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BOOK FORUM  
AFRICAN AMERICANS, LABOR REGULATIONS, AND  
THE COURTS:  
FROM RECONSTRUCTION TO THE NEW DEAL

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Moderator:

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Featuring

David E. Bernstein, Law Professor,  
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With comments by

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## P R O C E E D I N G S

MR. PILON: Good afternoon, and welcome to the Cato Institute. I am Roger Pilon, Director of Cato's Center for Constitutional Studies, which is sponsoring our Book Forum today.

Whenever a new book comes out that we think deserves to see wider attention, we try to hold a Book Forum to give it that attention. And we have just such a book today, "Only One Place of Redress," by Professor David Bernstein of the George Mason University Law School. The subtitle speaks volumes about the character of this book, "African Americans, Labor Regulations, and the Courts: From Reconstruction to the New Deal."

I will just draw from the preface, because it captures so nicely what this book is about. The book examines how several different types of labor regulations enacted between Reconstruction and the New Deal era have harmed African Americans. David looks at laws restricting interstate labor recruitment, occupational licensing laws, railroad labor laws, public works labor legislation and New Deal minimum wage and collective bargaining laws.

Much of this legislation came in for constitutional challenge, at least up until 1937, in the revolution that followed the court packing scheme, in which the court

essentially, after that, stepped out of looking at economic regulation. The court decisions invalidating labor laws on constitutional grounds have traditionally been seen as irredeemably reactionary. The judiciary is said to have been blind to economic realities that required government to intervene to ensure that labor markets functioned properly and to redress inequalities of bargaining power.

Now, this traditional sanguine view of the intent and effects of labor legislation neglects a very simple but powerful insight provided by modern political and economic theory, public choice theory in particular; namely, that regulatory legislation tends to benefit those with political power at the expense of those without such power. Many labor laws were blatant special interest legislation that at best helped certain workers at the expense of others, while reducing market efficiency. Even laws that were initially motivated by legitimate public health, safety and welfare concerns were frequently drafted and/or enforced to benefit the politically powerful at the expense of the politically vulnerable.

Not surprising, one of the principal focuses of this book is on the Lochner era and on the Lochner case in particular, the 1905 decision in which the Supreme Court found that the New York Maximum Hours Law was unconstitutional. And there, as David shows, this is a law that was widely understood at the time to

have been enacted to favor German unionized bakeries at the expense of new immigrants, Jewish and Italian immigrants, who actually lived in the bakeries and wanted to work the long hours that would be necessary to get their families off the ground financially.

We are going to explore these issues today. Of course, one of the underlying issues is the proper role of the judiciary, as no better evidenced than in this *Lochner* case. The word "*Lochner*" has come to be a verb; to "*Lochnerize*" is a pejorative term which conservatives use to attack liberal judicial activists, and liberals have used more recently to attack what they think of as conservative judicial activists.

Indeed, I was at a forum just last week that the American Jewish Committee put on, in which the court's New Federalism jurisprudence was the issue. I was invited to debate Larry Kramer of NYU, and Jeff Rosen of the New Republic and George Washington University, on this New Federalism. Both of my opponents condemned the Rehnquist court's activism. Indeed, see Larry Kramer's piece in Saturday's New York Times, which condemns the Rehnquist court for its judicial activism. He invokes the *Lochner* era in doing so.

So, it is very important to get a clear picture about what was going on during that era, which David's book helps us to do, so that we can use those same principles as they apply to the

modern debate, as to whether the Rehnquist court is in fact activist or whether it is instead simply applying the principles of the Constitution.

I am going to introduce David Bernstein first and then ask him to speak for about 20 minutes about his book. Then we are going to have Professor Mark Tushnet, from the Georgetown Law Center, give about 10 minutes of commentary. And I will introduce Mark prior to his coming to the podium.

Let me start with David, however. As I said earlier, he is an Associate Professor at the George Mason University Law School. He joined the GMU faculty in 1995. He was the John M. Olin, Jr., faculty fellow for the 1998-1999 academic years. He also served as a Mellon Research Fellow at Columbia University School of Law during the 1994-1995 academic years.

Before his stint at Columbia, he clerked for Judge David Nelson of the U.S. Court of Appeals for the Sixth Circuit, and practiced with Crowell and Moring in Washington, D.C. He is a graduate, with a B.A., summa cum laude, from Brandeis University, in 1988, and from the Yale Law School, in 1991, where he was senior editor of the Yale Law Journal and an Olin Fellow in Law, Economics and Public Policy.

He has published approximately 40 scholarly articles and essays in his young legal career, covering areas from legal history, civil justice reform and constitutional law. In fact,

he did a policy analysis for the Cato Institute back in 1992, called "Equal Protection for Economic Liberty: Is the Court Ready?"

The book, indeed, has its genesis, as he says in the introduction, from a Policy Forum that was held right here at the Cato Institute in 1988, in which Jennifer Roback Morse spoke about her work on Southern labor law in the Jim Crow era, exploitative or competitive. So, the book indeed has its genesis right here at Cato, and we are glad to welcome David back.

Would you please join us in welcoming David?

(Applause.)

DAVID E. BERNSTEIN, LAW PROFESSOR,  
GEORGE MASON UNIVERSITY LAW SCHOOL

MR. BERNSTEIN: Thanks, Roger. I'm not sure what I have left to say after all that, but I'll try.

Yes, I really am particularly glad to be here at Cato, because Professor Roback's, now Roback Morse's, talk really helped inspire my interest in this area. Also, chapter three of the book, about the Davis-Bacon Act, which I will discuss a little bit here, some of my research on that was originally published in a Cato analysis. So, Cato has as much to do with this book as anybody besides me.

Roger introduced the Lochner era to you a bit. So, let me point out that the most prominent criticism of Lochner, beyond the general discomfort with judicial activism, is that because of the court's hostility to labor legislation, particularly legislation that benefited labor unions, is that Lochner benefited the wealthy and powerful at the expense of the poor and helpless.

Scholars have assumed that political conflicts over labor regulations involved the oppressed workers on the one side and capitalists, or employers, on the other. The origins of this are twofold. First, in Marxist theory, they attribute all conflict in society to class conflict. So, you have workers and capitalists. We all know about that. But also, we have this progressive era myth that there are the interests on the one side and the people on the other. The interests were the large corporations and the people, at least in this context, were represented by the labor unions.

By contrast, my public choice instincts told me that not all workers have a common interest in labor regulations, nor do all employers gain from opposing such regulations. Unionized workers clearly benefit from legislation that benefits labor unions. But what about the workers who are excluded from such unions?

Meanwhile, employers who already have high-wage union shops, or who are on the cutting edge of mechanizations and don't use much labor, actually gain from laws that benefit labor unions because it raises their employers' costs while not raising their costs much, if at all.

More generally, there is no reason to assume, as the progressive critics of *Lochner* did, that economic regulations are generally public spirited rather than that they benefit those with political power at the expense of those without such power. In contrast, the workers versus capitalists hypothesis, my hypothesis was that groups with the least political power would have suffered the most from the type of economic regulations invalidated by *Lochnerian* courts. Or, to put it another way, the groups that benefited the most from *Lochner* were not the Plutocrats, but the politically oppressed.

Few groups had less political power during the *Lochner* era than African Americans. The vast majority of African Americans in those days lived in the South, and the vast majority of those who lived in the South were disenfranchised. Moreover, they had very few white political allies, so it was not like their interests were being virtually represented by somebody else.

So, my instincts told me that African Americans would therefore find far more assistance in competitive free labor

markets, where irrational discrimination is discouraged by economic considerations, than in the political marketplace, which reflected an entrenched irrational discrimination. I decided to do some historical research to test my economic intuition. I started doing some of this research in law school.

And just an interesting anecdote, when I was doing this for a third-year seminar in legal history, my professor told me, after he had already given me a good grade on the paper, that when I first told him what my thesis was, that *Lochner* was good for African Americans and that labor regulations harmed them, he said, "I thought it was going to be some right-wing crap that I'd throw in the garbage after I read it. But you have persuaded me and you should go write a book about." So, he helped persuade me to write a book about it. But this just shows you the entrenched view, that government regulations were always good for the poor and minorities and that free markets and *Lochner* were bad.

So, what kind of evidence do I have for this thesis that labor regulations hurt African Americans and *Lochner* therefore helped them?

Well, we know that the Equal Protection Clause of the 14th Amendment, passed in 1868, banned any explicitly discriminatory legislation with regard to African Americans. So, even in the Jim Crow South in the late 19th Century, you couldn't have a law that said explicitly African Americans may not have

this particular job. But there were still facially neutral legislation, legislation that didn't mention race at all, that could harm African Americans. And I discuss three categories of such legislation.

The first category is where the main purpose of the law was clearly to discriminate against African Americans. The second category is when the law had several purposes, but one purpose at least, one of the motivations, was to exclude African Americans from particular employment. Third, you had laws that were not intentionally discriminatory, but had discriminatory effects that could easily have been anticipated, and that once they came to fruition, the government chose not to ameliorate.

As I discuss in the book, when courts invalidated such laws under *Lochner*, African Americans benefited; and when they upheld them, African Americans suffered.

I only have 20 minutes, so I am just going to take one example from each of these categories to discuss today. There are more in the book.

So, let's start with the first category of laws that intentionally targeted African Americans. I will talk about immigrant agent laws. Immigrant agents were interstate labor recruiters who played a key role in promoting African American migration within the South during World War I. It is not widely known, but there was widespread migration of hundreds of

thousands of people per decade in the South in the decades before World War I. We all know about the great migration North during World War I and then in the 1920's, but what most people don't know is, for example, between 1900 and 1910, as many African Americans migrated interstate within the South as from the South to the North the following decade.

So, interstate migration was extremely important within the South, because this allowed African Americans to better their lot by fleeing drought and the boll weevil pest, by fleeing political oppression. If there were lynchings in one county, a lot of people would just pick up and leave and go somewhere else; and also to flee various other sorts of oppression, or just to get better wages. Because the plantations that were opening in those days in the Mississippi Delta and Arkansas and Texas had higher wages and better working conditions than the older plantations in the Southeastern States of Georgia, South Carolina and North Carolina.

The immigrant agents were important, first of all, because they lowered the information cost of migration. If you were an African American living in rural Georgia, it was very hard to find out about opportunities in, say, Mississippi, unless someone came and told you about them. Where would you otherwise find out?

And they also lowered the economic cost of migration. To get to Arkansas, you needed a train ticket. And a lot of people were sharecroppers; they lived in basically a cashless economy. So, unless someone gave them a train ticket, they couldn't leave, even if they knew about the opportunity. So, immigrant agents were extremely important to giving African Americans some measure of freedom, despite the Jim Crow South. There was one thing you could do, if you couldn't vote and you couldn't defend yourself, you could at least leave. And the immigrant agents were very important to that dynamic.

Well, immigrant agent laws were part of a more general legislative activity within the South to restrict the mobility of African American workers. The plantation owners didn't want people leaving and getting better hours and better pay and whatnot. And what essentially these laws did was they put huge taxes on agents, as much as \$1,000 per county, which was serious money around 1900, too much for anyone to be able to afford it. And they were not just licensing laws, but they were prohibitive laws. But since you couldn't explicitly say people can't have this job, because the courts wouldn't have liked that, you would just say, "We are going to put such a high license fee on you that you can't afford to do it."

Two State supreme courts, interestingly enough, struck down immigrant agent laws on Lochnerian grounds, that they

violated liberty of contract, among other constitutional provisions. But the United States Supreme Court upheld these laws in 1900, leading to their spread throughout the South. And the people who were hurt the worst were the poorest and most isolated African Americans, because they were, again, the ones with the hardest time finding out about opportunities elsewhere and gathering the economic resources that would allow them to move. So, that is an example, clearly, of a law that was designed to harm African American workers.

The second type of law that I will discuss are the laws that were neutral on their face and were advocated by special interest groups in part to exclude African Americans, although there were other things going on as well. While there are several laws that fit into this category -- I talk a lot about licensing laws, for example, in my book; there is a whole chapter on that -- I am going to talk today about the Davis-Bacon prevailing wage war.

Davis-Bacon, which still exists, by the way, is a Federal law that requires that the prevailing wage be paid on Federal construction contracts. The prevailing wage has been interpreted traditionally to be equivalent to the union wage.

The labor unions in the construction industry had been trying to dominate public construction through political means for years after the Civil War. Essentially, because of the free

labor ideology at the time, you couldn't have the kind of laws you have now benefiting workers, but you could, theoretically, say well, the Federal Government, or the State governments, are acting as employers when they hire contractors. They can make whatever conditions they want, just like any other employer could, and the courts were not particularly offended by that, perhaps.

Some courts, nevertheless, said that laws that restricted what contractors could do with their employees violated liberty of contract or were unconstitutional delegations of authority, or otherwise violated constitutional rules that are now considered old-fashioned, if not reactionary. The Supreme Court, however, found in *Atkins v. Kansas*, in 1903, that essentially, as the unions argued, that when State and local governments and the Federal Government are acting as employers themselves, they can put whatever conditions they want on the contractors they hire.

Meanwhile, African Americans were excluded from almost every major construction union composed of skilled or semi-skilled workers. In the mid-1920's, an Alabama contractor named Algernon Blair started gathering African American workers from its home State of Alabama and sending them around the country to work on Federal constructions projects. Not surprisingly, local residents and local congressman weren't happy

about this because, number one, it took away their jobs from the local people, from the pork barrel projects; and, number two, obviously, a lot of places weren't that eager to have African American migrants coming into their towns.

In 1927, the Blair Company built a Federal hospital in Long Island, and they used these African American workers from Alabama. Representative Robert Bacon of Long Island, in response, introduced the bill that eventually became the Davis-Bacon Act. The legislative history of Davis-Bacon is full of denunciations of cheap colored workers in competition with white labor throughout the United States. That is an actual quote. Clearly, a part of the reason Davis-Bacon was passed was to exclude African Americans, but it is also clear that the labor unions would have been perfectly happy to dominate the public construction market with or without African Americans.

We have mixed motives here. There is the general motive of wanting to get monopoly power, but there is also the specific motive and the specific motivation of trying to keep these itinerant African American workers from "stealing" the jobs of whites on these construction projects.

Davis-Bacon's discriminatory effects were subtle, but nevertheless real. The main recourse of African Americans in a discriminatory labor market dominated by racially exclusionary labor unions was to under-price. They had to under-price partly

because employers discriminated, so you had to charge somewhat less, but also the union workers were in fact often more skilled than non-union workers in general, including African Americans. The unions had apprenticeship programs, formal training programs, that African Americans were not allowed into. So, you may have had enough skills to work on the job, but you may not have been quite as highly skilled, so you had to charge a little bit less money. That is just basic economics.

The Department of Labor rules, however, as mentioned previously, almost always associated the prevailing wage under Davis-Bacon with the union wage. This took away African American workers' ability to under-price themselves, from using their price advantage. As a result, very few skilled African American construction workers were ever hired on Davis-Bacon projects. Meanwhile, the use of unskilled workers was strictly limited by Department of Labor rules.

The Department of Labor was lobbied by the unions, and the unions were mostly skilled and semi-skilled -- at least the ones that had power -- so they wanted fewer unskilled workers competing with them. African Americans were disproportionately unskilled, so they disproportionately lost jobs when the Department of Labor didn't let the contractors use unskilled workers. So, that is the Davis-Bacon Act.

The third type of law that disproportionately harmed African Americans were laws that really were passed for reasons that had nothing to do with African Americans. They would have been passed regardless whether of African Americans existed. But because African Americans lacked political power, their interests were not taken into account in the legislation. And, moreover, once legislation was enforced and discriminatory effects became apparent, no one did anything about it, and the laws were also administered unfairly.

My main example of both of these phenomena is the National Industrial Recovery Act, which was passed during Franklin Roosevelt's first 90 days, one of the famous pieces of New Deal legislation. The NRA had the potential to permanently cripple black labor. There were two major provisions: wage provisions and union provisions. The wage provisions established wage codes, which employers had to abide by. And the wage codes were set by panels composed of corporate representatives and union representatives. The unions, of course, did not allow African Americans, for the most part. And, not surprisingly, the wage codes that were established discriminated against African Americans in a variety of ways.

First of all, no codes were established in domestic labor or agriculture. A very large percentage of African American women were domestics and a very large percentage of

African American men worked in agriculture -- a much higher percentage than in the white population. And they did not get the benefit of the NRA. But, meanwhile, prices were forced up because the NRA also had price codes, which tried to increase prices. So, your wages stayed the same and your prices went up, lowering your standard of living.

Secondly, some occupational groups were only partially covered, and they were covered in such a way that white workers were covered and African Americans weren't, to the extent you could segregate them by job category.

Finally, even when African Americans were covered by the NRA, they still suffered. The wages were set really high sometimes, sufficiently high that employers either couldn't afford to hire anybody at these wages or, they could say, well, we could hire more skilled white workers who benefited from these apprenticeship programs and whatnot instead of these African American workers, or we could just indulge our discriminatory practices, for that matter, and hire white workers.

This was illegal under the National Recovery Act. Under the Act you cannot fire a worker because of the wage codes. Nevertheless, employers did it. And because African Americans lacked political power, the Roosevelt administration just had no interest in doing anything about this. So, a lot of African Americans lost their jobs because of that.

The other provision of the NRA was the union provision, or Section 7-A. Section 7-A was similar to the National Labor Relations Act of today. It led to a huge growth, a doubling and tripling, of the numbers of labor union members in a very short period of time, which led to widespread displacement of black workers. The unions would use Section 7-A to organize a union shop and they would say, well, blacks are not members of our union, so they can't be hired. So, that would be the end of African Americans in that particular job.

Despite complaints to the National Labor Relations Board by the NAACP and the Urban League, the Federal Government declined to intervene on behalf of African Americans. The only relief that African Americans got from the NRA is that the NRA did not forbid company unions. And company unions tended to discriminate a lot less than AFL unions did. That is one of these little historical facts that isn't well known, but as bad a reputation as company unions have in labor history, they were much more popular among African American workers than they were among white workers.

The NRA, because of these two provisions I mentioned, was so unpopular that the African American press said that NRA actually stood for "Negroes ruined again," "Negro run-around," "Negroes rarely allowed," "Negro Removal Act," "Negroes robbed again," and "No Roosevelt again." A contemporary newspaper noted

that, for African Americans, the symbolic NRA blue eagle was not a messenger of happiness, but a predatory bird.

The Supreme Court, of course, struck down the NRA on what is known in New Deal circles as Black Monday, but African Americans celebrated the end of it. And I go into it further in the book, but the Wagner Act and the Fair Labor Standards Act essentially recreated various elements of the NRA, and the effects were generally negative, as well.

For example, the Fair Labor Standards Act, the minimum wage law, put 30,000 African Americans out of work within two weeks of its enactment. Again, the law was not specifically designed to harm African Americans, but if you read the book you will see that the effects were known and no one cared.

So, what can we learn from all this? First, legal scholars and historians have spent a tremendous amount of energy discussing examples of blatantly racist legislation, blatantly discriminatory legislation. We all know about school segregation, for example, but they have ignored the more subtle discriminatory laws that have also had a major impact on African American economic welfare. I think that it would behoove historians and legal scholars to pay some more attention to this and not underestimate the role of State action in the oppression of African Americans by ignoring these facially neutral laws that

harmed African Americans because of their lack of political power.

Second, the jurisprudence of the *Lochner* era could, and sometimes did, protect African Americans. When *Lochner* was used to protect free labor markets, groups like African Americans, who had little political power, benefited. But when government regulations prevailed, African Americans suffered. Now, it is true that much of this protection of African American welfare was gratuitous. African Americans weren't parties to the cases. And it would be stretching things quite a bit to suggest that the Supreme Court justices or the lower court justices were purposely going out of their way to help African Americans. In all likelihood, they weren't. And in some cases they weren't even aware that they would be.

But that is part of the point. Ever since *Brown*, and the Warren Court era, we have expected courts to rise above societal prejudice and help minorities, regardless of what the rest of society thinks. However, that was actually a relatively unusual era in American history. In fact, there is not reason in general to believe that courts will rise above societal prejudices. And there is some reason to believe that sometimes they will actually do the opposite and they will entrench them and enforce them.

In the Plessy v. Ferguson decision, to take a famous example, the Court actually went beyond what the Louisiana Supreme Court had said, which was that "separate but equal" is required, and just said, well, if you read Plessy carefully, you will find it doesn't say "separate but equal." It says any segregation law is okay as long as it is reasonable, as we define it.

So, of course you want to be sympathetic to minorities, but it is also nice to have neutral kinds of principles that courts can enforce that will help oppressed groups, even if the courts are not particularly sympathetic to those groups. That is what I argue was happening in Lochner.

So, in fact, African Americans were able to benefit from Lochnerian jurisprudence well before the NAACP was able to form an effective African American legal defense organization, as their interests were often indirectly represented by litigants who favored liberty of contract.

Thank you.

(Applause.)

MR. PILON: Well, thank you, David.

We now have some basis to hear some critical remarks. We will hear that from Professor Mark Tushnet to whom we often turn at the Cato Institute when we want to have someone come over who is, let us say, of a different persuasion, but is nonetheless

charitable in his criticisms and always anxious to provide a view that will bring into relief some of the comments that have gone before.

Mark Tushnet is a Professor, as I said earlier, at the Georgetown University Law Center. He received his J.D. from Yale, as did David, and he clerked for U.S. Supreme Court Justice Thurgood Marshall from 1972 to 1973. He then was on the faculty of the University of Wisconsin at Madison before joining the Georgetown Law faculty in 1981.

He is the coauthor of no fewer than three case books, including, "Federal Courts in the 21st Century: Policy and Practice," and "Constitutional Law: Cases and Commentary." His other recent writings include, "The NAACP's Legal Strategy Against Segregated Education, 1925-1950," which received the Littleton-Griswold Award of the American Historical Association, and "Red, White and Blue: A Critical Analysis of Constitutional Law."

He was, from 1976 to 1985, the Secretary of the Conference on Critical Legal Studies, so he is, in light of that alone, well qualified to give us a perspective on this book.

Would you please welcome Mark Tushnet.

(Applause.)

MARK V. TUSHNET, ASSOCIATE DEAN,  
GEORGETOWN UNIVERSITY LAW CENTER

MR. TUSHNET: Thank you.

I should begin by saying I liked David's book a lot, not only for my historian's instincts, but I was satisfied, or encouraged, by reading the story about Peg Leg Williams, one of these immigrant recruiting agents. It is a really terrific story.

I wrote a jacket blurb for the book that, on reflection, I think comes across more lukewarm than I really am about the book. On the other hand, jacket blurbs aren't supposed to say anything; they are supposed to signal something. And I think this does signal that somebody at least, somebody on the left, doesn't think that this is just right-wing trash.

I should mention that at least in the second and third editions of our common law casebook, we used excerpts of an early version of one of the chapters. I think we may have omitted it for reasons of space in the upcoming fourth edition, but I hope something of it survives, because I do think the perspective that David offers is an important one and, indeed, in some ways, a very important one, as I will indicate in my conclusions.

I want to make three brief points, all about the implications of David's arguments for contemporary issues.

First, there is a legal point that David mentions in the book and alluded to today that I think deserves more extended consideration when we try to think about the implications of his analysis for contemporary issues. There is a doctrinal and theoretical difference between laws that impose disadvantage intentionally on the basis of race, whether the intent appears on the face of the statute -- that is, the statute singles out African Americans or some group for adverse treatment -- or when it, without on its face doing so, nonetheless has this kind of motivation -- that is on the one side -- and on the other side, laws that have an unintended, although perhaps foreseeable, and in David's formulation, noticed afterwards, adverse impact.

Now, in the *Lochner* era, the first category, the facially discriminatory statutes, were constitutionally impermissible. That is a matter of doctrine. The extent to which the courts enforce that doctrine is another question, which I will mention later. Under contemporary doctrine, the second group, intentionally discriminatory statutes even if facially-neutral, are constitutionally impermissible -- *Hunter v. Underwood* is the leading case on this. So, reviving a *Lochner*-type doctrine is needed only for disparate impact cases, roughly, David's third category, although his formulation blurs the lines a bit when he talks about discriminatory enforcement of the statute.

Now, let's consider the intentional discrimination situation. You have a bunch of people who want to impose disadvantage on blacks, and they can do so in one of two ways. They can get legislation enacted that imposes the disadvantage or they can try to act through market processes to achieve their discriminatory goals.

Now, you would want to try to figure out the conditions under which it makes sense for those people -- that is, these discriminators -- to act in the political process rather than in the market. There are two candidates. One I want to put aside because I don't think it will work, and the other does make a difference. The one I want to put aside is the thought of a coordinating act, coordinating market-based discrimination. That is going to be very difficult. There is a collective action problem. But there is a collective action problem in the political setting, as well.

You can run a sort of Mancur Olson argument that unions coming into existence for other reasons are in a better position to overcome the collective action problem. But it gets tricky and probably is not going to work with all of the case studies that David has.

The other, effecting a choice between market and political-based discrimination, is that through political discrimination you can enforce your preferences against people

who don't share those preferences. You get the coercive power of the government behind you, not merely whatever market power you can deploy. So, market discrimination doesn't have that kind of direct effect on third parties -- that is, potential non-discriminators -- that a politically enforced discrimination does.

My second point is that that is not necessarily true. And this is a point that David makes in the book, as well. This is a point that I will call a law in action concern. Suppose we were living in a *Lochner* world in which a set of background common law entitlements is immune from legislative displacement. I am going to come back to that assumption in my third point. So, for example, employers can offer whatever terms they want and potential employees accept the terms from whichever employer offers the best from their point of view.

I suppose there are employers who prefer to discriminate. There are well-known economic models, derived initially from work by Gary Becker, which David invoked implicitly in his discussion of the Davis-Bacon Act, that say that sort of discrimination provides opportunities for other entrepreneurs to offer, relatively speaking, better terms to the group discriminated against and therefore to out-complete the discriminators.

If you do it in the crudest sense, if there are a bunch of qualified African American workers who are discriminated against in the hiring process by one employer, another employer can say, look, you are getting from the discriminator a wage of zero. I pay my white workers 10; I'll pay you 5. And you are better off getting the 5 rather than zero. So, that is the way the model works.

I want to put aside the point that those models have developed and make it more complicated and I want to work with the simple one. As David understands, the competition will work only if the entrepreneurs, these people who are willing to employ African Americans, although at lower wage rates than they would pay to their white employees, the competition will work only if the entrepreneurs can in fact get away with offering better terms. And their ability to do so can be limited not just by legislation, although it can be by that, but also by extralegal sanctions, including, to take the paradigm case, violence. If an employer who hires a black plumber has the shop burned down, that is going to be a sanction that will deter the employer as effectively as a legal rule barring the employment of black plumbers.

Now, one response to that argument, the availability of extralegal sanctions, is that judges and executive officials can protect against such extralegal violence, which is by definition

extralegal. But, again, as David mentioned specifically when it came up in today's presentation, executive officials directly, and judges indirectly, are responsive to the same political forces that would allow the discriminators to obtain discriminatory legislation. David invokes this problem in connection with the non-enforcement of the non-displacement provisions of the NRA, and his concluding observations about judges as participants in the Jim Crow system, set up by *Plessy v. Ferguson*.

So, in the end, even in a *Lochner* regime where the background entitlements are fully acceptable in nondiscriminatory terms, or neutral in David's terms, even in such a regime, discrimination may not be competed away because of extralegal sanctions that can be controlled only by executive and judicial actions that may be unlikely to be forthcoming under the political circumstances that generate *Lochner*-like legislation.

Now, my third point is related to the preceding one. I will call it a legal realism point, and I will spend just a couple of minutes on this. In a *Lochner* regime, as I have mentioned, entitlements flow from background common law rules, which David called neutral rules, of contract and property. Now, the legal realist lesson is that those background rules can be manipulated to achieve any result whatever, and in particular the results achievable under *Lochner*-type legislation.

Now, I use the word "manipulated" deliberately, because sometimes the construction of the right set of common law rules is going to be pretty tricky, and judges might find it difficult to do so, to construct them, with a straight face. But in the context of racial discrimination, it is not tricky at all. One of the background rules of contract inevitably is going to be a rule about capacity. Only the contracts of those who have capacity to contract must be respected.

So, consider a *Lochner* world -- I will do this in the form of legislation; I could do it in the form of a judicially developed common law rule, but it is easier with legislation -- consider a *Lochner* world in which a legislature enacts a statute restricting the right of blacks to contract. Its defenders would justify it by the racist proposition that blacks lack the kind of capacity that entitles the contracts they enter to the protections of the Constitution.

Now, maybe statutes explicitly doing this on the basis of race would be barred by this independent understanding of the 14th Amendment that facial discrimination is impermissible. I just would note that that proposition is not connected, at least in any obvious way. Historically, it is connected, but it is not analytically connected to the theory of *Lochner*. But we can turn to the disparate impact cases to see how the same process could operate. Here the cases are *Robertson v. Baldwin* and *Muller v.*

Oregon, decided under the *Lochner* regime, and upholding restrictive legislation on the ground that the groups involved, seamen and women respectively, lack full capacity to contract.

Indeed, the court in *Lochner* emphasized that, at least relative to any other occupational group, and this analytically makes a difference, that there is no reason to think that bakers lack such capacity. But remember that, by assumption, we are operating in a racist society, and I don't see why judges operating within the assumptions of the *Lochner* regime wouldn't be willing to find that people who worked in occupations disparately filled by blacks -- to use a couple of David's examples, agricultural workers or domestic workers -- lack full capacity. It is trivial and easy to spin out from common law cases about capacity rules that would say agricultural workers and domestic workers lack capacity to contract.

To sum up, I have been arguing that there are reasons to think that *Lochner*, coupled with a racist society, wouldn't have eliminated the problems David identifies because of a combination of an executive non-enforcement of laws against violence, legislation and judicial willingness to find incapacity.

But I want to stress, in conclusion, that none of this is to undermine the force of David's argument. What I have said in response to David is that the discussion we ought to have

should take place on the terrain that David defines rather than on the interest versus the people or workers versus capitalist terrain, where much has already taken place. I think that that is really an important achievement, and it is the reason why I like David's book so much.

Thank you.

(Applause.)

MR. BERNSTEIN: Let me say this as a brief, not a response, but an elaboration. I appreciated Mark's comments. I don't really disagree with much of what he said.

But I think just an elaboration, I don't really get into this too much in the book, but for those who are interested in what one's research agenda might be beyond this or what other interesting things one might get out of this discussion, I think one thing is that I agree with Mark that Lochner plus a racist society where violence is permitted and the police don't step in and this kind of thing isn't going to eliminate discrimination. It could still alleviate it somewhat, as my book discusses, but it certainly would not be a nirvana.

I think this points to how important the civil rights movement was, not just in achieving legal change, because formal legal change could happen without any underlying changes in society, but how significant the civil rights movement was in changing attitudes of mainstream white America. If you look at

the surveys from 1940 about what percentage of whites would be willing to have an African American neighbor or what percentage think that whites should always be entitled to a job if there is a competitor, it is the overwhelming majority who don't want a black neighbor, who think that whites are always entitled to first crack at the job. And the civil rights movement, through the struggles of the people involved in it, really changed those attitudes. That is what allowed the formal legal rules to have the effect that they did.

Moreover, another thing that is less emphasized, I think the Voting Rights Act of 1965 gets a lot less attention than the Civil Rights Act of 1964, even though in my view, for the obvious public choice reasons that I was discussing, that people who don't have political power really aren't going to get very far with a host of laws that affect them both directly and indirectly. The Voting Rights Act was actually extremely significant and deserves more attention.

I will just open it for questions. I just wanted to add those points.

MR. PILON: We are now going to turn to questions. After that, we will adjourn for lunch upstairs in the Winter Garden.

Let me open the questioning by putting to Mark the following question: You are concerned about the judges

themselves being part of the culture and therefore not being immune from the same prejudices that led to the legislation in the first place is of course an abiding concern. But why is it that the same judges who could question the discriminatory impact of the kind of legislation that arose in *Lochner* and other such cases couldn't do so with respect to facially-neutral statutes that chose to focus on capacity, let us say?

Why is it the same presumptions and burdens of proof wouldn't apply there, such that those seeking to protect the legislation by virtue of resorting to incapacity to contract wouldn't have to also, on a case-by-case basis, have to make good on a given case of claiming incapacity to contract, such that the other side would have to show there was such incapacity and, failing that, the statute relating to capacity would be found wanting?

MR. TUSHNET: I think the answer would be something like this. I would have to think about it more to get a full answer. It is that the world in which they were operating was one that said, in its strongest form, which is what is needed in this context, that the common law provides the entitlements that legislation cannot displace. So, you have to look to the common law. Now, there are common law rules about capacity. In the common law, those could be administered on a case-by-case basis.

But, in fact, there were categorical exclusions within the common law.

So, the judges would say to themselves, operating within this common law framework, is a rule predicated on the categorical incapacity of agricultural workers permissible in light of the considerations that led us to create categorical rules regarding children, for example, where you could have, on a case-by-case basis, an examination of even the insane with respect to particular contracts, you might be able to say. So, the common law did operate on a categorical basis which would provide the opportunity for saying, as in *Robertson*, seaman or, in my hypothetical case, agricultural workers, categorically lack capacity.

MR. PILON: David, did you want to respond?

MR. BERNSTEIN: I am probably misinterpreting Mark here, but I guess the argument is that *Lochner* was too mild, that it actually allowed common law categories that permitted regulation to override the liberty of contract. There is nothing inherent in the Constitution, in the 14th Amendment, that says -- well, the 14th Amendment says you have liberty of contract; assuming it says that -- and that's with an "e", by the way; I'm not sure we made that clear -- but since miners are considered not to have complete capacity to contract because they're dependent on the mining companies, therefore we make an

exception. This is Richard Epstein's argument. The problem with *Lochner* ultimately was that it allowed too many exemptions and gave courts too much discretion, which they used both to exempt whole categories which shouldn't have been exempted, like women and miners, and that also, they could have, as Mark pointed out, had exemptions for other groups they weren't particularly fond of or thought were not that capable.

One more thing I should mention on this line is Mark and I both participated in a colloquium in the *Vanderbilt Law Review* on the case of *Buchanan v. Warley*, which I only discussed very much in passing in the book, which was a 1917 case in which the Supreme Court struck down, on liberty of contract and property rights grounds, a city statute from Louisville, Kentucky, that prohibited, essentially, blacks and whites from living on the same block. They didn't do it on equal protection grounds, because in those days it would have been said it formally forbade both sides -- well, whites can't live where blacks live. So, it is not a violation of equal protection, but it was a violation of property rights. That was nine-zero.

So, it was at least possible for *Lochnerian* types of concerns to overcome discriminatory legislation even when the justices knew they were going to be helping African Americans and even, surprisingly, Justice McReynolds, who is probably the most

explicitly racist Justice on the Supreme Court after the Civil War, even he joined the Buchanan v. Warley opinion.

MR. PILON: Okay, questions from the audience? And would you please identify yourself and any affiliation you have before you do?

MR. TOLLETT: Kenneth Tollett, Howard University.

First, I would like to compliment you on the last thing you said, that the people who think that the Court has been a protector of blacks. Certainly, in the history of the Supreme Court, most of its history has been hostile or indifferent to the plight of blacks. There is something almost unreal, though, about discussing it. And I might say in passing, since you mentioned Buchanan v. Warley, that attitudes have changed since the civil rights movement. Residential apartheid, or separation, has seen less progress than any other area of the struggle.

But my real question is this: What are you up to here? Blacks have now gained considerable power in unions. What I get from your whole discussion is that you are trying to undermine the labor movement by suggesting that historically it hasn't really been a friend to blacks, and therefore you are seeking the assistance, maybe, of blacks politically to undermine the labor movement more, which I see as mischievous. It's like pushing vouchers and so forth. Blacks buy into it, but they need the educational system more than anyone.

I am very suspicious of what you are up to, Brother Bernstein.

MR. PILON: Are you pushing anti-unionism along with anti-voucherism and so forth?

MR. BERNSTEIN: Well, let me say quite honestly that I am not a huge fan of the labor movement. But it really has nothing to do with the book. I don't believe in giving anyone monopoly power. I think when you give people monopoly power, they will abuse it. And in the era my book discusses, the people who were going to be abused were African Americans; now it will just be somebody else who may not be a discrete group. It will be people who are excluded from the unions for other reasons, or who knows what.

But, be that as it may, if you look at the book, I think you will see that I really go out of my way, and intentionally go out of my way, to avoid trying to make any normative points about current affairs from this. I want people to take the book seriously as history. I mean it seriously as history.

Historical works can give you background knowledge and can help you understand the way things happened and the way the world works to some degree. But I don't think that they can tell you what current policies should be. If it changes the way you think about the world in general, if it changes the way you think

about monopoly power, it may change the way you think about unions. But I am not writing it to tell you anything about unions.

In fact, as Roger mentioned in the preface to my book, my interest in writing this was partly a result of reading some work by Jennifer Roback on how different kinds of laws in the South that were facially neutral were used to exclude African Americans. But also, the way it really came together was when I was in law school and we read about the *Lochner* case, and I read all the traditional criticisms of *Lochner*: *Lochner* is hurting the poor, hurting the workers.

And it just occurred to me, well, having been exposed particularly in college to sort of radical, almost, shall we say, Afro-centric critiques of various things, why would we assume that workers, when we talk about workers, does that mean all workers? Were they considering what was going on with women workers or African American workers or immigrants in those days? I don't think they were allowed into labor unions. That was my impression. I didn't really know much about it at the time.

And, really, I was interested in the fact that it seemed to me that the criticisms of *Lochner*, and the history of *Lochner* as taught in the law schools and the history departments and the political science departments, was really oblivious to the fact that if you are arguing that *Lochner* was bad because it

hurt the unions, that the unions themselves had some problems that weren't being reflected. And if you think *Lochner* was bad in general because it hurt the oppressed, why do you think the oppressed had any say in these laws? Did they have a say?

So, it seems to me we had these Marxist and progressive, as I say, myths about how history worked. And I was interested in just looking into it, because my sympathies were with *Lochner* and I wanted to see if my reasons why I thought *Lochner* might have been good for some people who were allegedly harmed by it were correct or not.

So, the short answer is no, I am not up to what you suspect.

MR. PILON: David, couldn't it be said, however, that your larger concern, going beyond the concern about labor regulations during this era and the effect on blacks, and the role of labor unions such as it may have been in some of these cases, that your larger concern is with the relationship between the judicial branch and the political branches?

MR. BERNSTEIN: I would say it is not quite that. I think what you are getting at is if the political branches are not taking the interests of various groups into account, that we rely on the judiciary to enforce their rights. And that is true. But I think it is also more generally true that the target is really the progressive ideal that we still live with to some

extent today; that when we see legislation being passed, and where the legislation is claimed to help the poorest group or that group who are poor or oppressed, or it is helping the poor or the working class, often there is something else going on. Often there is a special interest behind it and some people are benefiting at the expense of others.

You can start with two different presumptions when you are looking at legislation. You can start with the presumption that the legislation is meant to be in the public interest, that Congress is looking out for the people, et cetera, et cetera, or you could start with the presumption that special interests are involved, and if the legislation happens to help the public, it is a coincidence.

I think public choice suggests more of the latter. And I think this attitude has, over the last few decades, pervaded American society. But it hasn't quite got it into the history profession yet. When we look back at history, we still think, well, if Congress said they were doing this to help the workers, that must have been what they meant, rather than Congress was doing it to help a discrete group of workers who they wanted to vote for them.

So, I am trying to essentially bring some of the insights that we routinely look at today when we are looking at legislation and bring it back to the past.

MR. PILON: Next question? Right here.

MR. MILLIKEN: Al Milliken, Washington Independent Writers.

I am wondering what comparisons and differences would you make in the way labor regulations and the courts affected African Americans as opposed to other historically discriminated against minorities, Jews, Catholics, Hispanics, and recent immigrants, even including those from the Caribbean and Africa that may be dark in skin color? I am just sensing from what I am hearing that the legacy of slavery was affecting what was happening, in particular, with regard to the laws that may not have been racist in their language. Do you see the legacy of slavery having economic and psychological effects from this material that you gathered?

MR. BERNSTEIN: I am not qualified to talk about psychological effects. Beyond that, for the first part of your question, I would just say that African Americans were not the only groups that were being excluded by the unions. I do point this out. You could look at protective labor legislation for women, for example, where you had what some people called a "bootlegger and Baptist coalition." Bootleggers, as well as Baptists, want Prohibition; the Baptists for religious reasons and the bootleggers because then they could get around Prohibition and make a lot of money.

Well, you had the social worker types, like Justice Brandeis and his sister-in-law, Josephine Goldmark, who thought women really needed special protective laws for themselves because they were the weaker in the sense of this and that, and they were being forced to compete in this jungle of the work force. They were sincere in wanting to help women, even though they probably were not doing it in a very wise way.

But then you also had the labor unions, who also wanted protective legislation for women because they didn't admit women. And in this way, if women are priced out of the market or can't work enough hours, that means they are not going to be competitive. And with licensing laws, for example, you often had licensing boards, controlled by unions, who excluded immigrants. You had to be a citizen to be a member of some of the unions. You, in some cases, had to be Christian, so obviously Jews would wind up being harmed. So, certainly, they were not the only group.

I want to say also that I do point out in the book, and this goes back to the gentleman from Howard's question, that while my book talks about what happened to African Americans when they were disenfranchised and were not considered equal citizens, when no one cared about their rights, I do point out that it is entirely possible that the opposite would happen after the Voting Rights Act and when they are considered equal citizens, when they

may be an active, vocal political coalition of African Americans. I am agnostic on that. I have no idea whether African Americans benefit more from political action nowadays or lose more. So, I am really not trying to make a current political point about that.

MR. PILON: Tim?

MR. LYNCH: Tim Lynch, Cato Institute. My question is for Professor Tushnet.

I was curious to know whether David Bernstein's discussion of the Davis-Bacon Act persuaded you that it is a bad law that ought to be repealed, that it had racist origins and that it is a special interest piece of legislation? And if you don't think it is a bad law, why not?

MR. TUSHNET: I actually don't have any views about the Davis-Bacon Act. I don't know enough about it to say. He persuades me that the origins were in part racist, and that makes it problematic. I think that is all that I would say.

MR. PILON: Do you want to give a one-sentence summary of the Davis-Bacon Act, David, to help Mark along here and maybe elicit a little more out of him?

MR. BERNSTEIN: Well, it requires the payment of prevailing wages, which are defined to be union wages. So it prices various people out of the market who might otherwise be able to get positions. And it makes it more difficult to hire

unskilled workers and to train unskilled workers. But I wouldn't expect Mark to take my word for it.

MR. TUSHNET: Well, I am sure it does. David says the "contemporary environment," including the interest group and the economic environment, is different from what it was at the origins. I just need to know a lot more about the contemporary distribution of cost and benefits to be able to make some assessment of it. I just don't know.

MR. PILON: There is a question right over here.

MR. KENDRICK: I am David Kendrick with the National Institute for Labor Relations Research. This question is for Professor Bernstein.

Not having had a chance to see your book yet, I was curious as to whether you dealt with another Supreme Court case from 1941 that fits in with this very well, called *Steel v. Louisville Railroad*. The basic facts were you had, under the Railway Labor Act, unions could be so-called exclusive representatives or monopoly bargaining agents. And in one, in the Louisville Railroad, this particular union deliberately discriminated against African Americans in assignments.

And when the plaintiffs went to the Supreme Court to have this provision, the exclusive representation provision, thrown out, the Court said, well, no, we can't do that in the interest of industrial peace. But they created something called

the duty of fair representation. So that these African Americans were still stuck with the same union that had been discriminating against them, but now they had this duty to "fairly represent" them. I am wondering if you were aware of that?

MR. BERNSTEIN: Yes, in fact, it is either chapter three or chapter four -- I had switched them around a couple of times so I don't know which is which -- but I have a chapter on the Railway Labor Act. I do discuss the Steel case. The Steel case is seen by those who don't look into it very carefully as this great victory for African Americans, because the Court did say that unions have a duty of fair representation, which they do not have under common law or explicitly under the Railway Labor Act or the Wagner Act. So, this was, in that sense, some progress.

The problem is that the Court said, you have a duty of fair representation, but fair representation doesn't mean that you have to allow blacks to join your union. Again, just like politicians, my whole thesis here is that politicians will not respond to people who are not voters and who have no political capital to spare. The unions just simply aren't going to care very much about representing the interests of African Americans if they are not allowed to become members.

So, yes, in theory, there was a duty of fair representation, but, in practice, the Railway Labor Board, or

whatever the government agency that enforces this stuff was called, didn't actually find any violations of this. They rarely found these until the civil rights era in the 1960's.

So, essentially, what happened was, in the jobs in the railroad industry, semi-skilled jobs where blacks had been prominent in the South, like firemen and trainmen, their percentages continued to go down until the 1960's. So, in 1930, right after the Railway Labor Act, you would have African Americans being maybe 25 percent or 33 percent of these jobs, by 1960, they were 6 percent. So, Steel didn't really do much to aid them, as we can see.

MR. PILON: Are there any other questions? Yes, right back here.

MR. OSORIO: Ivan Osorio, with Capital Research Center.

I just wanted to ask you, this whole dynamic you have been discussing, how did the Wagner Act, the National Labor Relations Act, change everything? Because it changed the whole regime of labor regulation at the time. Was it a watershed?

MR. BERNSTEIN: I do talk about the Wagner Act in my chapter on the New Deal. The Wagner Act is a very complex story. The beginning of the story is quite clear, which is that Senator Wagner had a provision in his original bill that would have required the unions to admit African Americans in exchange for the monopoly power they would get under the Act.

The AFL, American Federation of Labor, which was the primary organization of organized labor in those days, told Senator Wagner that if he kept that provision in the bill they would not support it. So, this just shows you how adamant the unions were in those days about their exclusionary policies. They would give up the monopoly power rather than have to admit African Americans to their unions.

So, Senator Wagner deleted the provision and it passed without it. There was gloom and doom, I would say, at the time at the NAACP and the Urban League. They really thought that this could lead to the widespread exclusion of African Americans from almost every industrial job that they had.

As it turned out, it wasn't quite so bad, because the CIO formed. The CIO tended to be much more racially progressive than the AFL, in part, because they were organizing industrial unions and not craft unions. It was much more difficult if 40 percent of the longshoremen or whatever were African American. If you tried to exclude them, it would mean that the union might very well fail; whereas in the craft unions, for a variety of reasons that I go into in the book, it was somewhat easier.

So, the CIO actually had some real benefit for African Americans. They were very supportive of the civil rights movement. Some of the civil rights activists were actually trained originally in the CIO, et cetera, et cetera. But even

then, the CIO was a mixed story. They became progressively less racially egalitarian as they went on. So, by 1955, when they merged with the AFL, they did not insist that the AFL adopt a nondiscrimination policy.

Also, the CIO in fact had a nondiscrimination policy within the unions. But when they did their apprenticeship programs, they almost never insisted that blacks be admitted to their apprenticeship programs. So, in these industrial jobs, almost all the skilled industrial jobs, the better-paying ones, went to whites. Moreover, they never insisted that employers not discriminate. Of course, a lot of employers wanted to discriminate.

Even employers who didn't want to discriminate were loath to hire African Americans for skilled jobs, because skilled jobs often involved supervision, and whites would not in those days be willing to be supervised by African Americans. This would cause tension at the work place. So, in the absence of any pressure on the employers by the unions to allow African Americans into supervisory positions, there wouldn't be any African Americans in those positions.

I discuss this in detail. Historians still argue exactly over the effects of the CIO on African American welfare. They were clearly a lot better than the AFL. Beyond that, I think the historical debate is still going.

MR. PILON: Are there any other questions? All right. We will conclude with one final question.

MR. MILLIKEN: I just wanted to ask if you think this would at least be a partial explanation of the historic shift of African Americans from almost exclusively Republican to largely Democratic? Was this a factor in what they were doing politically?

MR. BERNSTEIN: You know, it is often said that African Americans were very supportive of the New Deal. I have no way of measuring that. Because the surveys they took, as far as I could tell, were taken of voters, and the voters lived in the North. And it is very clear that Northern African Americans were much more supportive of New Deal policies than Southern ones were.

The Northern leadership was, for example, battling consistently with the Southern leadership over whether there should be special exemptions from some of these laws for African Americans. Because the Southern people saw their constituents losing jobs, and it wasn't happening so much in the North. And the Northern people tended to be more liberal and tended not to have as much of the Booker T. Washington background, et cetera, et cetera.

Plus, African Americans in the North lived in big cities, where almost everyone was Democratic. So, what does it mean if 60 percent supported Roosevelt in 1940? Well, Jews and

Catholics were much higher. Is that is a sign of a lot of Democratic support or not? It is very complicated.

On the one hand, African Americans, I think, were aware that some of these New Deal policies were harming them. On the other hand, they were also aware that there were some benefits to the New Deal. The regulatory laws tended to hurt them, but the welfare laws tended to be relatively nondiscriminatory. They tended to have much higher benefits than Southern State governments would have ever given to them. And the WPA, for example, at one point was employing up to one million African American workers. So, yes, they were losing jobs on the one hand, but they were gaining them on the other.

The whole Roosevelt story with regard to African Americans is very complicated. On the one hand, he refused to support an anti-lynching bill. On the other hand, he did have a so-called black cabinet, which was the first time that African Americans had any national policy influence. So, it is a very complicated story. I don't think anyone has ever written an adequate history of it. But I would say that my understanding is that the African American vote was really up for grabs until 1964.

As late as 1956, Eisenhower got a majority of the African American vote. In 1960, it swung because of apparently Kennedy's call to Martin Luther King in jail. But still, there

was a lot of African American support for Republicans until 1964, and then Barry Goldwater and his Southern strategy, as I think it's fair to say it was. Although I admire Goldwater on some other things, but not on that one, Goldwater's Southern strategy, and Nixon's future Southern strategy, marked the end of African American support for Republicans, for the most part, and led them to the Democrat camp.

MR. PILON: Well, thank you, David, and thank you, Mark. Let's have a good round of applause for our guests.

(Applause.)

MR. PILON: Please join us upstairs for lunch.

(Whereupon, the Book Forum concluded.)