce and protect wealth. Poverty is not a good substitute for the concept of class. It is a status category that implies deviance below a norm¹⁶⁸ and therefore reinforces the myth of classlessness (or at least middle class status) as the defining social norm. It draws arbitrary¹⁶⁹ lines between working people who may be similarly

166. I am indebted to Jeanne Adleman, my mother, for pointing out the many uses in law of the term “class” usually not related to each other. As Stephanie Wildman points out, a similar phenomenon is true of the term “privilege”; we have executive privilege, evidentiary privilege, and so on, yet ordinarily the term is not used to describe the dominance and the freedom from subordination which remain as invisible as whiteness. Interview with Stephanie Wildman, Mar. 27, 2001.

167. The best arguments on this point are by Deborah Malamud, who pointed out that it is difficult for law to deal with structural economic inequality. Malamud, *Lessons and Caveats*, *supra* note 2, at 1860. See also Deborah C. Malamud, *Race, Culture, and the Law: Values, Symbols, and Facts in the Affirmative Action Debate*, 95 MICH. L. REV. 1668 (1997) (reviewing four recent books on race and affirmative action).

168. Poor people are often constructed as deviant. See MARTHA ALBERTSON FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES* 101–25 (1995) (observing that single mothers are labeled “deviant” and viewed as threatening by society); Wes Daniels, *Judicial Images of Homeless Litigants and Implications for Legal Advocates*, 45 BUFF. L. REV. 687, 687–88 (1997) (reasoning that deviance is one of the shifting judicial images of homeless people as “derelicts, victims of misfortune, or as people burdened by structural forces beyond their control”); Lucy A. Williams, *Race, Rat Bites And Unfit Mothers: How Media Discourse Informs Welfare Legislation Debate*, 22 FORDHAM URB. L. J. 1159, 1160–61 (1995) (noting that welfare mothers are treated as deviant). My emphasis in this section is on the ways in which “poverty” implies a non-poor norm, rather than the ways in which it treats the poor as departures from that norm.

169. Poverty calculations have not been readjusted since 1950s and are not based on current proportional costs of housing and food, among other problems. See DOUG HENWOOD, *THE STATE OF*

situated except for income (similar in low wages, experience of unemployment or underemployment, and in their relations to employers or communities). Also, poverty as a category implies nothing about *classes* and the relations between them: it focuses on distribution rather than production of wealth with no implication about the control of capital except for the identification of a group that controls none.

In part, finding language for class in law is difficult because of the way legal doctrine involved in the late twentieth century. Poverty as a legal category does not find much constitutional protection, although occasionally indigency does. Once the Supreme Court determined that wealth was not a suspect classification triggering heightened constitutional review, lawyers for low-income people and scholars writing in the area were encouraged to focus on the categories of race and gender, which do receive heightened review.¹⁷⁰ The failure to establish any successful legal theories under which workers have rights to prevent deindustrialization and employer relocation discouraged focus on class as part of a system of production.¹⁷¹

In contemporary American usage, a confused interaction between the concepts of “race,” “poverty,” and “class” often affects legal and social discourse. Since whiteness as a dominant norm is transparent for whites, “race” is generally understood as non-whiteness. Race (as non-whiteness) in turn becomes a marker for class, which is in turn understood to mean poverty. “Race” and “poverty” thereby come to define the ways we

THE USA ATLAS 48, 111–12 (1994) (cited in WHITE TRASH, RACE AND CLASS IN AMERICA 191 (Matt Wray & Annalee Newitz eds., 1997)).

170. Legal advocates focus on race because poverty is so hard to deal with directly in law. John Calmore observes that:

[A]lthough class status plays a larger role than ever before in the life style and opportunities of blacks, due to ubiquitous racism and the law's reluctance to confront the issues arising from broad economic inequality, it is imperative that legal advocates treat the black poor as special, unique victims of racism.

John O. Calmore, *Exploring the Significance of Race and Class in Representing the Black Poor*, 61 OR. L. REV. 201, 204 (1982).

171. During the 1980s and into the 1990s, activists and communities sought legal and political tools to keep plants from closing, but victories were scarce. One of the most famous cases was *Local 1330 v. United States Steel Corp.*, 631 F.2d 1264 (6th Cir. 1980), discussed in Jules Lobel, *Losers, Fools & Prophets: Justice as Struggle*, 80 CORNELL L. REV. 1331, 1338 (1995). See generally Joseph William Singer, *The Reliance Interest in Property*, 40 STAN. L. REV. 611 (1988) (discussing problems of plant closings); Fran Ansley, *Standing Rusty and Rolling Empty: Law, Poverty, and America's Eroding Industrial Base*, 81 GEO. L.J. 1757 (1993) (same) [hereinafter Ansley, *Standing Rusty*]. See generally Fran Ansley, *Inclusive Boundaries And Other (Im)possible Paths Toward Community Development in a Global World*, 150 U. PA. L. REV. 353 (2001) (discussing transition between the plant closing movement and the response to globalization involved in activism against free trade and the World Trade Organization).

understand “class,” perpetuating stereotypes that equate poverty with non-whiteness. The racialization of the concept of poverty disserves low-income people of color, who come under attack because of racism as well as their impoverished status. It also disserves higher-income people of color, who are then treated with stereotypical expectations attached to low-income people as one manifestation of racism. Low-income whites also suffer from the racialization of the concept of poverty when social programs are attacked based on racism.

Labor, probably the legal category closest to class, is also an ineffective and misleading substitute for class or class interest. Labor law covers people in different employment categories and economic positions (for example, schoolteachers as well as mechanics). American labor law weakened over the past fifty years and membership in unions declined as organizing grew more difficult.¹⁷² The American legal system therefore addresses interests of working people far more frequently through “employment law” than “labor law.” The term “employee” describes a status, a legal relationship, and some recognition of relative power. However, managers, waitresses, executives, secretaries, bank vice presidents, doctors, nurses, truck drivers, and textile workers are all employees. Therefore, the term fails to capture either class or socioeconomic status effectively.

Solidaristic class interests are also disguised by certain structural qualities of employment discrimination litigation. Litigation tends to strip issues for courtroom presentation—partial shared interests vanish. Antidiscrimination law seldom challenges the ways in which economic and political systems of production and their legal protection are involved in the reproduction of racial power.¹⁷³ Classification by wealth or class does not trigger close scrutiny in constitutional law, and class is not a cognizable

172. Over time, it also became more difficult for workers to maintain organized status. *See generally* THOMAS GEOGHEGAN, *WHICH SIDE ARE YOU ON?: TRYING TO BE FOR LABOR WHEN IT'S FLAT ON ITS BACK* (1991) (describing overwhelming difficulties and obstacles in union organizing). Union membership in the United States fell from 35.5% of the work force in 1945 to 15.8% in 1993; in the private sector, union membership had fallen to 10.8% of the work force by 1994. *See* RICHARD SENNETT, *THE CORROSION OF CHARACTER: THE PERSONAL CONSEQUENCES OF WORK IN THE NEW CAPITALISM* 152, 157 (1998). In 2001, 13.5% of wage and salary workers were union members. “Nearly 4 in 10 government workers were union members in 2001, compared with less than 1 in 10 private wage and salary workers.” BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, *UNION MEMBERS IN 2001* (2003), <http://www.bls.gov/news.release/union2.nr0.htm>.

173. *But see* Marley S. Weiss, *Risky Business: Age and Race Discrimination in Capital Redeployment Decisions*, 48 MD. L. REV. 901, 902–03 (1989) (arguing that age and race discrimination are implicated in decisions about reallocating corporate capital investment).

category under Title VII.¹⁷⁴ Therefore, legal arguments in these areas are constructed as if all “employment” is about the same class, as if all classes have the same sorts of employment interests, and as if the same standards should in fact govern diverse employment contexts including hiring, promotion, layoffs or firings, and contracting.

2. The Rehnquist Court Turns Class into Status in Labor Law

American labor law places direct and indirect limits on class mobilization¹⁷⁵ by refusing to recognize the exercise of class power¹⁷⁶ and by choosing status over class. In *Lechmere, Inc. v. NLRB*,¹⁷⁷ for example, the Court held that union organizers could not gain access to employees of a retail store on the grounds of the shopping center where it was located, although seven months of sustained union effort had only succeeded in reaching twenty percent of the employees in the Hartford metropolitan area.¹⁷⁸ The workers’ right to learn about organizing opportunities was therefore diminished in order to protect the employer’s property rights—distribution trumps production. *Lechmere* describes the employer’s power as power over property, not over workers, but the holding reinforces the class power of employers.¹⁷⁹ The opinion essentially treats the *collective* interest of workers as attached to the separate property rights they hold in their residences. As Cynthia Estlund has explained, “the only employer interest that seems to have been threatened by the union’s

174. As Fran Ansley points out, if “class” were a protected category, disparate impact analysis would be impossible—the disparate impact of dollars is called “the market” and most American law is organized around it. Interview with Fran Ansley, May 19, 1994.

175. Examples include the structure in which contracts are negotiated with individual employers, and restrictions on secondary boycotts. See JAMES B. AILESON, VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW 69–77 (1983). Also, work is not protected as investment. See Int’l Bd. of Teamsters v. Daniel, 439 U.S. 551, 559–60 (1979) (stating that pension plan funded by employer is not a “security” under Securities Act and Securities Exchange Act). In *Daniel*, although the employee argued that the employer’s payments into a pension fund on his behalf were deferred compensation and even though substantial amounts of the income for pension funds were earned by investment rather than employer contribution; the court reasoned that the “purported investment is a relatively insignificant part of an employee’s total . . . compensation package.” *Id.* at 560.

176. See Richard Michael Fischl, *Self, Others, and Section 7: Mutualism and Protected Protest Activities Under the National Labor Relations Act*, 89 COLUM. L. REV. 789, 800–11 (1989) (noting differences between NLRB and courts in their analyses of this issue). See also *id.* at 811–13 (noting situations, such as fear or narrow economic self-interest, in which courts reject the worker’s position as too self-interested to constitute mutuality; noting narrow definitions of “mutual aid or protection” among workers as protected only when capable of being construed also a defense of oneself).

177. 502 U.S. 527 (1992).

178. See *id.* at 530, 540–41.

179. Cf. *NLRB v. Babcock & Wilcox, Inc.*, 351 U.S. 105, 113–14 (1956) (excluding non-employee organizers from access to workplaces that were characterized by the court as being near “small well-settled communities where a large percentage of the employees live”).

conduct was Lechmere's interest in preventing employees from receiving information about unionization."¹⁸⁰ The Court also weakened working class interest within labor law by restricting the ability of unions to use membership dues for political speech about shared interests.¹⁸¹

In *NLRB v. Health Care & Retirement Corp.*,¹⁸² the majority opinion doctrinally detached the category "labor" from both class and power in American labor law. In a nursing home, licensed practical nurses directed nurses' aides as part of the performance of both in their work.¹⁸³ The Supreme Court held that the nurses were "supervisors" excluded from the union bargaining unit.¹⁸⁴ The statutory question depended on whether the nurses directed the labor of other workers "in the interest of the employer":

Congress defined a supervisor as: "any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment."¹⁸⁵

The case therefore turns upon the interpretation of "the interest of the employer." The crucial question not addressed directly in the Court's interpretation is which core concepts—class or status, production or distribution—will be implied in brackets into the employer's "interest."

180. Cynthia L. Estlund, *Labor, Property, and Sovereignty After Lechmere*, 46 STAN. L. REV. 305, 334 (1994).

The law now allows employers to interfere with employees' protected conduct by excluding it from private property, with no better justification than a bare desire to inhibit that conduct. By allowing an employer's desire to inhibit union organizing to outweigh employees' federally protected right to organize, the *Lechmere* Court 'accommodated' employer interests that are simply incompatible with the basic policies of the Act.

Id. at 335.

181. See, e.g., *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 528 (1991) (limiting ability of teacher's union to speak to issues of public education using dues of nonmembers despite shared interest as employees, not only as citizens of the community and professionals). See also *Communications Workers v. Beck*, 487 U.S. 735, 745 (1988) (limiting ability of union to represent nonmembers on areas of class concern). Cf. *Keller v. State Bar of Cal.*, 496 U.S. 1, 11–17 (1990) (treating bar association's use of members' dues to fund speech as analogous to restrictions placed on workers in labor unions).

182. 511 U.S. 571, 576–80 (1994).

183. The case concerned a charge of unfair labor practice after the employer disciplined four licensed practical nurses. The nursing home had a Nursing Director and Assistant Director, nine to eleven nurses (both registered nurses and practical nurses), and fifty to fifty-five nurses' aides. See *id.* at 574–75.

184. On the importance of contests over bargaining units to the difficulty of union organizing, see generally GEOGHEGAN, *supra* note 172.

185. *Health Care & Retirement Corp.*, 511 U.S. at 573 (citing 61 Stat. 138, codified at 29 U.S.C. § 152(11)).

The Supreme Court implies that nurses—like all employees—work “in the [commercial] interest” or “the [market] interest” of the employer. The Court emphasized that it is always in the interest of the employer when employees perform their work. The direction by nurses of tasks performed by other workers therefore is part of a classless concept in which the “interest” of the employer is defined by successfully competing with other providers for clients, rather than by the extraction of profits from the labor of employees.¹⁸⁶

In contrast, a focus on “the [class] interest of the employer” leads directly to analysis of the end toward which power is exercised. “Managers and supervisors do not exercise authority simply to coordinate production but do so within a context in which the goal of production is profit and the means to that goal is the extraction of surplus labor.”¹⁸⁷ A relational class-based analysis completely avoids confusion: “Managerial tasks that involve giving direction in order to integrate and coordinate the labor process and to provide specialized knowledge are usefully distinguished from the authority exercised to discipline and control. But coordination tasks in themselves cannot be a base for exploitation, for the extraction of surplus labor.”¹⁸⁸

Power over workers *as workers* was the point Justice Ginsburg made in dissent:

It is a defining task of management to formulate and execute labor policies for the shop; correspondingly, the persons charged with superintending management policy regarding labor are the “supervisors” who, in the Board’s view, act “in the interest of the employer.”

Maintaining professional standards of course serves the interest of an enterprise But “the interest of the employer” may well tug against

186. See George Feldman, *Workplace Power and Collective Activity: The Supervisory and Managerial Exclusions in Labor Law*, 37 ARIZ. L. REV. 525, 537–45 (1995) (discussing managers and supervisors in *Health Care & Retirement Corp.*).

187. Johanna Brenner, *Work Relations and the Formation of Class Consciousness*, in THE DEBATE ON CLASSES 184, 186 (Erik Olin Wright et al. eds., 1989). “Managerial direction of other workers therefore has a two-sided character: on the one side, in coordinating production managers and supervisors may be performing tasks that are socially necessary labor; on the other side, since production is being coordinated within constraints set by the need to make an average rate of profit, managers also have to control and discipline the workforce.” *Id.* Class analysis explains more than one sort of exercise of authority: “Managers may exercise authority in order to coordinate the labor process or they may exercise authority in order to control workers—and often they do both at once. But these are two distinct kinds of authority.” *Id.* Brenner goes on to argue that “a failure to distinguish between [the different exercises of managerial authority] underlies Weberian claims about the inevitable connection between a complex division of labor and bureaucratic hierarchy.” *Id.*

188. *Id.* at 187.

that of employees, on matters such as “hiring, firing, discharging, and fixing pay”; “in the interest of the employer,” persons with authority regarding “things of that sort” are properly ranked “supervisor.”¹⁸⁹

The crucial issue is the exercise of power. When class is read out of the National Labor Relations Act, the result, predictably, weakens the position of workers.

D. WHY “CLASS-BASED AFFIRMATIVE ACTION” IS NOT ABOUT CLASS

Proposals to end race-based affirmative action frequently suggest that affirmative action programs based on “class” can and should replace race-conscious programs.¹⁹⁰ There are a few major strands to arguments for these proposals. They involve moral, political, and pragmatic justifications.

Although moral arguments take different forms, they are frequently argued together. The first moral argument treats *any* remedial action based on race as immoral since the use of race as a category is inherently destructive.¹⁹¹ The second argument weighs comparative disadvantage among individuals or groups, using the interest of low-income whites as a framework.¹⁹² This is often posed rhetorically as a question: why should the child of a relatively wealthy or influential African American be favored over a coal miner’s daughter?¹⁹³ In the context of educational admissions

189. *Health Care & Retirement Corp.*, 511 U.S. at 594–95 (Ginsburg, J., dissenting).

190. See generally KAHLBERG, *supra* note 2 (suggesting reform of the affirmative action system). For criticisms and analysis of “class” based affirmative action proposals, see generally Malamud, *Lessons and Caveats*, *supra* note 2; Malamud, *supra* note 167; Tung Yin, *A Caribolic Smoke Ball for the Nineties: Class-Based Affirmative Action*, 31 LOY. L.A. L. REV. 213 (1997). For defenses of “class”-based affirmative action that do *not* treat the concept of class as opposed to race, see Banks, *supra* note 2; Richard H. Fallon, Jr., *Affirmative Action Based on Economic Disadvantage*, 43 UCLA L. REV. 1913 (1996). In the late 1980s, William Julius Wilson had made proposals which could be seen as forerunners of this current position; he advocated avoiding race-targeted reform proposals and emphasizing job development that will aid whites as well as minorities, in order to avoid the resistance to potential class unity that is created by race-targeted assistance. See WILLIAM JULIUS WILSON, *THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS, AND PUBLIC POLICY* 114–18 (1987).

191. This is the position taken by Justice Scalia, both in an essay before he became a judge, see Scalia, *supra* note 54, at 153–54 and in judicial opinions, see, e.g., *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 239 (1995) (Scalia, J., concurring).

192. Angela Harris has pointed out that class is frequently discussed in relation to race in two unhelpful ways in America: first, as a critique that blames identity politics for disunity and the loss of a rhetorical appeal to class mobilization, and second, as an unhelpful competition over the comparative suffering of the working class and of minorities. See Harris, *supra* note 2, at 1187–88.

193. This analogy, commonly made after the confirmation hearings for Clarence Thomas, implicitly poses white women against African-American men as competing beneficiary groups for affirmative action programs. See Fran Ansley, *Classifying Race, Racializing Class*, 68 U. COLO. L. REV. 1001, 1028–31 & n.76 (1997) (criticizing this comparison and citing examples of this rhetoric

programs, this second paradigm creates a false sense of scarcity and opposition. Both candidates should have their applications weighed against wealthier white candidates rather than against each other.¹⁹⁴ The third moral argument recognizes that society places unfair obstacles in the path of many individuals, and that it is appropriate to recognize and adjust for these obstacles.¹⁹⁵ However, these arguments treat race-based recognition and adjustment as inherently unfair to those whose obstacles were not racial.

These moral arguments resolutely center on individuals rather than groups, and they focus on status rather than class. These arguments are concerned with selective elevation of individuals based on their status rather than with class in any relational sense. As Deborah Malamud warned:

The ideological and practical constraints of the legal system will tend to lead the system to view economic inequality through a purely individualistic and synchronic lens and to measure inequality by a relatively simple quantitative metric. These choices will impoverish the legal system's understanding of economic inequality by causing it to

associated with the confirmation of Justice Thomas); Jennifer M. Russell, *The Race/Class Conundrum and the Pursuit of Individualism in the Making of Social Policy*, 46 HASTINGS L.J. 1353, 1432 (1995) ("To make their case, class advocates frequently call attention to the deprived socioeconomic status of a hypothetical white Appalachian, whose plight is allegedly unaddressed by existing race-conscious policies that unfairly benefit racial minorities."). Justice Scalia made this argument together with his argument that race-based preferences are inherently immoral in Scalia, *supra* note 54, at 153–54. Frequently, this framing of opposed candidates for individual assistance implies that the working class person is presumptively white. *Cf.* ROEDIGER, *supra* note 36, at 26. Deborah Malamud addresses this argument directly by comparing the black middle class and white middle class, arguing that the structural disadvantages of the black middle class provide sufficient justification for affirmative action. *See* Deborah C. Malamud, *Affirmative Action, Diversity, and the Black Middle Class*, 68 U. COLO. L. REV. 939, 967–88 (1997).

194. Derrick Bell has argued that whites gained from civil-rights related training programs such as the one in *Steelworkers v. Weber*, 443 U.S. 193 (1979). He writes:

[T]he company, facing employment discrimination litigation, established an apprenticeship program that they had long refused to do in collective bargaining negotiations. One-half of the openings went to blacks based on their seniority, and evidently to forestall charges of racial unfairness, one-half went to whites based on their seniority. . . even in a situation where white workers would become the gratuitous beneficiaries of civil rights efforts, Mr. Weber and his supporters saw the issue as solely one of racial competition.

Bell, *Xerxes and the Affirmative Action Mystique*, *supra* note 50, at 1610.

195. *Cf.* Fallon, *supra* note 2, at 1914–15 (characterizing support for economic disadvantage programs as falling into two general areas: reaction to race-based proposals, and a "fresher" support because it permits responding to obstacles that have been placed in *individual's* paths). Fallon cites Clarence Thomas and Antonin Scalia as examples of the "fresher" approach that is not a reaction to race; in contrast, I find the "reaction to race" and "removal of obstacles" arguments intertwined. *See id.* at 1914 n.3. *See also* Russell, *supra* note 193, at 1432–33 (reviewing arguments for "class"-based programs).

reject the representation of class as a structured phenomenon that transcends the transitory economic rank-ordering of individuals.¹⁹⁶

The proposals address individual rather than group advancement, and in that sense they are committed to a status vision. Based on a norm of middle-class status, they offer a hand up to those unfortunate enough not to have a “full” measure of opportunity—really, privilege—distributed to them at birth. “Class” continues to mean “Other” and is equated with “poverty”—in reality, a status concept. Lower classes are lifted up toward the norm, usually perceived as classless.¹⁹⁷

Race-neutral programs assisting low-income individuals therefore do not address issues of class advancement in the way that race-conscious affirmative action addresses the complex questions of increasing access for racially subordinated communities. Instead, because of the explicit goal of assisting people with no particular race toward the status of the middle class, solidaristic working class interest disappears entirely. The idea that morally virtuous assistance is the sort offered to *individuals* rather than communities is a concept based on status rather than class. It is also a positioned notion that reflects the concepts of self, individuality, merit and access consistent with dominant white norms. In essence, it is a conservative approach to change.¹⁹⁸ That is why a conservative politician can publicly support affirmative action for people from “poor” areas—based on the argument that affirmative action programs must change from group to individual orientations.¹⁹⁹

Individual assistance avoids challenging prevailing distributions of power as well as white dominance. It reflects the positioned perception of

196. Malamud, *Lessons and Caveats*, *supra* note 2, at 1850.

197. Working class people are harmed by selection criteria that effectively favor the wealthy. See Susan Sturm & Lani Guinier, *The Future of Affirmative Action: Reclaiming the Innovative Ideal*, 84 Cal. L. Rev. 953, 957–58, 987 (1996) (criticizing selections framework and identifying “wealth preference” in SAT). Sturm and Guinier emphasize that existing selection criteria have exclusionary effects that include race, gender, and class; do not reflect functional merit; and do a poor job of predicting success. Their approach is transformational and avoids the class-versus-race paradigm that I criticize here.

198. Although Richard Fallon noted that “[t]o date, virtually no one has argued that preferences based on economic disadvantage are inherently morally unjust,” Fallon, *supra* note 2, at 1923, Abigail Thernstrom has criticized “class” based proposals as unworkable and motivated by a desire among Congressional Republicans not to be seen as “mean.” Abigail Thernstrom, *A Class Backwards Idea; Why Affirmative Action For the Needy Won’t Work*, WASH. POST, June 11, 1995, at C1.

199. “I’d rather talk about how do we replace group affirmative action with effective help for individuals, rather than just talk about wiping out affirmative action by itself.” Newt Gingrich, *quoted in* Richard Kahlenberg, *Equal Opportunity Critics*, THE NEW REPUBLIC, July 17, 1995 at 20, 20. Gingrich went on to advocate affirmative action for people ““who come out of poor neighborhoods, who come out of poor backgrounds, who go to schools in poor counties.”” *Id.*

the “middle class”—that is, it reflects concepts of self, identity, merit and access that do not depend on collective or solidaristic action and interest. Indeed, one reason whiteness may so easily be equated with “middle class” status in America is because the positioned dominant identities of whiteness and “middle class” status are so congruent. The insistently individualistic self-image and the lack of awareness of being part of a social group that are part of dominant white mentality fit neatly with unexamined “middle class” identity and with treating the status category “middle class” as presumptively white.

The second major strand of argument for “class”-based affirmative action claims a concern with class unity or coalition and treats demands for racial inclusion as a point of division.²⁰⁰ Richard Kahlenberg argues that race-based affirmative action programs divided the labor movement from the civil rights movement and justifies his arguments against race-conscious programs by arguing that the important contemporary project of building coalitions between the labor movement and minority communities requires the substitution of “class” for race as a criterion in affirmative action programs.²⁰¹ But Kahlenberg has also framed his proposal in terms of status rather than class. As Malamud has explained, it is difficult to choose a “class” paradigm for affirmative action from among many contested concepts of class.²⁰² Rather than choose, Kahlenberg articulated three sets of criteria for defining what he called “class” that could form the basis for affirmative action programs.²⁰³ His categories reflect differing levels of sensitivity to a variety of socioeconomic factors, but all involve changing *status* for individual applicants, rather than transforming relations of power among social groups. Much of the public debate has focused on education, especially on admission of students, and education is the context to which many academics turn reflexively—it is the work we know best. Kahlenberg’s criteria merged questions of education and of work which may be different in terms of class interest. Proposals for “class”-based affirmative action may include hiring, promotions, and the awarding of municipal contracts.

200. According to the Edsalls, Nixon was pleased that affirmative action created a political dilemma for labor union leaders and civil rights groups, but the programs proved more effective at dividing Democrats than he had anticipated. See EDSALL & EDSALL, *supra* note 164, at 86–87. In 1972, Nixon criticized the Philadelphia plan, which he had endorsed in 1969, to gain political rewards from resentment among the white working class. See *id.* at 97.

201. See KAHLENBERG, *supra* note 2, at 190–293 (using the term “black and blue” coalition, referring to blue collar workers and African Americans).

202. See Malamud, *Lessons and Caveats*, *supra* note 2, at 1861–94.

203. See KAHLENBERG, *supra* note 2, at 128–39.

In these proposals, the concept of class is disconnected from any concept of power except the consumer power that additional dollars inevitably provide to anyone who is lifted up to higher socioeconomic status. These are vulgar status proposals either explicitly (they help anyone with any form of disadvantage, all of which are equally contingent) or implicitly (they only analyze socioeconomic status and are not conceived as *group* phenomena). Programs that help individuals of lower socioeconomic status address different forms of exclusion than do race-conscious programs. Racial transformation programs create access for formerly excluded communities, affecting the reproduction of power in the present and in the future. Even when they disproportionately help the black middle-class,²⁰⁴ they increase the resources within oppressed communities and create the possibility of increasing access over time through networks of friendship and kinship. Therefore, the “coalitional” justification is really concerned with *removing* race-conscious programs on the theory that they harm coalition, rather than with building conditions for shared struggles for change.

The third strand of argument for “class”-based affirmative action is a pragmatic adjustment to the legal trends of our time: when law no longer permits race to be considered in educational institutions, some institutions will seek to maintain a diverse student body and avoid precipitous falls in minority enrollment through consideration of socioeconomic factors.²⁰⁵ Although scholars who believe such approaches are effective may become advocates, they do not argue for the *exclusion* of race from affirmative action programs.²⁰⁶ Once again, these are programs of individual rather than group advancement. The most sophisticated approach, undertaken by the UCLA faculty and described by Richard Sander, considered the concentration of poverty and levels of education in the applicants’ home communities.²⁰⁷ This program considers social factors, not merely individual ones. Nevertheless, the UCLA program remains fundamentally an adjustment for competitive disadvantage rather than a program to change power in subordinated communities.

As a matter of social justice, status-based affirmative action programs have both practical and theoretical flaws. Most important, in terms of the

204. See Malamud, *Black Middle Class*, *supra* note 193, at 948.

205. See, e.g., Danielle Holley & Delia Spencer, *The Texas Ten Percent Plan*, 34 HARV. C.R.-C.L. L. REV. 245, 252–62 (1999). See generally Sander, *supra* note 2 (discussing UCLA Law School plan).

206. See Banks, *supra* note 2, at 1066; Fallon, *supra* note 2, at 1947–50.

207. See Sander, *supra* note 2, at 485.

reproduction of racial power and access, programs based on wealth or socioeconomic status cannot adequately replace affirmative action programs based on race.²⁰⁸ If we were really to think in terms of *class* rather than status, there are significant differences between education and work, and also differences between the contexts of work in which programs of affirmative action have been undertaken and challenged.

The relational framework required for affirmative action to be truly *class*-based would analyze power in context and consider how individual decisions could help to empower social groups in opposition to subordination. This was the thinking that went into the early affirmative action programs, which aimed at remedying the impact of societal discrimination on individuals *and* strengthening minority communities, but which were limited to narrower grounds by the Supreme Court.²⁰⁹ Affirmative action programs developed from America's history of racial oppression, which was structural, based on group relations of power, and involved both subordination and exploitation. Ironically, individualism is the only framework that courts have accepted. Therefore, in states such as California that ban race-conscious criteria in employment or education, group relations of power *cannot* be addressed directly when they involve race.

These ironies point to two crucial problems with current debates over "class"-based affirmative action. The first problem lies in what these programs omit as the law fails to grapple with power. Status concepts leave relations of power unaddressed, even when they adopt sophisticated socioeconomic criteria that take account of neighborhood development and the circumstances of subordinated communities.²¹⁰ Therefore, they effectively protect the current distribution of class power.

208. See generally Linda F. Wightman, *The Threat to Diversity in Legal Education: An Empirical Analysis of the Consequences of Abandoning Race as a Factor in Law School Admission Decisions*, 72 N.Y.U. L. REV. 1, 4–29 (1997) (reviewing studies).

209. The Court disapproved the use of race to bring professional services to minority communities in *Regents of University of Calif. v. Bakke*, 438 U.S. 265, 305–06 (1978) (explaining that brief for petitioner defends program on four grounds: 1) reducing deficit of minority doctors, 2) countering societal discrimination, 3) increasing number of physicians who will practice in underserved communities, and 4) obtaining the educational benefits of a diverse student body; court holds all grounds except for diversity to be insufficient justifications for the use of race).

210. See Sander, *supra* note 2, at 485 (noting UCLA program considered education of both parents, parental income and net worth, and three aspects of disadvantaged communities: single-parent households in neighborhood; families in neighborhood on welfare; and young adults in neighborhood who are high school dropouts). See also Lawrence, *supra* note 133, at 970–71 (suggesting that factors in an affirmative action program might include incarceration rates in neighborhoods).

The second problem lies in the interaction between arguments about interest and the formation of classes and social groups.²¹¹ Law is part of the claims, rhetoric, and social mobilization involved in the construction of social groups. It is one of the important places in which American society argues about interest, and it is part of the cultural and political construction of class and interest. Arguments about “class”-based affirmative action affect social understandings about shared interests through their role in two areas of ideology: defining race in America, and defining the nature of class. When Republican Congressman Newt Gingrich proposed an individual version of class-based affirmative action,²¹² he made both a race-claim and a class-claim. The class-claim was that he spoke on behalf of “poor” people. The implicit race-claim was that white workers were disadvantaged by race-based affirmative action. Such comments on affirmative action promote group consciousness but not class consciousness in any left sense of that term. White working people have their own disadvantage recognized and are simultaneously told that the source of their problems lies in unfair preference for people of color and that anti-union voices are their spokesmen. The vulgar status approach to affirmative action *reinforces* for white workers the sense that their “class” interest is opposed to empowerment for people of color. While some scholars believe this approach will stop racial division, it fails to address the profound division that did not begin with affirmative action but with racial subordination, and it also fails to strengthen the oppositional mobilization of class.

IV. BUSINESSMEN ARE [NOT] LIKE LABORERS: HIDDEN QUESTIONS OF CLASS IN THE LAW

The doctrinal evolution of the anti-transformation cases—the pattern of analogies and deductions called “legal reasoning”—depends on both the transparency of whiteness and the legal invisibility of class. The Supreme Court has examined issues of affirmative action almost entirely in the context of public employment. There are no capitalists evident in the cases. Early complaints concerned workers who were not economically privileged; as years passed and the doctrine evolved, the plaintiffs held more privileged positions, but the Court’s reasoning about power failed to

211. “[T]here is every reason to believe that the law will help to *create*, rather than merely *reflect*, the dominant discourse on class and inequality in this country—just as the law has done in the case of race.” Malamud, *Lessons and Caveats*, *supra* note 2, at 1849 (emphasis added).

212. See Kahlenberg, *supra* note 199, at 20.

recognize the changes.²¹³ Hidden assumptions about class and status helped the Court develop the rule that “race classification demands strict scrutiny” rather than “equal protection demands an exploration of power, harm, and interest.” This Part of the Article explains the ways class could have been, and should have been, considered in the cases on work and racial transformation.

A. THE NATURALIZATION OF SCARCITY: PUBLIC EMPLOYEES AND THE “ZERO-SUM”²¹⁴ GAME

The sudden appearance of the innocent victim upon the constitutional stage has been amazing to behold. Shuffling out from the wings, blinking in the glare of the stage lights, this guy, it turns out, has rights he never even dreamed of, like a right to his job! Well, sometimes. At least if the immediate threat to that job is a black and/or a woman. Where did this figure come from? Why the starring role? What exactly is his (or occasionally her) role? Why is he being treated this way? And how did he get here, assigned top billing as the principal reason why society can no longer justify or tolerate race remediation in many of the areas where it might matter most?²¹⁵

Public employment has provided the framework for many cases on antidiscrimination and affirmative action. In general, it is easier for public than private employees to sue over discrimination.²¹⁶ Public sector

213. For example, in *Franks v. Bowman Transp. Co.*, 424 U.S. 747 (1976), the workers were teamsters; in *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979), production workers in a shipyard sought training for craft jobs. In contrast, white businessmen competed for contracts with a county in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), and for federal highway construction contracts in *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).

214. Justice Blackmun applied this term to the firefighters in *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561, 621 (1984) (Blackmun, J., dissenting) (describing what “admittedly was a zero-sum situation”). See also H. EDWARD RANSFORD, RACE AND CLASS IN AMERICAN SOCIETY 198 (2d ed. 1994) (discussing “zero sum problem” creating white working class hostility to some equality demands by blacks).

215. Ansley, *supra* note 9, at 1005. Ansley has noted the irony of the first Supreme Court appearance of the “perfectly innocent” white employee in *Franks v. Bowman Transportation Co.*, “when, (at least according to the employer), it was the refusal of white drivers to share cabs or showers with black drivers that ‘necessitated’ the discrimination in the first place.” *Id.* at 1018 & n. 88 (citing Francis Lee Ansley, Note, *Cost Allocation in Title VII Remedies: Who Pays for Past Employment Discrimination?*, 44 TENN. L. REV. 347, 366 n.89 (1977)) [hereinafter *Cost Allocation*].

216. *United Steelworkers v. Weber*, 443 U.S. 193 (1979) is the only private sector challenge to affirmative action outside the remedial context to reach the Supreme Court. The training program in *Weber* had been adopted to comply with an executive order that covered employers working on contracts for the federal government. See *id.* at 222–23 & n.2 (Rehnquist, J., dissenting). Redistribution from employer to employees was not an explicit factor in the court’s opinion. See *id.* at 197–209.

employees are far more likely to be unionized.²¹⁷ They are also more likely to have rights against arbitrary dismissal²¹⁸ than workers in the private sector, which may increase the possibility of litigating employment claims. Aspects unique to public sector employment have had a subtle effect on doctrine and ideology in affirmative action cases.

Firefighters unions in much of the United States had been almost entirely white and resisted minority suits to desegregate their departments.²¹⁹ Unions intervened in antidiscrimination suits brought by black firefighters²²⁰ and attacked settlements and judicial decisions as unfair to white male firefighters. Two main factors made class interests difficult to perceive in these cases. The first is social status, which is higher for protective services workers than for many other comparably paid workers. Within the range of manual labor and skilled work, firefighters

217. Labor organization in the private sector has become heroically difficult. *See generally* GEOGHEGAN, *supra* note 172 (discussing difficulty of labor organizing). Few workers can afford to litigate rights against discharge while organizing, but public sector workers often have more procedural protection against arbitrariness. Also, public employers cannot flee to avoid unionization.

218. *See, e.g.*, *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542–48 (1985).

219. *See, e.g.*, *Youngblood v. Dalzell*, 925 F.2d 954, 955 (6th Cir. 1991) (reporting that “[i]n 1973, the Cincinnati fire fighter force was only 0.5% black, far short of the percentage of blacks in the local population”); *Higgins v. City of Vallejo*, 823 F.2d 351, 356 (9th Cir. 1987) (reflecting a disproportionately small percentage of black firefighters); *In re Birmingham Reverse Discrimination Employment Litig.*, 833 F.2d 1492, 1495 n.7 (11th Cir. 1987) (showing that while the labor force was approximately fifty percent black in 1981, only forty-two of 453 Birmingham firefighters and none of the 140 higher officers in the department were black); *NAACP v. Beecher*, 679 F.2d 965, 968 (1st Cir. 1982) (showing that blacks and Hispanics represented only 0.9% of the Boston Fire Department’s personnel); *Ass’n Against Discrimination in Employment v. City of Bridgeport*, 647 F.2d 256, 260–61 (2d Cir. 1981) (reporting that only two minority firefighters were employed between 1936 and 1972, although minorities comprised forty-one percent of Bridgeport’s population; 428 member fire department had only one minority member in 1975); *Brown v. Neeb*, 644 F.2d 551, 555 (6th Cir. 1981) (showing that in 1973, Toledo’s fire department was 98.16% white and 1.83% black); *Van Aken v. Young*, 541 F. Supp. 448, 450 (E.D. Mich. 1982) (describing the Detroit Fire Department as “the private preserve of white males”); *United States v. City of Buffalo*, 609 F. Supp. 1252, 1254 (W.D.N.Y. 1985) (holding that the city’s past selection procedures for firefighters were discriminatory); *Dawson v. Pastrick*, 441 F. Supp. 133 (N.D. Ind. 1977) (finding past discrimination in hiring minority firefighters in East Chicago). For an example of on-the-job harassment of minorities, see *United States v. City and County of San Francisco*, 696 F. Supp. 1287 (N.D. Cal. 1988).

220. *See, e.g.*, *Youngblood v. Dalzell*, 804 F.2d 360, 364 (6th Cir. 1986) (showing that firefighter’s union unsuccessfully challenges legality of consent decree entered in antidiscrimination suit); *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561 (1984) (challenging successfully district court injunction that required changes in seniority system to benefit newly hired minority firefighters as violation of Title VII); *Martin v. Wilks*, 490 U.S. 755, 758 (1989) (intervening white firefighters in settlement of discrimination litigation); *Dawson v. Pastrick*, 600 F.2d 70, 75 (7th Cir. 1979) (allowing union to intervene as defendant in class action alleging racially discriminatory hiring practices); *City and County of San Francisco*, 696 F. Supp. 1287 (N.D. Cal. 1988) (intervening as defendant in class action alleging racial and sexual discrimination in fire department hiring and promotion).

are a relatively privileged sector. Also, their incomes are sometimes higher than the official range of wages would indicate because of overtime opportunities and work hours that often permit holding a second job outside the public sector.²²¹

The second factor is the public sector nature of the cases, which helps disguise class and class interest.²²² The Supreme Court developed an image of union members that was peculiar to public employment but allowed it to stand for all employment. In this image, unions exist without classes locked in struggle over production and without wealth subject to redistribution. In contemporary ideology and politics, government is considered an unproductive sector of society.²²³ Economic exploitation of the working class does not seem to be part of the picture in these cases, because there appears to be no production of wealth. All public sector “wealth” whether held by employer or employees seems to be produced at the expense of the rest of society.

Cases involving government employees therefore do not imply the existence of profits that can be subjected to redivision between classes, in contrast to the ways class interest might appear in private sector litigation. Taxpayers identify with the role of investors or capitalists in the private sector—the bankroll for the enterprise of government. They generally do not identify with the public sector employer or manager.²²⁴ Increasing the share of wealth held by public employees appears counter to the shared economic interests of other citizens. No *exploitation* seems evident. In

221. See, e.g., *Walsh v. Ward*, 991 F.2d 1344, 1345 (7th Cir. 1993) (involving firefighter who claimed that when forced to give up outside work he lost more than he received in additional salary as firefighter; suffered new assignment retribution for critical speech). “This court has previously recognized that certain municipal employees such as firefighters and police officers frequently work shifts which provide them with long periods when they are off-duty, and that these schedules are considered a highly desirable benefit . . .” *Id.* at 1349 (Pell, J., dissenting) (citing *F.O.P. Lodge No. 121 v. City of Hobart*, 864 F.2d 551, 553–56 (7th Cir. 1988)).

222. Public sector workers may or may not actually have different class consciousness than private sector workers, but the context of public employment is structurally different in terms of the *appearance* of class interest. In Marxist concepts of class consciousness, it would not be surprising if the shared consciousness of public employees was concerned more with general labor issues rather than the basic organization of capitalism. Cf. JERRY LEMBCKE, *CAPITALIST DEVELOPMENT AND CLASS CAPACITIES: MARXIST THEORY AND UNION ORGANIZATION* 166–76 (1988) (recounting debates over whether public sector work force has proletarian consciousness and concluding that it does).

223. I do not mean to accept the notion that government neither produces wealth nor is an important part of class-based redistribution. The fact that we do not see the public sector as producing social wealth reflects the ways in which the production of service and knowledge are undervalued. These are often aspects of traditional women’s work, like caregiving and teaching. See, e.g., MARILYN WARING, *IF WOMEN COUNTED: A NEW FEMINIST ECONOMICS* 30–31 (1988).

224. Taxpayers do not have direct power over public employment decisions and do not feel responsible for implementation of policies in public workplaces.

public employment, no group appears to produce profits that are captured by another group, therefore no argument arises over who (as between labor or capital) deserves profits. The pool of jobs cannot be expanded except through funds paid by taxpayers, a social group that merges the working class and the wealthy.

The only identifiable division in these cases is between those groups who wish to gain access (blacks and other people of color) and those who argue that reallocating access will hurt them unfairly (nonwealthy whites who need these jobs). Both groups lack elite status, and therefore there is no counterpoint—no elite, no powerful third party—toward which to turn the focus of transformative inquiry.²²⁵ The public is represented as made up of citizens or taxpayers, status categories that include all residents regardless of class. Any additional wealth subject to redivision must come out of that (classless) public pocket. Therefore, the public employment context of litigation such as the Firefighters cases legitimates the concept of a “zero-sum” game.

In these cases, scarcity (competition between workers) rather than struggle (collaboration between workers in competition with other classes) appears to be a natural condition of human society.²²⁶ The affirmative action cases contribute to the naturalization of scarcity by assuming a competitive framework in which anything given to black workers must be taken from whites. Whiteness is the invisible background norm in this vision. The current distribution of wealth, which favors whites²²⁷ appears to be natural, rather than part of a regime structured through law; thus, any

225. In general, discrimination in public employment cases was done by the government actors in charge of hiring (the second party bad actor) although in many firefighter cases, racial harassment of African Americans who desegregated the workplace was extreme and white firefighters were active participants in the process of racial exclusion. The distance between the public (citizens/taxpayers) and the government as employer eliminates any sense of shared responsibility for these governmental actions among citizens of the community. White Birmingham firefighters, for example, were not treated as responsible for the extent to which they were part of the polity that supported overtly racist and discriminatory administrations for many years. It is ironic, therefore, that gains in electoral positions for African Americans are treated by the Court as showing the danger of action against whites or the lack of continued oppression of blacks.

226. This is consistent with the logic of cases that refuse to limit the mobility of capital in the interest of workers—fundamental class conflicts are placed outside the realm of legal challenge as part of the protection of a market economy. I am not arguing here that scarcity is never a problem, but that, in this contemporary age of rapid transition in the international organization of work and capital, local narratives of scarcity for workers in the United States are often a result of the way the problem has been constructed.

227. Dalton Conley, *BEING BLACK, LIVING IN THE RED: RACE, WEALTH, AND SOCIAL POLICY IN AMERICA* 1 (1999) (noting that in 1994 “[t]he median white family held assets worth more than seven times those of the median nonwhite family”). Conley further emphasizes the lack of progress for African Americans since Reconstruction in percentage of national wealth. *Id.* at 25.

legal interference requires justification. The ideological framework of these cases also accepts as natural the size of the total social “pie” from which wedges of racially-allocated goods will be sliced; by definition, more for one party means less for another.

But the size of the pie is neither natural nor unchangeable. Some proposals in race remedy cases have sought to make employers pay for discrimination by giving front-pay to displaced workers, or by keeping more workers on the payroll.²²⁸ As these cases developed, Fallon and Weiler suggested job sharing to resolve layoffs and pointed to the fact that unemployment insurance might alleviate some of the worst impact of layoffs.²²⁹ Most proposed solutions, however, concerned revisions of the existing shares of wealth between black and white workers, rather than social redistribution toward workers overall.

Fear of job loss and hope of access to other jobs (and hope regarding the quality of future jobs) are deeply interrelated. In periods of full employment, job loss is less profoundly threatening than in times of downturn. If subsistence, health, and old age were sufficiently protected through social insurance, loss of work would be less threatening than when each of these protections is tied firmly to retention of a particular job. Only continuous employment involves continued access to health insurance and pensions.

Scarcity therefore cannot be understood without looking to the state and cannot be addressed without state involvement. Legal rules and governmental policies can create scarcity or diminish it. For instance, legal rules protect the mobility of capital.²³⁰ Legal rules affect work conditions that result in greater or lesser scarcity for the worker. Safety regulation and workers compensation affect how frequently and for how long injuries will remove workers from the work force, and how dire they will find the impoverishment accompanying movement in and out of the labor force. A minimum wage sets a floor under income, though the lack of rights to a job and the possibility of less-than-full-time employment place the true floor closer to unemployment insurance benefits.

228. See generally Ansley, *Cost Allocation*, *supra* note 215 (advocating compensation); J. Hoult Verkerke, Note, *Compensating Victims of Preferential Employment Discrimination*, 98 YALE L.J. 1479 (1989) (advocating a theory of systematic compensation under Title VII). See also Iris A. Burke & Oscar G. Chase, *Resolving the Seniority/Minority Layoffs Conflict: An Employer Targeted Approach*, 13 HARV. C.R.-C.L. L. REV. 81, 83 (1978) (advocating “full payroll” remedy to shift impact of unpreferred workers onto employer wrongdoer).

229. See Richard Fallon & Paul Weiler, *Firefighters v. Stotts: Conflicting Models of Racial Justice*, 1984 SUP. CT. REV. 1, 62–64.

230. See Ansley, *Standing Rusty*, *supra* note 171, at 1757.

Legal rules govern collective organization, bargaining, and action.²³¹ Law also affects the ways in which the scarcity of jobs in society—itsself affected by state policy—will affect the life of any individual worker through unemployment insurance and funding for retraining and education. Scarcity and competition are not a state of nature, but recognizing their role in reproducing power requires exposing the background rules of law. In the context of antidiscrimination litigation, the public employment cases make private capital disappear and fail to raise important questions about the way the state fails to protect working people in general.

B. CLASS AND STATUS IN THE WORK CASES: REASONING FROM *STOTTS* TO *ADARAND*

[Any] theory [of the social universe] must take as an incontrovertible truth that *the truth of the social world is the stake of a struggle*. . . . [D]epending on . . . the distributions of the various species of [economic, cultural, social, and symbolic] capital, the agents involved in this struggle are very unequally armed in the fight to impose their truth, and have very different, and even opposed aims.²³²

The cases on whiteness and work depend ideologically and doctrinally both on equating class with status and on the invisibility of white norms. Ideologically—as they describe the world while reasoning about it—these cases incorporate positioned white perceptions and manifest a concept of interest in working people that is defined by reference to status, distribution, and the market. Doctrinally, the cases explicitly limit transformative possibilities for people of color based on harm to whites, freezing white privilege while at the same time denying how powerfully it structures the reproduction of access to work and power. Class is mentioned only indirectly, as concern for otherwise disempowered white workers enhances the harm of race-based redistribution. Different concepts of class and of the interaction of class with white privilege would have altered the results of these cases.

In *Firefighters Local Union No. 1784 v. Stotts*,²³³ the dispute concerned layoffs among Memphis firefighters. The city had settled an antidiscrimination lawsuit by agreeing to remedial hiring and promotion policies without mentioning layoffs. When layoffs became necessary,

231. See generally WILLIAM E. FORBATH, *LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT* (1991) (emphasizing the ways in which American labor law distributes power rather than the ways in which it maintains conservative ideology); Rogers, *supra* note 108 (same).

232. Bourdieu, *supra* note 66, at 11 (emphasis added).

233. 467 U.S. 561 (1984)

black firefighters, still relatively low on the seniority roster, sued to enjoin the city from applying the seniority system to effectively reduce the percentage of black employees. Layoffs were adjusted in order to maintain the percentage of blacks in the department; ultimately, three white workers were laid off who would have kept their jobs if the seniority system had been enforced.²³⁴ These workers actually had been hired the same day as the black workers, but the black workers were listed below them alphabetically in the seniority roster.²³⁵ The Court held that reordering seniority plans to protect black workers against the layoffs was impermissible under Title VII. Racial seniority adjustments were impermissible even though the layoffs had not affected workers with any real difference in their length of employment, and even though the layoffs were part of a consent decree settling an antidiscrimination suit brought by black plaintiffs.

To reach this decision, the Court treated firefighters as comparable to laborers holding industrial working class jobs and emphasized their need for protection. A class-based analysis would have looked more carefully at how these workers were like and unlike other workers, so that the context of public employment did not conceal working class interest in redistribution. The *Stotts* opinion could also have considered the lack of resources for the unemployed that makes layoffs harsh. If the costs of layoffs could not be forced onto minorities, more attention might have been paid to the costs to all displaced workers, such as the need for development of legislative experiments in better methods for protecting workers in need.²³⁶ If class interest had been a factor in *Stotts*, a less formalistic reading of the conflict would have considered the substantive investment of workers in the jobs, rather than the formality of their placement on a seniority list. Also, the class consciousness brought to the workplace by

234. See *id.* at 567 n.2. The district court found that the seniority system was not “bona fide”—not protected under Title VII law—and that the layoffs would have a discriminatory effect. The court therefore granted the injunction. The appellate court reversed on the question of the validity of the seniority system but affirmed granting the injunction. *Id.* at 567.

235. See Samuel Issacharoff, *When Substance Mandates Procedure: Martin v. Wilks and the Rights of Vested Incumbents in Civil Rights Consent Decrees*, 77 CORNELL L. REV. 189, 225 (1992) (citing Fallon & Weiler, *supra* note 229, at 5). An identical hiring date seems in layoffs seems likely to be uncommon, but it is not unique. See *Taxman v. Bd. of Educ.*, 91 F.3d 1547 (3d Cir. 1996) (involving employees hired the same day).

236. These opinions reflect a greater willingness to see the burden of layoffs on whites than the burden that fell on laid-off blacks. Layoffs are reported routinely when occasioned by the drive to increase corporate profits; if during the course of that downturn a white worker is laid off because of the reallocation of racial privilege within the workplace, then layoff is shocking.

black firefighters could be seen as adding to the resources of white firefighters.²³⁷

Reckoning with class and with whiteness more directly in *Stotts* would in turn have affected the holding in *Wygant v. Jackson Board of Education*.²³⁸ The schoolteachers' union and the school board in Jackson, Michigan, negotiated an agreement adjusting layoffs to maintain the percentage of minority teachers employed by the city. In contrast to *Stotts*, which came to the Court as a Title VII case, *Wygant* addressed the issue of layoffs under the Equal Protection Clause of the Fourteenth Amendment. Justice Powell's plurality opinion took judicial notice of the needs of workers in other cases and made these workers the paradigm through which to understand the schoolteachers' needs: "Many of our cases involve union seniority plans with employees who are typically heavily dependent on wages for their day-to-day living. Even a temporary layoff may have adverse financial as well as psychological effects."²³⁹ Powell described the job security needs of workers with those limited resources:

A worker may invest many productive years in one job and one city with the expectation of earning the stability and security of seniority. "At that point, the rights and expectations surrounding seniority make up what is probably the most valuable capital asset that the worker 'owns,' worth even more than the current equity in his home."²⁴⁰

Had class, as well as race, been part of this analysis, schoolteachers would not have looked to the Court so much like firefighters, and therefore they would have looked less like teamsters, mechanics, or other industrial workers.²⁴¹ Teachers have higher educational levels than the workers invoked by Justice Powell. Attention to class would not have made the questions in *Wygant* simple.²⁴² It would, however, have contextualized the

237. Whites who remained after layoffs suffer the loss of that alliance—even if it were a loss they presently undervalued as the white pulpwood cutters in Mississippi had not understood the value of overcoming racism before they engaged in shared struggles. See *supra* text accompanying 147–48 (discussing the GROW project).

238. 476 U.S. 267 (1986). Justice Powell's plurality opinion noted that in *Stotts* the Court had "expressed concern over the burden that a preferential-layoffs scheme imposes on innocent parties" and held the layoff plan not sufficiently narrowly tailored to accomplish a purpose that "otherwise may be legitimate." See *id.* at 282–83.

239. *Id.* at 283.

240. *Id.* (quoting Fallon & Weiler, *supra* note 229, at 58).

241. Powell's easy analogy reflects the same confusion about class and status that marked the decision in *NLRB v. Health Care & Retirement Corp.*, 511 U.S. 571 (1994) (treating practical nurses as managers because they directed orderlies in their work). See *supra* text accompanying notes 182–89.

242. It would not be simple because layoffs are in fact the most difficult context for analyzing questions of racial transformation and redistribution. See *infra* text and accompanying notes 266–80. Also, class analysis has had great difficulty grappling with questions of the middle class. "The question

actual needs of teachers and strengthened the arguments made in the dissents. Justice Marshall pointed to the fact that this agreement had been negotiated by a mostly-white union, which agreed to impose this structure on itself.²⁴³ Schoolteachers are a well educated workforce, richer in human capital than most groups vulnerable to such systemic cutbacks. If class had been considered, the particular situation of the teachers could have supported their ability to decide the allocation of race privilege among themselves.²⁴⁴

Justice Stevens' dissent treated neither race nor power as neutral or formal matters. Implicitly, he did take a position conscious of class by treating teachers as having power particular to their profession—authority figures and educators of youth—rather than reflexively equating them with less skilled and less educated workers. From this understanding of power, Stevens argued against the reproduction of white privilege, pointing to the importance for white people of minority role models: “It is one thing for a white child to be taught by a white teacher that color, like beauty, is only ‘skin deep’; it is far more convincing to experience that truth on a day to day basis during the routine, ongoing learning process.”²⁴⁵ Stevens argued that the school board and the union could therefore have sought, as described in the collective bargaining agreement, “recognition of the desirability of multi-ethnic representation on the teaching faculty.”²⁴⁶ The plurality's analysis reflected a dominant white norm in addressing minority role models only as a need of minority children. In contrast, Justice Stevens treated the social construction of race as something affecting whites as well as people of color.

A different approach to class and whiteness in *Stotts* and *Wygant* would have permitted both whiteness and class to be cognizable in *City of Richmond v. J. A. Croson Co.*²⁴⁷ the case that did most to formalize

of the so called ‘middle classes’ in advanced societies—their theoretical status, social composition, and structural position—has been variously referred to as ‘one of the most intractable issues in contemporary sociology’ and a major ‘embarrassment’ for Marxist class analysis.” Wacquant, *supra* note 68, at 39. “[F]ew problems in social science have proved more persistent and more strongly colored by both ideological commitments and political context.” *Id.*

243. See *Wygant*, 476 U.S. at 310–11 (Marshall, J., dissenting).

244. A crucial fact hidden in the background of *Wygant* was the state of the economy in Michigan. If the need for *jobs* was the focus of concern, *Wygant* would have appeared as part of the era of decline that produced *Poletown Neighborhood Council v. Detroit*. 304 N.W.2d 455 (1981) (finding economic development necessary to relieve unemployment and severe economic conditions in the city and the state).

245. *Wygant*, 476 U.S. at 315 (Stevens, J., dissenting).

246. *Id.* (quoting statement of purpose in Jackson's collective bargaining agreement).

247. 488 U.S. 469 (1989).

questions of the reproduction of power and lay the basis for the 1990s decisions blocking racial transformation. Richmond had a proven history of discrimination in many fields, and national studies had established correlations between patterns of discrimination and the makeup of the contracting industry.²⁴⁸ *Croson* reviewed a set-aside program for awarding municipal contracts. The Court rejected the idea that the standard of review should depend on whether the program was designed to benefit historically oppressed groups and held that strict scrutiny applied to all racial classifications.²⁴⁹

Croson is *power evasive* in two ways: first, in treating racial classifications as if they have the same meaning and pose the same danger in all contexts; second, in holding that Richmond had failed to establish a connection between the low numbers of black contractors bidding on public contracts and actions taken by the city in furtherance of either public or private discrimination. Absent legally sufficient proof to the contrary, white power would not be understood to reproduce itself, and therefore the years of white majority city governments granting virtually all contracts to whites did not manifest a racial use of power. Black power, on the other hand, was presumptively dangerous: the Court expressed great concern that the new city government that enacted the set-aside program had a bare

248. The long history of official protection of white privilege in Richmond was discussed by Justice Marshall in dissent. *Id.* at 534–35, 544–45. However, the Court held that this history did not support application of the national findings to Richmond; however, the fact that the local government had finally developed a narrow majority of African Americans did buttress the need to scrutinize the program. In *Croson*, a majority of the Court for the first time endorsed the rule that had only plurality support in *Wygant*, holding strict scrutiny applicable to *all* racial classifications regardless of their purpose and context in a history of power and privilege. *Croson* constitutionalized a vision of “race” divorced from questions of power. Many scholars have criticized the *Croson* decision. See, e.g., Neil Gotanda, *A Critique of “Our Constitution is Color-blind,”* 44 STAN. L. REV. 47–53 (1991) (contrasting formal-race and historical-race approaches to strict scrutiny), Charles R. Lawrence III, *Race and Affirmative Action: A Critical Race Perspective*, in *The Politics of Law* 315 (David Kairys ed., 3d ed. 1998) (quoting historian’s assessment of discrimination and arguing that “[h]ad the Court considered the historical record, it would have found abundant and uncontroverted evidence that the dearth of minorities was a direct consequence of long-standing discrimination against African-American contractors in Richmond”).

249. The Court’s refusal to assume that minorities will be interested in a field in “lockstep proportion” to their presence in the population effectively assumes that minorities will not want the same career opportunities that whites want. The success of the “lack of interest” argument in discrimination cases is documented by Vicki Schultz and Stephen Petterson and reveals that courts are willing to attribute employment structures skewed by race and gender to the interest levels of excluded groups. See generally Vicki Schultz & Stephen Patterson, *Race, Gender, Work, and Choice: An Empirical Study of the Lack of Interest Defense in Title VII Cases Challenging Job Segregation*, 59 U. CHI. L. REV. 1073 (1992)

majority of black members.²⁵⁰ Following *Croson*, *Adarand Constructors v. Peña*²⁵¹ also denied the connection between race and the history of exclusion,²⁵² holding that the federal government could not consider minority race a category of presumptive disadvantage—even in a program in which disadvantaged whites were eligible for affirmative action.

The *Croson* decision moved the reproduction of power and privilege in the business community and its interaction with local government into the same legal sphere as the cases involving work and workers. Overlooking class differences is fundamental to the logic of the case. The case simply does not deal with the same sort of “affirmative action” issues as work cases involving steelworkers, schoolteachers, or firefighters. The interests of white working people are not at issue, nor those of underpaid, overworked schoolteachers. The issue is competition among businesses (employers) over which company gets to do business with government. Set-aside programs address the interaction in power and access between local businessmen and the political structures that allocate spending of public funds and thereby foster further business growth. These are precisely the areas in which whiteness reproduces itself in private clubs and social networks, even after previously excluded groups achieve increased political power. To reach the *Croson* holding, the Court had to overlook class, the social nature of work, the meaning of racial subordination and privilege, and questions of the ongoing reproduction of power—as well as distinguishing away the entire history of subordination in Richmond, Virginia as unreachable “societal” discrimination. In *Adarand*, the Court extended protection of contractors to federal as well as state programs, holding that all state, local, and federal decisions that classified by race are to be subject to strict scrutiny.

The contractor cases can only be explained through understanding class as well as whiteness. Courts do not protect inchoate opportunity for

250. See *Croson*, 488 U.S. at 495–96 (noting that political power in Richmond, Virginia, had shifted to a majority black city council in striking down fixed minority set-asides for municipal contracts). See T. Alexander Aleinikoff, *A Case for Race-Consciousness*, 91 COLUM. L. REV. 1060, 1102–06 (1991) (criticizing Court’s view of “racial politics” in Richmond). “It is a spectacular irony that black electoral successes are used to deny black elected officials an equal opportunity to fashion what they believe to be effective programs for ending second-class citizenship based on race.” *Id.* at 1105–06. *But cf.* Issacharoff, *supra* note 235, at 247 (accepting the Court’s account of the dangers of black capture of political power in historically white-dominated Southern cities and applying it to firefighters in Birmingham, Alabama).

251. 515 U.S. 200 (1995).

252. The *Adarand* decision is also power evasive in another sense. It avoids looking at the difference between federal and state power to correct past historical racial injustice.

working people.²⁵³ At the same moment as *Wygant* protected seniority against collective bargaining, the deindustrialization cases proved that even long work relationships and settled expectations were not protected for workers. The Court has found opportunity insufficiently certain to create standing when the plaintiffs are African Americans.²⁵⁴ Yet opportunity for white businessmen seemed so tangible that the Court granted standing even in the absence of criteria on which it insists in other cases.²⁵⁵ This is indeed protection of whiteness, but it is also protection of class privilege.

C. INTEREST IN CONTEXT

Class action antidiscrimination suits decreased by the 1990s, as did antidiscrimination suits dealing with hiring.²⁵⁶ Recent cases have dealt with either promotions or the award of government contracts. Although the Supreme Court applies the same logic to cases on hiring, promotions, and layoffs as to as cases on government contracts, questions of class interest are quite different in each context. The heavy emphasis on promotions and layoffs as this line of cases developed allowed the Court to ignore important questions about the direction of social development and government priorities favoring or threatening the supply of jobs.

253. See, e.g., *Local 1330, United Steel Workers of Am. v. United States Steel Corp.*, 631 F.2d 1264 (6th Cir. 1980); Joseph William Singer, *The Reliance Interest in Property*, 40 STAN. L. REV. 611 (1988) (reviewing the ways reliance is protected in property law and arguing that the court could have protected the steelworker's interests in their jobs).

254. See Girardeau A. Spann, *Color Coded Standing*, 80 CORNELL L. REV. 1422, 1424 (1995) arguing:

When minority plaintiffs file programmatic challenges to widespread patterns of racial discrimination, the Court typically denies standing because the plaintiffs cannot demonstrate a sufficient likelihood of particularized gain resulting from a favorable judgment. . . . However, when nonminority plaintiffs file similar programmatic challenges to affirmative action programs, the Court typically grants standing, even though the plaintiffs are equally unable to demonstrate a high likelihood of particularized gain.

Id. at 1424.

255. See *N.E. Chapter of the Assoc. Gen. Contractors v. City of Jacksonville*, 508 U.S. 656, 669 (1993). See generally Spann, *supra* note 254 (analyzing *Jacksonville Contractors* and the law of standing).

256. See John J. Donohue III & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 STAN. L. REV. 983, 984 (1991) (stating that “[a]lthough the authors and early architects of employment discrimination laws envisioned them as tools for opening employment opportunities to blacks, women, and other minorities, this is no longer their primary use. Instead, the antidiscrimination laws are predominantly used to protect the existing positions of incumbent workers”); Schultz & Petterson, *supra* note 249, at 1096 (showing that class actions and hiring discrimination suits dropped sharply in the late 1970s).

1. Hiring

Does affirmative action in hiring hurt white people? In *Wygant*, Justice Powell described affirmative action in hiring as a burden on whites that was “diffused” generally among society.²⁵⁷ Justice Stevens, who defended the general importance of affirmative action in his dissenting opinion in *Martin v. Wilks*, still assumed that whites were harmed if people of color were encouraged to apply for jobs:

It is inevitable that nonminority employees or applicants will be less well off under an affirmative-action plan than without it, no matter what form it takes. For example, even when an employer simply agrees to recruit minority job applicants more actively, white applicants suffer the “nebulous” harm of facing increased competition and the diminished likelihood of eventually being hired.²⁵⁸

Troubling assumptions underlie the idea that minority outreach in hiring is a burden for white workers. Even the idea of a “diffuse” burden overlooks advantages of diversity. Whiteness is transparent for whites until its capacity to define the dominant norm becomes endangered. Any good job without color is perceived naturally as a white job. The default position for hiring is therefore white. Even “more energetic recruiting” decreases the likelihood for whites of getting hired.

But energetic recruiting always increases the applicant pool and reduces the chance that any *individual* will be hired, even if all applicants are white. If the employer creates an applicant pool of the same size but greater diversity, any white applicant faces the same amount of competition and may retain an advantage in past work experience that was created by discrimination by other employers in the past or other institutions such as school systems. The assumption about harm implies that whites have a *collective* interest in white people constituting the pool, or in the hiring of other white people. The “more active” affirmative action recruiting programs are undertaken because a mostly-white applicant pool would tend to reproduce itself. Work is fundamentally social and embedded in a network of community relationships. The assumption about harm in energetic recruiting implies that having white colleagues, not merely access

257. See 476 U.S. at 282–83 (finding that “hiring goals impose a diffuse burden, often foreclosing only one of several opportunities . . .”). See also Estlund, *supra* note 2, at 89:

The potential backfire effect of affirmative, pro-integration preferences is likely to be least in the context of hiring. Hiring preferences in favor of minority applicants—as long as the preferences are neither rigid nor too large—are relatively invisible and nonthreatening to those white employees who are also hired, and who become coworkers with the minority hires.

258. *Martin v. Wilks*, 490 U.S. 755, 792 n.31 (1989) (Stevens, J., dissenting).

to job applications, is ultimately better for white people. Whites will gain the benefits of working in a more diverse environment.²⁵⁹ But the potential or actual benefits of integrating the work environment—in human relations, militancy on employment issues, and attention to broader social issues within the work place—are not cognizable in this framework.

The statement about the burden on whites hides both class interest and the naturalization of scarcity. Competition is harmless unless there is an inadequate supply of comparable jobs. Otherwise, a shift in an employer's hiring practices to more energetically recruit among minorities would be relatively unimportant to white well-being. The structural background of the organization of work is also important: a shift from industrial to service work marked by insecurity and low wages, chronically high unemployment with inadequate social insurance to cushion its hardships, and dangerously mobile capital that threatens to depart for less demanding shores.²⁶⁰

People of color, particularly African Americans, brought gains in class consciousness to the workplace, especially in the period after the civil rights movement.²⁶¹ If class activism and consciousness were a cognizable interest of white working class people, the gains for whites that come from the inclusion of people of color would be considered as well as the marginal changes in access that flow from ending exclusion. The attachment to privilege, not the integration of the workforce, endangers class consciousness and activism. In other words, diversifying the workplace hurts white workers if racism divides workers. But then the problem is racism, not diversity.

2. Promotions

Litigation about promotions also naturalizes scarcity in affirmative action cases. By definition, there will never be as many promotions as there are workers who aspire to them. The Supreme Court refers to promotions as an intermediate category in terms of their "burden" on white

259. See Estlund, *supra* note 2, at 20–29 (discussing benefits of interaction between groups within the workplace and society).

260. As Fran Ansley points out, the danger that jobs will leave the country entirely has the effect of linking the interests of employed workers more firmly to the profits of their employers, which also tends to undermine an adversarial sense of class interest in workers. Telephone Interview with Fran Ansley (Mar. 6, 1997).

261. See, e.g., *supra* notes 150–52 and accompanying text (accounts of organizing drive at Kmart). Michael Honey underlines this point, noting that "African-Americans are now the most unionized and the strongest union supporters of any social group." Honey, *supra* note 145, at 21. He also emphasizes the importance of women, immigrants, and people of color, who are increasingly responsible for success for the labor movement. *Id.*

workers—neither as diffuse a burden as hiring nor as harsh as layoffs. Yet having to “share” promotions with blacks still triggers treatment of whites as “innocent victims” of the burdens of past discrimination.²⁶²

Promotions are a middle-class concept of the interest of working people. Promotion is the individual path of upward mobility, an improvement in status for the person promoted. In contrast, concepts of class that are about group relationships of power would emphasize the collective interdependence of workers seeking advancement. There will never be as many promotions as there are workers. For most working class people, therefore, improvement in their work life depends on changed conditions that are not won individually, and on the ability to work together to gain more from their work and to transform the system to better meet their needs.

In a class-based analysis, promotions are important in direct relation to the lack of other rights in employment and in society. The smaller the total package of wages, benefits, rights, and comforts secured to people throughout society, the more important promotion becomes in the life of any individual worker. The relative importance of promotions is derived from the lack of other avenues of class advancement and the relative dignity and comfort of work conditions—the structure of class relations that law tends to render invisible. As the doctrine evolved in the promotion cases, the emphasis on opportunity and competition caused the need for collective advancement among workers to disappear from view.

Integration of systems of authority is an important aspect of justice for historically excluded groups, because the system of labor control and appropriation²⁶³ becomes less tightly connected with racial domination. Racial diversity in authority may also help workers notice class privilege and subordination rather than associating privilege so closely with skin color. To the extent that white workers supported the ability of white supervisors to reward arbitrarily based on skin privilege, they opened themselves to arbitrary treatment as individuals.²⁶⁴ A crucial component of

262. See *In re Birmingham Reverse Discrimination Employment Litig.*, 20 F.3d 1525, 1549 (11th Cir. 1994). The Birmingham firefighters cases reveal the interplay of hiring and promotion policies. Because of the city's failures in minority hiring, it later had difficulty finding sufficient numbers of minority candidates for promotions. To meet remedial goals in equalizing higher positions in the department, it turned to restrictions on promoting white firefighters; those restrictions were later held insufficiently narrowly tailored to withstand scrutiny.

263. See generally Brenner, *supra* note 187 (describing managerial control).

264. Unless all whites are equally favored, some will also be harmed by arbitrary power. For example, union membership in one textile factory had fallen below fifty percent, and white workers were not union members. Fearing decertification, the union began a campaign against favoritism in the

the transformative project must be to help whites see how they need people of color on the basis of equality.²⁶⁵ Rather than defending a property right in advantageous access to scarce resources, the project becomes (like the work done with white workers in Mississippi years ago) helping white workers see the limits of the privileges secured by whiteness and the class interest in constructing struggle on an antiracist basis to protect the interests of all.

3. Layoffs

The most troubling claims of harm to white workers arise in the cases dealing with seniority²⁶⁶ during layoffs. Most “competitive” benefits conferred by seniority concern job tenure.²⁶⁷ The fact that private sector employees have no independent right to jobs is an important aspect of this problem. So is the inadequacy of available unemployment insurance and social security systems.²⁶⁸ The scarcity of resources described as

shop. Of course, white supervisors tended to prefer white workers—but in reality they only favored a handful of whites; favoritism in fact *disfavored* the majority of whites as well as almost all blacks. Bringing all jobs within the bidding process opened some of them to African Americans, but it also protected whites who did not curry favor with supervisors. Union membership rose in response, and the next contract renewal brought the highest raise in the history of that shop. *See Mahoney, supra* note 38, at 766–67.

265. Elizabeth Iglesias argues that law often enforced solidarity based on the ability of a white majority to subordinate the needs of the Other, resulting in intersecting structures that perpetuate the subordination of women of color. *See Iglesias, supra* note 149, at 423–30.

266. In *Franks v. Bowman Transportation Co.*, the Court noted that seniority was of “vast and increasing importance in the economic employment system,” and that seniority was increasingly used to allocate entitlement among competing employees and compute “noncompetitive” benefits under employment contracts. 424 U.S. 747, 766 (1976) (citations omitted). Although this argument implies that “noncompetitive” benefits are not scarce resources, in fact their value depends in part on the lack of social benefits available outside the employment context.

267. The Court quoted an article by Donald Stacy:

[A]ffected by competitive status seniority, are not only promotion and layoff, but also transfer, demotion, rest days, shift assignments, prerogative in scheduling vacation, order of layoff, possibilities of lateral transfer to avoid layoff, “bumping” possibilities in the face of layoff, order of recall, training opportunities, working conditions, length of layoff endured without reducing seniority, length of layoff recall rights will withstand, overtime opportunities, parking privileges, and, in one plant, a preferred place in the punch-out line.

Donald R. Stacy, *Title VII Seniority Remedies in a Time of Economic Downturn*, 28 VAND. L. REV. 487, 490 (1975) (citations omitted) (cited in *Franks*, 424 U.S. at 762). Although the list is long, nine of the items relate to the retention of work, mostly to layoff or recall. Training opportunities and promotion, since they may indirectly affect the likelihood of being subject to layoff or the skills which would affect recall, could also be added to the list. In other words, seniority *is* as important as the Court said it was. *See Issacharoff, supra* note 235, at 220–22 (arguing for the importance of protecting property rights in seniority for workers).

268. Fallon and Weiler discussed the possibility that the costs of work downturns be absorbed through the unemployment system, by encouraging job sharing among workers. Unemployment systems in Europe and Canada have been revised to provide benefits when all employees lose some hours of work, not only when some lose their jobs entirely. Fallon & Weiler, *supra* note 229, at 63.

“competitive” and “noncompetitive” benefits in the workplace and in society is important to understanding the cases on seniority and layoffs. A more adequate system of social insurance would change much of the pressure currently placed on seniority systems and allow us to discuss affirmative action on a different, less desperate ground. Seniority is only partial protection in a system in which capital is mobile and the safety net is thin at best.²⁶⁹ “Noncompetitive” benefits such as vacation time, insurance,²⁷⁰ and retirement plans are similarly negotiated against the backdrop of what society does not provide.²⁷¹

Even if class interest were better articulated and the needs of workers better met in American law and society, layoffs would remain difficult and hurtful because the social aspect of work in human life—the “personhood” value of work—is important as well. Self-esteem and friendship are important components of work life. Displacement from work can make otherwise energetic and engaged people feel, at least temporarily, powerless. Proposals to make employers pay—including by retaining additional workers—have occasionally been raised in cases or

But unemployment insurance in this country provides benefits that are meager and that are also unhelpful to many low-wage contingent workers.

269. Fallon and Weiler first emphasized the importance of seniority. “At a certain point, the worker achieves the equivalent of tenure, because he knows that he is sufficiently high on the seniority list to be protected against nearly any risk of permanent job loss.” *Id.* at 58. In a footnote, however, they acknowledged that seniority rights may be effectively limited: “Seniority protection may not be as strong against short-term layoffs Nor is it an absolute guarantee against economic disaster, involving an employer’s bankruptcy, the closing of a plant, or the relocation of operations.” *Id.* at 58, n.219. They concluded optimistically, without foreseeing the subsequent growth of the contingent workforce: “Nevertheless, by committing a certain part of his working life to one firm, the employee can insure himself against most of the vicissitudes that might affect his job security.” *Id.*

270. The defeat of national health care plans forced unions to spend substantial negotiating energy arranging health care coverage for their members. *See, e.g.,* NELSON LICHTENSTEIN, *THE STATE OF THE UNION: A CENTURY OF AMERICAN LABOR* 251–52 (2002):

By the early 1990s . . . health care costs had risen at twice the level of inflation For the unions, this . . . meant that the effort to build a private welfare state for their own members, which had once seemed so promising, now generated a nightmare at the bargaining table and on the picket line. During the 1980s management efforts to trim health-insurance costs precipitated more than 80 percent of all strikes that took place in the United States.

271. “[T]he expected value to the worker of seniority may exceed the actual value of such tangible assets as his home or accumulated pension benefits.” Fallon & Weiler, *supra* note 229, at 58. Since no one would suggest taking a white teacher’s home or benefits to promote racial equality, Fallon and Weiler argued, seniority should be protected. *Id.* But the meaning of such a suggestion would surely depend on the rights to and availability of shelter and income available for all members of a society. Given a different constellation of rights, the need to “take” seniority rights could be obviated by the adequacy of general social protection, or it might be a proposal for relatively painless maneuvers to adjust social roles in the interest of justice, with minimal attendant costs. If compensation supplied a house that was comparable or better, not a bed in a homeless shelter or a space under a bridge, the question of displacement would change significantly—even though emotional attachment to the house one now has would likely still be great.

scholarship.²⁷² The aspect of work that involves meeting material needs could be met by opportunities for other work or better social insurance. But work is also an important part of our construction of ourselves in the world, and our part in the creation and reproduction of our society.²⁷³ Improving other aspects of work life and social insurance would not make jobs truly fungible, though it would radically alter the burdens of layoffs.

Recognizing the social nature of work and the importance of class reveals an important component of racial oppression that is currently invisible in these cases. The construction of race in America includes the presumption of employability that attaches to whiteness and the presumption of unemployability that often attaches to black communities and individuals. As a result, black workers encounter more difficulty securing jobs if they have home addresses in black neighborhoods than in whiter, more middle-income areas.²⁷⁴ The employment history of white and non-white workers—and the capacity to obtain future work—are therefore part of the social construction of race. Legal opinions do not address how the meaning of layoffs is shaped by the social construction of race in America. The impact of racial constructions is not simple. Having held a job helps establish one's identity as an employable person (for whites and for people of color), so arguably blacks are proportionately much better off to have worked at all. This position could support the current judicial approach that treats hiring as a much more available remedial measure than protection against layoffs. Blacks experience higher unemployment than whites²⁷⁵ and can also expect longer periods of unemployment when laid off than whites.²⁷⁶ Because the social

272. See, e.g., Ansley, *Cost Allocation*, *supra* note 215, at 374–76; Verkerke, *supra* note 228, at 1490.

273. For eloquent descriptions of the role of work in social life, see generally Kenneth L. Karst, *The Coming Crisis of Work in Constitutional Perspective*, 82 *CORNELL L. REV.* 523 (1997); Vicki Schultz, *Life's Work*, 100 *COLUM. L. REV.* 1881 (2000).

274. The social construction of race in America has shaped racially coded concepts of employability in which whiteness is culturally linked with employability and minorities with unstable or lesser employment. See, e.g., Kirschenman & Neckerman, *supra* note 96, at 203–04 (employers bluntly expressed overtly racial notions concerning the worthiness of prospective employees and preferred suburban to inner-city applicants).

275. See ANDREW HACKER, *TWO NATIONS: BLACK AND WHITE, SEPARATE, HOSTILE, UNEQUAL* 103 (1992) (noting that in 1990, average black unemployment was 2.76 times as great as white—the highest differential since 1960).

276. See, e.g., *id.* at 102 (“Stated very simply, if you are black in America, you will find it twice as hard to find or keep a job.”); *id.* at 105 (noting that of “discouraged workers” who have ceased looking for work because they are convinced they will not find it and are no longer counted among the statistics of the unemployed, close to thirty percent are black, a much higher proportion than on the official list of unemployed looking for work); Lori G. Keitzer, *Job Displacement 1977–1986, How*

construction of blackness includes stereotypes concerning unemployment and unemployability, the costs of layoffs are likely to be higher for blacks than for whites. These stereotypes reveal that current understanding of the harm of layoffs presumes a white norm. It may be more important to blacks than to whites to change hiring patterns and simultaneously more destructive to blacks than whites to be laid off.

Protecting rights for all workers is a collective class interest. In the context of layoffs, this means lowering the cost of lost jobs and perhaps adjusting those costs further for workers displaced because of the history of racial exclusion.²⁷⁷ Providing retraining and long-term higher-level income support would avoid simultaneously protecting the entire structure of privilege and inflicting the costs of transition on the displaced worker. In other words, the zero-sum game disappears if class interest, not merely white interest, is taken seriously.²⁷⁸ Balancing the equities would retain minority employees when there was little or no difference in seniority level, but protect seniority for workers who have long-term investment in that workplace.²⁷⁹ One reason it is difficult to reach this result in the current system is that worker investment in the job is protected only in the seniority system—not against plant closure or restructuring,²⁸⁰ nor against changes in unemployment benefits relative to wages.

4. Contracting

The reasons to redistribute access to contracting involve the nature of minority business development under conditions of widespread, continuing racial discrimination.²⁸¹ The creation of increased access for minority enterprises has the effect of strengthening the economy in minority

Blacks Fared Relative to Whites, 1991 MONTHLY LAB. REV. 17 (1991) (noting that blacks experienced longer periods of joblessness than whites).

277. Judge Sarokin had ordered that the federal government must pay long-term compensation in the New Jersey Firefighters case, but the opinion was withdrawn in light of *Stotts*. *Vulcan Pioneers, Inc. v. N.J. Dep't of Civil Serv.*, 588 F. Supp. 716, *vacated*, 588 F. Supp. 732 (D.N.J. 1984), *aff'd*, 770 F.2d 1077 (3d Cir. 1985). See EZORSKY, *supra* note 55, at 45.

278. In a world historically and currently structured by racial subordination and privilege, many layoffs will be experienced differentially because of a history of past exclusion. Therefore, class interest among workers lies in social remedies rather than zero-sum games.

279. When employees have been hired on the same day, the seniority system is not protecting greater investment in the job but at best investment in the rules of the system. See *supra* note 235 and accompanying text.

280. In the absence of a union contract, seniority may not be protected at all. And since less than ten percent of private sector workers are now organized into unions, a majority of workers may not have enforceable security rights.

281. See, e.g., *Fullilove v. Klutznick*, 448 U.S. 448, 465 (1980) (noting Congressional subcommittee report recognizing that past discriminatory practices affect present economic system).

communities, promoting economic development more evenly between white and minority communities. These are middle-class access arguments: take a historically weak minority business elite and strengthen it by ensuring greater opportunities for access and participation. Minority set-asides do not harm white workers directly; at most, more minority-owned businesses bring some more minority workers into the pool of employees on urban contracts.²⁸²

In the contracting cases, the Court applies precedent originally built on the rationale of protecting white workers but no longer invokes workers as a rationale. The Court identifies harm in the decreased opportunity for white contractors to compete for contracts. In *Adarand*, the state could seek to protect disadvantaged businesses, but the Court perceived harm in the decreased chance of getting the contract for a white business *which had not sought certification as a disadvantaged business*. The harm arose from the fact that non-white racial identity was rebuttably presumed to make a business eligible for certification as disadvantaged.²⁸³

Let us read workers back in. The category of “disadvantaged” businesses does not harm white workers, who often dream of becoming businessmen and fail because of undercapitalization, inexperience, and the other problems that plague small businesses. As Derrick Bell pointed out about the training program in *Weber*, working class whites gain from the establishment of programs put in place to adjust for the history of racial subordination, since those programs rarely exclude whites.²⁸⁴ For working class whites who seek individual mobility between classes rather than class advancement for all, programs to aid “disadvantaged” businesses are likely to be valuable. But class mobility for individuals should not be confused with class-based advancement in general.

282. Of course, since work is social and discrimination still exists, increasing minority business with government will likely bring more minority workers in general into urban employment. This is therefore something like the “increased competition” question mentioned in Justice Stevens’s dissent in *Martin v. Wilks*, 490 U.S. 755, 792 n.31 (1989) (Stevens, J., dissenting).

283. Justice O’Connor’s opinion for the court did not confront the difficulties of this argument directly, merely citing *Jacksonville Contractors* on the standing issue rather than confronting the difference between a race-targeted set-aside program and the Disadvantaged Business Entity (“DBE”) program under federal government guidelines. DBE guidelines compensated prime contractors for the higher costs involved in hiring disadvantaged businesses which were not the lowest bidders. See discussion in Casebeer, *The Empty State*, *supra* note 105. The *Jacksonville Contractors* case—which established standing for white contractors seeking to challenge minority set-aside programs—has been described as “universal white person’s standing” by Pamela Karlan, in *The Supreme Court, Racial Politics, and the Right to Vote: Shaw v. Reno and the Future of the Voting Rights Act*, 45 AM. U. L. REV. 1, 45 (1996), and criticized as “color-coded standing” by Spann, *supra* note 254, at 1496 (concluding that “the Court is stingier on standing for racial minorities than for the white majority”).

284. See Bell, *Xerxes and the Affirmative Action Mystique*, *supra* note 50, at 1610.

So what is the working class interest in which business secures a government contract?²⁸⁵ Working people would gain if the award of contracts was made on the basis of furthering equality. I can imagine a system which awarded points for the smallest gap between the pay of workers and management, for excellent records on employee safety, or for other class-based concerns.²⁸⁶ The Court has not addressed working class interest in these cases because it did not seriously explore that question in any of the affirmative action cases.²⁸⁷

V. ANTI-TRANSFORMATION: THE MOVE FROM WORK TO POLITICS

Any theory of the social universe must include the representation that agents have of the social world and . . . the contribution they make to the construction of the vision of that world, and consequently, to the very construction of that world. It must take into account the symbolic work of . . . group-making. It is through this endless work of representation (in every sense of the term) that social agents try to impose their vision of the world . . . and to define their social identity.²⁸⁸

A. CLASS QUESTIONS AND POLITICS

There is an interactive relationship between low rates of union organization and the politics of class in America. Legal rules make organization difficult, which in turn diminishes the capacity of workers to identify and pursue shared interests. The work of bringing labor together with community activism, always time-consuming, is impeded by labor's current general weakness.²⁸⁹ Lack of organization makes workers more

285. As long as the ranks of capital are not well integrated, there is a general social justice interest in transformative work for racial justice, which is shared by working class people.

286. A worker-friendly contracting criterion was struck down when the National Labor Relations Act was held to pre-empt a state's effort to ban from state contracts companies which had been found to have committed repeated unfair labor practices under the NLRA. *See Wis. Dep't of Indus., Labor, and Human Relations v. Gould, Inc.*, 475 U.S. 282, 291 (1986).

287. On remand in *Adarand*, the Tenth Circuit Court of Appeals focused on questions like lending capital to minority businesses as well as white businesses—issues that show the continuing need at the corporate level for affirmative action programs. The history of the case is discussed in *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147, 1155–57 (10th Cir. 2000), *cert dismissed*, 534 U.S. 103 (2001) (applying strict scrutiny and finding constitutional a program for disadvantaged businesses), and *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103 (2001) (dismissing writ of certiorari as improvidently granted because of *Adarand's* lack of standing to challenge particular regulations).

288. *See Bourdieu*, *supra* note 66, at 10–11.

289. *See generally* KIM MOODY, *AN INJURY TO ALL: THE DECLINE OF AMERICAN UNIONISM* (1988) (discussing weakness of labor). *See also* Elizabeth M. Iglesias, *Institutionalizing Economic Justice: A LatCrit Perspective on The Imperatives of Linking The Reconstruction of 'Community' to*

dependent on protection through state regulation of conditions and terms of employment. Other urgent interests of working people also depend on state policy, including the mobility of capital, a floor under subsistence when capital departs, reeducation and retraining if job skills become obsolete, and access to health care for the uninsured.

As unorganized workers become increasingly dependent on the state, they are represented less within the state *as workers* and more as the subject of divided political allegiances. Labor participation in promoting legislation and other government processes is correspondingly weakened.²⁹⁰ Working people become more dependent on general political representation which is embodied in any given elected official as an expensive winner-take-all prize²⁹¹ and need not be directly responsive to labor in many districts. A local representative must speak for many facets of constituent interest—taxpayer, homeowner, consumer, person who may someday need an abortion (or whose wife, daughter, or partner may need one), immigrant, advocate of a particular position on international issues, and many more. Systematic political participation for labor is reduced or may disappear entirely into the notion of a “nation of consumers” whose shared group interest is in keeping prices down rather than keeping income up.

The organizational and political weakness of the labor movement also has racial consequences. Low levels of labor organization lead white workers to interact less with leaders who are invested in building multiracial solidarity. Pervasive residential segregation means that working class whites often do not live near working class people of color. Since class formation happens outside the workplace as well as within it, antiracist class-based activism is a practical as well as a theoretical challenge. Political leaders of mostly-white districts may not believe they need interracial support when they build voting bases. The loss of leadership in organized labor and the transition to less organized participation within broader civic processes tend to diminish the amount of

The Transformation Of Legal Structures That Institutionalize The Depoliticization And Fragmentation of Labor/Community Solidarity, 2 U. P.A. J. LAB. & EMP. L. 773, 788 (2000) (“[U]nion failures to participate reciprocally in community struggles over matters unrelated to the conditions of employment must be analyzed against a history of judicial interpretation that has worked to isolate unions and to narrow the instances in which unionized workers can lawfully exercise economic and political power.”)

290. Judges import their own class-based concepts of the workplace into lawmaking, with results that demonstrate ignorance of the power relations of the workplace or disinterest in protecting workers. ATLESON, *supra* note 175, at 69–77.

291. See Lani Guinier, THE TYRANNY OF THE MAJORITY 79–82 (1994) (criticizing problems of winner-take-all voting).

messages white workers will hear about shared interests with people of color.²⁹²

Neither major party²⁹³ is moving to pursue labor-protective legislation to protect these voters *as workers*. Their self interest is too seldom addressed *as workers*, but there are occasional appeals to them *as white workers*. In the infamous political advertisement during Jesse Helms' senatorial campaign against African-American Harvey Gantt, a pair of white hands crumpled a slip of paper while the narrator said, "You really needed that job, but it went to a minority because of a quota."²⁹⁴ This strategy does not acknowledge inauthentic white privilege but, in contrast, attempts to forge consciousness as a social group around a view of whites as the objects of race discrimination. In the contested, interrelated construction of race and class in contemporary America, conscious efforts to identify, mobilize, or create antiracist class consciousness have been largely missing.²⁹⁵ A simplistic status approach may implicate the state's role in distribution (or redistribution) of wealth and privilege but need not implicate the state's role in organizing and maintaining the production of wealth and power.²⁹⁶

After 1995, the AFL-CIO under newly diverse leadership returned to emphasizing political organizing rather than relying on political endorsements.²⁹⁷ Unions were encouraged to address issues rather than backing candidates or parties and to mobilize voters through grass-roots

292. I am grateful to Monte Piliawsky for sharing his thoughts on this subject.

293. On the absence of a major party to speak for labor, see Rogers, *supra* note 108, at 47–54. See generally Moody, *supra* note 289 (discussing political weakness of labor).

294. See, e.g., Lloyd Grove, *The Ballot of Harvey Gantt; He's Had Six Years to Think About a Rematch with Jesse Helms. And He's Ready*, WASH. POST, May 24, 1996, at D1. These messages told white workers that they had a natural right of access to jobs, that they were meritorious, and that people of color, backed by powerful others as an intervention in the natural state of affairs, caused their problems.

295. See generally MOODY, *supra* note 289 (describing how the triumph of "business unionism" after World War II shrank the sphere of union work to wages, working conditions, and particular sorts of benefits, and noting how that triumph led to less class-conscious mobilization within unions in general).

296. Cf. Karl E. Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937–1941*, 62 MINN. L. REV. 265, 310 (1978) ("Liberal political theory has always conceived of the state as being radically divorced from, or rising above, civil society, the realm of private and group interest.").

297. The new leaders also changed their position on immigration, abandoning the previous commitment to protectionism. See Steven Greenhouse, *Labor Urges Amnesty for Illegal Immigrants*, N.Y. TIMES, Feb. 16, 2000, at A26 (describing attitudes of previous decades and new policy advocating blanket amnesty).

style efforts.²⁹⁸ By the 2000 election, labor turnout was the highest it had been in decades—twenty-six percent of voters were from union households, although only about ten percent of the workforce was unionized.²⁹⁹

Class and race were both crucial factors in the 2000 elections. Labor support was mobilized by grass-roots efforts to turn out the vote. Labor support, including from white workers, was vital to Democrats.³⁰⁰ Labor was one of the decisive factors in several states carried by Al Gore, in which Gore had lost among voters from non-union households.³⁰¹ The majority of white men and women from union households voted for Gore for president.³⁰² Black voter turnout was very high in several states.³⁰³

298. See generally Geoffrey Garin & Guy Molyneux, *Informing and Empowering American Workers, Ten Rules for Union Political Action*, in NOT YOUR FATHER'S UNION MOVEMENT: INSIDE THE AFL-CIO 113, 115 (Jo-Ann Mort ed., 1998) (introducing "Ten Rules for Union Political Action;" rule number one is "[i]ssues come first, candidates and parties second"). See also Steve Rosenthal, *Building to Win, Building to Last: The AFL-CIO Political Program*, in NOT YOUR FATHER'S UNION MOVEMENT 99, 111 ("Labor's goal has to be more than simply building a machine to elect Democrats.").

299. See Susan Schmidt & John Mintz, *Voter Turnout Up Only Slightly Despite Big Drive; Battleground States Had Major Gains*, WASH. POST, Nov. 9, 2000, at A35 (identifying twenty-six percent of voters from union households). On the percent of workers in the United States who are members of unions, see note 172.

300. Paul Frymer has described the "capture" of minorities within a two-party system: when minority voters cannot afford to switch parties, the party with which they are affiliated can take their votes for granted rather than working to fulfill their needs. See PAUL FRYMER, *UNEASY ALLIANCES: RACE AND PARTY COMPETITION IN AMERICA* 87–119 (1999) (describing electoral capture); *Id.* at 182 (noting that white racism makes building coalitions more difficult for black leaders and tends to reinforce electoral capture). The Democrats might similarly capture labor—to the extent that labor votes as a bloc. A history of the relationship between labor and the Democratic Party is beyond the scope this Article. Organized labor had previously voted strongly Democratic, but then turned out poorly for the 1972 election and afterward. As a result, the Democrats lost significant numbers of white voters to the Republican Party during the 1980s. See generally GORDON L. CLARK, *UNIONS AND COMMUNITIES UNDER SIEGE: AMERICAN COMMUNITIES AND THE CRISIS OF ORGANIZED LABOR*, 193–215 (1989); FORM, *supra* note 134, (describing impact of labor segmentation on politics); FRYMER, *supra*. Voting for the Democratic Party seems an imperfect measure of class consciousness, but America has no major party that speaks primarily for labor to present an affirmatively class-conscious electoral choice. Obviously, a two-party system limits the representational choices available to all citizens, but the consequences are less serious for corporations, which are represented by both parties, than for labor or minorities.

301. See Steven Greenhouse, *Unions See Signs of Trouble in Bush's Choice for Labor*, N.Y. TIMES, Jan. 4, 2001, at A23 (noting that the "[u]nion members gave Mr. Gore the winning margin in numerous closely contested states, including Iowa, Michigan, Pennsylvania and Wisconsin").

302. See PETER D. HART RESEARCH ASSOCIATES, *AFL-CIO ELECTION NIGHT STUDY* (Nov. 7, 2000) (on file with the Southern California Law Review). See also AFL-CIO Post Election Survey (2000), at <http://www.aflcio.org/mediacenter/resources/polls.cfm>. White women from union households voted for Gore; he lost among white women from non-union households. Gore also won among white men from union households, but lost badly among white men from non-union households. See also Jill Lawrence, *Country v. City, Spelled in Red, Blue: Election Map Shows Traditional*

Ninety percent of black voters cast ballots for Gore.³⁰⁴ Voting rights violations in black communities—and a conservative Court that has protected neither labor nor minorities—defeated that coalition effort.³⁰⁵

B. DEFINING WHITE INTERESTS—COLOR AND POWER EVASION IN THE VOTING RIGHTS CASES

The primacy of individual rather than group-based approaches to rights in law tracks the positioned identification of white people as individuals rather than as members of a race.³⁰⁶ It also affects consciousness of class. Whiteness and simplistic concepts of status make it easy for judges to conceive of voting cases as “race” cases when they concern minority voting rights and “political power” cases when they appear to mainly concern whites. Status and whiteness also help explain why class interest has not been a point of inquiry in the voting cases any more than class was explored in the cases on work. If class *had* been cognizable in the cases on work, it could have changed both the inquiry and the outcome in *Shaw v. Reno* and the cases that followed.

Color evasion and power evasion marked the reasoning of *Shaw v. Reno*,³⁰⁷ as the Court reviewed the creation of a legislative district in North Carolina that spanned many miles of I-85 through the industrial centers of the Piedmont district. Justice O’Connor’s majority opinion held that the act of classifying by race is inherently “odious,”³⁰⁸ regardless of whether the classification creates privilege or subordination or inflicts harm or deprivation on anyone. All racial classifications therefore trigger strict scrutiny by courts. The *Shaw* opinion is *color evasive*. As many scholars

Demographic Divide Still Strong, USA TODAY, Nov. 9, 2000, at 19A (noting that white women voted forty-nine percent for Bush and forty-eight percent for Gore).

303. See Samuel Issacharoff, *Race and Campaign Finance Reform*, 79 N.C. L. REV. 1523, 1526–27; Jill Lawrence, *Aggressive NAACP Urged African-Americans to the Polls*, USA TODAY, Dec. 8, 2000, at 8A.

304. See Lawrence, *supra* note 303.

305. See generally U.S. COMM’N ON CIVIL RIGHTS, VOTING IRREGULARITIES IN FLORIDA DURING THE 2000 PRESIDENTIAL ELECTION (2001), available at <http://www.usccr.gov> (reporting extensive problems with voting rights in Florida). As Pamela Karlan has pointed out, George Bush was able to claim a uniquely individual interpretation of equal protection in his Supreme Court arguments which had been developed through the 1990s voting cases. See Pamela S. Karlan, *Nothing Personal: The Evolution of the Newest Equal Protection from Shaw v. Reno to Bush v. Gore*, 79 N.C. L. REV. 1345, 1356–60 (2001).

306. See Barbara Jean Flagg, *Enduring Principle: On Race, Process, and Constitutional Law*, 82 CAL. L. REV. 935, 937–38 (1994) (arguing that the process perspective on constitutional law is identifiably white). See also FLAGG, *supra* note 18, at 1.

307. 509 U.S. 630 (1993).

308. *Id.* at 643.

and advocates have pointed out, districts are not suspicious when they are majority-white and near other majority-white districts, no matter how oddly they are shaped; only proximity to the Other triggers suspicion.³⁰⁹ For Justice O'Connor, as for Ruth Frankenberg's white subjects, race is something that good people simply do not notice.³¹⁰ Noticing race is "odious" because race itself is bad; race became bad because it was firmly linked to concepts of subordination and inferiority. The plaintiffs' belief that racial identity should not matter to the use of race under the Equal Protection Clause is itself an attitude that reflects positioned white views on race, and the coyness of the Supreme Court's discussion about the race of plaintiffs in some of these cases reflects the same general reluctance to discuss whiteness.³¹¹

Shaw is also *power evasive*. It is not the exercise of power resulting in racial subordination, but the act of classification by race that is held to offend the Constitution.³¹² Justice O'Connor's use of the terms "segregated" and "apartheid" reflects a positioned white viewpoint when describing states made up of many predominantly white districts and a small number which are predominantly minority (in North Carolina, black).³¹³ The term "apartheid" demonstrates that, to Justice O'Connor, this feels like racism.³¹⁴ The assertion that majority-minority districts may "pull us apart"³¹⁵ reflects a positioned white belief that "we" are not

309. See, e.g., T. Alexander Aleinikoff & Samuel Issacharoff, *Race and Redistricting: Drawing Constitutional Lines After Shaw v. Reno*, 92 MICH. L. REV. 588 (1993) (examining racial gerrymandering); Robert Polsby and Robert Popper, "Ugly": *An Inquiry Into The Problem of Racial Gerrymandering Under the Voting Rights Act*, 92 MICH. L. REV. 652 (1993) (same). Kousser points out that, after *Bush v. Vera*, 517 U.S. 952 (1996), Justice O'Connor required compactness of majority-minority districts but not of majority-white districts. See Kousser, *supra* note 164, at 417-18, 488.

310. See *supra* text accompanying note 34.

311. The *Shaw* plaintiffs were so color evasive that they did not identify their own race; the district court took judicial notice that the plaintiffs were white. See *Shaw*, 509 U.S. at 638. See also the discussion of the published comment by one of the *Shaw* plaintiffs that he did not think it important that he and the other plaintiffs were white in Karlan, *supra* note 305, at 1348-49 (criticizing Robinson O. Everett, *Redistricting in North Carolina—A Personal Perspective*, 79 N.C. L. REV. 1301 (2001)).

312. See Samuel Issacharoff & Pamela S. Karlan, *Standing and Misunderstanding in Voting Rights Law*, 111 HARV. L. REV. 2276, 2279 (1998) (criticizing the way that standing doctrine has evolved without any coherent theory of injury).

313. See, e.g., Pamela S. Karlan, *Our Separatism? Voting Rights as An American Nationalities Policy*, 1995 U. CHI. LEGAL F. 83, 94 (referring to North Carolina's twelfth congressional district as "among the most integrated" in the country).

314. Cf. *supra* text accompanying notes 43-44 (noting that to whites, making white people feel white feels like racism, because it violates norms of not recognizing one's own race or the race of others).

315. This reasoning has been criticized extensively. See Karlan, *supra* note 313, at 93-96; KOUSSER, *supra* note 164, at 270-72.

currently “apart.”³¹⁶ It is consistent with classic Southern *white* privilege for whites to believe that race relations are comfortable and undivided while blacks perceive division and oppression.³¹⁷

Positioned white perceptions were written into constitutional doctrine in the cases on the standing of plaintiffs challenging voting districts. In *United States v. Hays*,³¹⁸ the Court held that plaintiffs who lived in majority-black districts had standing to challenge the state’s redistricting plan, but that plaintiffs in a mostly-white district did not. A line that intentionally divides black from white must intentionally classify by race on both sides, unless whiteness is invisible. If intentional race-conscious districting were really the key to finding a constitutional violation,³¹⁹ voters from both districts would have standing to bring challenges.³²⁰ The Supreme Court has been unwilling to grant standing so widely. Instead, Justice O’Connor asserted a link between classification and political harm by emphasizing “representational harm”—the message purportedly sent by the act of racial classification that a political representative need only represent the particular group that forms the majority of the district. Representatives from white districts would be told to pay attention to whites, and white plaintiffs would not have standing in those districts.³²¹

The decision in *Bush v. Vera*³²² brought the subtext of *Hays* into the open and made its rationale incoherent. Although Justice O’Connor’s plurality opinion did not mention the plaintiffs’ race, they included at least

316. In 1993, just as *Shaw* was being decided, a study of attitudes of blacks and whites in North Carolina revealed that white residents tended to believe that neither race prejudice nor discrimination against blacks, were major problems in North Carolina. African Americans, in contrast, saw discrimination and prejudice as widespread. Although whites indicated they preferred local ordinances which permitted segregation, they seldom expressed overt hostility to blacks and expressed few sentiments that were openly racist. KOUSSER, *supra* note 164, at 272.

317. See, e.g., WILLIAM CHAFE, *CIVILITIES AND CIVIL RIGHTS* 3–10 (1980).

318. 515 U.S. 737 (1995).

319. Or if the injury creating standing was the “expressive harm” inflicted on all of society via “stereotyping” interests by drawing race-based voting districts, see Richard H. Pildes & Richard G. Niemi, *Expressive Harms, “Bizarre Districts,” and Voting Rights: Evaluating Election-District Appearances after Shaw v. Reno*, 92 MICH. L. REV. 483, 514–16 (1993), voters from both districts, or the whole state, would have standing. See, e.g., Issacharoff & Karlan, *supra* note 312, at 2286 (“When the government uses race to assign some voters to District X, it tells all voters that race matters.”). See also KOUSSER, *supra* note 164, at 399–409.

320. Many authors have criticized these cases. See, e.g., KOUSSER, *supra* note 164 (criticizing cases); Issacharoff & Karlan, *supra* note 312 (same).

321. The Court never addressed the tensions within the “representational harm” theory. “All five members of the *Shaw* majority appear to have abandoned the ‘representational harm’ justification for the *Shaw* doctrine.” Heather K. Gerken, *Understanding the Right to an Undiluted Vote*, 114 HARV. L. REV. 1663, 1693 (2001).

322. 517 U.S. 952 (1996).

one Hispanic³²³ as well as some whites who lived in and challenged a majority-Hispanic district.³²⁴ Even though the way the district was drawn “deliberately exclude[d] . . . wealthy white neighborhoods,”³²⁵ only whites and minorities in majority-minority districts had standing; plaintiffs from majority-white districts did not have standing.³²⁶ Together, *Hays* and *Bush* reveal that the current Court³²⁷ believes that minority dominance is the crucial factor that constitutes a presumptive “racial classification” and creates “personal injury” to a plaintiff. In the anti-transformation cases, the Supreme Court made power evasion into a constitutional standard.

Redistricting places questions of representation and power squarely at the center of political contest in America. *Shaw* is a case about politics, and therefore about past and future struggle. But that struggle takes place on odd terms.³²⁸ Legislators may be aware of race while creating electoral districts (color evasion is held not to be possible when the Voting Rights Act requires avoiding adverse impact on minorities). However, they may not be motivated primarily by race in structuring districts, nor may they act deliberately to maximize political representation for minorities (power evasion remains possible and in fact is required). If white voters are placed in majority-white districts, the Court does not presume that those voters

323. Hispanic is the term used by the court. Another plaintiff, Edward Chen, was Asian-American, see Alan Bernstein & R.G. Ratcliffe, *Justices Quash Racial Districts; Ruling May Force States to Hold New Elections*, HOUSTON CHRONICLE, June 14, 1996, at A1 (noting that Vera was Hispanic and Chen was Asian-American). The Court did not mention the race of the plaintiffs.

324. See Issacharoff & Karlan, *supra* note 312, at 2278 n.15 (1998) (noting that Al Vera, one of the plaintiffs in *Vera*, was himself Hispanic and was granted standing to challenge a majority-Hispanic House District).

325. *Vera*, 517 U.S. at 965 (“[District 30] sprawls throughout Dallas County, deliberately excludes the wealthy white neighborhoods of Highland Park and University Park and extends fingers into Collin County.”) (quoting *Vera v. Richards*, 861 F. Supp 1304, 1337–38 (S.D. Tex. 1994)). Obviously, when white neighborhoods are being placed “deliberately” into districts and excluded from other districts, they are the subjects of “racial classification” to the same extent as the minority neighborhoods placed in other districts.

326. See *Vera*, 517 U.S. at 957 (denying standing to plaintiff residing in District 25 who “has not alleged any specific facts showing that he personally has been subjected to any racial classification”) (following *United States v. Hays*, 515 U.S. 737, 744–45 (1995)).

327. *But cf.* *United Jewish Orgs. of Williamsburgh, Inc. v. Carey*, 430 U.S. 144, 155 (1977) (holding race-conscious districting not subject to strict scrutiny).

328. Overall, organized labor and racial minorities, especially African Americans, have been a strong base of support for the Democratic Party. In political redistricting, both “partisan” and “race”-based districting involve questions of race, class, and power. *Davis v. Bandemer*, 478 U.S. 109 (1986), is a case regarding “partisan” control of the districting process; it began with a racial vote dilution case as well as a partisan gerrymandering case, but reached the Court as a partisan case. The cases were consolidated after the district court noted that blacks in Indiana voted overwhelmingly Democratic and held that “the voting efficacy of the NAACP plaintiffs was impinged upon because of their politics and not because of their race.” *Id.* at 118 n.8. As I argue below, although *Shaw* was clearly a race case, it implicitly involved significant class issues.

have personally been subject to race-based decision-making. Placement in majority-minority districts, however, created standing for white voters. Race is acknowledged to be visible, but it will be up to the legislating bodies to minimize its apparent connection with decisions about power. Class will *not* be visible in this process most of the time. The next section turns to an exploration of interest, as it is understood by the Court, and as it could be understood.

C. REDEFINING INTEREST: HIGHWAYS, LABOR, AND POLITICAL POWER

Politics is what makes this world go 'round. It is the ruling factor in why the poor continue to be poor and the rich continue to be rich. This bothers me a lot. Textile workers in North Carolina are the lowest paid and the least unionized in the South, where the labor struggle is hard and getting harder every day.³²⁹

[T]he principles of vision and division of the social world at work in the construction of theoretical classes have to compete, *in reality*, with other principles, ethnic, racial or national, and more concretely still, with principles imposed by the ordinary experience of occupational, communal and local divisions and rivalries.³³⁰

If you tour the locations of labor struggles in the textile mills of North Carolina, much of your journey will follow I-85, the interstate highway through the Piedmont. Start near the Virginia border, where a walkout in 1927 at the Harriet Mill in Henderson began two years of intense and violent labor struggle in the textile industry regionally,³³¹ and where a long bitter strike in the 1950s³³² left the union “deeply defeated but not quite dead.”³³³ You will pass Durham, where the General Strike of 1934 was

329. Crystal Lee Sutton, *Crystal Lee Sutton*, in *HARD TIMES COTTON MILL GIRLS: PERSONAL HISTORIES OF WOMANHOOD AND POVERTY IN THE SOUTH* 201, 217 (Victoria Byerly ed., 1986). Ms. Sutton's story was the basis of the movie “Norma Rae,” made by Martin Ritt, and starring Sally Fields.

330. Bourdieu, *supra* note 66, at 7–8.

331. JACQUELYN DOWD HALL, JAMES LELOUDIS, ROBERT KORSTAD, MARY MURPHY, LUANN JONES, & CHRISTOPHER B. DALY, *LIKE A FAMILY: THE MAKING OF A SOUTHERN COTTON MILL WORLD* 212 (1987).

332. See generally Linda Frankel, “*Jesus Leads Us, Cooper Needs Us, the Union Feeds Us*”: *The 1958 Harriet-Henderson Textile Strike*, in *HANGING BY A THREAD: SOCIAL CHANGE IN SOUTHERN TEXTILES* 101–20 (Jeffrey Leiter et al. eds., 1991) (describing strike).

333. Rhonda Zingraff, *Facing Extinction*, in *HANGING BY A THREAD: SOCIAL CHANGE IN SOUTHERN TEXTILES*, *supra* note 332, at 205. Of course, not every labor struggle lay along I-85; the first major victory at J.P. Stevens in 1974 took place in Roanoke Rapids, east of Henderson on a different highway (though perhaps located along an intersecting railroad line). See James A. Hodges, *J.P. Stevens and the Union: Struggle for the South*, in *RACE, CLASS, AND COMMUNITY IN SOUTHERN LABOR HISTORY* 53–64 (Gary M. Fink & Merl E. Reed eds., 1994).

“100 percent effective”³³⁴ and a “marvel of self-organization.”³³⁵ In Burlington, at one time the site of the largest textile company in the world, the General Strike of 1934 brought confrontations between strikers and the National Guard, and strikers were convicted of conspiracy to dynamite a mill despite contradictory evidence.³³⁶ Farther along the highway lies Greensboro, corporate headquarters of Burlington Mills, Cone Mills, and other textile companies, where paternalism at Cone Mills maintained years of industrial peace that covered simmering resentment; paternalistic control had broken into labor struggles by the time of the Depression.³³⁷

In Kannapolis, home of the giant Cannon Mills, the needle trades union UNITE won an NLRB election in June 1999 after 25 years of organizing.³³⁸ In Charlotte, the financial and transportation hub of the Carolinas,³³⁹ a long strike in 1919 gained support from the governor and won the first labor victories in textile, promoting unionism in the region.³⁴⁰ Before the South Carolina border,³⁴¹ you will reach Gastonia, where Ella Mae Wiggins, activist and songwriter, was shot and killed during a strike in 1929;³⁴² the strike of 1934 “verged on class warfare” in Gastonia.³⁴³

The railroad was there before the interstate.³⁴⁴ During the 19th century, most mills relied on water power and were located along rivers.

334. See HALL ET AL., *supra* note 331, at 340. Hall et al. use the term “General Strike” or “General Textile Strike” to describe the great labor uprising of 1934. See *id.* at 328–54 *passim*.

335. See *id.* at 341. Durham was home to tobacco factories as well as textiles. See generally DOLORES E. JANEWSKI, *SISTERHOOD DENIED: RACE, GENDER, AND CLASS IN A NEW SOUTH COMMUNITY* (1985) (discussing industry in Durham and emphasizing the ways in which racism and segregation constructed a segmented and divided working class).

336. HALLET AL., *supra* note 331, at 343.

337. See generally Bryant Simon, “Choosing Between the Ham and the Union”: Paternalism in the Cone Mills of Greensboro, 1925–1930, in HANGING BY A THREAD, *supra* note 332, at 81–100. See also *id.* at 88 (describing simmering resentment).

338. David Firestone, *Union Victory at Plant in South is Labor Milestone*, N.Y. TIMES, June 25, 1999, at A16.

339. HALLET AL., *supra* note 331, at xii.

340. See *id.* at 233–36.

341. This pattern of production in the Piedmont crosses state lines. Textile mills spread across the state border, along I-85 through Greenville and Spartanville, South Carolina, and on into Georgia. The Georgia district that was the subject of repeated voting rights litigation in *Miller v. Johnson*, 515 U.S. 900 (1995), and *Abrams v. Miller*, 521 U.S. 74 (1997) also includes an industrial history of textile development.

342. See HALL ET AL., *supra* note 331, at 215, 227 (mentioning that Wiggins “lived in a black neighborhood outside the mill village and, alone among local unionists, tried to persuade black workers to sign union cards”).

343. See *id.* at 351.

344. The current route of I-85 follows the approximate route of the Norfolk Southern Railway from Durham to Greensboro, and of the Southern railway, from Greensboro through Charlotte toward

Industrial development grew after the railroads reached into coal mining areas, providing fuel for steam power, and brought cotton and coal to the Piedmont.³⁴⁵ Along the rail lines, industry and towns grew rapidly³⁴⁶ and “[m]ill building became synonymous with town building. . . .”³⁴⁷ Highways, like railroads, tie together the industrial centers of the Piedmont. Their placement is not arbitrary; they track the organization of production, as materials and people must be moved from place to place.

Along those routes, working people came to the mills and businesses developed around them. As the textile industry grew through the late nineteenth and twentieth centuries, mill villages became close-knit white working class communities; blacks were excluded from all but the heaviest jobs and lived outside the mill villages.³⁴⁸ Black workers moved into the industry in large numbers only after the federal government intervened to pressure the textile mills for desegregation. They brought militancy forged from collective action and the civil rights movement into the struggles of textile workers.³⁴⁹ Black support proved fundamental to union successes after 1970.³⁵⁰ Racism continued to be used as an anti-union strategy in fighting organizing drives, however, and many textile companies continued to reserve supervisory positions and better jobs for whites.³⁵¹

In 1992, the District Director for Amalgamated Clothing and Textile Workers Union described the newly created 12th Congressional District in North Carolina as an unparalleled opportunity for labor in the state. Running along Interstate 85,³⁵² it concentrated more shops organized by his union than any other district in the state.³⁵³ If the goal of legislative districting in North Carolina were to increase the political strength of working class people, and particularly of organized labor, the Piedmont workers could be brought together by a district through that textile and

Gastonia. Compare HALLET AL., *supra* note 331, at xxx (map of railroads and rivers of the Southeast), with *Shaw v. Reno*, 509 U.S. 630, 658–59 (containing map of contemporary District 12).

345. See HALLET AL., *supra* note 331, at 9–10, 24–25, 48–49.

346. See *id.* at 25.

347. See *id.* at 24. See also *id.* at xxx, xxvi (showing maps of railroads and rivers as of 1930 and density of textile spindleage by county in 1929 showing concentration in Piedmont).

348. See WOOD, *supra* note 15, at 42 (explaining that the threat to use black labor instead of white was an effective obstacle to organizing by white workers).

349. See Michael Schulman & Jeffrey Leiter, *Southern Textiles: Contested Puzzles and Continuing Paradoxes*, in HANGING BY A THREAD, *supra* note 332, at 11.

350. See *id.*

351. See *id.* at 11.

352. District 12 stretched from about 160 miles Durham to Gastonia. See *Shaw v. Barr*, 808 F. Supp. 461, 464 (E.D.N.C. 1992), *rev'd*, *Shaw v. Reno*, 509 U.S. 630 (1993). The district did not reach as far north and east as Henderson.

353. See Joe Alvarez, presentation at Law and Society Association (Philadelphia, May 1992).

furniture belt along the interstate. But North Carolina has never sought to maximize working class strength. A sustained period of coalition voting by blacks and poor whites after the Civil War triggered repeated waves of opposition. Some of the opposition was cultural, seeking to mobilize racism in opposition to class interest through racist rhetoric. But the attack was not only cultural: violence and terror, including whippings and killings of both blacks and whites, were part of the repression of biracial political alliance. When North Carolina disfranchised blacks, state leaders had promised to avoid disfranchising poor whites; in reality, however, the measures that disfranchised blacks drove poor white voters out of the political process as well.³⁵⁴

Political economy can easily trace the logic of an electoral district along an interstate highway. Textile mills and other factories shaped the economies of towns linked by roads. Construction of the interstate highway in turn affected the development of industry.³⁵⁵ Both textile and furniture production tended to attract further manufacturing in related industries. The pattern of black communities stretched in segregated pockets along major arteries of production and commerce is typical not only of North Carolina but of other Southern states as well.

The working class in North Carolina has been “politically and economically weak and, as a result of the way in which industrialization has taken place, socially and geographically fragmented.”³⁵⁶ North Carolina deliberately scattered its urban and industrial centers rather than develop concentrated urban areas.³⁵⁷ Having attracted major industries as companies fled union organization, the state’s leaders energetically pursued anti-union policies and declined to assist companies with organized workforces.³⁵⁸ In the 1970s, the state’s department of administration

354. See J. MORGAN KOUSSER, *THE SHAPING OF SOUTHERN POLITICS* 57–62 (1974) (discussing effects on lower-class whites generally); *id.* at 188–89 (observing that upper-class whites supported disfranchisement; Democrats ridiculed “low-born scum and quondam slaves”); *id.* at 191–92 (discussing issue of excluding lower-class whites; temporary grandfather clause as a concession to poor whites). See also HALL ET AL., *supra* note 331, at 105. See generally Paul D. Escott, *White Republicanism and Ku Klux Klan Terror: The North Carolina Piedmont During Reconstruction*, in *RACE, CLASS, AND POLITICS IN SOUTHERN HISTORY* 3–34 (Jeffrey J. Crow et al. eds., 1989) (describing violent repression).

355. See Alvarez, *supra* note 353 (describing the district along I-85 as tracking industrial towns and cities where African Americans lived and worked).

356. See WOOD, *supra* note 15, at 19.

357. See *id.* at 161–63.

358. See *id.* at 165–66. The governor of the state told manufacturers that the efficient highway system and agricultural labor force allowed industry “to locate away from congestion and at the same time to draw upon a large and industrious labor supply that is mostly rural. They are stable people who

avored “creation of a network of smaller urban centers [as] the key in a settlement pattern for shaping the growth and location of population within the state.”³⁵⁹ The state also sought to attract militantly anti-union employers and often proved unfriendly at the state or local level for industries that were higher-wage and unionized.³⁶⁰

“Traditional” districting practice in North Carolina would not bring working class districts together into electoral power. The state prevented that outcome by design. Bringing industrial districts together would necessitate linking them across farming areas and other regions. In the American legal system, there is no leverage that will force legislators to maximize working class electoral strength. The “one man, one vote” decisions brought greater democracy to urban areas in which many working-class voters were packed; beyond that, nothing forced the South to empower workers. Empowering workers generally in the South would run counter both to anti-union sentiment *and* to racism.

Disfranchisement in North Carolina at the end of the nineteenth century primarily sought to deprive African Americans of participation in the political process.³⁶¹ The state succeeded in this goal but hurt low income whites as well.³⁶² The modern shift on civil rights that swept into action during the Reagan administration and bore fruit in the *Shaw* cases was part of an attack on gains made by people of color—in North Carolina, particularly by African Americans—after many years of struggle. But its rationale is part of a political battle that has a message for working class whites as well. Elsewhere, I have described how white workers in Greensboro gained from black community leadership in a union organizing drive.³⁶³ The Greensboro area has been part of the challenged electoral district along the highway in North Carolina, but the interest of white workers in minority leadership has not yet been part of the public discussion or litigation in this case.

generally live on farms or in the country where they can gather some extra income and additional independence from some kind of farming.” *Id.* at 163.

359. *See id.*

360. *See id.* at 165–66.

361. *See* KOUSSER, *supra* note 354, at 191–94. Some white politicians also sought to disfranchise poor white farmers and workers; others sought to protect them. *See id.*

362. *See, e.g., id.* at 195 (“No longer did either party have to concern itself with the illiterate or those too poor to pay the poll tax.”).

363. *See, e.g.,* Hair, *supra* note 150, at 670 (describing white workers who responded to the company’s legal attacks on black workers by demanding to be sued as well). *See generally* Mahoney, *supra* note 38 (discussing actions of white workers at Greensboro K-Mart).

What is working class interest in the voting rights cases? First, overcoming the shibboleth that black domination was dangerous for white people in the South. The core logic of the recent voting rights decisions recreates that myth by presuming harm to any white who complains of being placed in a district with a black majority. Striking down majority-minority districts therefore is part of an entire history of Southern politics, repeating the most reactionary messages to white workers.³⁶⁴ If “class” is understood as a process in which consciousness and action interact, then the claim of harm from black dominance is plainly part of the attack on working class mobilization. Working class people placed in wealthier white suburban districts may find their elected leadership consistently opposing their class interest. Because consciousness and organization interact in making class, and because Americans have little social awareness of class, placing white working class people in wealthy white districts may increase their cultural identification with people of “middle class” status and diminish class consciousness, as well as diminishing opportunities for class mobilization.³⁶⁵

When white workers rely on white privilege, they tie their future to individuals and interests who do not share their class insecurity, their potential for multiracial solidarity, or their dependency on the bottom end of the regulatory scheme. Therefore, my second claim does not focus on the interest of African Americans in creating majority-minority districts, nor do I engage here the question of whether majority-minority districts best secure democratic representation for minorities. Rather, my argument concerns shared self-interest among working people of all races in that North Carolina District—and therefore, the self-interest of some white people. When a white worker wants to pursue class-conscious interests in America today, he or she may be best represented within a majority-minority district. Leadership arising from majority-minority districts may serve class needs of white workers far better than cross-class white majority political representation.³⁶⁶

364. These cases echo the calls that have always been used to bolster elite domination by consolidating as many whites as possible against the threat of class-conscious multiracial unity in the South. *See* Mahoney, *supra* note 38, at 755–57 (describing Henry Grady’s appeal to whites in Georgia to consolidate race power instead of class unity).

365. The voting records of politicians representing the areas of North Carolina that became majority-black voting districts had tracked the Conservative Coalition recommendations with great consistency (not positions of advocacy for minorities or the working class) until 1992, when the creation of the new district brought black representatives to office. KOUSSER, *supra* note 164, at 275 (depicting graph, “Did White Faces Represent Black Interests in North Carolina?”).

366. *See* discussion *supra* notes 150–52. In Greensboro during the 1990s, white workers supported a union drive initiated and led by black workers with community support organized by a

The interest of whites in black leadership is seldom explored in law. When the Supreme Court finally found the redrawn lines of District 12 constitutional,³⁶⁷ the decision was based not on coalitional interest or working class interest but on the plaintiffs' failure to prove racial motive in creating the district. The Supreme Court recognized the tendency of white registered Democrats to "cross over" and vote Republican vastly more often than black registered Democrats.³⁶⁸ Indirectly, the opinion recognized the persistence of segregation (by noting a reference to the "Greensboro black community") and racial division (by recognizing differences in voting behavior).

But the Court did not recognize inequality. Racial inequality played no role in the majority opinion, which remained formalistic about racial motive while adopting a slightly more deferential approach to proving motive. The Court recognized only the self-interest of legislators, who might have sought to protect their incumbency as a motive for structuring the district. The latest North Carolina case therefore left the reasoning about white interest in *Shaw* unchallenged. The ten-year fight about voting districts in North Carolina is an example of the formation of discourse and social groups around issues *other* than relations of economic power.

When racial classification, or intentional placement in a majority-minority district, is itself defined as harm to whites, exploration of the nature of subordination disappears. The reasoning of *Shaw* makes it impossible to hold the searching inquiry into the real nature of harm and interest that is fundamental to increasing class consciousness today. Had the Court permitted the decisions about collective interest struck down in *Wygant*, or had it recognized class structure in any of these cases, it would help avoid renewing the Old South myth of the danger of black domination for white working people.

black minister. *See id.* The *Shaw* cases implicitly treated the interests of those workers in these areas as white, rather than as workers or union members, when it held that the "message" sent by the creation of the majority-minority district was inattentive to their needs. *See Shaw v. Hunt*, 509 U.S. 630 (1993); *Shaw v. Reno*, 517 U.S. 899 (1996).

367. Greensboro had moved in and out of District 12 during the 1990s. The district was successfully challenged in *Shaw v. Reno*, 509 U.S. 630, 658 (1993), redrawn more compactly after *Shaw v. Hunt*, 509 U.S. 630 (1993), and then redrawn again, removing Greensboro and the rest of Guilford County, after the district court granted summary judgment to plaintiffs challenging the new plan. *See Hunt v. Cromartie*, 526 U.S. 541, 545 n.1 (1999). In *Cromartie*, the Supreme Court stated that if the constitutionality of the district were upheld, the borders would revert to their previous status. *See id.* The Court went on to uphold the district in 2001. *Easley v. Cromartie*, 532 U.S. 234 (2001).

368. *See Cromartie*, 532 U.S. at 245.

I argued earlier that when either whiteness or class is ignored, white workers are placed in an inherently more reactionary position than when both are considered together. If we notice only whiteness, then working class whites see only those aspects of self shared with more elite whites, and fail to see those aspects of self shared with people of color. If we emphasize only class, this shift does not make race disappear from American society. Rather, because whites do not see white privilege and white norms as a matter of course, demands for inclusion from people of color are experienced as disruptive and destructive of a natural state of affairs.

Formalism on race combined with the invisibility of class—the approach in *Shaw* and its progeny—places white workers in the most reactionary position. For white workers, transformative work requires recognition of structures of power and of mutual need. This includes, eventually, developing of an understanding of the limits that racism structures into class advancement. It includes recognizing the potential for labor mobilization in majority-minority districts. It includes the need to integrate union leadership and the need to work with leaders of minority communities as allies in labor struggles.³⁶⁹ Transformative work, in other words, will mean reconciling concepts of mutual interest and self-interest that are not often explored in America, articulating shared interest and working to put that vision into practice.

VI. CONCLUSION: POWER, HARM, AND INTEREST

Change in material life determines the conditions of [] struggle, . . . but the particular outcome is determined only by the struggle itself.³⁷⁰

Class matters to legal doctrine. If class were cognizable, the cases would have come out differently. Class also matters to justice. The cases *should* have come out differently, and the exploration of class and power provides a method that can change the ways conflicts have been framed and turn the framework of legal thought in a better direction. Finally, justice matters to class. Claims about morality, about interest, and even about legality are part of the mobilization of social groups and the construction of conditions that promote, or obstruct, solidarity.

Law has not been the only force diminishing class consciousness in America or discouraging solidarity. Law alone cannot determine whether

369. See ERIC MANN, TAKING ON GENERAL MOTORS 161–64 (1987). See also *supra* notes 150–52 (discussing the Kmart organizing campaign in Greensboro).

370. THOMPSON, *supra* note 114, at 222.

white people voluntarily work with people of color on terms of equality, or whether they find common ground in politics.³⁷¹ But law does affect the interaction of whiteness and class. Explicitly and implicitly, it identified harm to white people from transformative programs that included people of color within the workplace. Also, law shapes race-biased political standards under a guise of race-neutrality. By pretending that the status quo in political districting was neutral, these standards disempower people of color. By ignoring the ways in which the status quo disempowers working class people, the cases keep questions of class and power out of public debate.

The Rehnquist Court has not protected working class interests, and the cases limiting racial transformation do not address class interest directly. Searching examination of class and interest is necessary in many contexts. For example, rather than cooperating in the treatment of “class-based affirmative action” as a category opposed to “race-based affirmative action,” defending affirmative action as a tool of shifting power is important to people of color and to labor. Defending affirmative action involves structuring programs for inclusion on the basis of *both* race and class and recognizing, in both contexts, group relationships of power. The different goals of aiding businessmen, students, and laborers should be addressed by courts with specificity. Challenges and revisions to municipal set-aside plans should be addressed in terms that favor an end to racial exclusion *and* take class interest seriously, rather than merely protecting the white businessmen. The capacity of labor to organize and to speak politically needs protection. Antiracist, class conscious leadership needs support within unions and within communities.

The challenge in law is to make class visible and to examine what it means. The frameworks that have posed class interest for white workers against the interests of racial minorities in structural transformation are inadequate and misleading. The march backward on minority rights has happened under a banner of protecting disadvantaged whites. In the interest of working class white people, as well as people of color, that particular flag should be torn down.

371. Law does directly control choice at least in part by making third parties virtually impossible, thereby ensuring that working class people vote Democrat, Republican, or, much of the time, not at all.

