

# Paul Frymer, *Black and Blue: African Americans, the Labor Movement, and the Decline of the Democratic Party*

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## 1 Citation

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## 2 Abstract

In *Black and Blue*, Paul Frymer describes how the American State's fragmented labor policy in the mid 20th century caused the labor movement to clash with the civil rights movement, resulting in the integration of labor unions via financially crippling litigation and organized labor's permanent decline. Specifically, the Wagner Act of 1935 authorized workers to elect their own unions representatives, but it failed to provide for a duty of fair representation, and consequently the agency created by the Act to protect unions from employer sanction, the National Labor Relations Board (NLRB), lacked jurisdiction over civil rights issues. Conversely, when the Civil Rights Act of 1964 was passed, it created the Equal Employment Opportunity Commission (EEOC), which was eager to punish labor unions for violating Title VII of the Act but lacked the "cease and desist" powers to do so. Consequently, the EEOC relied heavily on litigation, lodged by the NAACP and corporate lawyers representing African American workers via class action lawsuits, to enforce the Civil Rights Act. Courts proved eager to integrate labor unions and to enforce civil rights law but, along the way, they largely ignored labor law and undermined workers' ability to collectively bargain. By bleeding labor unions to death via litigation, courts undermined labor power. In doing so, they permanently weakened one of the constitutive pillars of the Democratic Party as well as an organizational structure which, if reformed, could empower African American workers. In short, the racist foundations of the New Deal State, and the failure of electoral democracy, promoted civil rights leaders to turn to the courts to integrate labor unions. In turn, the courts relied on formalistic definitions of representation to enforce civil rights law and undermine labor law, thereby ignoring democracy's inherent messiness and failing to see how democratic equality sometimes requires not simply a focus on representation but also on power and outcomes.

## 3 The Fractured Foundation of National Labor Policy

### 3.1 The 1935 Wagner Act and the National Labor Relations Board (NLRB)

The Wagner Act of 1935, often heralded as the "Magna Carta" of the labor movement, authorized workers to elect their own union representatives, who could negotiate with their employers to obtain binding contracts governing "wages, benefits, hiring and firing, and general workplace conditions" (Frymer 2008: 23). The Wagner Act also created the National Labor Relations Board (NLRB), chartered to protect unionized workers from employer sanctions via cease-and-desist powers (Ibid: 31). the NLRB "was a critical agency in promoting union power in labor's heyday of the 1930s to the 1960s," but it also promoted the political interests of the original parties to the legislative bargain - "in this case, white, blue-collar unions" (Ibid: 13; 24). Indeed, with African American representation lacking in the 1935 Congress, efforts to attach a "duty of fair representation" to the Wagner Act had failed (Ibid: 29). Hence the NLRB continually allowed unions to discriminate against black workers (Ibid: 31). In fact, the NLRB claimed, "in many ways correctly," that

it lacked jurisdiction over civil rights issues (Ibid: 13). This racially discriminatory foundation of the Labor Movement set it on a collision course with the Civil Rights Movement once it emerged in the 1960s.

### 3.2 The 1964 Civil Rights Act and the Equal Employment Opportunity Commission (EEOC)

Where the Wagner Act was the defining “super-statute” for the Labor Movement, the 1964 Civil Rights Act was the equivalent for the Civil Rights Movement. *Inter alia*, the Act created the Equal Employment Opportunity Commission (EEOC), “an agency specifically designed to weed out discrimination by both employers and unions” (Ibid: 15). Yet unlike the NLRB, the EEOC lacked teeth: Senate Minority Leader Everett Dirksen had successfully attached an amendment to the Civil Rights Act removing the EEOC’s “cease-and-desist” and litigation powers,” and the EEOC was “understaffed and underfunded” from the get-go (Ibid: 40). It was in this context that it relied “on lawyers, sometimes through the Department of Justice but more often private lawyers who filed class-action lawsuits,” for enforcement (Ibid: 34).

## 4 The NAACP and Labor: From Allies to Enemies

The NAACP and Labor Unions collaborated at first: “The NAACP . . . began in the 1940s to become more directly involved in union civil rights. This was because it saw the newly formed CIO as a potential ally. . . the CIO, in turn, saw the NAACP as a useful ally. . . By 1947, the NAACP was working arm in arm with the CIO to mobilize new members for both organizations” (Ibid: 54-56).

Yet by the 1950s and 1960s the pressure to integrate unions was growing. Even so, “[the unions’] priority was maintaining union power, and even progressive union leaders such as [Walter P.] Reuther [of the United Auto Workers] had endorsed the inclusion of locals into their membership that had constitutions mandating segregation. . . As evidence and charges of far more systematic problems surfaced, union leaders stonewalled, denied, and attempted to deflect the accusations” (Ibid: 68). The NAACP, in turn, grew increasingly critical of labor. At first “they wrote letters, tried internal mediation, mobilized local union members around the country, and used publicity,” but “after this extensive effort by the Association failed. . . it took a more aggressive, litigious stance” (Ibid: 46). The NAACP’s pugnacious Labor Director, Herbert Hill, verbally attacked the UAW for discrimination, and Reuther threatened to resign from the NAACP board (Ibid: 66).

The NAACP’s legal team gained the ability to sue unions under Title VII of the Civil Rights Act, and it was encouraged to do so not only by the EEOC but by a growing number of civil rights organizations: “Frustrated by the glacial pace of change in many unions civil rights policies. . . African American union members and civil rights activists were increasingly organizing more radical movements such as the formation in 1968 of DRUM in the Midwest, and nonunion affiliated locals of the NAACP, including the Congress for Racial Equality (CORE) in Philadelphia and the Western Addition Community Organization (WACO) in San Francisco, to challenge stagnant unions with strikes and picketing” (Ibid: 69). In short, “the continuing resistance of unions to civil rights reforms eventually led to the activism of courts and lawyers” (Ibid).

## 5 Bleeding Unions via Litigation

### 5.1 Foundations: *Carolene Products* and the 1934 Rules Enabling Act

Courts proved to be the critical institution for the integration of labor unions. In doing so, “the American state. . . was again revised (if not replaced) by politics through courts. And this would become the legacy of the twentieth-century Democratic Party: not the Wagner Act and other legislation of the New Deal but legislation through litigation” (Ibid). Courts had two foundations from which to proceed. First, they leveraged the logic laid before them by Justice Stone in footnote 4 to *United States vs. Carolene Products co.* (1938), which provided the courts with a special duty to protect the civil liberties of “discrete and insular minorities” even as Congress would be accorded greater discretion to regulate commerce. Second, judges leveraged the 1934 Rules Enabling Act, which enabled judges to craft the content of the federal rules of civil procedure and facilitate litigation by petitioners for redress of grievances: “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 the district judges to decide large complex cases of national importance” (Ibid: 81).

## 5.2 The Courtroom Assault on Organized Labor

By the time the Civil Rights Act was passed in 1964 and the EEOC incentivized litigation to enforce the Act, courts began to attack unions left and right for violations of Title VII. First, they “called for dramatic action to remedy racial inequality in the labor movement and infringed on labor laws designed to protect union autonomy;” Second, “courts made unions comply with these rulings by allowing civil rights lawyers to bring many discrimination cases to federal court; authorizing the use of class actions; awarding back pay, attorneys fees, and punitive damages to civil rights plaintiffs; and demanding that labor unions and employers pay all these awards” (Ibid: 72). In effect, courts made it too financially costly for unions not to comply with the Civil Rights Act. As the President of the United Papermakers and Paperworkers wrote in a 1972 message 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” (Ibid: 91).

## 5.3 Unintended Consequences: The Long-Term Decline of Labor

The integration of labor unions via litigation had the unintended consequence of causing labor’s decline. Some labor leaders saw the tide coming: David Feller, counsel for the United Steel Workers, wrote to UAW President Walter Reuther that “if the NAACP attack on discrimination is converted into an attack on union organization it will inevitably be used by employers to defeat or weaken union organization, which in the end will obstruct rather than aid the achievement of job rights for Negroes” (Ibid: 41). Frymer argues that this is exactly what happened. Although courts were eager to enforce the Civil Rights Act, they proved unsympathetic and ignorant of the Wagner Act’s provisions, and consequently favored granting rights to individuals facing discrimination on the basis of race while refusing to extend equal protection to those discriminated against on the basis of class (Ibid: 6). “Judges. . . quite rightly found unions consistently in violation of the Civil Rights Act,” Frymer writes; “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. . . 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” (Ibid: 15). In this situation of “pattered anarchy,” corporate lawyers were able to expand civil rights while simultaneously “weakening the chief opposition to free market capitalism” (Ibid: 7; 25).

## 6 Conclusions: Law, “Messy” Democracy, and Intercurrences

Ultimately, while litigation proved extremely successful in integrating labor unions, it had the unintended consequence of weakening one of the constitutive pillars of the Democratic Party, a pillar that could have served the interests of workers and African Americans had it been reformed rather than bled to death. Democracy, Frymer argues, is “messy,” and when we rely too much on “formal definitions of representation,” as the courts did in the 1960s and 1970s, we lose sight of the fact that “democratic equality will often necessitate action by those who are less directly representative to the public, not because they are removed from public opinion and the tyranny of the majority but because they have incentives to represent both minority and majority groups that are unable to represent themselves effectively. . . democracy should not be defined simply in terms of representation but also in terms of power and outcome” (Ibid: 130).

Yet civil rights lawyers or judges should not bear the brunt of the blame. Indeed, “the centrality of courts in the policy-making process is symptomatic of a greater problem in American state development - the inability of the nation to represent all Americans equally through electoral democratic representation” (Ibid: 134). It was Congress that established a fragmented labor regime, with the NLRB on the one hand, unwilling and lacking jurisdiction to promote civil rights, and the EEOC on the other hand, willing to enforce civil rights but lacking the capacity to do so. Ultimately, Frymer’s is a story of what scholars of American Political Development call ‘intercurrences’: “two vectors of power involving labor and civil rights, created in different historical moments, conflict with each other, leading to unintended consequences” (Ibid: 9).