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## My Coworker, My Enemy: Solidarity, Workplace Control, and the Class Politics of Title VII

AHMED A. WHITE†

### INTRODUCTION

Few statutes are as esteemed as Title VII of the Civil Rights Act of 1964. Celebrated by legal academics, lawyers, activists, and liberals of every bent as a triumph for workers' rights, the statute's vision of a workplace purged of discrimination is contested only by reactionaries and ignorant, if occasionally well-meaning, libertarians. Last year's 50th anniversary of Title VII's enactment occasioned even greater affirmation, bringing forth a torrent of praise for the law and fulsome commemoration of its role in opening opportunities to minorities and women and broadly improving employment practices and working conditions.<sup>1</sup> Indeed, among liberals and progressives, the only consistent

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† Professor of Law and Wolf-Nichol Fellow, University of Colorado School of Law. I must thank the participants of the AALS 2014 Midyear Workshop on Next Generation Issues in Sex, Gender, and the Law, as well as my colleagues here at the University of Colorado for their many helpful criticisms and suggestions.

1. See Peter Baker, *50 Years Later, Obama Salutes Effects of Civil Rights Act*, N.Y. TIMES (Apr. 10, 2014), [http://www.nytimes.com/2014/04/11/us/politics/50-years-later-obama-salutes-passage-of-civil-rights-act.html?\\_r=1](http://www.nytimes.com/2014/04/11/us/politics/50-years-later-obama-salutes-passage-of-civil-rights-act.html?_r=1); *Legal Highlight: The Civil Rights Act of 1964*, U.S. DEP'T LABOR, <https://www.law.upenn.edu/live/news/5115-celebrate-the-50th-anniversary-of-the-civil-rights#.VhL2fuxVikq> (last visited Oct. 5, 2015). For an example of an event held to celebrate the law, see *Penn Law Celebrates the 50th Anniversary of the Civil Rights Act*, U. PA. L. SCH. (Oct. 31, 2014), <https://www.law.upenn.edu/live/news/5115-celebrate-the-50th-anniversary-of-the-civil-rights#.VhL2fuxVikq>.

criticisms of Title VII are that it does not go far enough in protecting workers from discrimination, and that its procedures are often overly cumbersome.<sup>2</sup> In its basic substance and framework, the law remains sacrosanct.

In fact, Title VII is problematic in ways that neither its strongest supporters nor its most vocal critics have managed to grasp. Although this history has been ignored or forgotten by the statute's champions, Title VII was enacted in the face of serious concerns on the part of unionists and other leftists about the wisdom of its approach to the problem of workplace inequality. These critics, who strongly supported the extension of the new Civil Rights Act into the workplace, nonetheless worried that Title VII's conceptualization of workplace inequality in terms of individual discrimination, its reliance on private litigation, and its indifference to the structural underpinnings of workplace inequality would render the law ill-suited to effectively address the problem. Instead, these critics favored a different approach that would have oriented the law around the collective interests of workers and addressed the problem of workplace inequality by establishing an active and powerful federal agency, interlinked with other agencies and initiatives, and charged with instituting structural and collective reforms. Unfortunately, this alternative approach was brushed aside. As predicted by its critics from the left—and as other critics

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2. See, e.g., Kathryn Abrams, *The New Jurisprudence of Sexual Harassment*, 83 CORNELL L. REV. 1169 (1998); Lisa Barré-Quick & Shannon Matthew Kasley, *The Road Less Traveled: Obstacles in the Path of the Effective Use of the Civil Rights Provision of the Violence Against Women Act in the Employment Context*, 8 SETON HALL CONST. L.J. 415, 425-26 (1998); Rosa Ehrenreich, *Dignity and Discrimination: Toward a Pluralistic Understanding of Workplace Harassment*, 88 GEO. L.J. 1, 7-11 (1999); Katherine M. Franke, *What's Wrong with Sexual Harassment*, 49 STAN. L. REV. 691 (1997); Tracy L. Gonos, *A Policy Analysis of Individual Liability—The Case for Amending Title VII to Hold Individuals Personally Liable for Their Illegal Discriminatory Actions*, 2 N.Y.U. J. LEGIS. & PUB. POL'Y 265, 281 (1999); Debbie N. Kaminer, *Title VII's Failure to Provide Meaningful Protection and Consistent Protection of Religious Employees: Proposals for Amendment*, 21 BERKELEY J. EMP. & LAB. L. 575, 628-31 (2000); Minna J. Kotkin, *Public Remedies for Private Wrongs: Rethinking the Title VII Back Pay Remedy*, 41 HASTINGS L.J. 1301 (1990); Lynn Ridgeway Zehrt, *Twenty Years of Compromise: How the Caps on Damages in the Civil Rights Act of 1991 Codified Sex Discrimination*, 25 YALE J.L. & FEMINISM 249, 315-16 (2014).

have since acknowledged—the regime that was enacted has failed to rectify the problem of workplace inequality.<sup>3</sup> Far worse, in the hands of employers, courts, and civil rights and feminist activists, Title VII has evolved in a fashion that enhances employers' authoritarian control of the workplace while eroding the most crucial foundation of workers' rights: solidarity. It is, in key respects, an anti-worker law.

This critique of Title VII is a sympathetic one, at least to the extent it is not motivated by a rejection of the values of workplace equality or antidiscrimination. Nevertheless, the argument developed in this Article is explicitly conceived as a blunt challenge to the law's class politics. Indeed, it is directed not only at the law but also at liberal and progressive supporters of Title VII who have consistently defended the law's virtues with scant regard for alternative approaches to workplace inequality, and with little thought of how, in a class society, the law might sacrifice values and interests that are at least as important as those of racial and gender equality, employment opportunity, and the like. More broadly, this critique sees Title VII as a milestone in a devolution of postwar liberalism marked by a wholesale repudiation of serious concerns about class in a favor of a debilitating focus on racial, gender, and other identities.

This critique has historical foundations. For it rests, at the outset, on a review of the struggle for control between employers and workers that has defined the workplace for

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3. See, e.g., RUBEN J. GARCIA, MARGINAL WORKERS: HOW LEGAL FAULT LINES DIVIDE WORKERS AND LEAVE THEM WITHOUT PROTECTION 64-84 (2012); Natalie Bucciarelli Pedersen, *A Legal Framework for Uncovering Implicit Bias*, 79 U. CIN. L. REV. 97, 117-18, 152-53 (2010); E. Christi Cunningham, *The Rise of Identity Politics I: The Myth of the Protected Class in Title VII Disparate Treatment Cases*, 30 CONN. L. REV. 441, 448-49 (1998); Kenji Yoshino, *Covering*, 111 YALE L.J. 769, 879, 889-905 (2002). See generally Susan Bisom-Rapp, *Of Motives and Maleness: A Critical Review of Mixed Motive Doctrine in Title VII Sex Discrimination Cases*, 1995 UTAH L. REV. 1029 (1995); Deborah L. Brake & Joanna L. Grossman, *The Failure of Title VII as a Rights-Claiming System*, 86 N.C. L. REV. 859 (2008); Juan F. Perea, *Ethnicity and Prejudice: Reevaluating "National Origin" Discrimination Under Title VII*, 35 WM. & MARY L. REV. 805 (1994); Leticia M. Saucedo, *Intersectionality, Multidimensionality, and Latino Immigrant Workers, and Title VII*, 67 SMU L. REV. 257 (2014); Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683 (1998).

more than a century and shaped the landscape on which Title VII was conceived, enacted, and implemented. It shows how the statute evolved in this context to advance a particularly pernicious vision of employer control, described by one scholar as a program of “bureaucratic control,” characterized by the operationalization of employers’ interests in a system of formal rules steeped in paternalistic rhetoric but committed at root to the “institutionalization of hierarchical power” at the expense of worker solidarity.<sup>4</sup> This Article shows how this vision of control emerged out of Title VII’s concept of discrimination and its codification in individual rights; and how it was realized in the context of seniority rules and workplace harassment, where the law has both mandated and inspired an unfortunate configuration of employers as benefactors and guardians of workers, and workers as each other’s adversaries.

Scholars have only approached the outermost edges of this topic. In recent years especially, social and legal historians have brought to light the class biases of the civil rights movement, including the ways these biases affected the enactment of Title VII.<sup>5</sup> But none have explored the way these politics have reflected themselves in the contemporary workings of the statute. Similarly, quite a few scholars have called attention to the problem of solidarity under Title VII, albeit with a very different concern for how the law supports, or might better support, racial and gender solidarity as opposed to class solidarity.<sup>6</sup> Others have explored the way

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4. RICHARD EDWARDS, *CONTESTED TERRAIN: THE TRANSFORMATION OF THE WORKPLACE IN THE TWENTIETH CENTURY* 21 (1979).

5. See, e.g., JUDITH STEIN, *RUNNING STEEL, RUNNING AMERICA: RACE, ECONOMIC POLICY, AND THE DECLINE OF LIBERALISM* 69 (1998) [hereinafter STEIN, *RUNNING STEEL*]; Risa L. Goluboff, “*We Live’s in a Free House Such as it is*”: *Class and the Creation of Modern Civil Rights*, 151 U. PA. L. REV. 1977, 1979 (2003).

6. On the articulation of solidarity in terms of identity, see generally Kathryn Abrams, *Elusive Coalitions: Reconsidering the Politics of Gender and Sexuality*, 57 UCLA L. REV. 1135 (2010); Reva B. Siegel, *From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases*, 120 YALE L.J. 1278 (2011); Noah D. Zatz, *Beyond the Zero-Sum Game: Toward Title VII Protection for Intergroup Solidarity*, 77 IND. L.J. 63, 79-82 (2002). On the impulse to directly critique class solidarity as the enemy of identity, see, for example, Molly S. McUsic & Michael Selmi, *Postmodern Unions: Identity in the Workplace*, 82 IOWA L. REV. 1339 (1997).

Title VII's emphasis on discrete classifications of workers ill-serves those who do not fit neatly into these categories;<sup>7</sup> how, in practice, it tends to exclude "marginal" workers entirely;<sup>8</sup> and how, in line with a different kind of paternalism, it joins with other civil rights regimes in forcing workers into the role of victims.<sup>9</sup> But none of these scholars have examined Title VII's role in systematically undermining *class* solidarity, let alone furthering a retrograde notion of employer sovereignty in the balance. Indeed, by relentlessly criticizing unions and the labor law in the course of defending Title VII and its values, more than a few liberals have implicitly rejected the concept of class solidarity as a valid social norm and organizing principle.<sup>10</sup> This Article takes a very different view of workers and the workplace, emphasizing the centrality of class solidarity to workers' interests in a way that questions not only the value of Title VII, but the premises of those whose outlooks on law and policy either ignore the question of class altogether or blithely subordinate class solidarity to race, gender, and other identities.

Conceptually, this Article has roots in a broader skepticism about the compatibility of social policies based in individual rights and legalism with the collective interests of workers, one that extends at least from the writings of the young Karl Marx—who famously impeached the emancipative claims of bourgeois rights in general—to

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7. 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 (1989).

8. See generally GARCIA, *supra* note 3.

9. See KRISTIN BUMILLER, *THE CIVIL RIGHTS SOCIETY: THE SOCIAL CONSTRUCTION OF VICTIMS* 52-77 (1988).

10. For examples of this kind of scholarship and commentary, see, for example, HERBERT HILL, *BLACK LABOR AND THE AMERICAN LEGAL SYSTEM: RACE, WORK, AND THE LAW* 162-68 (1977) [hereinafter HILL, *BLACK LABOR AND THE AMERICAN LEGAL SYSTEM*]; Marion Crain, *Whitewashed Labor Law, Skinwalking Unions*, 23 BERKELEY J. EMP. & LAB. L. 211 (2002); Herbert Hill, *The Problem of Race in American Labor History*, 24 REVS. AM. HIST. 189, 194-95 (1996) [hereinafter Hill, *The Problem of Race*]; see also David E. Bernstein, *Roots of the 'Underclass': The Decline of Laissez-Faire Jurisprudence and the Rise of Racist Labor Legislation*, 43 AM. U. L. REV. 85 (1993) [hereinafter Bernstein, *Roots of the 'Underclass'*] (discussing labor legislation's oppression of immigrants and persons of color).

contemporary commentary by Mary Ann Glendon—a conservative legal scholar who nonetheless rightly questioned the courts’ role in subordinating the “principle of solidarity” to individual rights.<sup>11</sup> To couch the thesis in yet a different debate, this Article argues that what labor and employment scholar Cynthia Estlund has called the “[p]rivatization of [r]ights [e]nforcement” in the workplace is actually at base a program for reifying employers’ power over workers.<sup>12</sup> From these vantages, this Article undertakes to subject Title VII to the kind of frank criticism that leftist scholars (including this author) have applied to the labor law.<sup>13</sup>

Although this Article’s political concerns follow a different line of leftist criticism, its critique of Title VII from the standpoint of workers’ interests is similar to Vicki Schultz’s 2003 article, *The Sanitized Workplace*. In this important contribution, Schultz exposes the “neo-Taylorist project of suppressing sexuality and intimacy in the workplace” that grew out of the work of feminist reformers and the efforts of human resource managers to realize their vision of Title VII.<sup>14</sup> In fact, Schultz’s critique of the sexual sanitization of the workplace, which is useful in many ways, hints at the way in which Title VII might undermine workplace solidarity, although without ultimately pursuing this question.<sup>15</sup>

A more direct inspiration for this Article is the work of radical economist Richard Edwards, whose 1979 book, *Contested Terrain*, provides an innovative and extremely useful account of the ways employers asserted authority in

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11. MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE 115 (1991).

12. Cynthia Estlund, *Rebuilding the Law of the Workplace in an Era of Self-Regulation*, 105 COLUM. L. REV. 319, 333-34 (2004).

13. See, e.g., JAMES A. GROSS, BROKEN PROMISE: THE SUBVERSION OF U.S. LABOR RELATIONS POLICY, 1947–1994 (2003) [hereinafter GROSS, BROKEN PROMISE]; Karl E. Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941*, 62 MINN. L. REV. 265 (1978).

14. Vicki Schultz, *The Sanitized Workplace*, 112 YALE L.J. 2061, 2064 (2003) [hereinafter Schultz, *The Sanitized Workplace*].

15. *Id.* at 2069.

the workplace.<sup>16</sup> Edwards gives theoretical clarity to the work of social historians and labor relations scholars who have depicted the struggle between workers and employers for control of the workplace as a fundamental feature of modern capitalism, and who see worker solidarity as a central point of conflict in this struggle. He shows how, after surrendering power to workers in the Depression Era and the decade that followed, employers in the postwar period developed newer, bureaucratized systems of workplace control that undermined worker solidarity and preserved employers' authority.<sup>17</sup> Edwards' notions of the origins and functions of bureaucratic control is central to this Article.

In more immediate ways, the argument developed here builds on the enterprising work of sociologists Frank Dobbin and Lauren Edelman, and historian Judith Stein. Dobbin's and Edelman's main contributions lay with their explorations of how employers appropriated Title VII for their own purposes, and how managers and "personnel experts" played a crucial role in shaping the real meaning of discrimination law in the workplace.<sup>18</sup> Neither of these scholars is especially concerned with class and class conflict as such, let alone the implications of Title VII for worker solidarity. Nevertheless, their work is useful in understanding how the interests and aims of employers have reflected themselves in the practical meaning of Title VII. Stein's critical rereading of the origins and early uses of Title VII, which she explores in the context of industrial policy and labor, is valuable not least because it is so sensitive to often-ignored questions of class and political economy.<sup>19</sup> Even

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16. See generally EDWARDS, *supra* note 4.

17. See *id.*

18. See FRANK DOBBIN, *INVENTING EQUAL OPPORTUNITY* 75-77, 98-100, 220-26 (2009); Lauren B. Edelman, *Legal Ambiguity and Symbolic Structures: Organizational Mediation of Civil Rights Law*, 97 AM. J. SOC. 1531, 1535 (1992) [hereinafter Edelman, *Legal Ambiguity*]; Lauren B. Edelman et al., *Diversity Rhetoric and the Managerialization of Law*, 106 AM. J. SOC. 1589 (2001) [hereinafter Edelman et al., *Diversity Rhetoric*]; Lauren B. Edelman et al., *Internal Dispute Resolution: The Transformation of Civil Rights in the Workplace*, 27 LAW & SOC'Y REV. 497, 511, 529 (1993) [hereinafter Edelman et al., *Internal Dispute Resolution*].

19. See STEIN, *RUNNING STEEL*, *supra* note 5.

though it is not overly focused on the anti-solidarity aspect of Title VII and not concerned at all with the implications of harassment law, Stein's study, which is relentlessly nuanced and ultimately quite persuasive, is, in many ways, the very model of a class critique of Title VII.<sup>20</sup>

Building on these critiques, this Article exposes Title VII as a law not simply flawed at its conception, but saddled with a hostility to the realities of class conflict in the workplace, and an indifference (if not hostility) to the collective interests of workers. These antipathies have only worsened in the decades since. Although not preoccupied with the longstanding debate about the relative virtues of employment law versus labor law, or the underlying contention that the proliferation of employment laws has diminished workers' need for labor rights and the collective representation that the labor law support, this Article does offer an important rejoinder to that contention; for this Article suggests that, in fact, what Title VII has actually done is erode the foundations of workplace solidarity on which a functional system of unionism and labor rights depends.

This argument unfolds as follows: Part I explores the deeper roots of workplace paternalism and its contest with worker solidarity. Drawing on Edwards' critical narrative of the struggle for control, it plumbs a more extensive literature in labor history—anchored in the work of David Montgomery, David Brody, and Lizabeth Cohen, among others—which emphasizes how central a struggle pitting solidarity against workplace paternalism was in the evolution of the labor movement and the campaign for workers' rights. Part II is a critical review of the early history of Title VII, which draws on the scholarship of Stein and her explorations to show how class politics, centered on competing visions of solidarity and employer control, attended the statute's enactment. Part III turns to Title VII itself; it details exactly how Title VII elevates paternalism to the detriment of solidarity. This Part builds its critique of the statute on a review of case law and administrative policies as well as management practices that the law has cultivated among employers. Finally, the Conclusion considers this Article's broader implications, including the implication that in the dysfunctions of Title VII

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20. *See id.*



can be found, not only an important instance in the antagonism between employment rights and labor rights, but something fundamental about liberalism's disqualifying antipathy to the realities of class.

I. "CONTESTED TERRAIN"—THE STRUGGLE FOR CONTROL OF  
THE WORKPLACE IN TWENTIETH CENTURY AMERICA

Although it is a fundamental feature of labor and life in modern society, the concept of worker solidarity can be tricky to define. Dominant trends in scholarship suggest defining the concept in quantitative, "behavioral" terms, and measuring it, for example, by surveying workers' attitudes. But construing worker solidarity in this way is actually quite problematic. Doing so simultaneously diminishes the interplay of workers' attitudes with their actions in constituting solidarity, and discounts solidarity's basis in the realities of conflict and opposition in the workplace. From a behavioral perspective, worker solidarity appears as a range of static attitudes or dispositions, rather than as a human institution that is shaped in the course of struggle, and whose meaning is fully revealed only in this light.<sup>21</sup> In other words, worker solidarity can be seen and measured most clearly in contests between workers and employers for control of the workplace.<sup>22</sup>

Although nascent from the very first iterations of industrialization, struggles between workers and capitalists intensified in the late nineteenth and early twentieth centuries. At that time, automation and mechanization, combined with immense accumulation of private capital, mass immigration, and evolving ideologies of capitalist entitlement and proletarian prerogative unsettled the structure of work, intensified conflicts, rendered older forms of workplace control obsolescent, and forced employers and workers alike to reconfigure their strategies.<sup>23</sup> After decades

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21. See RICK FANTASIA, *CULTURES OF SOLIDARITY: CONSCIOUSNESS, ACTION, AND CONTEMPORARY AMERICAN WORKERS* 4-8, 19-22 (1988).

22. *Id.* at 25-72.

23. On the overall history of labor relations in this period, see, for example, PHILIP DRAY, *THERE IS POWER IN A UNION: THE EPIC STORY OF LABOR IN AMERICA*

of discord punctuated by explosive conflict, in the 1930s and 1940s workers were able to make deep inroads against employer sovereignty. The key institution in this development was unionism, which assumed for the first time an enduring and functional presence in American life. Unionism at once embodied and incubated a vibrant culture of workplace solidarity at the same time that unionism and the solidarity on which unions were based were fomented by the obsolescence of existing models of employer control. Via collective bargaining agreements and shop floor representation, both backed by the power of strikes, unionism significantly qualified employers' capacity for control while expanding workers' participation in management.<sup>24</sup> The question of control was hardly settled, however. Workers' successes on these fronts proved contingent, as employers developed new methods of control, which would soon inform the meaning of Title VII.<sup>25</sup>

#### A. *The Evolving Landscape of Struggle*

All work is conducive to conflict; but capitalism engenders an inexorable struggle for control in the workplace, as the profit motive drives employers to wrest as much value out of the labor (or "labor power") of their workers as is practical; and as workers in turn resist these efforts in pursuit of their own interests in ease, creativity, autonomy, and material compensation.<sup>26</sup> As Richard Edwards makes clear, the modern history of capitalism can be understood as a struggle between employers and workers over this question of control, one defined by changing ideologies and methods of control and resistance, and shaped by an evolving array of economic and social structures. Edwards' special gift rests in the theoretical coherence his work gives to insights about the

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(2010). On the building struggle for control, see, for example, DAVID MONTGOMERY, *THE FALL OF THE HOUSE OF LABOR: THE WORKPLACE, THE STATE, AND AMERICAN LABOR ACTIVISM, 1865-1925* (1987); see also EDWARDS, *supra* note 4, at 11-36.

24. See *infra* Part I.E.

25. See *infra* Part I.E.

26. See EDWARDS, *supra* note 4, at 11-12; see also HARRY BRAVERMAN, *LABOR AND MONOPOLY CAPITAL: THE DEGRADATION OF WORK IN THE TWENTIETH CENTURY* 57-69 (1974).

workplace that have been the province of social historians, labor relations experts, and radical critics.<sup>27</sup>

In the early period of industrialization in this country, the struggle for control was muted by the relatively small size of capitalist concerns and the relative intimacy of relationships between managers (who were often owners of their businesses) and workers. These factors both diminished conflict and facilitated its resolution. In Edwards' terms, "simple" forms of managerial control sufficed: "although the need for control was great, the mechanisms for achieving it were very unsophisticated, and the systems of control tended to be informal and unstructured."<sup>28</sup> Often enough "the personal power and authority of the capitalist" himself (of course they were virtually all men) were adequate to ensure effective rule of the workplace.<sup>29</sup> Workers might very well feel "oppressed and exploited by such employers, but they also became enmeshed in a whole network of personal relations" that diminished worker solidarity and militancy at the same time that it legitimated employers' authority.<sup>30</sup>

As it unfolded, industrialization steadily uprooted these conditions, particularly in the late nineteenth and early twentieth century. For industrialization unsettled work; it eroded older, traditional pillars of authority that had prevailed in the workshops and small mills and factories. Smaller work units, often built around intimate community and family ties, were increasingly eviscerated as production was relocated to larger factories and anonymous contractual relations came to tie workers more loosely to their employers. In this period, employers and workers were further divided as the ethnic and racial homogeneity of enterprises was diminished by the influx of millions of immigrants and internal migrants of diverse backgrounds. In this way, anonymity and alienation replaced familiarity and intimacy. The result, according to Edwards, was the increasing

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27. EDWARDS, *supra* note 4, at 11-19.

28. *See id.* at 18-19.

29. *Id.* at 25.

30. *Id.* at 26.

obsolescence of simple control culminating in a “crisis of control.”<sup>31</sup>

On the shop floors, employers met this crisis by replacing simple systems of control with what Edwards calls “hierarchical control,” characterized by highly structured, often explicitly militaristic, systems of domination in which employers’ prerogatives were mediated by the naked authority of foremen and supervisors.<sup>32</sup> As a number of researchers have noted, a veritable “foreman’s empire” was erected on the industrial landscape, as these intermediaries wielded the authority, largely unchecked by anyone, to hire, fire, promote, demote, dock, discipline, or otherwise drastically alter the terms of service of the men and women who labored under them.<sup>33</sup> In many workplaces, this system of governance was quite brutal. A telling example can be found at Ford Motor, which through the 1930s maintained a “service department” of some “3,500 thugs, including former boxers, ex-cops, bouncers, football players and ex-FBI agents” who backed up the company’s foremen, dispensing threats and beatings to workers in its plants.<sup>34</sup>

These methods of control reflected intensified conflict between employers and workers. The cold logic of exploitation joined with immigration and the rapidly growing size of firms in corroding intimacies between employers and workers and sweeping aside traditional norms of workplace fairness.<sup>35</sup> From every corner of the working class, currents of militancy emerged in the form of left-wing political movements and various versions of unionism, united by little more than a common “resistance to their capitalist overlords.”<sup>36</sup> As labor historian David Montgomery notes, on at least three major occasions between the late nineteenth

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31. *Id.* at 33-34, 52-71.

32. *Id.* at 25-34.

33. See, e.g., DAVID NELSON, *MANAGERS AND WORKERS: ORIGINS OF THE NEW FACTORY SYSTEM IN THE UNITED STATES*, 34-54 (1975).

34. See Robert P. Weiss, *Private Detective Agencies and Labour Discipline in the United States, 1855-1946*, 29 *HIST. J.* 87, 105 (1986).

35. See EDWARDS, *supra* note 4, at 18-19, 25-26, 51.

36. See *id.* at 48.

century and the Second World War, this militant resistance coalesced in concentrated periods of widespread struggle: 1901–1904, 1916–1920, and 1934–1941.<sup>37</sup> However the first two of these campaigns foundered primarily because employers were increasingly successful not only in changing the terms of exploitation, but in rooting out organized resistance on the part of workers. In this, the instruments of hierarchical control were themselves quite useful, not least in mobilizing naked authority, including private police and armies of strikebreakers, to crush strikes.<sup>38</sup>

In these efforts, employers were also abetted by the fact that, until the mid-1930s, craft unionism, embodied in the ideals and practices of the leading labor federation, the American Federation of Labor (AFL), reigned as the leading form of unionism. In line with this orientation, the AFL and its constituent unions featured a parochial orientation that was at once increasingly dysfunctional in the face of deskilling and automation, and unsuited by structure and political temperament to accommodate into their ranks a rapidly diversifying working class.<sup>39</sup> Unions in this fold stood little chance in contesting the prerogatives of employers that wielded ever-more economic power and influence over courts and police; and they were repeatedly swept aside in labor conflicts during these periods.<sup>40</sup>

Importantly, unionization and union activism were not the only modes of resistance to employer control. Aside from formal political activism, which then as now is the near-exclusive province of elites, there was also so-called shop floor resistance on the part of workers: largely informal, often spontaneous acts of defiance, including walkouts and “quickie strikes”; verbal challenges and threats of physical

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37. David Montgomery, *The ‘New Unionism’ and the Transformation of Workers’ Consciousness in America, 1909–1922*, 4 J. SOC. HIST. 509, 515 (1974).

38. DRAY, *supra* note 23, at 334-44, 368-69, 382-90; EDWARDS, *supra* note 4, at 59-63.

39. These processes are richly described by David Montgomery and David Brody. See generally DAVID BRODY, *STEELWORKERS IN AMERICA: THE NONUNION ERA* (1960); MONTGOMERY, *supra* note 23.

40. For a review of events through this period of labor history, see DRAY, *supra* note 23, at 107-21, 243-51.

violence, often directed at foremen; thefts of property or time; and sabotage of equipment.<sup>41</sup> Far more pervasive than strikes, such forms of resistance were an absolute affront to hierarchical control. They could also be as damaging to employers' interests as organized protests—not least because the spontaneity of such tactics (and their secrecy) made them hard to defeat; and they could just as easily emerge in the absence of union organization.<sup>42</sup>

In order to combat such tactics, in the first decades of the twentieth century, hierarchical control was increasingly augmented by what Edwards calls “technical control.”<sup>43</sup> With technical control, direction and disciplinary functions are embedded in the nature of the task itself, usually via the structure of production. In the words of Harry Braverman, the one-time factory worker, whose critique of the degradation of work remains a classic: “[m]achinery offers to management the opportunity to do by wholly mechanical means that which it had previously attempted to do by organizational and disciplinary means.”<sup>44</sup> The archetype of technical control is the assembly line or, more broadly, the concept of “continuous flow” production, in which individual workers are all captive to specific tasks and a pace of work over which they have very limited control. “With the line,” writes Edwards, “the worker-boss struggle was mediated by technology, and the bosses were no longer responsible for actively directing workers in the sequence or the pace of their tasks.”<sup>45</sup> Under this regime, “the human hierarchy and the capitalist organization of production that has produced the technology appear to recede.”<sup>46</sup>

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41. EDWARDS, *supra* note 4, at 53-54; Elizabeth Fones-Wolf, *Industrial Recreation, the Second World War, and the Revival of Welfare Capitalism, 1934-1960*, 60 BUS. HIST. REV. 232, 233 (1986) [hereinafter Fones-Wolf, *Industrial Recreation*].

42. See Fones-Wolf, *Industrial Recreation*, *supra* note 41.

43. EDWARDS, *supra* note 4, at 20.

44. BRAVERMAN, *supra* note 26, at 195-97.

45. EDWARDS, *supra* note 4, at 121.

46. *Id.* at 125.

Although a familiar concept to the most casual students of workplace control, “Taylorism” or “scientific management” was in many ways less an operative system of management in its own right—its extreme mandates often foundered in the face of workers’ shop floor resistance—than an intellectual program which combined elements of hierarchical and technical control. In Braverman’s apt depiction, “[s]cientific management,” is little more than “an attempt to apply the methods of science to the increasingly complex problems of the control of labor . . . .”<sup>47</sup> Its key theme, and its most enduring feature, is the idea that management should wrest from workers “control over the special knowledge of production.”<sup>48</sup> While “time-motion” studies of the proper use of a shovel and other practical iterations of scientific management have become the stuff of classroom humor, the essential logic of scientific management can still be found in the workplace, in the way employers have operationalized the anti-harassment norms of Title VII.

In their attempts to contest the new systems of employer control, workers also had to contend with initiatives by which employers presented themselves as paternalistic guardians of workers’ interests. In some respects, these efforts took the form of practical institutions of so-called “welfare capitalism,” including employer-subsidized home purchasing programs and stock options, which were designed to increase workers’ dependence on employers and increase the costs of strikes or firings motivated by disloyalty.<sup>49</sup> Such programs proliferated in the early twentieth century. The same Ford Motor that deployed thousands of thuggish servicemen to menace and brutalize its workers maintained a vibrant array of paternalistic programs.<sup>50</sup> But in a way that speaks volumes

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47. BRAVERMAN, *supra* note 26, at 86.

48. EDWARDS, *supra* note 4, at 104.

49. LIZABETH COHEN, *MAKING A NEW DEAL: INDUSTRIAL WORKERS IN CHICAGO, 1919–1939*, at 163-76, 183-84 (2d ed. 2008).

50. IRVING BERNSTEIN, *THE TURBULENT YEARS: A HISTORY OF THE AMERICAN WORKERS 1933–1941*, at 570-71, 734-35 (1969) [hereinafter BERNSTEIN, *THE TURBULENT YEARS*]; EDWARDS, *supra* note 4, at 117-18; Robert P. Weiss, *Private Detective Agencies and Labour Discipline in the United States, 1855–1946*, 29 *HIST. J.* 87, 105 (1986).

about the true nature of welfare capitalism, these arrangements, including Ford's supposedly beneficent \$5 per day wage plan (still invoked today as an example of socially responsible capitalism), concealed a ruthless scheme for cultivating dependency and coercing obedience to management.<sup>51</sup>

In other cases, paternalism was institutionalized in employee representation plans, or ERPs, which were essentially company unions designed to preempt independent union representation.<sup>52</sup> Touted by liberal reformers and corporate ideologists alike, ERPs proliferated gradually from the mid-1910s through the 1920s, before exploding in frequency in the early 1930s, when employers embraced them as means of forestalling escalating union organizing efforts and pretending compliance with early (poorly drafted) New Deal legislation that seemed to favor union representation and collective bargaining. Although sometimes useful in representing workers' interests, the ERPs uniformly were "constructed to keep managerial control intact."<sup>53</sup> Worse than their immediate functions was their ideological program, as their structures were designed to "replace *working-class* solidarity with *company* solidarity, *shop* solidarity, or 'family factory relations.'"<sup>54</sup>

The ideology of paternalism was also reflected in a wide-ranging propaganda program, financed by powerful trade associations, which identified employers' interests with those of their workers, while tarring unionists as corrupt, selfish outsiders, willing to sacrifice (other) workers' interests to dishonest economic motives and radical political aims. Although often deployed locally and in fairly informal ways, this propaganda program became increasingly sophisticated and coordinated across entire industries through the first

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51. See BRAVERMAN, *supra* note 26, at 149-50; FANTASIA, *supra* note 21, at 28-29.

52. See COHEN, *supra* note 49, at 163-83; HORACE B. DAVIS, LABOR AND STEEL 148-51 (1933); see also Daniel Nelson, *The Company Union Movement, 1900-1937: A Reexamination*, 56 BUS. HIST. REV. 335, 336 (1982).

53. FANTASIA, *supra* note 21, at 37

54. *Id.* at 32, 35-37.



three decades of the twentieth century.<sup>55</sup> Its central motif was the “open shop” concept,<sup>56</sup> which deceptively packaged employers’ categorical opposition to genuine union representation as a benign nod to the liberty interests of their workers.

Welfare capitalism reached its zenith in the 1920s, when it constituted the main pillar in a comprehensive system of employer domination variously propagandized as the “American Plan,” the “New Era,”<sup>57</sup> and the reign of the “right to work.”<sup>58</sup> Augmenting the more practical aspects of welfare capitalism with cultural and recreational programs, and activities like company-sponsored picnics that we would now call (with appropriate derision) exercises in “team building,” companies managed to install a “company family concept” that blunted both the profound alienation that the modern workplace generated among those who labored in it, as well as workers’ efforts to unionize.<sup>59</sup> Welfare capitalism gave a paternalistic veneer to hierarchical control. However, it remained fundamentally consistent with such control, not least in that its many iterations were never anything but employer prerogatives designed, at root, to foster dependency on the part of workers while advancing a positive image of the companies that practiced them.<sup>60</sup>

A crucial turning point in the struggle for control of the workplace arrived in the 1930s. The most visible preconditions of this change occurred in the domains of politics, economics, and law. Of course, this was the period of the Great Depression and the New Deal. While the latter created a level of desperation that generated militancy by its

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55. See, e.g., Richard S. Tedlow, *The National Association of Manufacturers and Public Relations during the New Deal*, 50 *BUS. HIST. REV.* 25, 27-34 (1976).

56. IRVING BERNSTEIN, *THE LEAN YEARS: A HISTORY OF THE AMERICAN WORKER, 1920–1933*, at 147-48 (1960) [hereinafter BERNSTEIN, *THE LEAN YEARS*].

57. BERNSTEIN, *THE LEAN YEARS*, *supra* note 56 at 148; Nelson, *supra* note 52, at 336.

58. FANTASIA, *supra* note 21, at 39-44.

59. Elizabeth Fones-Wolf, *Industrial Unionism and Labor Union Culture in Depression-Era Philadelphia*, 109 *PA. MAG. HIST. & BIOGRAPHY* 3, 6 (1985) [hereinafter Fones-Wolf, *Industrial Unionism*].

60. EDWARDS, *supra* note 4, at 94-95.

own hand, the New Deal inaugurated a new political economy and legal order which entertained the possibility, at least, of government-sanctioned interventions into the domain of employer control.<sup>61</sup> Thus, section 7(a) of the National Industrial Recovery Act of 1933 purported to protect the right of workers to form unions and engage in collective bargaining; and the National Labor Relations (or Wagner) Act of 1935 encoded these rights (and the right to strike) in a comprehensive administrative program.<sup>62</sup>

At the end of the day, laws are neither self-enforcing nor self-validating—a point well illustrated by the administrative failure of section 7(a), followed by the invalidation of a majority of the National Industrial Recovery Act.<sup>63</sup> Both developments were the product of intense opposition from the business community.<sup>64</sup> Rather, the realization of effective constraints on employer control depended on an uprising by workers that began in the early 1930s and culminated in huge organizing gains later in the decade. Although a rank-and-file affair at root, this movement was much aided by Communists, social democrats, and other leftists, who together managed to forge what historian Lizabeth Cohen calls a “culture of unity”<sup>65</sup> among the diverse and hitherto fractious ethnic and racial divisions of the industrial working class.<sup>66</sup> For Cohen, the

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61. On the New Deal’s overall approach to labor rights, see ELLIS HAWLEY, *THE NEW DEAL AND THE PROBLEM OF MONOPOLY: A STUDY IN POLITICAL AMBIVALENCE* 12, 195-97 (1995).

62. *See id.*

63. On the dysfunctions of section 7(a) and its invalidation by the Supreme Court, see BERNSTEIN, *THE TURBULENT YEARS*, *supra* note 50, at 172-85, 342-43.

64. The relevant portion of the National Industrial Recovery Act, Title II, was struck down by the Supreme Court in May of 1935. *See A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935). However, the labor provision had proved ineffective in the face of employer resistance long before this occurred. On the story of this failure, see JAMES A. GROSS, *THE MAKING OF THE NATIONAL LABOR RELATIONS BOARD* (1974).

65. *See* COHEN, *supra* note 49, at 324.

66. *See* BERT COCHRAN, *LABOR AND COMMUNISM: THE CONFLICT THAT SHAPED AMERICAN UNIONS* 43-103 (1977). On the important role of leftists during this period of labor history, see JUDITH STEPAN-NORRIS & MAURICE ZEITLIN, *LEFT OUT: REDS AND AMERICA’S INDUSTRIAL UNIONS* (2002). The best overview of the labor

cornerstone of this effort was the success of labor organizations (many of them mere plant committees and other nascent, vulnerable formations), particularly those under the umbrella of the Committee for Industrial Organization (CIO, later the Congress of Industrial Organizations), in subverting divisions among workers on the basis of ethnicity and skill, and challenging the implements of employer paternalism. They accomplished this by courting local ethnic institutions, particularly churches and fraternal organizations; by infiltrating the ERPs, which they turned to their own purposes; and by destabilizing the very concept of employer paternalism, which the ERPs embodied, using their empty promises of genuine worker representation to steer workers towards more meaningful and effective organizations.<sup>67</sup> Built on such efforts, CIO unions were also able to make important inroads against the image of unions, so thoroughly embodied in the AFL old craft organizations, as exclusionary, racist and xenophobic, organizationally moribund, and enslaved to the interests of their own members (if not strictly their own bureaucratic leaderships); they were able to cultivate instead a very different image of unions as inclusive, activist, and above all committed to the vision of worker solidarity that helped give rise to them in the first place.<sup>68</sup>

Another crucial factor in the success of unions in this period concerned the nature of both hierarchical and technical control, whose contradictions influenced their own demise. As Edwards points out, both methods suffered from debilitating transparency in the way they exploited workers. "As a naked and clearly visible system of power, hierarchical

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movement during this period remains in two volumes by Irving Bernstein. See generally BERNSTEIN, *THE LEAN YEARS*, *supra* note 56; BERNSTEIN, *THE TURBULENT YEARS*, *supra* note 50; see also RHONDA F. LEVINE, *CLASS STRUGGLE AND THE NEW DEAL: INDUSTRIAL LABOR, INDUSTRIAL CAPITAL, AND THE STATE passim* (1988).

67. COHEN, *supra* note 49, at 171-73, 291-321.

68. On this process, in which black workers themselves actively participated, see, for example, RUTH NEEDLEMAN, *BLACK FREEDOM FIGHTERS IN STEEL: THE STRUGGLE FOR DEMOCRATIC UNIONISM* (2003); BRUCE NELSON, *WORKERS ON THE WATERFRONT: SEAMEN, LONGSHOREMEN, AND UNIONISM IN THE 1930S*, at 84-85, 133-34 (1988) [hereinafter NELSON, *WORKERS ON THE WATERFRONT*].

control revealed to the workers the oppressive nature of capitalist relations.”<sup>69</sup> Although effective in many respects, the “close supervision” inherent in hierarchical control generated “intensified militance among the oppressed.”<sup>70</sup> Workers chaffed at the oppressions of technical control too, as they were able to perceive in the speed of the line or the rigors of the task, the human hand of exploitation. Unions appeared increasingly attractive in this light.

The history of New Deal labor relations is very much defined by employers’ entrenched and often violent defense of their incumbent prerogatives and their resistance to the currents of reform. The resulting battles between employers and workers unfolded on a scale and with a ferocity unsurpassed in American history. Powerful employers, deeply committed to their own vision of the workplace and contemptuous of legal obligations under the labor law, bitterly contested workers’ efforts to challenge their rule.<sup>71</sup> How these struggles played out around competing visions of employer sovereignty and worker solidarity is nowhere better illustrated than in two signal clashes that should be familiar to all students of this period: the struggle of autoworkers at General Motors in 1936 and 1937 to establish effective union representation at that company; and the campaign to organize steel workers in Aliquippa, Pennsylvania, which unfolded over that same time-frame and gave rise to the Supreme Court’s landmark decision *NLRB v. Jones & Laughlin Steel*.<sup>72</sup> The story of these struggles, briefly told, illustrates how the contest for control of the workplace not only shaped the course of these disputes and others like them, but also framed workplace law and policy in the decades that followed.

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69. EDWARDS, *supra* note 4, at 53.

70. *Id.*

71. For a review of this struggle, see Ahmed A. White, *Industrial Terrorism and the Unmaking of New Deal Labor Law*, 11 NEV. L.J. 561, 573-606 (2010) [hereinafter White, *Industrial Terrorism*].

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

B. *The General Motors Sit-Down Strikes*

The GM sit down strikes, centered at Flint, Michigan, constitute one of the most important events in American history. The key facts are fairly well-known and may be stated succinctly: on the last day of the year, 1936, hundreds of workers at GM's sprawling production complex in Flint, Michigan, seized two factories and then held them for six weeks, defying injunctions and defeating a full-scale effort by local police to drive them out. Eventually, the conflict, which was front-page news throughout the country, spread to other GM plants and crippled the company's operations. Unable to convince state officials to use overwhelming force to drive out the Flint sit-down strikers, company officials retreated from a long-held, categorical opposition to treating with independent unions and agreed to negotiate with representatives of the strikers' union, the United Automobile Workers, or UAW.<sup>73</sup>

GM's opposition to independent unionism had been backed by a vast infrastructure of labor repression, which featured both soft and hard forms of hierarchical control and accomplished far more than simply warding off formal union representation. The company maintained a host of welfarist programs for its workers, including bonus and savings plans, an insurance program, stock ownership plans, a housing program, and an array of recreational and cultural programs.<sup>74</sup> However, it also maintained what government investigators called an "amazing and terrifying"<sup>75</sup> system of espionage at its plants, operated by about 200 company-employed spies, as well as agents provided by a dozen detective agencies and an unknown number of GM employees who had been coerced into spying on their fellow workers. The company also maintained one of the largest police forces in the country; it employed more than 1400 well-armed

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73. On the strike and the events surrounding it, see generally SIDNEY FINE, *SIT-DOWN: THE GENERAL MOTORS STRIKE OF 1936-1937* (1969).

74. *See id.* at 22-26.

75. Ahmed A. White, *The Depression Era Sit-Down Strikes and the Limits of Liberal Labor Law*, 40 SETON HALL L. REV. 1, 11 (2010) [hereinafter White, *The Depression Era Sit-Down Strikes*].

company police.<sup>76</sup> These spies and police concerned themselves with every aspect of life in and around GM's plants; and they gave backing to the front-line authority of GM's foremen, who ruled the shop floors.

Workers' anger and frustration with these oppressive dimensions of hierarchical control were major influences behind the move to organize GM that eventually culminated in the strikes, which originated among the rank-and-file. As Sidney Fine's definitive history of the strikes confirms, the main grievance among GM's workers was not pay, but rather with the company's system of control. Workers were keenly disappointed with GM's welfare program, whose caprices were laid bare by Depression Era conditions.<sup>77</sup> And they also deeply resented the rampant oppression they endured on the shop floors, including arbitrary rules for determining tenure and time of employment, and inscrutable pay systems.<sup>78</sup> Although Fine is right in pointing out that the grievances regarding the rigors of assembly line work probably captured too much attention among observers—fewer than one-fifth actually performed such work—the workers in this uprising against GM were definitely motivated as well by resistance to the company's assertion of technical controls. In particular, workers chaffed at the company's relentless employment of the "speed up," which in an integrated factory, reached beyond the assembly line to intensify the exploitation of all of its production workers.<sup>79</sup>

In its reliance on these methods, GM was fairly typical of major employers in this period. But the sit-down strikers' defeat of the company was quite remarkable. Their victory established the UAW, which was affiliated with the CIO, at what was then the largest company in the world. In forcing GM to deal with the UAW, the strikes removed it from its position as the cornerstone of a program of concerted opposition to the New Deal on the part of powerful industrial capitalists. In the meantime, the sit-down strikes electrified

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76. *Id.*

77. FINE, *supra* note 73, at 26-27.

78. *Id.* at 59-61.

79. *Id.* at 54-59.

other workers, inspiring an enormous wave of labor militancy, highlighted by hundreds of other sit-down strikes that swept over the country through the first half of 1937.<sup>80</sup> Perhaps even more important, the strikes helped secure the constitutionality of the Wagner Act, and indeed helped secure the political and legal survival of the entire New Deal.<sup>81</sup>

The GM sit-down strikes also illustrate the crucial role that solidarity played in forming the foundation of militant resistance to employer control. As James Pope makes clear, the strikes in Flint were the culmination of a vibrant movement among industrial workers in the 1930s, with deep roots in the automobile and rubber industries, in which these workers increasingly asserted their prerogatives, not only to receive better wages, but to regain some control over the very processes of production.<sup>82</sup> Long before some of them contrived to occupy GM's plants, workers were already seizing back from employers' some influence how those plants should be run and by whom.<sup>83</sup> What happened at GM was actually a major cresting in this wave of grass-roots and shop floor militancy whose strength is underscored by the success the workers had in holding the plants in good order for so long.<sup>84</sup>

At GM and elsewhere, such assertions of solidarity and demands for worker control were directly at the expense of employers' own claims to control the workplace via rules, policies, and personnel of their choosing and were a vivid example of how incumbent forms of control contributed to their own demise. At the same time, their success positioned workers, via union representation, to reshape the workplace in partial compliance with their own interests and values. Another important expression of this clash over contested visions of the workplace can be found in events that came to

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80. See White, *The Depression Era Sit-Down Strikes*, *supra* note 75, at 10-11, 15-16.

81. See Jim Pope, *Worker Lawmaking, Sit-Down Strikes, and the Shaping of American Industrial Relations, 1935-1958*, 24 *LAW & HIST. REV.* 45, 91, 95-96 (2006).

82. See *id.* at 50-60.

83. See *id.* at 49-50.

84. See *id.* at 56-61.

a head only a couple of months after the GM sit-downs strikes, in Aliquippa.

C. *The Steel Workers' Struggle at Aliquippa*

As both David Brody and David Montgomery have shown, the steel industry had long been the scene of especially heated conflict over control, not least because it was also home to a particularly rapid and complete triumph of modern, industrial capitalist production over more traditional organizations and practices. By the mid-1930s, the industry, which was already highly mechanized, was not overly invested in technical forms of control;<sup>85</sup> but it was committed to a system of hierarchical control based in an array of welfarist programs, ERPs, and a capacity for raw repression that exceeded even that of GM. Although brutal methods often prevailed—a truth reflected in the bloody battles at Homestead, Pennsylvania, in 1892, and during the Great Steel Strike of 1919—the industry offers a striking example of how the apparent conflict between these seemingly very different ways of controlling workers was muted, rhetorically at least, by strident appeals to paternalism.

By the mid- to late-1930s, the steel industry and its allies expended enormous sums courting workers with the idea that the companies cared deeply for them, and that the main threat to workers' interests lay not with the companies' relentless drive to exploit them and assert control over them, but with the irresponsible intrigues of other workers, often instigated by radical agitators and other outsiders, who wanted nothing more than to foment ruinous strikes and to poison the workplace with an air of antipathy between workers and capitalists.<sup>86</sup> In this way, steel workers were

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85. The industry's use of technical controls was limited by the process of making steel itself, which could not easily be rushed, and probably also by the low ratio of labor costs to capital investment. See EDWARDS, *supra* note 4, at 115.

86. S. REP. NO. 77-151, pt. 1, at 91-93, 109-13, 300-14, 320-21 (1939); Frank H. Blumenthal, *Anti-Union Publicity in the Johnstown "Little Steel" Strike of 1937*, 3 PUB. OPINION Q. 676, 677 (1939). On the full range of material developed for the campaign, see *Violations of Free Speech and Rights of Labor, Part 18—Employer Associations and "Citizens' Committees": Hearing on S. Res. 266 Before a*



invited to think of the companies' massive arsenals of firearms and gas weapons, and their cadres of heavily armed company police, not as outrageous affronts to the companies' paternalistic pretensions, but as essential extensions of this platform.<sup>87</sup>

All of the major steel companies (and many companies in other industries) subscribed to this program; and in the case of company propaganda, they actually coordinated in producing it. However, Jones & Laughlin Steel Corporation was particularly well-endowed in its capacity for hierarchical control, it seemed, not least because of the peculiar situation at its plant in Aliquippa, one of its two major operations. At a time when company towns were still commonplace, Aliquippa was perhaps the quintessential company town. Most of Aliquippa's working population was employed by the company and the company exercised more or less direct control of crucial civic functions: the police, retail commerce, the housing market, many social clubs, the political process, and so forth.<sup>88</sup> The director of Jones & Laughlin's operations in Aliquippa in the 1910s and 1920s described the company's rule as a "benevolent dictatorship."<sup>89</sup> And on the shop floors, the "foreman's empire" remained fully intact.<sup>90</sup>

And so it was that for years, workers who sought to organize independent unions in the town were hunted down and ejected, often after being severely beaten by company police. In one notorious episode in 1926, several union

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*Subcomm. of the Comm. on Educ. & Labor, 75th Cong. 7766-78, 7895-908, 7910-23, 8031-50, 8069-85 (1938) [hereinafter Hearings] (citing exhibits 3853, 3858-59, 3873, 3885); id. at Part 35, 14386-479 (1939). This position was clearly articulated in a series of articles and statements in the industry's trade journal. See L.W. Moffett, Washington, IRON AGE, July 9, 1936, at 72, 75-76; Royalist Lewis Adds Fabricators to His Prospective Empire, IRON AGE, July 30, 1936, at 45; Steel Companies Meet Unionization Drive With Statement of Position, IRON AGE, July 9, 1936, at 88; Steel Industry States Attitude Toward Unionization Drive Now Under Way, IRON AGE, July 2, 1936, at 55.*

87. See S. REP. NO. 76-6, pt. 3 at 5-13 (1939).

88. See Kenneth Casebeer, *Aliquippa: The Company Town and Contested Power in the Construction of Law*, 43 BUFF. L. REV. 617, 627-33 (1995).

89. See TOM GIRDLER WITH BOYDEN SPARKES, *BOOT STRAPS: THE AUTOBIOGRAPHY OF TOM GIRDLER* 177 (1943).

90. See EDWARDS, *supra* note 4, at 115.

sympathizers who dared meet together were “convicted” in an ad hoc tribunal and sentenced to five years in the county workhouse.<sup>91</sup> Perhaps as important in securing the company’s control, all workers in the town were subject to being spied on, having their political votes dictated by company agents, and of course being invited to bear witness to what happened to those who overtly supported unionism—while being reminded of how much the company cared about them and how vigilant it was in protecting their interests.<sup>92</sup> In 1934, the wife of Pennsylvania’s governor was able to address a union meeting in Aliquippa only with state police protection, and with company machine guns trained on the crowd.<sup>93</sup>

Nevertheless, Jones & Laughlin was not immune to the larger forces that were cultivating worker solidarity and militancy, and undermining the company’s system of control.<sup>94</sup> Matters in Aliquippa came to a head beginning in 1936, when the CIO’s Steel Workers Organizing Committee (SWOC) brought the company into its campaign to organize steel. As at Flint, workers in Aliquippa were eventually able to overthrow the company’s archaic system of labor control, but not without great difficulty. From the beginning of its drive, SWOC organizers working in Aliquippa faced intense repression.<sup>95</sup> The organizers’ rooms and persons were searched without warrant, and their union materials were confiscated and destroyed.<sup>96</sup> They were arrested “by the dozen” and charged with disorderly conduct, with the fines to be deducted directly from their pay, if they worked for the

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91. See Casebeer, *supra* note 88, at 634-35.

92. See *id.* at 627-54.

93. Jones & Laughlin Steel, 1 N.L.R.B. 503, 510 (1936); JOHN BODNAR, WORKERS’ WORLD: KINSHIP, COMMUNITY, AND PROTEST IN AN INDUSTRIAL SOCIETY, 1900–1940, at 125-34 (1982).

94. See BERNSTEIN, THE TURBULENT YEARS, *supra* note 50, at 475-77.

95. *Id.*

96. ROBERT R.R. BROOKS, AS STEEL GOES . . . UNIONISM IN A BASIC INDUSTRY 118 (1940).

company.<sup>97</sup> Those who worked in the mills were also often threatened, demoted, or discharged.<sup>98</sup>

As at GM, workers' efforts to overthrow this system of control were both an immediate prerequisite of union representation and its *raison d'être*. The culmination of their efforts was a massive strike. Beginning on May 12, 1937, virtually the whole town turned out on the picket line. Huge numbers of picketers besieged the company's sprawling plant, taking advantage of the mill's geography to place a *cordon sanitaire* around it. Armed with bats, clubs, and pipes, they routed the company police. Jones & Laughlin was forced to close the Aliquippa mill.<sup>99</sup> Fearing the effect of an extended shutdown on its viability and bowing to the fact that it could not foresee ousting the picketers any time soon, after three days the company capitulated. It agreed to do something that seemed quite unthinkable only weeks earlier: to grant the SWOC exclusive representation if it won a National Labor Relations Board (NLRB)-sponsored election. Little over a week later, on May 25, the union won the election by a decisive margin and the CIO had its first exclusive contract with a major steel producer.<sup>100</sup> The victory catalyzed a string of organizing successes at dozens, and then hundreds, of other, mainly smaller steel companies and set the union on its way to organizing nearly the entire steel industry.<sup>101</sup> The

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97. *Id.*

98. See Jones & Laughlin Steel, 1 N.L.R.B. at 503, 512, 516; BROOKS, *supra* note 96, at 117-20.

99. See BROOKS, *supra* note 96, at 123-27; *C.I.O. Steel Strike Shuts Two Plants of Jones-Laughlin: 27,000 Men Idled*, N.Y. TIMES, May 13, 1937, at 1; see also BERNSTEIN, THE TURBULENT YEARS, *supra* note 50, at 477-78; ROBERT H. ZIEGER, AMERICAN WORKERS, AMERICAN UNIONS, 1920-1985, at 50, 60-61 (1986); Louis Stark, *Peace Plan Drawn in Big Steel Strike; More Plants Close*, N.Y. TIMES, May 14, 1937, at 1; *C.I.O. Spreads Steel Strike: Seeks to Stir 200,000 Men to Join Walkout*, CHI. TRIB., May 14, 1937, at 1.

100. See BERNSTEIN, THE TURBULENT YEARS, *supra* note 50, at 477-78; ZIEGER, *supra* note 99, at 50, 60-61; *CIO Victorious in Sharon Vote*, CANTON REPOSITORY, May 26, 1937, at 1; *SWOC Wins by 10,000 at J-L; Sharon Steel Vote May 25*, STEEL LAB., May 24, 1937, at 1. Frank Purnell of Sheet & Tube also testified that Jones & Laughlin was motivated by economic vulnerability to sign. See *Hearings*, *supra* note 86, at Part 27, 11241-42 (1939).

101. See *The Union Mills*, STEEL LAB., June 5, 1937, at 2; *The Union Mills*, STEEL LAB., May 15, 1937, at 2; *Wheeling Steel, Timken Roller, 86 Others Sign*, STEEL

events at Aliquippa—the organizing that preceded the strike—also led directly to the Supreme Court’s landmark decision to uphold the Wagner Act in *NLRB v. Jones & Laughlin*, decided as the union’s drive gained steam and only about six weeks prior to the decisive strike.<sup>102</sup>

As at Flint, the underpinning of these developments was the union’s success in completely subverting employer paternalism at Aliquippa with a carefully crafted program of worker solidarity, cloaked at first in secrecy but increasingly rooted in the union’s penetration of churches, fraternal organizations, and other community groups, and its stealthy infiltration of the shop floor.<sup>103</sup> Indeed, as Kenneth Casebeer emphasizes in his study of this struggle, SWOC organizers made ironic use of the very dynamic that seemed to guarantee company control at Aliquippa—the fact that it was pervaded by intimacies, ironically preserved from the effacing powers of industrial capitalism by the company town itself—in redirecting worker loyalties from the company to the union.<sup>104</sup>

#### D. *The Changing Dynamics of Control and the Birth of the Modern Labor Movement*

More than simply illustrating the power of worker solidarity in overcoming employer intransigence, the SWOC’s victory at Aliquippa and the UAW’s defeat of GM stand out as key chapters in a complex and often dramatic campaign on the part of a resurgent labor movement, led by the CIO, to organize American workers, normalize collective bargaining, and refashion the workplace. There were other vivid contests during this period at other automobile and steel companies, and in rubber, electrical equipment, glass, textiles, and ocean shipping, to name a few of the industries

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LAB., May 1, 1937, at 1; *23 More Corporations Sign with Steel Union*, STEEL LAB., Mar. 20, 1937, at 1; *51 Steel Mills Signed as Lodges Climb to 492*, STEEL LAB., Apr. 10, 1937, at 1.

102. See *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30 (1937).

103. See Casebeer, *supra* note 88, at 626, 673.

104. *Id.*

affected.<sup>105</sup> In virtually all of these struggles, the basic structure of conflict evident in Flint and Aliquippa in early 1937 repeated itself as workers mobilized to displace oppressive systems of control.<sup>106</sup> Although political and legal dynamics, including the enactment of the National Labor Relations Act were important, solidarity was absolutely key. In Rick Fantasia's words, "It was not the law that proved decisive in labor's greatest victory to date, but a culture of solidarity that could freely negotiate a set of tactics and methods to meet the employers with their tactics and methods head-on and carry the workers through."<sup>107</sup>

This culture of solidarity was prefigured by the structure of the workplace and the dynamics of control in place, but it also grew out of intimate connections that were tirelessly cultivated by workers and union organizers. Records from the epic drive to organize steel that entailed the struggle at Jones & Laughlin confirm this. In the mill towns, organizers needed not only to pass out literature and make speeches, but also to meet with workers one-on-one and in small groups where they could prod and press the virtues of unionism, assuage workers' fears of the companies, and erode their faith in company paternalism.<sup>108</sup> As one participant recalled, "The task was to establish a core of secret union members in one department [in the plants] after another, without the company's knowledge."<sup>109</sup> This often required first approaching workers in secret, sometimes at the workers' homes, perhaps after dark to avoid arousing the suspicions of neighbors. But this was no easy thing; "organizers worked day and night for months."<sup>110</sup>

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105. For a review of the major episodes in this struggle, see BERNSTEIN, *THE TURBULENT YEARS*, *supra* note 50, at 572-634.

106. *Id.*

107. FANTASIA, *supra* note 21, at 47.

108. See *Hearings*, *supra* note 86, at *Part 44*, 16631-34 (citing exhibits 7421-23); COHEN, *supra* note 49, at 318-19; Interview by C. F. Traynor with John S. Johns, (Mar. 3, 1978), at 8 (on file with author); Minutes from SWOC Fieldworkers Meetings, Calumet District (1936-1942) (on file with author).

109. JOHN WILLIAMSON, *DANGEROUS SCOT: THE LIFE AND WORK OF AN AMERICAN "UNDESIRABLE"* 126 (1969).

110. *Id.* at 125-26.

This wave of solidarity immersed entire urban areas, sweeping aside workers' faith in welfare capitalism, the "company family concept," and other trappings of paternalistic hierarchical control.<sup>111</sup> In a vast display of the dialectic of spontaneity, ideology, and structure that defines the nature of solidarity, union activists nurtured this culture of camaraderie and common purpose at the same time that their very presence on the field of industrial conflict depended on an upsurge of consciousness and militancy that began among the workers themselves and could be traced to the economic and political conditions of the Depression Era.<sup>112</sup>

These struggles were difficult. Employers retained great power despite the Depression and the New Deal; and resistance was not easily overcome. The UAW defeated Chrysler with sit-down strikes in the spring of 1937 but faltered at Ford, whose servicemen brutalized its organizers.<sup>113</sup> The SWOC's drive prevailed against Jones & Laughlin and led the powerful industry leader, U.S. Steel, to acquiesce to union representation earlier in March; but it culminated in a brutal and unsuccessful strike at the other major steel companies in the summer of 1937. The "Little Steel" Strike, in which at least sixteen unionists were killed, hundreds injured, and maybe 2000 arrested, was a major setback for the SWOC, the CIO, and unionism in general. The strike was lost despite extraordinary displays of solidarity, including mass strike participation across ethnic lines, city-wide general strikes, and one particularly poignant episode in which thousands of sympathetic miners marched through one of the mill towns arm-in-arm in support of embattled steel workers.<sup>114</sup> The Little Steel affair is a study in the resiliency of hierarchical control. Not until the eve of the

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111. See Fones-Wolf, *Industrial Unionism*, *supra* note 59, at 6.

112. On this characterization of the nature of solidarity, see, for example, Marc Dixon et al., *Unions, Solidarity, and Striking*, 83 *SOC. FORCES* 3, 6-7 (2004).

113. See BERNSTEIN, *THE TURBULENT YEARS*, *supra* note 50, at 734-51; White, *Industrial Terrorism*, *supra* note 71, at 585-88.

114. On the events of the strike, see AHMED WHITE, *THE LAST GREAT STRIKE: LITTLE STEEL, THE CIO, AND THE STRUGGLE FOR LABOR RIGHTS IN NEW DEAL AMERICA* (forthcoming 2016). On the miners' display of solidarity, see JACK METZGAR, *STRIKING STEEL: SOLIDARITY REMEMBERED* 4 (2000).

Second World War increased the costs of continued labor unrest did Ford and the Little Steel companies concede to union representation.<sup>115</sup>

Despite resistance of this kind and weakening political support in the late 1930s for the labor movement and the New Deal, the union movement nevertheless achieved tremendous growth. Total union membership just about tripled between 1933 and 1941, reaching nearly 10 million just prior to America's entry into the Second World War.<sup>116</sup> Union density increased from 6.9% of the nonagricultural workforce in 1933, to 27.9% in 1941.<sup>117</sup> The war itself expanded production in industries where unions had recently established themselves and brought about government production controls, which favored labor peace, leading to further increases in membership. By 1945, something like 14.5 million men and women—35.4% of the nonagricultural workforce—were union members.<sup>118</sup> Employer sovereignty yielded. Unionized workers were positioned for the first time to play prominent roles in both formal politics and the governance of the workplace.<sup>119</sup> Through their unions, workers forged collective bargaining agreements that increased compensation and benefits and regulated hiring, discipline, promotion, and discharge procedures. Importantly, even many nonunionized employers embraced these standards, either to avoid unionization or to forestall labor conflict more generally.<sup>120</sup>

It must be emphasized that neither this organizational triumph nor the remarkable upsurge in worker solidarity that accompanied it abolished racism, sexism, and other types of inequality in the workplace. Needless to say,

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115. See BERNSTEIN, *THE TURBULENT YEARS*, *supra* note 50, at 729-31, 747.

116. GERALD MAYER, CONG. RESEARCH SERV., RL 32553, *UNION MEMBERSHIP TRENDS IN THE UNITED STATES 22-23 tbl.A1* (2004).

117. *Id.*

118. *Id.*

119. See *id.*; NELSON LICHTENSTEIN, *STATE OF THE UNION: A CENTURY OF AMERICAN LABOR 100-01* (2002) [hereinafter LICHTENSTEIN, *STATE OF THE UNION*]; ZIEGER, *supra* note 99, at 100-01.

120. See LICHTENSTEIN, *STATE OF THE UNION*, *supra* note 119, at 127-28.

employers continued to discriminate; and unions, though by the post-war period largely committed to equality in their constitutional documents and political pronouncements, struggled to realize these commitments in their dealings with employers and workers, and in the way their members treated each other.<sup>121</sup> For many liberal scholars and commentators—and for legal scholars in particular—these shortcomings have long anchored a simplistic narrative, rooted in the prioritization of identity over class, and redolent with a certain contempt for the working class, that sees the labor movement and its underlying culture of solidarity as indifferent to if not relentlessly hostile to the interests of marginalized workers.<sup>122</sup> In fact, this narrative is not nearly so well-founded as its proponents presume. Blacks, especially, were central to the CIO's efforts in major industries like steel and maritime shipping, played an important role in building the labor movement, and benefited significantly from its rise in the 1930s and 1940s.<sup>123</sup> Moreover, the unions, which spearheaded efforts in the 1930s and 1940s to stop the lynching of black men, also provided crucial (though largely unrecognized) support to the civil rights movement in the 1950s and 1960s.<sup>124</sup> As we shall see shortly, there may not have been any employment provision in the 1964 Civil Rights Act had it not been for the efforts of unions activists—and had the recommendations of these

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121. For a review of these problems and the debates surrounding them, see PAUL FRYMER, *BLACK AND BLUE: AFRICAN AMERICANS, THE LABOR MOVEMENT, AND THE DECLINE OF THE DEMOCRATIC PARTY* (2008).

122. See, e.g., HILL, *BLACK LABOR AND THE AMERICAN LEGAL SYSTEM*, *supra* note 10, at 4, 12; Crain, *supra* note 10, at 213, 220, 228-29, 255-56; Hill, *The Problem of Race*, *supra* note 10, at 190, 197, 200; see also Bernstein, *Roots of the 'Underclass'*, *supra* note 10, at 95-96.

123. See, e.g., NEEDLEMAN, *supra* note 68, at 19-22 (2003); NELSON, *WORKERS ON THE WATERFRONT*, *supra* note 68, at 21. On the belated development of this topic by historians, and for a review of their work, see Eric Arnesen, *Up from Exclusion: Black and White Workers, Race, and the State of Labor History*, 26 *REV. AM. HIST.* 146 (1998).

124. See FRYMER, *supra* note 121, at 47; Charlotte Garden & Nancy Leong, "So Closely Intertwined": *Labor and Racial Solidarity*, 81 *GEO. WASH. L. REV.* 1135, 1160-66 (2013).



activists been needed, there may have been a far more effective provision on workplace inequality.

E. *The Retreat of Solidarity and the Ascent of Bureaucratic Control*

The end of the war left American workers as strongly positioned as they had ever been to challenge and reshape the terms of exploitation in the workplace. The two decades that followed witnessed the most dramatic improvement in compensation and overall working conditions in American history. However, conflict is fundamental in the workplace and these gains were not easily won or defended. The Supreme Court effectively banned sit-down strikes in 1939 and they faded in frequency, becoming uncommon forms of protest.<sup>125</sup> In the wake of this development, other forms of worker solidarity came to the forefront. Wildcat strikes and similar forms of small-scale, often spontaneous shop floor resistance proliferated, even during the war years. Mass picketing, characterized by large numbers of workers engaged in raucous demonstrations, briefly flourished as well. Mass picketing figured prominently when, with the close of the war, workers embarked on the greatest strike wave in American history. On numerous occasions in 1945 and 1946, large assemblages of workers gathered to press their demands for union recognition, more favorable working conditions, and political reforms—both for themselves and, often enough, on behalf of their fellow workers.<sup>126</sup>

In many ways this upsurge of militant solidarity proved highly effective. The dramatic increase in the size and strength of the labor movement was matched by increasing success in securing contracts that limited employer control in the workplace, beginning with the most basic prerogatives to hire, discharge, and discipline workers at will. Nor were these the only impositions on employers. On the shop floors, union stewards and activists made deep inroads on

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125. Pope, *supra* note 81, at 46, 47, 98-99, 104-07.

126. See Ahmed A. White, *Workers Disarmed: The Campaign Against Mass Picketing and the Dilemma of Liberal Labor Rights*, 49 HARV. C.R.-C.L. L. REV. 59, 82-86 (2014) [hereinafter White, *Workers Disarmed*].

managers' and supervisors' authority, challenging their once-unquestioned rule with union contracts laden with grievance provisions, and via informal threats of strikes and slowdowns. This was too much for employers, who complained that their plants had been taken over by the workers.<sup>127</sup>

Of course, this complaint about workers taking over was only true in a very relative sense. But a relative loss of control was injury enough and a counterattack was not long in coalescing. No sooner had the National Labor Relations Act been deemed constitutional than the business community embarked on a campaign to amend the law to rein in strikes, including wildcat strikes and strikes involving mass picketing, as well as secondary strikes by sympathetic workers; to affirm the rights of union dissidents to abstain from membership and to cross picket lines; to preclude workers organizing across their own class lines, by excluding supervisors from the protections of the labor law and instituting special treatment of professionals and skilled workers; and, in the guise of barring Communists from union leadership, to purge the labor movement of leftists who had proved so troublesome to employers' interests.<sup>128</sup> Although these aims were frustrated through the war years, they were all realized with the enactment of the Taft-Hartley Act in the summer of 1947, which enforced them through a combination of administrative or judicial injunctions, civil damages, procedures by which unions could forfeit representative status, and expanded employer prerogatives to retaliate against workers. Notably, Taft-Hartley's passage was justified as a necessary step in reining in worker solidarity and restoring the sovereignty of employers in the workplace.<sup>129</sup> In the words of Rick Fantasia, "The act represented a direct assault on the traditional expressions of working-class solidarity and action."<sup>130</sup>

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127. FANTASIA, *supra* note 21, at 54.

128. See HARRY A. MILLIS & EMILY CLARK BROWN, FROM THE WAGNER ACT TO TAFT-HARTLEY: A STUDY OF NATIONAL LABOR POLICY AND LABOR RELATIONS 282, 290, 327, 335, 361, 379, 383 (1950).

129. On the campaign to ban mass picketing, via Taft-Hartley and other means, see generally White, *Workers Disarmed*, *supra* note 126, at 86-115.

130. FANTASIA, *supra* note 21, at 55.

Already by the early 1950s, the kind of intense solidarity so evident in the 1930s and 1940s had become somewhat rare, as the sit-down strikes and mass picketing of that earlier time were replaced by more conventional “work stoppages,” which occurred with somewhat less frequency and much less rancor. Even wildcat strikes and other forms of shop floor militancy faded, as both unionized and (to a considerable degree) non-unionized workplaces embraced a rule-bound, bureaucratized system of management,” which David Brody calls “workplace contractualism.”<sup>131</sup> Workers and capitalists settled into an uneasy period of *détente*, in which unionization was seldom challenged but ceased to expand into industries and sectors not conquered in the 1930s and 1940s, compensation and working conditions improved steadily but not dramatically, and employers nervously guarded their “managerial prerogatives” from union depredation.<sup>132</sup>

And so while the labor movement consolidated its membership rolls and its political standing, it lost vigor and spontaneity; a bureaucratic ethos and mode of governance proliferated within unions, at the expense, in part, of the very culture of solidarity on which the movement had been built. Any combination of a number of factors might account for this devolution, including the unique features with which the labor movement was born in the 1930s (including, for instance, a measure of top-down authoritarianism); the particular personalities who happened to lead the labor movement and the political choices they made; and, according to some at least, an inherent tendency of unions to become more conservative over time.<sup>133</sup> Almost certainly,

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131. DAVID BRODY, *Workplace Contractualism in Comparative Perspective*, in *INDUSTRIAL DEMOCRACY IN AMERICA: THE AMBIGUOUS PROMISE* 176 (Nelson Lichtenstein & Howel Harris eds., 1993). The degree to which non-unionized firms adhered to this approach can be seen in the fact that some 80% of large nonunion firms in the 1950s maintained grievance procedures patterned on those that could be found in almost all unionized workplaces. DOBBIN, *supra* note 18, at 92.

132. *See generally* LICHTENSTEIN, *STATE OF THE UNION*, *supra* note 119, at 122-25.

133. For a review of these arguments, see NELSON LICHTENSTEIN, *LABOR'S WAR AT HOME: THE CIO IN WORLD WAR II* 2-4 (1982).

though, changes in law and policy, including those codified in Taft-Hartley, played a role. In compliance with its norms, strikes became less common, less boisterous, and less effective; and leftists, who were often at the forefront in cultivating worker solidarity, were pushed out of the movement.<sup>134</sup>

Already by the late 1940s, the culture of solidarity that flourished in the 1930s and 1940s was in retreat. And yet, even in this era, the labor movement remained dependent on solidarity—and for a very basic reason. The rights that the labor law ostensibly conveys, including that of meaningful collective bargaining, are necessarily dependent on the same basic dynamic showcased in Flint and Aliquippa: the ability of the union to wage an effective strike. And the prospect of waging an effective strike is entirely dependent on solidarity—indeed, in the postwar period in some ways even more so. For, once the law condemned sit-down strikes, sympathy strikes, and mass picketing, affirmed the right of workers not to support unions, and validated the prerogative of employers to replace strikers, the only hope of waging an effective strike lay in cultivating a deep well of common identity and commitment among a strong majority of workers. For their part, the institutions that had defined employer paternalism earlier in the century—benefits programs, rules governing employee discipline and discharge, grievance procedures, and so forth—did not disappear in the postwar period, so much as they were incorporated into the institution of collective bargaining. On the one hand, this turn further diminished the role of shop floor militancy and other more basic forms of solidarity in governing the workplace while codifying an insidious kind of collaborationism.<sup>135</sup> On the other hand, the subrogation of employer control to union representation and collective bargaining was undeniably effective in subordinating employer sovereignty to a significant measure of worker

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134. On the effects of such legal changes on sit-down strikes, see generally Pope, *supra* note 81. On the effects of legal changes on mass picketing, see generally White, *Workers Disarmed*, *supra* note 126, at 111-20.

135. See, e.g., ALICE LYND & STAUGHTON LYND, RANK AND FILE: PERSONAL HISTORIES OF WORKING-CLASS ORGANIZERS 3-4 (1973).

influence. From this vantage, one can develop a new appreciation for the strikes of the 1950s and 1960s, which though less frequent and less sensational than those of the 1930s and 1940s, were in their own way profound expressions of solidarity and markers of workers' continued success in rolling back the kind of unqualified employer control that had once prevailed in America.<sup>136</sup>

In this context, the most immediate threat to workers' gains unfolded within the workplace itself. With proof before them of the self-destructive character of both hierarchical and technical control, employers constructed a new and potent system for managing their workers: bureaucratic control. As Edwards recognizes, this system had its origins before the New Deal as a seemingly logical means of organizing white collar office workers and was only gradually embraced as a way of managing the workplace more generally.<sup>137</sup> Another important influence was ERPs, or company unions, which—ironically—“pushed corporate leaders to see their firms as institutions best governed by ‘laws’ or rules rather than by management whim and command.”<sup>138</sup> The ERPs were made illegal by section 8(2) of the National Labor Relations Act and swept aside by the independent unions that emerged in the 1930s and 1940s.<sup>139</sup> But they were influential nonetheless. And the unions that took root in their place also had an ironic role to play in shaping the new system of bureaucratic control. For even as employers “sought to use bureaucratic control to limit the impact of unions, to draw them into joint disciplining of workers, and to regain some of [their] lost initiative” they confronted unions intent on using the “bureaucratization of the workplace to codify and thereby defend their negotiated

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136. An excellent occasion to reflect on this point is Jack Metzger's very personal account of steel unionism in the postwar period. See METZGER, *supra* note 114. On the course of labor relations in this period, see generally LICHTENSTEIN, STATE OF THE UNION, *supra* note 119, at 98-140.

137. EDWARDS, *supra* note 4, at 132.

138. *Id.* at 109.

139. National Labor Relations Act, 29 U.S.C. § 158(a)(2) (West 2015).

gains.”<sup>140</sup> In this light, bureaucratic control can be seen as an inherent dimension of Brody’s “workplace contractualism.”

In general, though, the prerogative to define, structure, and implement bureaucratic control rested with employers. For unions’ efforts to shape its meaning fell short in the face of their limited reach and economic power, and interpretations of the labor law that insulated “managerial prerogatives” from mandatory collective bargaining.<sup>141</sup> As it came to predominate in most workplaces in the postwar period, bureaucratic control was fundamentally a system of employer rule. Its main characteristics are well summarized by Edwards: “bureaucratic control is embedded in the social and organizational structure of the firm and is built into job categories, work rules, promotion procedures, discipline, wage scales, definitions of responsibilities, and the like. Bureaucratic control establishes the impersonal force of ‘company rules’ or ‘company policy’ as the basis for control.”<sup>142</sup> In compliance with the ethos of the postwar period, bureaucratic control encapsulates control in the “rule of law,” which is to say “the firm’s law.” By these means, it rearticulates power in abstract, formal terms. “Hierarchical relations [are] transformed from relations between (unequally powerful) people to relations between jobholders or relations between jobs themselves, abstracted from the specific people or the concrete work tasks involved.”<sup>143</sup>

Edwards harbored no illusions about the true functions of bureaucratic control, which he regarded as highly oppressive, deeply exploitative, and corrosive of worker solidarity. His review of its operationalization at major employers reveals its tendencies to replace workers’ inclination to identify with each other with a tendency to embrace “we the firm,” thus “the workplace culture tends to express less of the worker and more of the firm.”<sup>144</sup> A new

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140. EDWARDS, *supra* note 4, at 132

141. The key case on this question is *First Nat'l Maintenance Corp. v. NLRB*, 452 U.S. 666, 685-88 (1981).

142. EDWARDS, *supra* note 4, at 131.

143. *Id.* at 145.

144. *Id.* at 148.

paternalism is thus encoded in the workplace. Edwards notes how the rules often metastasize into totalitarian regimes that comprehensively regulate workers' activities, all the while not only undermining behaviors, like "gambling" or "horseplay," that often form the foundation of solidarity, but specifically banning behaviors that are explicitly solidary.<sup>145</sup> Even more perniciously, bureaucratic control, with its governance via rules of individual employment, drives workers to take on the project of managing themselves—to "internalize the enterprise's goals and values" and become "self-directed and self-controlled."<sup>146</sup> In all these ways, bureaucratic control creates and valorizes the oddest of concepts, at least from a standpoint that recognizes the inherent conflict of the workplace itself: that of the "good worker."

Despite this very pessimistic view of hierarchical control, Edwards argues that this system of control was nevertheless saddled with destabilizing contradictions. Among these, he says, was the tendency of such controls to convert labor costs into fixed costs, which tends to diminish competitiveness in the long run. As he suggests, this may indeed have played a role in deindustrialization, which was rapidly accelerating at the time he wrote on this subject. Of more immediate relevance to us, though, is Edwards' notion that another contradiction of bureaucratic control rests in its tendency to incorporate statutorily mandated reforms that benefit workers—like those encoded in Title VII.<sup>147</sup> Here, as we shall see, Edwards is correct in predicting what would occur but wrong in failing to see how, in this process, reform would be distorted and harnessed to employers' interests.

## II. SOLIDARITY REJECTED: CLASS POLITICS AND THE ORIGINS OF TITLE VII

Enacted fifty years ago, and amended several times since then, Title VII of the Omnibus Civil Rights Act of 1964 responded to the very real problem of pervasive inequality in

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145. *Id.* at 149.

146. *Id.* at 150.

147. *Id.* at 161.

the workplace.<sup>148</sup> In so doing it embraced a peculiar approach to inequality, one that conceptualized inequality in terms of discrimination and individual rights, and opened the door to the expansion of bureaucratic controls in the workplace to the detriment of worker solidarity. This fateful course was shaped around a fundamentally political decision—or, rather, was shaped by the results of a political contest—regarding the proper government response to the broad problem of inequality and economic dispossession among blacks that was the main motivation for its enactment in the first place. As Judith Stein points out, the political problem Presidents Kennedy and Johnson and Congress faced in 1963, and that actually gave rise to Title VII, was not reducible to discrimination at all, but rather encompassed the broader challenge of securing better working conditions for black workers at a tenuous point in the evolution of the American economy.<sup>149</sup>

While it may be tempting to think that Title VII emerged out of the concerns of elite politicians, undergoing some kind of belated enlightenment on the plight of minority workers, the real story of its origins is more complicated. At least as important as the views of congressmen and presidents were structural forces, including escalating social conflict fueled by the frustrations of black workers, and international politics.<sup>150</sup> These forces were harnessed and shaped by civil rights groups, on the one hand, and elements of the labor movement, on the other, without whose activism there would have been no statute.<sup>151</sup> Prominent among civil rights organizations were the Urban League; the Congress on Racial Equality (CORE); the Southern Christian Leadership

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148. For a useful review of extent and depth of inequality in the decades preceding the enactment of Title VII, see, for example, DOBBIN, *supra* note 18, at 22-31.

149. STEIN, *RUNNING STEEL*, *supra* note 5, at 69.

150. On these influences, see generally HUGH DAVIS GRAHAM, *THE CIVIL RIGHTS ERA: ORIGINS AND DEVELOPMENT OF NATIONAL POLICY, 1960-1972* (1990); PAUL D. MORENO, *FROM DIRECT ACTION TO AFFIRMATIVE ACTION: FAIR EMPLOYMENT LAW AND POLICY IN AMERICA, 1933-1972* (1997).

151. On the many groups that played important roles in securing the enactment of Title VII, see GRAHAM, *supra* note 150, at 95-99, 103-04.



Conference (SCLC); the National Association for the Advancement of Colored People (NAACP); and its litigation-oriented descendent, by that time an independent organization, the NAACP Legal Defense and Education Fund (LDF). Particularly important among labor organizations were the movement's two preeminent industrial unions, successors to the organizations that had triumphed only a quarter century earlier in the struggles at Flint and Aliquippa: the UAW; and the United Steelworkers of America (USWA), which evolved from the SWOC. Also important was the main labor federation, the AFL-CIO, which then included both of these unions.<sup>152</sup> In fact, the "super lobby," composed of elements of the civil rights and labor movement, that was the key force in enacting the Civil Rights Act, was initiated by UAW president Walter Reuther.<sup>153</sup>

Earlier attempts by Congress in the post-war period to address workplace inequality had made little headway and it seemed unlikely at first that the Civil Rights Act would contain any provision on employment.<sup>154</sup> But, as pressures from the civil rights and labor movements to include such a provision increased, the question emerged: What sort of provision to adopt? Representatives of the labor movement joined with left-liberals in supporting legislation that would have approached the problem of workplace inequality in an administrative fashion, via a scheme broadly similar to that used to enforce labor rights under the National Labor Relations Act. Thus they envisaged that the statute would be enforced by an agency like the NLRB empowered to investigate complaints, hold hearings, and issue cease-and-desist orders—all with the autonomy of individual complainants (and their lawyers) subordinate to agency discretion, and the courts' role reduced to that of policing the

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152. On the support of these organizations and their representatives for legislation on this front, see their testimony and statements before the House in *Hearings on S. 773, S. 1210, S. 1211 and S. 1937 Before a Subcomm. on Emp't & Manpower of the S. Comm. on Labor & Pub. Welfare*, 88th Cong. 229 (1963).

153. ROBERT D. LOEY, *TO END ALL SEGREGATION: THE POLITICS OF THE PASSAGE OF THE CIVIL RIGHTS ACT OF 1964*, at 56 (1990).

154. STEIN, *RUNNING STEEL*, *supra* note 5, at 79.

agency's use of its discretion. Beyond this, they contemplated a program to address workplace inequality (if not a single statute) that would eschew concern for individual bias and discrimination in favor of an emphasis on the structural underpinnings of the problem, including automation, deindustrialization, and other threats to employment and labor standards, and would feature proactive, structural remedies as well.<sup>155</sup>

To some degree, the unionists' support for such an approach reflected self-interests, as leaders of the big unions were keenly aware of their own checked history on issues of race and employment and were wary of how far the new law might go in imposing liability on their organizations if it hewed to the concepts of individual rights and discrimination. But to a very considerable degree, their interests in an administrative and structural approach to workplace inequality were also rooted in a genuine concern about the dysfunctions and liabilities that might inhere in the alternative approach that was in the offing, and a wariness about reforms that might enhance employers' power.<sup>156</sup> Union leaders were genuinely opposed to workplace inequality, not least because it undermined the worker solidarity in which many of them believed and on which the very existence of their organizations depended.<sup>157</sup>

There were precursors to labor's program. The first important foray of the federal government into this field (not counting the largely moribund statutes enacted to enforce the Civil War Amendments), the creation in 1941 of a Fair Employment Practices Commission, or FEPC, was largely the result of a campaign led by prominent black labor leader,

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155. See MORENO, *supra* note 150, at 204-09; see also ANTHONY S. CHEN, *THE FIFTH FREEDOM: JOBS, POLITICS, AND CIVIL RIGHTS IN THE UNITED STATES, 1941-1972*, at 209 (2009); STEIN, RUNNING STEEL, *supra* note 5, at 77-78.

156. See DOBBIN, *supra* note 18, at 37; see also STEIN, RUNNING STEEL, *supra* note 5, at 76-78 (discussing the influence of race and unemployment on S. 1937, 88th Cong. (1963)).

157. GRAHAM, *supra* note 150, at 139. These sentiments are reflected in the testimony of George Meany, president of the AFL-CIO, and David MacDonald, president of the USWA. *Hearings on S. 773, S. 1210, S. 1211 and S. 1937*, *supra* note 152, at 151-56, 158-59.

A. Philip Randolph, president of the Brotherhood of Sleeping Car Porters. Established by executive order, this first FEPC foundered because it lacked enforcement authority, jurisdictional reach, and political legitimacy.<sup>158</sup> An approach to workplace inequality somewhat more similar to that advocated by labor in the early 1960s had been instituted almost two decades earlier by the State of New York, whose moderately effective state FEPC was modeled on the NLRB.<sup>159</sup> Labor's support for structural reforms to address workplace inequality was also anticipated by political proposals and arguments in the lead up to debates about the 1964 legislation. Among these were precautions from Labor Secretary, Willard Wirtz, and from Leon Keyserling, the main author of the original National Labor Relations Act, who warned against the dangers of an approach to workplace inequality that did not feature structural reforms.<sup>160</sup>

Labor's program was encoded in legislation sponsored by Senator Hubert Humphrey (who ultimately shepherded Title VII through the Senate). Humphrey's bill, S. 1937, would have established an administrative agency very similar to the NLRB with both an administrator (like the NLRB's general counsel) charged with enforcing the law, and a five-person adjudicative board (similar to the NLRB itself, as distinct from the agency). The agency would have had the authority to investigate instances in which employers (or unions) infringed on the "equal employment opportunity of any individual," and to sanction such acts directly by means of cease-and-desist orders, back pay, and disqualification from government contracts.<sup>161</sup> The bill also called for "a nationwide effort . . . to secure equal employment opportunity by the affirmative and conscious efforts of government, employers, unions, and others."<sup>162</sup> In hearings on his bill in the House, Humphrey specifically described the legislation as a necessary response to workplace inequality (the plight of the "Negro American") in a time of escalating

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158. GRAHAM, *supra* note 150, at 10-11.

159. *Id.* at 19-22.

160. *See id.* at 83-84, 101-02; *see also* STEIN, RUNNING STEEL, *supra* note 5, at 75.

161. *See* Equal Employment Opportunity, S. 1937, 88th Cong. §§ 3-6 (1963).

162. *Id.* § 2.

deindustrialization. He urged that the problem of workplace inequality must be confronted "in its totality," including "practices not directly related to overt discrimination." Invoking the substance of the structural approach alluded to in the bill, he made clear his view the new agency created by the legislation would be expected to work with many other state and federal agencies to address not only discrimination but the broader problem of a lack of good jobs for black workers.<sup>163</sup>

Labor supported Humphrey's bill over the alternatives, which eschewed its administrative and structural approach. AFL-CIO president George Meany explained his preference for S. 1937 by telling the House Subcommittee on Employment and Labor that the bill's failure to mention "discrimination" was a good thing, for "[w]e are today considering more than just discrimination . . . . We are thinking in terms of repairing those ill practices which have been prevalent for a century."<sup>164</sup> Walter Reuther, who commanded considerable respect in the civil rights movement, submitted a statement to the Subcommittee that expressed his support for S. 1937 in similar terms. Reuther insisted that the problem of workplace inequality was such that "we need to do more than merely treat the specific grievances of a few brave souls who file a complaint." Rather, "what we need . . . is a greatly improved economic climate, a climate of full employment," and thus a response that included support not only for Keynesian stimulation but public works, "manpower" initiatives, and the like. He therefore supported the Humphrey bill because it would encourage such affirmative steps to maintain a healthy labor market.<sup>165</sup>

The Humphrey bill was doomed by conservative opposition to its ambitious program and a preference among civil rights supporters and congressional moderates for legislation founded on the concepts of litigation and

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163. *Hearings on S. 773, S. 1210, S. 1211 and S. 1937, supra* note 152, at 135-46.

164. *Id.* at 157.

165. *Id.* at 168-69.

individual discrimination.<sup>166</sup> The bill that did become law, H.R. 7152, embodied a set of compromises, many of them brokered by Senator Everett Dirksen, a moderate Republican, that thoroughly repudiated the agenda in Humphrey's bill.<sup>167</sup> To some extent, the preferences embodied in the law that was adopted reflected an inertial predilection for the typical approach to workplace inequality embraced by state fair employment practice commissions (of which there were around twenty at the time), albeit watered down to remove their investigative and cease-and-desist prerogatives.<sup>168</sup> The Humphrey bill and its approach also suffered, ironically, from resentments about the success of the NLRB as a vehicle for advancing labor rights. With complete disregard for the outrageous antics on the part of businesses that had made the NLRB's aggressive enforcement practices necessary in the first place, congressional conservatives criticized the idea of a federal employment agency modeled after the NLRB by resurrecting arguments they had deployed in the 1930s and 1940s regarding that agency's supposed congenital unfairness.<sup>169</sup>

Another reason that the structural, administrative approach yielded to the individual rights, litigation-based approach, as Judith Stein points out, is that it also clashed with the politics and social premises of the larger liberal establishment, whose embrace of the War on Poverty (launched while the Civil Rights Act was moving through Congress) reflected a growing preference to confront social inequality, not in structural terms, but as the product of personal factors, like deficient education and a "culture of poverty," and inadequate aggregate economic demand.<sup>170</sup> In

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166. See STEIN, RUNNING STEEL, *supra* note 5, at 84; see also CHEN, *supra* note 155, at 172-73, 184-90.

167. For a discussion of Everett Dirksen's amendments to Humphrey's bill, see STEIN, RUNNING STEEL, *supra* note 5, at 81-86.

168. See GRAHAM, *supra* note 150, at 129-32.

169. See *id.* at 130-31. On the course and character of these earlier attacks on the NLRB, see generally JAMES A. GROSS, THE RESHAPING OF THE NATIONAL LABOR RELATIONS BOARD (1981).

170. See STEIN, RUNNING STEEL, *supra* note 5, at 72-76. On liberalism's conceptualization of employment policy in Keynesian, rather than structural,

other words, for liberal elites and their supporters in Congress and the White House, the problem of workplace inequality, like that of inequality more generally, was increasingly one of “human relations, where morality and democracy demanded the abolition of actions based upon prejudice.”<sup>171</sup> Structural factors might be important, but mainly as mediated by the dynamics of discrimination and individual aggrievement. Although some civil rights leaders did agree with labor on the need for structural reform, the movement as a whole did not join with labor in pressing for a more comprehensive approach to workplace inequality. Their main concern was getting any functional bill enacted.<sup>172</sup>

These dynamics were fully embodied in the statute that was finally adopted. A remarkably thin, even intellectually weak, document, the new law fully embraced the idea of discrimination against individuals as the central problem of workplace inequality, as it invested individuals with the right to sue if denied employment or otherwise discriminated against in the employment context on the basis of race, color, religion, sex, or national origin. Critically, the law did little to actually define what was meant by workplace discrimination.<sup>173</sup> Although the statute created an Equal Opportunity Employment Commission (EEOC), unlike the NLRB, the Agency initially lacked any authority whatsoever to adjudicate violations of the law; indeed, the Agency could not even sue in cases of discrimination.<sup>174</sup> And although amendments in 1972 granted the EEOC authority to sue on behalf of individuals, the Agency remains structured in a way that leaves it unable to prosecute more than a few dozen such cases each year.<sup>175</sup> Even today, enforcement of the statute is

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terms, see GARY MUCCIARONI, *THE POLITICAL FAILURE OF EMPLOYMENT POLICY, 1945–1982*, at 7, 20-22, 34-44 (1990).

171. STEIN, *RUNNING STEEL*, *supra* note 5, at 78.

172. *Id.* at 79-80.

173. DOBBIN, *supra* note 18, at 34-37.

174. As enacted, Title VII empowered the EEOC to seek a voluntary settlement in cases where a violation of the law occurred. If such efforts failed, a complainant would be left to sue in her own behalf.

175. Congress accomplished this change via the Equal Employment Opportunity Act. In fiscal year 2013, the EEOC filed only seventy-eight

almost completely dependent on voluntary compliance backed by the threat of private litigation.<sup>176</sup> And because of the way it was designed without something like the NLRB positioned to actively enforce the law and with a reliance on private litigation to enforce its norms, Title VII implicitly nominates employers and their managers as the parties best endowed with the relevant information and necessary power to implement its norms.<sup>177</sup>

The statute makes absolutely no provision for instituting the kinds of structural reforms that at the time it was enacted already seemed essential to advancing the interests of the workers it was enacted to help. The law's singular orientation to discrimination divested it of any capacity to tackle overarching structural realities that formed the landscape of workplace inequality. Instead, "Title VII translated labor issues into discourses about a bias unrelated to the changing economy."<sup>178</sup> It affirmed dualisms—for example, the racist versus the non-racist, the sexist versus the non-sexist—that "simplified social reality."<sup>179</sup> Ironically, while the new law explicitly prohibited segregation in employment, as a matter of policy, it actually segregated "racial and economic policies" from each other.<sup>180</sup>

In other words, by framing the grievances of workers in terms of discrimination, the statute left untended the more fundamental threat facing these men and women in the form of aggregate job losses occasioned by automation, deindustrialization, and other structural changes then overtaking the American economy. The economy of the late 1950s and early 1960s was more tenuous than many now

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enforcement suits involving Title VII claims. *EEOC Litigation Statistics, FY 1997 through FY 2014*, EEOC, <http://www.eeoc.gov/eeoc/statistics/enforcement/litigation.cfm> (last visited Aug. 28, 2015).

176. In fact, in its early years of operation, the EEOC was substantially dependent on civil rights lawyers connected to the NAACP to do its work. See FRYMER, *supra* note 121, at 41-42.

177. DOBBIN, *supra* note 18, at 40.

178. STEIN, RUNNING STEEL, *supra* note 5, at 70.

179. *Id.*

180. *Id.* at 69-70.

appreciate. But for a time the boom of the late 1960s, built on escalating social spending and both the Keynesian and labor-force-reducing effects of the Cold War and the Vietnam War, improved labor market conditions and concealed the dangers. But by the early 1970s, the job market was rapidly deteriorating and the entire working class began a descent into a period of sustained retrenchment which has lasted into this century.<sup>181</sup> Black workers, ostensibly the main beneficiaries of Title VII, would suffer worse than most, not least because all hopes for the development a program of comprehensive workplace equality—let alone a campaign to protect all workers from impending structural changes—had essentially been lost with the enactment of Title VII. Liberalism had struck a new course.<sup>182</sup>

As Stein points out, building conflicts over jobs were shaped not only by the terms of Title VII, but by other forces, including the fact that even as Title VII was passed, the civil rights movement was then morphing into an institution dominated by lawyers and other professionals, as well as by race militants who frequently possessed no particular program at all. For the civil rights lawyers, many were well-schooled in conventional, adversarial litigation as they were ignorant of workplace politics and administrative practice—the idea of tackling the problem of workplace inequality with anything other than private litigation was unappealing; and of course there was the added fact that such a regime would favor them professionally.<sup>183</sup> Most fundamentally, as legal historian Risa Goluboff points out, by the 1960s the civil rights establishment, and civil rights lawyers in particular, were well along in rejecting class as a salient component of their activism—and well-disposed to subordinate class to

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181. *Id.* at 87-88.

182. As Stein points out, after Title VII was enacted, Humphrey attempted to convince President Lyndon Johnson to augment its discrimination and individual rights approach with structural interventions. In a clear harbinger of the new direction of liberalism, Johnson declined. A later attempt to amend the law to align it more closely with S. 1937 failed. *Id.* at 87. So did an extended effort, also spearheaded by Humphrey, to pass a full employment bill in the late 1970s. See JEFFERSON COWIE, *STAYIN' ALIVE: THE 1970S AND THE LAST DAYS OF THE WORKING CLASS* 270-88 (2010).

183. See STEIN, *RUNNING STEEL*, *supra* note 5, at 91, 102-06, 116-17.



race.<sup>184</sup> For their part, militants in the movement increasingly hewed to a position which anticipated the “New Left’s” reckless, self-justificatory maxim that unions were inherently dysfunctional and reactionary.<sup>185</sup> And both elites and activists in the civil rights movement during this period were increasingly keen on the racialization of social problems generally. This, too, was the functional corollary of their growing indifference and hostility to the labor movement—sentiments that would soon manifest within the women’s movement as well.<sup>186</sup> Not only did Title VII itself reflect a change in the meaning of postwar liberalism; it was born into, and further shaped by, this world in which the political significance of labor and class was rapidly diminishing.

In this political and economic context, it was inevitable that the statute’s imprisonment to the concept of discrimination would give rise to another set of dysfunctions: as black workers pressed individual discrimination claims (sometimes aggregated among groups of workers) in a deteriorating job market which featured fewer and fewer opportunities for promotions, or even positions of any kind, they inevitably aggravated conflicts between themselves and white workers. And although these claims typically implicated employers as authors of discriminatory policies (something that, as early opponents of Title VII’s approach predicted, sometimes annoyed and alienated employers that were actually inclined to support workplace reforms), they conspicuously relieved the business community of any obligations to support the kinds of structural reforms that might improve the employment situation of all workers. Worse, the conflict that the pursuit of discrimination claims in this context inspired among workers reduced worker solidarity, which then weakened the unions which had served (however imperfectly) as their strongest means of institutional support—and which, ironically, had played such an important role in securing the passage of the civil rights law in the first place. Moreover, the idea of cleansing the workplace of discrimination—conceived, again, in simplistic, individualist terms—was quickly subordinated to

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184. Goluboff, *supra* note 5, at 1979.

185. STEIN, RUNNING STEEL, *supra* note 5, at 90-91.

186. *See id.* at 89-91.

managerial interests. In these ways, as the next Part shows, Title VII facilitated the triumph of bureaucratic control over worker solidarity.

### III. TITLE VII AND THE TRIUMPH OF BUREAUCRATIC CONTROL OVER WORKER SOLIDARITY

Several years after Title VII came into effect, Alfred Blumrosen, recently advisor to the EEOC and civil rights lawyer with the Justice Department, authored a book in which he strongly defended the Agency and the law against criticisms concerning their effectiveness and the wisdom with which they were conceived. Blumrosen was particularly keen to refute the charge that the statute was misconceived in its reliance on private lawsuits. He advanced a number of arguments to support this claim, including an assertion that dependence on administrative processes was a “hallmark” of the ineffective, state-level workplace employment agencies that preceded the EEOC; and the idea that invocation of the NLRB as a superior organizational template was inapt, not least because of the institutional weaknesses of the civil rights movement compared to the labor movement.<sup>187</sup> Most striking, though, was Blumrosen’s claim that an administrative approach to workplace inequality would place an agency “in loco parentis for the victims of discrimination” and, as such, would have instituted a kind of “paternalism” of the sort that underlay “monstrous” injustices in American history and offended the precepts of a “pluralistic” society.<sup>188</sup> What Blumrosen failed to comprehend—what his own complementary faith in civil rights liberalism and the pluralist potential of American society likely concealed from him—was that, for workers, the more immediate threat of paternalism inhered not in agency actions, but in the employment relationship itself; and that the very law he was defending as a bulwark against paternalism was in fact abetting its resurgence in a particularly incipient form and at the direct expense of worker solidarity.

Over the last several decades, the congenital tendencies of Title VII to undermine worker solidarity not only

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187. ALFRED BLUMROSEN, *BLACK EMPLOYMENT AND THE LAW* 3-50 (1972).

188. *Id.* at 48-49.

continued to unfold, but converged with other tendencies in law, which have only increased over this period, to affirm and enhance bureaucratic control in the workplace. For over the last few decades, Title VII has entrenched employers—the very institutions and people whose practices were most responsible for workplace inequality in the first place—as the main line of protection for workers against discrimination. Although evident in many subtle ways, this process can be seen most clearly in two successive developments: in litigation surrounding seniority plans in the 1960s and 1970s; and beginning in the 1970s, in the way the law has evolved to govern claims of workplace harassment, and in the way employers responded to legal changes in this realm.

A. *Seniority Plans, Bureaucratic Control, and the Fracturing of Workplace Solidarity*

From the very outset, efforts to effectuate Title VII devolved into struggles between groups of workers over scarce resources, particularly in what were then the major centers of remunerative working class employment and the anchors of the postwar labor movement—manufacturing and basic industry. In line with Stein’s thesis, these increasingly dysfunctional conflicts could be traced to the statute itself. Not only did Title VII’s individualist, antidiscrimination orientation prefigure conflict among workers; in this context more than any, the statute established itself as a key instance in the larger evolution of post-war liberalism, marked by a turn away from the very idea of rational industrial planning, as well as an indifference, at best, to the devastating consequences of automation, deindustrialization, and a renewed rapaciousness among the business class.<sup>189</sup>

The most important battleground in the early stages of this unfortunate struggle was the contest over seniority plans, which proliferated in the post-war workplace and were ubiquitous in union shops when Title VII became effective.<sup>190</sup>

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189. See JUDITH STEIN, PIVOTAL DECADE: HOW THE UNITED STATES TRADED FACTORIES FOR FINANCE IN THE 1970S (2010) [hereinafter STEIN, PIVOTAL DECADE]; STEIN, RUNNING STEEL, *supra* note 5.

190. DOBBIN, *supra* note 18, at 55.

Seniority plans were a marker of workers' successful participation, through unions, in the construction of elements of bureaucratic control that benefited themselves. In part because of pressure from unions, which typically secured such plans in their collective bargaining agreements, Title VII was enacted with some accommodation for seniority.<sup>191</sup> Section 703(h) of the statute bars liability where differences in the terms or conditions of employment are the product of a *bona fide* seniority or merit plan. The gravamen of *bona fides*, or rather the lack thereof, is whether the plan was adopted with a prohibited, discriminatory purpose, like benefiting white workers over blacks, or men over women—even if adopted prior to the enactment of Title VII. If lacking in such prohibited purpose, the plan is legitimate even if its effects are discriminatory.<sup>192</sup>

On its face, this doctrine actually seems overly burdensome to plaintiffs. For whether they intended to or not, many unions and employers had been complicit, mainly via collective bargaining, in instituting seniority plans that left minorities and women at a disadvantage. Because they tended to be hired more recently, many minorities and women lacked overall seniority and were thus more exposed to across-the-board layoffs. Where seniority was administered in separate “lines” among different departments, as was often the case, others found themselves deterred from transferring out of lower paying departments because doing so required that they lose accrued seniority and thus suffer diminution of pay and heightened risks of layoff. Moreover, many seniority plans with such effects had been established years, even decades, earlier; and if ever there had been clear evidence of discriminatory purpose in establishing them, such evidence could almost never be produced by plaintiffs.<sup>193</sup> The situation seemed to warrant both a more flexible conception of discrimination and a remedy uniquely suited to these problems, in particular the institution of some sort of remedial or “rightful place” seniority which would reassign workers to rectify the

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191. GRAHAM, *supra* note 150, at 139-40.

192. *See Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 353-54 (1977).

193. *See* FRYMER, *supra* note 121, at 40; MORENO, *supra* note 150, at 238-44; STEIN, RUNNING STEEL, *supra* note 5, at 45-46.

discriminatory effects of seniority plans that lacked *bona fides*. Such an approach had not been anticipated in the text of Title VII. In order for it to be adopted required creative manipulation of Title VII's substantive and procedural norms and legal and political pressure on the EEOC and the courts. In this regard, the efforts of liberal lawyers, like the LDF's Jack Greenberg, and crusaders like Herbert Hill—a civil rights lawyer with the NAACP who displayed a rather consuming dislike for organized labor—proved essential and effective in prodding first the EEOC and then the courts.<sup>194</sup>

To this day, both a flexible notion of discrimination and the concept of remedial seniority strike most liberals as entirely appropriate ways of undermining white or male “privilege” in the workplace. But in practice, the true equities proved controversial in ways that few liberals have been inclined to admit. For in ways that leftist critics could certainly have anticipated when Title VII was enacted, claims involving seniority inevitably arose in the context of diminishing employment opportunities; and remedial seniority often meant the imposition of significant costs on workers who had nothing to do with the enactment of these plans.<sup>195</sup> In other words, the very dynamic that trapped many minorities and women in less advantageous seniority lines portended that *intra-class* conflict and acrimony would follow from any effort to address this problem with the tools provided by Title VII.

In several important instances in which remedial seniority was first employed—in cases from the steel and lumber industries involving discrimination against black workers—its dubious politics were laid bare by the complexities of job classification, training, and rank, and by the complex political realities on the ground.<sup>196</sup> These cases include *Paperworkers v. Local 189* and *Quarles v. Philip*

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194. FRYMER, *supra* note 121, at 40-41; STEIN, *RUNNING STEEL*, *supra* note 5, at 105-06, 112, 116; FRYMER, *supra* note 121, at 40-41.

195. On the nature of this problem and the legal principles that evolved around it, see *Title VII—Seniority—The Relevant Scope of Inquiry for Determining the Legality of the System*, 31 VAND. L. REV. 151 (1978).

196. One of these cases is familiar to students of discrimination law: *Local 189, United Papermakers v. United States*, 416 F.2d 980, 984 (5th Cir. 1969); see also *Quarles v. Philip Morris, Inc.*, 279 F. Supp. 505 (E.D. Va. 1968).

*Morris*, which are celebrated by civil rights lawyers and scholars as high points in the aggressive application of Title VII. However, in such cases, as Stein makes very clear, the attempt to fashion workable remedies ended in something of a debacle. Complicated schemes imposed by the judges and endorsed by EEOC and civil rights lawyers not only exacerbated racial conflict among workers, but also failed to consistently profit their supposed beneficiaries. Indeed, such was the cumbersome nature of these remedies that quite a few older *black* workers were expressly disadvantaged by their imposition. Perhaps worse, Title VII's narrow conception of workplace inequality guaranteed that the remedies would be indifferent to the broader and longer-term consequences of automation and offshoring and the resulting escalation of job scarcity that made seniority important to workers in the first place.<sup>197</sup>

In this context, the one thing that the law did accomplish was to “enhanc[e] corporate power.”<sup>198</sup> For despite the fact that the companies were primarily responsible for instituting such discriminatory plans in the first place, remedial remedies imposed almost nothing on their interests. In fact, the companies actually benefited from the conflict generated by the remedies, as this exacerbated fractures and tensions among their workers.<sup>199</sup> Amidst the litigation and political conflict surrounding the remedies, employers could occasionally position themselves as protectors of some workers while generally remaining aloof from the conflicts that arose between groups of workers. As a consequence, remedial seniority reflected what Stein calls a “perverse” kind of liberalism “defined as gains for . . . some members of the working class at the expense of other[s].”<sup>200</sup> Workplace inequality thus became a problem among workers, not between employers and workers. Tragically, things need not have gone this way. For in hindsight, this whole business of seniority seemed like exactly the kind of complicated problem that would have been much better confronted, not by adversarial litigation built around claims of discrimination,

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197. STEIN, *RUNNING STEEL*, *supra* note 5, at 110-45.

198. *Id.* at 117.

199. *Id.* at 117.

200. *Id.* at 185.

but by the combination of negotiation, expert administration, and most of all structural reforms, that labor's critics of Title VII had said should have been applied to the problem in the first place.

The flexible notion of discrimination on which the remedial seniority cases depended was, at root, the idea that discrimination could be established via a process of burden shifting in the absence of explicit proof of such animus. In 1971, the Supreme Court seemed to give impetus to remedial seniority when it validated this so-called "disparate impact" theory of discrimination.<sup>201</sup> In 1976, in *Franks v. Bowman Transportation*, the Court also endorsed the idea of remedial remedies for discriminatory seniority plans even in cases involving competition for scarce resources.<sup>202</sup> But the very next year the Court moved in a different direction when it decided *International Brotherhood of Teamsters v. United States*.<sup>203</sup> The case involved minority truckers' claim that, having been earlier shunted into a lower paying department, they were disproportionately affected by a policy that caused them to forfeit accumulated seniority when they transferred into a more favorable department. The court rejected the claim and the associated remedy, evidencing a concern that a retroactive remedy might be excessively unfair to incumbent workers (in the case at hand, workers already laid off). In essence, the Court directed lower courts and the EEOC to be more careful in balancing the competing interests and equities before imposing remedial seniority.<sup>204</sup>

The Court quickly extended its ruling in *Teamsters*. In *United Airlines v. Evans*, it applied the reasoning of *Teamsters* to a case where the offensive discrimination, though no longer in practice, had occurred after Title VII was enacted.<sup>205</sup> In 1989, in *Lorance v. AT&T Technologies*, the Court clarified the relevance of disparate impact theory in discrimination cases when it ruled that in the absence of

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201. *Griggs v. Duke Power Co.*, 401 U.S. 424, 431-32 (1971).

202. *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 774-75 (1976).

203. *See Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 353-54 (1977).

204. *Id.* at 355-56.

205. *United Airlines v. Evans*, 431 U.S. 553, 558-59 (1977).

“discriminatory purpose, the operation of a seniority system cannot be an unlawful employment practice even if the system has some discriminatory consequence.”<sup>206</sup> In the wake of these and similar decisions, successful challenges to seniority plans that are not manifestly the product of intentional discrimination are essentially impossible. However, any inclination to celebrate this development as an ironic and belated nod to worker solidarity by conservative judges runs up against not only the injustices that many minority and women workers endured, but the fact that most pernicious implications of Title VII’s problematic encounter with seniority had already reshaped the political landscape of labor rights.

By the time *Teamsters* was decided, the *institutional* solidarity between the labor movement and the civil rights movement, which may have actually strengthened in the struggle to enact the civil rights law, was much eroded, the victim in large part of conflicts over seniority.<sup>207</sup> Scores of Title VII suits alleging discrimination by unions, many of them seniority cases filed with the support of the LDF, had been decided in the federal courts; and over the same period, unions had been subjected to thousands of charges of discrimination before the EEOC.<sup>208</sup> “Civil rights lawyers besieged unions with lawsuits.”<sup>209</sup> Unions’ litigation costs skyrocketed, and some were even driven into bankruptcy.<sup>210</sup> These developments undoubtedly contributed to some increase in diversity in union ranks, particularly among the smaller trade unions (many of them old AFL unions) that were traditionally more discriminatory; but the political and social costs were extremely high. Worker solidarity suffered enormously while liberals and civil rights advocates increasingly saw, in conflicts over seniority, proof that unions were the embodiment of white, male, majoritarian excesses.

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206. *Lorance v. AT&T Tech., Inc.*, 490 U.S. 900, 905 (1989) (quoting *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 82 (1977)).

207. *FRYMER*, *supra* note 121, at 41-42.

208. *Id.* at 88-89.

209. *Id.* at 94.

210. *Id.* at 90-94.



In this way, the campaign to institute and defend remedial seniority became a cornerstone in liberalism's substantial repudiation of the very idea of unionism.<sup>211</sup> In perfect alignment with the class biases of the liberal elites, whose own burgeoning endowments were increasingly beyond criticism, the beleaguered white working man became the very image of race and gender "privilege." Neither institutional nor rank-and-file solidarity could survive well in such a context. Amidst these developments, in the words of historian Jefferson Cowie, the divide between the labor movement and the civil rights movement became "an unbridgeable chasm."<sup>212</sup>

In the meantime, the campaign against seniority plans also abetted employers' bids to reassert control within the workplace. This occurred in two ways. First, the political and economic costs of defending the plans contributed directly to a weakening of the labor movement, rendering unions less able to resist employers on the shop floor and in contract negotiations, and less able to assert themselves politically. In a telling display of how thoroughly its power had been diminished, the labor movement suffered a devastating defeat in its bid to secure modest but much needed reforms of the labor law in 1977 and 1978.<sup>213</sup> Second, the seniority plans, whatever their defects, were themselves very substantial impositions on employer control—indeed, in many ways, they represented the quintessence of postwar labor's success in limiting employers' prerogatives over the all-important issues of layoffs and tenure. Legal and political attacks on the plans thoroughly undermined their legitimacy, to the point that the very word seniority came to serve liberal commentators as shorthand for union racism

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211. As important as seniority in this larger conflict over the meaning and direction of postwar liberalism was not so much the matter of seniority but rather the right of minority workers in unionized workplaces to pursue interests and avenues of protest contrary to the positions taken by their union's leadership. The key case on the question is *Emporium Capwell Co. v. W. Addition Cmty. Org.*, 420 U.S. 50 (1975). For a discussion of the case, the political conflicts surrounding it, and their central role in this larger conflict over the meaning of liberalism, see Reuel E. Schiller, *The Emporium Capwell Case: Race, Labor Law, and the Crisis of Post-War Liberalism*, 25 BERKELEY J. EMP. & LAB. L. 129 (2004).

212. COWIE, *supra* note 182, at 237.

213. *Id.* at 288-96.

and sexism. In the balance, the whole concept of collective bargaining suffered.

Even as these political and ideological dynamics unfolded, the conflict over seniority was almost entirely mooted by the very problem which labor's critics of Title VII had feared would arise if workplace inequality were not confronted on a structural level: the dramatic retrenchment of employment conditions in the very industries where seniority plans proliferated and where the labor movement was anchored. In the steel industry, home to over a half-million workers in the 1960s, diversity was advanced by a series of consent decrees, including a landmark 1974 agreement which undertook to settle several hundred claims of discrimination involving seniority plans, among other things, that had been lodged by blacks, Hispanics, and women, against nine major steel companies.<sup>214</sup> But by the late 1970s, the entire industry was in freefall, as bedrock companies like Jones & Laughlin, Republic, and Bethlehem, battered by a political economy that eschewed any semblance of industrial planning, began their long slides into liquidation and dismemberment. Although blacks' entry into higher paying jobs increased, overall black employment in steel fell from over 38,000 in 1974 to less than 10,000 in 1988; and the consent decrees, which affected 350,000 workers in 1974, applied to only 135,000 in 1988.<sup>215</sup> Just as critics had worried would happen, the reality of employment discrimination had shifted from a question of how to assign job opportunities, to a tragic dispute about whom should be fired.<sup>216</sup>

B. *Workplace Harassment, the Corrosion of Worker Solidarity, and the Extension of Bureaucratic Control*

Even before litigation surrounding seniority plans had fully faded, the tendency inherent in Title VII to undermine

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214. On the consent decree and its limitations, see BRUCE NELSON, *DIVIDED WE STAND: AMERICAN WORKERS AND THE STRUGGLE FOR BLACK EQUALITY* 279-84 (2001); see also *United States v. Allegheny-Ludlum Indus., Inc.*, 517 F.2d 826, 834-39 (5th Cir. 1975).

215. STEIN, *RUNNING STEEL*, *supra* note 5, at 177-95.

216. COWIE, *supra* note 182, at 243.

worker solidarity began to coalesce in another realm: in causes of action premised on workplace harassment based on attributes, including race, sex, religion, and national origin, that are protected by the Act. Typically described as “abusive working environment” or “hostile environment” cases, these claims can be founded on the actions of employers themselves, or their supervisors. But their perverse implications are most fully realized in the way they regulate conduct between coworkers. Like the treatment of seniority systems, the operationalization of anti-harassment norms has directly corroded worker solidarity, primarily by positioning employers as protectors of workers against each others’ ostensibly abusive behaviors. Even more so than remedial seniority, this corrosion of solidarity has entailed the expansion of bureaucratic control.

Although the intellectual foundations of harassment claims were laid out in the 1970s by a number of scholars, lawyers, and activists, foremost among them was Catherine MacKinnon, who concerned herself primarily with sexual harassment.<sup>217</sup> MacKinnon’s prominence is justified, given that her definition of sexual harassment was eventually adopted by the Supreme Court.<sup>218</sup> But MacKinnon’s writings on the subject are also exemplary in another way. Although MacKinnon’s 1979 book on sexual harassment is very effective in showing the real harms that sexual harassment inflicts on women, the book, along with the rest of MacKinnon’s scholarship, is devoid of any concern at all for the way prosecuting and preventing harassment under Title VII might actually dramatically enhance employer sovereignty in the workplace at the expense of class solidarity.<sup>219</sup> Indeed, by her indifference to this question, MacKinnon embodies a tendency evident earlier among civil

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217. See DOBBIN, *supra* note 18, at 192-93; Schultz, *The Sanitized Workplace*, *supra* note 14, at 2079-82. Among other important figures in articulating and publicizing the concept of sexual harassment, see CARROLL M. BRODSKY, *THE HARASSED WORKER* (1976); LIN FARLEY, *SEXUAL SHAKEDOWN: THE SEXUAL HARASSMENT OF WOMEN ON THE JOB* (1978).

218. *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 65-69 (1986).

219. CATHARINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION* (1979).

rights lawyers, but also common among feminists, to subordinate concerns about social class and collective interests generally to identity politics and notions of individual rights. Ironically, this move, which reduces the concept of class conflict and struggle to its own terms (for many of this ilk, class is cognizable primarily as “classism”), is conspicuous for the way it leaves unchallenged the class interests and sensibilities of those who embrace it.<sup>220</sup>

To be sure, elite lawyers were not the only figures behind the development of this concept. Among others who were important in validating the concept of sexual harassment were unions and union officials, including Kathleen Nolan of the Screen Actors Guild.<sup>221</sup> Nor is this the only connection between the concept and the labor movement. For when employers eventually set out to police against harassment in the workplace, they frequently modeled their rules and procedures on union grievance machinery developed after the Second World War.<sup>222</sup> Although also quite ironic, in light of the ultimate implications of harassment policies, these genetic connections to the labor movement reflect something we have already seen both in our general review of the history of control and in our discussion of seniority: the limited ways in which organized labor in the postwar period participated in the construction of bureaucratic control.

The idea of protecting workers from harassment at the hands of their fellow workers is commendable. And the doctrines that emerged, like the move against discriminatory seniority, were concerned with a real problem in the workplace, one that involves not only the more familiar (and more influential) subject of sexual harassment, but also racial and other kinds of harassment.<sup>223</sup> Our earlier review of

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220. On the conflicted place of class in postwar feminism generally, see DOROTHY SUE COBBLE, *THE OTHER WOMEN'S MOVEMENT: WORKPLACE JUSTICE AND SOCIAL RIGHTS IN MODERN AMERICA* 227-28 (2005).

221. DOBBIN, *supra* note 18, at 193.

222. *Id.* at 91-97, 105-06.

223. The EEOC actually receives more charges involving claims of racial harassment than it does charges involving sexual harassment. *Compare Charges Alleging Race and Harassment, FY 1997-FY 2014*, EEOC, [http://www.eeoc.gov/eeoc/statistics/enforcement/race\\_harassment.cfm](http://www.eeoc.gov/eeoc/statistics/enforcement/race_harassment.cfm) (last visited Oct. 30, 2015), *with*

the history of Title VII anticipates, though, that the problem is not with the basic goals of harassment law but with how the law is framed and how it actually operates. In this instance, the relevant doctrines evolved in ways that have, in the guise of affirming the duty of employers to prevent and mitigate harassing activity, directly entrenched the role of employers as protectors of workers from each other and, in the balance, extended bureaucratic control.

How this occurs varies somewhat depending on the form of harassment, as harassment claims are of two types. Employers may be liable if they or their supervisors demand favors in exchange for workplace benefits—so-called *quid pro quo* or “tangible benefit” harassment.<sup>224</sup> And they may also be liable where they either create or suffer the existence of conduct that creates a “hostile work environment.”<sup>225</sup> While *quid pro quo* harassment is, of its nature, virtually always limited to claims involving sex, hostile work environment claims may implicate race, color, religion, and national origin, as well as sex. The hallmark of a harassment claim is a pattern of abusive conduct, not limited to physical acts, but possibly based on verbal conduct as well. In general, the conduct must be both subjectively unwelcome and, from the standpoint of a reasonable person, objectively abusive; it must also be “severe or pervasive” to the point that it

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*Charges Alleging Sexual Harassment FY 2010–FY 2014*, EEOC, [http://www.eeoc.gov/eeoc/statistics/enforcement/sexual\\_harassment\\_new.cfm](http://www.eeoc.gov/eeoc/statistics/enforcement/sexual_harassment_new.cfm) (last visited Oct. 20, 2015). In fact, although first endorsed by courts in the context of sexual harassment in 1976—and not at first embraced by all courts—the concept of workplace harassment has been recognized in the context of national origin harassment as early as 1971. See *Rogers v. EEOC*, 454 F.2d 234, 238 (5th Cir. 1971) (noting Congress’s purpose of eliminating ethnic and racial discrimination); *Williams v. Saxbe*, 413 F. Supp. 654, 657-58 (D.D.C. 1976) (finding sex discrimination when male supervisor took retaliatory actions against female employee because she rejected his sexual advances). For early cases rejecting sexual harassment claims under Title VII, see, for example, *Corne v. Bausch & Lomb, Inc.*, 390 F. Supp. 161, 163 (D. Ariz. 1975).

224. *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 65 (1986).

225. These two types of liability are elaborated by the Supreme Court in an early case validating hostile work environment claims. *Id.* at 64-68, 73.

significantly impairs the victim's ability to work or their well-being.<sup>226</sup>

Although Title VII imposes liability on employers as entities—not on individual workers, even those of high rank—employers are liable for the conduct of their employees under an agency theory. However, how this plays out depends on who authors the offensive conduct. Two Supreme Court cases decided together in 1998, *Burlington Industries v. Ellerth* and *Faragher v. City of Boca Raton*, proved important in firming up doctrine, particularly where the actions of managers and supervisors are implicated.<sup>227</sup> According to *Ellerth* and *Faragher*, liability is strictly imposed, unless the employer can prove by a preponderance of evidence that it had taken reasonable and timely steps to “prevent and correct” harassment, and the employee making the claim of harassment “unreasonably failed” to make use of available remedial procedures.<sup>228</sup>

Inherent in this affirmative defense is that an employer can diminish its exposure to liability by enacting rules barring workplace harassment, establishing procedures by which victims of harassment can lodge complaints, and acting diligently in cases where complaints are filed to remedy the harassment and prevent its recurrence. In the language of *Ellerth* itself, an employer will avoid liability if it “exercised reasonable care to prevent and correct” the harassment and the plaintiff failed to avail herself of these preventative or corrective measures.<sup>229</sup> The preventative measures generally must entail some formal policy barring harassment, as well as a complaint procedure.<sup>230</sup> Significantly, courts judge the sufficiency of the employer's corrective response not only by its promptness but also with regard to whether it is sufficiently punitive under the

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226. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21-23 (1993).

227. See *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998).

228. *Ellerth*, 524 U.S. at 764-65; *Faragher*, 524 U.S. at 807-08.

229. *Ellerth*, 524 U.S. at 765.

230. See *Faragher*, 524 U.S. at 807-08; *Gordon v. Shafer Contracting Co.*, 469 F.3d 1191, 1195 (8th Cir. 2006).

circumstances.<sup>231</sup> And, with ironic implications which we will explore below, courts have likewise taken quite seriously the injunction that workers who fail to avail themselves of these procedures essentially forfeit their harassment claims.

Hostile environment claims are treated somewhat differently where the harassment comes not from the employer or a supervisor, but a coworker of equal or nearly equal rank.<sup>232</sup> In fact, harassment claims involving complaints against coworkers are more common than those involving supervisors.<sup>233</sup> In dictum, the *Faragher* Court endorsed a negligence standard for such cases employed at the time by most courts and the EEOC itself. The employer is liable if it “knew or should have known” of the harassment and failed to rectify the problem.<sup>234</sup> Although the affirmative defense is not directly applicable, and although the mere existence of such rules may sometimes increase an employer’s exposure, with claims involving coworkers, too, an employer may avoid liability by having in place effective policies banning workplace harassment and by deploying

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231. See, e.g., *Loughman v. Malnati Org., Inc.*, 395 F.3d 404, 408 (7th Cir. 2005); *Jackson v. Quanex Corp.*, 191 F.3d 647, 664 (6th Cir. 1999).

232. The Supreme Court has recently narrowed the definition of supervisors for purposes of harassment claims under Title VII. *Vance v. Ball State Univ.*, 133 S. Ct. 2434, 2447-50, 2454 (2013).

233. At least, this is true of sexual harassment claims. See SOC’Y FOR HUMAN RES. MGMT., SEXUAL HARASSMENT SURVEY 6 (1999).

234. *Faragher*, 524 U.S. at 799 (quoting *Morrison v. Carleton Woolen Mills, Inc.*, 108 F.3d 429, 438 (1st Cir. 1997)); see also *Montgomery v. Am. Airlines, Inc.*, 626 F.3d 382, 392 (7th Cir. 2010); *Cross v. Prairie Meadows Racetrack & Casino, Inc.*, 615 F.3d 977, 984-85 (8th Cir. 2010). More specifically, courts have generally held that

[t]o establish a hostile work environment claim, the plaintiff must establish that: (1) he is a member of a protected class; (2) he was exposed to unwelcome harassment; (3) the harassment was based on a protected characteristic of the plaintiff; (4) the harassment affected a term, condition, or privilege of employment; and (5) the employer knew or should have known about the harassing behavior, but failed to take proper action to alleviate it.

*Arraleh v. Cty. of Ramsey*, 461 F.3d 967, 978 (8th Cir. 2006) (citing *Al-Zubaidy v. TEK Indus., Inc.*, 406 F.3d 1030, 1038 (8th Cir. 2005)).

them in cases where harassment has occurred.<sup>235</sup> Importantly, as is also true in cases involving supervisors, an employer is more likely to avoid liability if it inflicts serious punishment on the harasser, and such punishment is likewise evaluated for its deterrent effect.<sup>236</sup>

The advantages to an employer having in place a system for preventing and correcting harassment are further enhanced if the employer also institutes mandatory employer training programs in which workers are apprised of the employer's policies on harassment and their respective rights and duties.<sup>237</sup> In fact, courts have indicated that the mere existence of anti-harassment policies is not enough, and that training is essential to an effective defense.<sup>238</sup> Moreover, EEOC enforcement guidelines effectively encourage employers to adopt written policies barring harassment and outlining complaint procedures, to distribute these periodically, and to train "all employees to ensure that they understand their rights and responsibilities" under these policies.<sup>239</sup> Similarly, EEOC administrative rules on sexual harassment emphasize that "[p]revention is the best tool" and that employers should "take all steps necessary to prevent sexual harassment from occurring, such as affirmatively raising the subject, expressing strong disapproval, developing appropriate sanctions, informing employees of their right to raise and how to raise the issue of

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235. See, e.g., *Waldo v. Consumers Energy Co.*, 726 F.3d 802, 820-21 (6th Cir. 2013); *Peace-Wickam v. Walls*, 409 F. App'x. 512, 520-22 (3d Cir. 2010); *Ocheltree v. Scollon Prods.*, 335 F.3d 325, 334 (4th Cir. 2003). On the potential for unenforced rules, not backed by training, to increase an employer's exposure to liability, see, for example, *Mathis v. Phillips Chevrolet, Inc.*, 269 F.3d 771, 777 (7th Cir. 2001).

236. See, e.g., *Nichols v. Azteca Rest. Enters., Inc.*, 256 F.3d 864, 875-76 (9th Cir. 2001); *Knabe v. Boury Corp.*, 114 F.3d 407, 413 (3d Cir. 1997).

237. See *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 545 (1999); *Peace-Wickham*, 409 F. App'x. at 520-22; *Ocheltree*, 335 F.3d at 334-35.

238. See, e.g., *Hill v. Children's Vill.*, 196 F. Supp. 2d 389, 399-400 (S.D.N.Y. 2002); *Miller v. Woodharbor Molding & Millworks, Inc.*, 80 F. Supp. 2d 1026, 1029-30 (N.D. Iowa 2000).

239. U.S. EEOC, No. 915.002, V(C)(1), ENFORCEMENT GUIDANCE ON VICARIOUS EMPLOYER LIABILITY FOR UNLAWFUL HARASSMENT BY SUPERVISORS (1999), <http://eeoc.gov/policy/docs/harassment.html>.



harassment under title VII, and developing methods to sensitize all concerned.”<sup>240</sup> Finally, by law, some states encourage employers to provide some form of harassment training.<sup>241</sup>

Even before *Ellerth* and *Faragher* were decided, a majority of employers—and virtually all large employers—had already adopted anti-harassment policies.<sup>242</sup> Today, they are nearly universal. This effort to fight “bias with bureaucracy,” to quote Frank Dobbin, represents the very essence of bureaucratic control.<sup>243</sup> The policies, which are often inserted in employee handbooks, are invariably embodied in formal, quasi-legal documents that, like law itself, purport by their very existence to govern workers’ behavior. As we have already mentioned, they often employ complaint procedures modeled after grievance mechanisms in union contracts, albeit with none of the democratic representation implied in collective bargaining agreements.<sup>244</sup>

Although invariably presented as essential tools for complying with the law and safeguarding workers, these policies are, at root, expressions of control. This is particularly evident with regard to policies on sexual harassment. As Vicki Schultz, among others, has pointed out, from the very outset, MacKinnon herself spearheaded a drive to define sexual harassment in a way that essentially equated sexism with sexuality.<sup>245</sup> Although obviously not entirely compatible with the law, this expansive vision of

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240. 29 C.F.R. § 1604.11(f) (2014).

241. Michael W. Johnson, *Harassment and Discrimination Prevention Training: What the Law Requires*, 55 LAB. L.J. 119, 122 (2004).

242. As Frank Dobbin points out, in this respect, the Court in those cases merely “ratified procedures that 95 percent of employers already had in place.” DOBBIN, *supra* note 18, at 4; see also Deborah L. Brake, *Retaliation in an EEOC World*, 89 IND. L.J. 115, 132 (2014).

243. DOBBIN, *supra* note 18, at 101.

244. *Id.* at 197-99. To be sure, unions can cause employers to bargain over harassment rules and procedures and union contracts do sometimes cover these issues, but as union representation has retreated such contracts have become very rare.

245. See Schultz, *The Sanitized Workplace*, *supra* note 14, at 2081-83.

sexual harassment has very much informed the meaning of the concept for the media and the public.<sup>246</sup> More importantly, it has also defined the way the concept has been understood and operationalized by many employers, who, as Schultz documents, often go far beyond what the law requires in controlling workers' conduct: categorically banning sexual jokes and innuendos, flirting, and "insensitive" behavior in general.<sup>247</sup> In the interest of prohibiting sexual harassment, a substantial number of employers bar all amorous relationships between workers, including those of equal rank.<sup>248</sup>

An important respect in which anti-harassment policies go quite beyond the kind of bureaucratic control envisaged by Edwards is in the way they are administered in training.<sup>249</sup> As Dobbin argues, as early as the 1960s, many employers had already begun to institute "sensitivity" and "diversity"

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246. *See id.* at 2083-84.

247. *See id.* at 2091-92, 2094-99.

248. According to one recent survey, over 40% of employers had some kind of policy banning workplace romances. *Workplace Romance Survey*, SOC'Y FOR HUM. RESOURCE MGMT. (Sept. 14, 2013), [www.shrm.org/research/surveyfindings/articles/pages/shrm-workplace-romance-findings.aspx](http://www.shrm.org/research/surveyfindings/articles/pages/shrm-workplace-romance-findings.aspx); *see also* Schultz, *The Sanitized Workplace*, *supra* note 14, at 2124-29; Dana Wilkie, *Workplace Is No Place for Romance*, HR MAG., Dec. 2013, at 13 (referencing the SHRM Workplace Romance Survey: "more than one in 10 (12 percent) [of employers] won't even allow workers in different departments to pair up."). Human Resource and Management publications often specifically counsel the adoption of such policies as a means of evading liability. *See, e.g.*, Nolan C. Lickey et al., *Responding to Workplace Romance: A Proactive and Pragmatic Approach*, 8 J. BUS. INQ. 100, 110-17 (2009); Cindy M. Schaefer & Thomas R. Tudor, *Managing Workplace Romances*, 66 SAM ADVANCED MGMT. J. 4, 4-6, 8 (2001); *Romance in the Workplace Poses Possible Legal Problems*, FAIR EMP. PRAC. GUIDELINES, July 1, 2001, at 5. A search of the internet yields numerous examples of human relations consultant companies that encourage employers to guard against such relationships and adopt policies restricting them. *See, e.g.*, *Managing Office Romance: Does Your Company Need an Anti-Fraternization Workplace Policy?*, AVONTIS (Feb. 9, 2012, 3:28 PM), [www.avontisgroup.com/blog?p=104](http://www.avontisgroup.com/blog?p=104); *Non-Fraternization—Do You Have an HR Policy?*, INSIGHT PERFORMANCE (Mar. 29, 2010), <http://insightperformance.com/non-fraternization-do-you-have-an-hr-policy>.

249. *See generally* RICHARD EDWARDS, *Bureaucratic Control: Policy No. 1.1*, in *CONTESTED TERRAIN: THE TRANSFORMATION OF THE WORKPLACE IN THE TWENTIETH CENTURY* 130, 130-62 (1979).

training, although at the time mainly for supervisors and managers, and mainly with an emphasis on race.<sup>250</sup> By the 1990s, these programs encompassed sexual harassment.<sup>251</sup> By the late 1990s, sexual harassment had become their focus; 70% of corporations had harassment training systems in place and the programs were applied broadly to all employees.<sup>252</sup> In fact, in proof of a different way that capitalism has shaped Title VII's approach to workplace inequality, an industry has emerged to provide employers with an assortment of live trainers, training videos, and online programs.<sup>253</sup> An important point to note in weighing their dysfunctions is that there is very little evidence that these training programs actually reduce rates of harassment and some evidence to suggest that they have important negative effects in this regard, including promoting backlash, a de-legitimated concept of harassment, and a false sense of remediation.<sup>254</sup>

In the name of discouraging harassment in general, these training sessions are designed to impose on workers a program of continuous self-monitoring, underpinned by implicit norms of suspicion and adversity. This approach, which Schultz calls the "cultural sensitivity" approach in contrast to the "zero-tolerance" approach,<sup>255</sup> is particularly pernicious in that its mandate of self-monitoring and self-discipline (as Edwards noticed of bureaucratic control in general) explicitly shifts the employer's project of workplace control onto workers themselves. Each worker oppresses herself, with no direct compensation for doing so. Indeed, employers frequently impose on all workers, not just managers and supervisors, an obligation that they report to management any acts of harassment they know about or

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250. See DOBBIN, *supra* note 18, at 144-46.

251. See *id.* at 147-49.

252. See *id.* at 191; see also Schultz, *The Sanitized Workplace*, *supra* note 14, at 2094-95 n.96.

253. See Susan Bisom-Rapp, *Fixing Watches With Sledgehammers: The Questionable Embrace of Employee Sexual Harassment Training by the Legal Profession*, 24 T. JEFFERSON L. REV. 125, 126, 133 (2002).

254. For a review of the literature on this question, see *id.* at 142-44.

255. Schultz, *The Sanitized Workplace*, *supra* note 14, at 2099-103.

even suspect to have occurred. In ironic throwback to one of the most pernicious methods of union busting, such mandatory reporting rules effectively require that workers spy on each other. With similar irony, the practice parallels the stratagem by which employers seek to nominate workers as supervisors or managers in order to cleave them from other workers, to deprive them of the protections of the National Labor Relations Act and, sometimes, to frustrate workers' attempts to construct functional bargaining units.<sup>256</sup>

The potential for these practices to violate the labor law, though significant, is but one aspect of a broader conflict between workplace harassment rules and worker solidarity. Even where they do not violate the labor law, such rules preempt interactions that are, even if not immediate expressions of worker solidarity, quite often the foundation of truly solidary behavior. Both statistical and qualitative research, as well as anecdotal observations, confirm that intimate contact between workers in the workplace is absolutely integral to successful union organizing.<sup>257</sup> Flirting, horseplay, joke-telling, bull sessions, and other activities that are prohibited in the name of mitigating harassment, form part of the fabric out of which rank-and-file solidarity must be woven. These activities are integral for precisely the same reasons that make them unprofessional and deviant: of their nature, they establish among workers an identity, a set of interests, and an ethos all independent of the employer's, and they provide a space in which workers can develop and express trust and familiarity. These dynamics are crucial, for although organizing drives are not as physically dangerous

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256. To be sure, employer rules that impinge on workers' protected rights to engage in "concerted activity," which includes but is not necessarily limited to forming, joining, or assigning in the running of a union, may well be prohibited by the National Labor Relations Act. See *Guardsmark, LLC v. NLRB*, 475 F.3d 369, 372-74, 380-81 (D.C. Cir. 2007). Beyond the fact that such rights have become notoriously difficult to vindicate is the broader problem that such rules may impinge on conduct that is not protected because it is attenuated from protected concerted activity, but is nonetheless important to the development of solidarity.

257. For both a review of the research on this question as well as specific research in support of this thesis, see Kate Bronfenbrenner & Robert Hickey, *Changing to Organize: A National Assessment of Union Strategies*, in *ORGANIZING AND ORGANIZERS: REBUILDING LABOR* 17 (Ruth Milkman & Kim Voss, eds., 2004).

as they were in the 1930s, they remain contentious and risky affairs. Employers are adept at cultivating anti-union “solidarity” among anti-union workers.<sup>258</sup> Union supporters are regularly harassed, disciplined, or fired by employers.<sup>259</sup> And the labor law, weakened doctrinally and by the erosion of the very solidarity it purports to protect, often affords few effective remedies in these cases.<sup>260</sup> In such a context, it is absolutely essential that workers forge bonds of the kind that are difficult to build where the workplace has been, in Schultz’s words, so sanitized.

It goes without saying that jokes and bull sessions and such are not always conducive to constructive forms of worker solidarity; that they can indeed be oppressive to women and minorities; and that in this fashion, they can also undermine solidarity. Nevertheless, the more important point is that even the best workplace harassment rules are not devised by employers with any idea of maintaining a foundation of worker solidarity. Quite the contrary: even in their most justifiable form, these rules inevitably affirm the authority of the employer as the protector of workers from each other’s dysfunctions and depredations. Such is essential to their basic structure and grammar: workers—“employees,” “associates,” and “team members”—are prohibited from inflicting various harms on others, on pain of the employer stepping in and disciplining, even firing the offending worker. Workers are each other’s enemies, and employers, their protectors. Often enough, this dynamic is further heightened by wrapping the rules in the language of “diversity” and “inclusion,” the importance of “teamwork,” and the value of a “safe” environment—paternalistic rhetoric that is the modern cognate of the old “company family concept.”

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258. Robert A. Penney, *Workers Against Unions: Union Organizing and Anti-Union Countermobilizations*, in REBUILDING LABOR: ORGANIZING AND ORGANIZERS IN THE NEW UNION MOVEMENT, *supra* note 257, at 88-95.

259. See JOHN T. DUNLOP, U.S. DEP’T. OF LABOR, U.S. DEP’T. OF COMMERCE, FACT FINDING REPORT: COMMISSION ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS 84-85 (1994); Michael Goldfield, *Labor in American Politics—Its Current Weakness*, 48 J. POL. 2, 9-10 (1986).

260. See Paul Weiler, *Promises to Keep: Securing Workers’ Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769, 1787-94 (1983); see also GROSS, BROKEN PROMISE, *supra* note 13.

All of this conceals the fact that, although these rules ostensibly benefit workers, and although they may indeed accrue to workers' advantage in many cases, their most direct beneficiary is the employer. In fact, harassment training sessions themselves are important displays of employer sovereignty over workers, not least because they are mandatory, "captive audience" affairs, and their scheduling and content remain entirely within the control of the employer. Typically inane and annoying, they too allow the employer to present itself as an agent for protecting workers against one another in the course of asserting its prerogative to rule the workplace. Often based, like harassment rules, on overly-broad views of what is prohibited by the law and conveyed with the intent to scare their audience with the prospect of job loss, these sessions enhance divisions among workers in very palpable ways.<sup>261</sup>

These practices are all hallmarks of a program of bureaucratic control that is most fully realized when the rules are actually deployed to discipline or fire workers outright. Although recent data is not available, it appears that employers typically discipline the targets of harassment complaints, despite the fact that many such complaints involve conduct that would not actually give rise to a viable claim against the employer.<sup>262</sup> The indecorous image of a worker being escorted out of the workplace because she has been fired for harassment—or even that of a worker being compelled to attend remedial training sessions—may well advance some laudable goal, including the deterrence of harassment by others. But this image also reaffirms the basic sovereignty of the employer in the workplace and their position as defender of workers from each other. Whatever benefits are realized come at the expense of all workers being

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261. For instance, one veteran anti-harassment trainer describes how almost every harassment training video she is familiar with attempts to "scare" workers into compliance, and how the nearly inevitable result of this is heightened conflict between workers and a more divided workforce. Rita Risser, *Sexual Harassment Training: Truth and Consequences*, 53 TRAINING & DEV., Aug. 1999, at 21, 23. On the intent to frighten workers in these sessions, see Schultz, *The Sanitized Workplace*, *supra* note 14, at 2100-01.

262. At least, this appears to be the case with sexual harassment complaints. See Schultz, *The Sanitized Workplace*, *supra* note 14, at 2104-05.

subject to a telling display of the awesome power that employers possess—in this instance, backed, apparently, by the law, which rewards employers for swift and punitive action.<sup>263</sup>

The prerogative that harassment charges provide employers to discipline or fire workers underlies another, very specific way in which this legal regime abets the erosion of worker solidarity. Such charges are often invoked by employers to justify disciplinary action against workers where this otherwise appears to constitute illegal discrimination or coercion in violation of section 7 and section 8 of the National Labor Relations Act. Often, such claims are dismissed as pretexts by the NLRB, but not always.<sup>264</sup> In 2005, a majority panel of the Board overturned a ruling by an administrative law judge and let stand the discharge of a worker who was active in union organizing on the basis of the employer's claim that the worker had violated its sexual harassment policy. It did so despite its own acknowledgement that the employer was also motivated by an unlawful intent to violate the worker's rights under the labor law—and also, as a dissenting member complained, despite ample evidence that the horseplay that constituted the violation was rampant in the workplace and generally tolerated.<sup>265</sup> In 2000, another Board majority overturned an administrative law judge to uphold an employer's discipline of two workers, despite acknowledged evidence that it was motivated by unlawful anti-union animus, because the majority concluded that the workers' use of foul language to describe managers and workers who were unsupportive of the union was "intimidating and scaring the women."<sup>266</sup>

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263. See Estelle D. Franklin, *Maneuvering Through the Labyrinth: The Employers' Paradox in Responding to Hostile Environment Sexual Harassment—A Proposed Way Out*, 67 *FORDHAM L. REV.* 1517, 1549-57 (1999); Mark McLaughlin Hager, *Harassment as a Tort: Why Title VII Hostile Environment Liability Should Be Curtailed*, 30 *CONN. L. REV.* 375, 412 (1998).

264. See, e.g., *Ozburn-Hessey Logistics, LLC*, 359 N.L.R.B. 109, (May 2, 2013); *United Parcel Serv.*, 327 N.L.R.B. 317, 319-21 (1998); *Radisson Muehlebach Hotel*, 273 N.L.R.B. 1464, 1475-76 (1985).

265. *Krystal Enters. Inc.*, 345 N.L.R.B. 227, 227-31 (2005).

266. *Fixtures Mfg. Corp.*, 332 N.L.R.B. 565, 566 (2000). In particular, they credited the employer's assertion that the women:

Again, a dissenting member (the same, actually, as in the 2005 case) noted that the employer appeared to have little interest in enforcing its harassment policy—except to justify disciplining these workers.<sup>267</sup>

These critical observations about the pernicious functions of anti-harassment programs are consistent not only with Edwards' investigations, but also with the conclusions of sociologists who contend that diversity policies and procedures are implemented in ways that routinely align with the interests of employers. Consistent with Dobbin's account of how employers appropriated and bureaucratized the project of workplace equality, a number of researchers find that anti-harassment policies have often been embraced by employers as "good for business."<sup>268</sup> A closer look at how these programs operate reveals why this is so.

Although very little research has been done on the actual nature of harassment (or "diversity") training—in part because access is so difficult to obtain—what has been managed is instructive.<sup>269</sup> For instance, Susan Munkres' study of supervisor training revealed that the "trainers take it as a given that the supervisors will not engage in

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were offended by his [a worker named Sheall] calling employees "mother fucking chicken shits" and various members of management "chicken shit" and "mother fucking chicken shit." Lackey also testified that several women complained to her about Hoff's "foul language." They told her Hoff was "obscene," that they did not like to hear what he was saying, that they were "offended," and that "they felt threatened by him." They told Lackey that they heard Hoff saying "[Y]ou can see who's got the fucking balls—they wear the [Union] pins."

*Id.*

267. *Id.* at 566 n.14. *Cf.* NAPA Ambulance Serv., Inc., Case 20-CA-26832, 1997 WL 33316037 (N.L.R.B. Div. of Judges) (Apr. 15, 1997) (noting that the employer took necessary and proper steps to enforce its sexual harassment policy).

268. *See, e.g.*, Meredith Ann Newman, *Sexual Harassment and Productivity: It's Not Just a U.S. Problem*, 19 PUB. PRODUCTIVITY & MGMT. REV. 172, 178-79 (1995); Jana L. Raver & Michele J. Gelfand, *Beyond the Individual Victim: Linking Sexual Harassment, Team Processes, and Team Performance*, 48 ACAD. MGMT. J. 387, 395 (2005).

269. On the paucity of research and difficulties in conducting it, see Susan A. Munkres, *Claiming "Victim" to Harassment Law: Legal Consciousness of the Privileged*, 33 LAW & SOC. INQUIRY 447, 453 (2008).



harassment or discrimination”; instead, they exhorted the supervisors to control their subordinates.<sup>270</sup> Significantly, the trainers led their subjects to see “supervisors as rights-promoters rather than . . . workers as rights-claimants.”<sup>271</sup> Although Munkres argues that this represented a positive step in subverting the “resistance” of supervisors,<sup>272</sup> for us her findings are significant in showing how such training is geared to affirming hierarchy and authority.

Lauren Edelman argued early on (before the advantages to employers of harassment training and rules had been clearly affirmed by courts), on the basis of a survey of several hundred employers, that employers approach their obligations under Title VII with the aim of “minimiz[ing] law’s encroachment on managerial power,” and that they achieve this via their institutional capacity to “mediate” the meaning of the law in how they manage compliance.<sup>273</sup> Consistent with Judith Stein’s criticism, Edelman contends that this prerogative stems in large part from the law’s ambiguity and the way it was designed to depend on private litigation for enforcement.<sup>274</sup> Moreover, Edelman’s later survey (with two co-authors) of procedures at a small sample of large employers in the early 1990s found that the procedures functioned as a means of privatizing civil rights in a manner that ultimately subordinated “legal goals” to “managerial goals,” including that of “attaining a productive business environment with good working relationships and high employee morale.”<sup>275</sup> Edelman’s subsequent examination of managerial literature, this time after *Ellerth* and *Faragher* (and with a different group of co-authors) found more evidence of the re-articulation of anti-harassment and civil rights norms to advance managerial interests.<sup>276</sup> The main concern for Edelman and her coauthors in every one of these works was the potential “dilution” of legal rights. But

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270. *Id.* at 454-56.

271. *Id.* at 448, 454-58.

272. *Id.* at 456-58.

273. Edelman, *Legal Ambiguity*, *supra* note 18, at 1535-36.

274. *See id.* at 1536-41.

275. Edelman et al., *Internal Dispute Resolution*, *supra* note 18, at 511, 529.

276. Edelman et al., *Diversity Rhetoric*, *supra* note 18, at 1615-18.

what interests us is how this research confirms the intuition that employers consistently reduce the mandates of harassment law to their own interests and their own program of bureaucratic control of the workplace.

It might be tempting to say in response to these criticisms that the real problem lies with the fact that harassment policies and training programs may be used by employers in defending against harassment claims in the first place, and not with the law as such. But this is actually not so. For it is difficult to imagine a system of liability in coworker harassment cases that would not feature such defenses and in turn inspire these responses among employers. It is at least difficult to contemplate a system of this kind that is also remotely fair and yet consistent with the adversarial and individualistic character of the entire Title VII regime. Indeed, as Dobbin has argued, in rough alignment with Edwards' thesis, Title VII prefigured the devolution of the authority to decide when and how to enforce the law to managers, or "personnel experts," precisely because the drafters of the Act eschewed the activist, independent administrative approach, modeled on the NLRB and championed by labor officials, in favor of one that is not only adversarial and individualistic but institutionally unable to operationalize its norms without managers playing this central role.<sup>277</sup>

For Dobbin, this all reflects "the paradox of a weak state" marked by the fragmentation of government power and the relative lack of authority of government compared to corporations.<sup>278</sup> But as critical theorist Franz Neumann once observed, the idea of the weak State distracts from an appreciation of its true role in class society as a capable guardian of capitalist interests and ideology, and an arbiter of competing claims among the powerful: "The liberal state has always been as strong as the political and social situation and the interests of society demanded . . . . It has been a strong state precisely in those spheres in which it had to be

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277. DOBBIN, *supra* note 18, at 5-6.

278. *See id.* at 6-7.

strong and in which it wanted to be strong.”<sup>279</sup> In this light, Dobbin’s more specific point, that the peculiar structure of the state in America “opened the government to invasion” by those seeking influence, rings truer.<sup>280</sup> So does Stein’s suggestion that this legacy of Title VII reflects exactly the values of those who successfully worked to shape its meaning.<sup>281</sup> In other words, the law was designed by its champions in Congress, the White House, and the Civil Rights movement with at least an indifference to how it might aggrandize the power of employers. And this is what has happened.

#### CONCLUSION LIBERALISM AGAINST LABOR

In the opening chapter of his popular 1991 book, *Which Side Are You On?*, labor lawyer and journalist Thomas Geoghegan reflects bitterly on mainstream liberalism’s quiet contempt for the very notion of worker solidarity.<sup>282</sup> Liberals, even self-professed radicals, he said, “have more in common with Reagan” than with the labor movement, while Lane Kirkland, then president of the AFL-CIO and much reviled by labor radicals for his conservatism, was nevertheless “outside the American consensus in a way that even Abbie Hoffman never was.”<sup>283</sup> Indeed, Geoghegan then quotes with obvious approval a radical friend’s observations on Kirkland’s predecessor George Meany, an even more conservative man who was the very personification of the postwar bureaucratization of the labor movement: “You know, I feel much closer to Meany, whom I despise, than a lot of the liberals. He might be right-wing, but if the crunch really came, you could count on Meany, like you couldn’t

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279. FRANZ NEUMANN, *The Change in the Function of Law in Modern Society*, in *THE DEMOCRATIC AND THE AUTHORITARIAN STATE* 22, 22 (1957).

280. DOBBIN, *supra* note 18, at 19.

281. *See id.* at 44-49, 52-55.

282. *See generally* THOMAS GEOGHEGAN, *WHICH SIDE ARE YOU ON? TRYING TO BE FOR LABOR WHEN IT’S FLAT ON ITS BACK* (2004).

283. *Id.* at 7.

count on any liberals . . . .”<sup>284</sup> For Geoghegan, liberalism’s apathy to solidarity is congenital—“Emerson, Thoreau, all these guys are scabs.”<sup>285</sup>

The genealogy of American liberalism’s hostility to solidarity is something this Article certainly speaks to. By the most obvious markers, worker solidarity has definitely been in decline in this country for some time. Since Title VII was enacted, union membership in America has declined to levels not seen since the 1920s—falling from nearly 35% of the private sector, non-agricultural workforce in 1954 to only 7.5% in 2013.<sup>286</sup> Major strikes, which annually averaged in the hundreds from the 1930s into the mid-1970s, have diminished nearly to the point of disappearance, with only a few dozen, at most, in recent years.<sup>287</sup> A major reason for this is that strikes often end in failure—so often, in fact, that employers frequently bait unions into striking for the purpose of replacing strikers with strikebreakers.<sup>288</sup> Union organizing activity has also faltered, as has organizing success. In the early 1960s when Title VII came about, unions won nearly 60% of NLRB-sponsored representation elections; by the 1980s, that figure slipped below 50%.<sup>289</sup> And while the success rate for unions has rebounded in recent years, this

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284. *Id.*

285. *Id.*

286. On declining union membership, see MAYER, *supra* note 116, at 22-23 tbl.A1; LAWRENCE MISHEL ET AL., ECON. POL’Y INST., THE STATE OF WORKING AMERICA 269 fig.4AC (12th ed. 2012), <http://www.stateofworkingamerica.org/subjects/wages/?reader>; BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE U.S.: 1980, at 429 no. 714 (101st ed. 1980); Goldfield, *supra* note 259, at 3 fig.1; *News Release*, BLS (Jan. 24, 2014, 10:00 AM), [http://www.bls.gov/news.release/archives/union2\\_01242014.pdf](http://www.bls.gov/news.release/archives/union2_01242014.pdf).

287. On declining strikes, see *News Release*, BLS (Feb. 12, 2014, 10:00 AM), [http://www.bls.gov/news.release/archives/wkstp\\_02122014.pdf](http://www.bls.gov/news.release/archives/wkstp_02122014.pdf); *see also* BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE U.S.: 2001, at 410 no.636 (121st ed. 2002); BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE U.S.: 1991, at 423 no.694 (111th ed. 1991).

288. *See* Ruth A. Bandzak, *The Strike as Management Strategy*, 26 J. ECON. ISSUES 645, 653-54 (1992); *see also* TOM JURAVICH & KATE BRONFENBRENNER, RAVENSWOOD: THE STEELWORKERS VICTORY AND THE REVIVAL OF AMERICAN LABOR 37-38 (1999).

289. *See* DUNLOP, *supra* note 259, at 81 Exhibit III-1.

actually reflects deeper difficulties in organizing, as the number of elections has fallen to less than half the number in 1990 and less than one-quarter the number in the early 1960s.<sup>290</sup>

As the simultaneous deterioration in labor standards and the social and political standing of the working class since the 1970s make clear, this retreat of labor activism has little to do with the notion, implicit in arguments about the obsolescence of unions and such, that exploitation and alienation in the workplace have been largely conquered.<sup>291</sup> Rather, just as the explosive unionization in the 1930s and 1940s reflected the crisis of hierarchical and technical forms of control during that era, what has happened over the last several decades reveals, above all, employers' success in reestablishing their control of the workplace. To be sure, a number of other factors have obviously contributed to the retrenchment of unionism and labor activism, including deindustrialization, a hostile political and legal climate, a renewed offensive by employers, and the institutional deficiencies of the labor movement.<sup>292</sup> And other factors no doubt have altered the way employers pursue such control. But as our review of the history of employer control makes very clear, effective worker solidarity is a crucial mediating factor in deciding workers' ability to challenge employers' sovereignty and contest the terms of exploitation. These observations lead us back to Title VII. A postwar workplace in which bureaucratized union governance imposed on worker solidarity, while nonetheless continuing to rely on it to hold in check employers' appetite for control, has been replaced by one in which the realization of Title VII's program much more completely undermines the foundations

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290. See *id.*; 74 NLRB ANN. REP. 125 tbl.13 (2009). Compare 30 NLRB ANN. REP. 192 tbl.10 (1966), with NLRB, *Disposition of Election Petitions Closed in FY14*, <https://www.nlr.gov/news-outreach/graphs-data/petitions-and-elections/disposition-election-petitions-closed-fy14> (last visited Sept. 7, 2015).

291. See MISHEL ET AL., *supra* note 286, at 181 tbl.4.2, 184 tbl.4.3, 186 tbl.4.4, 189 tbl.4.5; CARMEN DENAVAS-WALT ET AL., U.S. DEP'T OF COMMERCE, U.S. CENSUS BUREAU, INCOME, POVERTY, AND HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2012, at 5 fig.1, 7 tbl.1, 13 fig.4, 18 tbl.5 (2013).

292. For a review of this question, see LICHTENSTEIN, STATE OF THE UNION, *supra* note 119, at 212-45 (2002); Goldfield, *supra* note 259, at 6-8.

of worker solidarity while directly legitimating and promoting the most pernicious forms of employer control.

This conclusion has important implications for debates about the relationship between employment law and the rights of individual workers, on the one hand, and labor law and labor rights, on the other. Employment law scholars have long claimed that the expansion of individual rights in the workplace, spearheaded by the passage of Title VII, has negated the need for labor law, unions, and other collective modes of advancing workers' interests in the workplace. More recently, liberal scholars in this vein have taken to arguing that such laws' program of individual rights could be used to accomplish what the labor law no longer seems able to do: to nurture, support, and ultimately reinvigorate the labor movement.<sup>293</sup> Others have argued more prosaically that employment laws like Title VII inevitably advance the cause of collective labor rights simply by rolling back employers' prerogatives to discipline or fire individual workers.<sup>294</sup> What this Article suggests is that employment law, and Title VII in particular, have not so much negated the need for unions and labor law as helped erode their foundations; that the idea of using such laws to reinvigorate the labor movement is misconceived; and that impositions on the doctrine of employment-at-will via laws like Title VII are not necessarily zero-sum deductions from employers' power in the workplace.

In fact, far from augmenting the labor law, what Title VII has actually done is invert the logic of the labor law in the course of serving very different interests. Although not a radical regime by any means, the National Labor Relations Act was enacted with the express intention of diminishing employer sovereignty in the interest of worker solidarity. It accomplished this in both functional and highly symbolic ways, including by limiting employers' speech and forcing them to suffer the return to the workplace of people they had fired for concerted activity, as well as requiring employers to bargain in good faith with workers over the terms and conditions of employment. Title VII, as we have seen, has

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293. See, e.g., Benjamin I. Sachs, *Employment Law as Labor Law*, 29 CARDOZO L. REV. 2685, 2687, 2721, 2744 (2008).

294. For a critical review of this perspective, see LICHTENSTEIN, STATE OF THE UNION, *supra* note 119, at 207-11.

served opposite ends in opposite ways. Enacted with a narrow view of the kind of employer control it would endeavor to restrain, an even narrower view of how this might be accomplished, and an indifference to how, in fact, its program might actually augment employers' power, Title VII has indeed affirmed and justified employers' sovereignty to the detriment of worker solidarity. It is the embodiment in law and policy of Geoghegan's depiction of liberalism.

Liberalism, in turn, has subordinated class to an individualistic and legalistic framework of workers rights—thus its attempt to reduce class to a species of bias, an artifact of discrimination cognizable in the uselessly subjective and absurdly symmetrical concept of “classism.” The roots of this turn have come into clearer focus in recent years. Historians, including Jefferson Cowie, have documented how the same contest between civil rights liberals and representatives of organized labor that shaped Title VII, culminated in the years that followed in a realignment of the Democratic Party and postwar liberalism more generally, along lines that favored identity politics and the claims of minorities and women, over class politics and the interests of organized labor and the working class.<sup>295</sup> Not coincidentally, the 1970s and 1980s, in which Title VII devolved into a venue of employer control and an engine of conflict among workers, were also a period in which the ethos of liberalism changed, jettisoning an earlier accommodation with class consciousness and collective interests in favor of a program, defined, like Title VII itself, by individualism, private litigation, and a therapeutic sensibility.<sup>296</sup> In this political and cultural context, labor rights and worker solidarity proved easy targets for employers, politicians, and judges. It was no coincidence either that the period after Title VII “brought forth a dual movement: the revolution in minority and women's occupational rights took place at the same time as the counter-revolution in labor rights.”<sup>297</sup>

The developments described in this Article are at once an expression of this political realignment and a particular

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295. See COWIE, *supra* note 182, at 236-37; STEIN, PIVOTAL DECADE, *supra* note 189.

296. See COWIE, *supra* note 182, at 213-21.

297. *Id.* at 239.

example of how liberalism's turn away from class and toward identity has imprinted itself in law and policy and the everyday conditions of the workplace. Indeed, they reveal the self-perpetuating nature of this process. For just as Title VII advances bureaucratic control and undermines worker solidarity, the decay of worker solidarity results in a further erosion of unions and working class activism, leaving workers even more vulnerable to employers' assertions of authority. Such is the ironic synergy in the workplace of individualism and individual rights with employer paternalism.

In this fashion, Title VII has provided employers with a way of undermining unions and labor rights, and consolidating their control of the workplace, not only covertly and in a paternalistic guise, but in a fashion that is legitimated and justified by a liberalism now dominated by identity politics. It allows employers, with the pretense of keeping workers safe from other workers, to protect their interests from workers generally and to make their workplaces safer from capitalism. And it allows liberals to express their supposed support for workers perversely, by endorsing employers' power over those workers. In all these ways, Title VII has been proved as reactionary and dysfunctional in its implications as the advocates of a different approach worried would happen fifty years ago. In their prescience about Title VII, those critical voices from the ranks of organized labor and an older brand of postwar liberalism revealed an understanding of the dangers of liberalism's turn in law and politics from class to identity, one that people who call themselves liberals or progressives and presume to care about workers would do well to reflect on today.