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Chapter 1

Introduction

When Franklin Roosevelt signed the Wagner Act in 1935, giving workers the right to form unions and bargain collectively with their employers, African Americans accounted for less than 1 percent of the labor movement. Over the next half century, the number of black workers in unions increased from an estimated fifty thousand to more than three million, roughly 20 percent of the labor movement. The Wagner Act, however, was only partially responsible for this increase. It was largely the result of the federal government taking subsequent steps to promote racial equality in labor unions, steps that, in fact, directly weakened the Act that union leaders once called "labor's Magna Carta." The Wagner Act, after all, included provisions that enabled unions to exclude and discriminate against black workers. Black workers who attempted to join unions found that they were limited to jobs that paid less, provided less security, fewer benefits, and little representation from the union. Only in the 1970s did dramatic changes for black workers come about as unions, prodded by the federal government and besieged by litigation costs, joined with employers to implement affirmative action programs, apprenticeship training, and the integration of previously segregated job and seniority lines. By the end of the 1970s, one in four black workers in America belonged to a union, and today there are far more African Americans in unions than in any civil rights organization.[1]

Although this is an impressive accomplishment matched by few other sectors of society, the prolonged battle to diversify unions has had significant fallout. Labor's racial divisions have left many black workers wary and cynical about unions, and anti-union corporations have seized on this reputation in their campaigns to deny workers their right to organize. Wal-Mart, which offers low wages and bad working conditions, discriminates against racial minorities and women, and is fiercely anti-union, has campaigned successfully in poor and predominantly African-American neighborhoods to gain support for building new, nonunion superstores. Just as the Ford Motor Company did decades ago, Wal-Mart has garnered support from the black community by playing up labor's historical treatment of non-white workers.[2]

Labor's civil rights successes were also marred by a decline of union power and membership during the years when unions diversified. The

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increase in black union membership was accompanied by a significant decline in the size and influence of the labor movement. Between 1964 and 1985, the percentage of unionized workers in the private sector dropped from 30 percent to 18 percent, and currently hovers around 12 percent nationally, which is lower than it was just prior to the Wagner Act's passage. Black workers have been directly affected by this decline; since 1975, although the percentage of black membership in unions has remained higher than national averages, the actual number of individual black workers in unions has dropped by one-third. Since 2000 alone, the number of African American union members has declined by more than 400,000, down to 2.1 million workers nationally.[3]

Scholars studying the relation between civil rights and the decline of the labor movement have argued that conflicts over race and integration in the labor movement greatly stressed unions at a time when economic and political forces were already working to reduce organized labor's power in the workplace. Although some of these scholars see the decline of the labor movement as primarily the fault of changes in the economy, many emphasize the poor decisions and unwise tactics of labor and civil rights leaders and their followers.[4] Some blame union leaders for failing to address the deeply entrenched racism of their members and failing to offer a broader vision of workplace equality.[5] Others blame the workers themselves, who resisted even the most minor attempts to diversify unions.[6] Still others blame leading civil rights groups, particularly the National Association for the Advancement of Colored People (NAACP), for emphasizing racial integration at the expense of union membership, economic justice, and broader issues of class and political power.[7]

Unlike these scholars, I put politics, particularly the Democratic Party's development of national labor policy during the mid-twentieth century, at the center of the labor–civil rights struggle. The absence of a strong and racially diverse labor movement did not result because of the failures of a few or even many individuals within the labor and civil rights movements. Rather, it is the outcome of a political system that, in its effort to appeal to civil rights opponents, developed a bifurcated system of power that assigned race and class problems to different spheres of government. In the middle decades of the twentieth century, the Democrats passed two landmark pieces of labor legislation: the Wagner Act of 1935, addressing the rights of white labor; and the 1964 Civil Rights Act, addressing the rights of African Americans and other racial minorities. Unfortunately, no legislation was passed that might have brought white unions and civil rights groups together. Instead, these two separate Acts institutionalized the labor-race divide, exacerbating an existing social problem at a time when the government could have worked to bridge

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the gap.[8] By the 1960s, instead of one national labor policy, the federal government had two, each with its own regulatory agency, its own understanding of workplace politics, and ultimately very different understandings of democracy. Not surprisingly, it did not take long for the two to directly conflict with each other.

Democrats initially promoted labor rights at the expense of civil rights. When they finally turned to civil rights, Southern Democrats in Congress and conservative union leaders combined with Republicans to sabotage reform efforts by preventing the creation of a unified regulatory agency that would have handled both labor and civil rights complaints. This move later backfired—at least for unions—when civil rights organizations pushed the federal government to let them resolve their disputes through the courts instead. Contrary to the expectations of many, the courts proved to be much more powerful and successful in integrating labor unions. However, because the courts, and not the labor regulatory agencies, were the primary agents of reform, their efforts showed little concern for the broader state of the labor movement. Many of the court decisions that promoted civil rights simultaneously weakened the bargaining strength of the targeted unions, contributing significantly to the situation we have today—a diverse but weakened labor movement. At a time when many unions were already under siege from a restructuring economy and a revitalized business class, few within the courts were sensitive to the political and financial strain their actions put on the broader labor movement.[9] It did not take long for employers to seize on the vulnerability of unions to their own advantage, working aggressively to defeat unions in the workplace. The 1970s, then, were a time when unions were not only being integrated but were also losing considerable economic and political clout. Unions that suffered financially had to put more resources into lawsuits and less into organizing. Employers began to win more and more union certification elections.[10]

It was also at this time that white union workers started to leave the Democratic Party in droves. Nearly 85 percent of white union voters supported President Lyndon Johnson at the ballot box in 1964, but only half as many white union members supported Hubert Humphrey four years later. The 1968 election represents the first time since Franklin Roosevelt's election in 1932 that a majority of white union members failed to vote for the Democratic Party in a presidential election (see Figure 1.1). The numbers declined to a low of 36 percent for George McGovern in 1972, and only 44 percent for Jimmy Carter in 1980. Numerous scholars have argued that race was an important factor in this shift.[11] The data in Figures 1.2 and 1.3 support their argument. Starting in 1972, when the American National Election Study began consistently to ask whether respondents support government activism on behalf of black Americans, we see a clear

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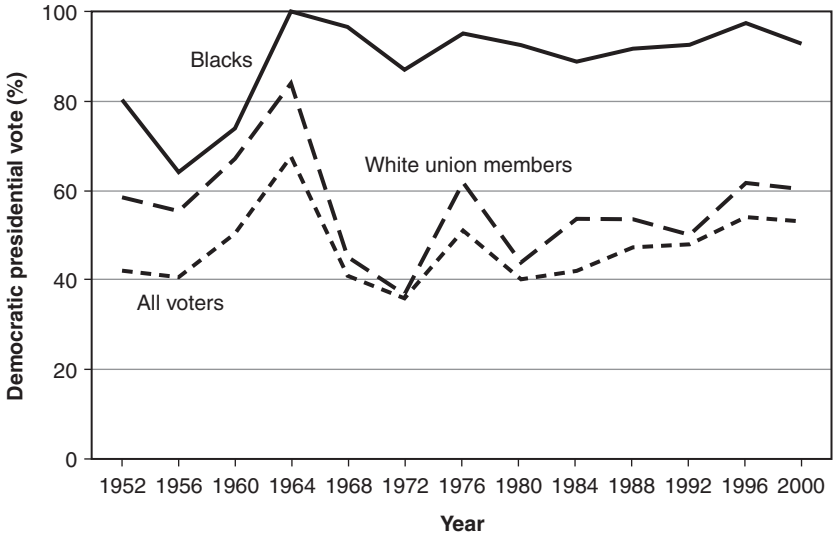

FIGURE 1.1 Votes for the Democratic Presidential Candidate, 1952–2000. *Source:* The data for this figure are from the American National Election Study. For data prior to 1952, see George Gallup, "How Labor Votes," *Annals of the American Academy of Political and Social Science* (1951), 124. Gallup polls put the percentage of white union support for Roosevelt and Truman at between 72 and 80 percent between the years 1936 and 1948.

and significant split among white union respondents. Majorities of white union respondents who support government aid to blacks have consistently voted for Democratic candidates, whereas white union respondents who oppose government aid have repeatedly voted at rates of 20 to 30 percent less for the Democratic Party. Equally important, the number of these conservative white union members has been more than double, sometimes triple, the number of liberal white union members.

The abandonment of the Democratic Party by significant numbers of white union members has had numerous consequences. First, it allowed Republican presidents to change the composition of the National Labor Relations Board, leading to the overturning of dozens of labor doctrines which, in turn, are perceived by many labor scholars and economists as critical to the massive decline in union power under Ronald Reagan in the 1980s.[12] A similar rollback has occurred in the area of civil rights, particularly in the workplace, as a result of changes in the composition of federal courts and the Equal Employment Opportunity Commission. Second, it has led to significant changes in the Democratic Party regarding how to handle both race and class issues. Democratic Party leaders and their pollsters throughout the 1980s and 1990s were well aware of white

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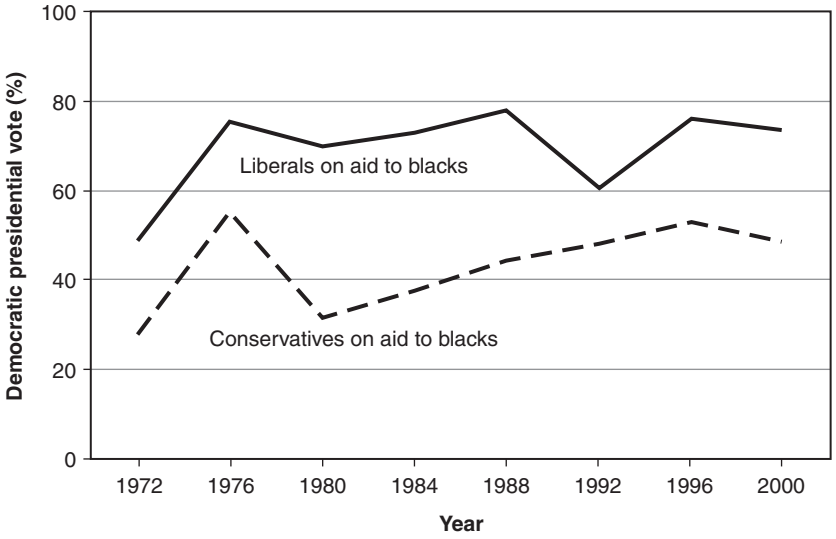

FIGURE 1.2 White Union Vote for President, Controlled by Views on Government Aid to Blacks, 1972–2000. To determine voters' views on government aid to blacks, voters were asked the following question by the National Election Study: "Some people feel that the government in Washington should make every possible effort to improve the social and economic position of blacks. Others feel that the government should make no special effort to help blacks because they should help themselves. Where do you place yourself on this scale, or haven't you thought much about it?" In the figure, liberals are coded as supporting government aid, and conservatives as opposing such aid.

union conservatism on race issues, and so they made a series of political calculations and choices affecting their party's policy agenda that produced not only a more conservative stance on civil rights but also a more conservative stance on labor and working-class issues.[13] Despite passionate opposition by both labor and civil rights groups, two of President Bill Clinton's biggest accomplishments were the ratification of a fair trade agreement and the reform of welfare.

The great irony in the decline of both labor and civil rights in the workplace and in American politics is that most of the people actively fighting one another at the time were progressive Democrats—legislators, union leaders, civil rights groups, their lawyers, federal bureaucrats, and judges. At different times in the twentieth century, these groups achieved monumental victories that strengthened and deepened American democracy, but their success often occurred quite apart from or in direct confrontation with other groups. The labor movement of the 1930s, particularly the American Federation of Labor, resisted the complaints of civil rights

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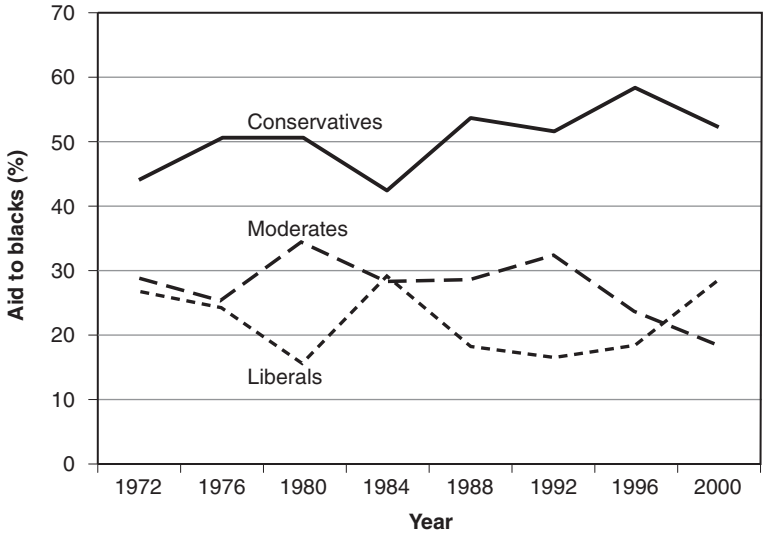

FIGURE 1.3 The Views of White Union Members on Government Support to Blacks, 1972–2000. In the National Election Study question, voters were asked to place themselves on a 7 point scale regarding their support of government aid to blacks (see figure 1.2 for the exact question). In the figure, liberals are coded as supporting government aid whether strongly or mildly, and conservatives as opposing such aid, whether strongly or mildly. Moderates are coded as having responded with a "4" on the 1–7 scale.

groups and achieved federal legislation that simultaneously provided unions additional rights and enabled them to more easily exclude African American workers from their ranks. While many national labor leaders supported the Civil Rights Act of 1964, they also successfully fought for important loopholes that would allow unions to avoid being targeted by the new antidiscrimination laws. When those loopholes were disregarded by judges a few years later, and civil rights groups called for affirmative action and greater integration of the workplace, union leaders and their members became some of the most vocal proponents of the backlash against civil rights. Meanwhile, lawyers became a backbone of the new era of "rights." However, rights would be of a limited type. Courts granted rights for individuals being discriminated against on the basis of race but refused to extend these rights to those discriminated against on the basis of class. The lawyers representing civil rights clients were often disinterested in class-based arguments, even those coming from their own clients, and, equally often, were tied to corporate power, representing civil rights clients *pro bono*, which was backed by the financial support of corporate firms and their clients. These lawyers promoted a rights regime

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that, although not exactly dovetailing the desires of corporate America, was unwilling to confront economic power in any meaningful way. As seen most recently in the Supreme Court's latest affirmative action case, *Grutter v. Bollinger*, corporate America has embraced certain forms of the rights revolution: Fortune 500 firms wrote amicus briefs and corporate lawyers were the primary force behind the litigation. The use of corporate lawyers to fight union racism has thus often served the dual agenda of expanding civil rights and, in the process, weakening the chief opposition to free market capitalism.

In many ways, then, this book is not simply a study of labor's racial divide. It is both a biography and an autopsy of the Democratic Party during the New Deal era; it offers an account of its birth, an analysis of its often precarious life, and an inquiry into its death. The New Deal coalition, which rose to prominence under President Franklin D. Roosevelt in the 1930s and remains a source of nostalgia for Democrats trying to revive their party today, was always divided along racial lines. Two of its most powerful constituents were southern whites and white union members. At the same time, in response to its promise and achievements, African Americans and Latinos began to vote in large numbers for Democratic candidates, creating an unsustainable coalition of racial minorities and supporters of racial apartheid. Although a fight over civil rights was inevitable, the Democrats tried to keep their coalition together. One way to do this was to promote civil rights through quieter, and at the time less controversial, legal channels while avoiding the issue as much as possible in the legislative and electoral process. But relying on civil rights lawyers and judges to carry out civil rights policy was a double-edged sword. The legal system was a powerful weapon in achieving significant victories for civil rights, especially in the early stages of the movement. Unfortunately, lawyers benefited from these victories as much as did black, Asian, and Latino Americans. Once emboldened, the legal community pushed its own version of a progressive agenda, listening less to those they "represented" than to their own values that tended to emphasize racial classifications and "rights" instead of systemic inequalities, particularly those that intersected with race and class.[14]

Today, both the labor and civil rights movements are struggling, independently and together. The union movement has changed dramatically since the 1960s—minority workers play greater leadership roles, and some of labor's biggest victories have involved campaigns of African American and Latino workers. Labor and civil rights groups also work together for the passage of civil rights and workplace legislation. When united, they have managed to expand social welfare legislation and veto specific efforts to dismantle their achievements. But in the aftermath of George W. Bush's reelection victory, the leaders of both movements are

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soul-searching. Some national labor unions have ended their long-standing membership in the AFL-CIO, and some are calling for an end to their involvement with the National Labor Relations Board (NLRB), the agency that unions fought so hard to establish in the 1930s. Civil rights groups are similarly debating their next move. Although there is vehement opposition to George W. Bush, the Democratic Party has not provided a clear alternative. Democrats did little to promote racial equality during the 2004 campaign, and leading Democrats have blamed critical civil rights issues such as voting rights, welfare rights, affirmative action, and desegregation for the party's misfortunes in the voting booth.

Even so, rebuilding the labor movement remains—or should remain—an important goal for workers, civil rights supporters, and the Democratic Party. In strictly economic terms, unions continue to be one of the best sources of individual advancement and financial security. Unionized African American workers in 2006 made on average $190 more per week than did nonunionized black workers; Latinos in unions made an average of $220 more per week than those not in unions.[15] Union members are among the increasingly few Americans with job security, health and retirement benefits, and access to representation and binding arbitration if they believe they are treated unfairly in the workplace. Outside of the workplace, union members are more likely to vote, to be politically active, and to be knowledgeable about and interested in current political events.[16] Labor unions have been powerful advocates of civil rights, welfare rights, increases in minimum wage and benefit laws, and broader job security. In the 2004 presidential election, labor mobilized its membership to vote well beyond its proportion of the electorate overwhelmingly for the Democratic Party. Moreover, in a time when pundits are asking, "What's the Matter with Kansas?" it is noteworthy that in the last presidential election, three critical groups that were supposed to have left the Democratic Party in droves—white men, suburban voters, and gun owners—voted overwhelmingly for the Democrats if they were also members of unions.[17]

Democracy, Institutions, and the Twentieth-Century American State

This book is also motivated by a methodological concern: to better make sense of the labor civil rights struggle in terms of the problem, the results, and the consequences, we need to place it in the broader context of American politics and examine how this politics has developed over time. I argue that there are two causal forces at work that are often overlooked by previous scholars of labor civil rights. First, I am interested in the independent role of "the state." The American state is the site of contestations

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over power within a framework of institutions, that is, within the rules, incentives, and organizations that shape the political environment and the actors who work in its midst. It is within an institutional context that power is exerted, fought for, shaped, and maintained. Similar to other "new institutional" scholars influenced as much by Max Weber and Michel Foucault as Karl Marx, I do not believe that the institutional rules simply reflect the interests of the powerful but instead believe they can take on a life of their own and have an independent causal effect on how power is attained and manifested. As such, I pay careful attention to how the institutional environment shapes both the behavior of political actors and political outcomes in often unintended and surprising ways that are not merely a reflection of societal preferences. Second, I am interested in the historical development of these institutions. History is a way to identify the existence and consequence of state and institutional autonomy. The existence of institutions as independent sources of power and authority necessitates that future political reform takes place not functionally in response to societal demands but in a manner constrained by politically entrenched interests, resulting in tension and conflict. Indeed, this is the heart of my argument; two vectors of power involving labor and civil rights, created in different historical moments, conflict with each other, leading to unintended consequences.[18]

In part, this methodological argument puts me squarely within the mainstream of much of American political development (APD). In the process, however, I will both expand and challenge APD scholarship in a number of ways. When I argue that *all* aspects of American politics need to be understood institutionally, I encroach on controversial ground and stretch the terms "institutions," "politics," and "democracy" in ways that are often resisted by this discipline and the broader scholarship on American politics and political history. I proceed in this section by first discussing the influence of institutions in national labor policy development. I then turn to how we might think of two spheres of American politics that are often discussed in only limited institutional terms and sometimes seen as the antithesis of these terms: the politics of law and courts, and the politics of race and racism.

Labor Policy in American Political Development

Institutions matter because U.S. national labor policy divided labor and race into separate forums, splitting the matters politically and legally, and leading to conflict instead of intersection. This institutional division was a result of compromises made by Democratic Party leaders from Franklin Roosevelt's New Deal to Lyndon Johnson's Great Society to keep a racially fractured political coalition together. Because Democrats were

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limited in their ability to pursue civil rights reforms, labor policy developed through a "patchwork" of different agencies, each created at different historical moments with different powers that ultimately came to be in direct conflict with one another, weakening all in the process.[19] By the 1960s, courts emerged as significant arbiters of the process and in a manner that suggests a prominent place for judges and courts as substantive policy makers in our understanding of the twentieth-century American state.

The claim that there was a distinctive and fragmented development of labor institutions in the twentieth century is inspired by scholarship that has examined the consequential nature and order of American state building. The core of this research has been to see how varying historical and political contexts have led the U.S. government to develop bureaucratic authority and capacity. APD scholars have principally been concerned with two dominant features of American politics: first, the weakness of the American state, and specifically the difficulties politicians and policy makers have had in developing governing organizations that could effectively regulate economic and social practices in a nation with a strongly individualistic and antigovernment ethos.[20] Second, scholars have been concerned with how, over time, the development of different political institutions in specific historical moments has led these institutions and policies to coexist in tension and conflict with each other. A central theme in the state-building literature is that governing actors who respond to political conflicts must always work within existing institutional arrangements, which constrains their possibilities for action and leads to direct confrontation between the old and the new, often resulting in inefficiency and unintended policy implications.[21]

The first of these themes—the weakness of the state—has been a prominent consideration among APD scholars who focus on the historical development of national labor policy. One of the most distinctive features of the U.S. political economy, after all, is the lack of a vibrant labor movement compared to other industrial nations, and the absence of a powerful national labor political party that could effectively build a social democratic state. Political historians and APD scholars have addressed this concern differently, with some denying the absence, or at least distinctiveness, of labor weakness in the U.S., and others attempting to locate the specific moments when national labor policy was both possible, and why it failed.[22] A number of different features of American state building have been blamed for the slow and ultimately weakened development of labor politics, with common themes including the conservativeness of American ideology and the unique power of corporate capital. Many scholars within the APD literature have focused on the confluence between a weak federal government and a simultaneously powerful legal

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system that aggressively constrained government efforts in the late nineteenth and early twentieth century to promote a safer and fairer workplace.[23] The 1930s, in this view, was a critical moment for U.S. labor policy, as it was the time when the elected branches finally triumphed over the courts, passing national regulatory policy that gave them direct authority over various avenues of the economy. For many APD scholars, this was a fundamental breakthrough, a defining moment of American state building, not only for labor but for American democracy more broadly.

In fact, the New Deal remains, in the eyes of many left-wing progressives, the transcendent period of social and political justice. Franklin Roosevelt's administration passed a bevy of laws enabling the federal government to influence almost every aspect of people's lives in ways that were unprecedented in American history.[24] The New Deal constitutes the triumph of democratically elected representatives over the courts to control the economic rights and working conditions of a majority of American citizens. Juxtaposed with the era prior to the New Deal, when the Supreme Court dominated economic life in America by blocking elected officials' efforts to regulate the economy, President Roosevelt's success in bringing laws authorizing the government to regulate the economy arguably represents the right of the majority voter over that of the economically privileged corporate owner. Elected officials in Congress and the Executive Branch would determine economic policy and had the opportunity to regulate the economy as they saw fit. Judges relying on notions of fundamental rights that were antithetical to participatory democracy were no longer able to prevent the majority from carrying out their will.[25]

Perhaps nowhere was the extension of electoral democracy more apparent than the gains labor unions received with the passage of the Wagner Act. By allowing workers to choose their own representatives to act for their interests in the workplace, the Wagner Act extended democratic principles to the place where many Americans spend most of their time. As Karen Orren argues, the workplace had long been the site of "feudal labor relations," because it was strictly hierarchical and enforced through common law rules of master and servant that allowed employers to have unimpeded control over wages, workplace hours and standards, and the rights of their laborers.[26] Labor supporters heralded the Act as "the next step in the logical unfolding of man's eternal quest for freedom," and workplace democracy was described as a fundamental extension of democratic self-government, the difference between "despotism and democracy." Just like citizens in government, labor leaders argued, workers should be free to form or join organizations and engage in collective action. Most important, and most essential in bringing democracy to the workplace, was that the Act enabled workers to designate representatives

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of their own choosing in unbiased elections: The Wagner Act, they claimed, "does no more than guarantee that right to American labor."[27] Although these comments from labor supporters may reflect the excitement of the moment, many scholars today continue to embrace such lofty democratic ideas. Most notable is Orren, who argues that the Wagner Act represented a fundamental transformation of American politics and democracy, pushing national legislators to the forefront of economic and labor policy making, and reducing the role of the Supreme Court from an ardent protector of economic liberties to merely an assenter to national legislative bodies.[28]

I offer both a critique and a revision of this narrative of national labor and democratic development. The critique is that the body of scholarly work on labor policy has paid almost no attention to the role of race in constituting both the potential and limits of labor law.[29] A big part of the reason for the absence of such discussion by many scholars is that, in the early 1930s, civil rights issues had yet to become manifest as a primary contention in Democratic Party politics. African Americans had little political representation, and, as a result, one has to search page after page in the annals of legislative history to find even the briefest mention of civil rights concerns during much of the debate over New Deal labor policy.[30] Moreover, scholars of American political development have tended to focus primarily on economics as the fundamental division of American politics, ignoring the possibility of race as a similar tension or division that might have concerned state builders.[31] To the degree that race appears in labor scholarship, it arises when the issue dominates national news headlines, primarily during the 1960s and the civil rights movement. But the implicit result of all this work is to see race as something that seemingly "emerges" to destroy the existence of "non-racialized" pre-existing institutions.[32] Labor institutions that developed in the 1930s are perceived as race-neutral, universal organizations; in turn, the civil rights movement of the 1960s becomes implicitly seen as more narrowly focused—as a special interest group only concerned with one issue, willing to weaken the possibilities of broader movements in the process. In doing so, this scholarship has created a too neatly drawn dichotomy between the two, ignoring that the labor movement was never the class-first, race-neutral coalition it has been portrayed to be.[33]

When we incorporate race into the initial development of labor institutions, we find that the institutions break down precisely because they were built on faulty orders, critically weakened by racial divisions that existed at the time of their legislative passage.[34] Labor's decline is not simply the result of new groups and problems emerging from the civil rights movement; it is better understood as a result of the initial weaknesses of institutional design ironically made possible by the "success" of anti–civil rights

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interests to marginalize African American interests in the Wagner Act. When the Wagner Act first passed, the labor movement had a significant race problem, and state building would play a critical role in its outcome, both for good and bad. As will become evident throughout the book, many unions denied membership to black members as a matter of policy, and others simply by common practice. Civil rights groups successfully mobilized some unions to make internal reforms, but large-scale efforts required federal intervention. The particular method of this intervention had long-term consequences. Because the government was dominated by a Democratic Party that was split along racial lines, the party's labor policies required compromises that would eventually cause those policies to collapse in a heap of contradictions.

One might think, for instance, that the Department of Labor (DOL), which had been in existence since the nineteenth century and was provided a seat in the White House Cabinet in 1913, would be a fitting place to handle labor civil rights issues. Indeed, the department made some initial attempts to address both race and labor issues in its early years, and in the 1960s it was largely members within the DOL who were arguing that the department needed to take control of a problem that had been divided up between too many different agencies. But, most often, the DOL was on the sidelines of labor civil rights issues. When it tried to be more active, it found its funding cut by southern Democrats in Congress or found itself so beholden to certain union and political interests that it accomplished very little. Instead, every time the federal government moved to significantly reform the workplace it created a new agency, backed by a different constituency and with different types of authority and scope. The National Labor Relations Board came into existence as part of the Wagner Act in 1935 and was a critical agency in promoting union power in labor's heyday of the 1930s to the 1960s. But the power of the Act and the NLRB would also be sharply constrained by the Democrats' racial divisions. With southern Democrats and racist union leaders wielding great influence, the Wagner Act allowed racially exclusionary unions to have constitutions that prohibited African Americans from membership and to sign collective bargaining agreements that discriminated on the basis of race. When civil rights groups demanded reforms, the NLRB was continually unresponsive, claiming (in many ways correctly) that civil rights issues were outside their legislative mandate.

In response, civil rights groups promoted the creation of a third government agency to respond to discrimination in the workplace. With the creation first of the Fair Employment Practice Committee (FEPC) and later the Equal Employment Opportunity Commission (EEOC) in 1964, civil rights groups now had an agency specifically designed to weed out discrimination by both employers and unions. But the creation of the agency

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was opposed by just about everyone else: unions, southern Democrats, Republicans, and the business community all opposed the agency at different times, and together they weakened it significantly; indeed, it was given no enforcement power in 1964 and few resources to combat widespread problems around the country. Complaints of discrimination flooded the agency during the 1960s, and its members were quickly overwhelmed by the sheer volume and their inability to act.[35] Moreover, as the EEOC tried initially to confront the problem in unions, they did so armed with a form of law, Title VII of the Civil Rights Act, which, in prohibiting employment discrimination based on race, color, religion, sex, and national origin, often directly conflicted with provisions of labor law as defined under the Wagner Act. By the late 1960s, all three federal agencies were being asked to play some role in responding to labor's race problem, but they were not working together and quite often were in confrontation with one another. The government's handling of union discrimination had become, in the parlance of those who study American state building, one of "patterned anarchy," as multiple agencies, created at different times to address different problems, were all attempting to address the same issue in fundamentally different ways, thus working at cross-purposes and producing inefficient and conflicting policies.[36]

One revision that comes from adding race to our understanding of labor policy is a sharper recognition of the place of law and courts, and the correspondingly limited nature of the supposedly "fundamental" ascent of electoral democracy in the workplace. It was in response to the ineffectiveness of the Democratic Party on civil rights that political activists turned to the legal system. After only recently acceding control of the workplace to the elected branches in 1937, courts quickly reemerged as central political actors. Through an onslaught of lawsuits and judicial decisions, courts effectively brought about dramatic changes both in terms of the law and by placing a huge financial burden on those unions that attempted to resist civil rights law. This was in part because elected politicians saw empowering courts during this time as a politically safer way of promoting controversial policies that had the potential to split their coalition.[37] Another contributing factor was that, whereas the protectors of racial hierarchies were powerful enough to stop the passage of effective federal legislation, they were paying less attention to changes that were altering the capacity of courts to handle this type of problem.

Under the radar—indeed, often passed without any objection by southern Democrats—the legal profession was gaining a wide range of new powers and weapons that allowed it to transform the judiciary into a more autonomous and effective institution of its own. Whereas government agencies were consistently weakened by political interests that opposed civil rights reforms, reforms to court capacity were less controversial

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because they were backed by a powerful interest group—lawyers—with no organized opposition. Few paid attention to the various ways in which the federal government expanded the power of courts and lawyers—including civil rights opponents who headed many of the congressional committees that passed these laws—and almost no one predicted the consequences. Seemingly technical changes, such as the passage of courtroom procedure rules, had dramatic political consequences. For instance, new courtroom rules that allowed lawyers to sue on behalf of a "class action" and generally made it easier for lawyers to bring cases into court, as well as rules that allowed these lawyers to sue for back pay and damages which both encouraged more lawyers to take these cases and made their victories more financially damaging to civil rights resisters, had the huge consequence of broadening the scope of judicial power to handle more and different types of cases. This in turn would have equally dramatic consequences for labor civil rights. Once empowered, civil rights lawyers armed with the threat of making unions and employers provide attorney fees as well as back pay to thousands of individuals represented in class-action suits pushed many national and local unions, which feared bankruptcy from these lawsuits, to sign consent agreements with strict time tables for changes in workplace demographics. Federal judges continually overturned racially biased union security agreements that the union and the employer had established through collective bargaining agreements.

In the process, courts—mostly unintentionally and seemingly without much awareness—scaled back many long-standing and critical New Deal protections of union workers. Courts dramatically scaled back the province of electoral democracy and its representatives in the workplace. Because the EEOC was powerless to handle discrimination on its own, it necessarily relied on the courts to enforce its mandate, and lawyers quickly flooded federal courts with Title VII claims against unions. Judges interpreted these cases as involving issues of antidiscrimination law, and quite rightly found unions consistently in violation of the Civil Rights Act. In doing so, however, they ignored labor law, and thus issues such as collective bargaining, majority representation, seniority, and security agreements were not addressed in antidiscrimination law. Those issues, the judges believed, were for the NLRB, the agency created to protect union rights. As a result, unions found themselves in courtrooms with judges who were fairly ignorant of labor law and insensitive to some of the reasons why even the most discriminatory of unions, if reformed, could serve to benefit civil rights causes down the road. The very reason why unions were protected by labor law—to give workers rights vis-à-vis far more powerful employers—was absent from most of these judicial considerations. The single-mindedness of these judges and lawyers led them, somewhat cavalierly, to overturn important provisions of labor law that

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protected union power. It also led them, equally offhandedly, to impose huge financial burdens on organizations that quickly became vulnerable.

More important for scholars of American political development is that, by the 1960s, the federal court system had once again become one of the leading engines of the regulatory state.[38] But, in so doing, courts were not merely replicating the role they played in the *Lochner* era. Back then, in the decades before the New Deal, courts actively suppressed state activism, continually vetoing the efforts of elected officials to regulate the economy. In the 1960s, courts played a far more active and *affirmative* role in building the powers of the state and expanding its powers to regulate civil society and the economy. This affirmative power of courts and its central place in the power of the American state is one rarely ascribed to it by APD scholarship.[39] Although these scholars have emphasized institutional dynamics in so many other spheres, including the expansion of executive agencies during the New Deal and the creation of the Executive Office of the President, they have been slow to recognize the comparable expansion of courts as one of the primary arms of state power.

This does not mean that political scientists fail to see courts as institutional. Rational choice scholars, for instance, have done much to show the ways in which judges, akin to other political actors, are influenced by institutional incentives.[40] APD scholars in recent years have begun to do some of the same, especially to show how electoral officials will promote court activism for their own strategic advantage.[41] Court authority is equally variable and contested in these accounts, and often rests on legislators deferring such powers in times when they find themselves ill-suited to respond to political problems.[42] Nonetheless, something important is missing from these accounts. Because these scholars tend to see courts as little more than a small group of judges who make declarative judgments rather than as broader institutions filled not only with judges and laws but with courtroom procedures, weapons, and regulatory powers, they identify the influence of the courts merely as that of veto and suggestion. As such, courts are merely an obstacle to the development of a regulatory state which is itself controlled by elected officials. Court power is thus juxtaposed to state power through electoral representation: elected officials try to promote state development, and courts try to stop it. When courts have tried to become active, as this argument goes, they have stretched themselves too thin. Courts make declarations but lack weapons to carry them out. They are a "hollow hope" that makes loud declarations but lacks the institutional capacity to enforce their decisions.[43]

In chapter 4 we will see a legal system far more powerful than it has been credited by political scholars. And the reason for this power comes from the institutional breadth of the law. Courts were critical to integrating resistant labor unions, compelling compliance with the help of a

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number of overlooked institutional weapons. First, in contrast to electoral officials who avoided civil rights issues by keeping them off the political agenda, courts provided generous access for litigants to push for civil rights goals, ensuring a court hearing and response on an issue. Responding to a steady stream of civil rights litigation, courts interpreted congressional statutes expansively, thus creating new rights, common laws, and political opportunities after elected officials had either refused to legislate or purposely created legislation that was ambiguous, contradictory, and unenforceable. Courts also compelled union compliance. While discriminating unions consistently slipped through government enforcement efforts by taking advantage of legislative loopholes, they were compelled to integrate their workforces in the face of court-ordered consent decrees and appointed "special masters," as well as in response to heavy litigation costs, both from damage awards and lawyer fees. Although it is a truism that courts do not have the power of the purse or sword—that they do not have enforcement powers in the classic sense of armies, agencies, and legislative might—the union example shows that courts can effectively enforce their will by making it too financially costly for unions not to comply. Litigation costs and court-ordered damages, as seen most recently in high-profile cases involving hundreds of millions of dollars against the tobacco and gun-manufacturing industries, can provide a powerful financial incentive for people to follow court orders in the absence of legislative or executive action.[44]

This point is not meant to be taken absent its potential consequences. Although courts were particularly effective in implementing civil rights policy, their efforts simultaneously helped bring about many of the unintended consequences of labor decline. Unlike regulatory agencies that are designed to reach compromise between antagonistic interest groups, courts as institutions tend to provide "winner-take-all" outcomes that benefit individual litigants. Although surprisingly effective in carrying out their goals, this court strategy is equally effective in damaging other interrelated facets of the social problem. Without a coherent policy strategy, the outcome resulted in the diversification of an increasingly marginal institution. Regarding labor union integration, court litigation tended to emphasize "rights" over "compromise," often leading to court decisions that disregarded the potential costs for the labor union and for minority workers seeking access to those unions.

Seeing Race and Racism Institutionally

If scholars have been slow to see court activism in an institutional manner, there is also fairly widespread consensus that race and racism are absolutely incomprehensible in terms of institutions. After all, racism leads to

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the breakdown of institutions, the absence of rationality, and the expression of chaos outside acceptable norms. Our understanding of racism in America, as I suggested in the preface, in many ways has changed little since the work of Alexis de Tocqueville and Gunnar Myrdal, who both saw racism as acting outside fundamental notions of American ideology and institutions.[45] Racism is perceived as a prejudice, an irrational, unconscious sin that leads people to act abnormally and in a manner counter to the values of our society. Even scholars of political institutions tend to treat race and racism differently than other dimensions of society. This, of course, is certainly right at one level—racism does affect behavior and can lead to violence, rage, and hatred that can appear outside the confines of rationality and normality—but it is also not a complete understanding of race and racism in America. The consequence of this approach is that it tends to see racism as apolitical and outside the bounds of everyday legitimate behavior and institutional rules and incentives, which then allows us to ignore the ways that it *is* a part of everyday behavior. Racism does not just rise up at dramatic moments in response to irrationality. It is continually reproduced by politics; it is constitutive of the American state, its rules, its norms, and its form of democracy.

Political scientists are not alone in treating racism as outside the confines of institutional analysis. Popular among labor historians who study union racism is the recent work of "whiteness" scholarship, which emphasizes the role and agency of white workers who, these scholars argue, should be seen as active participants in racist activity, benefiting from both the psychological and material "wages" of racism.[46] Exemplary is David Roediger's *The Wages of Whiteness*, a book that effectively brought the individual worker to the center of understanding racial prejudice and has been followed by an abundance of books that either focus on the agency of racist white workers or on its opposite, courageous civil rights activists who struggled for justice in the workplace.[47] Although these works have made important strides in understanding the relation between labor and race, they too often define and limit their understanding of union racism within the confines of individual and group psychology. They argue that union racism results from a combination of white working-class entrenchment—the defense of their social advantage over blacks—and resentment, which is based on those workers' feelings of insecurity, economic marginalization, and social anxiety. The white worker, writes Roediger, "made anxious by fear of dependency, began during its formation to construct an image of the Black population as 'other'—as embodying the preindustrial, erotic, careless style of life the white worker hated and longed for."[48] When these scholars refer to institutions, it is not in a manner that reflects the independent impact institutions have on racism, nor are institutions understood as political; instead, they are seen

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merely as harboring racist individuals, which obscures the strategic and rational aspects of an institution's racist behavior.

This particular focus on the individual psychology of white workers, I argue, loses sight of the context in which human action is situated, particularly the institutional and political explanations for racist manifestations in the workforce.[49] Racist manifestations by union workers are the result of a complex set of factors, and latent psychology is less meaningful in understanding its importance in the union movement than are the maneuverings and behavior of strategic actors—both inside and outside unions—who are following rules and incentives provided by institutional organizations. Racism does not become politically problematic simply because some or even many individuals hold racist attitudes; it becomes so because institutional dynamics legitimate and promote racist behavior in a concentrated and systematic manner. In this book I examine the ways in which institutions and state building either deny or encourage racist acts by providing the rules and procedures that offer "rational" incentives and motivate people either to behave in a racist manner or in a manner that motivates others to do so. Particularly in the union context, where unequal power is so readily apparent to the relevant participants, the way that institutions structure race, class, and power dynamics is critical in determining the consequence of the psychological behavior.

Where the psychological model perhaps becomes most wanting is when it involves the intersection of groups that are marginal in American politics and society. As with Cathy Cohen's study of homophobia in the African American community, this book examines prejudice among groups that have little power themselves in American society.[50] Labor unions have never dominated American politics; they have had moments of significant influence, but this power has always been precarious and necessitated bargains and compromises that weakened the more progressive elements of the coalition. In many ways, unions were at the forefront of civil rights policy advances. At the same time, labor had a significant internal race problem. Similarly, civil rights groups such as the NAACP have fought for power and influence largely from the sidelines. The NAACP and local civil rights organizations have been critically important in helping to mobilize black workers to join and be more active participants in the labor movement. Yet, the NAACP made choices at different times that led it to attack potential allies (notably those whose economic ideology was to the left of the NAACP) and misconstrue and ignore some of the demands of those they attempted to represent.[51] Institutions, I argue throughout this book, have shaped all these disparate facets of political action and, in doing so, have provided incentives for powerful actors to benefit from those that are less powerful by pitting them against one another in sites where these conflicts are most visible. It is when clashes between less

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powerful groups are most intense that an institutional explanation can allow us to step back and see such motivations and behavior in a broader context of power, rationality, and structure.

To Follow

The following chapters all examine the effort to integrate labor unions through an institutional lens. The next four chapters look at labor civil rights through the means of four political approaches. In chapter 2, I look at the activities of political officials from the 1930s to the 1960s as they attempt to set up multiple government agencies designed to confront some aspect of labor civil rights. Here we see the development of a divided national labor policy as government officials attempt to appease various political interests opposed to civil rights by introducing abbreviated reforms that led to policy fragmentation and, ultimately, institutional chaos. In chapter 3, I examine the role of social movement activism, specifically the NAACP's efforts in the 1930s, 1940s, and 1950s, to integrate labor unions and the power of labor unions to resist such efforts. Chapter 4 turns to the role of law, emphasizing the development of legal powers as a product of legislative behavior and the internal institutional dynamics of courts. Chapter 5 examines the role of an administrative agency, the NLRB, in handling union racism. The NLRB's behavior provides a dramatic alternative to the way courts understood civil rights, in turn emphasizing an alternative understanding of racial conflict that may be problematic in certain ways, and complicated, but provides at least an outline of what a truly institutional and intersectional approach to race could look like.

In the concluding chapter, I continue with a theme that lurks throughout the book: What do we mean by democracy and representation, and which of our forms of politics, including social movements, legislatures, and courts, can best provide it? I argue that when we understand the Democratic Party state of the twentieth century, we see numerous interactive and intersecting features that scholars have too frequently treated as totally separate. Relying too much on formal definitions of representation, scholars have ignored democracy's inherent messiness. Taking institutions more seriously leads us to conclude that democratic equality often necessitates action by those who less directly represent the public—not because they are removed from public opinion and the pressures of majority tyranny but because they have incentives to represent both minority and majority groups that ineffectively represent themselves.

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Concerning the sources compiled in this book, readers will find fairly extensive archival research throughout the chapters that provides evidence of union, civil rights, legal, and federal government activity. Archives of the NAACP, AFL-CIO, United Auto Workers, and United Steelworkers Association, as well as U.S. National Archives materials from the DOL, EEOC, NLRB, and FEPC, were all used. Union financial data were provided by the Department of Labor, union demographic statistics came from the EEOC and U.S. Census Commission, and litigation records were obtained from numerous courthouses. However, I am not a historian, and my goal was to engage in topics of political theory rather than offer a complete history of the integration of labor unions. As such, throughout the manuscript, I relied first on secondary sources whenever they were available, including a sizable collection of historical work on the integration of individual labor unions around the country. The archival work was undertaken to supplement the secondary sources. Very often, sufficient secondary research was unavailable to answer the theoretical questions I was asking. Just as often, some of the best secondary sources were published by scholars asking different questions, and thus I explored the same archives to see if they contained material more directly related to my immediate needs.

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