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Conflicting Obligations: American Political Culture and the Law of the Workplace

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Articles

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In two articles previously published in this Journal, I described American labor and employment law, and then compared it with the Japanese law of the workplace.[1] One of my conclusions was that, not surprisingly, the contrasting cultures of Japan and the United States generated different types of law regulating the employment contract. A similar contrast exists between labor and employment law regimes that developed at different times within the United States. American labor and employment law developed in two waves. During the 1930s and 1940s, the United States implemented a labor law regime that protected the right of workers to form labor unions. Then, during the 1950s and 1960s, Congress and many state legislatures passed laws aimed at eliminating employment discrimination based on race, sex, religion, and national origin. Because these two regimes developed at different times, in dramatically different political contexts, American labor law, and American employment discrimination law were based on different, sometimes contradictory, premises. Labor law was focused on the rights of the group, employment discrimination law on the rights of individuals. By the end of the 1960s, the contradictions between these premises resulted in doctrinal conflicts between the two areas of the law, and, more importantly, between the two interest groups that depended

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1) Reuel E. Schiller, *Regulating the Workplace: Three Models of Labor and Employment Law in the United States*, 29 NIHON UNIV. COMP. L. 138 (2012); *see also* Reuel E. Schiller, *Different Cultures, Different Conflicts: Sex Discrimination Law and the United States and Japan*, 28 NIHON. UNIV. COMP. L. 127 (2011).

on each regime for their legal rights. This conflict had a profound impact on American politics at the end of the twentieth century.

American labor law is based on three basic principles: workplace majoritarianism, exclusive representation, and voluntarism.[2] A union is permitted to bargain on behalf of workers in a particular workplace only if a majority of those workers vote to have that union represent them.[3] This is known as workplace majoritarianism. Once a union has received those votes, it negotiates a collective bargaining agreement on behalf of all the workers in the workplace, including those who did not vote for the union and those who refuse to join the union. These dissenting workers may not get another union to negotiate on their behalf. Nor may they bargain with the employer directly. This is known as the principle of exclusive representation.[4]

Once the workers have chosen to be represented by a union, the government steps out of the process.[5] The union and the employer negotiate the contract. If they are unable to agree, differences are resolved through the weapons of economic conflict: strikes, lockouts, replacement workers, boycotts, picketing. American labor law explicitly forbids the government from resolving these disputes. Similarly, disputes that arise under collective bargaining agreements are resolved through private arbitration, the arbitrators having been picked by the union and the employer. Absent exceptional circumstances, American courts simply enforce the results of these private arbitrations, regardless of the merits of a particular decision.[6] This system of industrial relations is known as volunterism.

Workplace majoritarianism, exclusive representation, and voluntarism are not the only models of labor law available to policy-makers.[7] They developed in the United States for specific, historical reasons. Each reflected aspects of the political culture of the 1930s and 1940s, the decades

2) Schiller, *Regulating the Workplace*, 29 NIHON UNIV. COMP. L. 138 (2012).
3) 29 U.S.C. § 159 (2013).
4) J.I. Case Co. v. National Labor Relations Board, 321 U.S. 332, 333 (1944) and Emporium Capwell Co. v. Western Addition, 420 U.S. 50, 64-60, 70 (1975).
5) *National Labor Relations Act*, S 2926, 73rd Cong., 2nd sess., *Congressional Record* 78 (June 6, 1934): 10559. *See also* Senate Committee on Education and Labor, *National Labor Relations Act*, 74th Cong., 1st sess., 1935, S. Rep. 573; Terminal Railroad Association of St. Louis v. Brotherhood of Railroad Trainmen, 318 U.S. 1, 6 (1943).
6) United Steelworkers of America v. American Manufacturing Co., 363 U.S. 564 (1960); United Steelworkers of America v. Warrior and Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers of America v. Enterprise Wheel and Car Corp., 363 U.S. 593 (1960). Katherine Stone, *The Post-War Paradigm in American Labor Law*, 90 YALE L.J. 1509, 1515, 1531-35 (1980-81).
7) KAZUO SUGENO, JAPANESE EMPLOYMENT AND LABOR LAW 494-765 (Leo Kanowitz trans. 2002); STEFAN LINGEMANN ET AL., EMPLOYMENT & LABOR LAW IN GERMANY 52-68 (2008); FOLKE SCHMIDT, LAW AND INDUSTRIAL RELATIONS IN SWEDEN (1977).

in which the foundational statutes of American labor law – the National Labor Relations Act, and the Labor Management Relations Act (generally referred to as the Taft-Hartley Act) – were passed. Voluntarism, for example, was a product of two different developments in American politics. The first of these was the extreme governmental hostility towards labor unions in nineteenth and early twentieth century.[8] During that time, federal and state courts frequently enjoined labor union activities – strikes, boycotts, organizational campaigns – and incarcerated labor union leaders. State and local police forces often supplemented private security forces in suppressing labor activity. When unions were able to use their political strength to pass legislation favorable to working people, the laws were frequently held unconstitutional by courts. Consequently, when, during the 1930s, unions finally had a hospitable political and judicial climate, many of labor's advocates, particularly those belonging to the country's largest labor federation, the American Federation of Labor (AFL), sought to create a legal regime that prohibited the government from entering into labor disputes or involving itself in the formation of or interpretation of collective bargaining agreements.

By the end of the 1930s, however, not all trade unionists were convinced that the government should remain neutral in the battle between labor and management. In particular, left-leaning unions affiliated with the Congress of Industrial Organizations (CIO) hoped to use their newly acquired political power to harness governmental actors to their side of the collective bargaining process.[9] Labor, management, and the state would work together to manage the economy. This vision of codetermined industrial planning did not survive the end of World War II.[10] Postwar strike waves soured public opinion on unions. This, in turn, emboldened American businesses to launch a counter-offensive against the labor movement. At the same time, the rise of anticommunism in the years immediately following the War caused the CIO to purge from its ranks many of its most statist leaders. As a result, by the end of the 1940s, the voluntarist beliefs of the AFL came to dominate the thinking of the American labor movement.

Similarly, the principles of workplace majoritarianism and exclusive

8) William Forbath, Law and the Shaping of the American Labor Movement (1989); Catherine Fisk, *'Still Learning Something of Legislation' The Judiciary and the History of Labor Law*, 19 Law and Social Inquiry 151 (1994).

9) Christopher L. Tomlins, The State and the Unions: Labor Relations, Law, and the Organized Labor Movement in America, 1880-1960 (1985), 99-245; Nelson Lichtenstein, The State of the Union: A Century of American Labor (2003), 54-97.

10) Alan Brinkley, The End of Reform: New Deal Liberalism in Recession and War (1996), 201-226; Tomlins, *supra* note 9, at 317-28; Lichtenstein, *supra* note 9, at 141-77.

representation stemmed from the particular political context of the 1930s. First of all, both doctrines were a response to the rise of company unions in the 1920s and early 1930s. Trade unions realized that employers could weaken independent unions by establishing their own unions in the workplace and tempting workers to join them with an offer of higher wages and benefits, both of which would disappear once the threat of the independent union passed.[11] Similarly, employers were able to undermine the ability of unions to organize their workforces by playing rival unions off against one another.[12] In particular, the 1930s saw bitter conflict between the AFL and the CIO. By requiring workers to pick a single union and then prohibiting other unions from representing workers at a give workplace, workplace majoritarianism and exclusive representation prevented employers from using company unions or the rival federations to weaken an incumbent union.

The emphasis on workplace majoritarianism and exclusive representation also reflected the political culture of the United States during the 1930s. The Great Depression caused a dramatic upwelling of class consciousness in the United States.[13] This resulted in a heightened belief in both the need to use the law to redistribute wealth downwards and an emphasis on shaping public policy to the will of the majority. This contrasted dramatically with an early twentieth century political culture that placed a much greater weight on laissez-faire principles and individual rights against the government. Consequently, the fact that workplace majoritarianism and exclusive representation had the effect of limiting the power of individuals to object to union membership and to negotiate individual employment contracts was seen as unproblematic. Because workplace majoritarianism and exclusive representation facilitated the will of the majority to redistribute wealth from employers to workers, the rights of individual workers had to conform to that goal. During the 1930s, American political culture did not value

11) LICHTENSTEIN, *supra* note 9, at 36-38; TOMLINS, *supra* note 9, at 84-85, 93-95, 132; PHILIP S. FONER, 3 HISTORY OF THE LABOR MOVEMENT IN THE UNITED STATES 42-43 (1964); *see also* Daniel Nelson, *The Company Union Movement, 1900-1937: A Reexamination.* 56 BUSINESS HISTORY REVIEW 335-57 (1982).

12) TOMLINS, *supra* note 9, at 150-69, 177-99, 248-50; LICHTENSTEIN, *supra* note 9, at 44-56; *see also* ROBERT H. ZEIGER, FOR JOBS AND FREEDOM: RACE AND LABOR IN AMERICA SINCE 1865 110-13, 127-29, 136-37 (2007).

13) For the basic historiography of the New Deal see WILLIAM E. LEUCHTENBURG, FRANKLIN D. ROOSEVELT AND THE NEW DEAL (1963); ANTHONY J. BADGER, THE NEW DEAL: THE DEPRESSION YEARS 34-37 (1989); David KENNEDY, FREEDOM FROM FEAR: THE AMERICAN PEOPLE IN DEPRESSION AND WAR (1999); and IRA KATZNELSON, FEAR ITSELF: THE NEW DEAL AND THE ORIGINS OF OUR TIME (2013).

individual autonomy as much as it did before, or as much as it would later.[14]

American labor law thus bears the mark of the historical period in which it was created – suspicious of both courts and of the rights of the individual; aimed at promoting economic equality; emphasizing private ordering and the power of the group. American employment discrimination law, a legal regime created during the 1960s, is a creature of a very different time.[15] By the 1960s American political culture had changed dramatically from the 1930s.[16] The rights that employment discrimination law created were individual rights. Furthermore, these rights were not designed to protect a particular economic class. Instead, they protected people from adverse employment actions taken on the basis of some unchangeable characteristic – race, sex, national origin. Additionally, employment discrimination law was primarily enforced through private lawsuits in court rather than by arbitrations or an administrative agency. Each of these elements of the law of employment discrimination reflected significant changes in American political culture between the 1930s and the 1960s

The first of these changes was the dramatic change in what the government viewed as the primary social problem in American society. Not surprisingly, during the Great Depression, the government focused on economic inequality as the primary problem to be solved. Consequently, labor and employment laws such as the National Labor Relations Act or the Fair Labor Standards Act were specifically aimed at redistributing wealth downwards from employers to their workers.

After World War II, the problem of racial and ethnic discrimination replaced economic inequality as the primary domestic problem that the government sought to eradicate.[17] This change occurred for a variety of reasons: postwar economic prosperity made class issues less salient to policy-makers; the Cold War and the rise of anticommunism caused policy-makers to downplay any class conflict that did exist; American propaganda

14) Reuel E. Schiller, *The Era of Deference: Courts, Expertise, and the Emergence of New Deal Administrative Law*, 106 MICH. L. REV. 399 (2007); and WILLIAM E. NELSON, THE LEGALIST REFORMATION: LAW POLITICS AND IDEOLOGY IN NEW YORK, 1920-1980 (2002), 271-368.

15) Title VII of the Civil Rights Act of 1964 was the primary piece of federal legislation prohibiting employment discrimination. 42 U.S.C. § 2000e. Many states also passed such legislation in the 1950s and 1960s. See, for example, Cal. Gov. Code § 12940(a)-(o).

16) Reuel E. Schiller, *Enlarging the Administrative Polity: Administrative Law and the Changing Definition of Pluralism, 1945-1970*, 53 VAND. L. REV. 1389, 1431-32, 1435 (2000); *see also* NELSON, *supra* note 14.

17) THOMAS J. SUGRUE, SWEET LAND OF LIBERTY: THE FORGOTTEN STRUGGLE FOR CIVIL RIGHTS IN THE NORTH (2008); Michael J. KLARMAN, FROM JIM CROWN TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY (2004); TAYLOR BRANCH, PILLAR OF FIRE: AMERICA IN THE KING YEARS (1998); TAYLOR BRANCH, AT CANAAN'S EDGE: AMERICA IN THE KING YEARS (2006).

portrayed the war against Nazi Germany as a war against racism and this fact helped white Americans grow accustomed to the idea of racial and ethnic pluralism even as it raised the expectations of racial and ethnic minorities in the United States; discriminatory racial practices in America proved to be an obstacle as the United States and the Soviet Union sought to gain allies among recently decolonialized countries in Asia and Africa.[18] American labor and employment law followed this changed policy priority. During the 1950s, most states outside of the American South passed laws prohibiting racial, ethnic and religious discrimination.[19] In 1964, the federal government passed Title VII of the Civil Rights Act of 1964, which prohibited sex discrimination as well.[20]

Another shift in American political culture was a change in how people believed public policy should be made. Throughout the 1940s and 1950s, most American policy-makers and politicians believed in what was called "the group basis of politics."[21] The best public policy, it was believed, was made when the government implemented policies that represented a compromise among different interest groups. In the 1950s, such interest groups were not condemned, as they are in contemporary American political culture, but were instead seen as the building blocks of a vibrant, democratic society. They represented the collective interests of people whose individual voices were easily ignored in a vast, complex society. Compromises among interest groups were the best way to ensure that the government implemented the wishes of most Americans. Labor and employment laws that promoted strong unions and elevated the power of the union over that of its individual members (doctrines such as exclusive rep-

18) Sugrue, *supra* note 17, at 76-81, 96-102, 170-83, 255-71, 356-65 79-82, 105, 318. *See also* MARY L. DUDZIAK, COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY (2000), 47-61, 79-82.

19) Francis H. Fox, *Discrimination and Antidiscrimination in Massachusetts Law*, 44 B.U. L. REV. 30 (1964); Derrick A. Bell, Jr. *Pennsylvania Fair Employment Practice Act*, 17 U. PITT. L. REV. 438 (1955-1956); Elmer A. Carter, *Practical Considerations of Anti-Discrimination Legislation Experience Under the New York Law Against Discrimination*, 40 CORNELL L.Q. 40 (1954-1955); Monroe Berger, *The New York State Law Against Discrimination: Operation and Administration*, 35 CORNELL L.Q. 747 (1949-1950); Patricia Ward Crowe, *Complainant Reactions to the Massachusetts Commission Against Discrimination*, 12 LAW & SOCIETY REVIEW 217-36 (Winter 1978); Richard B. Dyson and Elizabeth D. Dyson, *Commission Enforcement of State Laws Against Discrimination: A Comparative Analysis of the Kansas Act*, 58 MICH. L. REV. 920 (1959-1960); Carl A. Auerbach, *The 1967 Amendments to the Minnesota State Act Against Discrimination and the Uniform Law Commissioners' Model Anti-Discrimination Act: A comparative Analysis and Evaluation*, 52 Minn. L. Rev. 231 (1967-1968); Joseph Minsky, *FEPC in Illinois: Four Stormy Years*, 41 NOTRE DAME L. 152 (1965-1966); Charles H. Wiggins, Jr., *Illinois Fair Employment Practices Act*, 1965 U. ILL. L.F. 267 (1965).

20) 42 U.S.C. § 2000e.

21) Schiller, *supra* note 16, at 1438.

resentation and workplace majoritarianism), fit perfectly with this way of viewing the political process.

By the 1960s, the group basis of politics had fallen out of favor.[22] Interest groups came increasingly to be viewed as "special interests," whose only concern was promoting the interest of their group over the public interest. As the 1960s wore on, Americans came to believe that government was dominated by unrepresentative interest groups. The law, many believed, needed to protect individuals from such groups. Indeed, the employment discrimination laws that came into being in the 1960s were designed to have such an effect – to protect individual rights against groups (such as unions or corporations) that would discriminate against them.

The final change in American political culture that occurred between the 1930s, when America's basic labor laws were enacted, and the 1960s, when its employment discrimination laws were passed, was a dramatic shift in the role that courts were expected to play in American policy-making. In the 1930s, the progressive politicians who came into power because of the Great Depression hated courts.[23] They viewed them as reactionary entities – allies of the business elites who were blamed for the Great Depression. These courts held reform legislation unconstitutional.[24] They enjoined strikes.[25] They convicted labor union activists.[26] Consequently, the judiciary was marginalized by the labor law regime these politicians created. The law was implemented primarily by an administrative agency – the National Labor Relations Board – and by private arbitrations between unions and employers that courts were expected to rubber stamp.

By the 1960s, however, courts were back in the favor of liberal policymakers.[27] The politics of the federal judiciary in particular had changed dramatically. Far from being the engine of reaction, during the 1950s, federal courts were increasingly viewed as the institution responsible for implementing liberalism's goal of racial and ethnic egalitarianism. The United States Supreme Court was becoming increasingly active in protecting the constitutional rights of minorities and individuals.[28] Thus, when

22) Schiller, *supra* note 16, at 1410-13.
23) Schiller, *supra* note 2, at 402-403.
24) Lochner v. New York, 198 U.S. 45 (1905); Hammer v. Dagenhart, 247 U.S. 251 (1918); Adkins v. Children's Hospital, 261 U.S. 525 (1923); Forbath *supra* note 8, at 37-58.
25) Felix Frankfurter, The Labor Injunction (1930), 17-23; Forbath *supra* note 8, at 59-97.
26) *In re Debs*, 158 U.S. 564 (1895); Forbath *supra* note 8, at 98-127.
27) Schiller, *supra* note 16, at 1423-26, 1443.
28) For an encyclopedic description of the rise of the federal judiciary as the promoter of racial egalitarianism and the protector of civil liberties in the years following World War II, see Melvin I. Urofsky et al., 2 March of Liberty (2011). See also, Laura Kalman, The Strange Career of Legal Liberalism (1998).

policy-makers in the 1960s began to craft a legal regime to combat employment discrimination, they entrusted it to courts. The primary method of enforcing federal antidiscrimination laws would be lawsuits filed in courts. Administrative agencies and private arbitrators were excluded from the process.

These changes resulted into two legal regimes with very different sets of rules and institutions. Labor law, crafted primarily in the 1930s and 1940s, empowered the poor against the rich, and favored the rights of the group over the individual. The law of employment discrimination, created during the 1960s, was concerned with the rights of minorities and women, not the poor. Its goal was to protect individuals against the overbearing power of the group. Furthermore, each area of law was enforced by different institutions: labor law by an administrative agency and private arbitrators, employment discrimination law by the courts.[29] These differing goals and institutions resulted in a conflict between the two regimes. This conflict, in turn, led to a great deal of instability and, ultimately, to the profound weakening of labor unions in the United States.

The bitter struggle between unions and civil rights groups over the seniority provisions of collective bargaining agreements is an excellent example of this conflict. For the labor movement, seniority was one of the most jealously guarded benefits that came out of the collective bargaining process. By ensuring that workers' promotions were based primarily on how long they had been with a company, unions were able to constrain an employer's freedom to make promotions that were either arbitrary or to the disadvantage of workers who had been in a particular job for a long time.

From the perspective of African American workers, however, seniority was an institution that ensured that they rarely got promoted and that they were the first workers laid-off when economic times got hard.[30] Prior to 1964, almost all hiring in the United States was race-based. The best jobs went to white workers. Black workers were excluded from the workforce or given only the least desirable jobs. Even thought seniority was "race neutral," its effect was to ensure that black workers remained on the lowest rungs of the employment ladder, because they made up a disproportionate number of recently hired workers and workers in low-skilled, junior positions. Since the 1940s, white union leaders had insisted that eventu-

29) PAUL FRYMER, BLACK AND BLUE: AFRICAN AMERICANS, THE LABOR MOVEMENT, AND THE DECLINE OF THE DEMOCRATIC PARTY (2007), 22-43.

30) NANCY MACLEAN, FREEDOM IS NOT ENOUGH (2006), 29; ZEIGER, *supra* note 12, at 166-67; *see also* WILLIAM B. GOULD, BLACK WORKERS IN WHITE UNIONS (1977), 67-69.

ally African Americans would benefit from seniority provisions because they would prevent racial discrimination by employers.[31] However, it never seemed to work that way. Job turnover among black workers was exceptionally high not only because black workers were predominately in lower skilled jobs but also because of endemic discrimination in both hiring and promotion. Consequently, by the early 1960s, it was apparent that seniority was of limited benefit to black workers. Indeed, it was clear that ridged enforcement of seniority provisions ensured that African American workers remained in the lowest paying, most menial jobs.

The solution to this problem, as far as leaders of the Civil Rights Movement were concerned, was "affirmative action."[32] African Americans, it was argued, should be given "super-seniority" to make up for the fact that, historically, they had been discriminated against. If ten percent of the population was African American, should not ten percent of the supervisors at a given company be black? In its most extreme form, affirmative action would require a company to promote African Americans to supervisory positions, regardless of seniority, until the made of ten percent of all supervisors.

The Civil Rights Movement sought to implement affirmative action programs in a number of ways.[33] First of all, it used economic and political pressure. During the early 1960s, it used picketing, strikes, boycotts, and public protests to convince businesses to implement affirmative action programs in hiring and promotion. It also used its political muscle to convince federal, state, and local governments to require the businesses they contracted with to implement affirmative action programs. In unionized workplaces, however, these tactics were unsuccessful. When civil rights groups convinced an employer to implement a program, the labor union representing that employer's workers would have the agreement thrown out as a violation of the collective bargaining agreement. The white workers within most unions did not wish to have their seniority diluted by such programs.

Because of this problem, the Civil Rights Movement developed different tactics for promoting affirmative action programs in unionized workplac-

31) ZEIGER, *supra* note 12, at 167. *See also* SUGRUE, *supra* note 17, at 91-92.

32) MACLEAN, *supra* note 30, at 42-43, 54-61; PAUL D. MORENO, FROM DIRECT ACTION TO AFFIRMATIVE ACTION: FAIR EMPLOYMENT LAW AND POLICY IN AMERICA (1997), 145-54, 157-61, 189-90; JOHN D. SKRENTNY, THE MINORITY RIGHTS REVOLUTION (2002), 85, 87-89; SUGRUE, *supra* note 17, at 267-69, 273-77.

33) SUGRUE, *supra* note 17, at 267-69, 271-285, 273-77.

es. These tactics involved attacking the incumbent union.[34] Some African American leaders called for the formation of independent, all-black unions, to represent the needs of black workers exclusively. Others thought that African American workers should stay within white-led unions, but that the law should allow black workers to negotiate with employers directly. Each of these strategies, African American leaders believed, would allow black workers to pressure employers to implement affirmative action programs. Of course, both strategies would also require the abandonment of the principle of exclusive representation. During the 1960s and 1970s, both the National Labor Relations Board and the federal courts rejected the attempts of African American workers to do this.[35]

The failure to implement affirmative action programs in unionized workplaces either by direct pressure or by the abandonment of the principle of exclusive representation, forced African American workers to use yet another tactic, and this final one was successful. Starting in the late 1960s, black workers began suing their employers and their unions using Title VII of the Civil Rights Act of 1964.[36] When they won these law suits, which they frequently did, they would request a remedy that included affirmative action. If a court held that Title VII required the implementation of an affirmative action program, that holding would set aside the seniority provisions of the collective bargaining agreement. It would thus allow African American workers who had been systematically discriminated against to get superseniority, thereby leaping over white workers.

This campaign for affirmative action – the direct pressure, the attacks on exclusive representation, and the lawsuits under Title VII – had a profound effect on American politics in the late 1960s.[37] Labor union members and African Americans were two of the main constituencies that supported the Democratic Party, the political party that had dominated American politics since the 1930s. This coalition began to break apart in the late 1960s as the

34) Frymer, *supra* note 29, 47-61. *See also* JUDITH STEIN, RUNNING STEEL, RUNNING AMERICA: RACE, ECONOMIC POLICY, AND THE DECLINE OF LIBERALISM (1998); Kieran Taylor, *American Petrograd: Detroit and the League of Revolutionary Black Workers* in AARON BRENNER, ET AL., REBEL RANK AND FILE 311-54 (2010), 311-54.

35) Emporium Capwell Co. v. Western Addition, 420 U.S. 50 (1975).

36) STEIN, *supra* note 34, at 147-96; FRYMER, *supra* note 29, at 71-72, 83-90, 95-97; MACLEAN, *supra* note 30, at 70-75, 103-104, 335-36.

37) JUDITH STEIN, PIVOTAL DECADE: HOW THE UNITED STATES TRADED FACTORIES AND FINANCE IN THE SEVENTIES (2010), 137-42; BRUCE J. SCHULMAN, THE SEVENTIES: THE GREAT SHIFT IN AMERICAN CULTURE, SOCIETY, AND POLITICS (2001), 2-3, 54-58; STEVE FRASER AND GARY GERSTLE, EDS., THE RISE AND FALL OF THE NEW DEAL ORDER, 1930-1980 (1989), 231-32, 243-44, 248-49; LAURA KALMAN, RIGHT STAR RISING: A NEW POLITICS, 1974-1980 (2010), 180-94, 198-201; THOMAS BYRNE EDSALL AND MARY D. EDSALL, CHAIN REACTION: THE IMPACT OF RIGHTS, RACE, AND TAXES ON AMERICAN POLITICS (1992), 107-108, 122-31, 136, 138-39.

opposition party – the Republicans – peeled white union members out of this coalition by attacking affirmative action. Indeed, many white union members were happy to leave the Democratic Party, which they perceived as dominated by African Americans and their white, liberal supporters, who seemed intent on depriving them of the job security that seniority systems had provided.

This political conflict, which ultimately ended the Democratic Party's domination of American politics, stemmed from law. Postwar American liberalism had generated two labor and employment law regimes. One, created during the 1930s, sought to alleviate class disparities by empowering unions and protecting them from outside pressures. The other, created during the 1960s, sought to eliminate racial discrimination by allowing individuals to sue their employers and their unions if either engaged in discriminatory employment practices. In the late 1960s, these two regimes were being used to attack each other. Because they were based on antithetical premises, neither was able to accommodate the interests of the other. Labor law could not give up workplace majoritarianism, exclusive representation, or volunteerism. Similarly, the law of employment discrimination could not give up affirmative action and its right to sue unions over seniority systems. The inflexibility of each legal regime helped generate the political conflict that weakened American liberalism, and ended the power of the Democratic Party.

This narrative helps explain the rise of the Republican Party in the 1970s and the movement of the Democratic Party to the political center during the 1990s. It also helps explain why labor unions in the United States have become so weak in the last thirty years. The extensive conflicts that they have had with non-white workers have made it increasingly difficult for labor unions to recruit members of the United States' increasingly diverse workforce. This story also illustrates a broader point relevant to anyone who studies the law. When we study law we frequently focus on its smallest details: How do you determine if a contract is binding? What is the remedy for a particular injury? How does a government agency issue regulations? How else would we learn the law without such attention to the intricacies of legal doctrine? Because we spend so much time focused on these details, however, we frequently lose sight of the fact that law is a product of society. The law is shaped by the politics and the culture in which it sits, just as the law shapes politics and culture.