THE YALE LAW JOURNAL FORUM

JANUARY 6, 2021

Black Progressivism and the Progressive Court

James W. Fox Jr.

ABSTRACT. In the 1910s the Supreme Court responsible for *Lochner v. United States* and *Plessy v. Ferguson* supported African American rights in cases such as *Bailey v. Alabama* and *Buchanan v. Warley*. Scholars have struggled to explain how the disparate doctrinal paths of *Lochner* and *Plessy* led to the seemingly equality-friendly cases of the 1910s. Where modern libertarians see liberty-of-contract countering racism, modern progressives see support for an economic and racial status quo that did nothing to limit white supremacy on the ground. Stepping away from judicial decisions, this essay looks instead to the writing of Black progressives to understand better the Court's context. This essay argues that, unlike the Court and white elites, Thomas Fortune, Ida Wells, and W.E.B. Du Bois focused on the interdependence of capitalism and racism, stressing the systemic nature of racial harms across a range of legal and political doctrines. This critique, I argue, helps us understand better the ways in which the Court's different doctrines functioned, how they resulted in an anemic response to racist laws, and how we can, today, think more deeply about systemic racism and critiques of current neo-*Lochner* jurisprudence.

INTRODUCTION

The constitutional jurisprudence of the Progressive Era Supreme Court contains deep tensions. On the one hand, the Court developed a robust doctrine of substantive due process and liberty of contract in cases such as *Lochner v. New York*[1] and *Adair v. United States*,[2] battling what the Court saw as unjust protectionist, prolabor "class legislation." On the other hand, in cases such as *Plessy v.*

1. 198 U.S. 45 (1905) (holding that a state statute capping the number of hours bakers could work was an unconstitutional violation of the employer's and employees' freedom to contract, protected by the Due Process Clause of the Fourteenth Amendment).

2. 208 U.S. 161 (1908) (declaring a federal statutory provision that prohibited railroads from firing employees for union membership unconstitutional as a violation of the employer's and employees' freedom to contract, protected by the Due Process Clause of the Fifth Amendment).

Ferguson,[3] *Williams v. Mississippi*,[4] and *Giles v. Harris*,[5] the Court eviscerated the racial equality purpose and meaning behind all three Reconstruction Amendments, providing constitutional cover for the emergence of a legally mandated, state-based apartheid system. Yet, in the 1910s, the Court issued a series of opinions supporting African American rights claims, including *Bailey v. Alabama*,[6] *Guinn v. United States*,[7] and *Buchanan v. Warley*.[8] What was going on?

Lochner and *Plessy* each became core parts of the constitutional anticanon in the second half of the twentieth century, but scholars have struggled to explain the connections between these seemingly disparate doctrinal paths. Libertarians and *Lochner* revisionists have argued that liberty-of-contract ideas represented an important counter to the racist doctrines supporting segregation and were themselves important supports for the pro-rights decisions of the 1910s.[9] Modern progressives, on the other hand, argue that *Lochner* and *Plessy* are of the same cloth, both reflecting the Court's commitment to an economic and social status

---

3. 163 U.S. 537 (1896) (holding that a Louisiana law mandating racially segregated railroad cars was constitutional under the Thirteenth and Fourteenth Amendments).

4. 170 U.S. 213 (1898) (holding that Mississippi's constitutional and statutory provisions incorporating a poll tax and literacy test into the state's voting laws and limiting jury service to qualified voters did not violate the Equal Protection Clause because they were facially neutral).

5. 189 U.S. 475 (1903) (avoiding the question of the constitutionality of Alabama's literacy test, grandfather clause, poll tax, and discriminatory administration of voting laws, and holding that the Court was powerless to enforce the plaintiff's demand for injunctive relief even if he were to win on the merits); *see also* Giles v. Teasley, 193 U.S. 146 (1904) (upholding the Alabama Supreme Court's denial of Giles's action for damages and mandamus). The *Giles* cases are perhaps two of the worst examples of the Supreme Court's avoidance of constitutional wrongs for fear of its own institutional impotence. *See* Richard H. Pildes, *Democracy, Anti-Democracy, and the Canon*, 17 CONST. COMMENT. 295, 305-10 (2000). Particularly shocking is the Court's adoption of an absurdist, Catch-22 analysis that, if Giles in fact was right that the Alabama election law was unconstitutional, then there was no legal basis for him to either obtain an injunction requiring his own participation in the illegitimate election system or establish damages based on the denial of his right to participate in an illegitimate system. *Id.* at 306, 308. According to this reasoning, the very fact of creating an unconstitutional electoral system immunized that system from federal-court challenge.

6. 219 U.S. 219 (1911) (holding that Alabama's law criminalizing breach of employment contracts was a form of peonage and violated the Thirteenth Amendment).

7. 238 U.S. 347 (1915) (ruling that Oklahoma's grandfather clause, which enabled white Americans to avoid restrictive voting laws, violated the Fifteenth Amendment).

8. 245 U.S. 60 (1917) (holding that a Louisville, Kentucky ordinance mandating racial segregation in residential neighborhoods violated the Fourteenth Amendment).

9. *E.g.*, RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 210-25 (2004); DAVID E. BERNSTEIN, REHABILITATING *LOCHNER*: DEFENDING INDIVIDUAL RIGHTS AGAINST PROGRESSIVE REFORM 73-98 (2011); *cf.* Mark Tushnet, Plessy v. Ferguson *in Libertarian Perspective*, 16 LAW & PHIL. 245 (1997) (explaining through a libertarian lens that *Lochner* and *Plessy* "are more different than alike").

quo that was based on the twin pillars of antilabor capitalism and white supremacy. For these scholars, the pro-rights decisions are at best insignificant blips that did nothing to change racist laws and practices.[10]

While each of these views contains some explanatory power, they overlook a critical counter perspective on the nested problems of class and race. That perspective, deeply rooted in abolitionism and Reconstruction, was not directly present in the opinions of the white elites on the Court and so is not "doctrinal" in the classic sense. It was, however, very much part of the counterpublic discourse of African American writers and activists, including journalists T. Thomas Fortune and Ida B. Wells and scholar-activist W.E.B. Du Bois. This critical discourse articulated a broad civil, political, and economic rights agenda that cut across white supremacy and capitalist classism. It championed the essential connections between educational, political, social, and economic equality and access. With themes that sound the same chords currently struck by the Black Lives Matter movement, Black progressivism repeatedly connected oppressions across spheres, including criminal justice (peonage, lynching), education, property ownership and wealth creation, and political power, to advocate for systemic changes. As these writers argued, white supremacy controlled both the employer-based polices of liberty of contract and the labor movement's efforts to battle for living wages and working conditions. From this perspective, the law's failure to repudiate white supremacy meant that neither Lochnerism nor its pro-labor alternative could actually succeed in implementing the ideals of the Reconstruction Amendments and would, unless countered and overturned, continue to oppress Americans across both race and class.

This Essay traces some of these themes in four important texts of the Black Progressive Era: Thomas Fortune's *Black and White*, published in 1884; Ida Wells's *The Reason Why*, published in 1893; and two initial statements of the Niagara Movement from 1905 and 1906.[11] The themes we see being developed

10. *E.g.*, DERRICK BELL, SILENT COVENANTS: *BROWN V. BOARD OF EDUCATION* AND THE UNFULFILLED HOPES FOR RACIAL REFORM 84 (2004); Cass R. Sunstein, Lochner*'s Legacy*, 87 COLUM. L. REV. 873 (1987); *cf.* MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 79-85 (2004) (explaining that Progressive Era cases involved minimalist constitutional interpretation sufficient to uphold ideals of constitutional supremacy yet narrow enough to assuage dominant white racial attitudes, and sug-gesting that the Court's willingness to rule on the merits may have reflected a minor shi in racial attitudes of the Justices); Cheryl I. Harris, *In the Shadow of* Plessy, 7 U. PA. J. CONST. L. 867, 869 (2005) (arguing that *Plessy*, in its commitment to judicial neutrality, federalism, and private ordering, was *Lochner*'s antecedent and continues to shape the law's approach to race).

11. T. THOMAS FORTUNE, BLACK AND WHITE: LAND, LABOR, AND POLITICS IN THE SOUTH (New York, Fords, Howard & Hulbert 1884); IDA B. WELLS, FREDERICK DOUGLASS, IRVINE GARLAND PENN & FERDINAND L. BARNETT, THE REASON WHY THE COLORED AMERICAN IS NOT IN THE WORLD'S COLUMBIAN EXPOSITION: THE AFRO-AMERICAN'S CONTRIBUTION TO COLUMBIAN LITERATURE (Chicago 1893); W.E.B. DuBois, Address to the Nation: Delivered at the Second

in these texts give us some idea of the Black progressive critique of both Jim Crow and antilabor capitalism, made at the same time that the Court was moving in the other direction. I will conclude with some ideas about how this counter-narrative can reshape the way we today think about the Court's pro-rights decisions of the Progressive Era.

I. T. THOMAS FORTUNE'S *BLACK AND WHITE*

T. Thomas Fortune was a leading Black journalist in the late-nineteenth century. As editor of the *New York Globe* (later the *New York Freeman* and then the *New York Age*) he established a consistent forum for political, legal, and social critique in the growing Black public sphere. Having studied law at Howard, his writings often addressed legal as well as political issues. Although after 1900 he seemed to reject many of the views he advocated earlier and aligned himself with Booker T. Washington, his work in the 1880s and 1890s remained important for Black progressives.[12]

In 1884, Fortune published his influential book, *Black and White*, setting out a radical critique for social justice that wove together ideas of race, labor, and class. Fortune sought to bring together issues of class and race to argue that "*the condition of the black and the white laborer is the same, and that consequently their cause is common*; that they should unite under one banner and work upon the same platform of principles for the uplifting of labor, the more equal distribution of the products of labor and capital . . . ."[13] Fortune specifically cited Henry George's work and was clearly influenced by George's land and labor theory of wealth and value, to which Fortune added the dynamics of racial oppression that were a more common analysis of Black Reconstruction.[14] Fortune's views were

Annual Meeting of the Niagara Movement (Aug. 16, 1900), https://users.wfu.edu/zulick/341/niagara.html [https://perma.cc/6NT5-SBTC]; *Niagara's Declaration of Principles, 1905*, GILDER LEHRMAN CTR. FOR STUDY SLAVERY, RESISTANCE & ABOLITION, https://glc.yale.edu/niagaras-declaration-principles-1905 [https://perma.cc/92GH-3NNJ].

12. On T. Thomas Fortune generally, see Susan D. Carle, *Debunking the Myth of Civil Rights Liberalism: Visions of Racial Justice in the Thought of T. Thomas Fortune, 1880-1890*, 77 FORDHAM L. REV. 1479, 1486-99 (2009); and SUSAN D. CARLE, DEFINING THE STRUGGLE: NATIONAL ORGANIZING FOR RACIAL JUSTICE, 1880-1915, at 31-53 (2013) [hereinafter CARLE, DEFINING THE STRUGGLE].

13. FORTUNE, *supra* note 11, at 174-75.

14. HENRY GEORGE, PROGRESS AND POVERTY: AN INQUIRY INTO THE CAUSE OF INDUSTRIAL DEPRESSIONS AND OF INCREASE OF WANT WITH INCREASE OF WEALTH: THE REMEDY (New York, D. Appleton & Co. 1879). *Progress and Poverty* is sometimes cited as the origin of American Progressivism and was extremely popular in the 1880s and 1890s. On Henry George generally, see NELL IRVIN PAINTER, STANDING AT ARMAGEDDON: THE UNITED STATES, 1877-1919, at 24-26, 52-60 (1987).

similar to those of the Knights of Labor, and reflected the hope of some radical labor leaders that the overlap of white and Black economic interests could help achieve some of the promise of Reconstruction.[15]

Even though Fortune's goal was to bring together class and race analytically and politically, as the title of the book suggests he saw the particularly American version of this problem as rooted in the history of white supremacy. Near the opening of the book he identified 1619 and the introduction of slavery to Virginia as the origin of this problem.[16] Racial slavery had resulted, Fortune argued, in a denial of citizenship, liberty, and rights not just prior to the Civil War but even after ratification of the Reconstruction Amendments.[17] This was done, in large part, through constitutional interpretation: "That great document [the Constitution], while constantly affirmed to be the most broad and liberal compact ever devised for the government of man, has always been found to be narrow enough to serve the purposes of the slave oligarch and the make-shifts of the party in power . . . ."[18]

The use of constitutional interpretation to implement racial oppression was evident, for Fortune, in the doctrine of states' rights, the legal structures that protected corporate and oligarchical ownership and use of land, and the permissibility of other legislation that protected wealth as a class. The Court's recent uses of federalism in particular concerned Fortune, because they allowed both economic and violent physical oppression of Black Americans by wealthy white Americans, "undeterred by the law."[19] Combined with the widespread denial of suffrage rights, this denial of basic constitutional rights and protections were a "flagrant nullification of the very first principles of a republican form of government."[20]

Up to this point, Fortune's argument sounded like the critiques of many of the Black abolitionists, who saw the failure of Reconstruction as a denial of the

15. On the Knights of Labor, see LEON FINK, WORKINGMEN'S DEMOCRACY: THE KNIGHTS OF LABOR AND AMERICAN POLITICS (1983). On Fortune's hopeful view of the Knights of Labor, see CARLE, DEFINING THE STRUGGLE, *supra* note 12, at 49-50.

16. FORTUNE, *supra* note 11, at 9.

17. *See id.* at 17 ("[T]he American Government has always construed people of African parentage to be aliens, not only when the Constitution was tortured by narrow-minded men to shield the cruel, murderous slave-holder . . . but even now, when the panoply of citizenship is, presumably, all-sufficient to insure to the late slave the enjoyment of full manhood rights as a sovereign citizen.").

18. *Id.* at 18-19.

19. *Id.* at 29.

20. *Id.* at 33. Although Fortune did not discuss specific Supreme Court cases in *Black and White*, he had, in his journalism, critiqued the trio of 1883 decisions that undermined racial equality: *United States v. Harris*, 106 U.S. 629 (1883), the *Civil Rights Cases*, 109 U.S. 3 (1883), and *Pace v. Alabama*, 106 U.S. 583 (1883). *See* CARLE, DEFINING THE STRUGGLE, *supra* note 12, at 42-47.

rights won after the war. But Fortune in some ways moved beyond the views of his mentors. By bringing to bear the ideas and perspectives of agrarian populism and socialism, Fortune was able to connect the harms of post-Reconstruction to the emerging class conflict. Emancipation, argued Fortune, expanded the laboring class and left both Black and white laborers effectively unfree, "labor[ing] for the enrichment of vast corporations, which have no souls, and for individuals, whom our government have made a privileged class" by allowing wealth and commerce to control land and basic subsistence.[21] The monopolies of railroads, telegraphs, and other large corporations effectively did to the North and West what former slave-owning oligarchs did in the South.

It was this connection between slavery and capitalism that Fortune used to argue against the basic structure of late-nineteenth-century constitutional law. For Fortune, the status-quo, procorporate legal regime was itself invalid class legislation because it so clearly privileged wealth. Fortune did not address the Court's jurisprudence directly in *Black and White*, but at several points he used the language of special or class legislation to address how law protected white people and wealth and harmed Black people and workers. As he wrote, "I deny the *right* of any man to enslave his fellow; I deny the *right* of any government [federal or state] . . . to pass any legislation which robs *one man or class* to enrich *another*."[22] And although this may sound to modern ears like language consistent with *Lochner*, Fortune explained his meaning by citing the ways in which law had enabled white landowners to steal labor and property from Black laborers. The legal protection of unjust land ownership—unjustly gained and unjustly maintained—was the heart of what Fortune called "legalized robbery."[23] The remedy for centuries of legalized and government-supported robbery through slavery was not, for Fortune, the elimination of governmental action, but precisely its opposite: white people were "morally bound to do all that is in their power" to support Black freedom and to protect Black suffrage.[24] "It is the proper function of government," argued Fortune, "to see to it that its citizens are properly prepared to exercise wisely the liberties placed in their keeping."[25] The goal of legislation should not be the enrichment of wealth and fortune, but the "general diffusion of wealth" to the people, through supports such as broad-based public education and public health.[26] Millionaires were, according to Fortune, the "enemies of society" who "take advantage of the public" and "corrupt

21. FORTUNE, *supra* note 11, at 39.

22. *Id.* at 61 (emphasis in original).

23. *Id.* at 62; *see id.* at 61-62.

24. *Id.* at 63.

25. *Id.*

26. *Id.* at 65; *see id.* at 64-92.

legislatures and dictate to the unscrupulous minions of the law" (by which he likely meant judges).[27] Corporations as well as landowners both used law—legislative and judicial—to rob laborers (of all races) of the value created by their work.

Fortune also linked the abuses of the criminal law with the general oppression of Black people and workers. He noted this both in the injustice of the southern convict-lease penal system and in the excessive policing of the streets of New York. Both racial and class oppression were enforced through criminal law as much as through constitutional law. Crime control was in fact a misdirected expenditure away from the very things that would reduce crime—education, housing, and subsistence.[28] For Fortune, to actually address problems of race and class oppression required a comprehensive view of law and government. The wealthy and white oligarchs employed law across a range of areas to maintain control, and it was necessary for citizens to confront them in each area. It was also the duty of both the federal and state governments to take these steps, as they were essential to the implementation of constitutional ideals of citizenship, rights, and democracy. Indeed, a hard lesson of the preceding twenty years, for Fortune, was precisely the problem of the federal government's abandonment of its duties toward citizens in need.[29]

II. IDA B. WELLS'S *THE REASON WHY*

The World's Columbian Exposition of 1893 in Chicago celebrated a new, grand, capitalist America, a country of technological and industrial might, a nation that had emerged from its rural roots and a civil war to become a shining, electrified White City. No event better illuminated the glories of Gilded Age capitalism, with grand palaces that sprung seemingly overnight, electric lighting that turned night into permanent day, sidewalks that moved, and the wonders of the world brought to the middle of an erstwhile wilderness. The American

27. *Id.* at 151.

28. *Id.* at 75-76, 161-64. In a passage frighteningly relevant today, Fortune wrote, "I believe in law and order; but I believe, as a condition precedent, that law and order should be predicated upon right and justice, pure and simple. Law is, intrinsically, a written expression of justice; if, on the contrary, it becomes instead written *injustice*, men are not, strictly speaking, bound to yield it obedience." *Id.* at 161.

29. *Id.* at 98-100, 110-11. Fortune promoted a political labor movement that sought governmental action, as opposed to the trade unionist private contracting model that became the practice of the American Federation of Labor. *See* CARLE, DEFINING THE STRUGGLE, *supra* note 12, at 51. Fortune would found the Afro-American League in part to advance this state-centered, broad-based democratic vision. *See id.* at 52-53.

experiment in unbridled industrial capitalism, an apotheosis of one version or another of Social Darwinism, stood on display for the world to admire.[30]

Into this White City stepped a young Ida B. Wells, freshly arrived from a successful speaking tour in England and already recognized as a leading journalist and analyst of racial injustice. Or rather not into it, as African Americans were largely excluded from participation in the exposition. Frederick Douglass had been asked by Haiti to represent it in their nation's pavilion, and as part of his effort to use his location to advocate for Black rights and recognition, and an acknowledgement of racial injustices, he asked Wells to help write a monograph.[31] The result was *The Reason Why*. Douglass wrote the Introduction, Garland Penn and Frederick Barnett each wrote a chapter, but it was Wells who composed the bulk of the pamphlet, writing the Preface and chapters on Jim Crow laws, criminal justice, and lynching.[32]

Douglass set the tone by contrasting the ideals claimed by white Americans at the Exposition with the reality visited upon Black Americans daily. It would have been nice, Douglass wrote, if the "splendid display of wealth and power"[33] visible at the Exposition also reflected a "moral progress of the American people [that had] kept even pace with their enterprise and their material civilization."[34] Such claims would be a "flagrant disregard of the truth," however, for in fact the evil of American slavery, as perpetuated through institutionalized race prejudice, stood at the heart of this grand American landscape, corrupting it from within.[35] Thus Douglass, as he so often did, called out the hypocrisy of white America's self-celebration of ideals of individualism and liberty and industry that were achieved through the violence against and exclusion of Black Americans.

Douglass's critique of the Exposition sounded in the familiar refrains of his abolitionist and Reconstructionist ideals. Wells picked up on this, but also engaged in a more direct and contemporary challenge and critique. In as much as

---

30. On the iconic nature of the Exhibition for the late-Gilded Age, see GLENDA ELIZABETH GILMORE & THOMAS J. SUGRUE, THESE UNITED STATES: A NATION IN THE MAKING, 1890 TO THE PRESENT 2-7 (2015); *see also* Robert W. Rydell, *Editors Introduction: "Contend, Contend!," in* IDA B. WELLS, FREDERICK DOUGLASS, IRVINE GARLAND PENN, & FERDINAND L. BARTLETT, THE REASON WHY THE COLORED AMERICAN IS NOT IN THE WORLD'S COLUMBIAN EXHIBITION xi, xi-xii (Robert W. Rydell ed., 1999) (describing significance of 1893 World's Columbia Exposition).

31. *See* MIA BAY, TO TELL THE TRUTH FREELY: THE LIFE OF IDA B. WELLS 154, 165-67 (2009); DAVID W. BLIGHT, FREDERICK DOUGLASS: PROPHET OF FREEDOM 733, 737-38 (2018).

32. On the authorship of the chapters, see WELLS ET AL., *supra* note 11, at 2, 40, 63, which notes authorship of chapters penned by Douglass, Penn, and Barnett.

33. WELLS ET AL., *supra* note 11, at 4.

34. *Id*. at 3.

35. *Id*. at 4.

the Exposition claimed to reflect the glories of white American progress since Columbus (hence the title, Columbian Exposition), Wells asserted precisely the historical debt owed to enslaved Black people: "The colored people of this great Republic number eight millions — more than one-tenth the whole population of the United States. They were among the earliest settlers of this continent, landing at Jamestown, Virginia in 1619 in a slave ship, before the Puritans, who landed in Plymouth in 1620."[36] Much as Fortune had done in *Black and White*, Wells called on 1619 as a founding date.[37] For Wells, the long history of racial enslavement both represented a claim by Black Americans to be recognized as founders of this country being so resoundingly celebrated at the Exposition, and simultaneously shown a bright spotlight of critique on that very celebration for promoting financial success extracted from generations of forced labor that is the very antithesis of the liberty. As Wells continued:

> [Black Americans] have contributed a large share to American prosperity and civilization. The labor of one-half of this country has always been, and still is being done by them. The first credit this country had in its commerce with foreign nations was created by productions resulting from their labor. The wealth created by their industry has afforded to the white people of this country the leisure essential to their great progress in education, art, science, industry, and invention.[38]

In this remarkable passage — which Wells placed in the opening Preface statement, prior to Douglass's Introduction — we see a Black progressive critique that rests in part on the older analysis of Douglass but also speaks to a more modern problem. It is not simply that white Americans are being hypocritical, as Douglass said, but that the very basis of the wealth and industry they celebrate — the money, the education, the art, everything — was obtained upon the toil of the enslaved. This wealth continued to be gained and maintained through the violent suppression of Black Americans and the unconstitutional and unjust deprivation of political and civil rights.

---

36. *Id*. at 1.

37. In many ways the 1619 Project has been front and center in African American critical discourse for a long time. *Cf.* Nikole Hannah-Jones, *Our Democracy's Founding Ideals Were False when They Were Written. Black Americans Have Fought to Make Them True.*, N.Y. TIMES MAG. (Aug. 14, 2019), https://www.nytimes.com/interactive/2019/08/14/magazine/black-history-american-democracy.html [https://perma.cc/ES8H-3E3D] (discussing arrival of enslaved Africans to Jamestown in 1619); Jake Silverstein, *Why We Published the 1619 Project*, N.Y. TIMES MAG. (Dec. 20, 2019), https://www.nytimes.com/interactive/2019/12/20/magazine/1619-intro.html [https://perma.cc/822V-4WTT] (explaining that the current *New York Times* 1619 Project is an effort to reframe America's historical founding as being the arrival of enslaved Africans in the English colonies).

38. WELLS ET AL., *supra* note 11, at 1.

Wells extended this critique in her chapter on the growing legal regime denying black citizens voting rights and implementing mandatory segregation in public accommodations. Whereas Fortune had written *Black and White* after the 1883 Court decisions but prior to state legislative implementation of disenfranchisement and segregation, Wells, writing ten years later, confronted a newly legislated Jim Crowism. Notably, to address this legal movement, Wells, like Fortune, picked up on the jurisprudential idea of special or class legislation.

Even the title of Wells's chapter on Jim Crow — "Class Legislation" — reflected a critical inversion. Class legislation was, as of the 1890s, a key constitutional concept employed by courts, usually but not exclusively under the Equal Protection Clause of the Fourteenth Amendment, to describe legislation that unfairly or illegitimately favored one group over another.[39] The Court used this concept in the *Civil Rights Cases*,[40] it was the darling of Justice Field,[41] and it is a clear, if not actually named, concern of the Court in *Lochner*.[42] By titling her chapter on Jim Crow laws "Class Legislation," Wells staked a firm claim in the language of constitutional law that these laws were inherently unequal, were designed for the purpose of discriminating against Black people, and were a plain violation of equal protection. Importantly she was also, in the context of a booklet critical of unequal wealth, using the Court's rhetoric of wealth-protection to critique race inequality. The very class being protected were white wealth-holders who so triumphantly displayed American "civilization" in the Exposition's White City.[43]

Wells then depicted the wide range of interconnected legal and social networks that maintained white supremacy. The book's overall structure reflects this, with Wells writing chapters on criminal justice as well as disenfranchisement and segregation. She also addressed this interconnection to begin the chapter "Class Legislation" by setting out the ways that the Reconstruction Amendments had been nullified in the South:

> This has been accomplished by political massacres, by midnight outrages of the KuKlux Klans, and by state legislative enactment. That the legislation of the white south is hostile to the interests of our race is shown

---

39. On class or special legislation and its connection with the history of equal protection doctrine, see Melissa L. Saunders, *Equal Protection, Class Legislation, and Colorblindness*, 96 MICH. L. REV. 245 (1997).

40. Civil Rights Cases, 109 U.S. 3, 24 (1883).

41. Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429, 596 (1895) (Field, J., concurring).

42. Lochner v. New York, 198 U.S. 45, 64 (1905) (holding that the only plausible basis for the hours regulation was political choice to side with laborers over owners). For how class-legislation ideas influenced Justice Field's freedom of contract jurisprudence, see PAUL KENS, *LOCHNER V. NEW YORK*: ECONOMIC REGULATION ON TRIAL 119 (1998).

43. WELLS ET AL., *supra* note 11, at 1.

> by the existence in most of the southern states of the convict lease system, the chain-gang, vagrant laws, election frauds, keeping back laborers wages, paying for work in worthless script instead of lawful money, refusing to sell land to Negroes and the many political massacres where hundreds of black men were murdered for the crime (?) of casting the ballot.[44]

Because most Black Americans lived in the South, Wells also emphasized how critical political participation — and its denial — was to Black equality across the country: "Depriving the Negro of his vote leaves the entire political, legislative, executive and judicial machinery of the country in the hands of the white people. The religious, moral and financial forces of the country are also theirs."[45] Since disenfranchisement gave white Southerners excessive power in Congress and the Electoral College, she argued, a broad institutionalization of racism would follow, as was already being seen in the Supreme Court's overturning of the Civil Rights Act of 1875 in the *Civil Rights Cases*, which reinstituted a "'state's rights'[] doctrine" that ignored equal protection principles and was incentivizing separate car laws across the South (here, Wells anticipated the outcome of *Plessy*).[46]

Wells then pointed out that the convict lease system and "Lynch Law" were "two great outgrowths and results of the [Jim Crow] class legislation."[47] Essentially she argued that widespread exclusions from suffrage and political power, from the public sphere through segregated public accommodations, and from the civil sphere in whites-only religious, educational, and moral organizations, along with the tight controls on labor through employment and vagrancy laws, all worked together to force Black people into what white people then labeled illegal activities. Wells wrote, "[W]hite Christian and moral influences have not only done little to prevent the Negro becoming a criminal, but they have deliberately shut him out of everything which tends to make for good citizenship."[48] These policies and practices then created a cycle by which "convicts labor [was] . . . brought into direct competition with free labor" and thus drove down legitimate labor markets.[49] The criminal-justice system enabled by disenfranchisement was, she argued, itself deeply tied into the unjust labor markets, all of

---

44. *Id.* at 13-14.

45. *Id.* at 15.

46. *Id.* at 16.

47. *Id.* at 19.

48. *Id.* at 19-20.

49. *Id.* at 23 (quoting Correspondence, WASH. D.C. EVENING STAR, Sept. 27, 1892).

which served to perpetuate the wealth and cultural achievements of white Americans.

The Reason Why persuaded no white people.[50] The Exposition was seen by the leading American press as a resounding success and great statement of American industry and civilization. Yet Wells, Douglass, and Barnett had laid down a striking challenge that extended the arguments about racial equality and against white supremacy from late-Reconstruction and began reconfiguring them simultaneously as a critique of the White City that was American capitalism. And they had done so by weaving into this critique elements of constitutional claims, constitutional law, and a racial legal realism that reflected a burgeoning Black progressivism.

III. THE NIAGARA MOVEMENT

The Niagara Movement was a Black activist and civil-rights organization formed in 1905 by W.E.B. Du Bois, William Monroe Trotter, and others in an effort to advocate for social, economic, and political equality and to counter the conservative accommodationism of Booker T. Washington's movement. It is often considered the immediate precursor to the interracial National Association for the Advancement of Colored People (NAACP).[51] The Niagara Movement was both a distillation of late-nineteenth-century African American activism and a key expression of the direction that activism would take into the twentieth century in the fight against Jim Crow.

The Movement's Declaration of Principles from the initial conference in 1905, prepared by Du Bois and Trotter, and the 1906 Address to the Country, prepared by Du Bois, were concise statements of foundational principles for the establishment of racial equality.[52] Like Ida Wells and Thomas Fortune before them, the members of the Niagara Movement argued for a multi-pronged attack on injustice across all of civil society, from suffrage to civil rights to economic

---

50. Rydell, *supra* note 30, at xiii-xiv (finding that white people ignored the booklet, and many Black people were ambivalent about it).

51. *See* CARLE, DEFINING THE STRUGGLE, *supra* note 12, at 174-220; *see also* ANGELA JONES, AFRICAN AMERICAN CIVIL RIGHTS: EARLY ACTIVISM AND THE NIAGARA MOVEMENT 1 (2011) (describing the Niagara Movement as formative for twentieth century Black civil rights); DAVID LEVERING LEWIS, W.E.B. DU BOIS: A BIOGRAPHY 186-266 (2009) (discussing Du Bois's critique of Booker T. Washington, his role in the formation of the Niagara Movement, and the transition to the National Association for the Advancement of Colored People); Elliott M. Rudwick, *The Niagara Movement*, 42 J. NEGRO HIST. 177, 177 (1957) (providing the first comprehensive history of the Niagara Movement).

52. On the Declaration of Principles, see LEWIS, *supra* note 51, at 217. On the Address to the Country, see *id*. at 222.

opportunity to criminal-justice reform to educational rights. These statements, written a decade after *Plessy* and *Williams*, and nearly contemporaneously with *Giles v. Harris* and *Lochner*, presented an argument against the underlying principles of all four. Firm opposition to the elimination of voting rights across the South, which was sanctioned by the Court in *Williams*[53] and *Giles*[54] and was consistently ignored by a white Republican Congress that refused action on voting-rights bills,[55] was the first principle listed in the Declaration.[56] The loss of voting power in the South between the 1880s and 1905 had been dramatic and shocking, and the re-establishment of political power would long be Du Bois's overriding goal.

The Niagara Declaration similarly rejected the animating ideas of both the *Civil Rights Cases* and *Plessy*. It argued "against the curtailment of our civil rights . . . in places of public entertainment" and the institution of Jim Crow cars.[57] It declared that "[a]ny discrimination based simply on race or color is barbarous, we care not how hallowed it be by custom, expediency or prejudice."[58] The Declaration also stressed that this was not simply a state or local issue, but was a responsibility of Congress mandated by the Reconstruction Amendments: "We urge upon Congress the enactment of appropriate legislation for securing the proper enforcement of those articles of freedom, the thirteenth, fourteenth and fifteenth amendments of the Constitution of the United States."[59] This was a direct challenge to both Congress—which continued to temporize on bills to enforce each of the amendments[60]—and to the Court, which continued to denigrate federal powers of enforcement.

---

53. 170 U.S. 213 (1898).

54. 189 U.S. 475 (1903).

55. *See* Jeffery A. Jenkins, Justin Peck & Vesla M. Weaver, *Between Reconstructions: Congressional Action on Civil Rights, 1891-1940*, 24 STUDS. AM. POL. DEV. 57, 59-63 (2010).

56. *Niagara's Declaration of Principles, 1905*, *supra* note 11, para. 2.

57. *Id.* paras. 3, 12.

58. *Id*. para. 11.

59. *Id*. para. 14.

60. Two such failed initiatives were the Lodge Bill in 1890 to renew enforcement of the Fifteenth Amendment, H.R. 10958, 51st Cong. (1890), and the Crumpacker Resolution in 1901 to start a process to enforce section 2 of the Fourteenth Amendment, 34 CONG. REC. 517-22 (1901) (statement of Rep. Olmsted). *See also* 34 CONG. REC. 748 (1901) (motion of Rep. Crumpacker) (filing a motion for the Census Committee to investigate the denial of suffrage). Representatives Olmsted and Crumpacker worked together on the resolution, with Olmsted initially introducing it when Congress convened in 1901 after the Republican electoral victory of 1900. *See* KERRI K. GREENIDGE, BLACK RADICAL: THE LIFE AND TIMES OF WILLIAM MONROE TROTTER 72-74 (2020); *see also* CARLE, DEFINING THE STRUGGLE, *supra* note 12, at 141-45 (explaining that the Crumpacker resolution and related legislative actions were supported by

Like Fortune and Wells before them, the authors of the Niagara Declaration also embraced federal powers in the area of education. By emphasizing the need for public education for Black people, including high-school education, the Declaration rejected not only the lack of school funding across the South but also the Court's own approval of discriminatory funding and educational opportunities in *Cumming*.[61] They also stressed that it was properly the role of the federal government to support this necessary expansion of education—another issue that Congress had been dodging since the 1880s.[62]

Also like Fortune and Wells, the Niagara Movement members recognized the multi-dimensional aspects of racial oppression, advocating not only for political and civil rights but economic and social rights as well. In the Declaration they argued "against the denial of equal opportunities to us in economic life" which, in the South, "amounts to peonage and virtual slavery" and "tends to crush labor and small business enterprises" and across the country prevents Black people from earning a "decent living."[63] These injuries were effected both through "iniquitous laws" and through the social customs of "American prejudice." For the Niagara Movement, however, economic opportunity was not something that could magically arrive through capitalism, because the very agents of capitalism, as well as the agents of labor, were hostile to Black people. In an important paragraph they addressed directly the problem of racial prejudice and the conflicts between labor and capital that so greatly animated the turn of the century:

> We hold up for public execration the conduct of two opposite classes of men: The practice among employers of importing ignorant Negro-American laborers in emergencies, and then affording them neither protection nor permanent employment; and the practice of labor unions in proscribing and boycotting and oppressing thousands of their fellow-toilers, simply because they are black. These methods have accentuated and will accentuate the war of labor and capital, and they are disgraceful to both sides.[64]

Black civil rights groups); ALEXANDER KEYSSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES 108-11 (2000) (describing the legislative history of the Lodge Bill); Jenkins, Peck & Weaver, *supra* note 55, at 59-63.

61. Cumming v. Richmond Cmty. Bd. of Educ., 175 U.S. 528 (1899) (writing for a unanimous Court, Justice Harlan rejected Black plaintiffs' challenge to Richmond County, Georgia's decision to fund a segregated school system that provided high school facilities only for white people).

62. On the Blair Bill to provide federal educational funding, see CARLE, DEFINING THE STRUGGLE, *supra* note 12, at 48, 226.

63. *Niagara's Declaration of Principles, 1905*, *supra* note 11, para. 4.

64. *Id*. para. 9.

This passage is especially crucial to understanding the Niagara Movement's views of what would come to be known as Lochnerism—the antilabor, liberty-of-contract interpretation of the Fourteenth Amendment. While some scholars have contended that Lochnerism was potentially a liberty-enhancing doctrine for Black workers because of its attack on labor laws that protected segregated labor unions,[65] the Black members of the Niagara Movement rejected such a view. Of course, they did recognize that many white labor unions were aggressively racist. The 1880s biracialism of the Knights of Labor was by 1905 a distant memory, and for Black workers sometimes the only way into manufacturing positions was by being hired as replacement workers.[66] But Du Bois and Trotter also rejected the idea that employers were somehow benefiting Black workers in this scheme. Rather, they argued that employers only did so in emergencies—when white labor was striking—and that such hiring was provisional. Indeed, this strategic use of race to divide the interests of labor worked strongly to the economic advantage of employers, as Black workers were a source of reserve, low-paid replacement workers. As they pointed out, racial prejudice not only harmed Black people, it "accentuated . . . the war of labor and capital" and made the fight for labor justice harder for all workers.[67]

The Niagara Movement recognized that criminal justice was another means of implementing widespread civil, economic, and political oppression. In the Declaration they called for the "abolition of the dehumanizing convict-lease system," nondiscriminatory juries, and equality of punishment and penal reforms.[68] Du Bois extended this point in the Address by embracing a full commitment to constitutional and legal protections throughout the criminal system: "We are not more lawless than the white race: we are more often arrested, convicted, and

65. *See* BARNETT, *supra* note 9, at 210-25; BERNSTEIN, *supra* note 9, at 73-98.

66. On the history of anti-Black racism in the labor movement, see Nell Irvin Painter, *Black Workers from Reconstruction to the Great Depression*, *in* WORKING FOR DEMOCRACY: AMERICAN WORKERS FROM THE REVOLUTION TO THE PRESENT 63 (Paul Buhle & Alan Dawley eds., 1985). *See also* Eric Arnesen, *"Like Banquo's Ghost, It Will Not Down": The Race Question and the American Railroad Brotherhoods, 1880-1920*, 99 AM. HIST. REV. 1601 (1994) (studying racism in railroad unions); Warren C. Whatley, *African-American Strikebreaking from the Civil War to the New Deal*, 17 SOC. SCI. HIST. 525 (1993) (analyzing the extent to which race was an independent factor in strikebreaking practices). Although one must read Booker T. Washington cautiously on issues like this, his 1913 essay in The Atlantic Monthly on race and unions is fascinating and discusses several incidents of anti-Black racism in white unions. Booker T. Washington, *The Negro and the Labor Unions*, ATLANTIC MONTHLY, June 1913, at 756.

67. *Niagara's Declaration of Principles, 1905*, *supra* note 11, para. 9. Du Bois, in his Address the following year, similarly connected labor and class issues to race: "We want the law enforced against rich as well as poor; against capitalist as well as laborer; against white as well as black." DuBois, *supra* note 11, para. 8.

68. *Niagara's Declaration of Principles, 1905*, *supra* note 11, para. 6.

mobbed. We want justice even for criminals and outlaws. We want the Constitution of the country enforced."[69]

The Niagara Movement also addressed an aspect of legal doctrine that neither Fortune nor Wells had quite focused on. From the time of the framing of the Reconstruction Amendments, courts and legislatures had struggled with how to define the basic rights protected. A general approach developed to recognize a division among three categories of rights: civil, political, and social. By the 1880s this had become a standard typology and was one used by the court in the *Civil Rights Cases* and *Plessy* to explain away the refusal to protect Black Americans by cabining off public accommodation rights as mere "social rights," not civil rights (rights to contract, own property, appear in court) or political rights (voting, jury service).[70] Black legal activists contested this categorization, arguing that public accommodations were civil rights, but they also largely accepted the three categories.[71] Congressmen Richard Cain and John Lynch, for instance, defended the Civil Rights Act in the House in 1874 and 1875 by arguing that public-accommodations protections did not cover social equality and social rights, which were beyond the scope of legal regulation.[72] Similarly, Frederick Douglass, in a speech lamenting and critiquing the *Civil Rights Cases* shortly after it was issued in 1883, argued that "[s]ocial equality and civil equality rest upon

---

69. DuBois, *supra* note 11, para. 8.

70. On this tripartite structure, see James W. Fox Jr., *Doctrinal Myths and the Management of Cognitive Dissonance: Race, Law, and the Supreme Court's Doctrinal Support of Jim Crow*, 34 STETSON L. REV. 293, 317 (2005). This distinction does significant work for the Court in the *Civil Rights Cases*. *See* The Civil Rights Cases, 109 U.S. 3, 22 (1883).

71. Interracial marriage was often seen as the marker of the line between social and civil rights. Many Black advocates chose not to challenge when white people declared interracial marriage to be outside the scope of federal rights and privileges. Thomas Fortune had been an exception in 1883 when he wrote fiercely against *Pace v. Alabama* as one of the triumvirate of white supremacy cases of that year. *See* CARLE, DEFINING THE STRUGGLE, *supra* note 12, at 42-47.

72. *See* 2 Cong. Rec. 565 (1874) (statement of Rep. Cain); 3 Cong. Rec. 944 (1875) (statement of Rep. Lynch). Lynch's speech challenged white supremacism directly through the technique of radical inversion:

> I can then assure that portion of my democratic friends on the other side of the House whom I regard as my social inferiors that if at any time I should meet any one of you at a hotel and occupy a seat at the same table with you, or the same seat in a car with you, do not think that I have thereby accepted you as my social equal. Not at all. But if any one should attempt to discriminate against you for no other reason than because you are identified with a particular race or religious sect, I would regard it as an outrage; as a violation of the principles of republicanism; and I would be in favor of protecting you in the exercise and enjoyment of your rights by suitable and appropriate legislation.

an entirely different basis" and that the Civil Rights Act no more established social equality than the Declaration of Independence.[73] In each of these cases Black leaders opposed the use of social equality concepts to justify legal protection of segregation, but they also did not reject the concept itself. Du Bois instead directly challenged the typology. The 1906 Address described three rights as paramount: suffrage, public accommodations, and "the right of freedmen to walk, talk, and be with them that wish to be with us."[74] The right to choose one's friends, he argued, was "the most fundamental human privilege."[75] Du Bois rejection of the social-rights distinction, and his embrace of social rights as part of a basic civil-rights agenda marked a new step for Black progressivism. In some ways this was not a new position for many Black advocates—Black speakers and writers had generally supported eliminating all restrictions on interracial connections, whether interracial marriage or private and semiprivate organizations. But prior advocates had largely avoided challenging the *legal and political doctrine* of this tripartite rights structure.[76] Du Bois and others in the Niagara Movement now made this part of the agenda for the twentieth-century civil-rights movement.

IV. BLACK PROGRESSIVISM AND THE PROGRESSIVE COURT

There are two important themes evident in each of these writings from early Black progressives: the systemic nature of racism and the essential connection between racial and economic justice. For each of these authors, racism was far too complex and pervasive for it to be addressed by any single front. Indeed, to limit antiracism in that way would in fact *support* racism by allowing it to accumulate and solidify power across other spheres. This was one of the things Wells

73. Frederick Douglass, Speech at the Proceedings of the Civil Rights Mass-Meeting 13-14 (Oct. 22, 1883), https://udspace.udel.edu/bitstream/handle/19716/21266/90e8d7a2151711f22b2af42c68465954.pdf?sequence=1&isAllowed=y [https://perma.cc/9PPS-JNAF]; *see also* Marianne L. Engelman Lado, *A Question Of Justice: African-American Legal Perspectives on the 1883* Civil Rights Cases, 70 CHI.-KENT L. REV. 1123, 1138 n.95 (discussing Frederick Douglass's other statements on social rights and social equality in connection with the Civil Rights Act).

74. Du Bois, *supra* note 12, paras. 4-7.

75. *Id*. para. 7.

76. *But cf*. Rebecca J. Scott, *Public Rights, Social Equality, and the Conceptual Roots of the* Plessy *Challenge*, 106 MICH. L. REV. 777, 781 (2008) (arguing that advocates of color in the *Plessy* litigation called upon a well-established concept of public rights that had been part of the biracial, Reconstruction-era Louisiana constitution and was an alternative to the social-rights formulation adopted by the Supreme Court).

and Du Bois found so problematic with Booker T. Washington's accommodationism and its hyperfocus on industrial education.[77] And while Washington and the progressives may have agreed on the importance of economic development generally, Washington's cultivation of millionaires like Andrew Carnegie made the anticapitalist strand of Black progressivism unpalatable for conservative Bookerites.

Comparing the Black progressive thought sketched here with the Court's "pro-rights" cases of the middle period of the *Lochner* era, it becomes clear that the isolated and status-quo enhancing nature of the opinions meant they would, in the minds of Black progressives, have little chance of success.[78] For instance, when the Court struck down the Alabama peonage law in *Bailey* it explicitly abjured race as a basis for its decision.[79] Rather, the Court focused on how the law criminalized a breach of contract and thus converted a personal-service contract into a type of servitude.[80] Certainly the outcome of the case was welcome to Black progressives, who had been highlighting the injustice of peonage laws for almost thirty years. For Black progressives, however, the issue was not that the law criminalized contract relations, but that peonage re-established racial slavery. By divorcing its reasoning from the problem of race, the Court avoided confronting how this peonage law was part of a system of racial oppression that also violated the Reconstruction Amendments. Doing so would have required looking behind cases like *Giles*, *Plessy*, and the *Civil Rights Cases* and the related doctrines supporting states' rights and limited federal powers. Instead, the Court could rely on a contract-enhancing analysis arguably consistent with *Lochner* to provide some enforcement heft to the Thirteenth Amendment while not displacing established Jim Crow jurisprudence.

Similarly, the Court in *Buchanan* overturned a Louisville ordinance prohibiting Black people from moving into a majority-white neighborhood. A full-

77. On Wells's break from Washington, see BAY, *supra* note 31, at 232-73. On Du Bois, see LEWIS, *supra* note 51, at 186-230.

78. It is actually deceptive to talk about the Court from 1910-1920 as part of the *Lochner* era. Several of the Justices in the *Lochner* majority had left the Court by 1910. That period also saw decisions hostile to *Lochner*, including the case that many thought overturned *Lochner* sub silentio, *Bunting v. Oregon*, 243 U.S. 426 (1917). It is probably better to see the Court as struggling somewhat erratically between a hard liberty of contract ideology and a more legislatively supportive, progressive jurisprudence, which was consistent with the fact that Presidents Roosevelt, Taft, and Wilson had appointed most of the sitting Justices.

79. Bailey v. Alabama, 219 U.S. 219, 231 (1911) ("We at once dismiss from consideration the fact that the plaintiff in error is a black man."). No doubt the Court, and the newly confirmed author, Republican political progressive Justice Hughes, believed that de-racing both the case and the Thirteenth Amendment was necessary in order to overturn a facially race-neutral law and uphold the purpose of the Amendment.

80. *Id*. at 232-39.

throated Black progressive analysis of such a law might well have argued for the unconstitutionality of legal segregation and separation of the races. This was a perfect case to embrace Du Bois's idea that social rights were fundamental rights, or to declare that laws implicitly targeting race were invalid class legislation much as the Court had looked at the implied purposes of the labor regulations in *Lochner*. But this would have required overturning the underlying justification for *Plessy* and *Pace*; indeed, the Louisville ordinance was drafted to fit neatly within those cases because it also barred white purchasers from moving into majority-black neighborhoods. Overturning the ordinance seemed to require a confrontation with the *Pace-Plessy* doctrine. The Court again sidestepped this conflict. The Court emphasized the need to protect the property rights of the white owner. While the Black progressives working with the interracial NAACP, which brought the case, were clearly pleased with the result, the fact that the Court dodged the racial equality issues meant that, under the doctrine of *Buchanan*, residential segregation would remain divorced from systemic racism. And since the Court's opinion ended up supporting the rights of white property owners, it meant that Black people could only benefit if they could find a sympathetic white owner to sell to them. Whereas Black progressivism focused on the broadly unequal distribution of property caused by centuries of slavery, the Court's focus on protection of de facto property distributions not only avoided this problem but arguably upheld it, for if white people had the constitutional right to sell to Black people they also had the right not to. Residential segregation by custom — which Du Bois, Fortune, and Wells all viewed as on par with legal segregation — was legally secured under the rule of *Buchanan*.

The Court's penchant to avoid systemic issues was also apparent in the voting-rights case of *Guinn v. United States*. Oklahoma, soon after obtaining statehood, rewrote its election laws to exclude Black people from suffrage. It did so by implementing a literacy test and excepting white Americans through a grandfather clause timed to coincide with a date prior to the Fifteenth Amendment. The Court overturned the grandfather clause, but expressly upheld the literacy test as being race-neutral, clinging to (although not citing) its 1898 holding in *Williams*. From the perspective of Black progressivism this type of surgical constitutionalism served only to support the vast swath of racially discriminatory election laws. While enforcement of the Fifteenth Amendment was clearly cheered (the NAACP had argued as an amicus in the case), the failure to address the system of suffrage discrimination itself served to support that discrimination in its effects, a problem the NAACP and other would spend decades combatting.

This fact — that in each case the Court managed to address a narrow issue and that the cases had relatively little systemic impact — highlights another aspect of the Black progressive critique. As Michael Klarman has observed, victories in cases such as *Guinn* were essentially meaningless precisely because litigation

strategies required extensive financial resources and extended civil-society networks.[81] But absent significant economic development in Black communities, resources for long-term test litigation strategies were thin indeed. The economic and wealth critique advanced early on by Thomas Fortune still rang true: So long as wealth remained primarily in the hands of white corporations and property owners and wages remained low and discriminatory, sporadic cases like *Buchanan*, *Bailey*, and *Guinn* provided no *de facto* equality, even on the very topics they addressed. Without the federal government's willingness to fund basic citizenship programs, such as broad-based educational reforms, labor protections, or equal-suffrage enforcement, little progress could be made. As Ida Wells had observed and predicted, mass disenfranchisement in the South produced political paralysis on race issues nationally, and the *Lochner*-era Court's concurrent doctrines that greatly constrained federal powers only layered on more obstacles to racial justice.[82]

So, did the Court's post-*Lochner* race jurisprudence matter? To the extent it reflected and revealed tensions, fissures, and cracks in the Court's constitutional doctrines, they may have helped some. And given the limited range of options, they were some of the few tools available for the NAACP to build its long-term strategies. It also may have helped that there was some movement on other progressive fronts, including a spate of constitutional amendments and some state and local advances outside the South. But as Black progressives understood better than either white progressives or procapitalist libertarians, no ideological or jurisprudential approach — not liberty of contract, not prolabor progressivism, not property rights — could lead to broad-based racial quality. So long as racial equality was not a central doctrinal and political goal, so long as equal protection and equal citizenship were seen as occasional byproducts rather than animating ideals, and so long as the challenges to the historical intertwining of racial and labor oppression and punishment remained politically and economically fragmented, law was unlikely to be much help in realizing the hopes of Black Abolition and Reconstruction.

This brief inquiry into the jurisprudence of the Progressive Court and the critique of Black Progressives also speaks to our contemporary conflicts about the nature of constitutional equality and freedom both in the Court and on the

---

81. KLARMAN, *supra* note 10, at 85-86.

82. On the ways in which federalism and concepts of judicial neutrality are a central legacy of *Plessy*, see Harris, *supra* note 10, at 896-900. For an analysis of how Progressive Era federalism was also a selectively employed weapon for white supremacy at the legislative level, see Barbara Holden-Smith, *Lynching, Federalism, and the Intersection of Race and Gender in the Progressive Era*, 8 YALE J.L. & FEMINISM 31 (1996).

ground. Much like the Progressive Era, the modern Court has embraced a pro-capitalist, antilabor approach to constitutional powers and individual rights.[83] And much like the early Progressive Era Court, the modern Court has curtailed a prior generation's civil-rights and racial-justice advances.[84] But rather than simply identifying this historical parallel on the Court, the above focus on Black Progressivism asks us to also consider the parallels between Black Progressivism and modern Black and antiracist writers and activists. And some of the parallels are striking. Ida Wells and the Niagara Movement both identified how the southern criminal-justice systems replicated slavery relations, blocked efforts to advance racial equality, and entrenched white supremacy's national political power. That critique continues today with the movement for prison abolition and other fundamental criminal-justice reforms, including efforts to decouple criminalization from voting eligibility.[85] Thomas Fortune, Ida Wells, and W.E.B. Du Bois all identified the relationship of racial oppression and race-based capital and wealth accumulation as deeply unjust and dangerous for democracy. Living now during the second Gilded Age, with wealth inequality just as stark as that which motivated the Progressive Movement, we too must ask how and why the stubborn persistence of racial injustice maps onto the ever widening wealth and

83. For discussions of the modern re-emergence of Lochnerism, see generally Samuel R. Bagenstos, *The Unrelenting Libertarian Challenge to Public Accommodations Law*, 66 STAN. L. REV. 1205 (2014), which argues that libertarian view of the First Amendment may undermine public accommodations civil rights laws; Thomas B. Colby & Peter J. Smith, *The Return of* Lochner, 100 CORNELL L. REV. 527 (2015), which discusses the role of originalism in supporting the current move to a *Lochner*-style protection of economic liberties; Elizabeth Sepper, *Free Exercise Lochnerism*, 115 COLUM. L. REV. 1453 (2015), which compares the Court's current pro-corporate free exercise jurisprudence to *Lochner*; Amanda Shanor, *The New* Lochner, 2016 WIS. L. REV. 133, which discusses the Lochnerization of modern pro-corporate free-speech doctrine and administrative law; Jedediah Purdy, *Neoliberal Constitutionalism: Lochnerism for a New Economy*, 77 LAW & CONTEMP. PROBS. 195 (2014), which analyzes modern neoliberalism across several constitutional doctrines as a type of modern Lochnerism; and Mark Joseph Stern, *A New* Lochner *Era*, SLATE (June 29, 2018, 4:01 PM), https://slate.com/news-and-politics/2018/06/the-lochner-era-is-set-for-a-comeback-at-the-supreme-court.html [https://perma.cc/E8N5-D9W8], which discusses recent antilabor decisions.

84. *See, e.g.*, Shelby Cmty. v. Holder, 570 U.S. 529 (2013) (holding unconstitutional section 4(b) of the Voting Rights Act of 1965); Ricci v. DeStefano, 557 U.S. 557 (2009) (finding that New Haven's refusal to promote non-Black employees because the promotion examination had a disparate impact on Black people was itself a violation of Title VII of the Civil Rights Act of 1964); Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007) (ruling that Seattle's and Louisville's student-assignment plans, designed to support racial diversity, violated a race-neutrality concept of the Equal Protection Clause).

85. On prison abolition and the possible connections to prior racial-justice advocacy, see Dorothy E. Roberts, *Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1 (2019). On the racist history and present effects of felon disenfranchisement, see Lauren Latterell Powell, *Concealed Motives: Rethinking Fourteenth Amendment and Voting Rights Challenges to Felon Disenfranchisement*, 22 MICH. J. RACE & L. 383 (2017).

income chasm.[86] As Ta-Nehisi Coates, Richard Rothstein, Thomas Mitchell, and others keep telling us, modern racial oppression is fundamentally inseparable from governmental, legal, and economic structures of wealth and class distribution, a point that would have not surprised Black Progressives of the 1890s and 1900s.[87] And just as Fortune, Wells, and Du Bois each challenged judicial doctrines and categories such as the tripartite civil-political-social rights rubric or the condemnation of class legislation, so today do we need to critique facially neutral doctrines like colorblindness in equal-protection law and the irrelevance of racial-bias fourth amendment law.[88]

Of course none of these parallels should be asked to bear too much of the load of our current efforts to create racial justice in law. Current conflicts, doctrines, and structures have a multivariate history, some of which trace back to

---

86. The idea of the second Gilded Age focuses on the extraordinary rise in the percentage of wealth (and to a lesser degree income) being held by the top one percent. *See* Estelle Sommeiller & Mark Price, *The New Gilded Age: Income Inequality in the U.S. by State, Metropolitan Area, and County*, ECON. POL'Y INST. (July 19, 2018), https://www.epi.org/publication/the-new-gilded-age-income-inequality-in-the-u-s-by-state-metropolitan-area-and-county [https://perma.cc/744E-TLCT]. For a historian's caution about the analogy, see David Huyssen, *We Won't Get Out of the Second Gilded Age the Way We Got Out of the First*, VOX (April 1, 2019, 8:30 AM EST), https://www.vox.com/first-person/2019/4/1/18286084/gilded-age-income-inequality-robber-baron [https://perma.cc/4LDZ-GK5K].

87. *See, e.g.*, RICHARD ROTHSTEIN, THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA (2017) (studying mid-twentieth Century federal housing laws and policies that directly and often intentionally prevented racial integration in housing and produced the severe housing segregation that now dominates every major American city); Thomas W. Mitchell, *From Reconstruction to Deconstruction: Undermining Black Landownership, Political Independence, and Community Through Partition Sales of Tenancies in Common*, 95 NW. U. L. REV. 505 (2001) (studying the legal mechanisms that produced both land acquisition by rural Blacks during and after Reconstruction and the substantial loss of land and property rights among rural Blacks in the mid- and late-twentieth century); Thomas W. Mitchell, *Growing Inequality and Racial Economic Gaps*, 56 HOWARD L.J. 849 (2013) (surveying the overlapping dynamics of severe racial and economic inequality and suggesting possible legal and policy solutions); Thomas W. Mitchell, *Reforming Property Law to Address Devastating Land Loss*, 66 ALA. L. REV. 1 (2014) (presenting the uniform Partition of Heirs Property Act, for which Mitchell was the reporter, as a partial solution to the problem of historical land loss by rural Blacks); Ta-Nehisi Coates, *The Case for Reparations*, ATLANTIC (June 2014), https://www.theatlantic.com/magazine/archive/2014/06/the-case-for-reparations/361631 [https://perma.cc/RHX5-FARQ] (arguing that historical patterns and practices of racism in housing, employment, and criminal-justice policy and law justify serious efforts at racial reparations programs).

88. *See, e.g.*, Devon W. Carbado, *(E)racing the Fourth Amendment*, 100 MICH. L. REV. 946 (2002) (analyzing how search and seizure law implements racial ideology); Ian Haney-Lopez, *Intentional Blindness*, 87 N.Y.U. L. REV. 1779 (2012) (critiquing colorblindness in equal-protection and discrimination law); Anthony C. Thompson, *Stopping The Usual Suspects: Race And The Fourth Amendment*, 74 N.Y.U. L. REV. 956 (1999) (discussing how reasonable suspicion doctrine structurally ignores racial bias).

the Progressive era and before, and some of which have newer manifestations. Still, the critiques presented by Black Progressives should help us remain vigilant about how racial oppression and economic and class dynamics have a long history of reinforcing and reconstructing each other. White wealth was built in large part by enslaved and segregated Black labor. The contemporary Black Lives Matter civil-rights movement is not just an extension of the resistance to organized and governmental violence that Wells and others presented over 100 years ago. It is also an argument about how economic exclusion and oppression — the lack of employment and educational opportunities, unsafe and unaffordable housing, lack of access to medical care — interlock to maintain racial injustice, of how the injustice itself is simultaneously denied by and essential to the dominant political and legal ideologies. Absent full attention to racial justice as a primary goal, other ideologies, whether libertarian or communitarian, liberal or conservative, leftist or reactionary, are going to leave undone the equality mission embedded in the Reconstruction Amendments, like the prolabor, probusiness, or Progressive ideologies of the early 1900s. But just as importantly we can also see how current doctrines can be rhetorically turned in the direction of justice, as Wells did by identifying segregation as itself the worst type of class legislation and as the NAACP did in using *Lochner* Court's libertarianism as one of its tools to challenge Jim Crow. Resistance to the Court's current doctrines must involve both the development of alternative doctrinal paths and the reconfiguration of those paths the Court has already taken, and they must, like Wells, Fortune, and Du Bois, always keep one eye on the lived experiences of inequality that show us why the work is important.

Professor of Law, Stetson University College of Law. *Special thanks to law librarians Ashley Krenelka Chase and Kristen Moore for their help obtaining access to materials, which made this Essay possible during COVID-19 restrictions.*