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they were, importantly, joined and pushed by increasingly aggressive and organized civil rights activists and a sympathetic legal community of plaintiffs, lawyers, and judges who, in turn, institutionalized civil rights policies in a manner that transformed and altered the New Deal regime.⁴

This history has led scholars on both the left and the right to juxtapose Progressive-era regulation against the lack of commitment to racial equality and to see the rights revolution as essential to eradicating the racism that was always the subtext of early-twentieth-century reforms. In recent years, some scholars have gone further, suggesting that Progressivism was a detour on the road to equality. In its most extreme formulation, Progressivism was discredited by its racism, and it is argued that only a full-throated commitment to individual rights in the contemporary period holds out the promise of redeeming the potential of the Gilded Age to join democracy with *laissez-faire* economics.

Consider in this regard recent scholarly attempts to “rehabilitate” *Lochner v. New York* (1905). This ruling has traditionally been understood as vindicating an imagined vested right that was used to defend individual freedom to contract against an invasive Progressive agenda to regulate in the name of the public good. *Lochner* was discredited when the Supreme Court declared that no such fundamental right to contract existed and that government had the authority to pursue reforms associated with the New Deal and, later, Great Society programs. Those now seeking to rehabilitate *Lochner* argue that the Progressives’ critique of rights merely abetted a view of the public good that was racially charged and discriminatory. They assert that the rights upheld in *Lochner* would have—if defended—helped protect African Americans who were entering into a racially stratified labor market in which white male domination of both corporate capital and the trade unions served to deny blacks entry into many workplaces.⁵ In short, the effort to rehabilitate the old order of the *Lochner* era is part of a broader and sustained attack against the core principles of the Progressive order. More broadly, the racism of the era is being used as evidence of the failure of a reform idea: the use of governmental regulation to address societal inequalities.

Perhaps the most vocal of these rehabilitators of *Lochner* is David Bernstein, who charges that Progressive legal scholars and judges enabled and defended segregation as part of the police power and did not treat it as a violation of the Equal Protection Clause.⁶ He defends the jurisprudence of the *Lochner* decision as one that “pioneered the protection of the right of women to compete with men for employment free from sex-based regulations, the right of

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Civil Rights Aspirations in the Progressive-Era

Department of Labor

Paul Frymer

It is now well established that the intellectual vitality and political achievements of the Progressive era coincided with extensive reversals in civil rights and racial equality. Although a time of critical political innovation, when reformers increasingly looked to administrative institutions operationalized through national and local governments to help solve a range of societal ills caused by increasing industrialism and economic inequality, the Progressive era also marked a period frequently referred to as the nadir of American race relations.¹ The racism of the period came not just from southern whites reasserting their dominance in the aftermath of Reconstruction by imposing Jim Crow and voter disenfranchisement, but from many northern Progressives who injected a range of eugenic, social Darwinist, and male-dominant heteronormative ideas to promote xenophobic, segregationist, nationalistic, and imperialistic political agendas.²

Progressive-era racism was of significant consequence, since the ideas of the period became institutionalized in New Deal policies that promoted economic and social regulation in racially bifurcated ways. New Deal legislation including the National Labor Relations Act, the Social Security Act, and the Fair Labor Standards Act exempted critical coverage for African Americans seeking respite from economic and racial inequality.³ As a result, it was not until the “rights revolution” of the mid-twentieth century that democratic idealism became meaningfully inclusive. The rights revolution, in turn, relied on a set of tactics and instruments befitting a different political time and context, one in which both newly emergent organizations and older institutions found themselves importantly altered by ongoing changes in society and government. Political parties and administrators by no means disappeared, for instance, but

African Americans to exercise liberty and property rights free from Jim Crow legislation, and civil liberties against the states ranging from freedom of expression to the right to choose a private school education for one's children.⁷ Had the Old Court's defense of rights won out over Progressive-era efforts, Bernstein implies, African Americans would have benefitted from the free market. His attack, then, is part of a larger critique of both the Progressives' and the New Deal's reliance on governmental regulation of the economy as a tool used against inequality and on behalf of unions.

Both the traditional understanding of *Lochner*—as upholding an individual right to contract versus the governing authority to regulate for the public good—and the new scholarship—which reframes *Lochner* as maintaining individual rights against Progressive regulatory aims infused with racist intent—rely on false juxtapositions of concepts like regulatory administration and rights, and on dichotomies among governments, courts, and individuals. They also, in the course of drawing such dichotomies, ironically subordinate race to other considerations and deny its foundational status in any explanation of American political development. The scholarly debate is about rights versus regulation, and race, racism, and racial inequality in American society become reduced to mere exemplars. This debate presumes that rights and regulation can and do exist outside racial stratification, offering seemingly neutral, though contrasting, institutional responses.

Activists and scholars interested in racial power rarely make such distinctions, instead seeing different democratic approaches as offering historically specific opportunities in the ongoing battle to attack the long-standing bastions of racial inequality. Civil rights lawyers in both the *Lochner* and the New Deal eras looked creatively for any opportunity to challenge racial hierarchies.⁸ From W. E. B. Du Bois to Ralph Bunche to A. Philip Randolph, they attacked Progressive ideals and policies that excluded and hurt African Americans.⁹ But they did not then leap to the false juxtapositions and stark alternatives that characterize today's debate. In fact, their critiques tended to be largely consistent within the Progressive framework of the time. Many black leaders, especially those focused on economic reform, by and large endorsed the chief tenets of Progressivism, from the promotion of regulation to the aspirational emphasis on knowledge, science, and education. What distinguished them most from their white Progressive allies was that they demanded recognition of the race problem as something distinctive and central to the human condition, and they demanded enactment of specific measures to extend Progressive policies to the African American community.

To illuminate this distinction between, on the one hand, a trade-off between rights and regulation, and, on the other hand, the mutual entailments of rights and regulation, the rest of this chapter focuses on the work of African American activists in the Department of Labor (DOL) during the Progressive era, and on two men in particular: W. E. B. Du Bois and George E. Haynes. The labor problem was in many ways at the heart of the Progressive project, and the establishment of the Department of Labor and its forerunner, the Bureau of Labor, represented an early victory. Like many of these early institutional victories, the DOL was not a huge success. Its power was at the margins, and it rarely used such power for anything more than conciliation and tepid reformism. In the area of race, the Department of Labor did little to disturb a racially fragmented labor market dominated by white employers and by unions that discriminated against African Americans. But the department, following the Progressive spirit of believing in the power of knowledge, science, and expertise to expose societal problems and begin the process of solving them, participated in a quite wide-ranging examination of black labor in American life. Some of this was through issued reports. Du Bois wrote three of these reports for the Bureau of Labor in the years around 1900, compiling empirical data on African Americans that would help form the basis of his monumental book *The Philadelphia Negro*. In addition, the DOL created the Division of Negro Economics, headed by George Haynes. The division was consistently hampered by the broader constraints of the department and the times, but nonetheless represented one of the first civil rights employment agencies in American history.

My goal here is not to reclaim the Department of Labor as a force of Progressivism that sharply joined its agendas with understandings of racial power. At the end of the day, it did not. Instead, I want to explain why these two civil rights activists were drawn to the Progressive project. First, I show that they shared the Progressives' faith in the empirical findings of social scientists and other leading experts. They looked, in particular, for applications of Progressive techniques that might spur progress in race relations. Second, I retrace their discovery that science and expertise were not enough to focus the attention of the larger public on racial inequality and, through that discovery, that race and racial oppression were independent forces that could not be completely subsumed within the Progressive mantle of reform.¹⁰ Neither of these men succeeded in making their visions mainstream, either in the nation or in the Progressive movement. But their vision was decidedly not rights versus regulation. It was instead that racial progress required that the two be joined.

Rights are as race-less as regulation. The primary figures discussed in this chapter were interested in neither rights nor regulation per se. Instead, they sought to address the problem of racial inequality and to mobilize whatever resources were available to that end. Federal labor regulators wanted to know more about the lived experience of African Americans, and they enlisted the likes of Du Bois and Haynes as experts in this endeavor. When Du Bois and Haynes reciprocated, they acted on the Progressive premise that an objective assessment of the facts on the ground would lead both to an understanding of social problems and to progress toward their solution. Their studies were exemplary of the Progressive intent to identify social trends and to prepare the ground for action. They became disillusioned when politicians construed their findings in a way that served their own prejudices and ultimately questioned the whole premise of research targeted at racial problems. The racism was not in the techniques employed, but in the mindset of those politicians who reviewed the findings. Indeed, those Progressive techniques remained invaluable to the cause of promoting equality even after racism was assaulted more directly by the demand for civil rights. It was only when the Progressive commitment to social knowledge was joined to a commitment to equality that a civil rights agenda was more fully realized.

W. E. B. Du Bois and the Bureau of Labor's Reports on African American Life

Responding to the "constant, pressing, and growing demand for authentic information upon the subject of labor," Congress established the Bureau of Labor in 1884 to respond to the more than ten million people in the United States engaged in manual labor.¹¹ The bureau reflected the ideas of the budding Progressive movement and followed the development of similar labor bureaus in numerous northern states dealing with industrial strife and alarming social conditions. Massachusetts was first, creating its Bureau of Labor Statistics in 1869, with the mission of using social science and statistics to alert politicians and the broader public to workplace problems and to consider what might be done to promote greater peace and harmony. Legislators in Congress argued that a new federal bureau was needed to foster "a greater, profounder, and more extended knowledge of the general character, habits, manners, customs, and dispositions of the people, their social status, their progress in civilization and intelligence, their material and sanitary condition, their advancement in moral and mental culture"; its object would be "to promote a more general

diffusion and better comprehension of social science . . . based upon statistics which collect, collates, arranges, and compares facts, from which the statesman ascertains, and without which he can not ascertain, those great principles in accordance with which the state must act if it would promote and foster the well-being and happiness of its citizens."¹² They selected Carroll D. Wright, the former head of the Massachusetts labor board, to be the first head of the bureau. Wright, following in the Progressive spirit of Mary Parker Follett and others, stressed the need to use the bureau's knowledge for mediation and conciliation in order to avoid the conflicts arising from labor unrest and unionization movements around the country.¹³

Although the creation of the bureau occurred during the last decades of the nineteenth century, when racial discrimination, legal exclusion, and segregation were widespread, it was not an object of controversy for southern white legislators in the same way that New Deal legislation would be a half century later. White southerners had reestablished their obstructionist role in Congress toward civil rights policy, but their views toward a potential labor bureau reflected a range of realities. First, southerners worried throughout the era of black migration to the North that their region would be left without a suitable labor force. A bureau or department of labor might prove helpful in this regard. Second, although opposed to labor activism, southerners saw the budding labor movement as a potential ally, seeing northern labor leaders' antagonism toward African Americans and Chinese immigrants as helpful to their own desires to keep black labor from migrating north and west.¹⁴

This is not to suggest that southerners were indifferent to the potential role the new bureau might play with regard to the racial hierarchies in the segregated South. Senator John Tyler Morgan of Alabama worried at the time of the bureau's establishment in 1884 that such a new agency might harm the southern economy by meddling in the region's agricultural affairs. Morgan responded with fear:

This commissioner I suppose will send his emissaries, his agents, into my State among the people who live in the hill country, the white people who own the land and work it themselves, and who would not allow a negro to come within sight of a fence if they could help it. Not only are they not co-laborers, they are not associates with them; they are nothing more than the inhabitants of the same country upon terms of ordinary friendship between the races. Your commissioner's employee goes to one of these families and says to the head of it, "you are a laborer; you own this land, it is true; but you toil upon it, you raise crops from year to

year, you support and educate your children; I want to make an inquiry of you for the purpose of making a report to the Senate of the United States or to the commissioner of labor as to the social, intellectual, and moral prosperity of these laboring people upon your plantation."¹⁵

Morgan went on that these commissioners would be inquiring about racial conditions, and anticipated their questions:

I want to know whether you are in the habit of recognizing as equals the colored people that live in your neighborhood; I want to inquire whether it is in accordance with your views of social duty that you should associate with every person that you meet. What is the rule of social intercourse between you and your neighbor? What do you do if a colored man or colored woman wants to come and sit down at your table and the like? That is part of my duty to make this inquiry about you because you are a laboring man or a laboring woman, and I want to know your social condition.¹⁶

But other southerners supported creation of the bureau because it might help the South reverse rising migration patterns. Senator James George of Mississippi argued that the new bureau "would inquire and report as to the special employments of the colored people in this country, how many are employed in any particular class of manufacturers or in agriculture." George thought it "important that the people of this country shall know how the colored labor of this country is distributed and in what it is principally engaged," adding, "[I] believe that there are very few, if any, colored laborers in the factories of New England."¹⁷ He wanted the bureau's purview to be limited to those people who were wage laborers. George, like other southerners in Congress, joined in supporting the establishment of the bureau because black labor was a big business for the South. The estimated value of black labor at the time was announced in Congress at more than \$235 million: \$138 million for the production of cotton, \$100 million for the menial services of women and children, \$50 million for mechanical work, \$23 million for tobacco, \$13 million for sugar and molasses, \$8 million for transportation.¹⁸ To prevent black workers from fleeing the South and leaving capital in the region without an adequate workforce, southern politicians campaigned for a federal agency that would make clear to the nation that black workers would fare no better anywhere else. Indeed, as a special report issued by a congressional committee with a majority of Democratic legislators declared in 1880, African Americans were leaving not because of "deprivation of their political rights or any hardship in

their condition," but instead had "undoubtedly [been] induced in a great degree by Northern politicians, and by negro leaders in their employ."¹⁹

The desire of members of Congress, both northerners and southerners, for more information provided an opportunity for the new bureau to study African American life. As mentioned above, the bureau's first chief, Carroll D. Wright, was particularly interested in empirical studies. Among the many dozens of reports that he commissioned, he published nine at the end of the nineteenth century on the condition of black Americans. Wright argued that labor statistics promoted the "material, social, intellectual, and moral prosperity" of working Americans, and he found the perfect collaborator to provide information on African American workers—a young professor beginning work at Atlanta University, W. E. B. Du Bois. Du Bois shared Wright's sentiments, arguing at the time, "There is only one sure basis of social reform and that is Truth—a careful, detailed knowledge of the essential facts of each social problem. Without this there is no logical starting place for reform and uplift."²⁰ Du Bois likewise emphasized the importance of studying black workers: white academics at the time, he wrote, failed "to recognize the true significance of an attempt to study systematically the greatest social problem that has ever faced a great modern nation."²¹ As he put it in an 1898 essay: "Though we ordinarily speak of the Negro problem as though it were one unchanged question, students must recognize the obvious facts that this problem, like others, has had a long historical development, has changed with the growth and evolution of the nation; moreover, that it is not *one* problem, but rather a plexus of social problems, some new, some old, some simple, some complex."²² Du Bois argued strongly for the methods of social science: "Whenever any nation allows impulse, whim or hasty conjecture to usurp the place of conscious, normative, intelligent action, it is in grave danger. The sole aim of any society is to settle its problems in accordance with its highest ideals, and the only rational method of accomplishing this is to study those problems in the light of the best scientific research."²³ He thought social science would allow scholars to overcome long-standing biases and prejudices, compel people to realize the need for reform. Perhaps most importantly, he argued that scientific inquiry would force "all partisans and advocates" to "explicitly admit what all implicitly postulate—namely, that the Negro is a member of the human race, and as one who, in the light of history and experience, is capable to a degree of improvement and culture, is entitled to have his interests considered according to his numbers in all conclusions as to the common weal."²⁴

Du Bois wrote three reports for the bureau, material that coincided with conferences he hosted at Atlanta University on the study of African American

life. These studies were works of social science, relying on extensive statistical computations, beginning with a large-scale study of black socioeconomic conditions in 1897.²⁵ His bureau-sponsored studies reflected his methodological and ideological approach. At each turn, he emphasized variation and development, and in so doing, he transformed African Americans from a category to a group of individuals. He began his study of Farmville, Virginia, with the assertion that "there has been but the one object of ascertaining, with as near an approach to scientific accuracy as possible, the real condition of the Negro." Like all his writings for the bureau, this one relied extensively on census data, marching through the conditions of the black population in Farmville. For the most part, he made few additional comments, though he remarked that there was "considerable dissatisfaction over the state of domestic service" among his interviewees, and that "Negroes are coming to regard the work as a relic of slavery and as degrading, and only enter it from sheer necessity, and then as a temporary makeshift."²⁶ His research was intended to dispel binary notions of blacks' status: "The question then becomes, not whether the Negro is lazy and criminal, or industrious and ambitious, but rather what, in a given community, is the proportion of lazy to industrious Negroes, of paupers to property holders, and what is the tendency of development in these classes."²⁷

Du Bois argued that computation was needed in the study of black people in order to humanize the race in the eyes of white majorities, and to emphasize empirical variation, which would show both the possibilities of black progress and the social scientific reasons for the exceptions. His study of African American land ownership in Georgia relied on meticulously collected census data on black landholding, and he found slow but surprising progress of black land ownership in Georgia after 1870: by 1890, 470,000 blacks had gained possession over a million acres of land.²⁸ The reports are as neutral as they are meticulous, reporting pages and pages of census statistics without editorializing. But an occasional comment reflects his broader goal of uncovering variation, development, and humanity. In documenting "an unfinished cycle of property accumulation," Du Bois wished to show the possibilities of black citizenship: "The fact that an increasingly large proportion of the total property of the State is in the hands of town Negroes shows that it is not merely the idle and vicious that are drifting to town."²⁹

Of course, this evidence of the economic significance of the African American population did not satisfy Du Bois, and he remained skeptical of the potential efforts of the bureau and the Progressive spirit of reform. He fought

with the bureau when it decided not to publish a fourth study, one on Lowndes County, Alabama.³⁰ Moreover, the mainstream media of the day distorted his findings and frequently turned them on their head. For instance, the *Atlanta Constitution* put an absurdly positive spin on one of Du Bois's reports: "As a rule, the negroes are doing fairly well all over the south. They enjoy with the whites in the enjoyment of public school advantages, and every incentive to thrift, economy and upright citizenship is held out to them. Between the two races in the south there exist the kindest feelings, broken only by such occasional outbreaks of passion on the part of the negro race as call for vigorous treatment. But the foul brutes who suffer from the righteous, though illegally enforced penalties of lynch law, can hardly be said to represent the negro race."³¹ The *New York Times* ignored the bulk of the lengthy empirics in his report on Farmville, focusing on two lines in his conclusion: "The industrious and property-accumulating class of the negro citizens best represents, on the whole, the general tendencies of the group. At the same time, the mass of sloth and immorality is still large and threatening."³²

Moreover, Du Bois's writings for the bureau were just an early stage in his own intellectual evolution. He became increasingly radicalized by the violence of southern reaction and by racism across the nation generally: "One could not be a calm, cool, and detached scientist while Negroes were lynched, murdered and starved."³³ A few years after publishing his final report for the bureau, Du Bois titled a chapter of his book *The Souls of Black Folk* "On the Meaning of Progress." He used the chapter to express his disillusionment with the Progressive project and to lament the failed ideals of another Progressive reformer, Josie, a woman who tried valiantly to improve her community's condition, only to be thwarted and left destitute. Du Bois concluded the chapter with the question, "How shall man measure Progress there where the dark-faced Josie lies? How many heartfuls of sorrow shall balance a bushel of wheat? How hard a thing is life to the lowly, and yet how human and real! And all this life and love and strife and failure,—is it the twilight of nightfall or the flush of some faint-dawning day?" After "sadly musing," he left Josie and "rode to Nashville in the Jim Crow car."³⁴

At the heart of Du Bois's ultimate disillusionment was his recognition of the fundamental incompatibility between his empirical findings and the ex-tant power relations in the nation at large. Using social science to provide further insight into the problems facing African Americans could go only so far in convincing those in power. But Du Bois's disillusionment did not alter his goals for Progressive reform; it just redirected the focus of his primary

efforts. The racism lay in institutions, and social investigation would not stimulate reform until the foundations of those institutions changed.

George Haynes and the Division of Negro Economics

Although the number of reports commissioned on black workers declined after 1900, the bureau and the Department of Labor (established 1913) continued to provide statistics and reports on the activities of the black worker. World War I spurred the department's efforts because of renewed interest in the control of labor patterns and the promotion of weapons manufacture. The department responded as well to the Great Migration of the war years, in which an estimated half a million African Americans left the South for what they believed were better job and life prospects in northern cities. An estimated 150,000 to 300,000 African Americans left their homes in the South in the summers of 1916 and 1917 alone.³⁵ Many civil rights activists, such as Du Bois and James Weldon Johnson of the NAACP, celebrated this movement, arguing that it would benefit blacks all over the nation by making their labor more competitive and resulting in an increase in wages and opportunities.³⁶ National news outlets, however, tended to broadcast voices that were far more alarmist.³⁷ Samuel Gompers believed migration was being fueled by antilabor activists intent on disrupting trade unionism in the North, and southern politicians believed it was being done for political purposes; believing that northerners and the Department of Labor were involved, many southern states passed laws forbidding the solicitation of laborers for work outside the state.³⁸ Some legislators perceived the migration as being responsible for riots in the North, alarming members of Congress further.³⁹ The *New York Times* wrote, "The negro problem has entered upon a new and dangerous phase," and feared that "bloodshed on a scale amounting to a local insurrection at least will be threatened in more than one section where large white and black populations face each other unless some program of conciliation is adopted."⁴⁰

Fear of black migrants was pervasive, but it also provided an opportunity for the Department of Labor to do something novel in a policy arena—the state of black workers—that had previously been untouched by federal officials. In 1918, the department established the Division of Negro Economics, a unit that quickly developed into one of the nation's first economic employment agencies. Its establishment was in part motivated by the rates of black migration, since this movement led southern whites to rethink the value of black labor, but it was most directly driven by the need to mobilize black workers for the

war effort.⁴¹ As labor secretary William B. Wilson stressed to Mississippi organizers of a "War Workers' Conference" in 1918: "It is especially important at this crucial period, when we need to conserve all the resources of the Nation for the conduct of the War, that these principles should be applied to all the people of our Country, including the Negro people, who constitute about one-sixth of the total laboring population."⁴² The impact of the war was of special interest because African Americans were "freely admitted to many of the occupations formerly monopolized by white workers and from which Negroes were previously excluded. With the demand for labor so much greater than the supply, the fear of white workmen that Negroes would be their competitors at a lower wage was greatly lessened in many semi-skilled and skilled occupations."⁴³

With the end of the war, the division moved on to play an important role in the demobilization of thousands of black soldiers; it "is not an exaggeration to say that the return of the Negro soldier to civil life is one of the most delicate and difficult questions confronting the Nation, north and south."⁴⁴ The secretary of labor argued that "the question of living conditions of Negro wage-earners must receive more attention during the period of peace that it could receive during the war period," and he counseled the need for cooperation and information to avoid further disturbances and tension.⁴⁵ For these reasons, a surprising coalition of southern business owners and northern labor leaders looked to the Labor Department to take the lead in stabilizing labor conditions at the end of the war by reestablishing blacks in the South, for the benefit of the southern economy and northern white labor unionists.⁴⁶ Black organizations were generally supportive; both the NAACP and the Urban League provided vocal support for the creation of a specific adviser within the department to handle issues directly related to African American workers.⁴⁷

George Edmund Haynes, a professor of sociology and a cofounder and first executive director of the National Urban League, was picked to run the division. Since black workers constituted about one-seventh of the working population, Haynes wrote in explaining the need for the division, "it is reasonable and right that they should have representation in council when their interests are being considered and decided."⁴⁸ Haynes argued that three central facts about race in America would direct the mission of the division:

First, not only are negro workers employed by white employers, but they also work on jobs and in occupations with white workers; second, this racial difference is the occasion of many of the misunderstandings, fears, prejudices and suspicions. The labor problems growing out of such differences are in a real sense negro labor problems: third, such

racial labor problems must be worked out in local communities on a cooperative basis, for they arise between local employers and employees. Although they are local they have a national bearing on the welfare of all wage earners, white and colored, on the interests of all employers, and of the whole people.⁴⁹

With these goals in mind, Haynes worked immediately at creating Negro Workers' Advisory Committees in eleven states. They were intended to foster cooperation between white employers, white workers, and black workers in order to "develop racial understanding and good will."⁵⁰ Because the "two races are thrown together in their daily work" there were inevitably "misunderstandings, prejudices, antagonisms, fears, and suspicions which must be removed by mutual understanding and cooperation."⁵¹ Very much in keeping with the ideals of the era, the goal of these committees was to provide jobs and industrial opportunity; conciliation, deliberation, and knowledge were prioritized over ending segregation or promoting any kind of destabilization of race relations. Haynes and the division consistently emphasized that the goal of promoting cooperation was not intended to create conflict within existing societal relations among racial groups. Haynes's methods were exemplified by a conference in Florida that he promoted and that resulted in the governor of the state calling for the formation of a state Negro Workers' Advisory Committee to promote a better understanding of employment matters and to ease the "discontent of workers, in order that greater production of food and supplies might ensue."⁵² The division attempted to increase the representation of African Americans on the workers' committees and to respond to the "misunderstandings, prejudices, antagonisms, fears and suspicions" that come from "the two races . . . thrown together in daily work."⁵³

It is unclear whether these committees were successful. The Labor Department pointed to the creation of assistance organizations designed to help teachers, women, and other groups in "all matters related to Negro labor," and it believed that these campaigns "gave stimulation" to "amicable relations between white and colored workers and white employers," which in turn promoted "stability and thrift among Negro wage earners" and "reduced the labor turnover and absenteeism in a number of plants."⁵⁴ Employers, the department noted, "gladly arranged hours" for talks on "race pride, promptness, regularity, full-time work and increased opportunities for large earnings."⁵⁵ The fact that the programs and conferences resulted in "only one case of a member of one committee whose relationship on the committee has caused friction or made necessary a request for his resignation," and that "there has been the heartiest response for this work from citizens of both races everywhere" might

well suggest that the work of the committees was not terribly ambitious.⁵⁶ Nonetheless, the work of the division and the committees it helped spawn should not be dismissed out of hand. As the department pointed out, "In many of the localities by the holding of the conferences and the establishment of the Negro Workers' Advisory Committees, the principle of Negroes having representation in council when matters affecting their interest were being considered and decided was acted upon for the first time."⁵⁷

Moreover, even the division's tentative efforts disturbed the existing racial order. In Florida, for instance, the new committee upset representatives of a lumber association, who blamed the division for "inflammatory propaganda" that created "unrest" among black workers.⁵⁸ As a chief assistant to Haynes reminded him, there was great potential for good work because both the department's and the division's mandates were quite amorphous. The division's establishment created a "means of exchange of information and cooperation between this Department and other departments of the government both state and Federal the scope of which and the jurisdiction of which are almost unlimited."⁵⁹ The field of action was wide open: "The scope of the jurisdiction and authority of the Secretary of Labor have in no sense reached the plane which Congress had in mind when it created the Department of Labor. It is obvious that a wide span was left vacant over which the Department of Labor may, and should, leap in fostering and promoting the welfare of wage earners."⁶⁰ He pushed Haynes to seize the opportunity: "The destinies of 10 million Negroes are at bar in a way never before seen. The shift of the economic status, loyalty and citizenship of 10 million Negroes is more noticeable than ever before. . . . Should not every resource be invoked to insure peace, good will and justice to Americans, white and black?"⁶¹

Southern politicians increasingly worried about exactly that. Efforts by the division were threatening racial hierarchies in the region, and since its mandate lacked a clear limit, southern legislators increasingly put pressure on the Labor Department to get rid of the division entirely.⁶² With war's end, the protests of these legislators got louder, and governors from the region joined in the lobbying, arguing that the division was meddling in local affairs and promoting migration of blacks to the North.⁶³ Republicans cut the appropriation for the division in 1920 after southern legislators claimed that its funding was unconstitutional. The national elections of that year further weakened the division's hope for longevity. Wilson's presidency had ended, and Republicans significantly widened their congressional majorities. From that point forward, even studying social problems through the lens of race became illegitimate.

Shortly after the election, the new secretary of labor, James Davis, formally abolished the division on grounds that he opposed segregating workers on the basis of race: "Our laws do not distinguish between white men and Negroes or any other class or classes."⁶⁴

Haynes, however, continued to fight consistently for the awareness of racial divisions. He wrote, "There is a deep concern and fear expressed among Negroes in various ways, when one gets at exactly how they are feeling, that many of the plans laid for their help, even when meant in a friendly way, may work so as to limit the scope of their activities and development so as really to work in the end to a new handicap for them."⁶⁵ In true Progressive fashion, he argued that the best way out of this conundrum was by educating the public and "by presenting objectively the facts and conditions relating to both sides." A year later, he wrote, "The very issue of whether or not there will soon be a warless world is involved because the problem of the twentieth century is the problem of the contacts of the white and colored races. With such interests involved, no student of American race relations can well dogmatize or scold."⁶⁶ Like many others in the Progressive era, and like Du Bois during his time with the bureau, Haynes believed that a combination of learning and participating in community life would create the dialogue and compromise necessary to lead to improvements in race relations: "There is now available a growing body of scientific and religious ideas and principles to guide the feeling, thinking, attitudes, and actions on such social questions."⁶⁷

Haynes went before Congress to plead his case to have the division restored: "The colored people are now in a very restless condition because they gave a great deal during the war. . . . They have expected something from their Government."⁶⁸ Referring to a wave of racial violence in the year after the war, Haynes correctly predicted that such violence would precipitate a more aggressive and affirmative demand for rights by African Americans in the coming years. But Haynes was not in a position to be heard in a way that mattered. In a striking exchange between Haynes and members of Congress, the two sides battled intensely about the meaning of race in America. The bipartisan focus of the committee centered on the question whether race was an important category. The chairman of the House committee, James Good of Iowa, told Haynes, "It does occur to me that with a broad organization like that of the Department of Labor it would be unfortunate if it should ever be found necessary to have a separate division for Italian workers, for instance, a separate division for German workers, a separate division for persons coming from France, etc., and then a separate division for the white population of the United

States and a separate division for the Negro population of the United States. It seems to me that this would be bound to lead to duplication in that service." In the Senate, Chairman Francis Warren of Wyoming told Haynes something similar: "You are exactly equal under the law. You are exactly equal, of course, under those appropriations. But as far as we are concerned, there should not be a division between classes of workmen, one against the other. . . . We have to look at it with the idea of preserving equality. The same rule applies to both."⁶⁹

Haynes was no radical, and he frequently promoted conservative views of culture and economics.⁷⁰ Nonetheless, as he told Congress, "there is a general feeling among all classes of Negroes that the Federal Government should do something to remedy their condition." The government needed to respond to the black community's fears of mobs and lynching, and it needed to do something affirmative. The "feeling of the Negroes (was) that something should be done for them through the Federal Government." The counter by Republicans, however, did not address whether governmental intervention was right or wrong, but whether race mattered at all. In particular, Haynes went back and forth with New York representative Walter Magee, who contended that there were no race problems in America. Haynes countered this absurdity: pointing to an array of northern cities, he argued, "The Negro population is segregated from the white population in this country as no other group is. . . . Experience shows that there is a need of some special help for the Negroes. Help is required to adjust the Negroes and in giving them an opportunity to find adjustment in the ordinary every-day occupations."⁷¹ After Magee responded that people of all nationalities "must be treated alike," Haynes countered: "But as a matter of fact all of them have not been treated alike. The Negro has been the one group that has not been treated like other groups."

Conclusion

Both Du Bois and Haynes were products of and contributors to the intellectual spirit of the Progressive era and its political activism. They promoted a worldview of social justice that emphasized the value of knowledge, the possibilities of the human condition, and the important role played by the government as a primary weapon in engineering such progress. The contours of their own political developments were still very much in formation when they worked in the Labor Department and its predecessor; both moved over

the years, for instance, from believing that capitalism could incorporate civil rights to contending that capitalism was a central part of the problem. But what remained constant, and what they would continually fight both fellow Progressives and conservatives over, was the centrality of race to American power relations. The problem, as they saw it, was neither just about the promotion of regulation over rights, or of rights over regulation; it was critically about race. Race was the central organizing principle that governed how inequality was experienced and maintained. The concept of race mattered, and it mattered independently of any universal idea of human progress, whether such an idea was premised on Progressive regulation or individual rights. Whether the agendas emphasized self-promotion, capitalist gains, educational attainment, voting rights, or social policy and socialism, these activists were acutely aware of how easily race could be squeezed out of mainstream agendas.

One lesson from these brief case studies is that the debate over whether rights or regulation better promotes racial equality ultimately distracts from the central importance that race played in American society at the time, and more specifically, how race was and remains wrapped into questions of power. Another lesson is that regulation and rights might be compatible, and that their connection might well be essential to progress toward racial equality. Progressive faith in expertise was not enough, but that finding doesn't make Progressivism, by definition, the problem. All this is lost in both the conventional readings of the *Lochner* era that applaud Progressive aims and in the new scholarship that rehabilitates *Lochner* as standing firm against Progressive racism.

Rather than continuing to view Progressive reform as fundamentally at odds with the rights revolution, my retelling makes clear some basic connections. The rights revolution of the mid-twentieth century was necessary to attack the deeply entrenched nature of racism and its consequences in American society, but not to attack Progressivism in particular. And the breakthrough for rights, when it finally occurred, did not speak for itself either. The rights gained were essentially open-ended and forward looking and quite compatible with long-standing Progressive goals. This fact was recognized by an unprecedented burst of new interest in social inquiry and governmental policy aimed at making racial equality a reality. In the end, then, the assault on Progressive racism, warranted as it is, should not take on a life of its own and justify rights without other commitments that are fundamentally progressive.

Notes

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2. See, for example, Gail Bederman, *Manliness and Civilization: A Cultural History of Gender and Race in the United States, 1880–1917* (Chicago: University of Chicago Press, 1996); Gary Gerstle, *American Crucible: Race and Nation in the Twentieth Century* (Princeton, N.J.: Princeton University Press, 2001); Glenda Elizabeth Gilmore, *Gender and Jim Crow: Women and the Politics of White Supremacy in North Carolina, 1896–1920* (Chapel Hill: University of North Carolina Press, 1996); Matthew Frye Jacobson, *Barbarian Virtues: The United States Encounters Foreign Peoples at Home and Abroad, 1876–1917* (New York: Hill and Wang, 2000); Robin D. G. Kelley, “We Are Not What We Seem: Rethinking Black Working-Class Opposition in the Jim Crow South,” *Journal of American History* 80, no. 1 (June): 75–112; Eileen McDonagh, “Race, Class, and Gender in the Progressive Era: Restructuring State and Society,” in *Progressivism and the New Democracy*, ed. Sidney Milkis and Jerome Mileur (Amherst: University of Massachusetts Press, 1999); Nell Irvin Painter, *Standing at Armageddon: A Grassroots History of the Progressive Era* (New York: Norton, 2008); Aziz Rana, *The Two Faces of Freedom* (Cambridge, Mass.: Harvard University Press, 2010), 236–65; Daniel T. Rogers, “In Search of Progressivism,” *Reviews in American History* 10 (1982); Rogers M. Smith, *Civic Ideals: Conflicting Visions of Citizenship in U.S. History* (New Haven, Conn.: Yale University Press, 1997); David W. Southern, *The Progressive Era and Race: Reaction and Reform* (Wheeling, Ill.: Wiley-Blackwell, 2005).

3. See, for example, Ira Katznelson, *When Affirmative Action Was White: An Untold History of Racial Inequality in Twentieth-Century America* (New York: Norton, 2004); Robert C. Lieberman, *Shifting the Color Line: Race and the American Welfare State* (Cambridge, Mass.: Harvard University Press, 1998).

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5. David E. Bernstein, *Rehabilitating "Lochner": Defending Individual Rights Against Progressive Reform* (Chicago: University of Chicago Press, 2011); David E. Bernstein, *Only One Place of Redress: African Americans, Labor Regulations, and the Courts from Reconstruction to the New Deal* (Durham, N.C.: Duke University Press, 2001); Paul D. Moreno, *Black Americans and Organized Labor: A New History* (Baton Rouge: Louisiana State University Press, 2007). Regarding the consequences of a racially stratified workforce, see Quadagno, *Color of Welfare*; William Julius Wilson, *When Work Disappears: The World of the New Urban Poor* (New York: Vintage, 1997).

6. Bernstein, *Rehabilitating "Lochner"*, 82.

7. *Ibid.*, 5.

8. For important work making these claims, see, for example, Susan D. Carle, "Race, Class, and Legal Ethics in the Early NAACP (1910–1920)," *Law and History Review* 20 (Spring 2002): 97–146; Megan Francis, *Civil Rights and the Making of the Modern American State* (New York: Cambridge University Press, 2013); Risa Goluboff, "The Thirteenth Amendment and the Lost Origins of Civil Rights," *Duke Law Journal* 50 (2001): 1609–95; William B. Gould, *Black Workers in White Unions: Job Discrimination in the United States* (Ithaca, N.Y.: Cornell University Press, 1977); Evelyn Brooks Higginbotham, *Righteous Discontent: The Women's Movement in the Black Baptist Church, 1880–1920* (Cambridge, Mass.: Harvard University Press, 1993); Kenneth W. Mack, "Rethinking Civil Rights Lawyering and Politics in the Era Before Brown," *Yale Law Journal* 115 (2005): Roger L. Rice, "Residential Segregation by Law, 1910–1917," *Journal of Southern History* 34 (1968): 191–94.

9. See, for example, Eric Arnesen, "A. Philip Randolph: Labor and the New Black Politics," in *The Human Tradition in American Labor History*, ed. Eric Arnesen (Wilmington, Del.: Scholarly Resources, 2004); Cornelius L. Bynum, *A. Philip Randolph and the Struggle for Civil Rights* (Champaign-Urbana: University of Illinois Press, 2010); Ralph J. Bunche, "A Critique of New Deal Social Planning as It Affects Negroes," *Journal of Negro Education* 5 (1936): 59–65; W. E. B. Du Bois, "Of the Meaning of Progress," in *Du Bois, Souls of Black Folk* (New York: Vintage, 1990 [1903]).

10. Regarding the importance of these themes among middle-class reformers in the Progressive era, see Kevin Mattson, *Creating a Democratic Public: The Struggle for Urban Participatory Democracy During the Progressive Era* (University Park: Pennsylvania State University Press, 1998); John Louis Recchiuti, *Civic Engagement: Social Science and Progressive-Era Reform in New York City* (2007); Daniel T. Rodgers, *Atlantic Crossings: Social Politics in a Progressive Age* (Cambridge, Mass.: Harvard University Press, 1998); Theda Skocpol, *Protecting Soldiers and Mothers: The Political Origins of Social Policy in the United States* (Cambridge, Mass.: Harvard University Press, 1992); Jonathan Zimmerman,

Distilling Democracy: Alcohol Education in America's Public Schools, 1880–1925 (Lawrence: University Press of Kansas, 1999).

11. "Creating Bureau of Labor Statistics," 2254 HR Report 342 (February 12, 1884).
12. *Congressional Record*, April 19, 1884, 3146, quoting Congressman Foran.
13. See Sarah Staszak, *No Day in Court: Access to Justice and the Politics of Judicial Retrenchment* (New York: Oxford University Press, 2015), chap. 3.

14. Gwendolyn Mink, *Old Labor and New Immigrants in American Political Development* (Ithaca, N.Y.: Cornell University Press, 1986).

15. *Congressional Record*, May 14, 1884, 4156.

16. *Ibid.*

17. *Ibid.*, 4149–54.

18. *Ibid.*, part 2, 248.

19. Select Committee to Investigate the Causes of the Removal of the Negroes from the Southern States to the Northern States, 46th Congress, S. Rep. No. 693 (June 1, 1880). The committee members were D. W. Voorhees (D-Ind.), Zebulon B. Vance (D-N.C.), and George H. Pendleton (D-Ohio); William Windom (R-Minn.) and Henry W. Blair (R-N.H.) submitted a dissenting report.

20. Both are quoted in Jonathan Grossman, "Black Studies in the Department of Labor, 1897–1907," *Monthly Labor Review* 97 (June 1974): 19.

21. W. E. B. Du Bois, "The Relations of the Negroes to the Whites in the South," (1904), in *W. E. B. Du Bois on Sociology and the Black Community*, ed. Dan S. Green and Edwin D. Driver (Chicago: University of Chicago Press, 1978), 59.

22. W. E. B. Du Bois, "The Study of the Negro Problems," *Annals of the American Academy of Political and Social Science* (January 1898; reprinted, March 2000), 14.

23. *Ibid.*, 19.

24. *Ibid.*, 24.

25. W. E. B. Du Bois, "Conditions of the Negro in Various Cities," *Bulletin of the Department of Labor* 10 (May 1897): 257–369.

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27. *Ibid.*, 38.

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30. Grossman, "Black Studies," 24–25.

31. "A Study of Negro Life in the South," *Atlanta Constitution*, January 30, 1898.

32. "A Study of Negro Life," *New York Times*, January 30, 1898.

33. W. E. B. Du Bois, *Dusk of Dawn: An Essay Toward an Autobiography of a Race Concept* (New York: Oxford University Press, 2014 [1940]), 34. See also Adolph L. Reed Jr., *W. E. B. Du Bois and American Political Thought: Fabianism and the Color Line* (New York: Oxford University Press, 1997).

34. Du Bois, *Souls of Black Folk*, 58.
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36. "Negro Exodus from South Laid to Oppression," *New York Tribune*, July 8, 1917.
37. "An Alarming Migration of Negro Labor," *New York Tribune*, October 22, 1916; Ralph W. Tyler, "Negroes Are Moving Northward: 326,000 of Native Blacks Cross Mason and Dixon Line in Last Two Years—What of Result?," *Indianapolis Star*, October 15, 1916.
38. "An Alarming Migration of Negro Labor," *New York Tribune*, October 22, 1916; J. A. Hallomon, "Will Negro Supply Labor Exodus North?," *Atlanta Constitution*, June 19, 1919.
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46. Henry P. Guzda, "Social Experiment of the Labor Department: The Division of Negro Economics," *Public Historian* 4 (Autumn 1982): 11.
47. Though some saw it as another Jim Crow creation designed to promote black economic opportunities within the segregated South; see Guzda, "Social Experiment of the Labor Department," 17.
48. George E. Haynes, "To Avert Friction with Negro Labor," *New York Times*, June 15, 1919.
49. *Ibid.*
50. See Department of Labor, Office of the Secretary, "Matters of Record," Record Group 174-4-7, Records of the Division of Negro Economics; George Edmund Haynes, *The Trend of the Races* (New York: Council of Women for Home Missions and Missionary Education Movement of the U.S. and Canada, 1922), 118.
51. "Annual Report of the Secretary of Labor," 7734 H.Doc. 422 (November 10, 1919), 133.
52. Department of Labor, "Matters of Record," 2.
53. *Ibid.*, 3.
54. "Annual Report of the Secretary of Labor," 134-35.
55. *Ibid.*, 134.
56. Department of Labor, "Matters of Record," 3. As the report itself stated, "It has been readily recognized that Washington could not settle problems between an employer in Mississippi and his Negro worker in Mississippi" (11).
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62. Senator James Vardaman to Secretary Wilson, May 16, 1918 (defending segregation in the South). Wilson both doubted and accepted the Mississippi senator's claim (Wilson to Vardaman, June 1918, file 129/14, Record Group 174).
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66. Haynes, *Trend of the Races*, xi.
67. *Ibid.*
68. "Division of Negro Economics, Statements of George E. Haynes and Karl F. Phillips," in Sundry Civil Appropriation Bill, 1921, pt. 2, subcommittee of House Committee on Appropriations, 66th Cong., 2nd sess. (March 20, 1920), 2157.
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70. George E. Haynes, "Grasping the Hands of Economic Opportunity" (n.d.), U.S. Department of Labor, Division of Negro Economics, "Negro Migration in 1916-17" (1919), Record Group 174.4-7, Records of the Division of Negro Economics.

71. "Division of Negro Economics, Statements of George E. Haynes and Karl F. Phillips," 2165.

15 • The Progressives' Deadly Embrace of Cartels

A Close Look at Labor and Agricultural Markets,

1890-1940

Richard A. Epstein

The many facets of the Progressive movement, which played such a powerful role in United States politics from about 1900 to 1940, are difficult to encapsulate in any single, overall evaluation. But amid that diversity one constant and powerful theme demands more attention than it commonly receives. That theme involves the systematic Progressive embrace of cartelization over both competition and monopoly. I address this fundamental choice of industrial organization from a neoclassical point of view that ranks these three broad types of arrangement in this order: competition first, monopoly second, and cartelization third. The Progressive movement, with its deep suspicion of market institutions, chose a different order: cartels first, competition second, monopoly third.

These two disparate rankings depend on a complex set of economic and political factors that were imperfectly understood at the time and that are still imperfectly understood today. This chapter traces the comparative logic of the traditional classical liberal and the Progressive approaches to problems of industry concentration, with special reference to agriculture and labor. The dominant Supreme Court view at the time took a strong stance against the protection of cartels under the antitrust law, whether of businesses or unions, while at the same time working to protect regulated industries against the risk of confiscation through direct regulation. The Progressive response exempted unions and agriculture from the antitrust laws and worked assiduously to promote their monopoly power through direct forms of regulation. By resorting to democratic policies of cartel members, Progressives generated substantial social losses, which were not justified by any collateral end.

Of necessity, this analysis starts by looking at business cartels before the Clayton Act of 1914, passed in Woodrow Wilson's first term, which hived labor