Acting When Elected Officials Won't: Federal Courts and Civil Rights Enforcement in U.S. Labor Unions, 1935–85

PAUL FRYMER *University of California, San Diego*

Using the racial integration of national labor unions as a case study, I find that courts played an important and meaningfully autonomous role in integrating unions while elected officials largely failed to act. Courts, unlike elected officials, offered civil rights groups relatively easy access to the legal agenda. In response to thousands of cases in federal courts, judges rewrote key civil rights statutes, oversaw the implementation of their rulings, and used attorneys' fees and damage awards to impose significant financial costs on resistant unions. Court power was the product of multiple and historically contingent forces that involved the interaction of elected officials, civil rights activists, and the legal community. Elected officials delegated to the courts the power to enforce civil rights laws and tacitly endorsed procedural changes that augmented the courts' institutional powers and the legal community's professional influence. In response, judges and lawyers promoted and implemented a civil rights agenda far beyond the endorsement of elected officials. An historical–institutional approach helps explain how courts achieved and wielded independent power and the consequences of their action for civil rights, labor unions, and the American state.

Are courts capable of producing significant social change? Most scholars argue that, absent express executive and legislative backing, courts are ineffective reformers because they lack the institutional weapons to enforce their judgments (e.g., Dahl 1957; Rosenberg 1991). Judges have neither the power to compel behavior nor the staff and resources to confront multifaceted social problems (Horowitz 1977). Gerald Rosenberg's (1991, 338) recent work makes this claim most emphatically: "U.S. courts can *almost never* be effective producers of significant social reform. . . . Problems that are unsolvable in the political context can rarely be solved by courts." While this account has garnered its share of critics (e.g., Casper 1976; Feeley and Rubin 1999; McCann 1994; Reed 2001), most scholars "concede the central insight . . . that federal courts alone rarely 'cause' significant social change" (McCann 1999, 67). For this and other reasons, prominent legal theorists conclude that courts should accept a far more limited role in national politics (Sunstein 1999; Tushnet 1999; Waldron 1999), and even those who promote courts as policymakers tend to see their influence as less direct or "bottom-up" (Klarman 1994; McCann 1994; Silverstein 1996).

Using the racial integration of national labor unions in the latter half of the twentieth century as a case study, I find that courts succeeded in integrating resistant unions in a manner largely independent of both the interests and the actions of elected officials. From 1935 to 1985 the number of African Americans in labor unions increased from roughly 50,000, many of whom were in segregated local unions, to more than 3 million. Legal activism with the aid of "top-down" institutional weapons was crucial to this process. Most notably, courts compelled unions to integrate their workforces by imposing significant financial costs through lawyer fees and damage awards in a series of civil rights lawsuits. It may be 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 agencies and armies—but the case study shows that courts effectively enforced their will by making it too financially costly for unions not to comply.

To argue that courts produced significant social change nonetheless begs a second question—How did judges obtain and wield this power when the Constitution does not seem to provide for it? Scholars and politicians alike have deemed courts "the least dangerous branch" not only because the Constitution does not empower judges to enforce decisions but because judicial independence, as John Ferejohn (1999, 382) points out, "is dependent on the 'willingness' of the popular branches of government to refrain from using their ample constitutional powers to infringe on judicial authority." Elected officials can refuse to enforce court judgments or overturn these judgments with new laws. They retain the power to "ordain and establish" federal courts "inferior" to the Supreme Court, to define the jurisdiction of these courts, to set their budgets, and to impeach judges. During the historical period explored here, there was yet a second obstacle to judicial influence. This case study begins precisely at a time when judges seemingly buckled in response to one of the strongest attacks against their authority by Franklin Roosevelt's court packing scheme. How, then, did courts produce social change independently of electoral officials so soon after their power had seemingly hit a low point?

In recent years, public law scholars have emphasized the importance of historical and institutional context for understanding moments of court power (e.g.,

Paul Frymer is Assistant Professor of Sociology and the Law and Society Program, University of California, San Diego, 9500 Gilman Drive, La Jolla, CA 92093-0533 (pfrymer@ucsd.edu).

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Gillman 1999; Klarman 1996; Smith 1988; Whittington 1999). The integration of unions occurred at a specific historical juncture as a multitude of actors, from elected officials to civil rights activists to lawyers and judges, were pursuing often independent goals that coalesced in a manner enabling court-centered activism. First, elected officials faced great obstacles from Southern Democrats and labor unions in their efforts to pass civil rights policy. Blocked from acting through their own houses, the manner that elected officials could promote civil rights policy was of a specific type—not in their express approval of the civil rights policies themselves but in their often tacit support of the institutional methods by which courts carried out policies. Elected officials provided judges the power to determine civil rights law and establish remedies and encouraged private litigation by passing numerous statutes that made court strategies more affordable for civil rights groups. In arguing that courts were chief activists in promoting civil rights during this period, at least in part because legislators frequently invited and even "commanded" them to intervene, my account is consistent with judicial scholars who emphasize the links between elected official behavior and court power (Gillman 2002; Graber 1993, 1998; Lovell 2003; Melnick 1994).

But courts were not acting simply because elected officials wanted them to. A second factor was at work: Independently, this was a period when the legal community was actively expanding its own profession (Abel 1989; Halliday 1987), and it found elected officials unwitting allies. Elected officials provided uncontroversial "particularistic" policies to lawyers and judges, just as they provide to a myriad of well-organized interest groups (Mayhew 1974), with little recognition of how these policies would be used to promote civil rights goals. Most notably, elected officials delegated to judges and lawyers the power to greatly expand legal institutions, making litigation a more appealing political strategy for civil rights groups. The reform of federal civil procedure rules during this time, for instance, expanded the opportunities for civil rights groups to gain standing and access to a judge, expanded the entry points at which civil rights groups promoted creative legal interpretations through reforms to venue and jurisdiction, made it easier for civil rights plaintiffs to "discover" damaging evidence from discriminators, gave judges the power to create "special masters" who oversaw and implemented court orders, and provided judges far greater influence in determining the remedies, particularly financial, to use against resistant discriminators. Judges and lawyers used these reforms to promote and enforce a social agenda that often ranged far beyond the intent of legislators, express or otherwise.

Third, the decisions of civil rights activists interacted with the opportunities for success provided by other institutions. Civil rights groups used a litigation strategy predicated on their determination that the elected branches were unresponsive and this decision in turn perpetuated its further use. Lawyers not only became central players in the civil rights policy debates, but they consistently and successfully advocated legal solutions instead of political solutions from a deadlocked Congress. While the importance of activist interaction with lawyers and judges in promoting legal change has been well documented (see Epp 1998; McCann 1994; Novkov 2001), I wish to emphasize how the choice by civil rights activists to pursue goals through litigation enabled the further absence of political resolutions. In the following pages, I consider the interaction of these three factors with court power in two historical periods: from the National Labor Relations Act (NLRA) of 1935 to the Civil Rights Act of 1964 and the two decades that followed the Civil Rights Act. In the conclusion, I explore some broader implications about the role of courts and civil rights for the development of the twentieth-century American state.

ELECTED OFFICIALS AND LABOR UNION CIVIL RIGHTS POLICY FROM ROOSEVELT TO KENNEDY

The development of federal strategies to confront union racism took place in the context of a Democratic Party heavily reliant on southern votes to win elections and southern congressional members to pass legislation. In particular, southern Democrats wielded disproportionate power in Congress through a variety of internal mechanisms such as committee chairs in the House and the filibuster in the Senate. Southern influence divided the New Deal majority, preventing Democrats from passing civil rights legislation and necessitating that they include provisions in many of their key economic policies that discriminated against large numbers of minority workers (Katznelson et al. 1993; Lieberman 1998). Southern interests, with the support of many national unions, had similar influence on labor legislation including the passage of the NLRA, an act that Karl Klare (1978, 265) has called "the most radical piece of legislation ever enacted by the United States Congress." Most notably, Section 9 of the NLRA 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. 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" (Wolters 1970, 179). The National Urban League argued that the Act failed to 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 strike-breakers from employee protection even in situations where their only opportunity to gain work was during a strike period (Wagner Archives 1935a). These groups 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.[1] But with

[1] The National Urban League asked for three amendments, one regarding strike breakers, one providing that "no employee otherwise

little African American representation in Congress or in the labor movement—the NAACP estimated the numbers of black union members at roughly 50,000 at this time, half of whom were in the all-black Brotherhood of Sleeping Car Porters (Wolters 1970, 172)—it was soundly defeated (Wagner Archives 1934a). Their efforts to include agricultural workers in the Act, who at the time represented a significant proportion of black workers, also failed. As the Act's namesake, Robert Wagner, acknowledged at the time, agricultural workers 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" (Wagner Archives 1935b).

The NLRA enabled unions to maintain discriminatory workplace standards for decades and high-profile legislative reforms of the Act in the 1940s and 1950s failed to offer further protection for racial minorities. The National Labor Relations Board (NLRB) treated union discrimination in a manner that reflected congressional intent. The Board consistently certified all-white unions and was unwilling to declare that the creation of separate unions for white workers was a violation of fair representation (*Atlanta Oak Flooring Co.*, 62 NLRB 973 [1945]; broadly, see Hill 1986). By 1944, 31 national unions were known to discriminate against blacks, most notably the Railroad Workers, Electrical Workers, Plumbers and Steamfitters, Sheet Metal Workers, and Boilermakers (McCray 1944, 203). Overall numbers of black workers in trade unions had grown to roughly 400,000, but the percentage of blacks constituted only 3.4% of the AFL membership in 1945, a small growth from their 2.8% in 1926–28 (McCray 1944, 202; Marshall 1967, 29). Most black membership in unions was centered in northern industrial states, with large numbers in the United Mine Workers, Steelworkers, and Autoworkers. Moreover, many unions with large numbers of blacks restricted them to separate auxiliary unions that had limited rights and bargaining strength.

The Executive Branch was more active in other ways in confronting union civil rights matters. Presidents during this time passed a number of Executive Orders, most notably Roosevelt's Fair Employment Practice Committee (FEPC) that responded to A. Philip Randolph's threatened Washington protest. The orders gave a variety of commissions the authority to conduct investigations into union discrimination and to promote voluntary compliance. None of the executive commissions, however, had any type of enforcement power beyond publicity. The FEPC's (1943b) greatest achievement with regard to unions, for instance, was to hold hearings and put public pressure on the Boilermakers Union to grant equal status to black auxiliary unions. Although it lacked enforcement powers, the Committee, with the help of the National War Labor Board and some creative statutory interpretations by some federal and state judges, forced the Boilermakers to change their national constitution and accept black workers into their ranks in segregated but "equal" unions.[2] But further efforts to strengthen the FEPC continually met fierce resistance from both unions and southern Democrats in Congress (Arnesen 2001; Marshall 1967, 121–22). In the early 1960s, President John Kennedy's Committee on Equal Employment Opportunity similarly failed to get beyond initial investigations and requests for voluntary compliance (Department of Labor [DOL] 1963a; 1963e; 1964). The investigations, on the one hand, revealed that extensive union discrimination existed; nine different construction trade unions, for instance (electricians, elevator constructors, glasers, lathers, sheet metal workers, sprinkler fitters, stone masons, structural iron workers, and rodmen), had exclusively white workforces (DOL 1963c). They recognized the "need for very strong action"; they also recognized that it required "action which we will have no means to take" (DOL 1963c; 1963d; 1963f).

Absent federal involvement, national unions, particularly in the construction and craft industries, were slow in making their own reforms. Some unions were active in promoting diversity, most notably numerous CIO unions during the 1940s and also some AFL unions (e.g., Goldfield 1997; Honey 1993; Kelley 1990; Nelson 2001). Coalitions of union and civil rights protestors pushed for changes in national AFL policies in the 1930s and were integral in the Boilermaker reforms mentioned above (FEPC 1944a; NAACP 1935). But similar to elected officials, national unions moved slowly to promote changes and felt similarly constrained by internal opposition. Most often, their efforts paralleled those of the executive committees; they attempted to investigate how bad the situation was, came to mixed conclusions, and failed to do more than place occasional symbolic pressure on resistant locals (Meany Archives 1957b; Nelson 2001; Reuther Archives 1962a).[3] And while unions were widely diverse in their policies and treatment of blacks and other minority workers, white union workers often reacted with violence in order to prevent minority integration and promotions (FEPC 1943a; Nelson 2001, DOL 1963b).

eligible is denied membership or restricted or interfered with because of race, color, or creed," and one asking that denial of union membership because of one's race should be an unfair labor practice." The NAACP asked for similar provisions. (Wagner Archives 1934c).

[2] In Oregon shipyards, for instance, African Americans represented 19% of the workforce in 1944, after having numbered only 32 workers out of 18,707 in November of 1943 (FEPC 1943c, 1944b).

[3] A 1962 memo from Jacob Clayman of the AFL-CIO's Industrial Union Department to Walter Reuther, President of the United Auto Workers, in which he criticized the absence of a union civil rights policy, aptly reflects where national unions were on the eve of the Civil Rights Act: "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; which local unions have separate personal facilities, etc.?" (Reuther Archives 1962b).

COURTS AS A PROFESSIONAL BRANCH, COURTS AS A CIVIL RIGHTS PROMOTER 1935–64

Although efforts by elected officials to promote union integration largely failed during this period, two simultaneous events pulled judges and lawyers to the center of the policy process. First was the shift in the Supreme Court's jurisprudence during the New Deal. After failing to prevent Roosevelt's efforts to regulate the national economy, the Court slowly turned toward protecting the rights of individuals and "discrete and insular minorities" who found themselves unrepresented by the political process (*U.S. v. Carolene Products Co.*, 304, U.S. 144, 152 fn 4 [1938]).[4] It was in this political context that the NAACP and other "rights" organizations chose to emphasize litigation over legislative strategies (Epp 1998; Handler 1978; Tushnet 1987). The Supreme Court, with the prodding of the NAACP and the Department of Justice, went on to decide a series of cases that favored the expansion of rights to disadvantaged groups, most notably *Brown v. Board of Education* in 1954. It was also in this context that elected officials who desired civil rights reforms began to look to the courts as an avenue to achieve their goals. Kevin McMahon (2000) argues the Roosevelt Administration made a number of moves—through both court appointments and a more aggressive Department of Justice—to accomplish through courts what the President believed was unattainable through legislation and executive action. Presidents Truman through Johnson made similar moves, either through liberal judicial appointments or by using the Justice Department to file *amicus* briefs to promote civil rights goals before federal courts (Clayton 1992, 127–37; Dudziak 2000).

The Supreme Court was less active in the realm of union discrimination, never passing a case of *Brown*'s stature or legal scope but supportive of civil rights nonetheless. Often this was done with direct recognition that legislators had failed to act on the matter and with the assertion that it was the Court's duty to rectify the situation. In *Steele v. Louisville & Nashville R. Co.*, 323 U.S. 192 (1944), the Supreme Court's most notable statement on union civil rights during these years, the majority held that unions have a statutory duty of "fair representation," by which they cannot discriminate on the basis of race when representing employee interests. In response to a railroad union that supported a collective bargaining agreement which eliminated most African American jobs, the Court rewrote the Railway Labor Act: "We think that Congress, in enacting the Railway Labor Act . . . did not intend to confer plenary power upon the union to sacrifice, for the benefit of its members, rights of the minority of the craft, without imposing on it any duty to protect the minority" (199, 200). This assertion was reiterated on numerous occasions both by the Supreme Court (see *Brotherhood of R.R. Trainmen v. Howard*, 343 U.S. 768 [1952]; *Ford Motor Co. v. Huffman*, 345 U.S. 330 [1953]; *Conley v. Gibson*, 355 U.S. 41 [1957]) and by lower courts that overturned the efforts of white union members to sign contracts that denied rights to black employees.

The impact of these early decisions was mixed. On the one hand, the data and case studies examining the success of courts in the area of union discrimination during this time are uniform in finding significant compliance by the targeted unions, as well as in finding dramatic examples of what occurs in a much more extensive fashion in the 1970s—courts rewarding plaintiffs with large damage awards and union lawyers recommending compliance over further expense and litigation (see Arneson 2001, 209–15; FEPC 1943c, 1944; Herring 1964). On the other hand, the scope of the legal matters the courts were dealing with in most of these cases was narrow; they dealt primarily with unions that discriminated against current union members, not against workers who were denied access to unions altogether. More importantly, it was not until the 1960s that civil rights groups and lawyers began to prioritize union discrimination on their agenda (Meany Archives 1958).[5] The NAACP, for example, was concerned more with school segregation and voting rights and without their advocacy, few union cases were brought to federal courts. Between 1935 and 1964, federal courts ruled on only nine discrimination lawsuits involving the AFL-CIO.[6] Among the building trades, there was only one case decided in federal court, involving the abovementioned Boilermakers. Nearly three-quarters of the union discrimination cases in federal courts during this time involved railroad unions. Only when civil rights groups target unions, coupled with other legal reforms, are unions besieged with federal lawsuits.

The Rise of a Professional Bar and Court

Court expansion into civil rights matters was not solely the result of elected officials and civil rights activists promoting policy agendas on a different turf. Independent of civil rights, lawyers and judges were involved in efforts to reform and professionalize the bar and national legal system. In this regard, perhaps the most important event in the courts' eventual capacity to conduct civil rights policy successfully was not the heralded 1938 footnote in *Carolene Products* but the reforms to the federal rules of civil procedure that passed through Congress in the same year, four years after the historic passage of the Rules Enabling Act. The Rules Enabling

[4] The reasons for the Court's change, whether ideological, situational, or institutional, is much debated (see Cover 1982; Pacelle 1991, 52–55; Skrentny 1996, 171–75).

[5] Similarly, while the relationship between civil rights litigators and labor unions was generally mixed during this time, it was not until the late 1950s when the NAACP makes union litigation a priority that the two sides became polarized. Contrast, for example, a memo from NAACP's Herbert Hill in 1949 in which he wrote to Roy Wilkins that the NAACP should emphasize more extensive relationships and fundraising from unions (NAACP, 1949) with a series of memos he wrote a decade later when he accused the AFL-CIO of systematic discrimination practices and called on the NAACP to make litigation against the unions one of its primary objectives (NAACP, 1960; Nelson 2001, 232–42).

[6] This includes cases involving the AFL and CIO prior to 1956. The number of cases is compiled from Lexis. A similar check of state courts also found very few cases.

Act, passed by Congress with the strong backing of the American Bar Association (ABA), provided judges substantial influence over the content of the federal rules of civil procedure (Bone 1999; Burbank 1982). The Act provided that a set of judicial committees led by the Judicial Conference, and made up of judges, lawyers, and elite law professors, would devise the procedure for all federal courts to follow in the litigation process, from initial pleading to trial decisions and appeals. The 1938 Rules represented the first effort by these judicial committees, and their impact—although almost entirely ignored by political scientists (though see Kersch 2002)—is widely seen in the legal world as revolutionary. Perhaps most notably, the procedural rule changes made it easier for potential plaintiffs, even those of modest means and limited expertise, to have their day in court. Assuming, for instance, that a potential litigant meets rules of standing and follows the relatively simple pleading requirements as defined by Rule 8 of the Federal Rules of Civil Procedure, they will get a courtroom hearing with lawyers present to make arguments and will subsequently have opportunities for appeal if they are inadequately served.[7] Document exchange, deposition, and interrogatories became available to federal civil litigants as a matter of course, enabling plaintiffs greater ease in finding out damaging evidence against defendants. Litigants could avail themselves of all these remedies under a relatively broad definition of the scope of "discovery" that permits a plaintiff to look at any information relevant to the "subject matter" of the dispute. Even "fishing expeditions" were allowed in order to determine legal disputes with the maximum factual information. In 1946, the Judicial Conference again reformed discovery rules by making it easier for challenging parties to search for evidence, even if it is "not admissible at trial," as long it is appeared "reasonably calculated to lead to the discovery of admissible evidence" (Federal Rules of Civil Procedure, Rule 26b[1]).[8] These changes struck the balance in favor of those who petitioned for redress of grievances and shifted the burden onto those accused to come into court and make a case. Class action and joinder rules made it economically feasible to go to court despite the prospect of only small financial gain for the individual, while the use of special masters and magistrates enhanced the ability of district judges to decide large complex cases of national importance.

The writers of the federal rule changes had a diverse set of interests and agendas. Historians emphasize that the reforms were in part the culmination of Progressive ideals aimed at making it easier for everyday citizens to gain access to the courtroom as well as a significant step toward professionalizing the judicial branch and legal community, both longstanding goals of the ABA and high-profile judges and law professors (Burbank 1982). The ABA wanted legal procedure to be less technical so that people could understand and participate in court proceedings. It also hoped that uniform rules would "diminish the expense and delay of litigation" and complete trials more quickly (Resnick 1986, 503). Creating a national system of civil procedures made it cheaper for lawyers to litigate, made it easier for them to pursue multistate practices, and made it easier for them to find work in the midst of an economic depression (Auerbach 1976, 206–9). The 1938 Rules, Judith Resnick (1986, 522) argues, created a whole new set of jobs for lawyers: "With the new procedural opportunities came a new set of lawyers, 'litigators,' who did their work (motions, deposition and interrogatory practice) during the pretrial process and who were distinguished from 'trial lawyers,' who actually conducted trials."

The Rules were also part of an effort by lawyers and judges to insulate courts from the political process. Stephen Subrin (1987, 956) argues that many judges, most notably Chief Justice Howard Taft, believed as early as the 1900s that "making courts and their procedure more efficient would reduce the outcry for some popular control over the judiciary." Taft and others "saw the courts as the protector of property and republican values, a last moat shielding the country from the wild progressives, the unions, and the masses" and began promoting the ABA's Enabling Act proposal to better insulate courts from political attacks (Subrin 1987, 955). Franklin Roosevelt's attempt to diminish the Supreme Court's influence two decades later only further fueled ABA efforts at insulating the courts from politics. The ABA lobbied for rule changes and the passage of the Administrative Office Act of 1939 and other legislation to regain judicial authority and autonomy back from the elected branches. Chief Justice Fred Vinson called the 1939 Act "something of a Declaration of Independence for the courts" (quoted in Fish 1970, 603) as it provided for the transfer of legal administrative functions from the Department of Justice to the Judicial Conference, giving judges far more control over legal standards and determinations, as well as their budgets and administration without the scrutiny of the executive branch.

There is little evidence that these rule changes were in any way related to a civil rights agenda, and they were arguably unattached to any substantive ideological agenda. Expanding opportunities for litigants to participate in court, Richard Bone (1999, 897) argues, was reflective of the ABA's belief in the adversarial

[7] The Supreme Court, in *Conley v. Gibson*, 355 U.S. 41 (1957), emphasized that these new rules were intended to assist plaintiffs: "The Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim . . . all the Rules require is 'a short and plain statement of the claim' that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests. . . . The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits continues to steadfastly maintain the ease of pleading rules." The Court has continued to reiterate this point: all that is needed in civil rights discrimination claims, for example, is "a short and plain statement of the claim showing the pleader is entitled to relief" (*Swierkiewicz v. Sorema*, 534 U.S. 506 [2002]; *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163 [1985]).

[8] The Supreme Court affirmed these changes the next year: "No longer can the time-honored cry of 'fishing expedition' serve to preclude a party from inquiring into the facts underlying the opponent's case. Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation" (*Hickman v. Taylor*, 329 U.S. 495, 507 [1947]).

legal *process* and the organization's commitments to expanding employment opportunities and professional power, not a desire to allow any specific groups greater representation.[9] There was no mention of civil rights during congressional discussion of the 1938 Rules. Texas House member and Judicial Committee chair, Hatton Sumners, provided one of the very few public comments on the rule changes and they seemed to typify what opinion existed in Congress: He supported the rule changes because they would "materially reduce the uncertainty, delay, expense, and the likelihood which cases may be decided on technical points of procedure which had no just determination" of justice (Congressional Record, 1938, 75th Congress, 3rd Session, Appendix 2920). Labor unions offered one of the very few examples of a skeptical voice, fearing the new rules would allow judges to issue injunctions against strikes (House Judiciary Committee Hearings on Rules of Civil Procedure 1938, 13–14). The 1938 Rules changes were never voted on by Congress; as per the Rules Enabling Act, the Rules became law in six months when Congress failed to act against them.

In the following sections, I discuss some of the consequences of these rule changes. Civil rights groups may not have been involved in their creation, but they found that the rules provided greater opportunity for a fair hearing in the court room than in congressional chambers. Judges zealously guarded their new authority (e.g., *Sibbach v. Wilson*, 312 U.S. 1 [1941]),[10] and civil rights groups placed greater resources into litigation. Perhaps most importantly, although these rule changes were nominally supported by congressional action and inaction, the legal community had carved out a significant degree of professional and institutional autonomy from elected officials to carry out a major social agenda.[11]

1964–1972—ELECTED OFFICIALS ACT: TITLE VII AND EXECUTIVE ORDER 11246

In 1964, elected officials responded to unprecedented worldwide pressure brought on them by the civil rights movement and the Cold War by passing the Civil Rights Act (Dudziak 2000; Klinkner with Smith 1999; Skrentny 1998; 2002). In taking this action, elected officials set a significant precedent in antidiscrimination law (Burstein 1985; Edelman 1990; Lieberman 2002). As such, we might well expect that efforts to integrate unions would coincide with Rosenberg's (1991, 97–100) noteworthy findings about school integration. He found that prior to 1964, court activism failed to integrate schools; dramatic changes occurred only after Congress passed the Civil Rights Act and various financial inducements. But there are significant differences in the case of union integration. First, the Civil Rights Act included specific provisions promoted by the AFL-CIO that enabled unions to resist civil rights policy. Second, Congress did not pass a tax incentive package to motivate unions to integrate. Third, unlike Rosenberg's findings, EEOC data show that significant integration of resistant unions did not begin shortly after 1964, but in the mid-1970s as courts effectively rewrote Title VII of the Civil Rights Act to get rid of the carefully crafted loopholes, and as litigation created severe financial costs for discriminatory unions.

In order to end a southern filibuster against the initial bill, Congress passed a series of amendments to Title VII's provisions regarding discrimination in private employment (Graham 1990; Rodriguez and Weingast 2002). These provisions, first proposed by Senate Minority Leader Everett Dirksen, most notably took away the enforcement powers of the newly created EEOC as they denied the agency "cease-and-desist" and litigation powers. In this regard, the EEOC's power in 1964 was little different than the FEPC's two decades prior: When the agency's efforts at conciliation failed, its only option was to inform its clients of their right to sue in court (and in certain situations refer cases to the Department of Justice), leaving the enforcement of Title VII to private individuals through lawsuits.[12] Title VII contained further loopholes that limited its effectiveness. It prohibited the use of racial quotas to enforce integration[13] and mandated that an individual who accuses an employer (or union) of discrimination demonstrate that the accused acted with specific intent

[9] Malcolm Feeley (2002) makes similar arguments about the "nonpolitical" reforms of the American Law Institute, another organization backed strongly by the ABA, during this time period.

[10] In fact, some believed that judges were going too far. Justice Felix Frankfurter, for instance, dissented in *Sibbach*, criticizing the Court's decision as taking its power over rules too far: "So far as national law is concerned, a drastic change in public policy in a matter deeply touching the sensibilities of people or even their prejudices as to privacy, ought not to be inferred from a general authorization to formulate rules for the more uniform and effective dispatch of business on the civil side of the federal courts. . . . *Plainly the Rules are not acts of Congress and can not be treated as such. Having due regard to the mechanics of legislation and the practical conditions surrounding the business of Congress when the Rules were submitted, to draw any inference of tacit approval from non-action by Congress is to appeal to unreality*" (17–18; italics added).

[11] Suggestive of the importance of procedural change independent from ideological change in impacting court agendas is the increase in public law cases heard by the Fifth Circuit, arguably the nation's most conservative, from 12% between 1915 and 1930 to 31% between 1935 and 1955 and 35% between 1960 and 1975 (Baum et al. 1982, 301).

[12] Judith Stein (1998, 85) argues that the choice by Congress to give the Department of Justice and not the EEOC the power to sue after finding a "pattern or practice of resistance" was a specific effort to weaken Title VII's reach with labor. Senate Minority Leader "Dirksen assumed, accurately, that the Justice Department selected its cases conservatively. Consumed with voting and school desegregation cases and about to assume responsibility for enforcing of the new legislation, the civil rights division also lacked lawyers versed in labor matters. This meant, in effect, that individuals, not the government, would enforce the law."

[13] Senator Joseph Clark, the bill's manager in the Senate, said, "It is clear that the bill would not affect the present operation of any part of the National Labor Relations Act or rights under existing labor laws. The suggestion that racial balance or quota systems would be impacted by this proposed legislation is entirely inaccurate" (Congressional Record 1964, 7207). Union leaders seemed to believe similarly that this was the purpose of the legislation. Walter P. Reuther, President of the United Auto Workers Union, wrote to Senator Lister Hill, "Your principal concern appears to be that the pending law will require a mathematical apportionment of jobs. . . . [W]e do not believe it to be the import of the pending Federal measure" (General Subcommittee on Labor of the Committee on Education and Labor, House of Representatives 1965, 233).

to discriminate. It exempted small businesses and provided employers with a quite broadly defined "bona fide occupational qualification" defense to claims of discrimination while also expressly allowing employers to use professionally developed ability tests.[14] Labor unions, meanwhile, were successful in prohibiting any requirement that employers or unions make changes to existing seniority systems so long as such systems did not presently discriminate (Congressional Record 1964, 7206–17).[15] Even if a seniority system harmed black workers, Title VII could not address it unless there was a finding of specific *intent* to harm (EEOC 1964, 3006). This led unions to ignore EEOC requests at reconciliation and rely on seniority systems to maintain either all-white work forces or workforces segregated by job description (EEOC 1967b). By 1967, the seniority loophole in Title VII became a central concern among EEOC officials focused on union discrimination (EEOC 1967c). By 1969, civil rights groups were actively targeting discriminatory building trades with pickets, protests, and lawsuits (Gould 1977; Stetson 1969; Sugrue 2003).

The executive branch made further efforts to promote union civil rights. 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. Contractors had 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 unions successfully fought enforcement as the Office of Federal Contract Compliance (OFCC) in the Department of Labor was understaffed, was underfunded, and promoted vague plans that failed to create new jobs (Skrentny 1996, 134–38). Unions played a prominent role in the enforcement of the act and they pushed the Department of Labor (which enforced union apprenticeship programs) to "ignore most complaints filed against unions under the Equal Opportunity Act and [take] no action when its investigations revealed violations" (Quadagno 1994, 73).

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 of 1969, attempted to move black workers into six construction trades that all had abysmal minority hiring records.[16] 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. Enforcement, however, had a slow start—by the end of 1969, a summary of the results from the OFCC declared that unions were doing "in effect, nothing!" (DOL 1969b). 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 (Payton 1984; Waldinger and Bailey 1991). Labor Department 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" (Meany Archives 1971a). A 1974 report by the U.S. Commission on Civil Rights (USCCR) found the OFCC to have "taken virtually no enforcement action" and been largely ineffectual, calling the hometown plans "a failure."[17] OFCC statistics of the plans in five major cities found that 13 of the 16 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 (USCCR 1976, 188).

[14] Senator Clark interpreted the BFOQ broadly: "Examples of such legitimate discrimination would be the preference of a French restaurant for a French cook, the preference of a professional baseball team for male players, and the preference of a business which seeks the patronage of members of particular religious groups for a salesman of that religion" (Congressional Record 1964, 7213, 7217).

[15] During floor discussion, Senator Dirksen stated that "seniority rights are in no way affected by the bill. If under a 'last hired, first fired' agreement a Negro happens to be the 'last hired,' he can still be 'first fired. . . .' the bill is not retroactive, and it will not require an employer to change existing seniority lists" (EEOC 1964, 3013). Senator Kenneth Keating, in response to charges that Title VII would interfere with seniority rights of union members, said, "Title VII does not grant this authority to the Federal Government. . . . A particularly vicious implication . . . leads white workers to believe that they will be fired in order to make jobs for Negroes. An employer or labor organization must first be found to have practiced discrimination before a court can issue an order to prohibit further acts of discrimination in the first instance" (EEOC 1964, 3246). A summary statement by the Department of Justice stated, "Title VII would have no effect on seniority rights existing at the time it takes effect. If for example, a collective bargaining contract provides that in the event of layoffs, those who were hired last must be laid off first, such a provision would not be affected in the least by Title VII. This would be true even where, owing to discrimination prior to the effective date of the title, white workers had more seniority than Negroes." This was then reiterated by Senator Clark on the floor (Congressional Record 1964, 7207). The AFL-CIO clearly believed the law would not interfere with seniority rights, commenting on the Senate debate that Title VII "will take nothing away from the American worker which he has already acquired" (Meany Archives 1964).

[16] The ironworkers had 12 African Americans out of 850 workers; the steamfitters, 13 out of 2308 workers; the sheet metal workers, 17 out of 1688; the electricians, 40 out of 2274; the elevator construction workers, 3 out of 562; and the plumbers and pipefitters, 12 out of 2335 (DOL 1969a).

[17] "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" (USCCR 1974, 375–76, 385).

Although most construction unions refused to cooperate, the OFCC rarely applied sanctions and did so only symbolically (USCCR 1976, 168–69). After rising public and congressional opposition to these plans, as well as Nixon's efforts to make alliances with southern whites and conservative union members, government spending on civil rights declined and enforcement of Title VII policy waxed and waned over these years, leading to public criticism and resignations from key government enforcers and leading civil rights groups to turn aggressively to federal courts (Skrentny 1996, 215–16; Walton 1988, 78–85).

COURT ENFORCEMENT: REWRITING STATUTES AND IMPOSING FINANCIAL COSTS

Although elected officials largely failed in their ability to address union discrimination through legislation and regulatory agencies, they provided civil rights groups with a number of opportunities to press claims through the federal courts. First, as mentioned above, since the 1964 Civil Rights Act did not provide the EEOC with cease and desist powers and since the agency was understaffed and underfunded, it left federal courts with enforcement power. Some accounts of the EEOC have argued that despite its lack of enforcement power, the agency used hearings, creative rule making, participation as *amicus curiae* on lawsuits, and (after 1972 reforms that allowed the agency to sue in federal court) participation as a litigant to make itself influential (Lieberman 2002; Skrentny 1996). Alfred Blumrosen (1971, 43–44), an advisor with the agency in the 1960s, argued that its lack of enforcement power ironically went hand-in-hand with its political success as the increasing *threat* of litigation gave the agency more authority: Although the EEOC "has no power . . . its success rate in conciliations is substantial and meaningful. . . . The answer is that because it lacks power, 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" (also see Hill 1977, 28). But while the agency did participate in some notable high-profile cases such as the litigation against ATT and the steel industry, private lawyers were doing the overwhelming share of the work. Between 1972 and 1989, the EEOC brought less than four percent of the employment discrimination cases to federal courts (Donohue and Siegelman 1991, 1000). During this same period, private class action suits rose sharply, peaking in 1975 at more than 1,100 federal cases on Title VII charges (Donohue and Siegelman 1991, 1019). Indeed, one of the advantages of the class action suit, besides expediency, was that "class actions allowed class members who had filed no charges with the EEOC to circumvent this requirement" (Belton 1978, 932).

Even when the EEOC participated in the lawsuits, it was often unclear whose agenda was being followed. Civil rights lawyers quickly seized on the overwhelmed agency that received nearly 9,000 complaints in its first year. Lawyers were not simply helping the agency become more efficient, they were attempting to speed through procedural hurdles so that they could pursue their own agenda in federal courts. Judith Stein (1998, 102) writes 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." At the same time, these lawyers were pursuing an agenda with Congress that often opposed legislative efforts to strengthen EEOC power. While almost yearly efforts to reform the EEOC by giving it cease and desist powers both failed and were opposed by key legal organizations, lawyers were consistently able to get Congress to strengthen the courts' role in promoting civil rights reforms. For example, the 1964 Act provided attorneys' fees to victorious litigants, making it easier for poorer clients to sue and making it more worthwhile for lawyers to take Title VII cases. The 1972 reforms provided the EEOC with the power to represent discriminated employees in court but did not provide the cease and desist powers advocated by civil rights groups and labor unions, the latter who were supporting a stronger EEOC in exchange for an end to Title VII's private right to sue (Hill 1977, 34–38; Meany Archives 1971b).[18] Not only were cease and desist powers opposed by the Nixon administration as well as southern and conservative members of Congress (Graham 1990, 433–43)—they preferred court enforcement of civil rights claims, in part because they felt that southern federal courts would provide stricter definitions of the law than the EEOC (Bureau of National Affairs 1973, 354–68)—but also they were opposed by civil rights lawyers, who were emphatic about maintaining the private law suit and opposed cease and desist powers as an alternative (Meany Archives 1968).[19] Legal organizations and bar associations widely lobbied Congress to protect the private right to sue, as well as to defeat a bill that would have limited class action suits in discrimination cases, and the support of civil rights lawyers made it easier for opponents of the EEOC to legitimate to civil rights supporters.

[18] The AFL-CIO's support of agency power was also contingent on its proposal to move the OFCC into the EEOC (Graham 1990, 431–33).

[19] Henry Schwarzchild, executive director of the Lawyers Constitutional Defense Committee, for instance, wrote at the time that the Leadership Conference on Civil Rights should not accept any proposal that would "deprive private parties of [the rights] to seek redress in the Federal Courts for employment discrimination under Title VII. . . . [G]iving the EEOC more enforcement power [is not] a substitute." Schwarzchild called the AFL-CIO's opposition to private litigation of Title VII "a scandal and another sign that the labor movement's role in our present history is profoundly harmful." Clarence Mitchell, the Director of the NAACP's Washington Bureau, responded to Schwarzchild's letter: "It is so insulting to those of us who have been working for legislative progress with the invaluable help of organized labor that I do not consider it worthy of a substantive answer" (Meany Archives 1968).

Meanwhile, judges and lawyers continued to successfully promote (with tacit approval but little discussion from Congress) changes to federal procedure rules expanding opportunities for civil rights litigants as well as the capacity for court enforcement. Two rule changes were particularly notable, as was the changing use by the courts of a third rule. First, revisions to discovery rules in 1970 took away the need for civil rights plaintiffs to have "good cause" in order to obtain employment documents and authorized financial sanctions against defendants who resisted. Second, Rule 23 was officially amended in 1966 (with almost no congressional attention), which made it far easier for lawyers to represent a large class of individuals in a single case. As mentioned above, the rule change helped lead to an explosion in class action litigation in the late 1960s and early 1970s, rising from only a few dozen in 1965 to more than a thousand a decade later (Donohue and Siegelman 1991, 1019). The class action provided the prototypical example of where giving private lawyers a financial incentive enabled them to perform a public good—only through representing a large class of litigants can the lawsuit become financially worthwhile for the individual lawyer. The changes to Rule 23 also provided one of the very few examples where civil rights issues appeared to play at least some role in the thinking of the Judiciary Council. The Council's advisory notes explaining the reform specified a notable civil rights case of the early 1960s to illustrate the usefulness of class actions (Bell 1976, 506). Regardless of intent, the rule was used dramatically by the NAACP and other civil rights groups to make claims against employers and unions. During this time, its use was consistently interpreted expansively by courts, even when in it appeared to be in direct conflict with specific provisions of Title VII.[20]

Third, courts began to interpret Rule 53, which provided for special masters, in a far more expansive manner leading these court-appointed administrators to play a variety of critical roles, particularly as enforcers of consent agreements between unions and civil rights groups. During this period, consent agreements became one of the primary ways that unions avoided long-term litigation. By entering into an agreement, usually in the face of severe threats of litigation and brokered by some combination of courts and government administrative agencies, unions found themselves presented with specific timetables, racial quotas, and provisions for penalties and found that their hiring decisions would be directly supervised and authorized by the special master. The special master enabled courts to respond quickly to union resistance to these agreements by making quick assessments of compliance efforts and invoking often sizeable financial fines against resistant unions. By relying on and directly supervising special masters, as Malcolm Feeley and Edward Rubin (1998) found with regard to prison reform, judges were given the capacity to replace the EEOC and DOL as the agency overseeing enforcement. In so doing, they interpreted and enforced the law in a manner that often went far beyond legislative intent, particularly with the use of racial quotas and affirmative action.

Congress was not simply a passive participant in the expansion of legal opportunities. To enable judges to better handle their increased responsibilities, elected officials authorized a significant increase in federal judgeships, increasing the size of the court of appeals bench by 43% during the 1960s and another 36% during the 1970s (Harrington and Ward 1995, 210). In addition, they passed the Federal Magistrates Act of 1968, which gave federal judges the power to appoint these government officials whenever it was deemed appropriate to help them with caseload. Designed to relieve the litigation burden of judges, the Act greatly increased the power and scope of the judiciary by allowing them to delegate a substantial portion of their work and responsibilities (Silberman 1989). Congress also continued to provide particularized benefits—with much prodding by lawyers and judges and little resistance—that significantly broadened the standards of who could claim "standing" to litigate (Orren 1976) and how lawyers could be paid for their litigation efforts through attorney fee provisions (Melnick 1994, 27–28). This was perhaps most dramatic in 1976, when Congress extended attorney fee awards to other civil rights statutes under the Civil Rights Attorney's Fees Award Act of 1976. Drafters of the 1976 Act recognized what they were doing: "The effective enforcement of federal civil rights statutes depends largely on the efforts of private citizens. Although some agencies of the U.S. government have civil rights responsibilities, their authority and resources are limited. In many instances where these laws are violated, it is necessary for the citizen to initiate court action to correct the illegality" (House of Representatives, No 1558, 94th Cong., 2d Session 1976, 1). Senator Hugh Scott stated during floor debates at the time that "Congress should encourage citizens to go to court in private suits to vindicate its policies and protect their rights. To do so, Congress must insure that they have the means to go to court and to be effective once they get there" (Civil Rights Attorney's Fees Award Act 1976, 19). The Act also had the benefit, as one opponent in the Senate described it, as going "down in history as . . . [a] bonanza to the legal profession. . . . I am wondering if the person advocating this legislation is interested in civil rights or if he is interested in attorney's fees" (Civil Rights Attorney's Fees Award Act 1976, 24).

Judicial Use of Statutory Interpretation

As elected officials provided amorphous and broad institutional powers to courts, judges were actively creating and enforcing claims that far exceeded the initial legislative intent of Congress and kept constant pressure on unions to integrate in ways unforeseen by legislative actors. Most importantly, courts significantly rewrote the law on Title VII, getting rid of the carefully

[20] Title VII excludes the authority of a nongovernmental group to sue on behalf of a protected worker. Federal courts navigated around this by expanding class action opportunities as long as groups like the NAACP could find one plaintiff. See *Oatis v. Crown Zellerbach Corp.*, 398 F.2d 496 (5th Cir., 1968).

placed loopholes that unions and other civil rights opponents demanded in order to pass the Act and turning it from one that emphasized color-blindness to one that emphasized affirmative action (Skrentny 1996). Courts have always used their power of statutory interpretation to create new rights, laws, and political opportunities in situations where elected officials have either refused to legislate or have purposely created legislation that is hollow and unenforceable (e.g., Eskridge 1994; Melnick 1994; Shapiro 1964). This is in part why the changes to federal rules that made it easier for civil rights proponents to get into courts were so important. Once in court, effective civil rights lawyers could convince judges to follow their interpretations of key civil rights statutes. And federal judges were particularly dramatic with regards to their interpretations of Title VII. For instance, just a few years after the Act's passage, a federal district court held in *Quarles v. Philip Morris*, 279 F.Supp. 505, 515 (E.D. VA, 1968), that plant seniority is discriminatory where it adversely impacts black workers. The court argued that although the legislative history reflected congressional desire to protect "bona fide" seniority systems, "obviously, one characteristic of a bona fide seniority system must be a lack of discrimination" (1968, 517). While the legislative history did not intend for affirmative action programs that would require blacks to be preferred over more senior whites, the court argued that it was "also apparent that Congress did not intend to freeze an entire generation of Negro employees into discriminatory patterns that existed before the act" (1968, 516). The 3rd Circuit, in *Contractors Association of Eastern Pennsylvania v. Secretary of Labor*, 442 F.2d 159, 173 (3d. Cir., 1971), defended affirmative action with a similarly expansive reading: "To read §703(a) in the manner suggested by the plaintiffs we would have to attribute to Congress the intention to freeze the status quo and to foreclose remedial action under authority designed to overcome existing evils. We discern no such intention either from the language of the statute or its legislative history."

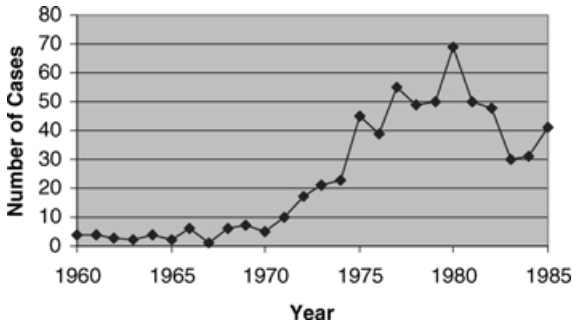
The Supreme Court was also active in reinterpreting the law. In *Griggs v. Duke Power Company*, 401 U.S. 424 (1971), the Court went strongly against legislative history, striking down employer and union tests that had a disparate impact on the hiring of minority workers (many unions, for example, instituted new standards for employment such as diplomas and written exams) and expanded Title VII by including historical experience as a way of determining racial discrimination. A few years after *Griggs*, the Court gave further bite to antidiscrimination efforts against unions by holding that Title VII was independent from the NLRA and that employees claiming discrimination could pursue a grievance through both laws at the same time, effectively expanding plaintiff opportunities (*Alexander v. Gardner-Denver Co.*, 415 U.S. 36 [1974]). In *Franks v. Bowman Transportation*, 424 U.S. 747 (1975), the Court responded to a class action law suit by holding that discriminated union members could receive seniority credit based on the time of their initial application. The Court held that a union was liable in situations even when it shared blame with the employer (*Bowen v. United States Postal Service*, 459 U.S. 212 [1983]) and expanded legal standing to potential plaintiffs who had not formally applied for jobs, thus allowing litigants to challenge seniority positions (*International Brotherhood of Teamsters v. U.S.*, 431 U.S. 324 [1977]). In *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979), the Court may have taken its most extensive liberties interpreting Title VII. The case involved an affirmative action plan at Kaiser Aluminum where the company and the steelworkers union agreed to a training program for unskilled production workers that would set aside 50% of the spaces for African Americans. At the time, blacks constituted less than 2% of the workforce at the company, despite representing nearly 40% of the area workforce (1979, 198–99). Weber, a white production worker, complained that he was not chosen for a position despite having greater seniority than the African Americans chosen. In the majority decision, Justice Brennan held that Title VII allowed for affirmative action in training programs that could effectively trump existing seniority systems. In so holding, Brennan took ample liberty with the legislative statute, emphasizing the "spirit" of Title VII by relying on liberal Senate speeches during the Title VII debates and ignoring many of the concessions the legislation made to labor, Republicans, and southern Democrats.[21]

Mammoth Court Case Loads and Financial Coercion

Federal court receptiveness to civil rights litigation and its re-writing of Title VII law helped fuel a mammoth case load of litigation by individual plaintiffs and civil rights lawyers representing class actions. In 1970, there were 350 federal court cases involving Title VII litigation; by 1975, this number had reached roughly 1,500; and by 1983, the number had reached 9,000 cases (Donohue and Siegelman, 985–86). Figure 1 charts the number of Title VII cases specifically involving labor union discrimination that resulted in decisions by federal judges. Note that in focusing on federal court *decisions*, these numbers represent only a small portion of the overall cases filed, as this larger number includes cases dismissed during litigation or settled out of court. To give a sense of the number of cases being filed, AFL-CIO records indicate that unions were investigated in 658 cases by the EEOC as of June 30, 1967 (Meany Archives 1967), and nearly double these charges were brought to the agency in 1971; more than 1,600 charges

[21] Justice Rehnquist, in his dissent, argued that the legislative history of the Act clearly showed that seniority rights trumped affirmative action programs. Rehnquist quoted the Senate managers of Title VII, who claimed during the legislative battles that "Title VII would have no effect on established seniority rights. . . . [I]f a business has been discriminating in the past and as a result has an all-white working force, when the title comes into effect the employer's obligation would be simply to fill future vacancies on a nondiscriminatory basis. He would not be obliged—or *indeed permitted*—to fire whites in order to hire Negroes, or to *prefer Negroes for future vacancies, or, once Negroes are hired, to give them special seniority rights at the expense of the white workers hired earlier*" (1979, 240; emphasis in original).

FIGURE 1. Union Discrimination Cases Decided by Federal Courts, 1960–85



were filed in 1973 (Meany Archives 1971c; USCCR 1974, 510), and in 1978 the EEOC had 2,617 union discrimination cases still open (Meany Archives 1978). The increase in the number of decided cases against unions during these years is also dramatic. The number of cases doubles between 1970 and 1971, does so again in 1973 and once again in 1975, and rises another 20% in 1977 and again in 1980. Between 1964 and 1985, the AFL-CIO was involved in 296 reported federal court decisions involving union discrimination; the International Brotherhood of Electrical Workers (IBEW) was involved in 44 and the Teamsters in 51 discrimination cases alone.

The number of cases created huge litigation costs for unions. These costs rose further when unions resisted, as judges and special masters frequently ordered them to pay significant fees in damages—whether through orders to provide backpay or through financial sanctions for not following quota-based consent decrees. Racial minorities and women won significant financial awards against discriminatory unions, and even when damages were not awarded, unions recognized the potential of losses and often settled with potential litigants by entering into long-term consent agreements that set targeted goals to be overseen by special masters. These consent agreements, often involving the union paying out millions of dollars in the initial settlement, led to dramatic changes in union behavior and, as evidenced below, real changes in the number of racial minorities in union ranks (Marshall et al. 1978; Minchin 2001; Schwarzschild 1984; Stein 1998). Certainly judges believed that they could achieve change through financial pressure. The Eighth Circuit, for instance, wrote in an order for damages and back pay to enforce a chemical workers union to follow integration orders: "Backpay awards act as a deterrent . . . they provide the spur or catalyst which causes employers and unions to self-examine and self-evaluate their employment practices and to endeavor to eliminate the last vestiges of racism" (*U.S. v. NC Industries and Chemical Workers Basic Union*, 479 F.2d 354 [8th Cir., 1972]). Three years later, the Supreme Court ruled that back pay awards could not be denied in discrimination cases: "It is the reasonably certain prospect of a backpay award that 'provide[s] the spur or catalyst which causes employers and unions to self-examine and to self-evaluate their employment practices" (*Albermarle Paper Co. v. Moody*, 422 US 405 [1975]).

The use of damages to enforce court decisions against unions occurred consistently during the 1970s, to the extent that many unions were severely weakened by the costs to their treasuries. AFL-CIO budgets show that its litigation costs doubled between 1966 and 1973, and doubled again between 1973 and 1979, before further quadrupling between 1979 and 1983 (Proceedings of the Constitutional Convention of the AFL-CIO, 1966–85; Labor Organization Reports, 1966–85).[22] Similar costs occurred with other national unions; the IBEW's legal fees quadrupled between 1965 and 1975 and then doubled again by 1980; the Papermakers and Paperworkers Union tripled between 1975 and 1980; and the Sheet Metal Workers union rose six times over the course of the 1970s (Labor Organization Reports, 1966–85).

Union leaders responded to the increasing costs of litigation—as financial institutions with often tight budgets, they had little choice but to follow court orders or face severe economic costs. By the late 1960s, as mentioned above, the AFL-CIO was lobbying Congress to shield it from Title VII lawsuits and was willing to increase the power of the EEOC as a compromise. In the 1970s, a period "where the unions were getting sued out of their socks," the AFL-CIO civil rights division repeatedly told its local members that "it was better to conciliate than litigate," because of the number of cases, the unfavorable response to unions from court decisions, and the economic "hardship" that both locals and the national were enduring (Meany Archives 1971c, 1972; quote from McCann 1995, 190). Court activity, the division argued, had led to large backpay and attorney costs, and it repeatedly told locals that were considering fighting court battles that "the local would have to pay the bill" (Meany Archives 1972). Facing "massive amounts of back pay," the steelworkers signed a nation-wide 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" (Steelworkers Civil Rights Decree 1974, 1). A report of the International Executive Board of the United Papermakers and Paperworkers in 1972 showed a picture of the union's attorney with his head in his hands next to a report that detailed how "[e]qual employment opportunity problems have continued to multiply. . . . The most disturbing feature of the recent batch of Title VII cases against the International Union is that all of them demand substantial back pay. . . . [M]oney judgments against the Union could be paralyzing" (Minchin 2001, 69). A leading attorney for the same union reported that the cost of Title VII litigation threatened "the future solvency and possible continued

[22] This increase was not isolated to labor lawyers. Robert Kagan (1995, 106) found that "national expenditures on lawyers exploded" during this time, "growing sixfold [in constant dollars] between 1960 and 1987 and more than doubling the share of gross national product [GNP] devoted to legal services."

existence of the union," leading the president of the union to write to his 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" (69–70).

Some unions were ultimately "bled to death." Local 28 of the Sheet Metal Workers in New York was sued almost yearly during the 1970s and 80s. The constant litigation including involvement by the Supreme Court (*Local 28 of Sheet Metal Workers v. EEOC*, 478 U.S. 421 [1986]), use of a special master, and hundreds of thousands of dollars in fines when the union failed to meet court-ordered quotas of 29% racial minorities, led the union to reach 10% minority membership in 1982 (it had 0% in 1970). By the end of the decade, while the union reached 20% minority membership, it had gone bankrupt from a demand to pay more than $12 million in wages when it had assets of only $2.5 million and was back in court attempting to force another union to take on its debts. At least some courts, meanwhile, appeared to be sensitive to this financial crisis. While many simply saw their role in using financial damages as a means of costing "the union enough money to provide an incentive to meet [its] goals," (*EEOC v. Local 638*, 921 F.Supp. 1126 [1996, S.D. NY]), others feared union bankruptcy from Title VII litigation and made efforts to avoid it. Justice Thurgood Marshall wrote in a fair representation breach by the IBEW that punitive damage awards not only would deplete union treasuries, but also 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 for whatever deterrent effect punitive damages may have" (*IBEW v. Foust*, 442 US 42, 49–51 [1979]).

While litigation was hurting unions financially, it was having an impact on their racial demographics. The local examples are numerous. The Teamsters Union responded to a class-action suit in 1972 by integrating previously segregated unions in Boston, Buffalo, and Washington, DC (*U.S. v. Time*, 1992 US District Lexis 11509 [1972]). By 1975, the minority membership of these locals had increased from roughly 0% to 13%. In Seattle, law suits were filed against four construction unions—the ironworkers, who had one black member out of 920 workers; the sheet metal workers, who had one black member out of 900; the electricians, who had 1 out of 1,715 workers; and the plumbers and pipefitters, with one black worker out of 1,900 (USCCR 1976, 213). A federal district court ordered the unions to participate in an affirmative action and apprenticeship program, supervised by a labor advisory committee. After unions were halting in their response and after further civil rights groups' protests, the federal judge became more aggressive; he issued a series of specific supplemental orders, rewrote the unions' collective bargaining agreements, and appointed a special master to be involved on a daily basis in overseeing implementation efforts. The U.S. Commission on Civil Rights found the impact of these cases "substantial," although only the electricians union met the goals required by the court order—the other unions met roughly 50–70% of their goals within three years of the order (USCCR 1976, 218–19). A study of Seattle building trade unions found the four unions supervised by court order to integrate at a far faster rate than those unions not covered by the order (Marshall et al. 1978, 51). By 1980, census data reflect even further change in at least three industries (data on ironworkers are unavailable), as electricians reached 9% minority workers in Seattle, plumbers and pipefitters reached 9.3%, and sheet metal workers reached 8.2% (Bureau of Labor Statistics 1981). Lawsuits directed against Washington, DC unions achieved a similar impact. All seven craft unions targeted by class-action law suits showed significant improvement between the early 1970s and 1980; census data (Bureau of Labor Statistics 1981) reflect dramatic increases among sheet metal workers (from 8.5% to 21.8% minority), electricians from (11.9% to 25.8%), and machinists (16.9% to 29.8%). A settled lawsuit against the bricklayers union in Washington, DC, had a similarly significant impact by integrating a white-only union that had provided work preference to its workers over an all-black local that comprised nearly 40% of industry workers (Payton 1984).

TABLE 1. Percentage Minority Membership in Unions, 1968–83[a]

Union	1968	1972	1978	1983
Asbestos workers	0.1	2.9	7.2	10.1
Boilermakers	7.6	9.6	17.6	15.9
Bricklayers	12.5	12.7	14.5	15.3
Carpenters	4.9	9.7	12.9	12.6
Electrical workers	5.1	6.6	10.1	10.5
Elevator constructors	2.5	5.1	6.3	7.8
Hotel and restaurant	23.4	31.5[b]	44.7	51.5
Ironworkers	5.3	6.5	11.6	12.1
Plumbers/pipefitters	2.1	3.6	8.0	8.0
Painters	12.0	13.9	17.7	19.3
Plasterers	25.4	31.4	36.2	37.1
Operating engineers	4.3	5.1	12.0	11.8
Sheetmetal workers	2.6	6.4	8.2	11.0
Stage and motion picture	4.3	8.9[b]	9.7	11.3
Teamsters	16.0	N/A	26.3	26.5

Source: Office of Research, Equal Employment Opportunity Commission, "EEO-3 Reports."
[a]"Minority" includes blacks and "Spanish Surnamed" only; Asian Americans and Native Americans are inconsistently listed in the EEOC data reports and thus are left out to provide consistency.
[b]1972 data unavailable; 1974 data used.

Table 1 provides a sense of the national progress in unions, according to available reports from the EEOC. The reports are the most comprehensive data available on union membership during this time and the numbers correspond with available "Employment and Earning" statistics from the Bureau of Labor (1983).[23] While they exclude some large unions, they nonetheless

[23] Unfortunately, the Bureau of Labor's statistics are sporadic and broken down only by occupation, not by union membership. In 1983, Bureau of Labor statistics placed the percentage of blacks and Hispanics in the construction trades at 13.2% (compared to the EEO-3 number of 12.6%), the number of electricians at 11.8% (compared

provide strong evidence that both building and nonbuilding trades significantly increased the percentages of nonwhite workers in their ranks between 1968 and 1983, particularly between 1972 and 1978.[24] After a slow start—the EEOC reported that the percentage of black workers in construction unions went down between 1968 and 1969 (EEOC 1970)—the changes were dramatic. Boilermakers, electrical workers, and iron workers doubled; carpenters, elevator constructors, stage and motion picture workers, and operating engineers roughly tripled; plumbers and pipefitters quadrupled; sheet metal workers increased almost five times; and asbestos workers increased from 0.1% in 1968 to 10.1% in 1983.

CONCLUSION

The history of union integration demonstrates the significance of judicial power on a matter of national importance. Judges interpreted statutes in ways that denied unions the benefit of well-crafted loopholes. Judges and lawyers helped devise and then aggressively implemented new courtroom procedures that made it easier for civil rights plaintiffs to access the courtroom and achieve success once they were there. Civil rights lawyers besieged unions with lawsuits and judges compelled compliance with the use of special masters and by ordering unions to pay significant financial fees for back pay, attorneys' fees, and damage fees. Far from a "hollow hope" (as Rosenberg [1991] labels them), courts acted independently and forcefully.

Arguments about institutional independence are inherently fraught with difficulties in a political system filled with clearly interdependent actors and this case study makes clear that courts did not act in a vacuum—not only were elected officials, both national and local, influential, but both leaders and activists of civil rights groups and labor unions were critical to the final outcome. I argue simply that judicial independence is a meaningful concept within the context of institutionally shared powers and historical circumstances. In so arguing, I hope to offer not only a more nuanced understanding of court power, but a similar understanding of the power of elected officials as well. The enormous institutional power that elected officials have to make social policy cannot be separated from the incentives that lead them not to do so. The Constitution may provide elected officials with institutional weapons that it denies to courts, but with these weapons come significant institutional constraints on the ability of elected officials to be active policy makers, particularly on matters of civil rights (Frymer 1999). No political branch, then, is either "hollow" or perfect, as each provides activists different opportunities and constraints that vary with historical and political context.

I conclude with three broader consequences and implications. First, the institutional power of courts described in this article is *both* historically situated and, in important ways, constant over time. Courts gained power when elected officials were unable to respond on their own and looked to defer and displace political conflict onto the courts. In this regard, my work agrees with Mark Graber's (1993, 36) argument that courts are historically most powerful when "the dominant national coalition is unable or unwilling to settle some public dispute." In addition, courts gained influence at a time when lawyers and judges were greatly expanding their own professional opportunities. Congress aided, but only tacitly, this expansion of the legal community. The specific historic nature of these reforms meant that they could later be taken away. By the mid-1970s, Congress started to pay closer attention to the politics of legal rule making. In 1973, Congress rejected rule changes for the first time and has since remained far more active in this process (Bone 1999). Congress has also scaled back professional opportunities for lawyers, restricting class action and attorney fee opportunities. The Supreme Court has also changed and now reviews legal and procedural matters differently. Many of the Court's key decisions that put pressure on unions, from *Griggs* to *Weber*, have since been either overturned, severely narrowed, or reinforced only by statute. At the same time, as American political development scholars have argued with regard to other institutions, certain historical developments that increase an institution's power are not so easily displaced even in times when electoral officials favor such changes (e.g., North 1990; Skowronek 1993). Moreover, there are features of U.S. legal systems and courts, such as their reliance on common law and the multitude of judges and forums that are provided to civil rights litigants, which enable courts always to provide a certain degree of malleability and dynamism that can give rise to political activism even in moments of historical retrenchment (McCann 1994).

Second, the historical–institutional analysis of court power provided here offers insights to broader questions about the unique development of the American state during the twentieth century and, particularly, the importance that both race and law played in this development. American political development scholars have frequently argued that race has been a central limit to the expansion and success of the New Deal welfare state (e.g., Katznelson et al. 1993; Lieberman 1998; Quadagno 1994). Into the vacuum of New Deal civil rights enforcement stepped courts and lawyers, making themselves a major component of the state building enterprise. An account of courts as pivotal actors in the New Deal and post-New Deal state is at odds with political development scholars who link the New Deal's importance to state building with the *defeat* of court activism (e.g., Forbath 1991; Orren 1991). The mid-1930s may have been a moment when elected officials took control of national labor policy away from the courts, but the fragmented nature of the New Deal

to 10.5% for EEO-3), the number of plumbers and pipefitters at 7.9% (compared to 8.0%), and the number of sheet metal workers at 9.0% (compared to 11.0%).

[24] This is not to contend that these numbers are the only measure of racial progress. Statistical improvements do not account for discrimination against minority workers on the job, nor do they mean that there is not discrimination in the types of jobs that workers on the basis of their race tend to get (see Crain and Matheny 1999; Edelman 1990; Mahoney 2000).

coalition and its failure to incorporate black Americans into labor policy meant that courts would remain the primary vehicle for civil rights reforms. This in turn would help undermine the New Deal state, as the split between labor and civil rights groups has had dramatic implications for national politics (Frymer and Skrentny 1998; Goldfield 1997; Klare 1981; Sugrue 1996). By the early 1980s, the percentage of minorities in unions had increased dramatically, but because the overall union population was declining precipitously during these years, the actual number of minorities in many integrated unions actually declined (Stein 1998). Had race not been left out of the initial building of labor regulatory agencies—had the NLRB or DOL, for example, been an available alternative for handling civil rights matters—the government might have been able to respond in a manner that did not further weaken labor and the New Deal coalition in the process. Considering union importance for the passage of civil rights laws, the fact that unions represent far more minority workers than any other interest group, and the very concrete benefit of union membership for minority workers' salaries,[25] union decline during this time is far from inconsequential.

This leads to a final point. As much as the history of labor union integration reflects court power, it also supports arguments from law and society scholars as to the problematic role of courts in the policy realm—that they are often inefficient and unnecessarily combative (Kagan 1995), that they provide opportunities to those who are well-organized compared to disadvantaged litigants (Gallanter 1974), and that their decisions place a particular emphasis on individualism and "rights" that ignore political and economic deliberation and more complicated social realities (Glendon 1991; Scheingold 1974). In fact, the claim that courts ignored a more complicated economic reality regarding union discrimination, resulting in further (and unintended) consequences for the labor movement, has become a popular refrain among labor scholars (e.g., Lichtenstein 2002; Stein 1998). It also became an occasional concern of the Supreme Court, most notably in a series of decisions authored by Justice Thurgood Marshall (e.g., *Foust: Emporium Capwell Co. v. Western Addition Community Organization*, 420 U.S. 50 [1975]). The single-mindedness with which many judges and lawyers focused on integrating unions led them to ignore less adversarial ways in which the process might have been resolved. As a result, when racial minorities were provided access to unions, they often found them gravely weakened by financial problems and social discord, leaving unions less power to negotiate collective bargaining agreements. One of the ironies of this story, *pace* those who claim that courts are a "hollow hope," is that courts were arguably *too* powerful in promoting civil rights in labor unions.

Court influence, then, was the product of a much larger political–institutional conflict—an historically specific conflict that particularly involved the national Democratic Party, the evolving regulatory state, and entrenched anti-civil rights interests both in the South and in the national labor movement. It is out of this broad historical and institutional context, and out of the fact that the development of the American regulatory state failed to incorporate racial minorities until very late in its process, that courts came to have tremendous significance. The successful activism of judges and lawyers took place as the federal government was trying to resolve new social policy matters within a web of fragmented and uneven patterns of state building. It was also quite arguably the only possible alternative for civil rights groups, even if its impact was problematic and led to many unintended outcomes. The end result, then, was not ideal for anyone involved and key actors continue to this day to respond to its consequences.

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[25] According to the Bureau of Labor Statistics (2002), in 2001 African American and "Hispanic" union members (aged 16 and over), respectively, made on average $140 and $180 more per week than nonunion members.

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