

## Contesting Racial Wages

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### ABSTRACT

*This Article uses archival research to recover the important work of John P. Davis, the Negro Industrial League (NIL), and the Joint Committee on National Recovery (JCNR) as they fought for a racially just New Deal and substantive equality in the Jim Crow era. Specifically, it analyzes the battle between southern industrialists mobilized against Black labor and liberation; John P. Davis and his anti-racist, labor-focused organizations; and the National Recovery Administration (NRA) in the contest over racial exclusions and wage differentials in the codes of fair competition. The Article shows how Davis exposed and challenged the racism and discrimination that shaped New Deal labor and employment law and examines an unexplored archival source to collaborate Davis' original claims. Finally, the Article reveals that Davis not only criticized the New Deal, but championed its promise in the name of democracy and underscored the constitutional necessity of federal intervention to combat oligarchy and racial inequality. It recovers Davis' alternative vision of New Deal reform and considers its significance today.*

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## I. INTRODUCTION

The deeply entrenched and rising economic, political, and racial inequality and the steadily expanding economic and political power of large corporations we face today has prompted many scholars to conclude that our democracy is in crisis.<sup>1</sup> These scholars have called for a dramatic transformation of our political economy through a broader and more just dispersal of power.<sup>2</sup> With scholars in search of both inspiration and solutions, there has been a renewed interest in the New Deal. The New Deal—the nation’s most significant historical example of how the American legal system can transform our political economy and combat the lawless capitalism, corporate rule, and economic and political inequality that threaten constitutional democracy—brought us the federal minimum wage, maximum hour, and collective bargaining; Social Security and unemployment insurance; and the Banking Act and the FDIC.<sup>3</sup> For some, the renewed interest in and emphasis on the New Deal and federal intervention is misguided in view of the historical and present-day impacts of the New Deal on Black people.<sup>4</sup> With this understanding, it is impossible to avoid the fact that New Deal statutes and programs were formed in the shadow of Jim Crow; colorblindness was wielded in their development and interpretation as a weapon to extend white supremacy and legitimize systemic and institutionalized racism.<sup>5</sup>

The shadow of Jim Crow looms large over the history of worker protection laws in the United States. Scholars have documented how race discrimination was embedded in New Deal labor and employment law beginning with the National Industrial Recovery Act (NIRA).<sup>6</sup> Southern industrialists advocated for the wholesale exclusion of Black workers from coverage under the NIRA, as well as reduced minimum wage rates and increased maximum hour limitations for Black workers.<sup>7</sup> While explicitly segregated wage rates were not adopted, scholars have shown that the exclusions and differentials sought by southern

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1. See generally JOSEPH FISHKIN & WILLIAM E. FORBATH, *THE ANTI-OLIGARCHY CONSTITUTION: RECONSTRUCTING THE ECONOMIC FOUNDATIONS OF AMERICAN DEMOCRACY* (2022); STEVEN A. RAMIREZ, *LAWLESS CAPITALISM: THE SUBPRIME CRISIS AND THE CASE FOR AN ECONOMIC RULE OF LAW* (2013).

2. See, e.g., Sharon Block & Benjamin Sachs, *Clean Slate for Worker Power: Building a Just Economy and Democracy* (2020), <https://www.cleanslateworkerpower.org/clean-slate-agenda>; FISHKIN & FORBATH, *supra* note 1.

3. See RAMIREZ, *supra* note 1, at 29, 31, 89, 96, 163, 185; FISHKIN & FORBATH, *supra* note 1, at 265, 287, 301, 320.

4. See Harry G. Hutchison, *Waging War on “Unemployables”? Race, Low-Wage Work, and Minimum Wages: The New Evidence*, 29 HOFSTRA LAB. & EMP. L.J. 25, 26–27 (2011).

5. George Lipsitz, *The Sounds of Silence: How Race Neutrality Preserves White Supremacy*, in SEEING RACE AGAIN: COUNTERING COLORBLINDNESS ACROSS THE DISCIPLINES 23, 31 (2019).

6. See generally Juan F. Perea, *The Echoes of Slavery: Recognizing the Racist Origins of the Agricultural and Domestic Worker Exclusion from the National Labor Relations Act*, 72 OHIO ST. L.J. 95 (2011); Marc Linder, *Farm Workers and the Fair Labor Standards Act: Racial Discrimination in the New Deal*, 65 TEX. L. REV. 1335 (1987); IRA KATZNELSON, *WHEN AFFIRMATIVE ACTION WAS WHITE: AN UNTOLD HISTORY OF RACIAL INEQUALITY IN TWENTIETH-CENTURY AMERICA* (2005).

7. Perea, *supra* note 6, at 106; Linder, *supra* note 6, at 1351; KATZNELSON, *supra* note 6, at 56–59.

industrialists were ultimately delivered through the use of proxies for race.<sup>8</sup> This race discrimination was later embedded in the Fair Labor Standards Act (FLSA) and National Labor Relations Act (NLRA).<sup>9</sup> Recent literature details how the racist origins of our tiered system of worker protection continue to impact farmworkers,<sup>10</sup> domestic workers,<sup>11</sup> day laborers,<sup>12</sup> tipped workers,<sup>13</sup> and ride-hail and delivery platform drivers today.<sup>14</sup>

Much of this scholarship builds on arguments originally articulated and advanced by John P. Davis.<sup>15</sup> Davis is recognized as a preeminent civil rights activist of his time, a leading critic of the National Recovery Administration (NRA), and the first person to identify the race discrimination being written into federal law through the minimum wage and maximum hour provisions of the NRA codes of fair competition.<sup>16</sup> Yet, the literature reveals little about the work and role of Davis and his organizations—the Negro Industrial League (NIL) and the Joint Committee on National Recovery (JCNR)—in the contest over racial wages. This Article aims to begin to fill this gap.

Accordingly, this Article makes several interventions into our understanding of the crucial moment in United States legal history that the New Deal brought forth. First, it uses archival research to provide a more complete picture of the early New Deal contest over racial wages, analyzing the battles between southern industrialists, Davis and his organizations, and the NRA in relation to the contest over racial wages. Second, it examines the modes of engagement and arguments employed by Davis and his organizations, recovering Davis' approach to challenging discrimination along with his alternative vision of New Deal reform. In doing so, it provides a critical resource and source of inspiration for scholars, practitioners, and activists working to understand and address the problems of oligarchy and inequality that threaten our democracy today. Third, the Article adds

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8. Perea, *supra* note 6, at 100, 132–33.

9. *Id.* at 114, 118; Linder, *supra* note 6, at 1336.

10. See, e.g., Perea, *supra* note 6, at 126–27.

11. See, e.g., *id.*; Keona K. Ervin, *Breaking the “Harness of Household Slavery”: Domestic Workers, the Women’s Division of the St. Louis Urban League, and the Politics of Labor Reform During the Great Depression*, 88 INT’L LAB. & WORKING-CLASS HIST. 49, 62–63 (2015).

12. See Julie Yates Rivchin, *Building Power Among Low-Wage Immigrant Workers: Some Legal Considerations for Organizing Structures and Strategies*, 28 N.Y.U. REV. L. & SOC. CHANGE 397, 428 (2004).

13. SARU JAYARAMAN, FORKED: A NEW STANDARD FOR AMERICAN DINING 35 (2016). See generally *From Excluded to Essential: Tracing the Racist Exclusion of Farmworkers, Domestic Workers, and Tipped Workers from the Fair Labor Standards Act: Hearing Before the Subcomm. on Workforce Protections of the H. Comm. on Educ. & Lab.*, 117th Cong. (2021) (testimony of Rebecca Dixon, Executive Director, National Employment Law Project) [hereinafter *Excluded to Essential Hearing*].

14. See generally Veena Dubal, *The New Racial Wage Code*, 15 HARV. L. & POL’Y REV. 511 (2021).

15. See, e.g., Perea, *supra* note 6, at 116; Linder, *supra* note 6, at 1373; Dubal, *supra* note 14, at 523 n.55.

16. Kenneth W. Mack, *Rethinking Civil Rights Lawyering and Politics in the Era Before Brown*, 115 YALE L.J. 256, 346 (2005); Kenneth W. Mack, *Law and Mass Politics in the Making of the Civil Rights Lawyer, 1931–1941*, 93 J. AM. HIST. 37, 54 (2006).

to current debates concerning the role of the New Deal in deepening segregation,<sup>17</sup> retrieving Davis' claims against the NRA and presenting previously unexplored archival evidence of the NRA's purposeful discrimination. Finally, the Article demonstrates that even as Davis criticized the New Deal for sanctioning racism, he championed its promise, emphasizing the constitutional necessity of government intervention to combat the oligarchy and racial inequality that eroded our potential to guarantee complete equality of citizenship and "accomplish the promise which our heritage of democracy so brilliantly offers."<sup>18</sup>

I begin Part II of this Article by introducing the NIRA and the NRA, detailing how the passage of the NIRA prompted southern industrialists to mobilize against Black labor and liberation and advocate for racial wages. Then, in Part III, I discuss John P. Davis' initial intervention in the NRA code-making process, before explaining the formation of the NIL and JCNR. In Part IV, I show how southern industrialists used framing devices, scientific racism, and terrorization as tactics to secure racial wages and suppress the mobilization of Black labor. Moving on, in Part V, I present Davis' approach to proving and challenging discrimination and his alternative vision for major, structural change. In Part VI, I present and analyze a completely neglected archival source as evidence of the NRA's purposeful discrimination. Then, in Part VII, I briefly explain how the race discrimination embedded in the NRA codes was ultimately incorporated into the FLSA and NLRA before discussing how both Davis and southern industrialists responded to the legislation. Part VIII then provides a concluding set of remarks.

## II. RACE AND RECOVERY

The cornerstone of the first New Deal, the National Industrial Recovery Act (NIRA), was the first national effort to regulate minimum wages and maximum hours and the first federal attempt to provide legal protection for workers' collective action.<sup>19</sup> It was also the first major federal attempt at tripartism.<sup>20</sup> Passed on June 16, 1933,<sup>21</sup> the NIRA gave both worker and business associations a direct

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17. See generally Richard Walker, *An Off-Color History: How the Color of Law Misrepresents the Origins of Racial Segregation*, BERKELEY DAILY PLANET (June 17, 2019, 5:09 PM), <https://www.berkeleydailyplanet.com/issue/2019-06-21/article/47685?headline=An-Off-Color-History-How-The-Color-of-Law-Misrepresents-br-The-Origins-of-Racial-Segregation-br-Richard-Walker>; Richard Walker, *The New Deal Didn't Create Segregation*, JACOBIN (June 18, 2019), <https://jacobin.com/2019/06/the-color-of-law-richard-rothstein-review>; Richard Rothstein, *How the Federal Government Deepened Segregation*, JACOBIN (June 25, 2019), <https://jacobin.com/2019/06/rothstein-segregation-color-of-law-new-deal/>.

18. See *Reorganization of the Federal Judiciary: Hearing on S. 1392 Before the S. Comm. on the Judiciary*, 75th Cong. 1647 (1937) (statement of John P. Davis, National Secretary, National Negro Congress) [hereinafter *Reorganization Hearing*].

19. See Seth D. Harris, *Conceptions of Fairness and the Fair Labor Standards Act*, 18 HOFSTRA LAB. & EMP. L.J. 19, 105 (2000); Kate Andrias, *An American Approach to Social Democracy: The Forgotten Promise of the Fair Labor Standards Act*, 128 YALE L.J. 616, 656 (2019).

20. See Andrias, *supra* note 19, at 655–56.

21. National Industrial Recovery Act, Pub. L. No. 73-67, ch. 90, 48 Stat. 195 (1933). The NIRA was declared unconstitutional on separation-of-powers grounds, with the Court holding that the code-

and institutionalized role in policymaking,<sup>22</sup> allowing them to participate in code development by negotiating and crafting “codes of fair competition” that would set minimum wage scales, maximum hour limits, and price codes to compensate for the higher wages in each industry before a public hearing and submission for approval by the President.<sup>23</sup> Section 7(a) of the NIRA required industry codes to include provisions aimed at the protection of labor—including the right of employees to collectively bargain and engage in concerted activities.<sup>24</sup>

President Franklin D. Roosevelt issued Executive Order 6173 immediately after the NIRA’s passage to establish the National Recovery Administration (NRA), which provided an administrative structure to draft and implement the codes of fair competition; appoint General Hugh S. Johnson as the Administrator of the NRA; and appoint a Special Industrial Recovery Board (SIRB).<sup>25</sup> As Administrator, Johnson “created, or approved the creation of, various advisory boards and technical divisions, together with the various operating divisions utilized in the making and enforcement of codes.”<sup>26</sup> The SIRB operated to effectuate policies intended to foster fair competition and worked with trade, industry, and labor to establish the fair competition codes.<sup>27</sup> The Board was also tasked with receiving proposed codes and conducting the public hearings,<sup>28</sup> as well as setting forth the NRA’s program.<sup>29</sup>

#### A. The Code-Making Process

The code-making process included seven main phases: 1) drafting the proposed code; 2) reviewing the proposed code for both form and substantive and confirming it included all mandatory provisions; 3) preliminary conferences and review; 4) public code hearings; 5) final conferences; 6) final revision of the code; and 7) Presidential approval.<sup>30</sup> First, trade and industrial associations, or privately represented groups, prepared proposed codes informed by the suggestions of the NRA as to the appropriate form and content.<sup>31</sup> The association or group then submitted the proposed code to the NRA accompanied by a copy of

making authority conferred by the NIRA impermissibly delegated legislative power. *See generally A.L. A. Schechter Poultry Co. v. United States*, 295 U.S. 495 (1935).

22. *See* Andrias, *supra* note 19, at 656.

23. *See generally* National Industrial Recovery Act, ch. 90.

24. *See id.* at § 7(a). Even after the NIRA was declared unconstitutional as a result of *Schechter Poultry*, this central feature of the NIRA was incorporated into the NLRA. PETER IRONS, *THE NEW DEAL LAWYERS* 227 (1982).

25. *See Executive Order 6173 on the N.R.A.*, THE AMERICAN PRESIDENCY PROJECT, <https://www.presidency.ucsb.edu/node/208238> (last visited Apr. 13, 2023). President Roosevelt, however, was authorized by the Act to establish any necessary agencies and “delegate any of his functions and powers” to officials appointed by him. IRONS, *supra* note 24, at 26–27.

26. CHARLES L. DEARING, ET AL., *THE ABC OF THE NRA 44–45* (1934) [hereinafter *THE ABC OF THE NRA*].

27. *See id.*

28. *See id.* at 129.

29. *See id.* at 44.

30. *Id.* at 79.

31. *See id.* at 80.



the association's constitution and by-laws, a letter of transmittal describing industry conditions and explaining how these conditions informed the proposed code provisions, and supporting documentation that substantiated the proposed draft and relevant industry claims.<sup>32</sup> The NRA administrator would then send the proposed code and suggested revisions to NRA subagencies, including: the Industrial Advisory Board; the Consumers Advisory Board; the Labor Advisory Board; the Legal Division; and the Research and Planning Division.<sup>33</sup> A preliminary conference was then held in Washington D.C. with both industry representatives and a member from each subagency in attendance.<sup>34</sup> Afterward, a draft of the revised code was distributed to all members of the industry for suggestions, final changes were made, and a public hearing was scheduled.<sup>35</sup>

The public code hearings were “formal events and were presided over by an NRA deputy or assistant deputy administrator.”<sup>36</sup> The hearings were an opportunity for industry, labor, consumer groups, and the public to present information and commentary upon which the administration could base its ultimate recommendation for approval to the President.<sup>37</sup> Any member of the public could testify at the public code hearings. In order to testify, a person needs to file a brief statement at least one day before the hearing that proposed a modification or elimination of a specific provision, or alternatively, the creation of new provision.<sup>38</sup> The media generally attended the public hearings, which could go on for several days, reporting to the public, in detail, what had transpired.<sup>39</sup>

After the hearing, the deputy administrator and industry representatives informally discussed potential amendments, passage of which required a majority of industry members to vote in approval.<sup>40</sup> The deputy administrator then sent the final draft back to the NRA advisory boards which would draft written reports and commentary to be sent, along with the final code provisions, for approval by the NRA's chief administrator before being sent to the President.<sup>41</sup> Once approved by the President, the code – and its included minimum wage, maximum hour, and collective bargaining provisions – had the force of federal law.<sup>42</sup>

At the outset of the NRA, “the policymaking and coordination for the NRA was vested in the Special Industrial Recovery Board,” with Administrator

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32. *Id.* at 81.

33. JASON E. TAYLOR, *DECONSTRUCTING THE MONOLITH: THE MICROECONOMICS OF THE NATIONAL INDUSTRIAL RECOVERY ACT* 34 (2019).

34. *Id.*

35. *Id.*

36. *Id.*

37. *THE ABC OF THE NRA*, *supra* note 26, at 84, 87.

38. TAYLOR, *supra* note 33, at 34–35.

39. *Id.* at 35.

40. *Id.* at 36.

41. *Id.* at 36–37.

42. See Richard Primus & Roderick M. Hills, Jr., *Suspect Spheres, Not Enumerated Powers: A Guide for Leaving the Lamppost*, 119 MICH. L. REV. 1431, 1483–84 (2021).

Johnson at its helm.<sup>43</sup> Serving as the administration's nerve center, Johnson and the SIRB were responsible for receiving proposed codes, negotiating with industry, conducting public hearings, and advancing the recovery program.<sup>44</sup> Yet, it was Johnson who was most deeply embedded in developing codes of fair competition.<sup>45</sup> Johnson and the administration maintained a permissive stance toward both industry and racism. Moreover, they failed to implement procedures and practices to guarantee collective worker participation, prevent racial discrimination, and enforce industry compliance in this environment. As a result, industries mobilized their power and resources to dominate the code-making process—thwart organized labor, and legalize racialized economic subordination.<sup>46</sup>

### B. Racial Wages

The day the NIRA was passed, President Roosevelt emphasized that the legislation was an inclusive commitment to the wellbeing of all workers that promised a living wage:

In my inaugural I laid down the simple proposition that nobody is going to starve in this country. It seems to me to be equally plain that no business which depends for existence on paying less than living wages to its workers has any right to continue in this country. By "business" I mean the whole of commerce as well as the whole of industry; by workers I mean all workers—the white collar class as well as the men in overalls; and by living wages I mean more than a bare subsistence level—I mean the wages of decent living.<sup>47</sup>

Roosevelt further emphasized "the entire recovery program of the administration ha[d] been planned from its initiation to aid the nation toward recovery by providing necessary assistance and regulatory measures for all persons without regard to race."<sup>48</sup> He ensured that "the plan and spirit of the NRA is designed solely to give the average citizen greater returns for his labor and subsequent

43. DONALD R. BRAND, *CORPORATISM AND THE RULE OF LAW: A STUDY OF THE NATIONAL RECOVERY ADMINISTRATION* 122 (2019).

44. See *id.* at 44–45. See also JOHN KENNEDY OHL, HUGH S. JOHNSON AND THE NEW DEAL 107 (1985) (the Board also served the specific purpose of supervising Johnson, which President Roosevelt, Secretary of Labor Frances Perkins, and Secretary of Commerce Daniel C. Roper all thought necessary).

45. See OHL, *supra* note 44, at 106–10 (Johnson adopted an independent, direct, and industry-focused approach to code-making, taking the lead role in engaging and negotiating directly with industry to develop and revise the initial codes).

46. Perea, *supra* note 6, at 106; Linder, *supra* note 6, at 1351; KATZNELSON, *supra* note 6, at 56–59.

47. Franklin Delano Roosevelt, *Presidential Statement on the N.I.R.A.* (June 16, 1933) (transcript available in the Franklin D. Roosevelt Library & Museum, <http://docs.fdrlibrary.marist.edu/odnirast.html>). See also Robert M. Woodbury, *Policy in the Control of Wages Under NRA: Introduction and Minimum Wage Policy*, DIV. OF REV., OFF. OF NAT'L RECOVERY ADMIN. 19–20 (Mar. 1936).

48. RAYMOND WOLTERS, *NEGROES AND THE GREAT DEPRESSION: THE PROBLEM OF ECONOMIC RECOVERY* 94 (1970).



security for himself and his family” and confirmed that “[t]he elimination of inequalities and class distinctions are the underlying principles of the National Recovery Administration.”<sup>49</sup> For Black workers, however, Roosevelt’s promise of living wages and an inclusive New Deal never materialized.

Southern industrialists publicly supported the passage of the NIRA and New Deal federal interventions that provided a potential solution to the overproduction, cost-cutting, declining profitability, and poor public image that plagued Southern industries.<sup>50</sup> They sought to benefit from NRA cartelization and set minimum prices in collaboration.<sup>51</sup> However, southern industrialists feared that standardized wages and collective bargaining protections would upend the racialized political economy traditionally maintained through segregated wages. They contended that higher wages in industry would make Black agricultural laborers “dissatisfied and unmanageable” and feared that an uprising of Black labor would disrupt the “whole sociological condition” of Southern agricultural areas.<sup>52</sup> So, southern industrialists mobilized an anticipatory countermovement against Black labor and liberation to preserve their “racially exclusive brand of democracy,” white supremacy, and the existing socio-economic hierarchy dependent on cheap Black labor.<sup>53</sup> To bring these aims to fruition, they formed informal mobilizing structures and countermovement organizations like the Southern States Industrial Council (SSIC).<sup>54</sup>

Southern industrialists successfully advocated for farmworkers and domestic workers to be excluded from coverage under the NIRA. Moreover, from the very beginning of the code development process, southern industrialists pushed for Black workers in industries covered by the NIRA to be excluded from minimum wage provisions or given a lower wage rate compared to white workers.<sup>55</sup> Southern industrialists stressed the importance of preserving the southern tradition of segregation, denigrating and depicting Black workers as inferior and inefficient to rationalize the devaluation of Black labor. While race was not explicitly mentioned in the NRA codes, proxies for race were utilized to deliver the exclusions and differentials demanded by southern industrialists.<sup>56</sup> The adoption of

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49. *Id.*

50. KATHERINE RYE JEWELL, *DOLLARS FOR DIXIE: THE BUSINESS AND TRANSFORMATION OF CONSERVATISM IN THE TWENTIETH CENTURY 26–28* (2017).

51. *Id.*

52. WOLTERS, *supra* note 48, at 99.

53. JASON MORGAN WARD, *DEFENDING WHITE DEMOCRACY: THE MAKING OF A SEGREGATIONIST MOVEMENT & THE REMAKING OF RACIAL POLITICS, 1936–1965* 11, 13 (2011).

54. *Id.* at 11.

55. *See generally* Perea, *supra* note 6 (explaining current NLRA exclusions of domestic and farm workers in terms of the exclusion of laborers in majority Black occupations from New Deal programs); Linder, *supra* note 6 (tracing history of exclusions from FLSA to New Deal programs excluding majority Black labor forces based on racial politics).

56. Perea, *supra* note 6, at 100, 102–03.

race-neutral exclusions and differentials worked to achieve the racist effects southern industrialists desired and appease southern democrats.<sup>57</sup>

### III. TAKING ON KING COTTON

A month before the NIRA was passed, cotton textile representatives and NRA Administrator Johnson gathered at the Mayflower Hotel in Washington, D.C. to draft a proposed code for the industry.<sup>58</sup> The final version of the proposed code, while race-neutral on its face, incorporated proxies for race that functioned to exclude Black workers in the industry from the code's protections altogether or pay them lower wages than their white counterparts.<sup>59</sup> The proposed cotton textile code contained a geographical wage differential that set a minimum wage of \$11 for a forty-hour workweek for the North and \$10 for the South.<sup>60</sup> It also contained an occupational exclusions, expressly exempting cleaners and outside workers, occupations most held by Black people, from the code's benefits and protections.<sup>61</sup> As the majority of the industry's Black workforce lived in the South and the overwhelming majority of Black workers in the South were limited to custodial and service positions, the potential impact on Black workers was profound.<sup>62</sup>

The mobilization of southern industrialists against Black labor and liberation also triggered an organized Black response led by a young, Black attorney named John P. Davis. To the dismay of both southern industrialists and the NRA, Davis intervened at the first ever public code hearing, exposing and challenging the race discrimination embedded in the proposed cotton textile code's provisions.<sup>63</sup> A recent graduate of Harvard Law, Davis attended the cotton textile hearing with his Harvard roommate and friend, Robert C. Weaver,<sup>64</sup> the first Black Ph.D. graduate of Harvard's economics program.<sup>65</sup> Like Roosevelt and the New Dealers, Davis was concerned about the concentration of economic and political power and interested in the potential solutions offered by the New Deal.<sup>66</sup> However,

57. *Id.* at 106.

58. OHL, *supra* note 44, at 115.

59. Exec. Order Approving Code of Fair Competition for the Cotton Textile Industry, Approved Code No. 1, at 4 (July 9, 1933), *microformed on* Presidential Executive Orders and Proclamations, CIS No. 1933-51-1 (Cong. Info. Serv.).

60. *Id.* at 3.

61. *Id.* at 2.

62. WENDELL E. PRITCHETT, ROBERT CLIFTON WEAVER AND THE AMERICAN CITY: THE LIFE AND TIMES OF AN URBAN REFORMER 22 (2008); Statement of the Negro Industrial League Concerning the Proposed Code of Fair Competition for the Cotton Textile Industry 3-7 (National Negro Congress Records, on file with the New York Public Library, Schomburg Center for Research in Black Culture, Manuscripts, Archives, and Rare Books Division) [hereinafter NIL Statement for Cotton Textile Industry].

63. Hilmar Ludvig Jensen, *The Rise of an African American Left: John P. Davis and the National Negro Congress*, 311, 315-17 (1997) (Ph.D. dissertation, Cornell University) (on file with author); *Code of Fair Competition for the Cotton-Textile Industry*, 37 MONTHLY LAB. REV., no. 2, at 265 (Aug. 1933).

64. Jensen, *supra* note 63, at 298, 303.

65. PRITCHETT, *supra* note 62, at 25.

66. Mack, *Rethinking Civil Rights Lawyering*, *supra* note 16, at 337-38. Davis was interested in the developing area of administrative law and he had just taken a public utilities course with Felix

Davis was particularly concerned “about the concentration of discriminatory economic power.”<sup>67</sup> For both Davis and Weaver, a federal government empowered to regulate and redistribute economic power and wealth on a national scale had the potential to address both of these issues. Looking back to Reconstruction as a precedent, the men felt that federal intervention was necessary to circumvent southern states’ complete disenfranchisement of Black citizens.<sup>68</sup>

When Davis and Weaver arrived at the opening session of the public hearing on June 30, 1933,<sup>69</sup> their presence no doubt came as a shock to others in attendance. With Jim Crow ruling the South and race discrimination as a national norm, the temporary building constructed behind the White House in which the hearing was held—and most of Washington D.C.—were practically and perceptually “deep white spaces.”<sup>70</sup> No representatives of the Black bar or traditional racial advancement organizations were present at the cotton textile hearing,<sup>71</sup> leaving Davis and Weaver as the only Black attendees.

Davis quickly diagnosed the threat that legalized segregated wages and the entrenchment of white supremacy presented. He mobilized the public hearing, his capacity for improvisation, and his knack for publicly exposing institutional racism as resources of resistance,<sup>72</sup> creating an organization—the Negro Industrial League (NIL)—on the spot.<sup>73</sup> Davis introduced himself to the NRA hearing administrator as the Secretary of the NIL and presented Weaver as its director of research, describing the NIL as a “national organization which concerns itself with the bettering of the labor and economic conditions of Negroes as workers and consumers.”<sup>74</sup> After convincing the administrator to “credential him as a consumer advocate for Black industrial workers,”<sup>75</sup> Davis requested that the NIL be permitted to testify on behalf of Black workers at the hearings.<sup>76</sup> The

Frankfurter, who was an integral policy and personnel advisor to Roosevelt. Jensen, *supra* note 63, at 294, 295.

67. Mack, *Rethinking Civil Rights Lawyering*, *supra* note 16, at 338.

68. PRITCHETT, *supra* note 62, at 42.

69. *Code of Fair Competition for the Cotton-Textile Industry*, *supra* note 63, at 265.

70. PRITCHETT, *supra* note 62, at 31. For an explanation of the perceptually “White space,” see ELIJAH ANDERSON, *BLACK IN WHITE SPACE: THE ENDURING IMPACT OF COLOR IN EVERYDAY LIFE* 14–15 (2022) (“White space” is a perceptual category that assumes a particular space to be predominantly White, one where Black people are typically unexpected, marginalized when present, and made to feel unwelcome, a space that Blacks perceive to be informally “off-limits” to people like them and where on occasion they encounter racialized disrespect and other forms of resistance. “Deep White spaces” are settings in which Black folk are seldom if ever present and are unexpected. . .”).

71. Jensen, *supra* note 63, at 313.

72. Davis had previously publicly exposed and challenged the discriminatory policies and practices of his own undergraduate institution, Bates College, in an editorial. The reaction to Davis’s editorial was so intense that his “contemporaries referred to the issue as The Crisis.” Jensen, *supra* note 63, at 173–76.

73. *Id.* at 313.

74. PRITCHETT, *supra* note 62, at 31.

75. Jensen, *supra* note 63, at 313.

76. *Id.*

NRA panel approved the request.<sup>77</sup> The NAACP's Walter White and other Black leaders had testified at federal hearings before, but none as young as Davis and never at such a prominent hearing as those of the codes of fair competition.<sup>78</sup> Immediately after announcing the NIL's existence to the NRA administrator, Davis set out to build the NIL's membership base, develop the organization's goals and strategies, and mobilize resources. He recruited the NIL's first two members, his mother, Julia Hubbard, and sociologist George Edmund Haynes.<sup>79</sup>

*A. Taking a Seat at the Table and Speaking Truth to Power*

After two days of intense preparation, armed with his own legal research and a comprehensive statistical analysis prepared by Weaver, Davis took his place at the hearing table of the National Recovery Administration to present the statement of the NIL.<sup>80</sup> His presentation unpacked the provisions of the code that consigned Black workers to receiving substandard wages and excluded them from the benefits and protections of the proposed code, while highlighting the deficiencies in the data undergirding code provisions.<sup>81</sup> As written, Davis asserted, the code's minimum wage and maximum hours provisions excluded cleaners and outside employees.<sup>82</sup> Davis pressed the point that these exclusions were poorly veiled race discrimination,<sup>83</sup> furnishing evidence that "the bulk of Negro labor employed in the industry comes within the excepted classes of workers."<sup>84</sup> He argued: "[t]his exception necessarily results in the exclusion of Negro wage earners from the benefits to labor provided for by the Act and stated to be within the purpose of the Act by the President of the United States and the Administrator of the Act appointed by him."<sup>85</sup>

Davis provided data prepared by Weaver demonstrating that the nearly 14,000 Black cotton mill workers, most of whom worked in the South, were the lowest paid workers in the industry.<sup>86</sup> Even where Black and white workers were grouped under the same labor classification, Davis detailed, Black workers earned less than their white counterparts.<sup>87</sup> The supposedly race-neutral occupational exclusions affected ten out of every thirteen Black workers in the

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77. *Id.*

78. *Id.* at 315.

79. *Id.* at 320. After coming home from the hearing, Davis reportedly exclaimed to his mother, "You're the first member of the Negro Industrial League!" and went to work. Haynes was the first Black sociology Ph.D. in the country who had worked for the Wilson administration as the director of the Division of Negro Economics in the Department of Labor and co-founded the Urban League. *Id.* at 320–21.

80. PRITCHETT, *supra* note 62, at 31.

81. NIL Statement for Cotton Textile Industry, *supra* note 62, at 3–7.

82. *Id.* at 4.

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.* at 1–3.

87. *Id.* at 3.

industry.<sup>88</sup> Referencing the geographical wage differential that set a lower wage rate for the south, Davis declared the “sharpness of the discrimination” inherent in the occupational exclusion was “accentuated by the fact that over four-fifths of colored ‘laborers’ attached to the cotton textile industry are concentrated in the South—where wages are lowest and hours of service are longest.”<sup>89</sup>

Davis contended the occupational exclusions coupled with a data deficit on race and labor created an opportunity for unscrupulous employers to evade wage and hour provisions by misclassifying Black workers in covered occupations by classifying them in lower paid or excluded occupations.<sup>90</sup> Again pointing to the statistical research prepared by Weaver, Davis highlighted the fact that the Bureau of Labor had no recent data on wages paid to ‘laborers’ in the cotton textile industry, detailing that the “the only wage scale available in which this group is catalogued is under the misleading category of ‘other employees’ which include[d] highly skilled employees of many types as well as the group under consideration.”<sup>91</sup> As Black workers were traditionally relegated to unskilled jobs and the majority were thus classified as unskilled labor, Davis stressed that “no official source of information concerning the wages paid Negro laborers” was available.<sup>92</sup> Davis filled the gap by presenting findings from independent investigations that spoke to the state of Black labor in the industry.

Reports of private investigations from several sources agree, however, on these basic conclusions: that persons classified as laborers working in cotton mills receive a lower wage than that paid those classified as operatives; that an even lower wage scale prevails for Negro laborers in the cotton textile industry than for whites classified as laborers; that the hours of work for this class are more than 40 hours a week; that the work is unhealthy and generally unsanitary conditions prevail.<sup>93</sup>

Turning to the Bureau of Labor Statistics to illustrate the potential for rampant misclassification, Davis explained that “in some mills the picker-tender devotes the time between doffs to oiling and sweeping” and “emptying the mote boxes.”<sup>94</sup> If the picker-tender occupation was classified as within the reach of the minimum wage and hour provisions, he posited, employers would simply reclassify picker-tenders as sweepers or cleaners to evade the provisions.<sup>95</sup> Davis made

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88. *Investigation of National Recovery Administration: Hearings Before the S. Comm. on Fin. on S. Res. 79, 74th Cong. 2141 (1935)* (testimony of John P. Davis, representing the NAACP) [hereinafter *Investigation of the NRA Hearings*].

89. NIL Statement for Cotton Textile Industry, *supra* note 62, at 4.

90. *Id.* at 5–6.

91. *Id.* at 3.

92. *Id.*

93. *Id.*

94. *Id.* at 5.

95. *Id.*

explicit the dangers of misclassification that would arise as a result of “the exclusion of the lowest grade of labor.”<sup>96</sup>

If there are certain classes that are beyond the regulation of the minimum wage and maximum hour provisions, the employers will tend to evade the law by reclassifying employees. That is to say, they will either falsify the classification or shift men grouped in the excluded occupations to part time work in fields that are included in the regulations. Thus the spirit of the provisions is violated and its regulations are evaded.<sup>97</sup>

He warned, “[i]f an invitation to evade its regulations exists, there will be constant disputes over issues of classification, notoriously difficult of solution.”<sup>98</sup>

Davis argued that excluding the lowest paid workers in the industry from the minimum wage provisions contravened the very spirit and purpose of the NIRA and minimum wage legislation—“the raising of excessively low wages.”<sup>99</sup> Invoking President Roosevelt’s promise that the NIRA would secure Americans a living wage and quoting an official release by NRA Administrator that confirmed that the “minimum wage” standards was that “sufficient to allow [workers] a decent living,”<sup>100</sup> He charged that the NRA officials and southern industrialists “entrusted with the honest administration” of the NIRA had failed in their duty “to see to it that the wage paid Negroes engaged as cleaners and outside employees” was “sufficient to meet [their] cost of living.”<sup>101</sup> In that the Act also aimed to increase buying power and restore the economy, Davis argued, economic recovery would be thwarted unless Black and white workers were paid equal wages.<sup>102</sup> If the cost of living increased while wages and thus the buying power of Black workers remained the same, manufacturers would suffer along with Black workers and their families.<sup>103</sup> The code should be modified, Davis insisted, to include an anti-discrimination clause, and a study of the Black cost of living in the South should be conducted by the Department of Labor.<sup>104</sup>

After Davis finished, Secretary of Labor Frances Perkins commended him on the presentation, with NRA Administrator Johnson adding that it was a “comprehensive and forceful brief.”<sup>105</sup> Despite the compliments offered by NRA administrators, the cotton textile code was approved with occupational exclusions and

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96. *Id.*

97. *Id.*

98. *Id.* at 6.

99. *Id.* at 4–5.

100. Roosevelt, *supra* note 47; NIL Statement for Cotton Textile Industry, *supra* note 62, at 7.

101. NIL Statement for Cotton Textile Industry, *supra* note 62, at 7.

102. *Id.* at 6.

103. *Id.*

104. Jensen, *supra* note 63, at 317.

105. PRITCHETT, *supra* note 62, at 37.



geographical differentials intact, with workers in the Southern earning \$12 for the same forty-hour work week that brought workers in the North \$13.<sup>106</sup> The NRA, however, had not anticipated Davis and Weaver's intervention. Weaver later recalled, "[n]o one expected us, we were literate and we were contentious."<sup>107</sup>

*B. The Formation of the NIL and JCNR*

Immediately after the cotton textile code hearing, Davis took to the Black press to announce the arrival of the new organization.<sup>108</sup> The NIL, Davis set out, was a national organization "designed to help the man in the street, the laborer" concerned with "the bettering of the labor and economic conditions of Negroes as workers and consumers."<sup>109</sup> Specifically, the NIL aimed to "organize Black labor", increase wages for Black workers, secure unemployment relief for Black workers, organize cooperative groups of Black consumers, and improve the economic conditions for Black workers and consumers.<sup>110</sup>

Davis and Weaver spent the rest of the summer of 1933 tracking the development of the codes, providing the public with information about their incorporation in real-time, and making regular appearances at code hearings to expose and contest the inclusion of the discriminatory devices. Over the next few months, Davis would transform the NIL, a movement organization, into a movement organization network that could mobilize resources and facilitate collaboration. The Joint Committee on National Recovery (JCNR), formed by Davis in the fall of 1933,<sup>111</sup> had twenty-one national member organizations by that December.<sup>112</sup> Among its organizational members were the NAACP and the Urban League.<sup>113</sup> Under Davis' leadership, the JCNR worked to contest racial wages, expose and counter the racism and discrimination underlying NRA code development and implementation, and reveal colorblindness as a tool to achieve racist effects. Davis and the JCNR pushed for racially just labor and employment laws; improved wages and working conditions for Black workers; broader legislation that would improve the social, political, and economic position of Black workers and families; and the eradication of Jim Crow and white supremacy.

106. NAT'L RECOVERY ADMIN., CODE OF FAIR COMPETITION FOR THE COTTON TEXTILE INDUSTRY AS APPROVED ON JULY 9, 1933, BY PRESIDENT ROOSEVELT 8 (on file with the Gov't Publ'g Off.) [hereinafter COTTON TEXTILE CODE].

107. PATRICIA SULLIVAN, LIFT EVERY VOICE: THE NAACP AND THE MAKING OF THE CIVIL RIGHTS MOVEMENT 192 (2009).

108. Jensen, *supra* note 63, at 324.

109. NIL Statement for Cotton Textile Industry, *supra* note 62, at 5.

110. *Id.* at 1.

111. JOHN P. DAVIS, JOINT COMMITTEE ON NATIONAL RECOVERY, REP. OF THE EXEC. SEC. 1 (Dec. 15, 1933) (National Negro Congress Records, on file with the New York Public Library, Schomburg Center for Research in Black Culture, Manuscripts, Archives, and Rare Books Division); Jensen, *supra* note 63, at 330–31.

112. *Id.*

113. JOHN B. KIRBY, BLACK AMERICANS IN THE ROOSEVELT ERA: LIBERALISM AND RACE 156 (1980).

#### IV. THE SOUTHERN INDUSTRIALIST PUSH FOR RACIAL WAGES

As I previewed in the introduction, here in Part IV I turn to the multifarious tactics southern industrialists mobilized to hinder labor equity for Black workers. More specifically, I discuss the use of strategic frames, material resources, discourses of scientific racism, and terrorization as distinct means of securing racial wages.

##### *A. Framing the Demand for Racial Wages*

Southern industrialists used several strategic frames to substantiate their demands for racial wages and inspire collective action. In the early stages of code development, southern industrialists aiming to entrench the subordinate status of Black workers in the new system of labor and employment law mobilized the white supremacist and “Old Negro” tropes and framing devices of the Reconstruction and Redemption eras, drawing heavily from Lost Cause mythology to frame their demands for racial wages.<sup>114</sup> They highlighted the value and necessity of preserving the southern tradition of segregation and, with it, the tradition of segregated wages. They depicted Black workers as inferior and inefficient to justify substantially reduced wage rates for Black labor.

Just as earlier countermovements against Black labor and liberation had used racial science to defend slavery and scientific racism to oppose Reconstruction,<sup>115</sup> southern industrialists also marshaled scientific racism to prove Black inefficiency, deficiency, and dependence to legitimize racial wages.<sup>116</sup> Southern industrialists depicted themselves as benevolent employers looking to protect Black workers’ best interests.<sup>117</sup> Portraying Black workers in the south as content with their wages, working conditions, and benefits,<sup>118</sup> southern industrialists emphasized that with respect to Black workers, no minimum wage rates, maximum hour limits, protections for labor organization, or protections for collective bargaining were needed. This section first examines the varying strategic frames southern industrialists mobilized to justify racial wages. Then, it shows how southern industrialists mobilized their strategic frames in concert with scientific racism and terrorization to secure racial wages.

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114. For a discussion of “Old Negro” tropes and framing devices of the Reconstruction and Redemption eras, *see generally* HENRY LOUIS GATES, JR., *STONY THE ROAD: RECONSTRUCTION, WHITE SUPREMACY, AND THE RISE OF JIM CROW* 72–141 (2019). For a discussion of Lost Cause mythology, *see* GARY W. GALLAGHER, *THE MYTH OF THE LOST CAUSE AND CIVIL WAR HISTORY* 1 (2010).

115. Gates provides an illuminating examination of the use of racial science to justify slavery and scientific racism to oppose Reconstruction. GATES, *supra* note 114, at 56.

116. *Id.* at 66–67.

117. *Id.* at 17.

118. *See, e.g.*, James E. Fickle, “Comfortable and Happy”? *Louisiana and Mississippi Lumber Workers, 1900–1950*, 40 J. LA. HIST. ASS’N 407, 424–26, 428 (1999); Notes on Lumber Code Hearing 4 (July 20, 1933) (National Negro Congress Records, on file with the New York Public Library, Schomburg Center for Research in Black Culture, Manuscripts, Archives, and Rare Books Division) [hereinafter Notes on Lumber Code Hearing].

### 1. The Destruction of Southern Tradition

At the outset of the New Deal, southern industrialists framed the potential destruction of southern tradition as a problem. The standardization of wages and empowerment of Black labor threatened to extinguish southern culture and destroy southern tradition. Relying on the idea of a culturally distinct and separate South, southern industrialists routinely emphasized the longstanding tradition of segregation and the custom of paying Black workers lower wages than whites in advocating for racial wage rates.<sup>119</sup> Tennessee mill owner and president of the SSIC, John Edgerton, contended that standardized wages would disrupt the local custom of paying lower wages to Black workers and undermine the southern labor system.<sup>120</sup> Segregated wage rates and workplaces, he argued, would “preserve labor’s racial purity.”<sup>121</sup> The codes of fair competition, southern industrialists pressed, should legalize rather than upset the southern tradition segregated wage rates.

### 2. The Purported Inefficiency of Black Workers

Southern industrialists also framed equal wages as a problem due to the purported inefficiency of Black workers.<sup>122</sup> An industry representative from Dorchester Lumber Company in South Carolina insisted:

[T]he first thing must be taken into consideration in making up the wage scale, is the inefficiency of our labor, which is 90% colored, or Negro, who are drawn from the farms adjacent to our operations . . . whose habits manner of living and efficiency would not be charged to a high level for many generations to come.<sup>123</sup>

In petitioning for racial wages, an Alabama paper company representative explained that Black workers had “always been paid less than whites and for good reason”<sup>124</sup>—because they were “not as efficient as white people” and “need[ed] constant supervision over any work that they perform[ed].”<sup>125</sup> The SSIC’s wage differentials committee identified the need to employ “negro labor of subnormal capabilities” as a justification for wage differentials.

In his request for an exemption from the textile bag code, J.F. Ames of Alabama’s Selma Manufacturing Company (the SSIC’s largest donor) argued that reduced wages were justified for “subnormal” and “unproductive” Black

119. See JEWELL, *supra* note 50, at 33, 36, 57; WARD, *supra* note 53, at 11.

120. See JEWELL, *supra* note 50, at 57.

121. WARD, *supra* note 53, at 11.

122. BRUCE J. SCHULMAN, FROM COTTON BELT TO SUNBELT: FEDERAL POLICY, ECONOMIC DEVELOPMENT, AND THE TRANSFORMATION OF THE SOUTH 1938–1980, at 24 (1994).

123. Notes on Lumber Code Hearing, *supra* note 118, at 4.

124. SCHULMAN, *supra* note 122, at 24.

125. *Id.*

workers.<sup>126</sup> Submitting pre-war intelligence tests to support his claim,<sup>127</sup> Ames argued:

The test reveals 74 out of every 100 colored men examined rated inferior intelligence to unteachable men. In the face of this fact, by what possible chance could these men find employment in competition with the superior white race at the same rate of wages? . . . The figures given are taken from men who were four, five and even six generations from their native land, in which there has been no progress for centuries. Contact with the superior white race, in all those generations, has not elevated the colored race beyond the position in relative intelligence established by the tests. If all the past years have failed to make any real impression in the status of their intelligence, can any legislative act take them and immediately advance their capabilities to be equal to those of the white man with whom they must compete in the race for employment? We think not and because of this inherent irradicable element of incapability, any idea is futile that fails to recognize a difference does exist and will always exist, and that a proper difference in wage rates must be applied to meet the inequality. It is to be regretted that the facts are as they are. It is to be regretted that all men are not created free and equal, as some would have us believe.<sup>128</sup>

Southern industrialists mobilized to conduct their own research to legitimate their frames and bolster their demands for racial exclusions and differentials. Ames, for example, organized southern employers and joined forces with the Chamber of Commerce in Selma, Alabama to mobilize both the support and data needed to secure the exclusion of Black workers from code protections and benefits or procure reduced wage rates for Black workers.<sup>129</sup> The organized group released a survey to southern employers that it later used as evidence; the survey questions included:

Do you believe that average Negro labor, men or women, is subnormal in respect to their capabilities, industrially as compared with white men and women?

Do you believe because of the necessity of employing a substantial number of subnormal Negro men and women at the same rate as White

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126. Perea, *supra* note 6, at 105. See Linder, *supra* note 6, at 1354; *National Industrial Recovery Administration, Hearing on Application for Exemption from Code of Fair Competition for the Textile Bag Industry in the United States* (Nov. 24, 1933) (statement of J. F. Ames, Selma Manufacturing Company) [hereinafter *Ames Textile Bag Exemption Statement*].

127. See *Ames Textile Bag Exemption Statement*, *supra* note 126, at 13–15.

128. *Id.*

129. Subnormal Questionnaire 4, Questions 1, 9, 11, 12 (1932–1933) (on file with author).

men and women in various districts, that this fact makes the \$1.00 differential insufficient to enable Southern industry to maintain its existence?

Is it not a fact that the necessity of employing subnormal Negro labor with White labor lowers the average productivity per capita of all employees, and for this reason it is necessary to establish an average rate which would equalize the average inefficiency of these two classes of labor as compared with Northern white labor?

[D]o you believe that the present rate should stand for White labor and that the rate for the Negro be reduced to a level which equalized his lack of capability as compared with the White worker?<sup>130</sup>

In an attempt to convince potential members to get involved in the counter-movement cause, Ames distributed letters to manufacturers in the North and South urging them to mobilize to defend lower wages for Black workers.<sup>131</sup> In one such letter, Ames wrote:

It is an established fact over the entire nation that, generally, a colored man or woman should be and is paid less than a white man or woman, the reason being that their performance, responsibility and capability are less. This fact has been established since the beginning of time.<sup>132</sup>

Ames explained that equal wages in the face of unequal work performance and capability would wreak havoc on the economy, writing “[a]t a crisis like we are passing through, it certainly will prove disastrous to fail to consider what this means.”<sup>133</sup>

In framing Black workers as inefficient, inferior, and lazy, southern industrialists like Ames applied the “planter’s theory of value” to industry, contending that they would get more value out of Black workers if they paid them substandard wages.<sup>134</sup> One southern employer testified, “a negro makes a much better

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130. The survey instrument and findings submitted by Ames deployed white logic and white methods. The survey presumed measuring racial identity and efficiency using an employer questionnaire was possible. It forced the consideration of a statistical relationship between racial identity and efficiency. Further, it purported to objectively study what it already referred to as presumptively true. The survey questions posed refer to “subnormal Negro labor,” “subnormal Negro men and women,” and the Black worker’s “lack of capability as compared with the White worker.” *Id.* For a discussion of white logic and white methods, see TUKUFU ZUBERI & EDUARDO BONILLA-SILVA, WHITE LOGIC, WHITE METHODS: RACISM AND METHODOLOGY 17–19 (2008).

131. Cyril Briggs, *Dr. Moton Endorsed Drive for Lower Pay for Negro Workers*, DAILY WORKER (N.Y.C.), Apr. 6, 1934, at 3.

132. *Id.*

133. *Id.*

134. CINDY HAHAMOVITCH, THE FRUITS OF THEIR LABOR: ATLANTIC COAST FARMWORKERS AND THE MAKING OF MIGRANT POVERTY, 1870–1945, at 82 (1997).

workman and a much better citizen, insofar as the South is concerned, when he is not paid the highest wage,<sup>135</sup> before urging the adoption of lower wages for “unskilled colored labor.”<sup>136</sup> Combining racist notions about the “natural” inferiority of Black people with the “natural” laws of economics, southern industrialists advanced the argument that an increase in wages for Black workers would likewise be unnatural.<sup>137</sup> At the lumber and timber industry hearing, a representative of southern industry stated:

We have a situation relative to the quality of our labor which we are no way responsible for. It is at least 80% Negroes, and of the most inferior and indifferent type of Negro labor. . . To pay the average Negro in my section a high wage is but to impair his usefulness. For he needs but little, he want but little and when he gets more he works less.<sup>138</sup>

As proof of the inefficiency of Black workers, the representative stated that Black workers had given him “trouble” the week before by refusing to work a six-day work week when they had previously only worked five days a week, and that “scores of Negroes” had “walk[ed] the streets and refus[ed] employment” during and after WWI when industry wages were at their peak.<sup>139</sup>

As this overtly racist frame met with the NRA’s hesitance to make an explicit distinction concerning race and was subjected to data-driven attacks by Davis, the NIL, and the JCNR, southern industrialists gave it a race-neutral makeover. To this end, southern industrialists claimed that reduced wages for southern workers were appropriate because southern workers were less efficient than northern workers due to climatic conditions.<sup>140</sup> The heat and humidity of the South, southern industrialists claimed, limited a worker’s ability to apply “steady and constant labor.”<sup>141</sup> For instance, despite having previously testified before the NRA to the veracity of the climatic conditions frame,<sup>142</sup> a prominent leader in the southern lumber industry later explained that it was inefficient “low class negro [sic] labor” that “burdened” Louisiana as he pushed for the defeat of the Wagner Bill later that same year.<sup>143</sup>

### 3. Protecting White Businesses, Saving Black Jobs

In yet another frame, southern industrialists defined the potential displacement of Black workers and the bankruptcy of white businesses as a problem.

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135. WOLTERS, *supra* note 48, at 99, 145.

136. *Id.*

137. HAHAMOVITCH, *supra* note 134, at 82.

138. Notes on Lumber Code Hearing, *supra* note 118, at 4.

139. *Id.*

140. See JEWELL, *supra* note 50, at 41–43.

141. *Id.* at 42–43.

142. Fickle, *supra* note 118, at 428.

143. *Id.*



According to this frame, paying Black workers the same standard wage they paid white workers would force employers to either fire Black employees or go out of business. Racial wages, southern industrialists contended, would save white business and Black jobs all at the same time. Using this frame, a representative of the Central Weaving and Spinning Company argued that the company would go out of business if it paid Black workers equal wages, citing that the company would likely never be able to pay Black workers an equal wage to whites due to the “inefficiency” of Black workers, inferring that paying equal wages would send the company spiraling toward bankruptcy.<sup>144</sup> Similarly, an Alabama company that employed an almost entirely Black workforce argued that without a subnormal wage rate for its Black workers, the plant could become insolvent.<sup>145</sup>

Southern industrialists combined explicit racism with the southern ideology of benevolent paternalism. Employers framed their efforts to secure racial wage differentials as an attempt to save Black jobs.<sup>146</sup> Claiming that Black workers were “incapable of performing other than casual or incidental service,” a Georgia businessman pleaded for racial wages, exclaiming “somebody must take care of them and if industry cannot do so, who will?”<sup>147</sup> Similarly, the Atlanta Constitution, a Georgia newspaper, ran an article that framed racial wages as a benefit to Black workers, highlighting the supposed compassion and concern whites had for Black workers.<sup>148</sup>

Unless such differentials are granted, the Negro is certain to suffer, because many would lose employment if a common minimum wage for both white and Negro labor was enforced. That is a condition that the white people of the South do not wish to see and are certain to protest, for after all, the Negroes, as the New York Times comments, have no better friends than the white people among whom they live and who will not willingly see them done an injustice.<sup>149</sup>

Southern industrialists were desperate to save Black jobs, the framing went; they just needed to pay Black workers starvation wages to do so.

#### 4. Contented Black Workers in the South

Another strategic frame southern industrialists used called upon post-Reconstruction and Redemption era archetypes of the “contented slave” who was gentle and docile “until misled by ‘radical’ agitators, when he became a dangerous

144. *Action of Labor Board is Definite*, PITT. COURIER, July 7, 1934, at 6.

145. Jensen, *supra* note 63, at 428.

146. See, e.g., KARLYN FORNER, WHY THE VOTE WASN'T ENOUGH FOR SELMA 73 (2017).

147. SCHULMAN, *supra* note 122, at 24.

148. Jesse O. Thomas, *Will the New Deal Be a Square Deal for the Negro?*, 11 OPPORTUNITY: J. NEGRO LIFE 308, 309 (1933) (citing THE ATLANTA CONSTITUTION, Aug. 24, 1933).

149. *Id.*

beast.”<sup>150</sup> This frame portrayed Black workers as content with their wages and working conditions, which southern industrialists argued were already sufficient; potential wage increases, minimum wage protections, and labor protections for Black workers were thus unnecessary and would only cause radical organizers to descend upon the South and stir up discontent where none had previously existed. Southern industrialists and Congressmen provided testimony depicting the South as a low-cost place to live with “a total absence of labor trouble and dissatisfaction,”<sup>151</sup> where Black workers were happy, earning fair wages, and enjoying ample workplace benefits unavailable in other parts of the country.<sup>152</sup>

At the lumber code hearing, one southern industry representative declared that there was “no question” that the (majority Black) workforce had “lived in comfort and earned a fair living under the conditions existing in the South during the period prior to depression.”<sup>153</sup> C.C. Sheppard, president of the Louisiana Central Lumber Company, argued that the lower wage scale for the South was warranted because Black workers in the industry were “comfortable and happy,” as the cost of living was cheaper in the South and mill workers benefited from the “abundance of provisions and supplies,” cheap company housing, and inexpensive goods sold in company stores in mill towns.<sup>154</sup>

Testifying before the Senate Finance Committee, SSIC President John Edgerton stated that southern workers “had never felt the impulses of hate, distrust, and disloyalty toward their employers until National Recovery Administration exposed them to invasions of outside influences.”<sup>155</sup> According to Edgerton, workers knew right from wrong and justice from injustice

without instruction from those who have specialized in the science of developing class hatred by the method of creating the impression that there is a natural antagonism of interest between employer and employee which calls for frequent applications of physical force.<sup>156</sup>

When asked if he “regarded the discussion of proper industrial relations by [his] workers as unwholesome” and if he objected to his workers discussing “free industrial relations,” Edgerton responded that he “object[ed] to anybody coming in there and spreading strife and creating hate and class conflict when it [was]

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150. GATES, *supra* note 114, at 100.

151. Notes on Lumber Code Hearing, *supra* note 118, at 4.

152. JEWELL, *supra* note 50, at 155; Fickle, *supra* note 118, at 425.

153. Notes on Lumber Code Hearing, *supra* note 118, at 4.

154. Fickle, *supra* note 118, at 424–26.

155. *Extension of National Industrial Recovery Act: Hearing Before the H. Comm. on Ways & Means*, 74th Cong. 390 (1935) (statement of John E. Edgerton, President, Southern States Industrial Council).

156. *Id.*

wholly unnecessary.”<sup>157</sup> He then described his process for hearing worker grievances about working conditions, wages, and other labor issues:

I have never undertaken to prevent free discussion, Senator. For 18 years in my own plant we have had what we call a chapel service every morning, and we come together in an exercise that consists of songs, prayer, spiritual reading, and when we talk over, if there is anything to talk over, and when they have been made to understand that those are their meetings and they are permitted to bring up any question they wish in that connection, and questions very often are brought up, and where we thrash those out among ourselves and without any friction whatever.<sup>158</sup>

As Edgerton explained it, his workers were so content that they never brought up wages and working conditions and thus had no need for organizing or unionization.

In their attempts to justify the starvation wages paid to Black workers, southern industrialists further claimed that Black workers had a lower cost of living than whites,<sup>159</sup> and therefore did not need an equal raise in wages. The white press echoed these racist assumptions. The Atlanta Constitution proclaimed:

In view of the cheaper living conditions among the Negroes, they are done no injustice by such differentials. Comparatively they can receive the same improvement in condition by a small wage increase that a larger increase would bring to white labor.<sup>160</sup>

### *B. Terrorization Tactics*

Southern industrialist countermovement actors and their informal mobilizing structures and countermovement organizations strategically integrated terrorization with their framing and racial wage advocacy. To this end, southern industrialists mobilized terror to compel Black leaders and workers to consent to, and formally advocate for, racial wages and suppress Black worker activism and organization. As an example, the leadership of the Selma Manufacturing Company, mentioned above, strategically integrated terrorization tactics with its advocacy

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157. *Id.* at 387.

158. *Id.*

159. Mack, *Rethinking Civil Rights Lawyering*, *supra* note 16, at 335. This reflected a racist narrative that claimed Black people “could survive on less than whites” and “could live on a diet of fatback and corn, while white men could not.” WOLTERS, *supra* note 48, at 100.

160. Thomas, *supra* note 148, at 309.

efforts, racist survey research, and framing strategy to justify differentials on the basis of Black inefficiency.<sup>161</sup>

Selma Manufacturing Company's leadership organized Selma employers to press for a code that paid minimum wages of \$9.50 a week for Black men, \$8 a week for Black women, and \$6 for Black girls ages 14-16 years old.<sup>162</sup> They framed their efforts as an attempt to save the jobs of "Negro porters, delivery boys and others employed around places of business" and argued "they could not afford the federally prescribed wages for Black employees," joining together to form what hoped to be a "south-wide movement."<sup>163</sup>

Ames, president of the Selma Manufacturing Company, delivered the proposed minimum wage codes to local Black ministers on August 20, 1933.<sup>164</sup> Ames explained that a committee of white delegates was leaving for Washington immediately and urged the Ministerial Alliance to endorse paying Black workers subminimum wages, saying, "I earnestly request that you approve this plan so that the committee . . . may feel that they have the entire support of the leaders of the colored race in Selma."<sup>165</sup> Reverend E. D. Hughes, pastor of the Brown Chapel A.M.E. Church and president of the Ministerial Alliance, was among the ministers to whom the proposed code was delivered.<sup>166</sup> Hughes delivered a letter on behalf of himself and the other ministers declining but thanking Ames for his interest.<sup>167</sup>

After the mobilized employers failed to secure supporting testimony from Black leaders using intimidation, deputy sheriffs showed up on Hughes' doorstep two days later and forcibly took Hughes to the courthouse where a white mob of thirty of Selma's leading citizens awaited him.<sup>168</sup> The Chief of Police, the Secretary of the Chamber of Commerce, and the president of Selma National Bank were among them.<sup>169</sup> One of the men told Hughes:

Your record has been thoroughly investigated and we have found that you are not the type of citizen that exactly fits into a community like Selma and Dallas county, therefore we have decided that 24 hours from

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161. N.A.A.C.P News Service, *Minister Run Out of Ala. for Supporting NRA Code for Race*, CATH. WORKER, Oct. 1933, at 3 [hereinafter *Minister Run Out of Ala.*].

162. *Id.*

163. FORNER, *supra* note 146, at 73.

164. *Minister Run Out of Ala.*, *supra* note 161, at 3.

165. FORNER, *supra* note 146, at 73.

166. *Minister Run Out of Ala.*, *supra* note 161, at 3. *See also* Complaint Hearing of the National Recovery Administration 2 (Feb. 28, 1934) (statement of John P. Davis, Executive Secretary of the J. Comm. on Nat'l Recovery) (National Negro Congress Records, on file with the New York Public Library, Schomburg Center for Research in Black Culture, Manuscripts, Archives, and Rare Books Division) [hereinafter *Complaint Hearing*, Feb. 28, 1934].

167. FORNER, *supra* note 146, at 73.

168. *'New Deal' and Code Manipulations Provoke Serious Trouble in South*, OMAHA GUIDE, Sept. 23, 1933, at 2 [hereinafter *'New Deal' and Code Manipulations*].

169. *Minister Run Out of Ala.*, *supra* note 161, at 3.

this minute, which is now 3:25p.m., are long for you to get your business together and get out of town and Dallas county.<sup>170</sup>

When Hughes failed to leave his house, five squad cars full of police officers came to Hughes' home.<sup>171</sup> After first pursuing and then arresting a friend of Hughes who had taken Hughes' car to the gas station, the police officers returned for Hughes, who had just escaped in another car driven by a friend.<sup>172</sup> The mob chased the two men out of Selma for 6 miles at sixty miles an hour.<sup>173</sup> After his friend hit a patch of dust, Hughes jumped out of the moving vehicle into the cloud of dust and rolled into a ditch.<sup>174</sup> The officers sped by Hughes, who hid in the ditch until after nightfall before walking to the next town under the cover of darkness.<sup>175</sup>

The coordinated efforts of Selma Manufacturing, other countermovement actors in Selma, and the broader industry were successful in depriving Selma's Black community of a dedicated Black leader and advocate. Curb and delivery service workers at drug and retail stores, restaurant curb waiters, tipped workers, and other occupations held predominately by Black workers were ultimately subjected to occupational exclusions and differentials.<sup>176</sup> The textile bag code was approved with a southern wage differential of 10 cents. Still, for the Selma Manufacturing company, the 30 cent an hour minimum wage and 40 hour a week maximum (48 hours a week in peak season),<sup>177</sup> was unsatisfactory. So, Selma Manufacturing, which had been paying its Black employees nine cents an hour for 12 hours a day in 1933,<sup>178</sup> petitioned for an exemption to the code on the basis that Black workers were subnormal and inefficient, drawing on the pre-war intelligence tests and racist employer survey (discussed above) to support its racist contentions and petition for racial wages.<sup>179</sup> The company continued in this vein, serving as a leading donor to the SSIC in following years.<sup>180</sup>

Throughout the South, southern industrialists mobilized terror to undermine and intimidate their opposition and suppress the activism and organization of Black workers. When Black citrus packing house workers determined they were

170. *Id.*

171. *Id.*

172. 'New Deal' and Code Manipulations, *supra* note 168, at 2.

173. *Id.*

174. *Minister Run Out of Ala.*, *supra* note 161, at 3; 'New Deal' and Code Manipulations, *supra* note 168, at 2.

175. *New Deal' and Code Manipulations*, *supra* note 168, at 2.

176. Arthur F. Raper, *The Southern Negro and the NRA*, 64 GA. HIST. Q. no. 2, 1980, at 129.

177. The Textile Bag Code set the minimum wage for the industry at \$13 per week in the North and \$12 per week in the South for a 40-hour week and 48 hours a week in peak season. NAT'L RECOVERY ADMIN., CODE OF FAIR COMPETITION FOR THE TEXTILE BAG INDUSTRY AS APPROVED ON SEPT. 18, 1933, BY PRESIDENT ROOSEVELT, at 6 (on file with the Gov't Publ'g Off.).

178. *Southern Bag Company Seeks Exemption from Code Wages*, PITT. COURIER, Dec. 2, 1933, at 2.

179. Questionnaire, *supra* note 129.

180. JEWELL, *supra* note 50, at 35.

not excluded from coverage under the NIRA, they began to organize against starvation wages and abysmal labor conditions with the support of the United Citrus Workers (UCW) and the United Cannery, Agricultural, Packing and Allied Workers of America (UCAPAWA).<sup>181</sup> Growers and other southern industrialist actors responded immediately and comprehensively.<sup>182</sup> The citrus packing industry sought to have packing labor classified as agricultural, despite its highly industrialized nature, by seeking out a marketing agreement with the Agricultural Adjustment Administration.<sup>183</sup> This would enable the citrus packing industry to evade the reach of the NRA and deprive its mostly Black workforce of the code benefits and protections.<sup>184</sup> Countermovement actors in the industry micromobilized the law through local ordinances and law enforcement to suppress Black activism and organization. In Lakeland, Florida, for example, they mobilized to pass local anti-picketing ordinances that prohibited picket lines with 400 feet of a citrus packing houses.<sup>185</sup> The ordinance became a model for other cities nationwide.<sup>186</sup>

Citrus workers and organizers were arrested for loitering and vagrancy.<sup>187</sup> They were also subjected to attacks by the public and were beaten, mutilated, castrated, abducted, and killed by Florida's Night-riders and the Ku Klux Klan.<sup>188</sup> Reverend T.A. Allen, who supported worker organizations, was found lynched and weighted down by a chain in the Coldwater River, with organizing pamphlets in his pockets.<sup>189</sup> Willie Foster, a Black organizer for the International Labor Defense (ILD), was on his way to investigate a cotton choppers strike; he was arrested upon his arrival in Selma, Alabama and lynched by a mob, later found by friends.<sup>190</sup>

181. Jerrell H. Shofner, *Communists, Klansmen, and the CIO in the Florida Citrus Industry*, 71 FLA. HIST. Q. no. 3, 1993, at 300–02. The AAA refused to recognize the workers as industrial labor and signed marketing agreements with the Florida, Arizona, and California citrus industries in December of 1933. The NRA accepted the more expansive definition, leaving workers without the protection of any code even though the NRA inter-departmental committee determined packing house employees were industrial labor: “The packing house employees are distinctly industrial labor. They are used in cleaning, grading and packing the fruit. They are factory workers, skilled and unskilled, carrying on routinized operations. They are the adjuncts of belt conveyors, mechanical graders and other typically industrial machinery.” ROBERT M. WOODBURY, DIV. OF REV., OFF. OF NAT’L RECOVERY ADMIN, LIMITS OF COVERAGE OF LABOR IN INDUSTRIES CLOSELY ALLIED TO AGRICULTURE UNDER CODES OF FAIR COMPETITION UNDER THE NIRA 12, 19 (1936).

182. Shofner, *supra* note 181, at 302.

183. Linder, *supra* note 6, at 1358–59.

184. *Id.*

185. Lakeland, Florida was the first to enact an anti-picketing ordinance, which later became a model for other cities. Shofner, *supra* note 181, at 302.

186. *Id.*

187. Two of the most well-publicized killings were of white organizers Frank Norman and Joseph Shoemaker. Frank Norman, a citrus worker organizer, was abducted by Klansmen and never seen again. Joseph Shoemaker, another citrus organizer, died two weeks after being abducted, beaten, and castrated. *See id.* at 301–02.

188. *Id.*

189. THE NAT’L ASS’N FOR THE ADVANCEMENT OF COLORED PEOPLE (NAACP), 26<sup>TH</sup> ANNUAL REPORT FOR 1935 27 (1935) (on file with the Maryland State Archives).

190. *Id.*



Davis and the JCNR monitored the violence and lynching of Black workers, documenting cases where Black workers were intimidated, beaten, and killed for attempting to organize.<sup>191</sup> As the NIRA approached its one-year anniversary in 1934, JCNR records note that a Black coal miner was shot and killed by deputies in the picket line in Alabama;<sup>192</sup> three Black iron ore miners were killed on picket lines in Alabama;<sup>193</sup> and Black longshoremen were killed by company pier guards in a longshoremen's strike in Texas.<sup>194</sup> Davis' records document his efforts to help a red ore miner named Ben Winston, who joined his local union a month after the NIRA was passed, draft a statement after he was beaten with a flashlight, hit with a rubber hose, stomped on, and then forced to sign a criminal confession to a shooting he did not commit after he participated in a strike on May 4, 1934.<sup>195</sup>

#### V. CRACKING CODES AND COUNTERING COLORBLINDNESS

When Davis intervened in the cotton textile code hearing in 1933, the legal meaning of "discrimination" was unclear, and it would remain so until the 1950's. It would be another 21 years before the Court would decide if segregation constituted a form of race discrimination and if the Constitution barred federal officials from discriminating on the basis of race.<sup>196</sup> Davis understood that Congress and the courts had turned a blind eye to the discrimination and terrorization Black people endured at the hands of whites. Testifying before the Senate Committee on the Judiciary a few years later, he declared that in "innumerable decisions the Supreme Court has nullified the constitutional rights of Negroes and deprived them of the full stature of citizenship."<sup>197</sup> Davis understood that race had been minimized in the Court's readings of the Fourteenth Amendment. With major questions concerning discrimination and racial equality yet unanswered, Davis set out to contest racial wages on the basis of race discrimination and demand equal wages; protections against discrimination by the federal government officials and private labor; and substantive equality under the NIRA and

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191. *Negro Workers Killed in Labor Struggles, Apr–Nov 1934* (National Negro Congress Records, on file with the New York Public Library, Schomburg Center for Research in Black Culture, Manuscripts, Archives, and Rare Books Division) [hereinafter *Negro Workers Killed in Labor Struggles*].

192. *Id.*

193. *Id.*

194. *Id.*

195. February 27, 1937, Letter from John P. Davis (National Negro Congress Records, on file with the New York Public Library, Schomburg Center for Research in Black Culture, Manuscripts, Archives, and Rare Books Division). See generally Testimony of Ben Winston (Feb. 1937) (National Negro Congress Records, on file with the New York Public Library, Schomburg Center for Research in Black Culture, Manuscripts, Archives, and Rare Books Division).

196. See generally *Brown v. Board of Education*, 347 U.S. 483 (1954); *Bolling v. Sharpe*, 347 U.S. 497 (1954).

197. In his testimony, Davis expressed his support for Roosevelt's court-packing plan. See *Reorganization Hearing*, *supra* note 18, at 1644.

broader New Deal. Decentering litigation as a tactic, he made his arguments in administrative and legislative hearings and the court of public opinion.

Davis' claims ran as follows. First, he argued that a variety of code provisions had been intentionally designed to deprive Black workers of equal benefits and protections under the NRA. Second, he contended that racism and discrimination permeated the recovery administration and its decision-making processes. Third, he asserted that the arguments southern industrialists and the NRA used to justify and inspire support for the varying exclusions, differentials, and discriminatory devices were unfounded and illegitimate. Finally, he maintained that such race discrimination was contrary to the legislative intent of the NIRA, public interests, and the broader aim of the New Deal, and set forth an alternative vision for New Deal reform. This section details these four key components of Davis' claims.

#### *A. Cracking Codes and Proving Purposeful Discrimination*

Davis argued that the ostensibly race-neutral exclusions, differentials, and other discriminatory code provisions had been purposefully designed to deprive Black workers of equal benefits and protections under the NIRA; had foreseeably discriminatory results; disproportionately impacted Black workers; and formed a clear pattern of discrimination when taken together.<sup>198</sup> To substantiate these claims, Davis first identified and categorized the four major discriminatory devices incorporated into the codes of fair competition. Then, he used the JCNR's own empirical and analytical research; historical information concerning segregation and segregated wages; the contemporaneous, racist remarks of southern industrialists in their petitions for racial wages; and the administrative justifications for the discriminatory devices to substantiate his allegations.

Ultimately, Davis identified four major types of facially neutral discriminatory devices deployed in 670 codes of fair competition:<sup>199</sup> 1) occupational exclusions and differentials; 2) geographic differentials; 3) the economic grandfather clause; and 4) a miscellaneous discriminatory devices, that included a myriad of code exemptions, substitutions, and non-industrial classifications.<sup>200</sup> Each, he argued, had been deliberately designed to deprive Black workers of equal benefits and protections under the NRA.

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198. See generally NIL Statement for Cotton Textile Industry, *supra* note 62; Complaint Hearing, Feb. 28, 1934, *supra* note 166; Statement of the Negro Industrial League Concerning the Code of Fair Competition for the Structural Clay Industry (National Negro Congress Records, on file with the New York Public Library, Schomburg Center for Research in Black Culture, Manuscripts, Archives, and Rare Books Division); Statement of the Joint Committee on National Recovery Concerning the Code of Fair Competition for the Shipping Industry (National Negro Congress Records, on file with the New York Public Library, Schomburg Center for Research in Black Culture, Manuscripts, Archives, and Rare Books Division) [hereinafter JCNR Statement on Shipping Industry]; *The Fair Labor Standards Act of 1937: Joint Hearings on S. 2475 and H.R. 7200 Before the S. Comm. on Education & Labor and the H. Comm. on Labor*, 75th Cong. (1937) (statement of John P. Davis, National Negro Congress) [hereinafter *FLSA Hearings*].

199. *FLSA Hearings*, *supra* note 198, at 571.

200. *Id.*

### 1. Occupational Exclusions and Differentials

Occupational exclusions had been incorporated into NRA code provisions, Davis explained, to wholly deny Black workers in the respective industry the benefits and protections available under the NIRA. Alternatively, occupational differentials were embedded into code provisions to set lower wages for the occupations generally held by Black workers.<sup>201</sup> Both in code and legislative hearings, Davis and his colleagues provided statistical evidence showing that those occupations held by Black workers were singled out for exclusion from benefits or else given differential and discriminatory treatment.<sup>202</sup> After contesting the exclusion of outside crews and cleaners in the cotton textile code,<sup>203</sup> Davis appeared at the Bituminous Coal hearing to challenge the exclusion of trappers, spraggers, switch throwers, oilers, and couplers, occupations generally held by Black workers.<sup>204</sup> In a memorandum to the NRA, the JCNR provided United States Census of Occupations data for the iron and steel industries to demonstrate that the occupational differentials in the code were “aimed directly at Negro workers” who accounted for 82% of the lowest paid occupational group.<sup>205</sup> Similarly, the JCNR contested the hotel industry’s exclusion of waiters, waitresses, bellmen, porters and hotel barber and beauty shop employees from minimum wage provisions.<sup>206</sup>

### 2. Geographical Differentials

Geographical differentials were incorporated into the codes in place of explicit racial differentials to allow for lower wages to be set in the South and other geographic areas in which Black labor predominated.<sup>207</sup> As Davis explained in a statement before the Senate Committee on Finance, geographical differentials went on to become more complicated after their introduction in the cotton

201. Complaint Hearing Feb. 28, 1934, *supra* note 166, 1. *See also FLSA Hearings*, *supra* note 198, at 571.

202. Complaint Hearing Feb. 28, 1934, *supra* note 166, at 1.

203. *Investigation of the NRA Hearings*, *supra* note 88, at 2141.

204. Statement of the Negro Industrial League Concerning the Code of Fair Competition for the Coal Industry 5 (National Negro Congress Records, on file with the New York Public Library, Schomburg Center for Research in Black Culture, Manuscripts, Archives, and Rare Books Division) [hereinafter NIL Statement on the Coal Industry] (arguing “Negro workers form a large fraction of those omitted classes and will thus no benefits intended to be guaranteed under the (NIRA)”).

205. Memorandum to the National Recovery Administration from the Joint Committee on National Recovery for the Proposed Code of Fair Competition for the Steel Plate Fabricating Industry, at 1 (National Negro Congress Records, on file with the New York Public Library, Schomburg Center for Research in Black Culture, Manuscripts, Archives, and Rare Books Division) [hereinafter Steel Plate Memorandum] (referencing Article IV (a) (1) of the code).

206. Negro Hotel Workers and the N.R.A. 1 (National Negro Congress Records, on file with the New York Public Library, Schomburg Center for Research in Black Culture, Manuscripts, Archives, and Rare Books Division).

207. *Id.* at 126, 128–30; Linder, *supra* note 6, at 1355; John P. Davis, *Blue Eagles and Black Workers*, 81 NEW REPUBLIC 7, 8 (1934).

textile code,<sup>208</sup> using the fertilizer code as an example.<sup>209</sup> The fertilizer code set wage rates at 20 cents an hour in Puerto Rico, 25 cents an hour in the South, 35 cents in the Midwest, and 40 cents in the Pacific Coast,<sup>210</sup> but the corresponding geographical areas were anything but straightforward.<sup>211</sup> For example, two counties in Delaware, in which 94% of the industry's workers were Black, were included in the fertilizer code's "southern area."<sup>212</sup>

Davis lambasted the logical inconsistency of classifying the Delaware counties as southern in the fertilizer code on the basis of a lower cost of living, but classifying the same counties as northern in 669 other industrial codes also based on a cost of living analysis.<sup>213</sup> He held out the lumber, coal, steel, hotel, restaurant, and laundry industries as additional examples.<sup>214</sup> The geographical boundaries of the "South" had been gerrymandered by code authors and authorities to include any region where Black workers predominated in order to deny Black workers the benefits of minimum wages.<sup>215</sup> Davis charged that the shifting southern borders constituted an "economic Mason-Dixon line" that "had a way of extending itself to prevent Negro workers from receiving high wage minimums."<sup>216</sup>

Davis and his colleagues used demographic data and the inconsistent geographical definitions included in different codes to establish that those regions labeled as "South" or assigned the lowest wage rate were those where the bulk of the labor supply was Black.<sup>217</sup> For example, at the lumber and timber industry hearing, Davis and Weaver presented U.S. Census data on occupations to show that Black workers accounted for the overwhelming majority of Southern lumber workers set to receive 22½ cents an hour for a forty-eight hour workweek, while workers in areas with a largely white workforce would receive 40 cents an hour for a forty-hour week.<sup>218</sup> In some cases, the efforts of Davis and his colleagues resulted in material wage gains. While the lumber and timber code retained the geographical differential, the minimum wage was raised half a cent as a result of Davis and Weaver's efforts.<sup>219</sup>

208. COTTON TEXTILE CODE, *supra* note 106, at 4.

209. *Investigation of the NRA Hearings*, *supra* note 88, at 1935; NATIONAL RECOVERY ADMINISTRATION, CODE OF FAIR COMPETITION FOR THE FERTILIZER INDUSTRY AS APPROVED ON OCTOBER 31, 1933, BY PRESIDENT ROOSEVELT, at 4 (on file with the Gov't Publ'g Off.) [hereinafter FERTILIZER INDUSTRY CODE].

210. FERTILIZER INDUSTRY CODE, *supra* note 209, at 4.

211. *Id.*

212. *Blue Eagles and Black Workers*, *supra* note 207, at 2–3; *Investigation of the NRA Hearings*, *supra* note 88, at 2158–59.

213. *Investigation of the NRA Hearings*, *supra* note 88, at 2141.

214. Complaint Hearing, Feb. 28, 1934, *supra* note 166, at 2.

215. *Investigation of the NRA Hearings*, *supra* note 88, at 2140–41.

216. *Blue Eagles and Black Workers*, *supra* note 207, at 8.

217. *Investigation of the NRA Hearings*, *supra* note 88, at 2141; Complaint Hearing, Feb. 28, 1934, *supra* note 166, at 2.

218. PRITCHETT, *supra* note 62, at 39.

219. *Id.*

### 3. Economic Grandfather Clause

After receiving a tip from a white sub-administrator at the Labor Advisory Board concerning the use of a new tactic in the proposed structural clay products and fertilizer codes, Davis identified a third discriminatory device, which he termed the “economic grandfather clause.”<sup>220</sup> The clause established minimum wage scales based on 1929 wages.<sup>221</sup> As Black workers were usually paid less than 30 cents an hour in 1929, it enabled employers to pay white workers ten cents an hour more for doing the same work in the same locality as Black workers, simply because Black workers had received less than the standard wage in 1929.<sup>222</sup> Davis and the JCNR stressed that the historical wage differentials were intended to keep Black workers in a state of economic servitude. By relying on Black workers’ pre-code economic and racial subordination, Davis argued, the NRA used the economic grandfather clause to “codif[y] the wage slavery and treat[the] Negro workers adversely.”<sup>223</sup> As the codes often failed to include the relevant 1929 rates, Davis expounded, the NRA “expect[ed] the worker to avail himself of a mass of statistical references to learn what he is entitled to receive”; this impeded workers from making claims.<sup>224</sup>

Davis and the JCNR mobilized data from various sources to show the economic grandfather clauses included in NRA codes worked to secure reduced wages for Black labor. Davis used this approach to contest the economic grandfather clause provision of the shipping industry.<sup>225</sup> Using U.S. Census and U.S. Shipping Board Bureau data, Davis and the JCNR demonstrated that “the only group reported to have been receiving rates approaching the minimum of 30 cents an hour” in 1929 was the almost entirely Black workforce of the South Atlantic.<sup>226</sup> Workers with the same occupational classification in other areas, the majority of whom were white, were earning 73.3 cents an hour, by comparison.<sup>227</sup> Black workers in the South Atlantic, Davis argued, “every bit as efficient as the

220. The clause was a variant of the “grandfather clause” used by southern states to disenfranchise Black voters. Davis later recognized the device had been introduced even earlier in the lumber code. Jensen, *supra* note 63, at 345–46.

221. NAT’L RECOVERY ADMIN., CODE OF FAIR COMPETITION FOR THE LUMBER AND TIMBER PRODUCTS INDUSTRY AS APPROVED ON AUG. 19, 1933, BY PRESIDENT ROOSEVELT 9 (on file with the Gov’t Publ’g Off.) [hereinafter LUMBER AND TIMBER PRODUCTS CODE]. However, data from 1928 was used in the NRA’s final wage calculations because detailed statistics for 1929 were “unavailable.” *Id.* at 9–10.

222. Complaint Hearing, Feb. 28, 1934, *supra* note 166, at 2.

223. *Investigation of the NRA Hearings*, *supra* note 88, at 2141.

224. *Id.* at 2143. An NRA Division of Review report affirmed that 1929 rates were often absent from the codes and that this inhibited workers from making claims because a statistical investigation was required to substantiate wage violations allegations. Woodbury, *Policy in the Control of Wages*, *supra* note 47, at 26.

225. NATIONAL RECOVERY ADMINISTRATION, PROPOSED CODE OF FAIR COMPETITION FOR THE SHIPPING INDUSTRY AS REVISED OCTOBER 25, 1933, BY PRESIDENT ROOSEVELT (on file with the Gov’t Publ’g Off.).

226. JCNR Statement on Shipping Industry, *supra* note 198, at 2.

227. *See id.* at 3.

workers on the Pacific Coast, are the victims of a differential of more than 100 per cent per hour.”<sup>228</sup>

#### 4. Exemptions, Substitutions, and Non-Industrial Classification

In addition to the previous three discriminatory devices, Davis maintained that the NRA functionally excluded Black workers from the benefits and protections of the NIRA through a matrix of exemptions, substitutions, and non-industrial classification.<sup>229</sup>

##### *a. Exemptions and Substitutions*

Once an industry code was approved, the NRA permitted employers to petition for exemptions to relieve them from certain industry obligations.<sup>230</sup> It also allowed employers to petition for minimum wage and maximum hour provision substitutions which, upon NRA approval, allowed employers to pay workers subminimum wages and set longer maximum hours than in the general industry code.<sup>231</sup> These exemptions and substitutions, Davis argued, were used to functionally exclude Black workers from the benefits and protections of the NIRA.<sup>232</sup>

In some cases, ambiguous code language provided loopholes that southern industrialists could exploit to seek subminimum wage rates for Black workers. Davis encouraged the NRA to eliminate these ambiguities. At the public hearing for the shipping industry code, he urged the NRA “to prevent ambiguous interpretation of the shipping code’s minimum wage provision by deleting the phrase “unless otherwise provided in a Division or Sub-division Code” in its entirety.”<sup>233</sup>

In other cases, Davis found, subminimum wage rates were allowed for industries that shared the same labor pool as agriculture. Davis used the low wages of the fertilizer industry (35 cents an hour)—which had a majority Black workforce that was wholly unorganized—as an example.<sup>234</sup> The justification for the low wage rate, he highlighted, was that the industry drew from a similar labor pool to that of agriculture.<sup>235</sup> The code’s letter of transmittal from the Administrator to President Roosevelt read:

The percentage of common labor reaches to more than 70 percent of the total labor employed and is of the farm labor type. It seems

228. Complaint Hearing Feb. 28, 1934, *supra* note 166, at 2.

229. *FLSA Hearings*, *supra* note 198, at 571–74.

230. Paul Aiken, *Administrative Law and Procedure Under the NIRA*, DIV. OF REV., OFF. OF NAT’L RECOVERY ADMIN 84–85, 129 (Mar. 1936). *See also* Woodbury, *Policy in the Control of Wages*, *supra* note 47, at 25–26.

231. Woodbury, *Policy in the Control of Wages*, *supra* note 47, at 25.

232. *FLSA Hearings*, *supra* note 198, at 571–74.

233. JCNR Statement on Shipping Industry, *supra* note 198, at 6.

234. Complaint Hearing Feb. 28, 1934, *supra* note 166, at 3.

235. *Id.*



Important, therefore, that scales of wages be not set up so high as to disrupt the agricultural situation in the vicinity of fertilizer factories.<sup>236</sup>

The NRA, Davis argued, was “holding the wages of Negro workers down for no other reason than to allow plantation owners to exploit them.”<sup>237</sup>

*b. Non-Industrial Classification*

Lastly, Davis identified non-industrial classification as another discriminatory device incorporated into the codes of fair competition. Agricultural and domestic workers were not expressly excluded under the NIRA.<sup>238</sup> After the NIRA was passed, agricultural and domestic workers mobilized to propose codes of fair competition for farm and domestic labor.<sup>239</sup> The NRA, however, was generally unwilling “to formulate codes for major occupations, especially in agriculture and domestic service, in which Black men and women were concentrated.”<sup>240</sup> The agency denied these workers protection under the NIRA based upon the its own interpretation of congressional intent. Since Congress passed the Agricultural Adjustment Act (AAA) to protect the interests of farmers contemporaneously with the NIRA, the NRA concluded, it did not intend for agricultural workers to be covered by the NIRA.<sup>241</sup> The NRA denied domestic workers coverage under the Act based upon its assessment that domestic service was neither a trade or industry, the homes of individual citizens could not be made the subject of regulations or restrictions, and that enforcement of a code for domestic service would be “virtually impossible.”<sup>242</sup>

Davis protested the exclusion of over a million Black domestic workers from code coverage and the JCNR worked collaboratively with other organizations to advocate for improved wages, working conditions, protections, and benefits for domestic workers.<sup>243</sup> When it became clear that the NRA had determined to exclude agricultural workers, Davis argued, many industries claimed that they were in fact engaged in agricultural production and employed agricultural labor to escape the reach of the NRA. When 62,000 cotton gin laborers who were

236. *Id.*

237. *Id.*

238. Linder, *supra* note 6, at 1358.

239. Kayce R. Compton, *Defeating the Agricultural Exemption: The Norris LaGuardia Act as A Means for Collective Action for Agricultural Labor*, 74 N.D. L. REV. 509, 520 (1998); PHYLLIS M. PALMER, *DOMESTICITY AND DIRT: HOUSEWIVES AND DOMESTIC SERVANTS IN THE UNITED STATES 1920–1945* at 118–21, 155 (1989).

240. PALMER, *supra* note 239, at 119.

241. Linder, *supra* note 6, at 1356. This interpretation ignored that the Act’s domestic allotment plan offered to plantation owners and landlords government payments for voluntary reductions in crop acreage, without guaranteeing agricultural workers be paid wages from such payments. Payments were distributed to owners and landlords directly who then refused to pay the sharecroppers and tenants who worked their land. *See generally* Shofner, *supra* note 181. *See also* Paul W. Bruton, *Cotton Acreage Reduction and the Tenant Farmer*, 1 L. & CONTEMP. PROBS. no. 3 275, 279 (1934).

242. PALMER, *supra* note 239, at 120–21.

243. Jensen, *supra* note 63, at 336, 355, 364–65; PALMER, *supra* note 239, at 120.



arbitrarily reclassified as agricultural workers and thereby deprived the benefits and protections of the NRA, Davis challenged the non-industrial classification and exclusion.<sup>244</sup> Davis and the JCNr insisted that highly industrialized sectors like cotton ginning should be dealt with under the NRA, which was empowered to give the labor benefits of shorter hours and higher wages. The Florida citrus growing and packing industry tried to evade NRA coverage by making the argument that it was agricultural labor, even though it “was one of the most highly industrialized fields of agriculture,” used centralized quasi-factory methods of growing, packing, and shipping produce, and recruited its packing house employees from the “general industrial labor market.”<sup>245</sup>

### 5. Discriminatory by Design

Despite being race neutral on their face, Davis alleged, each of these discriminatory devices had been purposefully crafted to deprive Black workers of equal benefits and protections under the NRA. Using empirical and analytical research, he showed that the devices had foreseeably discriminatory results; disproportionately impacted Black workers; and formed a clear pattern of discrimination when taken together.<sup>246</sup> Colorblindness, Davis established, was simply a tool used to achieve racist effects without having to admit racist intent.

#### *B. Countering Colorblindness and Exposing Discrimination in the NRA*

Racism and discrimination, Davis contended, permeated the recovery administration and its decision-making processes. To support this claim, Davis emphasized the NRA’s refusal to prohibit discrimination in the codes of competition. He also pointed to the failure of the NRA to prevent, study, and investigate discrimination in code development, implementation, and enforcement, as well as its refusal to ensure Black representation in the recovery administration.<sup>247</sup> Davis and the JCNr had pressed the NRA for both Black representation in the recovery administration and the investigation of code violations by southern industrialists. Such representation, Davis contended, would work to address these issues. The NRA finally hired Mabel Byrd, a Black field investigator, to investigate NRA code violations against workers in the South, but then canceled the investigative trip on September 18, 1933, mere hours before her departure with no explanation.<sup>248</sup>

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244. THE NAT’L ASS’N FOR THE ADVANCEMENT OF COLORED PEOPLE (NAACP), 25<sup>TH</sup> ANNUAL REPORT FOR 1934 at 6–7 (1935) (on file with the Maryland State Archives); Joint Committee on National Recovery Memorandum on Cotton Ginning Marketing Agreement and Laundry Code, 1–2 (National Negro Congress Records, on file with the New York Public Library, Schomburg Center for Research in Black Culture, Manuscripts, Archives, and Rare Books Division); Jensen, *supra* note 63, at 43; *Race Man for First Time, Addresses Okla. Legislature*, CHI. DEF., Jul 7, 1934, at 1.

245. Linder, *supra* note 6, at 1358–61 (quoting S. Jamieson, *Labor Unionism in American Agriculture*, BUREAU OF LAB. STAT., U.S. DEP’T LAB., BULL. NO. 836, at 288 (1976)).

246. See JCNr Statement on Shipping Industry, *supra* note 198, at 8.

247. Complaint Hearing Feb. 28, 1934, *supra* note 166, at 4–5.

248. Jensen, *supra* note 63, at 378.

When a whistleblower gave Davis a stenographic transcript of a Special Industrial Recovery Board Meeting that occurred that same September 18, 1933 day, Davis was able to provide direct evidence of race discrimination by NRA administrators and in administrative decision-making. He used the evidence to both confront and publicly expose the NRA. The transcripts detailed the Special Industrial Recovery Board members' candid reactions to the demand for Black representation in the administration, which Secretary Perkins reported had been made "every day."<sup>249</sup> Perkins stated

[t]hey want a Negro Assistant Secretary in the Department of Labor. We already have a Negro economist in the Bureau of Statistics which we could call our Bureau of Economics. (Karl Phillips) He is not very satisfactory but he holds a Civil Service Position and there is a division of Negro economics and there is a Negro at the head of that. I do not know how we are going to deal with them. They claim the thing Mr. Roper set up here is not satisfactory—that it is political in its setup, rather than organization.<sup>250</sup>

Other Recovery Board members expressed similar frustration with the demands for Black representation.<sup>251</sup>

The transcript also revealed that race was considered in the decision-making processes related to the dismissal of Byrd and the cancellation of her already scheduled trip to investigate code violations in the South.<sup>252</sup> NRA Administrator Johnson was quoted in the transcript explaining Byrd's appointment. Referring to Byrd and her appointment as an code violation investigator, NRA Administrator Johnson declared that "a Negress" had been appointed "to look into certain matters with respect to Negro labor."<sup>253</sup> He remarked that he "questioned the wisdom" of Byrd's appointment and "the extent of authority" she would be given.<sup>254</sup> Johnson admitted that he had "stopped that" (Byrd's investigation), as he thought it "was crazy" and "very unwise" to give Byrd "authority to go in and interrogate employers" on account of her race.<sup>255</sup> Agricultural Adjustment Administrator Mordecai Ezekiel agreed with Johnson and exclaimed that it "would be playing

249. See Transcript of Meeting of the Special Industrial Recovery Board 1 (Sept. 18, 1933) (National Negro Congress Records, on file with the New York Public Library, Schomburg Center for Research in Black Culture, Manuscripts, Archives, and Rare Books Division) [hereinafter *SIRB Meeting September 18*].

250. *Id.*

251. *See id.*

252. *Id.* at 2–3.

253. *Id.* at 1. Black women had protested the use of the term "Negress." Carter G. Woodson also identified the term as offensive. See generally Pero Gaglo Dagbovie, *Black Women, Carter G. Woodson, and the Association for the Study of Negro Life and History, 1915–1950*, 88 J. AF. AM. HIST. 25 (2003).

254. See *SIRB Meeting September 18*, *supra* note 249, at 1.

255. *Id.* at 3.

with fire to send a Northern trained Negro to the South and certainly anyone trained in Chicago.”<sup>256</sup>

The transcript indicated that the Recovery Board had a very different idea of the kind of person it needed to investigate code violations in the south. Executive Secretary Dickinson shared that the NRA Research Unit thought that:

[T]he selection of the research worker from the Negro race to go down and make that investigation would perhaps meet with difficulties that would not be met by a research worker of some other race, and that if it were desired to win the confidence of the Negroes in the result of a research investigation, that purpose could be accomplished in a more tactful way, which would be, instead of sending a research worker from their race, to put the investigation in the hands of some outstanding Negro, like Mr. Moton, or somebody of that kind and then if he wanted to let him employ the research worker. That was my suggestion, but the point here is, whether this research worker shall be given her ticket and sent down this afternoon.<sup>257</sup>

Secretary Perkins agreed with Dickson, responding, “I think you are right that it is very much better to put a distinguished Negro citizen on some of the central boards.”<sup>258</sup>

Tuskegee Institute President R.R. Moton, who historian Richard M. Mizelle, Jr. described as a “disciple of Booker T. Washington” had previously been appointed by Herbert Hoover (serving as Secretary of Commerce and head of relief operations after the Mississippi flood) to investigate the accusations of forced labor and mistreatment in Red Cross camps in 1927.<sup>259</sup> In 1932, Moton was again appointed by Hoover (serving as President) to head the “Colored Advisory Commission” in a civilian investigation of forced labor in the Mississippi Flood Control levee camps under federal jurisdiction.<sup>260</sup> Moton refused to allow anyone with ties to the NAACP to serve on the Commission or participate in the investigation, even though it was the NAACP that brought to light the dismal conditions of forced labor that Black levee camp workers endured and demanded change on the workers’ behalf.<sup>261</sup>

In his contemporaneous reflection on Moton’s first appointment, W.E.B. Du Bois wrote that he and other Black leaders strongly suspected that Moton’s Committee would likely be “sorely tempted to whitewash the whole situation, to pat Mr. Hoover loudly on the back, and to make no real effort to investigate the desperate and evil conditions of that section of our country.”<sup>262</sup> The significance

256. *Id.*

257. *Id.*

258. *Id.*

259. Richard M. Mizelle, Jr., *Black Levee Camp Workers, the NAACP, and the Mississippi Flood Control Project, 1927–1933*, 98 J. AFR. AM. HIST. 511, 522 (2013).

260. *Id.*

261. *Id.* at 522–23.

262. *Id.* at 523 (quoting W.E.B. Du Bois, *Postscript*, 34 CRISIS 311, 311 (Nov. 1927)).

of the Special Industrial Recovery Board's consideration of Moton as a replacement for Byrd would have been evident to Davis and JCNR member organizations, including the NAACP.

The discovery of the September 18<sup>th</sup> transcript, blatant biases and discrimination that infected the administration and its decision-making processes, and the NRA's refusal to send a competent Black investigator to the south, prompted Davis to take immediate action. Davis decided to conduct the prohibited investigation himself.

### 1. Investigating the Plight of Black Labor in the South

Davis charted an itinerary for a data collection trip across the Jim Crow South and readied himself for travel.<sup>263</sup> In late November of 1933, Davis left Washington, D.C. and traveled to North Carolina, South Carolina, Georgia, Alabama, Tennessee, and Kentucky.<sup>264</sup> His background with empirical research came in handy. Using method triangulation, Davis conducted surveys, in-depth interviews, and observational research;<sup>265</sup> he collected data on actual wages, working conditions, labor violations, living conditions, cost of living, access to federal relief, and food security of Black workers and families in the South.<sup>266</sup>

He spent time talking to Black workers at their jobs and homes, gathering data on wage theft, job loss, employer retaliation, discrimination, and poverty in the process.<sup>267</sup> Davis collected paystubs, grocery bills, and rent receipts; documented the cost of produce and staple goods in company stores and town centers; and took field notes and photographs.<sup>268</sup> He prepared multiple in-depth case

263. John P. Davis, Travel Schedule (1933) (National Negro Congress Records, on file with the New York Public Library, Schomburg Center for Research in Black Culture, Manuscripts, Archives, and Rare Books Division) [hereinafter Travel Schedule]; John P. Davis, Report of the Executive Secretary, Joint Committee on National Recovery 9 (Dec. 14, 1934) (National Negro Congress Records, on file with the New York Public Library, Schomburg Center for Research in Black Culture, Manuscripts, Archives, and Rare Books Division).

264. Davis, Travel Schedule, *supra* note 263.

265. Davis, a mentee of W.E.B. Du Bois, employed methodologies developed by the Black pioneers of sociology. His work bears the hallmarks of Du Bois and the Atlanta Sociological Laboratory (ASL). ASL was the first American sociological unit to institutionalize the public acknowledgement of the limitations of one's research, use of the insider researcher, and method triangulation or mixed method data collection, all of which Davis used in his research. For information on these sociological pioneers and their revolutionary methodologies, *see generally* EARL WRIGHT II, THE FIRST AMERICAN SCHOOL OF SOCIOLOGY 8 (2016).

266. *See, e.g.*, John P. Davis, Report Number One (Nov. 23, 1933) (National Negro Congress Records, on file with the New York Public Library, Schomburg Center for Research in Black Culture, Manuscripts, Archives, and Rare Books Division) [hereinafter Report Number One]; Case Narratives and Field Notes (July 9, 1933) (National Negro Congress Records, on file with the New York Public Library, Schomburg Center for Research in Black Culture, Manuscripts, Archives, and Rare Books Division) [hereinafter Case Narratives and Field Notes].

267. *See generally* Report Number One, *supra* note 266; Case Narratives and Field Notes, *supra* note 266.

268. *See generally* Report Number One, *supra* note 266; Survey Description Document C (National Negro Congress Records, on file with the New York Public Library, Schomburg Center for Research in Black Culture, Manuscripts, Archives, and Rare Books Division).

studies of individual workers using rich description.<sup>269</sup>

Davis went on to conduct multiple data collection trips, traveling more than 20,000 miles across the south by September of 1935.<sup>270</sup> His emphasis on and strategic approach to research served several key functions. For one, it responded to the deficit of data on Black labor Davis and Weaver identified as a problem at the cotton textile code hearing. Davis' particularly methodological approach also provided Davis and the JCNR a degree of data validity that southern industrialist anecdotal testimony, survey research, cost of living analyses, and company-packaged data sorely lacked. In addition, Davis was able to use the data he collected to negate the justifications for the discriminatory devices advanced by southern industrialists and the NRA; substantiate his discrimination claims, legitimate and inform the JCNR's demands; and impel the NRA to take action against code violators.

## 2. Confronting and Exposing the NRA

Davis returned to Washington, D.C. in December of 1933, just in time for a secret meeting that the NRA had planned at Howard University.<sup>271</sup> Thirty white NRA staff members attended the meeting,<sup>272</sup> with the purported intention of having informal roundtable discussions with Black leaders, lawyers, and academics. Borrowing the southern industrialist displacement frame, the NRA officials tried to convince Black leaders of the potential benefits of accepting wage differentials.<sup>273</sup>

Armed with the research findings of his first investigative trip to the South, Davis arrived at the meeting with other plans.<sup>274</sup> Davis confronted the NRA staff members head on, reproaching the administration for attempting to drum up support for racial wage differentials. He then refocused the meeting on the plight of Black workers. Davis read aloud the worker narratives he collected on his investigative trip.<sup>275</sup> He produced the pay envelopes he collected from Black workers earning starvation wages.<sup>276</sup> Then, he read verbatim from the September 18 Special Industrial Recovery Board transcript.<sup>277</sup>

269. See generally Report Number One, *supra* note 266; Case Narratives and Field Notes, *supra* note 266.

270. John P. Davis, Letter to Rev. J.R. McClendon (Sept. 4, 1935) (National Negro Congress Records, on file with the New York Public Library, Schomburg Center for Research in Black Culture, Manuscripts, Archives, and Rare Books Division).

271. Dutton Ferguson, *Justice Department Probe Looms Over NRA Minutes Leak*, PITT. COURIER, Dec. 23, 1933, at 1.

272. *Id.*; *Lower Pay for Negro Suggested: Meeting a Flop When Davis "Cracks Down" on NRA*, CAP. NEWS SERV., Dec. 1933, at 1 [hereinafter *Lower Pay for Negro Suggested*]. U.S. Commissioner of Labor Statistics Isadore Lubin, Rose Schneiderman of the Labor Advisory Board, and Clark Foreman, Special Advisor to the Secretary of the Interior of Negro Economics were all present.

273. Ferguson, *supra* note 271, at 1.

274. *Id.* at 1, 4.

275. *Id.*

276. *Id.*

277. *Id.*

Davis denounced the administration for its blatant discrimination and indifferent treatment of the representatives of Black organizations.<sup>278</sup> He demanded the NRA “crack down” on southern industrialists for paying starvation wages.<sup>279</sup> He admonished those Black leaders willing to defer to differentials.<sup>280</sup> NRA administrators attempted to confirm the press was absent from the meeting.<sup>281</sup> Davis made sure the meeting went public, sending the stenographic transcript to the press for immediate publication.<sup>282</sup> In publishing the transcript, Davis provided the public with direct evidence of discriminatory remarks by NRA administrators and their consideration of race in administrative decision-making. In a memo to Harold Ickes, Frances Perkins called for government investigators to uncover the secret source that had made the transcript available to Davis, warning “we may be caused considerable embarrassment” with further “irresponsible” publicity.<sup>283</sup>

### C. *Delegitimizing the Justifications for Racial Wages*

Davis and his colleagues mobilized their empirical and analytical research, including the data Davis collected during his trips across the South, to delegitimize the frames southern industrialists used to justify the discriminatory devices incorporated into the NRA codes. Below, therefore, I detail several of the dimensions along which Davis’ project of using research data to contest southern industrialist methods of instantiating racial wages proceeded.

#### 1. Efficiency

Davis used both field data and secondary data analyses to challenge southern industrialist claims as to the inefficiency of Black workers. In one such instance, he challenged the legitimacy of the Southland Manufacturing Company’s petition for an exemption on the basis that its Black workers were inefficient. Using data from his own field investigations<sup>284</sup> in combination with a close analysis of Southland’s own data, Davis first showed that the comparative data the company submitted to the NRA to demonstrate the inefficiency of its Black workers inappropriately compared productivity rates between an Indiana and Georgia plant

278. *Id.*

279. *Race Problem Baffles the NRA: Leaders Irritated by Demand for Jobs at Capitol Davidson*, PHILA. TRIB., Dec. 21, 1933, at 1; *Lower Pay for Negro Suggested*, *supra* note 272, at 1; Ferguson, *supra* note 271, at 1.

280. Ferguson, *supra* note 271, at 1.

281. *Lower Pay for Negro Suggested*, *supra* note 272, at 1. See also *John Davis Thumbs Nose as Government Opens Mystery Minutes Probe*, PHILA. TRIB., Dec. 28, 1933, at 1.

282. See generally *Lower Pay for Negro Suggested*, *supra* note 272.

283. Jensen, *supra* note 63, at 391.

284. Davis investigated the plant, spoke with the manager, inspected the plant’s records, and talked to many of the plant’s workers. *In re* Petition for Exemption by Southland Mfg. Co., Bd. of Indus. Appeals, Nat’l Recovery Admin., 165–85 (Oct. 9, 1934) (statement of John P. Davis, Exec. Sec’y, Joint Comm. on Nat’l Recovery) (on file with U.S. Dep’t of Lab., Lawrence A. Oxley Subject Files, National Recovery Administration - Fair Competition Industry Codes - Southland Manufacturing Company) [hereinafter Davis Southland Statement].



that operated on two different systems.<sup>285</sup> Using the productivity data from Southland and a nearby cotton garment plant that operated under the same system, his own observational and interview data, and the company's records provided to him by a manager, Davis was able to establish that the lower productivity resulted from the use of older machinery and not race.<sup>286</sup> In another case, where a southern industrialist garment factory contended that its Black garment workers were inefficient, Davis used his fieldwork data to invalidate the company's contention and show that the difference in productivity was a result of the fact that the Black women had been segregated from their white counterparts and provided inferior working conditions and machinery, while the white women working in the same plant were provided both superior working conditions and machinery.<sup>287</sup>

## 2. Cost of Living

Davis' field data proved especially useful in calculating accurate cost-of-living data for workers living in mill-towns and other employer provided housing, where companies directly controlled the prices of rent and staple goods available at the company commissary. The data enabled Davis to repudiate the testimonies and statements of southern industrialists like the aforementioned C.C. Sheppard and South Carolina and Georgia Congressmen who reiterated Sheppard's claims that Black workers in the South were happy and enjoyed a lower cost of living, access to cheap products, and other benefits.<sup>288</sup> Citing field data he collected in the Congressmen's own states, Davis confirmed that prices at mill stores were in fact higher than those at stores in nearby villages, presenting data to show that the prices of the staples that constituted the majority of the low wage workers' diets in the areas, like "flour, rice, coffee, fatback, beans, and sugar," had "increased in their retail price at mill-owned stores out of all proportion to any wholesale price increase."<sup>289</sup> Davis' findings were echoed by the Department of Labor, which determined that "there were no economic reasons for wage differences between regions."<sup>290</sup>

## 3. Contented Workers

Davis and the JCNR focused the nation's attention more closely on the actual impact unchecked race discrimination in the development and implementation of

285. The Indiana plant operated under a new progressive line system, while Southland still operated under the conventional system. *Id.* See also Memorandum re: The Southland Mfg. Co. Case (on file with U.S. Dep't of Lab., Lawrence A. Oxley Subject Files, National Recovery Administration - Fair Competition Industry Codes - Southland Manufacturing Company) [hereinafter Southland Memorandum].

286. See generally Southland Memorandum, *supra* note 285; Davis Southland Statement, *supra* note 284.

287. John P. Davis, *The Maid-Well Garment Case*, 41 CRISIS 356 (Dec. 1934) [hereinafter *The Maid-Well Garment Case*].

288. See Fickle, *supra* note 118, at 425.

289. John LaFarge, *The Negro and the Wage Differential*, AMERICA, Feb. 10, 1934, at 442.

290. SCHULMAN, *supra* note 122, at 23-24.



NRA codes and New Deal programs had on the lives of Black workers and families. They mobilized empirical data to underscore the incredulosity of southern industrialist claims that Black workers in the South were content and earning sufficient wages. Davis illuminated the brutal working conditions and starvation wages Black workers endured and the effects of these conditions on Black workers and their families in the face of rising inflation,<sup>291</sup> reading case narratives and letters from Black workers directly into the record in administrative and legislative hearings.<sup>292</sup> Black workers in the South received less pay for doing the same work as whites, earned starvation wages, and saw their wages decrease rather than increase after the passage of the NIRA.<sup>293</sup> Code violations were ubiquitous.<sup>294</sup> Furthermore, Davis reported, the jobs held by Black workers in the industry were “fraught with danger of occupational disease and other industrial hazards,” constantly exposing Black workers to poisonous gases, intense heat, steam, acid, and heaving lifting that resulted in higher rates of illness and injury.<sup>295</sup>

If Black workers complained, Davis explained, they were fired.<sup>296</sup> If they then attempted to find work by registering with the Civil Works Administration, their employers would protest their employment with the CWA and prevent them from obtaining work.<sup>297</sup> If they sought federal relief to survive these abysmal economic conditions, Davis revealed, race discrimination “operated to exclude Black workers from relief benefits.”<sup>298</sup>

If Black workers in the South attempted to avail themselves of the labor organizing and collective bargaining protections under Section 7(a) of the NIRA, Davis revealed, they were “met with lockout, with violence, even with lynching.”<sup>299</sup> The rise and organizing activities of the interracial Southern Tenant Farmers Union intensified the systematic terrorization of Black and white organizers seeking to improve the wages and working conditions of Black

291. Complaint Hearing, Feb. 28, 1934, *supra* note 166, at 1.

292. *See, e.g., id.* at 3–4.

293. John P. Davis, *Plan Eleven—Jim Crow in Steel*, 43 *CRISIS* 262, 276 (Sept. 1936); Complaint Hearing, Feb. 28, 1934, *supra* note 166, at 3–4.

294. Complaint Hearing, Feb. 28, 1934, *supra* note 166, at 3–4.

295. *Id.*

296. *Id. See generally The Maid-Well Garment Case, supra* note 287.

297. *See* Complaint Hearing, Feb. 28, 1934, *supra* note 166, at 3–4.

298. John P. Davis, *A Survey of the Problems of the Negro Under the New Deal*, 5 *J. NEGRO EDUC.*, no. 1, Jan. 1936, at 4–5 [hereinafter *A Survey of the Problems*].

299. Jensen, *supra* note 63, at 420 (citing *Hearing on Code of Fair Competition for the Cotton Pickery Industry Before the Nat'l Recovery Admin.*, 84–85, 87–94 (Mar. 10, 1934) (statement of John P. Davis, Exec. Sec’y of the Joint Comm. on Nat’l Recovery)) (National Negro Congress records, on file with the Schomburg Center for Research in Black Culture, Manuscripts, Archives, and Rare Books Division, New York Public Library).

laborers.<sup>300</sup> Davis highlighted the terrorization visited upon Black leaders who dared to defy southern industrialists and white supremacy. In his hearing statements, Davis called attention to the fact that Reverend E.D. Hughes had been run out of Alabama for refusing to sign a petition in support of racial wage differentials and even spoke of his own experience in Arkansas collecting worker statements and affidavits.<sup>301</sup> “We risked our lives in attempting to get these affidavits,” Davis testified before the Senate Committee on Finance, “[t]he chief of police, among others, was hounding us the entire time. . . to prevent us from seeing these workers.”<sup>302</sup>

Armed with a mass of longitudinal data from continuous research and repeated data collection trips, Davis was able to show that the discriminatory NRA codes had deepened the depression for Black workers and families who experienced irregularity of work,<sup>303</sup> joblessness,<sup>304</sup> starvation,<sup>305</sup> retaliation, and terrorization.<sup>306</sup> Davis countered southern industrialist contentions of contented Black workers by forcing the public, the NRA, and New Deal administration to reckon with the empirical facts of racism and discrimination.

#### 4. Saving Black Jobs

The “thinly veiled threat of displacement,” Davis argued, was the “most un-American and the most damnable” justification for racial wages.<sup>307</sup> To challenge southern industrialist claims that wage differentials were meant to save Black jobs, Davis laid bare that southern industrialists were using terrorization tactics to intimidate Black leaders and workers into publicly supporting racial wages and the displacement narrative.<sup>308</sup>

From whom does the argument of displacement come? It does not come from the representatives of Negro workers. It comes from the employer group. Large sums of money have been expended by a group of Southern manufacturers to propagandize among Negro workers,

300. See DAVIS EUGENE CONRAD, *THE FORGOTTEN FARMERS: THE STORY OF SHARECROPPERS IN THE NEW DEAL* 83–104 (1965).

301. Complaint Hearing, Feb. 28, 1934, *supra* note 166, at 2 (mentioning a minister being run out of Alabama); *Investigation of the NRA Hearings*, *supra* note 88, at 2146 (discussing his own experience collecting worker affidavits).

302. *Investigation of the NRA Hearings*, *supra* note 88, at 2146.

303. *Id.* at 10.

304. See Complaint Hearing, Feb. 28, 1934, *supra* note 166, at 5.

305. *Id.* at 1 (mentioning that Black workers were literally at the point of starvation as a result of discriminatory codes and inflation).

306. See *id.* at 2 (mentioning that a minister had been driven out of Alabama because he refused to support racial differentials); *The Maid-Well Garment Case*, *supra* note 287, at 1 (noting that Black women garment workers were fired after one of the workers filed a complaint with the NRA concerning the code violations of the garment company employer); *Negro Workers Killed in Labor Struggles*, *supra* note 191, at 1 (documenting the Black workers killed in labor struggles).

307. *Id.*

308. Complaint Hearing, Feb. 28, 1934, *supra* note 166, at 2.

urging them to protest high code wages on the ground that they would be displaced by white workers. A Negro minister was driven out of Selma, Alabama, because he refused to sign a petition to the National Recovery Administration asking for a special Negro differential to protect Negroes in their cheap labor jobs. Certainly the argument of displacement should be viewed with suspicion.<sup>309</sup>

Highlighting southern industrialist countermobilization against Black labor, and the terrorization Ames and his mob of white Selma leaders visited upon Revered Hughes, Davis charged, the NRA “should not be taken in by such a specious argument.”<sup>310</sup> Southern industrialists had no interest in saving Black jobs; they wanted to exploit and control Black labor.

The southern laundry industry, Davis disclosed at the NRA Complaint Hearing of the National Recovery Administration, had openly threatened Davis and his colleagues and promised that if they persisted in their demand for higher wages, Black women—who accounted for nearly the entire workforce—would be fired from their jobs in the industry.<sup>311</sup> “[I]f the [NRA] really wanted to crack down on somebody” it would have done so by including an “anti-displacement clause,” Davis proclaimed, adding that workers “should not be penalized for the unfair threats of their employers” and “white labor should no longer be crucified because of cheap Negro labor.”<sup>312</sup>

### 5. Southern Industrialists Adopt a New Frame

With their previous frames under attack, southern industrialists advanced a new strategic frame to justify and drum up support for racial wages. Using what historian Katherine Rye Jewell has called an “infant-industry” frame, southern industrialists positioned the South as a disadvantaged minority deserving of protection.<sup>313</sup> Under this new frame, the South was a victim of discrimination by the NRA.<sup>314</sup> As SSIC president John Edgerton explained, the SSIC’s main purpose was to protect the South against “various sorts” of discrimination and “secure fair treatment for the South in the matter of wage differentials and proper representation on the Code Authorities.”<sup>315</sup> The SSIC alleged that the misclassification of southern states as northern was evidence of southern discrimination.<sup>316</sup> SSIC director of research Margaret Mager, who attended code hearings to increase the

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309. *Id.*

310. *Id.*

311. *Id.*

312. *Id.*

313. JEWELL, *supra* note 50, at 38–39, 41.

314. *See generally id.*

315. SCHULMAN, *supra* note 122, at 22; John E. Edgerton, *To Protect the South Against Discrimination*, 103 MFR.’S REC., no. 7, July 1934, at 19.

316. JEWELL, *supra* note 50, at 45–46.

number of codes with geographically based wage differentials,<sup>317</sup> argued that misclassifying border states as northern “caus[ed] hardship to many manufacturers.”<sup>318</sup> By this logic, wage differentials would help the disadvantaged South achieve a more developed level of industry like other more industrially advanced regions.<sup>319</sup> Representing more than twenty-five groups of southern industrialists by November 1934, SSIC leaders deployed this new frame as the argued for wage differentials in code hearings.<sup>320</sup>

#### D. Legal Arguments, Policy Considerations, and a New Vision

Failing to bring an end to the racialized economic exploitation of Black workers, Davis argued, contradicted the legislative intent of the NIRA, whether such intent was to modify the “profits system to give wage earners a more equitable proportion of the national income”<sup>321</sup> or to remove “obstructions in the way of the smooth flow of profits into the hands of employers.”<sup>322</sup> Neither objective would be achieved, he assured, “without action on the part of the NRA to eliminate the untypical condition of Negro labor.”<sup>323</sup>

In one Article, Davis recalled the assurances made by the New Deal administration and stressed that insofar as the intent of the Act was to improve labor standards by raising minimum wages, both Black and white workers had been promised an increased wage.<sup>324</sup>

It pledged an end to poverty and the beginning of a permanent prosperity. It affirmed its belief that a planned economy could be created within a capitalist nation which would carry with it none of the toll of human sacrifice and human poverty so characteristic of capitalist development until the present time. Implicit in this promise was the assurance of economic equality of Negroes.<sup>325</sup>

Realizing this first purpose, Davis asserted, necessitated a “drastic limitation of so-called *laissez-faire* industry”<sup>326</sup> and the immediate improvement of labor standards for the lowest paid workers in the country who were easiest for employers to exploit—Black workers.<sup>327</sup> Davis used his field research to demonstrate that the economic plight of Black workers was a matter of life and death. He

317. *Id.* at 26–28, 47. Mager exclaimed of the codes approved up until June 7, 1934 “only 247 provide a differential in wages between the South and other sections!” *Id.* at 46.

318. *Id.* at 47.

319. *Id.* at 39.

320. *Id.* at 48.

321. *A Survey of the Problems*, *supra* note 298, at 8–9.

322. *Id.*

323. *Investigation of the NRA Hearings*, *supra* note 88, at 2151.

324. *A Survey of the Problems*, *supra* note 298, at 8.

325. *Id.* at 4.

326. *Id.* at 9.

327. *Investigation of the NRA Hearings*, *supra* note 88, at 2151.

explained the dire effects of the rising prices of inflation and racial wages on Black workers at the Complaint Hearing of the National Recovery Administration.

Now these increases were made to recapture the wages of white workers—wages made mandatory by the code. They had the effect, however, of penalizing Negro workers and forcing many of them to the point of starvation. I use the word starvation advisedly. I can never forget the baby of a Negro textile worker in Clifton, South Carolina, who died because milk was too expensive to buy. It seems clear to me that the responsibility for the plight of the Negro textile worker rests clearly on the shoulders of the National Recovery Administration.<sup>328</sup>

The southern industrialist employers and government officials entrusted with the Act's administration, Davis charged, had failed in their duty to "to end the brutal exploitation of Negro industrial labor" and increase minimum wage rates for all workers to a level sufficient to meet their cost of living.<sup>329</sup>

Davis reasoned that if, alternatively, Congress' intent was to remove any obstructions that stood in the way of putting profits in the hands of employers, occupational, geographical, and other racial differentials needed to be eliminated.<sup>330</sup> "A properly organized profits economy," he wrote, did not indefinitely allow for an "immobile" and "excessive supply of unorganized workers."<sup>331</sup> Instead, it demanded the immediate removal of any conditions that impeded the "flow of purchasing power into the hands of the buying public," including discriminatory wage rates, low standards of living, and illiteracy.<sup>332</sup> The "honest pursuit" of this legislative intent, Davis explained

would recognize the inevitability of cut-throat competition through the inversion of profits-seeking, in that industrialists, unable to compete on a free and competitive basis, would seek to take advantage of the unprotected wage slaves of the South. Such an inversion means the perpetuation of socially inferior organization and production methods as now exist, for the competitive exploitation of a large part of the population tends to keep down the whole population. In short, the existence of wide-spread Negro poverty must sooner or later contradict white prosperity.<sup>333</sup>

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328. See Complaint Hearing, Feb. 28, 1934, *supra* note 166, at 1.

329. *A Survey of the Problems*, *supra* note 298, at 9; NIL Statement for Cotton Textile Industry, *supra* note 62, at 6–7.

330. *A Survey of the Problems*, *supra* note 298, at 9.

331. *Id.*

332. *Id.*

333. *Id.*

Whether “for either humanitarian or for the purely selfish reasons of the profit-seeker”, Davis declared, the NRA’s “first task was and is to guarantee Negro industrial workers real wages sufficient to meet a decent living standard over a definite period of time.”<sup>334</sup> It failed.

### 1. Policy Arguments

Davis combined traditional legal arguments with arguments based on national policy considerations. He highlighted that race discrimination—and the racialized economic subordination of Black workers—contradicted white prosperity, resulted in economic inefficiencies, hindered economic recovery, and harmed white labor.<sup>335</sup> Addressing white labor directly at an NRA hearing, he proclaimed that “every stumbling block put in our way is a knot in the noose which will be used by unscrupulous employers to hang black and white workers alike.”<sup>336</sup> The NRA’s refusal to include an antidiscrimination provision and prohibit closed shop unions allowed closed shop unions to deprive Black workers of both employment opportunities and the right of collective bargaining by excluding them from membership.<sup>337</sup> Excluding Black workers from democratic union participation destroyed their confidence in the government and its representatives,<sup>338</sup> which put the future of the federal government’s relationship with Black workers at risk. Failing to curtail discriminatory industrial practices also placed both Black and white citizens in danger; discriminatory industrial practices incited violence between Black and white workers.<sup>339</sup> Racial animosity and violence, in turn, unnecessarily inhibited the growth and empowerment of organized labor.<sup>340</sup> From a multitude of angles, Davis made clear that prohibiting racism from shaping the codes of competition served the public interest.<sup>341</sup>

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334. *Investigation of the NRA Hearings*, *supra* note 88, at 2152.

335. *See, e.g., A Survey of the Problems*, *supra* note 298, at 9; NIL Statement on Cotton Textile Industry, *supra* note 62, at 5; *Investigation of the NRA Hearings*, *supra* note 88, at 2150–52; Steel Plate Memorandum, *supra* note 205, at 2.

336. Complaint Hearing, Feb. 28, 1934, *supra* note 166, at 5.

337. *Id.* at 1; NIL Statement on the Coal Industry, *supra* note 204, at 5–6.

338. *Reorganization Hearing*, *supra* note 18, at 1644.

339. In one Article, Davis provided an example of how discriminatory NRA codes and white labor practices had been used by exploitative steel companies in the North to disempower and divide native white, European immigrant, and Black workers, describing how physical violence had broken out between the two groups. *Plan Eleven—Jim Crow in Steel*, *supra* note 293, at 262.

340. *See generally id.*

341. Notably, many of Davis’ arguments were later used by his colleague and frequent collaborator Charles Hamilton Houston in his briefs for *Steele v. Louisville & Nashville Railroad Co.* and *Tunstall v. Brotherhood of Locomotive Firemen*. Like Davis, Houston employed legal and policy arguments in combination with empirical evidence. Houston’s approach in *Steele* and *Tunstall* were the foundation for the approach used in *Brown v. Board of Education*. For a discussion of Hamilton’s arguments in and approach to the cases, *see generally* J. Clay Smith, Jr. & E. Desmond Hogan, *Remembered Hero, Forgotten Contribution: Charles Hamilton Houston, Legal Realism, and Labor Law*, 14 HARV. BLACKLETTER L.J. 1 (1998).

## 2. An Alternative Vision

Davis advanced several suggestions to strengthen wage and hour and collective bargaining legislation. He called for the abolition of occupational exclusions and differentials, geographical differentials, and other discriminatory devices, as well as a prohibition of any differential based on race.<sup>342</sup> He advocated for a living minimum wage for all workers that increased in direct proportion to the cost of living.<sup>343</sup> He supported the tripartite model of the NIRA but insisted that labor must be given the right to propose codes and amendments, and public hearings be made mandatory.<sup>344</sup>

The way in which the code was interpreted and enforced, Davis recognized, did little to stop employers from paying workers subminimum wages; deter employers from intimidating, coercing, and abusing workers trying to organize; or prevent employers and unions from discriminating against Black workers.<sup>345</sup> Davis insisted that there should be no restrictions on the right to organize and bargain collectively.<sup>346</sup> He pressed for the prohibition of closed shop and company unions.<sup>347</sup> In view of the fact that law had permitted employers to violate the minimum wage and collective bargaining provisions of the code without accountability for individual wrongdoers,<sup>348</sup> Davis pushed for criminal sanctions for code violations, with criminal-contempt prosecution of any potential code violators who attempted to withhold evidence or coerce witnesses.<sup>349</sup>

However, Davis also made a much larger set of demands, advancing constitutional claims and an alternative vision of New Deal reform that have yet to be reflected in the literature.<sup>350</sup> While a comprehensive analysis of the same is outside the scope of this Article, a brief explanation is essential to understanding Davis' ongoing interventions. Davis, like Roosevelt and the New Dealers, understood government intervention was a constitutional necessity to curb the "so-called *laissez-faire*" industrial practices that had mutated into fundamentally undemocratic protections of concentrated industrialist wealth and privilege.<sup>351</sup> Unlike Roosevelt and the New Dealers, however, Davis underscored the inextricable link between labor exploitation and racial domination. He mobilized

342. *Investigation of the NRA Hearings*, *supra* note 88, at 2147.

343. *Id.*

344. *Id.*

345. See generally John P. Davis, Notes on Eighth Discussion: Unions and the Government (National Negro Congress Records, on file with the New York Public Library, Schomburg Center for Research in Black Culture, Manuscripts, Archives, and Rare Books Division) [hereinafter *Davis Notes*, *Eighth Discussion*]; Complaint Hearing, Feb. 28, 1934, *supra* note 166, at 1; NIL Statement on the Coal Industry, *supra* note 204, at 5–6.

346. See, e.g., NIL Statement on the Coal Industry, *supra* note 204, at 5–6.

347. *Investigation of the NRA Hearings*, *supra* note 88, at 2147.

348. *Davis Notes*, *Eighth Discussion*, *supra* note 345.

349. *Investigation of the NRA Hearings*, *supra* note 88, at 2147.

350. For a discussion of constitutional politics and constitutional claims, see FISHKIN & FORBATH, *supra* note 1, at 3–8.

351. *A Survey of the Problems*, *supra* note 298, at 9.



empirical research in combination with legal and policy arguments to demonstrate that in failing to account for the racialized political economy, the NRA codes and broader New Deal had reproduced the inequality inherent in the system.

Davis consciously looked back to Reconstruction and charted an alternative vision of New Deal reform that underscored the constitutional necessity of linking the broad, political-economic, redistributive project with one that secured Black liberation. He demanded federal intervention, accountability, and the enactment of legislation necessary to curb the excessive concentration of economic and political power; ensure that such power was justly and broadly dispersed among *all* Americans; defeat white supremacy and achieve Black liberation; and guarantee both formal and substantive equality of citizenship for all Americans. Legislation that guaranteed *all* workers living wages; protected *all* workers' collective freedoms against domination by private capital; and enacted a second emancipation,<sup>352</sup> was the minimum democracy required. In no small way, Davis' demands evoked the Reconstruction Congress' encouragement of states to enact legislation to remove the badges and incidents of slavery and the Radical Republicans' establishment and authorization of the Freedmen's Bureau to set minimum wages and ensure fair contracts for the recently emancipated.<sup>353</sup>

Davis described his own work and the work of his organizations as defending democracy and fighting for "every letter of the American Constitution (including the 13<sup>th</sup>, the 14<sup>th</sup>, and 15<sup>th</sup> Amendments)."<sup>354</sup> In the spirit of free labor, he mobilized the theory of "wage slavery,"<sup>355</sup> along with empirical and analytical research – to expose the starvation wages, abysmal working conditions, discriminatory federal relief practices, disenfranchisement, and terrorization Black people endured – and demonstrate that the race discrimination embedded in the NRA codes and broader New Deal legislation had imposed conditions upon Black workers that existed in the shadow of the Thirteenth Amendment, alluding to its application. Quoting Frederick Douglass directly in one speech, Davis proclaimed, "that there may be a slavery of wages only a little less galling and crushing in its effects than chattel slavery, and this must go down with the others."<sup>356</sup> Davis demanded a radical reconstruction of

352. ERIK S. GELLMAN, DEATH BLOW TO JIM CROW: THE NATIONAL NEGRO CONGRESS AND THE RISE OF MILITANT CIVIL RIGHTS 158 (2012).

353. Ruben J. Garcia, *The Thirteenth Amendment and Minimum Wage Laws*, 19 NEV. L.J. 479, 485 (2018).

354. GELLMAN, *supra* note 352, at 130–31.

355. For Davis' use of "wage slavery," see *Plan Eleven—Jim Crow in Steel*, *supra* note 293, at 276; *Investigation of the NRA Hearings*, *supra* note 88, at 2141–43; John P. Davis, Report of the Executive Secretary, Joint Committee on National Recovery 9 (Feb. 21, 1934) (National Negro Congress Records, on file with the New York Public Library, Schomburg Center for Research in Black Culture, Manuscripts, Archives, and Rare Books Division). For a discussion of free labor, see James G. Pope, *Labor's Constitution of Freedom*, 106 YALE L.J. 941, 995 (1997); Rebecca E. Zietlow, *A Positive Right to Free Labor*, 39 SEATTLE U. L. REV. 859, 888 (2016).

356. John P. Davis, Pennsylvania National Negro Council Speech (June 28, 1934) (National Negro Congress Records, on file with the New York Public Library, Schomburg Center for Research in Black Culture, Manuscripts, Archives, and Rare Books Division). See generally Address of Hon. Fred.

the political economy and American values to recognize the value of human rights above property rights, free labor above slavery, and democracy above Jim Crow.<sup>357</sup> He invoked the Constitution's inherent ability to protect Black workers from discrimination, safeguard the collective rights of labor against private domination, and secure Black liberation. Nonetheless, Davis stopped short of advocating for constitutional litigation due to the racial bias of the courts. "[T]he constructions given the Constitution by the courts," Davis plainly stated as he testified in support of Roosevelt's court packing plan, were not "consistent with the principles of democratic government embodied in the Constitution and its amendments."<sup>358</sup>

## VI. FORMULAIC RACIAL WAGES

Neither the NRA nor any NRA code openly admitted to racial differential or discrimination.<sup>359</sup> The codes of competition were race-neutral on their face. Though it maintained a veneer of race-neutrality, the NRA developed codes and approved subminimum wage substitutions and exemptions without refuting the racist justifications underpinning southern industrialist petitions for racial wages, especially as to the supposed inefficiency of Black labor. The NRA noted that "no conclusion can be drawn" as to the alleged incapacities and "leisurely" work habits of southern Black workers.<sup>360</sup> As to the inefficiency of Black workers, an NRA report detailed that "[i]t is generally known that there is a very high percentage of syphilis among the Negro race," only to conclude "[i]f allegations of slowness of reaction are true, this factor would account for it."<sup>361</sup>

Davis' direct confrontation of the NRA and public exposure of the Special Industrial Recovery Board transcript did not prompt the NRA to admit to discrimination or eliminate the discriminatory devices from the codes of fair competition. Instead, the administration sought to uncover the whistleblower that gave Davis the transcript.<sup>362</sup> A review of the archival record also appears to indicate that Davis' allegations of discrimination and publication of the September 18 transcript may have driven the NRA to remove the transcript from the administrative records. To this point, all but one of the Special Industrial Recovery Board transcripts are now publicly available on the Department of Labor website.<sup>363</sup> The

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Douglass, delivered before the National Convention of Colored Men, at Louisville, Ky., (Sept. 24, 1883), <https://omeka.coloredconventions.org/items/show/554>.

357. GELLMAN, *supra* note 352, at 139. *See also A Survey of the Problems*, *supra* note 298, at 3–4, 11–12.

358. *Reorganization Hearing*, *supra* note 18, at 1644–45.

359. Woodbury, *Policy in the Control of Wages*, *supra* note 47, at 58.

360. SCHULMAN, *supra* note 354, at 24.

361. *Id.*

362. Jensen, *supra* note 63, at 392. *See also* Ferguson, *supra* note 271, at 1.

363. *The Proceedings of the Special Industrial Recovery Board*, U.S. DEP'T OF LAB., <https://www.dol.gov/general/aboutdol/history/1933-sirb> (last visited Apr. 13, 2023).

September 18, 1933, transcript which Davis exposed to the world, is simply marked *missing*.<sup>364</sup>

Below I mine this crucial but completely neglected archival source,<sup>365</sup> picking up where Davis left off to examine the meeting transcripts that remained unavailable to Davis during his lifetime. As I argue below, had Davis obtained access to the remainder of the Special Industrial Recovery Board transcripts, he would not only have “caused considerable embarrassment”<sup>366</sup> to Perkins and the NRA—he would have had direct evidence of purposeful discrimination in the formulation of the discriminatory devices that he so vigorously contested.<sup>367</sup>

#### A. “*The Formula We Devised*”

On July 17, 1933, the same day the cotton textile code went into effect, the members of the Special Industrial Recovery Board gathered for a meeting.<sup>368</sup> The Board was in the middle of prehearing conferences with the lumber industry, which had already submitted its proposed code. The NRA was preparing for the public hearing for the lumber and timber code which Davis and Weaver were registered to attend. As part of the prehearing conferences and in preparation for the hearing, the Board had received mountains of data from the administrative researchers and industry representatives, which provided evidence that the majority of the southern lumber workforce was Black.<sup>369</sup> NRA Administrator Johnson used the proposed lumber code as an example to explain the construction and purpose of the 1929 clause (which Davis termed the “economic grandfather clause”) to the Board. The 1929 clause was to be included in the lumber code and the President’s Reemployment Agreement (PRA), which the NRA was developing at the time. The PRA (also called the blanket code) was the early New Deal antecedent to the FLSA.<sup>370</sup>

364. *Id.*

365. I identified one law review Article citing the source; the text of the transcript is not included in the Article. Deborah C. Malamud, *Engineering the Middle Classes: Class Line-Drawing in New Deal Hours Legislation*, 96 MICH. L. REV. 2212, 2257 (1998). Two Articles appear in JSTOR citing the source (four if you count bibliography or library reference material). See generally James P. Johnson, *Reorganizing the United Mine Workers of America in Pennsylvania During the New Deal*, 37 PA. HIST.: J. MID-ATL. STUD. 117 (1970).

366. Jensen, *supra* note 63, at 391.

367. Malamud, *supra* note 365, at 2257.

368. RECORDS OF THE OFFICE OF THE EXECUTIVE DIRECTOR, MINUTES OF THE SPECIAL INDUSTRIAL RECOVERY BOARD 15–16 (Meeting No. 4, July 17, 1933) (on file with the Dep’t of Lab.) [hereinafter SIRB MEETING MINUTES, JULY 17, 1933]. See also COTTON TEXTILE CODE, *supra* note 106, at 14.

369. The Southern Pine Association reported that nearly 80% of the lumber industry’s unskilled workers were Black and that the South’s eleven principal pine-producing states contained 68% of the nation’s Black population. Fickle, *supra* note 118, at 426–27.

370. The PRA served as a “blanket code” while the individual industry codes of fair competition were being developed. It was authorized by section 4(a) of the NIRA. National Industrial Recovery Act, Pub. L. No. 73-67, § 4(a), 48 Stat. 195 (1933); see generally *The President’s Reemployment Agreement*, 37 MONTHLY LAB. REV. 262 (1933).

Johnson, who spearheaded the blanket code drafting effort, informed the other Board members that the PRA would allow for exemptions and substitutions to its provisions. He then explained that the 1929 clause had been crafted as a strategic solution to address the foremost problem the NRA faced in drafting minimum wage provisions for the codes of fair competition:

[A]s these people bring in exceptions you will find that some of the rules will be changed slightly. In manufacturing, there is an agreement not to pay any employee less than 40 cents an hour. That is where the worst problem in the situation comes in, and that has to do with Negro labor in the South. We cannot go in and disrupt the Southern industries. If we set a rate of 40 cents an hour, it will wipe out the southern lumber industry: and we cannot make a distinction between white and colored labor. So here is the formula we devised on industry: Not to pay any employee of the class mentioned in paragraph 4 (manufacturing and mechanical) less than 40 cents per hour unless the hourly rate for the same class of work on July 15, 1929, was less than 40 cents per hour, in which latter case not to pay less than the hourly rate on July 15, 1929, and in no event less than 30 cents per hour.<sup>371</sup>

In explicitly racial terms, Johnson identified “Negro labor in the South” as “the worst problem” the NRA faced in creating minimum wage provisions. Johnson presented the 1929 clause (the economic grandfather clause) as a strategic solution to solving the “problem” of Black labor.<sup>372</sup>

The transcript makes clear that solving what Johnson defined as the problem of Black labor meant that race was the criteria upon which the NRA would set the minimum wage rates. However, Johnson explained race and color could not be expressly mentioned in the text of the provisions.<sup>373</sup> Based upon its own data confirming that Black workers were making less than 30 cents an hour in 1929,<sup>374</sup> and with an eye to preserving the tradition of segregated wage rates to avoid disrupting southern industry, the NRA purposefully devised a formula that linked the minimum wage rates to the traditional wage structures embedded in racial segregation. This ensured that Black workers received a lower wage rate. The formula the NRA devised allowed the agency to achieve its racially discriminatory ends without having to admit its discriminatory intent. Johnson’s statement provides direct evidence of race-based intent, confirming Davis’ allegations. It

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371. SIRB MEETING MINUTES, July 17, 1933, *supra* note 368, at 5–16.

372. *Id.* at 16.

373. *Id.*

374. NRA’s Division of Planning and Research had reported that 80% of the lumber and timber industry’s workers received less than 30 cents per hour in 1929. NAT’L RECOVERY ADMIN., AMENDMENTS TO CODE OF FAIR COMPETITION FOR THE LUMBER AND TIMBER PRODUCTS INDUSTRY AS APPROVED ON DECEMBER 7, 1933, BY PRESIDENT ROOSEVELT 10 (on file with the Gov’t Publ’g Off.) [hereinafter LUMBER AND TIMBER PRODUCTS CODE AMENDMENTS].

shows that the ostensibly race-neutral action of setting wage rates on the basis of the 1929 rate of pay was taken to limit Black workers' eligibility for the 40 cents an hour wage rate.

The NRA's formula was incorporated into paragraph 6 of the PRA.<sup>375</sup> Over 2,300,000 employers signed the PRAs.<sup>376</sup> According to an NRA Division of Review report, the PRA's provisions—which included the minimum wage rates purposefully designed to discriminate on the basis of race—were presumed to reflect the general purposes of the Act.<sup>377</sup> The NRA referenced the 1929 rates in the transmittal letters of many codes, explicitly incorporated it into 33 individual codes (including the Lumber and Timber Code),<sup>378</sup> and explicitly incorporated it into the PRA (the precursor to the FLSA).<sup>379</sup> By doing so, I argue, the NRA purposefully standardized a wage system that was built on structures of racial subordination for all industries across all geographic regions in the nation and sanctioned the practice of paying Black workers substandard wages.

Just as Davis had alleged, the NRA did not simply concede to the racist demands of southern industrialists—it actively created racially discriminatory provisions that endorsed and reinforced racialized economic subordination and deepened segregation. The NRA Review Division Guide that contained principles on wage policy to help NRA Review Officers make substitution determinations incorporated the discriminatory devices Davis identified in three ways.<sup>380</sup> First, it emphasized the use of the 1929 clause in provision 6 of the PRA, providing that it was “desirable that such basic rate, as far as is practicable, approximate the minimum rate of 1929.”<sup>381</sup> Second, it detailed that lower rates were reasonable if the industry did not have the ability to pay standard wage rates, allowing the NRA a race-neutral justification for approving substitutions for businesses that claimed

375. *The President's Reemployment Agreement*, *supra* note 372, at 264, ¶ 6 (“Not to pay any employee of the classes mentioned in paragraph 3 (manufacturing and mechanical in the PRA) than 40 cents per hour unless the hourly rate for the same class of work on July 15, 1929 was less than 40 cents per hour; in which latter case not to pay less than the hourly rate on July 15, 1929, and in no event less than 30 cents per hour.”).

376. Marc Linder, *Closing the Gap Between Reich and Poor: Which Side Is the Department of Labor On?*, 21 N.Y.U. REV. L. & SOC. CHANGE 1, 6 (1993); Woodbury, *Policy in the Control of Wages*, *supra* note 47, at 156.

377. Woodbury, *Policy in the Control of Wages*, *supra* note 47, at 24 (“[s]ince [the PRA] was designed to cover all industries, its provisions may be presumed to reflect the general purposes of the Act”). The same report confirmed that the 1929 minimum wage provision, as well as the differentials based on population “embodied the views of the President and his advisers on the substantive content of minimum rates.” *Id.* at 25.

378. *Id.* at 2–3, 52; LUMBER AND TIMBER PRODUCTS CODE AMENDMENTS, *supra* note 374, at 26. The code incorporated southern, subdivision, zone differentials, and the 1929 clause.

379. Woodbury, *Policy in the Control of Wages*, *supra* note 47, at 51. The 1929 base point calculation was used in the cotton textile code to justify southern wage differentials in the cotton textile code, and to justify geographical differentials and wage rates below standard. H. CONRAD HOOVER, OFF. OF THE NAT'L RECOVERY ADMIN., *THE PRESIDENT'S REEMPLOYMENT AGREEMENT* 17–18 (1936).

380. NRA Review Officers were tasked with deciding if substitutions would be granted and provided with an NRA Review Division Guide that contained principles on wage policy. *See* Woodbury, *Policy in the Control of Wages*, *supra* note 47, at 25.

381. *Id.* at 29.

they would go out of business if they paid “inefficient” Black workers the standard wage.<sup>382</sup> Third, it functioned to green light the approval of subminimum wages in industries allied to agriculture by NRA Review Officers as it unambiguously stated “there is a presumption of propriety of lower wage rates in industries allied to agriculture.”<sup>383</sup> The NRA Division of Review found that the NRA approved petitions for reduced wages rates made on the basis of race, with one report noting that industries that received approval for subminimum wage rates often employed a large portion of unskilled Black labor and cited the use of light and repetitive labor performed by Black and Mexican women as a reason the NRA should approve lower wage rates.<sup>384</sup>

*B. “Packed Away Out of Sight”*

The next day, the Board met again. George Peek, head of the AAA, a visitor at the meeting, argued that food industries should be excluded from the application of the PRA because they were meant to be dealt with under the AAA.<sup>385</sup> Secretary of Agriculture Henry Wallace sought to clarify that the PRA’s minimum wage provision, which already included the 1929 formula devised to limit Black workers’ eligibility for the 40 cent per hour wage rate, would still include geographical or other differentials. Wallace explained that “[u]nder No. 6, apparently the misapprehension was that this minimum wage would be the same in every community.”<sup>386</sup>

**Secretary Wallace:** You are not making any differentiation between North and South.

**General Johnson:** Yes, in individual industries, but you do not see it. It is packed away out of sight.

**Chairman Roper:** That is quite a delicate question in my country.<sup>387</sup>

Less than three weeks after Davis and Weaver had publicly challenged southern differentials as racially discriminatory, Johnson assured the Board that

382. *Id.* at 54, 57–58 (Woodbury noted that phrase “allied to agriculture” was “vague.” The “cotton pickery industry, raw peanut milling, pecan shelling, and loose-leaf tobacco warehousing, were industries of this class.” The NRA was sympathetic to these arguments.).

383. *Id.* at 31.

384. The NRA approved 252 substitutions. 94 substituted wage rates approved with southern or other geographical differentials, the large majority of which set a wage rate below 30 cents an hour. 23 codes were approved with substituted wage rates below 25 cents, including some with 15 cents an hour. *Id.* at 26, 58.

385. Dep’t of Comm., RECORDS OF THE OFFICE OF THE EXECUTIVE DIRECTOR, MINUTES OF THE SPECIAL INDUSTRIAL RECOVERY BOARD 1 (Meeting No. 5, July 18, 1933) (on file with the Dep’t of Lab.) [hereinafter SIRB MEETING MINUTES, JULY 18, 1933]. See also OHL, *supra* note 44, at 164.

386. SIRB MEETING MINUTES, JULY 18, 1933, *supra* note 385, at 5.

387. *Id.* at 6.



southern differentials would still be included, just in a more covert manner.<sup>388</sup> Population differentials were provided for in the previous paragraph and geographical differentials and the employer's right to petition for a substitution or stay in the case of "great and unavoidable hardship" were preserved in an appendix of the PRA.<sup>389</sup>

### C. *Airing Dirty Laundry*

By August 1933, the lumber code and its economic grandfather clause was only three days away from receiving the President's approval, and the NRA was under scrutiny from Davis and the NIL for use of discriminatory devices.<sup>390</sup> After Secretary of Commerce Daniel C. Roper asked Secretary Wallace whether the NRA had support in southern states, Secretary Wallace affirmed the "extraordinary enthusiasm for NRA program" in the South and brought up the laundry code as it related to building southern support for the NRA.<sup>391</sup>

**Secretary Wallace:** The thing merges over into the Negro labor problem. Apparently the laundry people are very much perturbed because they feel they are going to suffer from competition with negro washerwomen. They talk like people in genuine fright.

**General Johnson:** That has been our problem. The laundry people have finally submitted, and had approved, a temporary code for the whole laundry industry except the South; but they are out—they have no Blue Eagle—they are left on a limb. I know I cannot approve a lot of people being paid \$5 or \$6 a week. I do not think that can be justified.

**Secretary Perkins:** On the other hand, they say they cannot compete with the domestic laundry.<sup>392</sup>

Once again, the Board identified "the Negro labor problem" as a pressing issue and devised a solution that privileged whites while depriving Black workers of the same benefits and protections.<sup>393</sup> Though Johnson recognized it would be

388. *Id.*

389. HOOVER, *supra* note 379, at 142.

390. *See* LUMBER AND TIMBER PRODUCTS CODE, *supra* note 221, at 26 (detailing minimum wage provisions). *See also supra* text accompanying notes 81–107 and 111 (discussing discriminatory devices).

391. Dep't of Comm., RECORDS OF THE OFFICE OF THE EXECUTIVE DIRECTOR, MINUTES OF THE SPECIAL INDUSTRIAL RECOVERY BOARD 32–33 (Meeting No. 9, August 14, 1933) (on file with the Dep't of Lab.).

392. *Id.*

393. *Id.* at 32.



unjustifiable to “approve a lot of people being paid \$5 or \$6 dollars a week,” the NRA went on to approve a matrix of geographical and population differentials that ultimately delivered a minimum wage rate of fourteen cents an hour—\$5.60 cents for a forty-hour week—for the southern laundry industry, a workforce made up almost entirely of Black women.<sup>394</sup>

Article II of the Laundry Code also included an occupational exclusion, denying “washerwomen engaged solely on their own behalf” from the benefits and protections provided in the code, while still including “anyone engaged in any phase of the laundry trade either as an employer or on his own behalf.”<sup>395</sup> By excluding “washerwomen,” an occupation which had long been linked to Black women,<sup>396</sup> the code functionally excluded Black women without excluding whites in the laundry industry who also “worked on their own behalf.”<sup>397</sup>

The Board transcripts evince not only the NRA’s racially discriminatory intent in devising the “economic grandfather clause” and other exclusions and differentials, but also show the NRA’s purposeful, productive formulation of race-neutrality. They show how the NRA avoided the mention of race and kept differentials “packed out of sight” to wipe its fingerprints off the racially discriminatory devices it devised and distance itself from the conditions that resulted from their implementation.<sup>398</sup>

## VII. THE FLSA AND THE NLRA

After the NIRA was declared unconstitutional in 1935,<sup>399</sup> the race discrimination Davis identified and challenged in the NRA codes was incorporated into the Fair Labor Standards Act (FLSA) and the National Labor Relations Act (NLRA), the two laws that form the bedrock of worker protection in the U.S. today. In both pieces of legislation, occupational exclusions served as a proxy for the racist and purposeful exclusion of Black workers.<sup>400</sup> In this manner, agricultural workers, domestic workers, and tipped workers were excluded from coverage under the FLSA, while agricultural workers and domestic workers were denied the protections and benefits available under NLRA.<sup>401</sup> The hearings and debate on the FLSA revealed direct evidence of intentional discrimination against Black workers on the basis of race, with many southern congressmen making racist

394. *Id.* See NAT’L RECOVERY ADMIN., CODE OF FAIR COMPETITION FOR THE LAUNDRY TRADE AS APPROVED ON FEB. 16, 1934 BY PRESIDENT ROOSEVELT, *as reprinted in* CODES OF FAIR COMPETITION NOS. 245-286 at 494-97 (on file with the Gov’t Publ’g Off.) [hereinafter LAUNDRY CODE].

395. *Id.* at 492.

396. See generally Carter G. Woodson, *The Negro Washerwoman, a Vanishing Figure*, 15 J. NEGRO HIST. 269 (1930) (discussing the role and work of Black washerwomen prior to emancipation and onward). See also KIM KELLY, *FIGHT LIKE HELL: THE UNTOLD STORY OF AMERICAN LABOR* 18 (2022) (noting that in 1881, white washerwomen only made up only 2% of the workforce in Atlanta).

397. LAUNDRY CODE, *supra* note 394, at 492.

398. SIRB MEETING MINUTES, JULY 18, 1933, *supra* note 385, at 5.

399. See generally *A.L.A. Schechter Poultry Co. v. United States*, 295 U.S. 495 (1935).

400. See generally Perea, *supra* note 6.

401. Excluded to Essential Hearing, *supra* note 13, at 10, 12-13, 16-17.

arguments in favor of the exclusion of agricultural and domestic workers and racial wage differentials.<sup>402</sup> Though Davis supported minimum wage legislation and collective bargaining protections, he anticipated the lasting consequences that would result from allowing racism to shape the FLSA and the NLRA and condemned Congress for doing the same. Southern industrialists, however, perceived minimum wage and collective bargaining laws as a threat and strategically transformed their framing once again to justify their subsequent attacks on worker protections.<sup>403</sup> Crucially, in the wake of the passing of these twin pieces of legislation, two contrasting responses emerged, the contours of which I reconstruct below.

#### A. Davis on the FLSA and NLRA

Davis' critiques of the FLSA were no less harsh than those he aimed at the NRA codes. He condemned the FLSA's exclusion of domestic and agricultural workers which "represent[ed] the bulk of Negro labor" and lambasted the myriad of "exemptions through which hundreds of thousands of workers" would be "excluded from any meaningful improvement of their conditions."<sup>404</sup> Protections against misclassification and discrimination, Davis argued, needed to be written directly into the text of the Act.<sup>405</sup> Davis also criticized the bill's failure to provide a legal framework that ensured all workers would be paid a living wage or fix a "level below which the labor standards of workers may not go."<sup>406</sup> The FLSA was poised to "mak[e] possible even worse differential treatment of Negro workers" than the NRA codes," Davis argued,<sup>407</sup> issuing a dire warning to Congress about what would come to pass if the issues he raised were not addressed:

Poverty is a highly contagious disease. Once you permit employer-pressure groups to secure exemptions and differentials affecting half a million Negro workers, you will find that the very exploitative conditions you hope to cure by this bill will not be cured. Instead, the growing impoverishment of Negro workers will be the ugly cancer preventing the improvement of the lot of a much larger number of white workers.<sup>408</sup>

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402. See Perea, *supra* note 6, at 114–15; KATZNELSON, *supra* note 6, at 57–60.

403. See discussion *infra* Sections VII.A–B.

404. *FLSA Hearings*, *supra* note 198, at 573–74.

405. See *id.* at 574.

406. *Id.* at 573. Davis also condemned the bill for permitting the Labor Standards Board to fix minimum wages by occupations and not by industry and to base the minimum wage rates on cost of living, the value of the service, or the class of service rendered. *Id.*

407. *FLSA Hearings*, *supra* note 198, at 573.

408. *Id.* at 574.

The FLSA, Davis highlighted, was “supposed to be intended to help those workers whose lack of collective bargaining power renders them capable of exploitation by employers” but it “[did] no such thing.”<sup>409</sup>

Davis supported the NLRA.<sup>410</sup> However, Davis and his colleagues pressed for an expanded and enforced right to organize and bargain collectively that extended to domestic and agricultural workers who had been left unprotected.<sup>411</sup> Davis stressed the importance of labor organizing and collective bargaining, arguing that racially just democratic unionism was not only critical to ending the economic exploitation, but fundamental to the Black struggle for democratic rights, civil liberties, and economic freedom.<sup>412</sup>

### B. *A New (and Familiar) Southern Industrialist Frame*

After the demise of the NIRA, southern industrialist organizations like the SSIC adopted an anti-New Deal position.<sup>413</sup> Southern industrialists saw minimum wage floors and union protections as a threat. Their discontent was not diminished by the occupational exclusions in the FLSA and NLRA. Southern industrialists recognized that the strategic frames they used to petition for racial wages that relied on explicit racism and the portrayal of the South as a disadvantaged victim of discrimination had proven ineffective.<sup>414</sup> They needed a race-neutral frame to mobilize broader support from non-southern conservatives if they were to influence policy, weaken the power of labor unions, and secure their continuing access to cheap, Black labor. So, southern industrialists constructed a free market, anti-union politics, and states’ rights frame as an “alternative to white supremacy.”<sup>415</sup>

This new and improved frame allowed southern industrialists to make conservative arguments against New Deal liberalism that mobilized non-southern conservatives and avoided explicit racism.<sup>416</sup> It allowed for southern industrialists seeking to challenge minimum wage legislation and wage rate increases that

409. *Id.* at 573. See STATUTORY HISTORY OF THE UNITED STATES: LABOR ORGANIZATION 396–97 (Robert F. Koretz ed., 1970) (quoting President Roosevelt’s special message to Congress, May 24, 1937)

410. *National Labor Relations Act and Proposed Amendments: Hearings on S. 1000, S. 1264, S. 1392, S. 1550, S. 1580, and S. 2123, Bills to Amend the National Labor Relations Act Before the S. Comm. on Educ. and Lab.*, 76th Cong. 2632–2633 (1939) (Statement of John P. Davis, National Secretary, National Negro Congress); He similarly condemned the exclusion of domestic and agricultural workers from workmen’s compensation. *Social Security: Hearings before the H. Comm. On Ways and Means*, 76th Cong. 1542 (1939) (statement of John P. Davis).

411. JOHN P. DAVIS, LET US BUILD A NATIONAL NEGRO CONGRESS 30 (National Negro Congress Records, on file with the New York Public Library, Schomburg Center for Research in Black Culture, Manuscripts, Archives, and Rare Books Division); National Conference on the Problems of the Negro and Negro Youth, Recommendations on Increased Opportunity for Employment and Economic Security 20 (Jan. 6–8, 1937); Jensen, *supra* note 63, at 336, 355, 364–65.

412. See, e.g., *Plan Eleven—Jim Crow in Steel*, *supra* note 293, at 276.

413. See JEWELL, *supra* note 50, at 94–95.

414. See *id.* at 98.

415. *Id.* at 174–75.

416. See *id.* at 7, 174.

threatened their access to cheap, Black labor did so by extoling the virtues of an unregulated free market or free enterprise rather than white supremacy.<sup>417</sup> This frame helped southern industrialists avoid having to justify how a certain race or class of people did not actually require living wages to survive rising inflation by allowing them to instead say that minimum wage legislation amounted to the distortion of the free market.<sup>418</sup> The new anti-union frame positioned labor unions as a threat to worker freedom that enslaved workers for the benefit of a few, portrayed union leaders as slave masters.<sup>419</sup> Lastly, the states' rights frame depicted the South's economic lag as the result of "federal meddling in the region dating to Reconstruction" rather than interference from competitors.<sup>420</sup>

### VIII. CONCLUSION

Recovering the work of Davis, the NIL, and the JCNr underscores how wage and hour, collective bargaining laws, and other federal programs and legislation were constructed, interpreted, and adapted to create and maintain white supremacy. Using empirical, analytical, and investigative research alongside legal and policy arguments, Davis established that despite its facial neutrality, the law was not neutral, objective, or apolitical. The Special Industrial Recovery Board transcripts, discussed above, substantiate Davis' original claims, providing direct evidence that the NRA intentionally designed the codes of fair competition to deprive Black workers of equal benefits and protections under the NIRA and considered race during decision-making processes as a basis for its action. The transcripts evince that the NRA engaged in the productive formulation of race neutrality to conceal its discriminatory intent.

As we face a growing resistance to the acknowledgement of how racial subordination is constructed, legitimated, and maintained by the American legal system,<sup>421</sup> Davis' work serves as a reminder that slavery and racism have shaped and continue to shape the law, including the fundamental framework of our worker protection system. This recovery project also reminds us that we must confront, preserve, and further examine this history to guarantee it is not lost and make sure we understand it.

That the recovery of Davis' work provides important historical context for problems we face today can be readily borne out through connections he, himself, could have scarcely imagined. Indeed, my own interest in Davis first developed because of the way I found it shedding light on seemingly unrelated areas of my own work concerning the problem of worker misclassification within the gig

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417. *See id.* at 98.

418. *See id.* at 201.

419. *See id.* at 115–16, 298.

420. *Id.* at 175.

421. *See generally* CRT Forward, *Tracking the Attack on Critical Race Theory*, UCLA School of Law Critical Race Studies Program (Apr. 6, 2023), [https://crtforward.law.ucla.edu/wp-content/uploads/2023/04/UCLA-Law\\_CRT-Report\\_Final.pdf](https://crtforward.law.ucla.edu/wp-content/uploads/2023/04/UCLA-Law_CRT-Report_Final.pdf).

economy by companies like Uber and Lyft.<sup>422</sup> As I have demonstrated in such past work with my colleague Federico Rosenbaum Carli, platform economy companies argue for a third category worker classification that effectively delivers subminimum wage rates, in the process claiming they want to “save” and “protect” “App-Based Jobs,” and offering themselves up, Veena Dubal has noted, as fonts of racial benevolence.<sup>423</sup> In so doing, the major players in the gig economy have insisted that the law discriminates against them while engaging in a particularly intensive brand of anti-union politics.<sup>424</sup>

As “new” as the companies of the “new” economy may be, therefore, their actions and claims clearly harbor a deep continuity with earlier efforts of Davis’ southern industrialist adversaries, as they sought to secure a tiered worker protection system that would also preserve white supremacy. Accordingly, it is hardly a stretch to see recovering Davis’ work as a means of helping to bring into view the similarities in the strategies and tactics employers have used to secure their continued access to a cheap, exploitable, pool of largely racial minority and immigrant labor. For at base, Davis’ career teaches that excluding certain classes of workers from wage and hour and collective bargaining protections and crafting a tiered system of worker protection was bound to lead to rampant misclassification, emasculated unions, and competitive exploitation amidst the drive for profit-seeking.<sup>425</sup> So long as major, structural reform failed to account for the racialized political economy, it would reproduce the inequality inherent in the system. In no insignificant way, then, can one see Davis’ warnings to still now be coming to fruition in the course of constituting our present, amidst the persistence of racial and ethnic inequalities, multibillion dollar corporations enjoying soaring profits in a time of persistent inflation, and concerted efforts to intimidate workers from organizing and, ultimately, bust unions.<sup>426</sup> Even if for no other

422. See generally Pamela A. Izvānariu, *Matters Settled But Not Resolved: Worker Misclassification in the Rideshare Sector*, 66 DEPAUL L. REV. 133 (2016).

423. Pamela A. Izvānariu & Federico Rosenbaum Carli, *Plataformas digitales y el derecho del trabajo: un análisis comparativo y una guía para el future*, 3 REVISTA JURÍDICA DEL TRABAJO, Núm. 8, 119, 153–59 (2022); Dubal, *supra* note 14, at 517; see generally KEN JACOBS & MICHAEL REICH, THE EFFECTS OF PROPOSITION 22 ON DRIVER EARNINGS: RESPONSE TO A LYFT-FUNDED REPORT BY DR. CHRISTOPHER THORNBERG (Aug. 26, 2020), <https://laborcenter.berkeley.edu/the-effects-of-proposition-22-on-driver-earnings-response-to-a-lyft-funded-report-by-dr-christopher-thornberg/>.

424. Erwin Chemerinsky & Catherine Fisk, *Opinion: Reopening Uber’s Challenge to California Labor Law is Just the Beginning*, L.A. TIMES (Mar. 20, 2023, 12:32 PM), <https://www.latimes.com/opinion/story/2023-03-20/california-uber-postmates-circuit-court-labor-law> (“Uber and other gig companies argued AB 5 unconstitutionally discriminates against them because it exempts other occupations, such as doctors, lawyers, graphic designers and cosmetologists.”); Abhimanyu Ghoshal, *Uber is Forcing Drivers in Seattle to Listen to Anti-Union Propaganda*, BUSINESS INSIDER (Mar. 13, 2017), <https://www.businessinsider.com/uber-forces-drivers-in-seattle-to-listen-to-anti-union-propaganda-2017-3>.

425. NIL Statement for Cotton Textile Industry, *supra* note 62, at 5; *Plan Eleven—Jim Crow in Steel*, *supra* note 293, at 262; *A Survey of the Problems*, *supra* note 298, at 9.

426. See, e.g., *7 Facts on Racial Equity and the Economic Recovery*, CTR. FOR AM. PROGRESS (Nov. 17, 2022), <https://www.americanprogress.org/article/7-facts-on-racial-equity-and-the-economic-recovery>; Michael Martin & Isabella Weber, *Economist Explains Record Corporate Profits Despite*

reason, then, the contours of our present should provide ample reason to take Davis seriously.

The same proves just as true if we move from diagnosing our present predicament to prescribing ways out of it. Here as well Davis' original contentions, recommendations, and approach provide a critical resource and source of inspiration. By way of conclusion, it is thus apt to note that a Davis-informed approach to combatting inequality and the cementing of a constitutional order of oligarchy in our own world would require at least three priorities. First, it demands that we undertake an honest reckoning with the ways that racism, race discrimination, and white supremacy continue to shape the development and implementation of law. This would necessitate an accounting of resultant harms and reparative action to address them. This is why, on admittedly the smallest of scales, this Article has identified a unique and practical opportunity for the Department of Labor (DOL) to make good on this priority. In this respect, it would need do little more than acknowledge the September 18, 1933, Special Industrial Recovery Board meeting transcript marked "missing" from the DOL records that Davis had long ago used to expose race discrimination at the highest levels of the NRA. Doing so would naturally lend itself, in turn, to undertaking relevant steps to produce a more complete record of the Recovery Board transcripts.<sup>427</sup>

Secondly, a Davis-informed approach to addressing inequality and the slide into a constitutional culture of effective oligarchy would require federal intervention, including the passage and enforcement of legislation to guarantee freedom, liberation, and material equity in a way that could not but help upend white supremacy. As such, it entails a call for an alternative New Deal not unlike the one Davis backed. At a minimum, such intervention would aim to facilitate a wide-ranging political-economic redistribution to ensure a more just and equitable arrangement of decision-making power, access to resources, and, dare one say, material outcomes. It would also aim to facilitate the passage and enforcement of laws guaranteeing a baseline freedom from domination and improper exclusion. This, more specifically, could take shape through legislation to guarantee workers a living wage; safeguard against worker misclassification; protect the right of all workers to join together and negotiate collectively in the workplace; and secure

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*Rising Inflation*, NPR (Feb. 13, 2022, 5:07 PM), <https://www.npr.org/2022/02/13/1080494838/economist-explains-record-corporate-profits-despite-rising-inflation>; Whizy Kim, *Prices at the Supermarket Keep Rising. So Do Corporate Profits.*, Vox (Mar. 17, 2023, 6:00 AM), <https://www.vox.com/money/23641875/food-grocery-inflation-prices-billionaires>; Steven Greenhouse, 'Old-school Union Busting': How US Corporations are Quashing the New Wave of Organizing, GUARDIAN (Feb. 26, 2023 4:00 PM), <https://www.theguardian.com/us-news/2023/feb/26/amazon-trader-joes-starbucks-anti-union-measures>; Josh Eidelson, *The Undercover Organizers Behind America's Union Wins*, BLOOMBERG (Apr. 3, 2023, 4:00 AM), <https://www.bloomberg.com/news/features/2023-04-03/starbucks-amazon-labor-union-wins-helped-by-undercover-salts#xj4y7vzkg>.

427. See generally *The Proceedings of the Special Industrial Recovery Board*, U.S. DEP'T OF LAB., <https://www.dol.gov/general/aboutdol/history/1933-sirb> (last visited Apr. 13, 2023); *SIRB Meeting September 18*, *supra* note 249; *Lower Pay for Negro Suggested*, *supra* note 272.



accountability for the powerful, including through providing for criminal sanctions against lawbreaking corporate employers.

Last but not least, a Davis-informed approach to addressing inequality and oligarchy would foreground the mass mobilization and movement building aspects of his work that are so vitally needed to effect structural and cultural change.<sup>428</sup> Davis himself recognized that effecting transformative change required more than federal intervention and new legislation; indeed, this is partly why he went on to build the most militant interracial freedom movement since emancipation.<sup>429</sup> Just as Frederick Douglass had called for the mobilization of an interracial coalition “to dismantl[e] . . . the Southern slave-based oligarchy,”<sup>430</sup> Davis called for a Black-led, interracial, antiracist, labor-focused freedom movement; and a much larger movement organization network.<sup>431</sup> Using the JCNR as a foundation, Davis mobilized the National Negro Congress (NNC),<sup>432</sup> a much larger movement organization network that worked to “emancipate blacks [and] also liberate working class whites from the economic system of oppression that Jim Crow had sustained for the past half century.”<sup>433</sup>

Serving as the NNC’s executive secretary,<sup>434</sup> Davis thus pushed forward a wide-scale organizing campaign, successfully motivating leaders from the Congress of Industrial Organizations (CIO) to work with the NNC to bring Black workers into the union<sup>435</sup> and connecting the CIO with its first dozen Black steel-worker organizers, who were drawn from the NNC’s own base.<sup>436</sup> Indeed, it was Davis who spearheaded the NNC’s union drive,<sup>437</sup> including through serving as a tireless voice at union rallies for domestic workers, garment workers, hotel workers, autoworkers, longshoremen, meatpackers, and tobacco pickers.<sup>438</sup>

At the same time, here it is important to remember that the work of Davis and his NNC colleagues was not limited to labor issues. They also called for the abolition of peonage, police brutality, lynching, and other forms of racialized violence,<sup>439</sup> and this in the name of “demand[ing] and attempt[ing] to enact a ‘second emancipation.’”<sup>440</sup>

Truth be told, a Davis-informed approach to addressing inequality and constitutional oligarchy cannot help but look a lot like the transformative visions that

428. GELLMAN, *supra* note 352, at 1–2.

429. *Id.*

430. SCOTT YENOR, RECONSTRUCTION: CORE DOCUMENTS 47 (2018).

431. *See generally*, DAVIS, LET US BUILD A NATIONAL NEGRO CONGRESS, *supra* note 411.

432. GELLMAN, *supra* note 352, at 1–2, 12–17.

433. Gellman documents the breadth and significance of Davis’ later work with the NNC, which he explains became the “black vanguard of the Popular Front.” *Id.* at 1–2, 264.

434. *Id.* at 69.

435. *Id.* at 35. As a result of these efforts, 25,000 Black workers in Chicago alone joined the CIO. *Id.* at 58.

436. Jensen, *supra* note 63, at 514.

437. *Id.*

438. *Id.*; GELLMAN, *supra* note 352, at 127–28.

439. GELLMAN, *supra* note 352, at 50, 116, 131–34.

440. *Id.* at 2.



worker and racial justice advocates have been working under such difficult conditions to implement today. Davis' demands thus clearly echo on in the policy platform of the Movement for Black Lives,<sup>441</sup> the Black Domestic Workers Agenda and Domestic Worker Bill of Rights of the National Domestic Workers Alliance,<sup>442</sup> the National Black Worker Centers' proposals for Black Worker Bill of Rights,<sup>443</sup> and the kinds of calls made by organizations like One Fair Wage.<sup>444</sup> If the demands Davis was making in 1933 are strikingly similar – in fact, nearly identical – to those worker and racial justice movements are making in 2023, it is worth noting, in closing, that the best explanation is likely the most obvious. This is because the problems Davis identified and the demands he made to address them—now, some 90 years ago—are ones that have persisted down to the present day.

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441. See *Policy Platforms*, THE MOVEMENT FOR BLACK LIVES, <https://m4bl.org/policy-platforms/> (last visited Apr. 13, 2023).

442. THE NATIONAL DOMESTIC WORKERS ALLIANCE, UNBOSSSED: A BLACK DOMESTIC WORKER AGENDA 2, [https://www.domesticworkers.org/wp-content/uploads/2020/08/Unbossed\\_Agenda\\_English.pdf](https://www.domesticworkers.org/wp-content/uploads/2020/08/Unbossed_Agenda_English.pdf) (last visited Apr. 13, 2023); see *The Gender Wage Gap: Breaking Through Stalled Progress: Hearing before the U.S. Cong. J. Econ. Comm.*, 117th Cong. 9 (2021) (statement of Ai-jen Poo, Executive Director, National Domestic Workers Alliance).

443. See *The Black Worker Bill of Rights*, NAT'L BLACK WORKER CTR, <https://nationalblackworkercenters.org/policy/black-worker-bill-of-rights/> (last visited Apr. 13, 2023).

444. A complete wage includes a living wage, non-wage benefits (like paid sick and vacation leave, retirement benefits, healthcare, and childcare), racial and gender equity, fair scheduling, and a harassment-free workplace environment. See *Campaigns*, RESTAURANT OPPORTUNITIES CENTERS UNITED, <https://rocunited.org/campaigns/> (last visited Apr. 13, 2023). For One Fair Wage, see *Home*, ONE FAIR WAGE, <https://onefairwage.site> (last visited Apr. 13, 2023).