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# Race, Labor, and the Twentieth-Century American State

PAUL FRYMER

*The author examines the federal government's civil rights promotion in labor unions, focusing in particular on the consequences of this halting, fragmented effort. After the government deflected racial politics from labor policy in the 1930s, it attempted to integrate unions not by reforming labor law but by developing new agencies and empowering federal courts. This created an institutional environment where different agencies worked at cross-purposes, and courts imposed great financial costs on unions. The result of this effort was a host of unintended consequences for unions and civil rights groups. By putting race at the center, it also suggests an alternative understanding of the twentieth-century American state.*

**Keywords:** *race; labor; law; American political development*

Between 1935 and 1985, African American labor union members increased from an estimated fifty thousand to more than three million.<sup>1</sup> The federal government played a critical role in this civil rights achievement by passing legislation, issuing executive orders, arming new bureaucracies, and encouraging private law suits to counter resistant discriminatory unions. I examine this federal effort from a historical-institutional perspective, taking into account the long-standing impact of the government's various policy choices and the constraints that each decision made for future efforts at labor-civil rights policy making. Federal labor

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union policy, the outcome of political struggles in the 1930s, crystallized into institutional arrangements that impeded future civil rights reform. By creating multiple institutions that were often in direct conflict with each other, this policy effort ended in unintended and undesirable consequences for labor, civil rights activists, and the Democratic Party's New Deal coalition.

When politicians passed the National Labor Relations Act (NLRA or Wagner Act) in 1935, they did not include antidiscrimination measures fought for by civil rights groups. The Democratic Party's reliance on southern segregationists to achieve legislative goals prohibited any type of civil rights policy. To rectify this failure, the government neither reformed the NLRA nor instituted changes through the National Labor Relations Board (NLRB), but instead responded with a series of "patchwork" reforms, creating new agencies at different historical moments with varying powers.<sup>2</sup> No one agency was given total control or adequate weapons to accomplish civil rights reform in labor unions. By the late 1960s, the federal government's handling of union discrimination had become one of "patterned anarchy," as multiple agencies were addressing the issue in different ways, working at cross-purposes, and producing inefficient and conflicting policies.<sup>3</sup> Federal courts became most active in resolving the quagmire by punishing resistant unions with often overwhelming financial penalties in the course of courtroom litigation.<sup>4</sup> In the process, however, courts scaled back many important New Deal protections of union workers. Few individuals within the courts or among the myriad bureaucrats involved in this policy struggle were sensitive to the political and financial strain their actions put on the broader labor movement. Thus, the 1960s and 70s was a time period not only when the civil rights movement was having success integrating unions but when unions were losing considerable economic and political clout both with regard to their collective bargaining power *vis-à-vis* employers and in national politics.<sup>5</sup> Large numbers of white union members voted for George Wallace and Richard Nixon, further weakening the New Deal order and enabling harmful retrenchments by the Republican Party in the areas of both labor and civil rights policy.<sup>6</sup> On the job, this had a very real impact for civil rights economics: while the percentage of African Americans in unions increased, in many industries the overall number of union members, including African American union members, declined.<sup>7</sup>

This history of labor civil rights policy also has important implications for scholarship on the American state. First, this historical-institutional account shows that racial hierarchies were central to the foundation of New Deal labor policy, not something that "emerged" in the 1960s to destroy a universally beneficial redistributive program.<sup>8</sup> It was the racially exclusive nature of early twentieth-century labor policy that necessitated later government action to promote civil rights within the labor movement. It was a further weakness of state actions in the 1960s that forced federal courts and not Congress, the president, or a federal bureaucracy, to be the final arbiter. The end result of these institutional weak-

nesses was a confrontation between two causes central to the Democratic Party—white labor and civil rights groups—and quite arguably neither was left better for it. Second, incorporating race into labor policy necessitates a reconsideration of whether the passage of the Wagner Act was as fundamental to U.S. state building as it is often characterized. Karen Orren, for instance, argues that the Wagner Act dealt the final blow to American-style feudalism and allowed liberalism to flourish as legislative majorities took control of national economic policy away from courts.<sup>9</sup> But because legislative majorities at the time were unable to confront civil rights inequities, courts rather quickly worked their way back into labor policy, doing so in a manner that weakened both legislative and union authority over labor policy. By the 1980s, not only had labor unions declined dramatically as a political and economic force but federal courts had in many ways regained their position as the primary overseer of the workplace, often by interpreting statutes but also by using common law and constitutional rights to overturn statutes and create liberties for individual employees, to the direct detriment of national labor unions. Third, it reminds us that while institutions in important ways structure and place limits on the behavior of political actors, power—and here specifically, racial power—remains an important dimension that shapes policy outcomes. In academic efforts to show how institutions reign in strategic behavior, scholars have increasingly forgotten that power lies underneath these institutions and continually shapes events in a manner that benefits specific groups and interests.

I proceed first with an overview of the historical context in which federal civil rights policy engaged with labor unions. The bulk of the article explores the government's response, beginning with the NLRA of 1935 and then examining subsequent institutional developments involving the expanding use of the Department of Labor (DOL), the formation of the Equal Employment Opportunity Commission (EEOC), and finally, the active involvement of federal courts. In the conclusion, I return to the theoretical questions raised here and examine the role of race in understanding theories of labor union decline. I argue that while race by no means single-handedly led to union decline, it has been overlooked by scholars as both an independent and contributing force.

#### THE CONTEXT: UNION DISCRIMINATION, CIVIL RIGHTS ACTIVISM, AND THE NEED FOR A FEDERAL RESPONSE

Over the past decade, labor historians have heatedly debated the existence of racism and civil rights violations in the labor movement and the degree to which white workers were responsible.<sup>10</sup> Much of the scholarship on the labor movement, whether written by historians, social scientists, or legal scholars, ignores questions of race almost entirely, at best presenting it “as an actor in a subplot that can be left on the cutting-room floor without violating the main story.”<sup>11</sup> Among those scholars who explore union race problems in greater detail, many argue that it was caused by capitalist dynamics, micro and macro, rather than specific prob-

lems of racism in the union community.<sup>12</sup> It is of course true, for instance, that employers and the broader capitalist market have played a major and at times singularly important role in promoting workplace discrimination and segregation.<sup>13</sup> But recent historical treatments have portrayed the labor movement as having a much more extensive race problem that was independent of employer instigations and was not simply isolated to the building trades and the south.<sup>14</sup> Although many national unions were important advocates of the civil rights movement and the passage of the Civil Rights Act, even some of the most progressive unions far underestimated and denied their internal discriminatory problems and were slow to act against it. Race was a fundamental division in the labor movement throughout the twentieth century, and while largely ignored by union leadership for the first six decades of the century, by the early 1960s it had become clear that union leadership lacked both the will and the tools to resolve its problems without outside intervention.

To generalize about labor unions during this time would be foolhardy. Some unions were explicitly segregationist and discriminatory, maintaining white-only hiring standards.<sup>15</sup> In the 1930s, leaders in the American Federation of Labor (AFL) often spoke critically of African Americans as being antiunion and strike-breakers.<sup>16</sup> Other unions were at the forefront in supporting civil rights causes both domestically and internationally. Walter Reuther and Philip Murray, presidents of the United Auto Workers (UAW) and Steelworkers, respectively, had extensive links with civil rights causes, providing financial assistance to and being on the boards of civil rights organizations, and creating internal fair employment committees to examine their own union's race problems.<sup>17</sup> During the 1940s and 1950s, in an effort to combat national union discrimination, the International Lady Garment Workers conducted extensive surveys of racism in its southern unions; more broadly, Congress of Industrial Organizations (CIO) and communist union organizers were aggressive in the 1940s in organizing black workers in the south.<sup>18</sup> Moreover, even within unions such as the International Boilermakers that had constitutions forbidding the hiring of nonwhite workers, internal rank-and-file efforts had moments of success in bringing about civil rights reform.<sup>19</sup>

Civil rights groups stepped up efforts to confront union leaders about racism internal to the movement in the late 1950s and 1960s. Through memos, public protests, and mobilization of all black caucuses and trade union alternatives, civil rights activists made clear to union leaders the scope of the problem. The litany of problems was similar throughout the country: unions were discriminating by explicitly creating racially segregated locals, by implicitly segregating the workforce through different job duties and pay scales, by denying opportunities for apprenticeship training, by maintaining seniority systems that left black workers as the first fired and least powerful, and by excluding minority workers from union leadership positions.<sup>20</sup> Roy Wilkins and Herbert Hill of the NAACP pro-

vided national union leaders with extensive testimonies of discrimination.<sup>21</sup> In 1959, A. Phillip Randolph led the formation of the National American Labor Council to demand increased efforts by national unions and the federal government to promote more and more equal jobs for African American workers.<sup>22</sup> Similar organizations popped up throughout the union movement, most notably the Trade Union Leadership Council in the UAW, the National Council of Distributive Workers of America, and the Coalition of Black Trade Unionists.<sup>23</sup>

The response of union leaders, whether from the progressive CIO unions or the more conservative building trades, was generally the same: they tried to deny the existence of internal racism as being anything more than incidental, blame its existence on outside forces, or attack the civil rights activists as racists, radicals, and antiunion.<sup>24</sup> When the Civil Rights Committee of the AFL-CIO investigated union racism in 1956, for instance, it focused its attention almost entirely on the Ku Klux Klan's efforts to "chop away union membership from AFL-CIO affiliates" while making no reference to internal union problems.<sup>25</sup> The Steelworkers during the 1950s "rarely, if ever, mentioned combating racism as an objective. Instead, they spoke in vague generalities about the need to 'create a better economic and social climate in which to live.'" <sup>26</sup> When asked about segregated unions in its southern locals in the early 1960s, the Steelworkers blamed it entirely on the employer.<sup>27</sup> The UAW's Reuther was "defensive and maladroit" to attacks from civil rights activists within the union, while its secretary-treasurer Emil Mazey accused the NAACP of misplacing "its criticism of labor for actions which were obviously the sins of management."<sup>28</sup> AFL-CIO president George Meany was consistently ambivalent on civil rights in the union movement. He supported the Civil Rights Act and listened with quiet approval to a public lambasting from NAACP president Roy Wilkins for the continued systematic racism within many AFL-CIO trades.<sup>29</sup> But he also opposed the march on Washington and other civil rights activism, referred often to African Americans as "you people," and responded defensively to accusations of discrimination, from his infamous response at an AFL-CIO convention to A. Philip Randolph ("Who in the hell appointed you as guardian of the Negro members in America")<sup>30</sup> to his claim that federal efforts to attack union discrimination was merely a result of unions being a "whipping boy" designed to offset the shortcomings of others.<sup>31</sup> He, like Reuther and other union leaders, moreover, tended to oppose activism of any kind in the labor movement; civil rights activists were often asking not just for racial equality but for a more radical vision of labor economics.<sup>32</sup>

What was clear by the mid-1960s was that national unions had significant race problems and they had not done enough of substance to stop it.<sup>33</sup> Their priority was maintaining union power, and even progressive union leaders such as Reuther endorsed the inclusion of locals into their membership that had constitutions mandating segregation (at the AFL-CIO general counsel meetings, only A. Philip Randolph opposed the affiliation of white-only union locals). As evi-

dence and charges surfaced of far more systematic problems, union leaders consistently attempted to brush such charges under the rug.<sup>34</sup> Internal union civil rights committees were largely symbolic: the AFL-CIO Civil Rights Committee was consistently called “a waste of time” and “fruitless,” and until the late 1960s it avoided responding to even its most extreme systematic examples of racist hiring practices.<sup>35</sup> Similar committees of the UAW and Steelworkers were focused more on promoting public image than responding to internal matters.<sup>36</sup> By 1968, numerous building trade presidents and members were vocal supporters of George Wallace’s presidential campaign, vowing active defiance to even symbolic reform efforts.<sup>37</sup>

Federal labor policy, then, developed in this context of a labor movement that was sharply divided along racial lines. Not surprisingly, given the class-first principles of the labor movement and the marginal status of African Americans within it, labor policy began in the 1930s by ignoring race issues. As the civil rights movement confronted workplace inequality and the federal government reacted tepidly, the continuing resistance of unions to civil rights reforms eventually led to the activism of courts and lawyers. In doing so, unions lost control over the way in which integration would take place. Whereas unions had ample influence within the NLRB and DOL, their influence in the courtroom was far less as they found themselves confronted with lawyers and judges who cared little about the future maintenance of unions.

FEDERAL LABOR UNION POLICY—  
A REFLECTION OF WHITE UNION DOMINANCE

The labor movement’s primary focus in the first few decades of the twentieth century was to establish regulatory policies that could prevent employers from firing and blacklisting union organizers, legitimate a degree of union autonomy over its members, and prevent federal courts from issuing injunctions against strike activity and preventing collective action.<sup>38</sup> Prior to the New Deal, labor unions achieved a number of regulatory victories at the state and national level with the Clayton Act, the Railway Labor Act, and the Norris-LaGuardia Act, but not until the Supreme Court’s acquiescence to the New Deal regulatory state in *NLRB v. Jones and Laughlin Steel*<sup>39</sup> and later *Thornhill v. Alabama*<sup>40</sup> did a brief golden age of national labor policy begin with unions central to power. The Wagner Act, heralded by Karl Klare as “the most radical piece of legislation ever enacted by the United States Congress”<sup>41</sup> and hailed at the time by AFL leader William Green and future CIO president John L. Lewis as labor’s “Magna Carta,”<sup>42</sup> led to an era of both union and federal regulatory power.<sup>43</sup> The Wagner Act gave workers the legal right to strike, the right to be protected from discrimination on the basis of their union activity, and the right to enter into collective bargaining agreements, all regulated and enforced by the NLRB. The number of labor unions in the

United States rose dramatically after the passage of the act, a tribute to both the law and the initial enforcement practices by the board.<sup>44</sup>

The Wagner Act was far less helpful for African American workers.<sup>45</sup> The act was passed at a time when the New Deal legislative agenda was dependent on southern Democrats in Congress for its success, limiting the reach of New Deal programs to help African Americans.<sup>46</sup> Labor legislation, such as the NLRA and the Fair Labor Standards Act, excluded large portions of African American workers, most notably by denying statutory protection to agricultural and domestic workers, effectively excluding roughly two-thirds of the black workforce population.<sup>47</sup> African Americans in the 1930s were woefully underrepresented in the national union movement and were almost nonexistent in its leadership with the exception of the all-black Brotherhood of Sleeping Car Porters.<sup>48</sup> Numerous national unions discriminated as a matter of policy, and the numbers of African Americans in many union-dominated industries declined even further with the passage of New Deal legislation.<sup>49</sup>

This is not to claim, as Gareth Davies and Martha Derthick rightly caution about other elements of the New Deal agenda, that race was the critical factor in the passage of the NLRA.<sup>50</sup> Debates about race and civil rights were almost entirely absent from the legislative floor debates and conference committee hearings. Even on a seemingly certain indicator of southern influence, the notable absence of agricultural and domestic workers from the NLRA, the legislative history reflects very little discussion of the reasons for their exclusion.<sup>51</sup> It seems fairly clear that legislators were more interested in coming up with a piece of legislation that promoted union rights and would survive constitutional scrutiny from the Supreme Court.<sup>52</sup> It was not until two years later, in the debates over the Fair Labor Standards Act, that race and civil rights issues become explicitly linked to the political agenda during on-the-floor legislative discussions.<sup>53</sup>

Nonetheless, the Wagner Act had components that were clearly harmful to African Americans and civil rights leaders at the time both recognized these components and explicitly opposed them in letters to elected officials. Elected officials, while rarely raising these matters on the legislative floor, were nonetheless cognizant of the concerns and the fact that they were doing nothing about them. The chief concern of civil rights groups in lobbying on the Wagner Act was not the exclusion of agricultural or domestic workers but the potential impact of Section 9, which empowered unions to have closed shops and be the exclusive collective bargaining agents based on a determination by the majority of workers in a company. Both the NAACP and the National Urban League were in constant contact with Senator Robert Wagner in an effort to change labor legislation.<sup>54</sup> The NAACP complained that unions were using the act "to organize a union for all the white workers, and to either agree with the employers to push Negroes out of the industry or, having effected an agreement with the employer, to proceed to make a union lily-white."<sup>55</sup> The National Urban League argued that the act failed to pro-

protect blacks from being excluded from employment by closed shop unions, that it permitted competitive unions in the same industry on the basis of race, and that it excluded blacks who were hired as strikebreakers from employee protection even in situations where their only opportunity to gain work was during a strike period.<sup>56</sup> Both organizations fought to have a civil rights amendment attached to the NLRA—a “duty of fair representation” that would prevent discriminatory unions from representing only white workers.<sup>57</sup> Other local black unions, such as the Colored Railway Trainmen, pushed for a principle of proportional representation in union control.<sup>58</sup> The AFL, according to Wagner aide Leon Keyserling, “fought bitterly” against the inclusion of these provisions and with little African American representation in Congress or in the labor movement, it was soundly defeated without a floor fight.<sup>59</sup>

African American lobbyists continued to push for changes to NLRA policy for the next two decades without success. Congress amended the Wagner Act on two major occasions, and neither added the provisions lobbied for by the NAACP and National Urban League. In the passage of the Taft-Hartley Act, Senator Taft made this specific when asked to clarify the changes made to the closed shop: “Of course many persons believe that the union shop, which is the usual form of closed shop, should be absolutely prohibited. The committee did not feel that it should go that far. . . . Let us take the case of unions which prohibit the admission of Negroes to membership, they may continue to do so; but representatives of the union cannot go to the employer and say, ‘you have got to fire this man because he is not a member of our union.’”<sup>60</sup> In committee hearings, civil rights leaders were blamed for “frequently making the mistake of being entirely too sensitive about [civil rights] matters” and were told not to “raise these questions because they will destroy the legislation.”<sup>61</sup> In 1954, a brief effort to reform Taft-Hartley ended when Democrats offered an amendment that would have made union discrimination an unfair labor practice.<sup>62</sup> During the Landrum Griffin bill in 1959, meanwhile, Adam Clayton Powell raised the issue of racial inequality in congressional debate, only to be denounced and defeated by other House members who claimed he was promoting a “killer” amendment.<sup>63</sup>

### *The NLRB and Civil Rights*

As mentioned above, the Wagner Act provided the NLRB with cease and desist powers to regulate relations between unions and employers. The Board also has ample authority to determine the scope of its powers on matters such as racial discrimination. While the Board has attempted to maintain itself as a relatively neutral arbiter between unions and employers, its decision-making biases—particularly in the 1930s when it was strongly prounion and in the 1980s when it was strongly promanagement—has been a critical factor in determining the scope

of the act and the power of unions within them.<sup>64</sup> On civil rights matters, the Board has been fairly consistent in following the legislative history of the Wagner Act, which has meant to avoid confronting it whenever possible. No “duty of fair representation” existed in the Wagner Act, and the Board subsequently avoided interpreting such a duty for its first three decades, despite the fact that the Supreme Court indicated that such a duty ought to be presumed in union representation.<sup>65</sup>

In a series of race discrimination cases during the 1940s and 1950s, the Board refused to decertify unions that excluded black workers and were unwilling to make racial discrimination an unfair labor practice. For instance, in 1945, the Board held that a racially segregated local was not an “issue of discrimination” because both white and black workers were being represented “adequately” by the union.<sup>66</sup> That same year, the Board certified an all-white union in *Larus & Brother Co.* and ruled that the exclusion of black workers from union membership was not a violation of the duty of fair representation.<sup>67</sup> While the Board declared that unions must act as “genuine representatives of all the employees in the bargaining unit,” it also held that it had no express authority to remedy undemocratic union practices and that having a separate local on the basis of race “does not, in our opinion, constitute, *per se*, a subversion of representation.”<sup>68</sup> Not only did the Board consistently refuse to deny union certifications in clear cases where racial discrimination was being committed by the union, it tended to see racism as simply the result of employer manipulation. It overturned union election results, for instance, when the employer used racial epithets to scare workers away from the union. In two southern cases—one where the employer claimed he would hire a “nigger, Cajun, wop or whatnot” if a union came in, and the other where the employer threatened that a “nigger” would head the incoming union<sup>69</sup>—the Board found these comments to be unlawful threats by the employers against workers: if they accepted the union “the employees would suffer enforced association with persons of supposedly inferior origins.”<sup>70</sup> But in cases where union racism was found during election campaigns, the Board consistently found the actions to be incidental or harmless. As it declared in *Maple Shade Nursing Home, Inc.*, in response to the use of racist epithets during the union organizing campaign, “I am reminded of an ancient line of Board cases that speak of union activities not being any form of tea party.”<sup>71</sup> Similar rationale by the Board is given frequently, minimizing racist speech by the union as part and parcel of union organizing behavior, at times considering racially derogatory speech as “obvious ribbing.”<sup>72</sup>

The Board has been consistently reluctant, when asked either by courts or by federal officials, to extend its power to address civil rights matters. In the 1950s, as the Supreme Court debated extending the doctrine of fair representation to the NLRA, the Board’s general counsel argued that the act’s legislative history provided no provision that prevented the exclusion of racial minorities from bargaining agreements.<sup>73</sup> Shortly after the passage of the Civil Rights Act, the Board

acted to rescind bargaining rights to unions that were found to be discriminating and later held that racial discrimination was an unfair labor practice.<sup>74</sup> But even after this decision, the Board has consistently stated, both in its decisions and in personal correspondence with other government agencies and elected officials, that it was the wrong agency to handle issues of racial discrimination and that it would defer on racial discrimination matters to the EEOC. For instance, in response to Senate questions about the civil rights enforcement capacity of the NLRA, Arnold Ordman, the Board's general counsel, responded, "The NLRA is primarily designed as a law concerned with problems of labor-management-relations and organizational rights rather than racial discrimination. On the other hand, Title VII . . . is aimed directly at racial discrimination. . . . I have deferred action in some cases on charges involving racial discrimination where charges have also been filed with the EEOC where it appears the Commission is actively investigating and if permitted to act might well be able to dispose of the case more expeditiously or more effectively than the Board would."<sup>75</sup> In the post-Civil Rights Act era, the Board's reluctance to engage in civil rights matters was dramatically exemplified in *Emporium and Western Addition Community Organization*, where it refused to separate civil rights activity from labor activity, allowing the termination of civil rights activists for violating labor law when they protested their union's reluctance to counter civil rights problems in the workplace.<sup>76</sup> The Board's policy culminated in *Handy Andy*, where it held that a plaintiff accusing a union of race discrimination should use Title VII of the Civil Rights Act, not the NLRA.<sup>77</sup> In allowing the certification of a discriminatory union to stand, the Board wrote, "A union that has discriminated actively in the past and still has a racial imbalance may be preferable for minority workers to no union at all. . . . Employers faced with the prospect of unionization will be provided and have been provided . . . with an incentive to inject charges of union racial discrimination into Board certification and bargaining order proceedings as a delaying tactic in order to avoid collective bargaining altogether rather than to attack racial discrimination."<sup>78</sup>

The Board was not wrong to claim, as it did in both *Emporium* and *Handy Andy*, that civil rights matters cannot be viewed independently of class conflict and employer power.<sup>79</sup> But by consistently refusing to deal with civil rights matters, particularly in its active deferral to the EEOC on discrimination issues, the Board (and, more broadly, national labor policy) effectively separated labor rights and civil rights into separate agencies and jurisdictions, and, as a result, left unions vulnerable to administrators and judges with little knowledge or sympathy for the particularities of union politics. Not only would handling union discrimination outside of the NLRB be far more costly to unions<sup>80</sup> but unions put themselves in a position where antiunion forces would be in a better position to exploit exactly the Board's concerns in *Handy Andy*, but without having labor officials participate in the decision making.

UNION CIVIL RIGHTS POLICY THROUGH PATCHWORK: DEPARTMENT OF LABOR,  
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, AND FEDERAL COURTS

With the NLRB not playing a role in combating union discrimination, federal officials concentrated their regulatory efforts in two other agencies—the DOL and the various equal employment committees culminating in the 1964 creation of the EEOC. Neither of these agencies would be particularly effective, and both were severely limited in their ability to handle union civil rights. The DOL was too closely allied with labor unions and generally lacked a will to challenge those unions to enforce civil rights. The EEOC lacked enforcement power and thus relied on lawyers, sometimes through the Department of Justice but more often from the private sector, who filed class action lawsuits. These efforts would ultimately have an impact in integrating unions, but the principal actors involved—leaders at the EEOC and civil rights lawyers—often had little knowledge or interest in the specific class issues that surround unions. As a result, their efforts to integrate unions unintentionally contributed to significant union decline.

*The Department of Labor*

Founded in 1913, the DOL was seen at least until the Nixon Administration as a pronoun agency. The agency's creation was championed by labor unions, and as Francis Rourke argues, because the agency lacked a coherent agenda and constituency, it found itself open to organized interests.<sup>81</sup> As a result, the agency has remained on the sideline for many of the major developments during the twentieth century, and not because of the department's own lack of ambition. During discussion of the Wagner Act's passage, the DOL's secretary, Frances Perkins, made a concerted effort (with the backing of the AFL) to include the new NLRB within the DOL's province. Before a Senate committee hearing, she argued, "Employer-employee relations and the problems of collective bargaining belong within the normal sphere of a Labor Department. . . . Unless the agency which deals with these problems is part of the Labor Department, there is danger that there will not be that constant integration of these problems with other labor problems, which is essential if the Department and the Board are to have the greatest possible understanding of the ramifications of their decisions and the greatest possible effectiveness."<sup>82</sup> John L. Lewis also endorsed DOL involvement, claiming the department as the "recognized branch of the Federal Government upon which labor can depend to represent its viewpoints."<sup>83</sup> But for exactly this reason, placing the NLRB within its auspices failed because they were not considered impartial enough for handling disputes over interference with the right to organize.<sup>84</sup> As Senator Lloyd Garrison stated in committee, putting the NLRB within the DOL would be "a vital error . . . not because the Labor Department would interfere with it . . . but solely because of the [unfavorable] impression on the public."<sup>85</sup>

The DOL became involved in union civil rights affairs during the Kennedy Administration. Unfortunately, the Kennedy Administration's efforts only epitomized the failure of federal pressure to do anything about union civil rights prior to the 1964 Civil Rights Act. Much of its time was spent just trying to get an accurate account of the problem.<sup>86</sup> Though it was frustrated in this effort, what it found "indicates an extremely bad situation" in the construction trades.<sup>87</sup> When the department attempted to promote a nondiscrimination policy in apprenticeship and training programs, it met severe resistance.<sup>88</sup> (A parallel effort was taking place through the EEOC as it attempted to pressure unions to join a "Programs for Fair Practices"—it had similar difficulty in simply receiving responses from many of the major unions.)<sup>89</sup> At least some members of the department wanted a bigger role in union affairs and were concerned when the Kennedy Administration began to rely more actively on the Department of Justice to intervene.<sup>90</sup> The department also felt that the NLRB was the inappropriate avenue because it "is a quasi-judicial, independent agency and it would be inappropriate for other agencies of the Executive Branch to interfere," and concluded (perhaps, not surprisingly) that "it would seem almost essential, however, that future activities in this area be coordinated by the Department of Labor."<sup>91</sup>

In 1965, President Johnson issued Executive Order 11246 mandating that all federal contractors take affirmative action to ensure equal employment opportunities, advertise their commitment to nondiscrimination, and file detailed reports describing their own employment practices. The DOL and its new Office of Federal Contract Compliance (OFCC) would oversee government contractor efforts to meet hiring goals for each construction trade or at least show that they had made "good faith" efforts; penalties for failing to comply included disqualification from future federal contracts. Since construction unions operated their own hiring halls, their discriminatory behavior—even when acting independently from the contractor—could effectively exclude minority workers from jobs. But union dominance within the DOL enabled it to successfully fight enforcement—the OFCC in the DOL remained understaffed and underfunded, and it promoted vague plans that failed to create new jobs.<sup>92</sup> Jill Quadagno argues that the department's Bureau of Apprenticeship and Training, which was designed to spearhead affirmative action efforts in union apprenticeship programs, was "run like a union department."<sup>93</sup> In fact, early on in its failing efforts to promote integration in apprenticeship programs, DOL leaders looked for ways to defer their powers to the newly created EEOC so as to avoid embarrassment.<sup>94</sup>

President Nixon's "Philadelphia Plan," an affirmative action program that created specific goals and timetables for federally funded construction trades in the Philadelphia metropolitan area, perhaps had the most potential of the government enforcement efforts. The plan, which began in June 1969, attempted to move black workers into six construction trades that all had abysmal minority hiring records.<sup>95</sup> It provided a designated time period of four years for contractors to

reach their goals for minority employment in all crafts. The goal was to have the percentage of qualified black workers in each covered craft equal to the percentage of black residents in the five-county area. The OFCC could cancel or suspend contracts or portions of contract and disbar unions from further federal contracts. By the end of the year, the OFCC reported that unions to date were doing “in effect, nothing!”<sup>96</sup> The U.S. Commission on Civil Rights stated that “the fact that the sanctions and penalties provided in Executive Order 11246 have been used so infrequently tends to undermine the credibility of the contract compliance program and thus reduce its effectiveness.”<sup>97</sup> It did not get much better. In response to anger from contractors and unions, the Nixon Administration supported “hometown plans” negotiated by local contractors, local union representatives, and community organizations that were ineffective as they were not binding and limited in coverage.<sup>98</sup> DOL officials complained in 1971 that “it has become apparent that the implementation of Executive Order 11246 is and in the foreseeable future will continue to be, materially impeded by the failure of the unions involved to grant membership and provide employment referrals to minorities” and urged “appropriate legal action.”<sup>99</sup> A New York City report in 1973 stated, “No juggling of statistics can hide the fact that the Plan fell far short of that goal. And besides . . . that goal was not nearly adequate.”<sup>100</sup> A 1974 report by the U.S. Commission on Civil Rights found the OFCC to have “taken virtually no enforcement action” and been largely ineffectual, calling the hometown plans “a failure.”<sup>101</sup> OFCC statistics of the plans in five major cities found that thirteen of the sixteen targeted craft unions had fewer minority workers in 1973 than they had in 1971, while two of the others had an increase of only five workers.<sup>102</sup> Although most construction unions refused to cooperate, the OFCC rarely applied sanctions and did so only symbolically.<sup>103</sup>

#### *The Equal Employment Opportunity Commission*

Fair employment commissions were continually used by presidential administrations from Roosevelt through the passage of the Civil Rights Act of 1964, which created the EEOC. None of the commissions had much more than symbolic power, as all were hampered by southern opposition in Congress. In 1941, the Roosevelt Administration created the Fair Employment Opportunity Commission, (FEPC) and in 1943, it included a specific clause dealing with labor unions; but the FEPC was consistently weakened by southern opposition and eventually defeated in 1945. The AFL was a major opponent of the commission, aligning with southern Democrats in FEPC hearings that led to its defeat.<sup>104</sup> Without much more than investigative power, the FEPC nonetheless combined with the help of the War Board and state courts to pressure the Boilermakers Union to grant equality to its all-black auxiliary unions.<sup>105</sup> Truman and Eisenhower also used executive orders to promote fair employment programs, but only with the

Kennedy Administration was it used to more actively address labor union civil rights. In part, this was because it was not until the late 1950s that the civil rights movement aggressively targeted union racism. The NAACP's labor department published a well-publicized report on union civil rights problems in 1960, and its labor director, Herbert Hill, spent the early 1960s aggressively attacking prominent national unions on grounds that they had systemic problems with discrimination.<sup>106</sup> With the civil rights movement at its height, a federal agency was finally passed over southern opposition in 1964.

Although the DOL was unsuccessful with enforcement because of its ties to unions, the EEOC was seemingly up against even further odds. Passed after a fierce debate in the Senate, Republicans and southern Democrats succeeded in significantly weakening the power of the agency by denying it, among other things, cease-and-desist powers. Understaffed and underfunded, the agency immediately found itself backlogged and spent most of its time simply trying to get information from unions on the state of the problem.<sup>107</sup> Similar to the DOL, one of the EEOC's biggest struggles was simply gathering accurate statistics about the racial composition of unions.<sup>108</sup>

But unlike the DOL, which was weakened by its strong attachments to organized labor, the EEOC was far more sensitive to civil rights groups and, perhaps most notably, to civil rights lawyers.<sup>109</sup> Because the EEOC and civil rights lawyers were not participants in NLRA-style collective bargaining battles, but instead were fighting to incorporate the rights of individuals and groups who are being excluded from those bargaining battles, their "reasoning and remedies differed."<sup>110</sup> There was a fear, as the DOL had about the Department of Justice's involvement (the Department of Justice could and did intervene at the EEOC's request for "pattern and practice" suits), that agencies not "sufficiently equipped with the requisite expertise in labor-management relations and related areas" might lead "those unsophisticated in the subtleties of labor-management relations to push for actions and remedies which may have undesirable repercussions in labor-management relations and in intra-union relations."<sup>111</sup> As David Feller, counsel for the UAW, wrote to Reuther, "Litigation in the field of employment rights has certain very special problems and must therefore meet certain specific standards. . . . It must be remembered that the universe of discourse in this area includes more than the NAACP and the unions. . . . If the NAACP attack on discrimination is converted into an attack on union organization it will inevitably be used by employers to defeat or weaken union organization, which in the end will obstruct rather than aid the achievement of job rights for Negroes."<sup>112</sup> This created an internal split among civil rights leaders and lawyers, as well, as Clarence Mitchell and Roger Wilkins of the NAACP, Bayard Rustin, A. Phillip Randolph, and others consistently struggled with the difficult effort of pursuing union civil rights while attempting to maintain an institution that potentially held great economic and political promise for the further pursuit of racial equality.<sup>113</sup>

Although unions had been active in defeating amendments to the Civil Rights Act that would have made union discrimination an unfair labor practice, they nonetheless immediately found themselves a critical target of the new agency.<sup>114</sup> Union leaders quickly complained that they were not getting a fair hearing from the agency. When the agency seemingly exceeded its mandate with regard to union seniority provisions and color-conscious remedies, the AFL-CIO began to actively lobby for its further weakening in the mid-1960s.<sup>115</sup> The AFL-CIO's committee on civil rights found itself with little influence in the EEOC, often complaining that they never "heard back" from the agency when they asked about the state of the commission's activities with their local unions.<sup>116</sup> In 1975, the UAW complained that the agency continually failed to make distinctions between civil rights discrimination and labor grievances. William Oliver, who led the UAW's efforts to resolve union civil rights matters, criticized the agency for failing to explore more conciliatory measures before filing charges against the union.<sup>117</sup>

Because the agency was understaffed and without enforcement powers, it relied extensively on lawyers and federal court decisions to carry out its mission, especially as its backlog of cases quickly became unmanageable. Judith Stein writes, for instance, that the NAACP's legal director Jack Greenberg told the EEOC that "his lawyers could do [their] investigatory work. Greenberg was less concerned with improving agency fact-finding and conciliation than with getting cases to court. He required only a pro forma run through the process . . . then he could sue."<sup>118</sup> Ironically, the EEOC's lack of enforcement powers quickly became one of its chief assets. "Because it lacks power," Alfred Blumrosen wrote based on his experiences working as an adviser for the agency, "conciliation can consist of 'helping' the respondent company or union avoid an uncertain but certainly unpleasant prospect of litigation conducted by private persons whom the government does not control."<sup>119</sup> Blumrosen was right about the simple threat of litigation, and in certain situations it seemed to work. The president of the Building Trades, Peter Schoemann, for example, backed off of his vocal opposition to affirmative action in 1968 (a year after he had vigorously attacked affirmative action as reverse discrimination and a threat to union quality and autonomy). He told members of the Building Trades that he was "persuaded . . . by the danger of exposing our local unions and apprenticeship programs to the so-called 'pattern or practice of discrimination' suits. . . . If we want to remain free . . . it is absolutely imperative that we institute affirmative action programs."<sup>120</sup> Lawsuits were his primary motivation in supporting an important civil rights policy: "You might think you have never seen a Negro applicant in your life, and you might be an honorable man, but this will not necessarily save your life if you become a defendant in one of those suits . . . if these suits continue over time, the Justice Department is bound to try all kinds of sociological legal theories, and attorneys tell me that if they try them often enough, they are going to win at least some of them."<sup>121</sup> The

president of the Papermakers and Paperworkers Union similarly told members, "We are forced by the developments in the field of civil rights to make substantial and radical changes in our seniority, progression lines, promotion, and lay-off practices. . . . We must face the fact that unless we do what the law requires we will be bled to death financially."<sup>122</sup> Some union locals went bankrupt, and more offered to settle and sign consent decrees. In an effort to avoid "massive amounts of back pay," for instance, the United Steelworkers signed a nationwide consent decree to avoid the "unworkable and inconsistent rules written by judges" that "threatened bankruptcy of many local unions and severe crippling of the International."<sup>123</sup>

More often than not, however, conciliation failed, as many unions resisted affirmative action efforts or the EEOC and private plaintiff lawyers demanded extensive sums of back pay and damages.<sup>124</sup> The number of cases in federal courts rose dramatically, and the litigation increase put great financial stress on unions, forcing even the most resistant among them to make civil rights advances.<sup>125</sup> AFL-CIO budgets for litigation costs doubled between 1966 and 1973, doubled again by 1979, and then quadrupled over the next four years.<sup>126</sup> But this reliance by civil rights groups to resolve union discrimination was a high-cost strategy, even if they were without a better option. Unlike a regulatory agency that subsumes much of the cost on itself in the name of mediation and a public good, federal court activity places a huge financial cost on the losing party. And while unions were clearly guilty of civil rights violations, if reformed, they remained one of the most promising ways to promote broader racial equality by providing significant economic and political advantages.<sup>127</sup> Federal courts too often ignored this element, seeing labor and civil rights goals as independent, and resolving them in a manner that had long-term implications on labor's economic health.<sup>128</sup>

#### *The Return of Courts in Labor Affairs*

The fragmented and patchwork nature of federal civil rights policy also had an unintended consequence for the broader institutional position of courts and legislatures in labor policy making. The failure of the federal government to accomplish union civil rights helped lead courts back to the forefront of national labor policy. The Wagner Act had been important not just because it provided a substantial improvement in the lives of union workers; it also mattered because it provided the moment in American state building when the elected branches gained control of economic policy.<sup>129</sup> But by the 1970s, federal courts had again become widely involved in both micro- and macroeconomic policy. In some areas, such as the rights of individual "at-will" employees, courts and not elected officials have been at the forefront of the regulatory effort, finding protections for individual workers by using contract and tort law to revise at-will employment doctrine and using implied covenants of good faith and fair dealing.

Civil rights was hardly the only reason for this return of the courts in economic policy making,<sup>130</sup> but it played a far bigger role than many people recognize. As mentioned above, the Supreme Court first intervened dramatically in labor civil rights matters in 1944 in the *Steele v. Louisville & Nashville R. Co.* decision. The case is notable not just for its legal conclusions and implications but that it came out at a time when the Court was consistently protecting union autonomy and majority decision making in nonrace-specific cases on the grounds that not doing so would weaken the union's power as a unanimous body against the employer.<sup>131</sup> *Steele* involved a union that came to a collective bargaining agreement that would have eliminated most of the jobs of its African American members. The Court held that "constitutional questions arise" if a statute confers on a statutory bargaining representative the right to discriminate against members of the bargaining unit. "The representative is clothed with power not unlike that of a legislature which is subject to with power not unlike that of a legislature which is subject to constitutional limitations on its power to deny, restrict, destroy or discriminate against the rights of those for whom it legislates and which is also under an affirmative constitutional duty equally to protect those rights."<sup>132</sup> While the majority decision stated that they were interpreting a statute, they emphasized a broader "duty to exercise power" by the union and a "duty toward those for whom it is exercised," all the while relying on Fourteenth Amendment precedents, the NLRA or its legislative history, for defense.<sup>133</sup> The same year, a California Supreme Court judge held against a union closed shop that denied membership on the basis of race, "Courts without statutory aid, may restrain such conduct by a union on the ground that it is tortuous and contrary to public policy."<sup>134</sup>

What courts were arguing, and would continue to do so in a series of union civil rights cases both before and after the passage of the 1964 Civil Rights Act, was what Justice Murphy, in the concurrence of *Steele*, had made clear—that union discrimination was a constitutional matter that trumped legislative declarations.<sup>135</sup> Its impact was dramatic for union civil rights cases. In decision after decision, federal courts used the Constitution and civil rights common law to weaken union and NLRA autonomy involving issues of seniority, collective bargaining agreements, union security, and administrative discretion. The *Steele* decision, as Karl Klare points out, "has become a prolific source of litigation in cases having nothing to do with race discrimination. It is of daily concern to union officials in countless situations entirely divorced from the civil rights context. Duty of Fair Representation (DFR) law has become today one of the primary vehicles of government intervention in the internal affairs of labor unions."<sup>136</sup> Further cases expanded the DFR enabling its extensive use in matters both related and unrelated to race. In *Conley v. Gibson*, a case that involved a union's discriminating against black employees, the Supreme Court extended *Steele* to the quality of representation for individual workers, while in *Humphrey v. Moore*, a seniority case not involving civil rights, the Court extended the possibility of using the DFR for a

wide range on applications.<sup>137</sup> In *Vaca v. Sipes*, the Supreme Court ran around the NLRA's autonomy of rule making, because the preemption doctrine was not deemed "applicable to cases involving alleged breaches of the union's duty of fair representation."<sup>138</sup> In doing so, the Court held that federal courts had concurrent jurisdiction with the Board in hearing fair representation cases. DFR cases doubled between 1965 and 1970 and again by 1975.<sup>139</sup> As Reuel Schiller has remarked, "With the passive equal protection analogy transformed into a more aggressive examination of the bona fides of union activity, *post-Humphrey* courts would become involved in monitoring union activity with a degree of precision unknown in the 1940s and 1950s."<sup>140</sup>

Courts also used broad and arguably creative interpretations of Title VII law to infringe on NLRA precedents. In *Contractors Association of Eastern Pennsylvania v. Secretary of Labor*, a federal appellate court chipped away at the right of unions to have exclusive hiring halls (and only a few years earlier upheld by the Supreme Court in a noncivil rights case) by finding on the basis of Title VII that the Philadelphia Plan was a legal intervention by the government into an area ordinarily governed by the NLRA.<sup>141</sup> In *Quarles v. Phillip Morris*, a federal district court held that Title VII could apply to union seniority provisions, even though legislative history reflected Congress's desire to protect seniority systems from the act: "Obviously, one characteristic of a bona fide seniority system must be a lack of discrimination."<sup>142</sup> In *NLRB v. Mansion House Center*, the Eighth Circuit overturned the Board in its decision to certify a union, again relying far more on constitutional than statutory grounds: "The remedial machinery of the National Labor Relations Act cannot be available to a union which is unwilling to correct past practices of racial discrimination. Federal complicity through recognition of a discriminating union serves not only to condone the discrimination, but in effect legitimizes and perpetuates such invidious practices. Certainly such a degree of federal participation in the maintenance of racially discriminatory practices violates basic constitutional tenets."<sup>143</sup> Thus, to remedy the NLRA's inadequacy on civil rights, federal courts used Title VII law, the Fourteenth Amendment, and even tort law to take broader powers away from unions and the Board altogether—powers that were often critical to union power such as seniority and hiring autonomy.

#### CONCLUSION

In 1965, before Senate hearings regarding whether to reform the NLRA by restoring union security agreements, AFL-CIO legislative director Andrew Biemiller made clear the union's recognition of a connection between NLRA and Title VII law: "Title VII . . . gives our unions some problems." He assured the committee that while the union supported enforcement of Title VII, it needed the reform of the NLRA union security provisions because it would make it difficult for racist workers to leave unions when they enact civil rights reforms: it will

“protect the union against resignations in the heat of the moment.”<sup>144</sup> Biemiller may have recognized the connections between the NLRA and Title VII, but by 1965 this recognition had come too late. Too many racially segregated unions existed in the United States, and the process of integration would further splinter the national labor movement. Because unions were weaker politically than they were three decades earlier, there were far fewer supporters in Congress who were willing to promote a strong labor policy that could respond to the existing crisis. Union decline, aided by the defections among union members to the Republican Party and the subsequent efforts of the Reagan administration’s NLRB to further undermine many key principles of union autonomy, spread precipitously in the following decades.<sup>145</sup>

Labor’s civil rights problem is not the only explanation for union decline, but its importance has been overlooked as both an independent and contributing factor. In particular, it offers an important contributory factor to three existing explanations of union decline: the absence of resources for union organizing, the rise of business and the Republican Party during the 1970s and 1980s, and the resulting changes in labor law as interpreted by the NLRB in the 1980s.<sup>146</sup> Certainly, if racial conflict is attributed to organizational strength and the ability to win union campaigns, the discord over ending racial discrimination in the 1960s, as well as the sharp increase in financial resources needed by unions to fight constant court battles, coincides directly with the sharp decrease in union victories in certification elections during this time. Craft unions suffered particularly in this regard. Notable for their extensive discrimination problems and the fierce court litigation they faced, these unions suffered some of the most dramatic declines in the percentage of union election victories, winning just 56 percent of NLRB certification elections between 1972 and 1984, after having won nearly 95 percent of such elections in 1966.<sup>147</sup> More broadly, one does not need an extensive chain of events to link racial discrimination to the administration of labor law and policy. Not only did union election victories decline during this period but elections to decertify unions rose dramatically. White-labor support of George Wallace, Richard Nixon, and Ronald Reagan enabled Republican victories in the White House and led directly to the reforms by the Reagan NLRB that legal scholars have argued were profoundly harmful.<sup>148</sup> By the 1980s, even those unions that were not sites of civil rights conflict were nonetheless weakened by the changes in law and politics that hampered their abilities to mobilize new sectors of workers. As business interests pushed for further economic reforms to benefit free trade at the expense of unions, the union movement was too weak and too divided to muster much of a fight.

Union decline has further consequences for understanding American state building in the twentieth century. Most scholars either have completely ignored the role of race in an understanding of American political institutions, ideology, and culture or have understood racism as simply an irrational prejudice that is

both separate from the regular functioning of American democracy and inconsequential for understanding our institutions. The American political development literature has provided some notable exceptions to this research approach, but as with other fields within the study of politics, the state-building literature remains separated between those few who study race and those who claim theoretical understandings of American politics without even the slightest attention to racial matters.<sup>149</sup> As this study shows, we cannot understand the significance and success of American policy making without attending to the importance of civil rights' exclusion. Even in those moments such as the 1930s when there is an absence of public discourse about race, its presence is often of great and lasting consequence.

I have emphasized three ways that the denial of racial equality has affected understandings of the New Deal and twentieth-century labor policy. First, it revises many of the standard accounts of the New Deal's place in the twentieth century and as a fundamental moment in the development of American liberalism. Civil rights is not so easily separable from an understanding of the New Deal, even if elected officials continually attempted to make such a separation in their acts of state building. Instead, this patchwork form of state building led agencies and laws to work in direct conflict with each other, and in the process, helped undermine many of the key principles of the initial New Deal effort. By seeing the state-building effort of the 1960s in conflict with that of the 1930s, moreover, it questions American political development scholars who interpret the civil rights movement as simply an effort by Democrats to finish the New Deal by extending economic principles to all.<sup>150</sup> Race was clearly a fundamental axis that was both separable and conflicting (rightly or wrongly) with the economic emphasis of the New Deal. Ignoring the independent significance of race both diminishes the importance of the 1960s as an era of fundamental "reconstructive" state building and gives too much importance to the New Deal.

Second, the government's response to racial inequality effectively brought the law "back in" to labor regulation. Labor is by no means the only place that this happened; court involvement in modern-day voting rights and election law, for instance, were heavily contingent on the Court's initial involvement through the civil rights struggles of the 1940s through 1960s, leading it to reinterpret definitions of party organizations and elected official behavior in a manner that diminished their once autonomy from legal oversight. Once courts become involved in labor policy making on matters of race, it is not a far leap to where they extend this involvement to broader questions previously handled by electoral officials. Courts have not only scaled back the NLRA, they have extended their influence to a wide range of employment matters, using tort and contract law to increase individual worker rights independent from legislative involvement.<sup>151</sup>

Third, it emphasizes the importance of power in the process of institution building. The new institutional literature rose at a time when the power literature

was declining and it has distinguished itself from the latter's claim that institutions reflect specific societal interests and elite hegemony.<sup>152</sup> The new institutional literature has argued instead that the state was in important ways autonomous from any specific political or economic interest.<sup>153</sup> Recent studies have moved new institutionalism from its initial neo-Marxism to 'disjointed' pluralism, where decisions are not just seemingly made outside of any actor's intent or control, but inequalities of class, race and power are no longer recognized or discussed. I do not disagree that institutions can have autonomous impacts, and I have, in fact, made that argument here. But, the impact of institutions should not lead scholars to lose sight of the ways in which institutions manifest and promote powerful interests. In this case, white supremacists within Congress and the labor movement continually shaped the possibilities and limits of labor policy. The capacity of progressives in the New Deal appears to have been far overestimated. As Desmond King and Rogers Smith have well argued, by ignoring racism's importance as a real and enduring ideology and "order" in the United States, scholars have not simply missed the way that it is embedded in our institutions and political development, they have ignored a more profound point.<sup>155</sup> Racism has greatly limited the political influence of progressives and liberals in the twentieth century; success has been brief and piece-meal and both labor and civil rights groups will continue to confront this power dynamic as they work to remobilize in the twenty-first century.

## NOTES

1. The most recent statistics are from the Bureau of Labor Statistics. The estimate of fifty thousand in 1935 comes from Ray Marshall, "Unions and the Negro Community," *Industrial and Labor Relations Review* 17 (1964): 179.

2. The term *patchwork* comes from Stephen Skowronek, *Building a New American State: The Expansion of National Administrative Capacities, 1877-1920* (New York: Cambridge University Press, 1982). Specific to twentieth-century labor policy, see Ruth O'Brien, "Duality and Division: The Development of American Labour Policy from the Wagner Act to the Civil Rights Act," *International Contributions to Labour Studies* 4, no. 21 Spring (1994); Karen Orren, *Belated Feudalism: Labor, the Law, and Liberal Development* (New York: Cambridge University Press, 1991); and Margaret Weir, *Politics and Jobs: The Boundaries of Employment Policy in the United States* (Princeton, NJ: Princeton University Press, 1992).

3. See Karen Orren and Stephen Skowronek, "Beyond the Iconography of Order: Notes for a 'New Institutionalism,'" in *The Dynamics of American Politics: Approaches and Interpretations*, ed. Lawrence C. Dodd and Calvin Jillson (Boulder, CO: Westview, 1994), 328.

4. See Paul Frymer, "Acting When Elected Officials Won't: Federal Courts and Civil Rights Enforcement in U.S. Labor Unions, 1935-85," *American Political Science Review* 97, no. 3 (2003):483.

5. See Kevin Boyle, *The UAW and the Heyday of American Liberalism, 1945-1968* (Ithaca, NY: Cornell University Press, 1995); Nelson Lichtenstein, *State of the Unions* (Princeton, NJ: Princeton University Press, 2002); and Judith Stein, *Running Steel, Run-*

ning America: Race, Economic Policy, and the Decline of Liberalism (Chapel Hill: University of North Carolina Press, 1998).

6. See Thomas Byrne Edsall and Mary D. Edsall, *Chain Reaction: The Impact of Race, Rights, and Taxes on the Democratic Party* (New York: Norton, 1991); Steve Fraser and Gary Gerstle, eds., *The Rise and Decline of the New Deal Order* (Princeton, NJ: Princeton University Press, 1989); Paul Frymer and John David Skrentny, "Coalition-Building and the Politics of Electoral Capture During the Nixon Administration: African Americans, Labor, Latinos," *Studies in American Political Development* 12 Spring (1997): 370, no. 131. Specifically regarding the role of the Reagan administration for the decline of union legal protections, see Katherine Van Wezel Stone, "Labor and the Corporate Structure: Changing Conceptions and Emerging Possibilities," *University of Chicago Law Review* 55 Winter (1988):73.

7. Stein, *Running Steel*, 195; Katherine Van Wezel Stone, "The Legacy of Industrial Pluralism: The Tension between Individual Employment Rights and the New Deal Collective Bargaining System," *University of Chicago Law Review* 59 Spring (1992):575, footnote 18.

8. For at least implicit arguments that the New Deal was "raceless" and that race emerged in the 1960s leading to the New Deal and labor's downfall, see Fraser and Gerstle, eds., *New Deal Order*; Robert H. Zieger, *American Workers, American Unions* (Baltimore: Johns Hopkins University Press, 1994); and Melvyn Dubofsky, *The State and Labor in Modern America* (Chapel Hill: University of North Carolina Press, 1994). Ira Katznelson has said of Fraser and Gerstle, "Not a single word in this book concerns the subject of race in the pages that deal with the 'rise' of the New Deal in the Roosevelt years. By contrast, race provides one of the central tropes in the volume's consideration of the 'fall.'" Ira Katznelson, "Reinventing Liberalism: Bidding the New Deal Goodbye," (lecture, New School for Social Research, April 13, 1993).

9. Orren, *Belated Feudalism*.

10. See, for example, the debate between Bruce Nelson, "Class, Race and Democracy in the CIO: The 'New' Labor History Meets the 'Wages of Whiteness,'" *International Review of Social History* 41, nos. 351, 352 (1996); and Thomas J. Sugrue, "Segmented Work, Race-Conscious Workers: Structure, Agency and Division in the CIO Era," *International Review of Social History* 41, no. 389 (1996). For different perspectives on this debate, see Eric Arnesen, "Up from Exclusion: Black and White Workers, Race, and the State of Labor History," *Reviews in American History* 26, no. 146 (1998); Robin D. G. Kelley, "'We Are Not What We Seem': Rethinking Black Working-Class Opposition in the Jim Crow South," *Journal of American History* 80 (June 1993); Brian Kelly, *Race, Class, and Power in the Alabama Coalfields, 1908-21* (Chicago: University of Illinois Press, 2001); Adolph Reed Jr., "Unraveling the Relation of Race and Class in America," *Political Power and Social Theory* 15, no. 265 (2002); Herbert Hill, "Myth-Making as Labor History: Herbert Gutman and the U.S. Mine Workers of America," *International Journal of Politics, Culture and Society* 2, no. 132 (1988); and Michael Goldfield, "Race and the CIO: The Possibilities for Racial Egalitarianism During the 1930s and 40s," *International Labor Working Class History* 44, no. 1 (1993).

11. David R. Roediger, *Towards the Abolition of Whiteness: Essays on Race, Politics, and Working Class History* (New York: Verso 1994), 25.

12. See Stein, *Running Steel*; Goldfield, "Race and the CIO."

13. See Edna Bonacich, "A Theory of Ethnic Antagonism: The Split Labor Market," *American Sociological Review* 37, October (1972):547; Kelly, *Alabama Coalfields*.

14. See Eric Arnesen, *Brotherhoods of Color: Black Railroad Workers and the Struggle for Equality* (Cambridge, MA: Harvard University Press, 2001); Philip S. Foner, *Orga-*

nized Labor and the Black Worker (New York: Praeger, 1982); William B. Gould, *Black Workers in White Unions: Job Discrimination in the United States* (Ithaca, NY: Cornell University Press, 1977); Herbert Hill, *Black Labor and the American Legal System: Race, Work and the Law* (Madison: University of Wisconsin Press, 1986); August Meier and Elliott Rudwick, *Black Detroit and the Rise of the United Auto Workers* (New York: Oxford University Press, 1992); and Bruce Nelson, *Divided We Stand: American Workers and the Struggle for Black Equality* (Princeton, NJ: Princeton University Press, 2001).

15. In 1944, thirty-one national unions were known to discriminate as a matter of policy. George F. McCray, "The Labor Movement," in *The Negro Handbook: A Manual of Current Facts, Statistics, and General Information Concerning Negroes in the United States*, ed. Florence Murray (New York: Wendell Malliet, 1944), 203. See also Marshall, "Unions and the Negro Community"; Arnesen, *Brotherhoods of Color*; and Timothy J. Minchin, *The Color of Work: The Struggle for Civil Rights in the Southern Paper Industry, 1945-80* (Chapel Hill: University of North Carolina Press, 2001).

16. Marshall, "Unions and the Negro Community."

17. Regarding Reuther, see Boyle, *The UAW and the Heyday of American Liberalism*; Nelson Lichtenstein, *Walter Reuther: The Most Dangerous Man in Detroit* (Urbana: University of Illinois Press, 1997), 379; and Thomas J. Sugrue, *The Origins of the Urban Crisis* (Princeton, NJ: Princeton University Press, 1998), 100-103. Regarding Murray, see Nelson, *Divided We Stand*. For an examination of the AFL-CIO's participation in the southern civil rights movement, see Alan Draper, *Conflict of Interests: Organized Labor and the Civil Rights Movement in the South, 1954-1968* (Ithaca, NY: ILR Press, 1994).

18. These surveys are available at George W. Meany Archives, Department of Civil Rights Records, 1943-67, Box 1. On the CIO's efforts, see Carol Anderson, *Eyes off the Prize: The United Nations and the African American Struggle for Human Rights, 1944-55* (New York: Cambridge University Press, 2003); Michael Goldfield, *The Color of Politics: Race and the Mainsprings of American Politics* (New York: New Press, 1997); and Robert Korstad and Nelson Lichtenstein, "Opportunities Found and Lost: Labor, Radicals, and the Early Civil Rights Movement," *Journal of American History* 75 December (1988):786.

19. See, for instance, the efforts of Boilermakers to integrate their union during World War II, "Petition of 5000 California Boilermakers," Fair Employment Practices Commission, Record Group 228, Box 324, National Archives (January 31, 1944). Also see "Summary, Findings and Directives Relating to International Brotherhood of Boiler Makers, Iron Ship Builders, Welders and Helpers of America, AF of L.," Records of the Fair Employment Practice Committee (December 9, 1943). The combination of these protests with government intervention through the Fair Employment Practices Commission and the War Commission led to changes in the Boilermakers' constitution and significant improvement in the numbers of nonwhite workers in the union.

20. The NAACP's Labor Department produced a report in 1961, "Racism within Organized Labor: A Report of Five Years of the AFL-CIO 1955-60," which found an "institutionalized pattern of anti-Negro employment practices . . . with large sections of organized labor and industrial management." Discrimination was "not limited to any one area of the country or to some few industries or union jurisdictions but involves many unions in a wide variety of occupations in manufacturing industries, skilled crafts, railroads and maritime trades"; Box 348, Folder 7, Walter P. Reuther Archives, Wayne State University.

21. See "Roy Wilkins to George Meany" (December 19, 1958); "Herbert Hill to Boris Shishkin, Director of Civil Rights Department, AFL-CIO" (December 4, 1958); Box 348, Folder 7, Walter P. Reuther Archives, Wayne State University.

22. See "Address by A. Philip Randolph at Negro American Labor Council Workshop and Institute Metropolitan Baptist Church," Washington, D.C. (February 17, 1961), Box 348, Folder 7, Walter P. Reuther Archives, Wayne State University.

23. See Heather Ann Thompson, *Whose Detroit? Politics, Labor, and Race in a Modern American City* (Ithaca, NY: Cornell University Press, 2001), chap. 3; and "Building Trades Discrimination," Box 9, Folder 4, Papers of Cleveland Robinson, Robert F. Wagner Archives, New York University.

24. "To William B. Arthur, Editor *Look Magazine* from William F. Schnitzler, Chairman AFL-CIO Civil Rights Committee," (December 6, 1968), "The facts are: most unions never had any Jim Crow locals; most have always admitted Negroes," (October 17, 1962) Jewish Labor Council Papers, General Files, AFL-CIO, Robert F. Wagner Archives, New York University; "To Roy Wilkins from Emanuel Murnuchick, Jewish Labor Council." "Mr. (Herbert) Hill has now climaxed his long campaign of irrational abuse and vilification of organized labor by making a target of an organization that, certainly as much as any other in this country, has associated itself with the cause of civil rights." George Meany, meanwhile, consistently attacked what he saw as black racism, "The advocates of black supremacy and white supremacy belong in the same camp and the American trade union movement opposes both equally," *American Federationist* (November 1966).

25. "Statement by the Executive Council of AFL-CIO Organizations: Report of the Civil Rights Committee" (February 10, 1956), Jewish Labor Council Papers, General Files, AFL-CIO, Robert F. Wagner Archives, New York University.

26. Nelson, *Divided We Stand*, 204.

27. "From Ben Fischer, Director Arbitration Department to Emanuel Muravchick, National Director, JLC," (December 11, 1963), Jewish Labor Council Papers, General Files, United Steelworkers of America, Robert F. Wagner Archives, New York University.

28. Lichtenstein, *Walter Reuther*, 376, 379. See too Boyle, *The UAW and the Heyday of American Liberalism*; and Thompson, *Whose Detroit?* chaps. 3 and 5. Union leaders, in their effort to maintain that internal racism was not their fault, continually championed specific civil rights leaders, such as A. Philip Randolph and Bayard Rustin, who defended them against the charges coming from civil rights leaders. Rustin, for example wrote numerous defenses of the labor movement, attacking civil rights protestors such as the Coalition of Black Trade Unionists who he believed used strategies that harmed the broader union movement. Rustin was a powerful supporter of unions, and at times was championed by union leaders as seemingly representing the "black perspective." Continually, articles written by Rustin were forwarded by union leaders with attachments indicating their approval to supporters nationwide. In response to Bayard Rustin, "Fear, Frustration, Backlash: The New Crisis in Civil Rights," *Dissent*, March-April 1966, Jewish Labor Council chair Charles Zimmerman forwarded the piece with the attached note: "Of special interest to the JLC is the unmistakable evidence that poverty breeds racism and other forms of bigotry, and that it contributes significantly to the social evils that now plague our cities." Jewish Labor Council Papers, General Files, "Bayard Rustin," (December 1966). In response to Rustin's article ("The Failure of Black Separatism," *Harpers*, January 1970), Don Slaiman, director of the AFL-CIO Department on Civil Rights, widely distributed it with the note "I think this is one of the most thoughtful articles on the subject to date." Jewish Labor Council Papers, General Files, "Correspondence 1966." In response to Rustin's article "Blacks and the Unions," Harry Fleischman, director of the American Jewish League wrote that it is "one of the most perceptive and informational articles on this issue that I have seen in years." Jewish Labor Council Papers, General Files, "Bayard Rustin," Robert F. Wagner Archives, NYU Library.

29. Victor Riesel, "NAACP Warns Labor Chief to Admit Black Workers or Government and Negroes Will Smash Down Union Doors," *Inside Labor*, December 13, 1967.

30. Quoted in Marshall, "Unions and the Negro Community," 190.

31. "The Philadelphia Plan: Forcing Labor's Hand," George Meany Archives, Civil Rights Files, Box 6.

32. See Boyle, *The UAW and the Heyday of American Liberalism*; Freeman, *Eyes off the Prize*.

33. By the early 1960s, government issues were declaring union discrimination, particularly in the building trades, "an extremely bad situation." See "Memorandum from W. Willard Wirtz to Lyndon Baines Johnson" (June 12, 1963) and "Memorandum from W. Willard Wirtz to Honorable Lee White, re: Civil Rights Meeting with Union Leaders on June 13, 1963" (June 12, 1963), General Records of the Department of Labor, Record Group 174, Records of the Special Assistant and Executive Assistant to the Secretary, John C. Donovan, 1961-64, Box 8, National Archives. By 1967, William Gould wrote in an EEOC memo that the "toughest [discrimination] cases are de facto segregation in northern plants [such as the UAW]." William Gould, "Employment Security, Seniority and Race: The Role of Title VII of the Civil Rights Act of 1964: A Report to the EEOC," Records of the EEOC, Record Group 403, Records of Chairman Stephen Shulman, 1966-68, Box 4, National Archives. For further statistical evidence, see Frymer, "Acting When Elected Officials Won't."

34. At the UAW, for instance, repeated memos from William H. Oliver of its Fair Practices Department to Reuther indicated extensive racial problems. See February 5, 1959, Box 503, Folder 27, and November 1, 1962, Box 504, Folder 3, Walter P. Reuther Archives, Wayne State University. A memo in 1962 by Jacob Clayman of the AFL-CIO's Industrial Union Department to Reuther criticized the AFL-CIO's lack of civil rights policy: "I understand that the AFL-CIO Civil Rights Department does not have a concise or even a reasonably clear civil rights inventory relating to our various AFL-CIO unions. For example, no one has the answer to . . . which local unions have a separate line of job progression; which local unions have segregated meetings; which local unions have denied membership because of race" (November 2, 1962), Box 504, Folder 4, Walter P. Reuther Archives, Wayne State University.

35. Quotes from Foner, *Organized Labor and the Black Worker*, 323; and NAACP Labor Department report *Racism Within Organized Labor*, 2. Regarding the willing avoidance by the AFL-CIO's civil rights committee of widespread problems with sheet metal worker unions, see "Confidential: Attention Civil Rights Committee of AFL-CIO" (June 29, 1964), AFL-CIO Civil Rights Department, Jewish Labor Council Papers, Robert F. Wagner Archives, New York University.

36. Boyle, *The UAW and the Heyday of American Liberalism*; and Nelson, *Divided We Stand*.

37. Boyle, *The UAW and the Heyday of American Liberalism*, 253-56; and Thompson, *Whose Detroit?* 116.

38. See William E. Forbath, "The Shaping of the American Labor Movement," *Harvard Law Review* 102, April (1989):1111; Orren, *Belated Feudalism*; Victoria Hattam, *Labor Visions and State Power: The Origins of Business Unionism in the United States* (Princeton, NJ: Princeton University Press, 1993). Specifically on the relationship between labor politics and federal courts pre-Wagner Act, see George Lovell, *Legislative Deferrals: Statutory Ambiguity, Judicial Power, and American Democracy* (New York: Cambridge University Press, 2003); Ken I. Kersch, *Constructing Civil Liberties: Discontinuities in the Development of American Constitutional Law* (New York: Cambridge University Press, 2004); and David E. Bernstein, *Only One Place of Redress: African Americans, Labor Reg-*

*ulations, and the Courts from Reconstruction to the New Deal* (Durham, NC: Duke University Press, 2001).

39. 301 U.S. 1 (1937).

40. 310 U.S. 88 (1940).

41. Karl E. Klare, "Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness," *Minnesota Law Review* 62, March (1978):265.

42. Irving Bernstein, *The New Deal Collective Bargaining Policy* (Berkeley: University of California Press, 1950).

43. Karen Orren writes of Laughlin Steel that the case "signaled the Supreme Court's final abandonment of common law ordering of personal relations and its deference to the legislative branch on matters of social policy." Karen Orren, "The Primacy of Labor in American Constitutional Development," *American Political Science Review* 89, June (1995):377 no. 377 (1975): 379. Some argue that this break was less fundamental, arguing that federal courts quickly reintervened into union affairs, restraining union activity, particularly with regard to its right to strike. See Forbath, "Shaping of the American Labor Movement," 1232-33; Klare, "Judicial Deradicalization"; James A. Gross, *The Making of the National Labor Relations Board: A Study in Economics, Politics, and the Law* (New York: State University of New York Press, 1974); and Lovell, *Legislative Deferrals*.

44. Gross, *The Making of the National Labor Relations Board*.

45. Troy Duster has labeled it "The Magna Carta for white labor." Duster, "Individual Fairness, Group Preferences, and the California Strategy," *Representations* 55, Summer (1996):41, 46.

46. Ira Katznelson, Kim Geiger, and Daniel Kryder, "Limiting Liberalism: The Southern Veto in Congress: 1933-50," *Political Science Quarterly* 108 (Summer 1993): 283-306; and Robert C. Lieberman, *Shifting the Color Line: Race and the American Welfare State*, (Cambridge, MA: Harvard University Press, 1998).

47. Kenneth Finegold, "Agriculture and the Politics of U.S. Social Provision: Social Insurance and Food Stamps," in *Politics of Social Policy in the United States*, ed. Margaret Weir et al. (Princeton, NJ: Princeton University Press 1988), 212; Bernstein, *Only One Place of Redress*.

48. See Nelson, *Divided We Stand*; Arnesen, *Brotherhoods of Color*; Foner, *Organized Labor*.

49. Herbert Northrup, *Organized Labor and the Negro* (New York: Harper, 1944); and Bernstein, *Only One Place of Redress*.

50. Gareth Davies and Martha Derthick, "Race and the Social Security Act of 1935," *Political Science Quarterly* 112 no. 2 (1997):217.

51. The only mention of race and agricultural workers is by Vito Marcantonio on the House floor: "Unless the right to organize peacefully can be guaranteed we shall have a continuance of virtual slavery." *Congressional Record* 79 (June 19, 1935): 9720. In response to the exclusion of agricultural workers, Robert Wagner commented that they were "excluded because I thought it would be better to pass the bill for the benefit of industrial workers than not to pass it at all, and that inclusion of agricultural workers would lessen the likelihood of passage." "Robert F. Wagner to Norman Thomas" (April 2, 1935), Special Collections—Robert F. Wagner, General Correspondence, Robert F. Wagner Archives, Georgetown University. For discussion of southern Democratic recognition during this time of the race-agriculture link, see Harvard Sitkoff, *A New Deal for Blacks: The Depression Decade* (New York: Oxford University Press, 1978); and Finegold, "Agriculture and the Politics of U.S. Social Provision."

52. And as such, the literature that examines the motivations of NLRA legislators does not raise the race question. For discussion of the primary motivations of legislators in pass-

ing the Wagner Act, Bernstein, *New Deal Collective Bargaining*, remains the most extensive discussion of the legislative history. Also providing extensive discussion is Christopher L. Tomlins, *The State and the Unions: Labor Relations, Law, and the Organized Labor Movement in America, 1880-1960* (New York: Cambridge University Press, 1985). On the importance of the political struggle that led up to the Wagner Act, see Michael Goldfield, "Worker Insurgency, Radical Organization, and New Deal Labor Legislation," *American Political Science Review* 83, no. 1257 (1989); Theda Skocpol and Kenneth Finegold, "Explaining New Deal Labor Policy," *American Political Science Review* 84, no. 1297 (1990); Frances Fox Piven and Richard A. Cloward, *Poor People's Movements* (New York: Vintage, 1977), chap. 3; David Plotke, "The Wagner Act, Again: Politics and Labor, 1935-37," *Studies in American Political Development* 3 (1989):105; and David Plotke, *Building a Democratic Political Order: Reshaping American Liberalism in the 1930s and 1940s* (New York: Cambridge University Press, 1996), chap. 4.

53. Sean Farhang and Ira Katznelson, "The Southern Imposition: Congress and Labor in the New Deal and Fair Deal" (paper presented at the meetings of the American Political Science Association, San Francisco, CA September 2001).

54. Copies of this extensive dialogue are available through the Robert F. Wagner Archives, Special Collections—Robert F. Wagner, General Correspondence, Georgetown University.

55. Quoted in Raymond Wolters, *Negroes and the Great Depression: The Problem of Economic Recovery* (Westport, CT: Greenwood, 1970), 179.

56. "T. Arnold Hill to the Honorable Robert F. Wagner" (April 18, 1935), Special Collections—Robert F. Wagner, General Correspondence, Robert F. Wagner Archives, Georgetown University.

57. The National Urban League asked for a number of different amendments, one regarding strikebreakers, one providing that "no employee otherwise eligible is denied membership or restricted or interfered with because of race, color, or creed," one asking that "denial of union membership because of one's race should be an unfair labor practice," and another asking, "Where a minority group is excluded from membership in a majority group, they shall have representation, from their own number, on all committees organized for making collective bargaining agreements." See "A Statement of Opinion on Senate Bill S.2926, National Urban League to Committee on Education and Labor of the Senate of the United States," (no date); "In Reference to Negro Workers and Bill S. 2926, Introduced into the Senate of the United States by Senator Wagner, from T. Arnold Hill to Senator Robert F. Wagner" (April 2, 1934); and "Reginald A. Johnson to Senator Wagner" (June 10, 1935). The NAACP asked for similar provisions. See "Walter White to General Hugh Johnson" (April 26, 1935). All of these memos are from Robert F. Wagner Archives, Special Collections—Robert F. Wagner, General Correspondence, Georgetown University.

58. "W. G. Young to Robert F. Wagoner [*sic*]" (May 12, 1934), Robert F. Wagner Archives, Special Collections—Robert F. Wagner, General Correspondence, Georgetown University.

59. "Robert F. Wagner to Walter White" (April 16, 1934), Robert F. Wagner Archives, Special Collections—Robert F. Wagner, General Correspondence, Georgetown University. Wagner's response to an article in *Opportunity* magazine titled "The Negro and the 'Closed Shop'" typified his reaction to civil rights protests: "I think that this bill by giving labor unionism a more definitely legal status will be more likely to check the spread of discriminatory practices within the unions themselves. . . . I think that when the unions come before these agencies they will find it in their best interest to come with clean hands." "Robert F. Wagner to Elmer Anderson Carter" (June 18, 1935), Robert F. Wagner Archives.

Keyserling is quoted in Kevin J. McMahon, *Reconsidering Roosevelt on Race: How the Presidency Paved the Road to Brown* (Chicago: University of Chicago Press, 2004), 52.

60. Senator Taft, *Congressional Record* 93 (April 29, 1947): 4193.

61. Quoted in James A. Gross, *Broken Promise: The Subversion of U.S. Labor Relations Policy, 1947-1994* (Philadelphia: Temple University Press, 1995), 48, 50.

62. *Ibid.*, 89.

63. *Congressional Record* 105 (August 12, 1959): 15722-25. A similar amendment proposed by Congressman Powell during committee discussions also represented the scope of civil rights discussion off the floor.

64. See Terry M. Moe, "Control and Feedback in Economic Regulation: The Case of the National Labor Relations Board," *American Political Science Review* 79, no. 4(1985):1094, for the argument that, with the exception of a few periods, the Board was relatively neutral between 1935 and 1980 in regulating unions and employers. On the importance of the board in creating and retracting opportunities from unions, see Gross, *The Making of the National Labor Relations Board*; James A. Gross, *The Reshaping of the National Labor Relations Board: National Labor Policy in Transition 1937-1947* (Albany: State University of New York, 1981); Klare, "Judicial Deradicalization of the Wagner Act"; Tomlins, *The State and the Unions*; and Van Wezel Stone, "The Legacy of Industrial Pluralism."

65. *Steele v. Louisville & Nashville R. Co.*, 323 U.S. 192 (1944). The decision focused on the National Railway Act, a statute with parallel language to that of the NLRA. I discuss *Steele* in greater length later.

66. *Atlanta Oak Flooring Co.*, 62 NLRB 973 (1945).

67. 62 NLRB 1075 (1945).

68. *Ibid.*

69. *Petroleum Carrier Corp. of Tampa*, 126 NLRB 1031 (1960); *General Steel Products Inc.*, 157 NLRB 636 (1966).

70. *General Steel*, 640, citing *Petroleum Carrier*, 1038. See also *Sewell Manufacturing*, 138 NLRB 66, 67-68 (1962).

71. 223 NLRB 1475, 1483-84 (1976).

72. *Vitek Electronics*, 268 NLRB 522 (1984); and *Beatrice Grocery Products, Inc.*, 287 NLRB 302 (1987).

73. Neil M. Herring, "The 'Fair Representation' Doctrine: An Effective Weapon against Union Discrimination," *Maryland Law Review* 24, (1964):113, 153.

74. *Independent Metal Workers Union, Local No. 1*, 147 NLRB 1573 (1964); *International Brotherhood of Painters and Allied Trades, Local Union 1066*, 205 NLRB 110 (1973).

75. Quoted in Hill, *Black Labor and the American Legal System*, 141. Board Chairman, Frank McCulloch, meanwhile claimed it "untimely" to further expand Board authority vis-à-vis the EEOC. "From Frank W. McCulloch, NLRB Chairman, to Stephen J. Pollack, First Assistant, Civil Rights Division, Department of Justice," (October 19, 1966), Records of the National Labor Relations Board, Record Group 25, Box 9, National Archives.

76. *The Emporium*, 192 NLRB 173 (1971). This was affirmed by the Supreme Court in *Emporium Capwell Co. v. Western Addition Community Organization*, 420 U.S. 50 (1975). See Elizabeth M. Iglesias, "Structures of Subordination: Women of Color at the Intersection of Title VII and the NLRA, NOT!" *Harvard Civil Rights—Civil Liberties Review* 28, no. 395 Spring (1993):421-22.

77. 228 NLRB 447 (1977).

78. *Ibid.*, 452.

79. Indeed, Thurgood Marshall later wrote the Supreme Court decision upholding the Board in *Emporium Capwell v. Western Addition Community Organization*, 420 U.S. 50 (1975).

80. As a quasi-judicial branch, the board plays the role of both judge and prosecutor, cutting dramatically on the cost of legal fees.

81. Francis E. Rourke, "The Department of Labor and the Trade Unions," *Western Political Quarterly* 7, (1954):656; see too Weir, *The Politics of Jobs*.

82. "Testimony of Secretary of Labor, Hon. Frances Perkins before the House Committee on Labor Conducting Hearings on Wagner-Connery Bill to Establish a National Labor Relations Board" (April 3, 1935), General Records of the Department of Labor, Box 11, General Subject Files 1933-41, Record Group 174, National Archives.

83. "National Labor Relations Board," hearings before the Senate Committee on Education and Labor, 74th Cong., 1st sess., 1935, pt. 2, 196.

84. "Bills—Wagner Labor Bill, 1935" (no date), Record Group 174, General Records of the Department of Labor, Box 11, General Subject Files 1933-41, National Archives.

85. "National Labor Relations Board," hearings before the Senate Committee on Education and Labor, 74th Cong., 1st sess., 1935, pt. 2, 134.

86. As of the end of September 1963, more than two-thirds of the unions contacted had not responded to the questionnaire asking for numbers of racial minorities in locals. Many unions that did reply did so without providing data—34 percent of the respondents were "rejected as unacceptable." A union from Anchorage, Alaska, wrote, "We are not anthropologists and we do not know when a member becomes or ceases to be a Negro, an Indian, an Oriental, a member of a minority group or any of the other designations in the form." "Memorandum to Secretary from John Donovan" (September 23, 1963), General Records of the Department of Labor, Record Group 174, Records of the Special Assistant and Executive Assistant to the Secretary, John C. Donovan, 1961-64, Box 8, National Archives.

87. "Memorandum from W. Willard Wirtz to Lyndon Baines Johnson" (June 12, 1963), General Records of the Department of Labor, Record Group 174, Records of the Special Assistant and Executive Assistant to the Secretary, John C. Donovan, 1961-64, Box 8, National Archives.

88. John Herling's Labor Letter, "Building Trades and Government Pressure" (August 24, 1963), Jewish Labor Council Papers, General Files, Employment: Apprenticeship, 1963-64, Robert F. Wagner Archives, New York University: "This week we saw the growing determination by the leaders of the building and construction industry to resist imposition by government of standards which would eliminate racial discrimination in employment." The plumbers and pipefitters union stated, "We will not accept to dictation from any government agency. We intend to proceed with our training program as planned, without lowering our standards for any reason whatsoever. We don't believe in rejecting an applicant because of his race, color or creed, and we likewise cannot be expected to admit an applicant because of his race, color or creed." The International Typographical Workers Union, meanwhile, published a statement telling its locals to refuse to agree with the non-discriminatory clause. "To John F. Henning, Under Secretary of Labor from Edw. E. Goshen, Administrator-BAT, "Highlights of Equal Employment Opportunity in Apprenticeship" (December 12, 1963).

89. General Records of the Department of Labor, Record Group 174, Records of the Special Assistant and Executive Assistant to the Secretary, John C. Donovan, 1961-64, Box 8, "Memorandum from Hobart Taylor, Jr. to W. Willard Wirtz, Subject: Report on Unions Which Have Not Joined Programs for Fair Practices" (March 25, 1963), National Archives.

90. "Justice Department Participation in NLRB Cases Involving Racial Discrimination" (March 18, 1963), General Records of the Department of Labor, Record Group 174, Records of the Special Assistant and Executive Assistant to the Secretary, John C. Donovan, 1961-64, Box 8, National Archives.

91. This remained a concern between the different agencies: in 1966, the EEOC agreed to tell the DOL about its investigations, and if it found probable cause, would let the DOL conciliate. "Draft Agreement Between the EEOC and the DOL Relating to Complaints of Discrimination Which are of Interest to Both Agencies" (March 8, 1966), Records of the Equal Employment Opportunity Commission, Record Group 403, Records of Chairman Stephen Shulman, 1966-68, Box 1, National Archives. The EEOC also on occasion asked the DOL for extra manpower in matters that involved both agencies. "Administrator, Wage and Hour and Public Contracts Division, DOL" (April 10, 1967), Records of the Equal Employment Opportunity Commission, Record Group 403, Records of Chairman Stephen Shulman, 1966-68, Box 9, Shulman to Clarence T. Lundquist, National Archives.

92. John David Skrentny, *The Ironies of Affirmative Action: Politics, Culture and Justice in America* (Chicago: University of Chicago Press, 1996), 134-38.

93. Jill Quadagno, "Social Movements and State Transformation: Labor Unions and Racial Conflict in the War on Poverty," *American Sociological Review* 57, October (1992): 616.

94. See Edward C. Sylvester Jr. to the Secretary, "Equal Employment Opportunity Reports by Joint-Labor-Management Apprenticeship Committees" (December 7, 1965), where Sylvester supports giving the EEOC the power to collect construction data because "BAT has limited ability to use such data to effect change and covers only 19 states. . . . The data is going to highlight the ineffectiveness (of apprenticeship programs) by showing no or nominal minority participation in many areas of high minority population. The Department is probably more vulnerable if BAT initiates collection of data and does not or cannot show substantial improvement than if someone else initiates collection." General Records of the Department of Labor, Record Group 174, Records of Secretary of Labor W. Willard Wirtz, Box 251, National Archives.

95. The Iron Workers had 12 African Americans out of 850 workers, the Steamfitters had 13 out of 2,308 workers, the Sheet Metal workers had 17 out of 1,688 workers, the Electricians had 40 out of 2,274 workers, the Elevator Construction workers had 3 out of 562 workers, and the Plumbers and Pipefitters had 12 out of 2,335 workers. "Establishment of Ranges for the Implementation of the Revised Philadelphia Plan for Compliance with EEO Requirements of EO 11246 for Federally Involved Construction," General Records of the Department of Labor, Record Group 174, Records of the Secretary of Labor George P. Schultz, 1969-70, Box 68, National Archives.

96. General Records of the Department of Labor, Record Group 174, Records of the Secretary of Labor George P. Schultz, 1969-70, Box 68, "Summary of Revised Philadelphia Plan Results to Date" (December 22, 1969), National Archives.

97. Cited in Skrentny, *Ironies of Affirmative Action*.

98. Regarding various city's apprenticeship efforts, see Sugrue, *Urban Crisis*, 117; and Roger Waldinger and Thomas Bailey, "The Continuing Significance of Race: Racial Conflict and Racial Discrimination in Construction," *Politics & Society* 19, no. 3 (1991):291.

99. Arthur A. Fletcher and John L. Wilks of the Department of Labor to Attorney General John Mitchell, (January 4, 1971), Record Group 9-2, Box 36, Folder 27, File 73, George W. Meany Archives.

100. "News Release from Mayor Lindsay" (April 17, 1973), Papers of Cleveland Robinson, Box 9, Folder 4, Robert F. Wagner Archives, New York University.

101. "Altogether, 335 of the 478 participating trades fell short of their promised objectives. OFCC audits found that a total of 3,102 minorities had been placed in construction work in the 39 cities." United States Commission on Civil Rights, *The Federal Civil Rights Enforcement Effort*, vol. 5 (The Commission, Washington, D.C. 1974), 375-76, 385.

102. United States Commission on Civil Rights, *The Challenge Ahead: Equal Opportunity in Referral Unions* (The Commission, Washington, D.C. 1976), 188.

103. *Ibid.*, 168-69; also see Quadagno, "Social Movements and State Transformation."

104. See Farhang and Katznelson, "The Southern Imposition."

105. Records of the Fair Employment Practice Committee, "Summary, Findings and Directives Relating to International Brotherhood of Boiler Makers, Iron Ship Builders, Welders and Helpers of America, AF of L." (December 9, 1943). Also see Daniel Kryder, *Divided Arsenal* (New York: Cambridge University Press, 2000), 103-104.

106. See NAACP, "Racism in Organized Labor"; "Memorandum from Herbert Hill to Boris Shishkin" (1958), Record Group 9-2, Box 9, Folder 4, George W. Meany Archives; and Nelson, *Divided We Stand*.

107. "Dent and EEOC v. St. Louis-SF Railway . . ." (May 12, 1967), Records of the Equal Employment Opportunity Commission, Record Group 403, Records of Chairman Stephen Shulman, 1966-68, Box 9, National Archives.

108. "Gordon Chase Memorandum, Re: Union EEO3 Compliance" (March 27, 1967), Records of the Equal Employment Opportunity Commission, Record Group 403, Records of Chairman Stephen Shulman, 1966-68, Box 7, National Archives. In fact, the EEOC quickly looked to the DOL for help in compiling statistics. As its chair, Franklin D. Roosevelt Jr. wrote to the chair of the DOL, W. Willard Wirtz on October 12, 1965, "There is an obvious need for considering possibilities of consolidating forms and providing for common administration. . . . We do not have the funds and have not definitely decided that we have the legal authority (to conduct this operation) under Title VII alone." General Records of the Department of Labor, Record Group 174, Records of Secretary of Labor W. Willard Wirtz, Box 251, National Archives.

109. See Skrentny, *Ironies of Affirmative Action*; Hanes Walton Jr., *When the Marching Stopped: The Politics of Civil Rights Regulatory Agencies* (Albany: State University of New York Press, 1988). Judith Stein called the EEOC "a subcommittee of the NAACP. . . . The EEOC's intellectual and administrative weakness created a vacuum, which the NAACP and LDF eagerly filled." Stein, *Running Steel*, 101-102. More broadly, there was constant dissatisfaction among the labor community with civil rights lawyers and in particular, the NAACP's labor secretary, Herbert Hill. These civil rights lawyers, they believed, were hell-bent to integrate unions at any cost, even the potential destruction of unions. UAW labor lawyer David Feller reported to Walter Reuther about Hill, "In an area in which the greatest care should be exercised in order to keep clear the distinction between a campaign against discrimination by unions and a campaign against unions, and in which the highest degree of professional competence in labor law should be exercised, there has been neither. . . . A failure to divert the course of events from the direction they have taken can only lead to a weakening of both the drive for fuller employment opportunities and the trade union movement." David E. Feller, "Memorandum to Walter Reuther: The NAACP's New Program" (November 9, 1962), Box 504, Folder 2, Walter P. Reuther Archives, Wayne State University.

110. Stein, *Running Steel*, 183.

111. "Justice Department Participation in NLRB Cases Involving Racial Discrimination" (March 18, 1963), General Records of the Department of Labor, Record Group 174, Records of the Special Assistant and Executive Assistant to the Secretary, John C. Donovan, 1961-64, Box 8, National Archives. Justice Thurgood Marshall made this same point

in a nonrace-specific case, arguing that simply imposing punitive damages on unions would impair “the effectiveness of unions as collective bargaining agents. Inflicting this risk on employees, whose welfare depends on the strength of their union, is simply too great a price.” *IBEW v. Foust*, 442 U.S. 42, 51 (1979).

112. Feller, “Memorandum to Walter Reuther,” 3-4.

113. See notes 21, 22, 28, and 29 for references to Randolph and Rustin and Wilkins. Also see Clarence Mitchell to Henry Schwarzschild (March 14, 1968), Legislative Files, Box 9, Folder 27, George W. Meany Archives.

114. O’Brien, “Duality and Division,” 41.

115. See “Commission Meetings” and William Gould, “Employment Security, Seniority and Race: The Role of Title VII,” Equal Employment Opportunity Commission, Record Group 403, Box 7-8, 4, (1967), National Archives. Regarding the EEOC’s mandate on these matters, see Skrentny, *Ironies of Affirmative Action*; and Hugh Davis Graham, *The Civil Rights Era: Origins and Development of National Policy, 1960-72* (New York: Oxford University Press, 1990).

116. See various dates, “Equal Employment Compliance Data,” Record Groups 9-1 and particularly 9-2, Box 36, George W. Meany Archives; William H. Oliver to Eric W. Springer, Director of Compliance EEOC (May 8, 1967), UAW Fair Practices, Box 28, Folder 5, Walter P. Reuther Archives, Wayne State University.

117. William H. Oliver to John Fillion, General Counsel, “EEOC Chairman John H. Powell, Jr., and the General Counsel of EEOC William Carey” (February 6, 1975), UAW Fair Practices, Box 35, Folder 25, Walter P. Reuther Archives, Wayne State University.

118. Stein, *Running Steel*, 102. Though even within the EEOC, there was division between agency leaders over whether to sue or conciliate. See Oliver, “EEOC Chairman.”

119. Alfred W. Blumrosen, *Black Employment and the Law* (New Brunswick, NJ: Rutgers University Press, 1971), 44; also see Skrentny, *Ironies of Affirmative Action*; Herbert Hill, “The Equal Employment Opportunity Acts of 1964 and 1972: A Critical Analysis of the Legislative History and Administration of the Law,” *Industrial Relations Law Journal* 2, no. 1 (1977):1; Robert C. Lieberman, “Weak State, Strong Policy: Paradoxes of Race Policy in the United States, Great Britain, and France,” *Studies in American Political Development* 16, no. 1(2002):138.

120. Peter T. Schoemann, “United Association and Affirmative Action—Report to UA Membership from General President” (March 27, 1968), Jewish Labor Council, “AFL-CIO Civil Rights Department, 1963-68,” Robert F. Wagner Archives, New York University. Schoemann was hardly a civil rights activist. In defending affirmative action, he argued, “For those who hold the other point of view, we carried the fight just about as far as we could. . . . The building trades need a single policy in this area. We had no such policy, and the only policy that had a Chinaman’s chance of getting unanimous support . . . was a policy of affirmative action.”

121. *Ibid.*

122. Quoted in Minchin, *The Color of Work: The Struggle for Civil Rights in the Southern Paper Industry*, 69.

123. Steelworkers Civil Rights Decree, 1974, 1.

124. See Stein, *Running Steel*, 194, who argues, “The new regulators in OFCC and EEOC made the process more contentious than it need have been. They ignored unions that were prepared to cooperate.”

125. See Frymer, “Acting When Elected Officials Won’t.”

126. *Ibid.*, 493.

127. It should be recognized that the confluence of race and class matters in the civil rights cases was not entirely white workers maintaining their own privilege. In *Bailey v.*

*Ryan Stevedoring Co.*, 528 F.2d 551, 553 (5th Cir. 1976), the Fifth Circuit combined two segregated Longshore workers unions in Baton Rouge, Louisiana, on the ground that segregation was inherently unequal. But the case reflected a further issue: 204 of the 230 members of the black local stated, "If the unions are integrated, we will lose (1) our right to equal jobs with the whites, (2) our right to elect our own officers and grievance committees, and (3) our rights to our own meetings and a chance to hold office and act for the black longshoremen to protect their interest. By maintaining our separate strength and not having it diluted by joining with the white Local we have been able to obtain the same wages, the same number of jobs and equal working conditions, including foremen and other jobs in the Port. If our Locals are put together a few dissatisfied black men can join with the white men and deprive the vast majority of black workers of their jobs and working conditions."

128. Justice Thurgood Marshall was a dramatic exception to this. In *IBEW v. Foust*, 442 U.S. 42, 49 (1979), he wrote in a fair representation matter that high damage awards against the union would deplete union treasuries and impair "the effectiveness of unions as collective bargaining agents. Inflicting this risk on employees, whose welfare depends on the strength of their union, is simply too great a price for whatever deterrent effect punitive damages may have."

129. Orren, *Belated Feudalism*.

130. George Lovell has argued that court involvement was intrinsic to the Wagner Act itself as Congress intentionally left specific policy matters such as issues involved in the right of workers to go on strike to be resolved by courts instead of the NLRB. Lovell, *Legislative Deferrals*, 221-51.

131. See, for instance, *J. I. Case v. NLRB*, 321 U.S. 332 (1944); *Medo Photo Supply Corp. v. NLRB*, 321 U.S. 678 (1944); *Order of R. R. Tel. v. Railway Express Agency*, 321 U.S. 342 (1944); *Elgin, J&E Ry. v. Burley*, 327 U.S. 661 (1945).

132. *Steele v. Louisville & Nashville R. Co.*, 198.

133. *Ibid.*

134. *James v. Marinship Corp.*, 25 Cal 2d 721, 734 (1944).

135. Pre-1964, see *Graham v. Brotherhood of Locomotive Firemen and Enginemen*, 338 U.S. 232 (1949); *Brotherhood of Railroad Trainmen v. Howard*, 343 U.S. 768 (1952). After 1964, John Skrentny argues, the courts became increasingly active in the employment sector without the "use of employment law precedent. . . . The greatest source of relevant precedent and analogy was . . . other civil rights cases, in areas of life government by what may be considered completely different institutional rules." Skrentny, *Ironies of Affirmative Action*, 163.

136. Karl E. Klare, "The Quest for Industrial Democracy and the Struggle against Racism: Perspectives from Labor Law and Civil Rights Law," *Oregon Law Review* 61, no. 1(1982):157, 187.

137. 355 U.S. 41 (1957); 375 U.S. 335 (1964).

138. 386 U.S. 171, 180 (1967).

139. James E. Jones Jr., "Time for a Midcourse Correction?" in *The Changing Law of Fair Representation*, ed. Jean T. McKelvey (Ithaca, NY: Cornell University Press, 1985). For a broader discussion of the use of DFR, see Reuel E. Schiller, "From Group Rights to Individual Liberties: Post-War Labor Law, Liberalism, and the Waning of Union Strength," *Berkeley Journal of Employment and Labor Law* 20, (1999): no. 1.

140. Schiller, "From Group Rights," 64.

141. 442 F.2d 159 (3d Cir., 1971). The Supreme Court case was *Teamsters Local 357 v. NLRB*, 365 U.S. 667 (1961).

142. 279 F.Supp. 505, 515 (E.D. VA, 1968).

143. 473 F.2d 471, 477 (8th Cir., 1973).

144. Hearings before the Subcommittee on Labor of the Committee on Labor and Public Welfare, U.S. Senate, 89th Cong., 1st sess., June 22-25, 1965, 89.

145. Union membership in the United States had been declining since the 1950s, but the most precipitous declines in the percentage of union members in the labor force occurred during the 1970s and 1980s. In 1965, 30 percent of the private sector labor force was unionized (a 2 percent drop from 1955); in 1975, it was 24 percent, and in 1983, had dropped further to 20 percent. Leo Troy, "The Rise and Fall of American Trade Unions: The Labor Movement from FDR to Ronald Reagan," in *Unions in Transition: Entering the Second Century*, ed. Seymour Martin Lipset (San Francisco: Institute for Contemporary Studies Press, 1986), 81. Measures of union density also show the 1970s as the major period of decline. See Bruce Western, "Postwar Unionization in Eighteen Advanced Capitalist Countries," *American Sociological Review* 58, 2 (1993):266, 267.

146. Regarding the importance of resources being stretched for union decline, and the significant cost of organizing new workers, see Henry S. Farber and Bruce Western, "Accounting for the Decline of Unions in the Private Sector, 1973-1998," *Journal of Labor Research* 22, 459 (2001); Bruce Western, "Postwar Unionization," *American Sociological Review* 58, no. 266 (1993); and Larry J. Griffin, Holly J. McCammon, and Christopher Botsko, "The 'Unmaking' of a Movement? The Crisis of U.S. Trade Unions in Comparative Perspective," in *Change in Societal Institutions*, ed. Maureen T. Halliman, David M. Klein, and Jennifer Glass (New York: Plenum, 1990). Regarding the role of employer opposition, see, for example, Richard B. Freeman, "The Effect of the Union Wage Differential on Management Opposition and Union Organizing Success," *American Economics Review* 76 (1986):92 and Paul C. Weiler, "Promises to Keep: Securing Workers' Rights to Self-Organization under the NLRA," *Harvard Law Review* 96, no. 8 (1983):1769. Regarding the impact of changes in labor law, see Stone, "The Legacy of Industrial Pluralism"; and Karl Klare, "Judicial Deradicalization," *Minnesota Law Review* 62, no. 265 (1978).

147. Michael Goldfield, *The Decline of Organized Labor in the United States* (Chicago: University of Chicago Press, 1987), 212.

148. See, for example and overview, Stone, "The Legacy of Industrial Pluralism."

149. See Michael K. Brown, *Race, Money and the American Welfare State* (Ithaca, NY: Cornell University Press, 1999); Paul Frymer, *Uneasy Alliances: Race and Party Competition in America* (Princeton, NJ: Princeton University Press, 1999); Ira Katznelson, *Black Men, White Cities: Race, Politics and Migration in the United States, 1900-1930, and Britain, 1948-1968* (Chicago: University of Chicago Press, 1973); Claire Jean Kim, "The Racial Triangulation of Asian Americans," *Politics & Society* 27, no. 1 (1999):105; Desmond King, *Separate and Unequal: Black Americans and the U.S. Federal Government* (New York: Oxford University Press, 1997); Kryder, *Divided Arsenal*; Adolph Reed Jr., *Stirrings in the Jug: Black Politics in the Post-Segregation Era* (Minneapolis: University of Minnesota Press, 1999); Lieberman, *Shifting the Color Line*; Michael P. Rogin, *Ronald Reagan: The Movie* (Berkeley: University of California Press, 1989); John D. Skrentny, *The Minority Rights Revolution* (Cambridge, MA: Harvard University Press, 2002); and Richard M. Valelly, "National Parties and Racial Disenfranchisement," in *Classifying by Race*, ed. Paul E. Peterson (Princeton, NJ: Princeton University Press, 1995).

150. For example, see Stephen Skowronek, *The Politics Presidents Make: Leadership from John Adams to Bill Clinton* (Cambridge, MA: Harvard University Press, 1997).

151. See Cynthia L. Estlund, "The Ossification of American Labor Law," *Columbia Law Review* 102, (2002):1527.

152. For an overview and illustration of the power debates, see John Gaventa, *Power and Powerlessness: Quiescence and Rebellion in an Appalachian Valley* (Urbana: Illinois University Press, 1982).

153. See Theda Skocpol, "Bringing the State Back in: Strategies of Analysis in Current Research," in *Bringing the State Back In*, ed. Peter B. Evans, Dietrich Rueschemeyer, and Theda Skocpol (New York: Cambridge University Press, 1985).

154. See Desmond King and Rogers M. Smith, "Racial Orders in American Political Development," *American Political Science Review* (forthcoming); also see Rogers M. Smith, *Civic Ideals: Conflicting Visions of Citizenship in U.S. History* (New Haven, CT: Yale University Press, 1997).

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