The Lost Promise of Civil Rights

Risa L. Goluboff

On May 17, 1954, the United States Supreme Court declared segregation in public primary and secondary education unconstitutional. *Brown v. Board of Education* marked a great milestone for racial progress in the United States. In the half-century since *Brown*, scholars have unsurprisingly lavished attention on the case as the pivotal moment in the creation of modern civil rights doctrine. Indeed, in many ways, it was.[1]

The Supreme Court's opinion in *Brown* did not fix in stone every detail of civil rights law, of course, but it did serve as a crystallizing moment that channeled legal energy in some directions rather than others. Because of *Brown*, psychologically damaged schoolchildren and the state-segregated school became the icons of Jim Crow. It was out of these particular and poignant materials that ordinary Americans, lawyers, and judges constructed subsequent civil rights doctrine. In the wake of *Brown*, that doctrine has primarily addressed questions of racial classification (as well as classifications on the basis of other personal characteristics like national origin and gender), focused on the stigmatic harm of such governmental classifications, and relied upon the equal protection clause of the Constitution's Fourteenth Amendment.

The centrality of *Brown* to both the dominant historical narrative and the reigning legal canon obscures an important point: *Brown* represented only one possible form of modern civil rights doctrine. When lawyers in the National Association for the Advancement of Colored People (NAACP) succeeded in *Brown*, they achieved a major victory over Jim Crow. They also largely eclipsed the other legal experiments in civil

rights that lawyers had undertaken in the decade and a half before *Brown*. The 1940s were not a relatively uneventful interlude between the New Deal's creation of the modern bureaucratic state and the Supreme Court's fulfillment in *Brown* of a long immanent promise to protect the rights of racial minorities. Rather, during that period, the world of civil rights was conceptually, doctrinally, and constitutionally up for grabs. Those years were a signal period of ferment, in which the boundaries of the bureaucratic state, the form of individual rights, and the relationship between them were still unclear. The political and social fundamentals of late 20th-century American liberalism remained deeply uncertain as the New Deal made way first for World War II and then for the Cold War.

In this era of instability and upheaval, civil rights law barely resembled the field as we now know it. Both laypeople and legal professionals included not only the race-based rights with which we associate the term today but also collective labor rights to governmentally provided economic security and affirmative rights to material and economic equality. Contemporaries saw an explicit connection between discrimination and economics, rights and reform, individual entitlement and government obligation. Lawyers treated as civil rights issues labor-based and economic harms as well as racial ones, and they placed responsibility for rights protection within government as well as in opposition to it. Their constitutional imaginations were also more heterodox: they turned for constitutional authority to the antislavery imperative of the Thirteenth Amendment and the due process clause as well as to the equal protection clause of the Fourteenth.

Indeed, from the standpoint of civil rights lawyers, the complaints of African-American workers rather than schoolchildren represented the emblematic civil rights

claims of the 1940s. Throughout the decade, lawyers with a commitment to challenging Jim Crow pursued cases unrelated to labor. They challenged police brutality, lynching, and voting discrimination, as well as segregation in education, transportation, and housing. But both the nature of the workers' claims and the larger political and intellectual currents that shaped the lawyers' responses to them made those claims central to developing legal practices and understandings of civil rights.

The claims of the black workers who sought assistance from civil rights lawyers originated in agriculture and industry, involved near slavery and modern forms of discrimination, and reflected a lack of personal autonomy and opportunities for concerted protest. For all their diversity, each claim traced its roots to the racial slavery as old as the colonies. For many southern whites, the abolition of slavery following the Civil War had spawned two related problems: a race problem and a labor problem. How, they asked themselves, would they prevent the newly freed African-Americans from contaminating the white race and debasing white politics? And how would they find a replacement for the cheap labor black slaves had previously provided and on which the southern economy was largely based?

The answer to both questions was the complex of laws and customs that arose in the late 19th century and eventually came to be called Jim Crow. When southern states managed through both violence and legal chicanery to nullify the vote blacks had so recently won, they made it possible to inscribe Jim Crow into legal and political structures for generations. When railroads decided to segregate their railroad cars and local school boards decided to allocate fewer tax dollars to black schools than to white ones, they helped create Jim Crow. When white planters preferred black to white farm

hands and tenants because they could get more work out of black workers for less pay, they drew on and reinforced Jim Crow. When unions excluded black workers and companies refused to hire them, they perpetuated Jim Crow. When the Ku Klux Klan, often with the acquiescence of law enforcement officers, lynched black men and women, they enforced Jim Crow. Jim Crow existed because every day, in ways momentous and quotidian, governments, private institutions, and millions of individuals made decisions about hiring, firing, consuming, recreating, governing, educating, and serving that kept blacks out, down, and under.[2]

Outside the South, African-Americans could usually vote, and social isolation and terror were less ubiquitous. But Jim Crow as a system of economic exploitation, if not complete segregation and political exclusion, was very much in evidence across the country during the first half of the 20th century. For black workers trying to make a living, Jim Crow North and South meant job announcements addressed specifically to white or "colored" workers. It meant that whole swaths of industry and whole sectors of the workplace were off limits. It meant inadequate schooling, inaccessible labor unions, and unavailable government benefits. Black workers usually performed the worst work for the lowest pay. They could not eat in lunchrooms or use bathrooms on site. They worked in segregated gangs and were forced to join segregated unions or found themselves excluded from unions altogether. They had limited, and usually segregated, access to tolerable housing and other services.

By the time World War II began, Jim Crow as a system of both racial oppression and economic exploitation was longstanding and well entrenched. What was new was a political, intellectual, and legal climate that was increasingly hospitable to the rights

claims of black workers. Prior to that time, there was neither substantial space in constitutional doctrine for civil rights lawyers to construct frameworks that would break down Jim Crow nor much political will or institutional capacity to do so.

Before the late 1930s, federal civil rights litigation held out little promise for African-Americans. In the late 19th century, the Supreme Court had largely undermined the power of the Civil War amendments to protect African-Americans. It read narrowly the Thirteenth Amendment's prohibition on involuntary servitude, the Fourteenth Amendment's promise of due process of law and equal protection of the laws for African-Americans, and the Fifteenth Amendment's protection of their right to vote. In two cases in particular, the Court gutted the Fourteenth Amendment's equal protection clause. In the 1883 *Civil Rights Cases*, the Court concluded that the amendment only protected against rights violations committed by governments, not those committed by private actors. In the 1896 case of *Plessy v. Ferguson*, it upheld state-mandated racial segregation as constitutional.[3]

Between the turn of the 20th century and the 1930s, the Court had instead protected a very different set of individual rights under the due process clause of the Fifth and Fourteenth Amendments—the right to make and enforce contracts, the right to property, and the right to pursue one's livelihood and obtain the fruits of one's labor. Those rights came to be associated with the 1905 case of *Lochner v. New York*, which struck down a state law that prohibited bakers from working more than ten hours per day. In the first third of the 20th century, courts frequently viewed these due process rights as undermining the constitutionality of progressive social and economic regulation. African-Americans' enjoyment of contract and property rights had been central to

Reconstruction-era ideas of civil rights, but during the *Lochner* era the Court largely divorced due process rights from those of African-Americans.[4]

By the Depression decade of the 1930s, the Court began to dethrone the right to contract and uphold New Deal and other legislative interference in the economy against constitutional challenges. The ensuing expansion of federal power and denigration of *Lochner* rights created what was widely perceived as a revolution in constitutional law. It was not apparent at the time how completely courts would eschew contractual rights or what, if anything, would replace *Lochner*. Legal professionals disagreed about what civil rights were, about where in the Constitution courts could find authority to protect them, and about who exactly should provide that protection and how they should do so.

Nevertheless, with *Lochner* displaced, one particular type of rights did seem poised to serve as a replacement in the late 1930s. The political concerns of the Depression made workers' collective rights to organize into unions, bargain, and strike appear paramount. These rights were also a crucial component of the larger set of rights to economic security—to minimum subsistence, unemployment insurance, old age assistance, housing, and education—that the New Deal aspired to provide. No single doctrinal approach to civil rights was yet entrenched, but the collective rights of workers appeared the most likely to replace the *Lochner*ian right to contract within dominant legal discourse.

When World War II brought black protest to the fore, the civil rights issues with the most political traction became those that combined claims to racial equality with still-robust claims of labor and economic rights. In particular, the attempts of black workers to

build on the labor and economic rights of the New Deal represented the most politically promising civil rights issues of the 1940s.

Both because of the way black workers experienced Jim Crow as an integrated economic and racial system of oppression and because of the changing understandings of civil rights, then, the cases black workers brought to lawyers in the 1940s offered significant opportunities. The central civil rights dilemma of the era before *Brown* was whether and how civil rights lawyers would integrate the various strands of labor rights that survived the 1930s into civil rights practices largely focused on African-Americans. In practical terms, this translated into the question of whether and how civil rights lawyers would take the cases of the black workers who sought their counsel.

Indeed, lawyers in two of the most significant legal institutions concerned with civil rights in the 1940s—those in the Department of Justice's Civil Rights Section (CRS) and those in the legal department of the NAACP—pursued the claims of black workers with considerable vigor. The lawyers in the two institutions were situated quite differently. One group of lawyers was white and one largely African-American, one public and one private, one electorally accountable and one increasingly membership driven.

The CRS lawyers worked in the first federal agency in American history whose mission it was to offer legal protection for civil rights. Finding federal jurisdiction for such protection was not easy, but the very difficulty of the task spurred the lawyers to look to the complaints of black agricultural workers for insights. Those complaints offered the lawyers creative ways of balancing an initial mandate of protecting the rights of labor with the World War II imperative of responding to the rights claims of African-

Americans. In doing so, however, the lawyers had to contend with the politics of the Department of Justice, the Roosevelt administration, and the Southerners in the Democratic Party.

For their part, the NAACP lawyers worked for an organization that took as its original mission the destruction of Jim Crow. But well into the 1940s, the association remained open to a number of understandings of that mission. In choosing among them, the NAACP lawyers also took seriously the complaints of black workers. Although the lawyers shared a racial status with their clients, the lawyers' relatively elite social and economic status led them to experience Jim Crow differently from their clients. Those differences shaped the nature and extent of the legal assistance they would offer black workers, as did the institutional context in which they worked. The lawyers had to answer to the higher-ups in the NAACP as well as to the association's white funders and black members. They had to navigate between attacks on the association as communist and attacks that it was too bourgeois.

Consequently, the CRS and the NAACP lawyers approached the complaints of black workers—and the larger project of formulating and establishing new civil rights doctrine—in very different ways. The lawyers' disparate strategies, and the implications of those strategies for the civil rights that eventually emerged, suggest an implicit confrontation between (at least) two contending views. On the one hand, the CRS lawyers understood civil rights in part through the lens of labor rights. They built the foundations of some of their cases on the claims of black agricultural workers, and they made the Thirteenth Amendment's prohibition on involuntary servitude central to their practice. The involuntary servitude cases the CRS lawyers pursued on behalf of black

workers, and the understandings of civil rights those cases suggested, neither monopolized the section's legal practice nor offered up a single, linear plan for a new civil rights doctrine. Nonetheless, the section used the Thirteenth Amendment to extend to some of the most destitute black workers affirmative New Deal protections for personal security, labor rights, and rights to minimal economic security. In part because the CRS took seriously the complaints of African-American agricultural workers, its civil rights practice accepted an affirmative responsibility to challenge economic exploitation as well as racial discrimination.

The NAACP lawyers' very different relationship with the black workers who would be their clients led their civil rights practice in a different direction. For much of its history, the NAACP had not seen itself as deeply concerned either institutionally or programmatically with the economic fortunes of black workers. The exigencies of the Depression and World War II convinced the NAACP and its lawyers to view black workers as institutionally, politically, and doctrinally promising clients. As the NAACP lawyers experimented with due process as well as equal protection frameworks in their wartime legal practice, their cases on behalf of black workers challenged both the public and the private, the stigmatic and the material harms of Jim Crow.

Nevertheless, in the years after World War II ended, so, too, did the NAACP lawyers' pursuit of the complaints of black workers. The cases that the NAACP eventually took to the Supreme Court in the 1950s and beyond sometimes involved poor and working-class African-Americans. And sometimes they concerned material inequality as well as formal discrimination. But by 1950, when the NAACP's legal team embarked on the direct attack on segregation that would eventually lead to victory in *Brown*, they

largely rejected the possibility that workers' complaints would shape their litigation agenda. The lawyers eschewed labor cases, the due process clause, private defendants, and material inequality in favor of a frontal attack on state-mandated educational segregation. They eventually came to depict as the essence of Jim Crow the stigma of governmental classifications.

Had the NAACP's lawyers taken more seriously the complaints of working African-Americans, the lawyers might have realized that undermining Jim Crow required more than attacking state-mandated segregation and discrimination. It required as well an attack on the private economic orderings that were equally a part of Jim Crow America. Answering the entirety of black workers' complaints meant not only establishing a norm of racial nondiscrimination but also shoring up the rights to work, to join a union, to participate in the labor market, to minimal subsistence.

As a result of the NAACP's overwhelming success in the courts—NAACP lawyer Thurgood Marshall alone won twenty-nine cases before the Supreme Court—*Brown* and its progeny succeeded in establishing the NAACP's legal strategy as American constitutional law. Once the Court decided *Brown*, the case, the image of Jim Crow it projected, and the civil rights doctrine it initiated captured—and limited—the legal imagination. The antidiscrimination paradigm that began to take hold had little space for the kinds of claims African American workers and their lawyers in the NAACP and the CRS had made on their behalf a decade earlier. Those lawyers had built on their clients' experiences of Jim Crow to challenge the idea of state action as well as state-sanctioned segregation itself. They had fought for economic advancement within segregated workplaces even as they lodged principled objections to segregation. They

had relied on substantive right-to-work arguments rooted in due process as much as, if not more than, equal protection arguments about formal nondiscrimination. And they used the Thirteenth Amendment as well as the Fourteenth as constitutional authority.

The civil rights doctrine we have today, the doctrine born in education cases and culminating in an anticlassification rule, was not inevitable. It was the product of the explicit and implicit judgments of historically situated actors and institutions—of lawyers who decided which clients to take and how to create legal claims out of their complaints. In opening the way for the attack on Jim Crow as formal, government-enforced segregation, *Brown* short-circuited lawyers' efforts in other realms. The Court's validation of the NAACP's litigation choices made the kinds of arguments the NAACP had constructed on the road to *Brown* more culturally available to future lawyers than the arguments the lawyers had discarded.[5] Whether an alternative strategy would have produced a different outcome is impossible to know. But the problems of African-American workers disappeared from the most influential civil rights practice at a pivotal moment in civil rights history, and our civil rights doctrine has largely failed to address the kind of material inequality black workers faced. By uncovering historical alternatives to the civil rights law we know as our own, we can broaden our imagination about the possibilities for addressing the remnants of Jim Crow still facing the nation today.

Risa L. Goluboff is professor of law and history at the University of Virginia. This essay is drawn from her book, *The Lost Promise of Civil Rights* (Harvard University Press, 2007).

[1] 347 U.S. 483 (1954).

[2] In viewing Jim Crow as both a racial and an economic system, I draw on Robert Rodgers Korstad, *Civil Rights Unionism: Tobacco Workers and the Struggle for Democracy in the Mid-Twentieth-Century South* (University of North Carolina Press, 2003); Eric Arnesen, *Brotherhoods of Color: Black Railroad Workers and the Struggle for Equality* (Harvard University Press, 2001), 101; and Thomas J. Sugrue, "Affirmative Action from Below: Civil Rights, the Building Trades, and the Politics of Racial Equality in the Urban North, 1945–1969," *Journal of American History* 91 (2004): 145–173.

[3] 109 U.S. 3 (1883); 163 U.S. 537 (1896).

[4] 198 U.S. 45 (1905).

[5] I am not arguing here that any particular argument became analytically unavailable. As an analytical matter, a variety of arguments are always available. See, e.g., Duncan Kennedy, "The Structure of Blackstone's Commentaries," *Buffalo Law Review* 28 (1979): 205–382; Mark Kelman, *A Guide to Critical Legal Studies* (Harvard University Press, 1987). Rather, I am suggesting that historically, some arguments are more culturally available in a particular time and place. See, e.g., Morton J. Horwitz, *The Transformation of American Law, 1870–1960: The Crisis of Legal Orthodoxy* (Oxford University Press, 1992).