"LET ECONOMIC EQUALITY TAKE CARE OF ITSELF": THE NAACP, LABOR LITIGATION, AND THE MAKING OF CIVIL RIGHTS IN THE 1940S

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During World War II, the lawyers of the NAACP considered the problem of discrimination in employment as one of the two most pressing problems (along with voting) facing African Americans. In a departure from past practice, they pursued the cases of African American workers vigorously in state and federal courts and before state and federal administrative agencies. These cases offered the NAACP lawyers opportunities to facilitate the growth of the Association, materially assist African American workers, and develop legal doctrine. After the war ended, however, the postwar political and economic climate was less favorable to such cases, and the NAACP's institutional plans conflicted with the continued pursuit of labor cases. Moreover, the kinds of doctrinal opportunities labor cases offered diverged from the NAACP lawyers' increasingly single-minded pursuit of desegregation in education. By the time the NAACP lawyers embarked on the path that would ultimately lead them to victory in Brown v. Board of Education, *labor cases, and the particular problems of working African Americans, had disappeared from their legal agenda. That loss has had fundamental implications for the civil rights they succeeded in instantiating in constitutional law, and for the civil rights we know as our own today.*

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INTRODUCTION

In December 1943, Thurgood Marshall, special counsel of the National Association for the Advancement of Colored People (NAACP or the Association), flew on short notice to northern California to assist a group of African American shipyard workers fighting for their jobs in area shipyards. The day before, 430 African American workers who had refused to pay dues to a segregated and powerless auxiliary of the International Brotherhood of Boilermakers had been barred from employment at the shipyards of the Marinship Corporation. Marinship had signed a closed-shop contract with the union—an agreement to hire only union members—and the black workers, the union claimed, had lost their good standing when they refused to pay their dues. The crisis had garnered so much local attention that Marshall appeared on a radio show to discuss it. He told his radio audience that, "as a negro and an attorney" of the NAACP, he saw "the right of the negro to nondiscriminatory employment"[1] and the right to vote as the two most

1. *America on Guard* (KSFO radio broadcast transcript, Nov. 27, 1943), *microformed on* Papers of the NAACP, pt. 13, ser. C, reel 1, frames 55, 59–60 (John H. Bracey, Jr. & August Meier eds., Univ. Publ'ns of Am.) [hereinafter Papers of the NAACP].

pressing long-term problems of African Americans. "When those problems are solved," he predicted, "other questions will settle themselves."[2] The African American boilermakers complaint, Marshall later explained, was "the type of case which must be filed."[3]

The NAACP's defense of San Francisco's African American shipyard workers reflected the Association's commitment to what Marshall called its "nation-wide fight against discrimination in defense industries."[4] As mobilization for World War II heightened national attention to discrimination against African Americans in the workforce,[5] the NAACP described "one of [its] objectives [as] . . . the improvement of the economic status of Negro workers through the strengthening of their legal position by the enforcement of rights granted to them by the Constitution of the United States, the constitutions of states, and Federal and state laws."[6] In the spring of 1946, a report on the work of the NAACP in the field of employment concluded: "During the war years the work of the NAACP concerned with elimination of discrimination in employment reached such a peak that the National Office found it necessary to employ one attorney [out of five] who would specialize in such work throughout the nation."[7]

In the years after the war ended, however, so too did the NAACP lawyers' pursuit of complaints like those of the San Francisco shipyard workers. By May 1946, Thurgood Marshall no longer could find the time to get to California, although he still had the boilermakers cases on his mind.[8] By 1950, when Marshall and his legal team embarked on their direct attack on segregation, the

2. *Id.* at 60.

3. Letter from Thurgood Marshall to Noah W. Griffin, NAACP Regional Secretary, West Coast Regional Office (May 9, 1946), *microformed on* Papers of the NAACP, *supra* note 1, at pt. 13, ser. C, reel 1, frame 492.

4. Letter from Thurgood Marshall to W.F. Turner, President, Denver Branch (Dec. 13, 1940), *microformed on* Papers of the NAACP, *supra* note 1, at pt. 13, ser. C, reel 7, frame 22.

5. *See infra* notes 108–124.

6. Motion for Leave to File Brief as Amicus Curiae, *James v. Marinship Corp.*, 155 P.2d 329 (Cal. 1945) (S.F. No. 17015), *microformed on* Papers of the NAACP, *supra* note 1, at pt. 13, ser. C, reel 1, frames 259, 259–60.

7. Work of the National Office and Branches of the [NAACP] in the Field of Employment—New York (Apr. 16, 1946), *microformed on* Papers of the NAACP, *supra* note 1, at pt. 18, ser. A, reel 7, frame 762.

8. Letter from Thurgood Marshall, Special Counsel, NAACP to George R. Andersen & Herbert Resner (May 11, 1946), *microformed on* Papers of the NAACP, *supra* note 1, at pt. 13, ser. C, reel 1, frame 494.

attack that would eventually lead to victory in *Brown v. Board of Education*,[9] work-related cases no longer comprised any substantial part of their litigation agenda.[10]

This Article reconstructs the history of the NAACP Legal Department's brief but significant foray into labor-related litigation in the 1940s.[11] That history has received little scholarly attention despite considerable scholarship on the NAACP's litigation strategy and legal activities.[12] In fact, the labor-related concerns of working-class African Americans largely have been absent from the history of modern civil rights doctrine generally. Although historians of African American labor have explored the civil rights activities of both integrated and segregated unions,[13] their contributions largely have failed to penetrate the legal narrative of the development of civil rights doctrine.

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9. 347 U.S. 483 (1954).

10. Throughout this Article, I distinguish between the legal and political activities of the NAACP. My focus here is on the Legal Department's activities. For more detail on the institutional and personnel history of the Legal Department, see *infra* notes 125–129.

11. This Article concerns only industrial workers, not agricultural workers. On the NAACP's relationship to agricultural workers, see Risa L. Goluboff, *"We Live's in a Free House Such as It Is": Class and the Creation of Modern Civil Rights*, 151 U. PA. L. REV. 1977 (2003) [hereinafter Goluboff, *"We Live's in a Free House"*]; Risa L. Goluboff, The Work of Civil Rights in the 1940s: The Department of Justice, the NAACP, and African American Agricultural Labor 17–111, 178–226 (2003) (unpublished Ph.D. dissertation, Princeton University) (on file with author) [hereinafter Goluboff, Work of Civil Rights]. *See also* RISA L. GOLUBOFF, THE LOST ORIGINS OF MODERN CIVIL RIGHTS (under contract Harvard University Press). Because book pagination is not yet set, I refer the reader to the dissertation.

12. *See generally* DAVID J. ARMOR, FORCED JUSTICE: SCHOOL DESEGREGATION AND THE LAW (1995); JACK GREENBERG, CRUSADERS IN THE COURTS: HOW A DEDICATED BAND OF LAWYERS FOUGHT FOR THE CIVIL RIGHTS REVOLUTION (1994); JENNIFER L. HOCHSCHILD, THE NEW AMERICAN DILEMMA: LIBERAL DEMOCRACY AND SCHOOL DESEGREGATION (1984); JOHN R. HOWARD, THE SHIFTING WIND: THE SUPREME COURT AND CIVIL RIGHTS FROM RECONSTRUCTION TO *BROWN* (1999); PETER IRONS, JIM CROW'S CHILDREN: THE BROKEN PROMISE OF THE *BROWN* DECISION (2002); MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY (2004); RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF *BROWN V. BOARD OF EDUCATION* AND BLACK AMERICA'S STRUGGLE FOR EQUALITY (1977); ANDREW KULL, THE COLOR-BLIND CONSTITUTION (1992); CONSTANCE BAKER MOTLEY, EQUAL JUSTICE . . . . . UNDER LAW: AN AUTOBIOGRAPHY (1998); JAMES T. PATTERSON, *BROWN V. BOARD OF EDUCATION*: A CIVIL RIGHTS MILESTONE AND ITS TROUBLED LEGACY (2001); GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (1991); MARK V. TUSHNET, THE NAACP'S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925–1950 (1987) [hereinafter TUSHNET, LEGAL STRATEGY]; J. HARVIE WILKINSON III, FROM *BROWN* TO *BAKKE*: THE SUPREME COURT AND SCHOOL INTEGRATION: 1954–1978 (1979). Mark Tushnet has discussed the labor cases briefly in MARK V. TUSHNET, MAKING CIVIL RIGHTS LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1936–1961, at 76–80 (1994) [hereinafter TUSHNET, MAKING CIVIL RIGHTS LAW].

13. *See generally* ERIC ARNESEN, BROTHERHOODS OF COLOR: BLACK RAILROAD WORKERS AND THE STRUGGLE FOR EQUALITY (2001); ROBERT KORSTAD, CIVIL RIGHTS UNIONISM: TOBACCO WORKERS AND THE STRUGGLE FOR DEMOCRACY IN THE MID-TWENTIETH-CENTURY SOUTH (2003); EARL LEWIS, IN THEIR OWN INTERESTS: RACE, CLASS, AND POWER IN TWENTIETH

In part, the absence of African American workers and their particular problems from the lawyer's canonical story is a product of legal scholars' fixation with *Brown*. Taking the school desegregation cases as their starting point, such scholars have largely assumed that civil rights before *Brown* looked a lot like civil rights after *Brown*: characterized by a fixed meaning, bounded by racial concerns, and reliant upon the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution. Because legal scholars have imagined that the history of civil rights doctrine before *Brown* was, in effect, laying the foundation for modern antidiscrimination doctrine in some way, they have missed the significance of much civil rights practice in the 1940s. In particular, they have missed litigation concerning work, and the ways in which such litigation did not reflect a single-minded and linear pursuit of an antidiscrimination norm.[14]

On the whole, the contours of civil rights were deeply uncertain during the 1940s. Much of civil rights doctrine and politics prior to World War II was linked to work. Legally, for the forty years prior to the late 1930s, courts largely protected one specific understanding of civil rights: Individuals had the right to contract without government interference, the right to own property, and the right to enjoy the fruits of their labor.[15] These rights, identified with the 1905 case of *Lochner v. New York*,[16] often were seen to constrain governmental regulation.[17] In the late 1930s, the Supreme Court

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CENTURY NORFOLK, VIRGINIA (1990); Robert Korstad & Nelson Lichtenstein, *Opportunities Found and Lost: Labor, Radicals, and the Early Civil Rights Movement*, 75 J. AM. HIST. 786 (1988).

14. The reasons for the NAACP's pursuit of education cases in particular have been explored extensively by other scholars. *See, e.g.*, KLUGER, *supra* note 12; TUSHNET, LEGAL STRATEGY, *supra* note 12. These explanations are beyond the scope of this Article. My aim here is to delve into why labor cases, which were so prominent in the early 1940s, had disappeared by the early 1950s.

15. These rights were the dominant, though not the only, rights protected at the time. *Cf.* Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923).

16. 198 U.S. 45 (1905).

17. The meaning and normative implications of *Lochner* have long been the subject of debate. For most of this century, legal scholars have reviled the *Lochner* era as a time when the U.S. Supreme Court subordinated judicial doctrine to economic philosophy. *See, e.g.*, JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980); ARNOLD M. PAUL, CONSERVATIVE CRISIS AND THE RULE OF LAW: ATTITUDES OF BAR AND BENCH, 1887–1895 (1960). Recently, revisionist scholars have begun to view this period of U.S. Supreme Court history in a more positive light. *See, e.g.*, 1 BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS (1991); 8 OWEN M. FISS, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: TROUBLED BEGINNINGS OF THE MODERN STATE, 1888–1910 (Stanley N. Katz ed., 1993); HOWARD GILLMAN, THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF *LOCHNER* ERA POLICE POWERS JURISPRUDENCE (1993); MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870–1960 (1977); William E. Forbath, *The Ambiguities of Free Labor: Labor and the Law in the Gilded Age*, 4 WIS. L. REV. 767–817 (1985); Michael Les Benedict, *Laissez-Faire and Liberty: A Re-Evaluation of the Meaning and Origins of Laissez-Faire Constitutionalism*, 3 LAW & HIST. REV. 293–331

upheld New Deal economic regulation perceived to curtail these rights, destabilizing the long-reigning *Lochner* paradigm.[18] It was not apparent at the time what, if anything, would replace the discredited *Lochner* framework, however. In the political context of the Depression, in fact, lawyers, activists, and government officials often associated a new civil rights with the collective rights of laborers to organize into unions without facing repression and violence. By the early 1940s, the old *Lochner* framework of contractual rights was discredited but still lingering, no single doctrinal approach to civil rights was ascendant, and the collective rights of laborers—a new kind of right to work—appeared to many court watchers the most likely kinds of rights to replace the individual's right to contract.[19]

As the 1930s gave way to the 1940s, World War II transformed the political and social concerns of the nation much as the Supreme Court had upended legal doctrine. The need to use all of America's labor power to support the war effort, and the increasing political and economic strength of African Americans, placed race discrimination in employment and unions at

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(1985); Harry N. Scheiber, *American Federalism and the Diffusion of Power: Historical and Contemporary Perspectives*, 9 U. TOL. L. REV. 619–80 (1978). *See generally* Gary D. Rowe, Lochner *Revisionism Revisited*, 24 LAW & SOC. INQUIRY 221 (1999) (discussing the debate). Revisionists have depicted the Court as less instrumental and more genuinely committed to neutral doctrinal principles. Charles W. McCurdy has suggested something of a middle position. Although he finds revisionism has "greatly enhanced our understanding of the era," he concludes that "no amount of thoughtful revisionism can erase the fact that the 'principle of neutrality,'" now touted as the guiding light of *Lochner*-era judges, did not operate uniformly and without biases. Charles W. McCurdy, *The "Liberty of Contract" Regime in American Law*, *in* THE STATE AND FREEDOM OF CONTRACT 161, 165–66 (Harry N. Scheiber ed., 1998). In particular, McCurdy discusses the way in which labor contracts were deemed special during the *Lochner* era. *Id.* at 173–79. In contrast to the debate on *Lochner* revisionism, I aim not to get at the "cause" of the U.S. Supreme Court's decisions, or some logic that might or might not have run among them. Because my goal is to show the framework that civil rights lawyers would have understood to have governed their cases, it is sufficient to note that most scholars agree that the right to contract—as instrument or principle—was central to the Court's framework for individual rights during the era.

18. Despite extensive academic debates about the timing, causes, and legal and political significance of the end of the *Lochner* era, there is general consensus that change occurred. *Compare* internalists like BARRY CUSHMAN, RETHINKING THE NEW DEAL COURT (1998), MERLO J. PUSEY, CHARLES EVANS HUGHES (1951), Felix Frankfurter, *Mr. Justice Roberts*, 104 U. PA. L. REV. 311–17 (1955), Paul A. Freund, *Charles Evans Hughes as Chief Justice*, 81 HARV. L. REV. 4–43 (1967), *with* externalists like 1 ACKERMAN, *supra* note 17, EDWARD S. CORWIN, CONSTITUTIONAL REVOLUTION, LTD. (1941), ROBERT G. MCCLOSKEY, THE AMERICAN SUPREME COURT (1960), ALPHEUS T. MASON, HARLAN FISKE STONE: PILLAR OF THE LAW (1956), ALPHEUS T. MASON, THE SUPREME COURT: VEHICLE OF REVEALED TRUTH OR POWER GROUP, 1930–1937 (1953), *and* BENJAMIN F. WRIGHT, THE GROWTH OF AMERICAN CONSTITUTIONAL LAW (1942). *See generally* Laura Kalman, *Law, Politics, and the New Deal(s)*, 108 YALE L.J. 2165–2213 (1999) (discussing the debates).

19. For a more detailed discussion, see Risa L. Goluboff, *Deaths Greatly Exaggerated*, 24 L. & HIST. REV. (forthcoming 2006).

the center of the civil rights stage. In the political present of the 1940s, both racial and labor issues were ascendant. Yet the future of civil rights doctrine, the kinds of civil rights claims that would be heard and validated, remained uncertain. How robust would the new right to work be? How much responsibility would the federal government take to ensure it? What kind of equality would replace Jim Crow? What would inclusion look like, and what would be the terms on which African Americans would accept it? Would the future continue to combine protection for the rights of workers and racial minorities, and if so, in what way?

Legal actors and commentators in the decade and a half before *Brown* recognized that legal understandings of civil rights were in a fundamental state of flux. In 1952, for example, Robert Hutchins's foreword to the only casebook on political and civil rights in the United States observed: "Perhaps the best thing that can be said about the law in this field is that it is unsettled."[20] Throughout the preceding decade, others reflected this same sense of openness and confusion.[21] They saw how deeply uncertain were the contours of civil rights, their foundational constitutional texts, and the extent of public and private responsibility for their vindication. Before *Brown*, civil rights—conceptually, doctrinally, constitutionally—contained multitudes.

Within those multitudes, I have argued elsewhere, was a civil rights paradigm in which the rights of African American laborers were prominent.[22] I have demonstrated in particular how the Civil Rights Section of the Department of Justice, a significant and largely overlooked legal player in the 1940s, practiced a civil rights infused with the concerns of African American workers. In part because the Section took seriously the complaints of African American workers who experienced Jim Crow as a system of both racial and economic oppression, the Section's civil rights practice challenged economic

20. Robert M. Hutchins, *Foreword* to POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES, at iii (Thomas I. Emerson & David Haber eds., 1952).

21. In 1942, the Colorado Supreme Court, for example, hesitated to categorize a First Amendment case. It stated instead, "Here then is another case involving a conflict between liberty and authority, a conflict that is sometimes labeled 'civil rights v. the police power' or 'liberty of the individual v. the general welfare.'" Hamilton v. City of Montrose, 124 P.2d 757, 759 (Colo. 1942). In its final report in 1947, President Truman's new Committee on Civil Rights treated these uncertainties as positives. The committee was "convinced that the term 'civil rights' . . . has with great wisdom been used flexibly in American history." PRESIDENT'S COMM. ON CIVIL RIGHTS, TO SECURE THESE RIGHTS, at x (1947) [hereinafter PRESIDENT'S COMM. ON CIVIL RIGHTS]. "The phrase, 'civil rights,'" it opined, "is an abbreviation for a whole complex of relationships among individuals and among groups." *Id.* at 13.

22. *See* Goluboff, Work of Civil Rights, *supra* note 11, at 17–111.

exploitation as well as racial discrimination and placed responsibility for civil rights protection within the federal government.[23]

In this Article, I explore how the NAACP's lawyers had similar opportunities to litigate on behalf of African American workers after World War II but chose instead to pursue their civil rights agenda elsewhere. In Part I, I provide some background on the NAACP's approach to labor issues before World War II. I describe how the Association was formed to address the legal and political, more than the economic, subordinations of Jim Crow, and I discuss the complicated relationship the Association had with workers and organized labor from its creation in 1909 until the beginning of World War II. In Part II, I describe the labor-related cases that the NAACP pursued during the 1940s, and I discuss how those cases fit into the NAACP's larger political, institutional, and doctrinal agenda during the war. The wartime cases that the NAACP pursued and the arguments that its lawyers made reflect the opportunities and negotiations of practicing law in a time of flux. The cases reflect an openness to doctrinal experimentation and a multiplicity of approaches to the problems of African American workers. Ultimately, the NAACP's wartime cases aimed to expand job opportunities as well as challenge segregation; they invoked a *Lochner*ian substantive right to work as well as an equal protection right to be free from discrimination; and they sought to attack material inequality in the private labor market as well as state-sanctioned segregation.

In Part III, I describe the NAACP Legal Department's rejection of labor-related cases in the late 1940s. When the war ended, the reconversion of industry from war production back to a domestic economy threatened African Americans with considerable postwar unemployment. A legal strategy that countenanced some segregation in exchange for real, if insufficient, material advancement no longer presented a viable compromise when the material opportunities seemed to be disappearing. Some NAACP staff members outside the Legal Department continued to push labor unions to desegregate through lobbying, negotiation, and even supporting litigation. Although Marshall and his lawyers occasionally assisted these efforts,[24] for the most part, cases in which discriminating unions were the target became less appealing as unions and the NAACP allied against a rising conservatism and a chilling Cold War.

23. *See id.* at 227–87; Risa L. Goluboff, *The Thirteenth Amendment and the Lost Origins of Civil Rights*, 50 DUKE L.J. 1609 (2001).

24. Sophia Lee, Hotspots in a Cold War: The NAACP's Postwar Labor Constitutionalism, 1948–1964 (unpublished manuscript, on file with author).

The NAACP's postwar litigation choices were grounded in political, institutional, and doctrinal constraints, and they ultimately brought the NAACP considerable success. They were not, however, costless. The Conclusion considers the ways in which the rhetorical and doctrinal contours of civil rights doctrine were a product of the explicit choices of historically situated actors. At a time when civil rights were associated with both labor rights and the rights of racial minorities, the NAACP's labor-related litigation suggested a melding of the two visions. That litigation also was significant because the plaintiffs were working African Americans. 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, in the end, the NAACP's lawyers chose not to take as their focal point the problems of working African Americans as working African Americans.

Because the Legal Department's choices proved so successful in the courts—Thurgood Marshall won twenty-nine cases before the Supreme Court—the decisions that Marshall and his legal team made have deeply influenced the modern paradigm of civil rights. In order to explain the new constitutional paradigm created in *Brown* and beyond,[25] we need to explore the opportunities rejected as well as taken by those who ultimately succeeded in shaping that new paradigm. By reconstructing a previously unexamined component of the NAACP's litigation strategy in the 1940s, this Article highlights complexities and contingencies that otherwise have been submerged in the mainly hagiographic narrative of civil rights triumphant. The point of the Article is not to make the case for a particular lost alternative, nor is it to suggest that the NAACP should have pursued workers' cases. Rather, its purpose is to historicize a conceptual framework and to focus on the creation of civil rights through strategic litigation choices about which cases to pursue and which to avoid, which harms to emphasize and which to ignore, and which constituencies to address and which to disregard. At least in part because of the decisions described in this Article, our imagination of the civil rights plaintiff, the civil rights complaint, and the scope of constitutional civil rights protections are importantly different today.

25. *See, e.g.*, Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles Over* Brown, 117 HARV. L. REV. 1470 (2004) (discussing debates over *Brown*'s meaning).

I. LABOR LITIGATION AND THE EARLY NAACP

Thurgood Marshall's decision to fly from New York to California to meet with African American shipyard workers in December 1943 reflected his determination that their case was worth his time and energy. Marshall's dedication to the shipyard workers and their legal problems was something of a departure from the NAACP's priorities and practice before World War II, however. From its inception in 1909, the NAACP "endeavor[ed]," in the words of Boston lawyer and NAACP founding member Moorfield Storey, "to smooth the path of the Negro race upward."[26] Founded on the heels of race riots in Springfield, Illinois, and of increasingly widespread racial segregation and discrimination, the NAACP emerged out of and in response to the legal orderings of race in the early twentieth century.[27] By the turn of the century, the Supreme Court had largely eviscerated the power of the Reconstruction Amendments to protect the rights of African Americans. Two cases were particularly devastating. In the 1883 *Civil Rights Cases*,[28] the Court held that private discrimination was beyond the scope of the Fourteenth Amendment. And in 1896, in *Plessy v. Ferguson*,[29] it upheld a Louisiana statute requiring railroads to "provide equal but separate accommodations."[30] *Plessy* came eventually to stand for the proposition that segregation laws of all kinds were constitutional so long as the separate conditions were substantially equal, or, in shorthand, "separate but equal." In the aftermath of these and other cases, the NAACP's founders emphasized halting and reversing the escalation of legally explicit instantiations of racial inequality.

Throughout its history, the NAACP struggled with whether and how it would address the particular concerns of African American workers. One of the Association's original goals, as stated in its certificate of incorporation, was obtaining "employment according to [colored citizens'] ability."[31] Early in the NAACP's history, however, it informally arranged with the National Urban

26. CLEMENT E. VOSE, CAUCASIANS ONLY: THE SUPREME COURT, THE NAACP, AND THE RESTRICTIVE COVENANT CASES 32 (1959).

27. *See* Wilson Record, *Negro Intellectual Leadership in the National Association for the Advancement of Colored People: 1910–1940*, 17 PHYLON 375–89 (1956); *id.* at 378 (describing the original program). *See generally* CHARLES FLINT KELLOGG, NAACP: A HISTORY OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, 1909–1920, at 9–47 (1967) (discussing the founding of the NAACP).

28. 109 U.S. 3 (1883).

29. 163 U.S. 537 (1896).

30. *Id.* at 540, 550–51.

31. Certificate of Incorporation of the National Association for the Advancement of Colored People (May 25, 1911), *microformed on* Papers of the NAACP, *supra* note 1, at pt. 18, ser. A, reel 3, frame 636, 637.

League to divide the pursuit of African American advancement into legal and economic equality. The NAACP focused on the former, the Urban League on the latter.[32] One speaker at the Association's 1914 annual conference emphasized this division, stating, "[T]his Association is concerned with 'Legal Equality' only, and proposes to let 'Economic Equality' take care of itself."[33]

That speaker overstated the division of labor, as the NAACP did not always or entirely eschew economic matters. Because Jim Crow was a system of both racial and economic subordination, legal and economic inequalities often were inextricably and inescapably linked in everyday black experience. In responding to the complaints of African American workers, the NAACP sometimes addressed both together.

But the NAACP's orientation from the start suggested that the problems African American laborers faced in their working lives were peripheral to the main goals of the organization. As one speaker at the 1919 Annual Conference recognized,[34] this orientation was largely due to the elite and middle-class interracial composition of the Association.[35] "It is one thing

32. KELLOGG, *supra* note 27, at 14–15, 34–45, 131–32; MARY WHITE OVINGTON, BLACK AND WHITE SAT DOWN TOGETHER: THE REMINISCENCES OF AN NAACP FOUNDER 67–69 (1995). On the Urban League generally, see JESSE THOMAS MOORE, JR., A SEARCH FOR EQUALITY: THE NATIONAL URBAN LEAGUE, 1910–1961 (1981). Although the Springfield race riot was the immediate impetus for the National Negro Conference, the Conference focused quickly on such issues as suffrage, jury service, and other incidents of full citizenship. *See* KEVIN GAINES, UPLIFTING THE RACE: BLACK LEADERSHIP, POLITICS, AND CULTURE IN THE TWENTIETH CENTURY 66 (1996).

33. Charles J. Bonaparte, Legal and Economic Equality, *microformed on* Papers of the NAACP, *supra* note 1, at pt. 1, reel 8, frame 352, 353.

34. The Negro in Labor and Industry (June 24, 1919), *microformed on* Papers of the NAACP, *supra* note 1, at pt. 1, reel 8, frame 566, 568.

35. Throughout its history, the NAACP has been plagued by accusations that it "reflect[s] the outlook and aspirations of the middle class, which is actually not interested in the welfare of the masses of the race." August Meier, *Some Observations on the Negro Middle Class*, 64 THE CRISIS 461, 462 (1957) (citing E. FRANKLIN FRAZIER, BLACK BOURGEOISIE (1957)); *see also* DANIEL WEBSTER WYNN, THE NAACP VERSUS NEGRO REVOLUTIONARY PROTEST 34 (1955) (characterizing the NAACP as "confined to the upper classes"). *See generally* ADAM FAIRCLOUGH, RACE & DEMOCRACY: THE CIVIL RIGHTS STRUGGLE IN LOUISIANA, 1915–1972 (1995); KENNETH ROBERT JANKEN, WHITE: THE AUTOBIOGRAPHY OF WALTER WHITE, MR. NAACP (2003); RAYMOND WOLTERS, NEGROES AND THE GREAT DEPRESSION: THE PROBLEM OF ECONOMIC RECOVERY (1970); Beth Tompkins Bates, *A New Crowd Challenges the Agenda of the Old Guard in the NAACP, 1933–1941*, 102 AM. HIST. REV. 340 (1997); Korstad & Lichtenstein, *supra* note 13, at 787–88; Robert C. Weaver, *The NAACP Today*, 29 J. NEGRO EDUC. 421, 421 (1960). Weaver stated:

> [I]n America most organizations—even those fighting for the rights of minorities—tend to become middle-class in their orientation and outlook. This is inevitable since ours is a middle-class dominated society. . . . And herein lies a dilemma. The mass of colored Americans, largely because of prejudice and discrimination, are not and will not soon become middle-class.

Id.

to talk about the laboring people, and it is another thing to talk to them," Reverend P.J. Bryant said. "It is one thing to work for the laboring people and it is another thing to work with them. The reason many of us cannot help these people we talk about is because we stand too far from them and feel ourselves so far above them."

Reflecting the "uplift ideology" of the Progressive era, the black elites who joined with white elites to work toward liberal legal reform in the NAACP simultaneously embraced cross-class racial solidarity and reinforced class lines within African American society.[36] Both despite and because of the particular class location of the founders, the NAACP hoped to represent "the race" as a whole. The founders hoped to represent the race despite the fact that their lives largely were unrepresentative of the lives of most African Americans. Yet because of their privileged socioeconomic status, the African American leaders of the Association were well prepared for their positions—they were far better educated than most African Americans, and their professional training and status particularly enabled them to organize resources and plan attacks on Jim Crow. They embodied W.E.B. Du Bois' notion of the "talented tenth" of African Americans who should lead the race.

Even when the early NAACP did consider advocating for African American workers, it was unsure how to proceed. *The Crisis*, the official organ of the NAACP, reveals numerous ways the Association thought about assisting working African Americans—through socialism or cooperatives, by supporting northern migration or black businesses.[37] Union organizing seemed potentially the most transformative approach to improving the lot of African American workers, but it presented apparently insurmountable obstacles. Most unions in the early twentieth century were defined as much by the race of their membership—white—as by their class composition.[38] Unions' exclusionary and discriminatory practices led many African Americans to view employers as friendlier to black workers than were fellow

36. *See* GAINES, *supra* note 32, at xiv–xv, 1–17. *See generally* GLENDA ELIZABETH GILMORE, GENDER AND JIM CROW: WOMEN AND THE POLITICS OF WHITE SUPREMACY IN NORTH CAROLINA, 1896–1920 (1996); EVELYN BROOKS HIGGINBOTHAM, RIGHTEOUS DISCONTENT: THE WOMEN'S MOVEMENT IN THE BLACK BAPTIST CHURCH, 1880–1920 (1993); VICTORIA W. WOLCOTT, REMAKING RESPECTABILITY (2001); Kenneth W. Mack, Class and Mass Politics in the Imagination of the Civil Rights Lawyer, 1931–1941 (unpublished manuscript, on file with author).

37. *See* Goluboff, Work of Civil Rights, *supra* note 11, at 112–61.

38. *See generally* THEODORE W. ALLEN, THE INVENTION OF THE WHITE RACE (1994); NOEL IGNATIEV, HOW THE IRISH BECAME WHITE (1995); DAVID R. ROEDIGER, THE WAGES OF WHITENESS: RACE AND THE MAKING OF THE AMERICAN WORKING CLASS (1991). *But see* Eric Arnesen, *Whiteness and the Historian's Imagination*, 60 INT'L LAB. & WORKING-CLASS HIST. 3 (2001) (criticizing this literature).

white workers.[39] Thus, the twin problems of "white unions . . . not welcom[ing] Negroes" and "Negroes themselves [being] ignorant of the meaning of the labor movement" worried the NAACP that neither white unions nor African American workers would respond to appeals to class solidarity.[40]

The NAACP's ambivalence about labor issues in the first two decades of its existence had long-term consequences for the Association's litigation agenda. In 1929, the Garland Fund, a left-leaning foundation looking to fund labor organizing among African Americans, created a committee to help the fund decide how best to do so. The NAACP-dominated committee[41] unsurprisingly suggested that the best target for the funds would be the NAACP. But the fit was not perfect, and the committee struggled to find a way for the NAACP adequately to integrate labor issues into the proposed use of the funds. In the end, the committee abandoned the attempt. "[T]he Negro as a Negro suffers disabilities which the white laborer does not face," the committee explained.[42] It was necessary first to change "these precedent conditions" before "[t]he subsequent problem of organizing the Negroes" could be tackled.[43] The NAACP, in other words, planned to treat African American workers as any other African Americans, leaving their distinctively work-related problems for another day, or another organization.

The Garland Fund nonetheless offered the NAACP funding, which financed the writing of what became known as the Margold Report. The report grew into something of a blue-print, much modified over the years, for the NAACP's litigation focus for the next several decades. True to the grant proposal that funded its writing, the report contained scant mention of labor-related legal action.[44] It focused instead on challenges to segregated education

39. *See, e.g.*, HORACE R. CAYTON & GEORGE S. MITCHELL, BLACK WORKERS AND THE NEW UNIONS (1939); WILLIAM H. HARRIS, THE HARDER WE RUN: BLACK WORKERS SINCE THE CIVIL WAR (1982); HERBERT R. NORTHRUP, ORGANIZED LABOR AND THE NEGRO (1944); STERLING D. SPERO & ABRAM L. HARRIS, THE BLACK WORKER: THE NEGRO AND THE LABOR MOVEMENT (1931); ROBERT C. WEAVER, NEGRO LABOR: A NATIONAL PROBLEM (1946).

40. Report of the Committee on Negro Work (Oct. 18, 1929), *microformed on* Papers of the NAACP, *supra* note 1, at pt. 3, ser. A, reel 1, frame 252, 255.

41. Out of the three-person committee, one was the NAACP's executive secretary and one was a close legal advisor to the Association.

42. Memorandum from the Committee on Negro Work to the Directors of the American Fund for Public Service (May 28, 1930), *microformed on* Papers of the NAACP, *supra* note 1, at pt. 3, ser. A, reel 1, frame 360, 376.

43. *Id.*

44. *See* Nathan R. Margold, Preliminary Report to the Joint Committee Supervising the Expenditure of the 1930 Appropriation by the American Fund for Public Service to the N.A.A.C.P., *microformed on* Papers of the NAACP, *supra* note 1, at pt. 3, ser. A, reel 1, frame 560 (discussing labor for a single page at the end of the 212-page report); *see also* TUSHNET, LEGAL

and to racially restrictive covenants that excluded African Americans from buying and renting property in covered areas. Ironically, the organization that tried to push the NAACP to take on labor issues instead helped the Association to clarify that, at least for its own legal agenda, labor and litigation did not mix.

Even as the NAACP shied away from labor-related litigation in the Margold Report, the Depression spurred the Association to rethink its relationship to poor and working-class African Americans.[45] Faced with the Depression's devastating impact on African Americans, competition among organizations for African Americans' loyalty, class-based critiques from prominent African Americans both outside of and within the NAACP, and racially discriminatory federal responses to the economic crisis, the Association ambivalently embraced some activities redressing economic inequality. Although the NAACP took significant, if reluctant, steps in the political and economic arenas toward improving the lives of working-class African Americans, work-related issues continued to play no role in its developing legal agenda throughout the 1930s.[46]

The economic crisis of the Depression created fertile ground for the growth of myriad organizations across the political spectrum. As the Communist Party, the International Labor Defense (ILD), the National Negro Congress (NNC), and other Popular Front organizations attempted to gain African American members, the NAACP self-consciously began to compete for loyalty and membership. The legendary fight between the NAACP and the ILD over legal representation of the nine young African American men "legally lynched" for rape in Scottsboro, Alabama, was a fight over ideology, lawyering, and the mantle of leadership.[47] At this point, the NAACP could

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STRATEGY, *supra* note 12, at 26–28 (describing the Margold Report); TUSHNET, MAKING CIVIL RIGHTS LAW, *supra* note 12, at 12–13 (describing the purpose of the Garland Fund).

45. August Meier & John H. Bracey, Jr., *The NAACP as a Reform Movement, 1909–1965: 'To Reach the Conscience of America,'* 59 J. S. HIST. 3, 18 (1993). According to Meier and Bracey, "it would be difficult to overestimate the impact of the economic collapse and the New Deal on . . . the NAACP's programs and activities." *Id.* at 15; *see also* JANKEN, *supra* note 35, at 233–59; ROY WILKINS, STANDING FAST: THE AUTOBIOGRAPHY OF ROY WILKINS 146–64 (1992) (describing the "radical thirties").

46. I discuss the NAACP's ambivalence about labor issues and African American workers in some detail in Goluboff, Work of Civil Rights, *supra* note 11, at 112–61.

47. *See* DAN T. CARTER, SCOTTSBORO: A TRAGEDY OF THE AMERICAN SOUTH (1979); JAMES E. GOODMAN, STORIES OF SCOTTSBORO (1994). Kenneth Mack recently suggested that the dichotomy of approaches between the NAACP and the ILD has been overstated. *See* Mack, *supra* note 36. To the extent that individual members of the NAACP (like Mary White Ovington and W.E.B. Du Bois) at times leaned to the left, however, the Scottsboro case ended any possible serious engagement with socialism and communism as Association policy. CAROLYN WEDIN, INHERITORS OF THE SPIRIT: MARY WHITE OVINGTON AND THE FOUNDING OF THE

avoid economic issues altogether only at its peril. Press releases about the 1933 Annual Conference amply demonstrate that "[a] discussion of the alleged left or radical movement of Negroes in this country"[48] led to "resolutions[ ] dealing more than ever before with the economic status of the Negro."[49]

The creation of the Congress of Industrial Organizations (CIO) in 1935 fundamentally changed the NAACP's approach to industrial labor issues and organized labor.[50] Prior to that time, the American Federation of Labor (AFL), whose affiliated unions were craft-union based and often racially discriminatory in both policy and practice, had been the major labor federation in the nation.[51] The CIO was a different creature altogether, a federation of industrial unions that made early, although inconsistent, attempts to persuade African Americans of its sincere opposition to racial discrimination.[52] As organized labor grew in both strength and numbers in the 1930s, from 12 percent of industrial workers in 1930 to 27 percent in 1941,[53] the NAACP renewed its efforts at a labor alliance. Although it remained somewhat ambivalent about the proposition, the NAACP's 1936 Conference resolved, "We urge support and active participation in the effort for organization of industrial unions in the American labor movement without regard to race or color."[54]

NAACP 297 (1998). Other legal defense cases during the 1930s reflected similar conflicts with the ILD, although none were as celebrated as the *Scottsboro* case, either in themselves or in the organizational conflict. *See, e.g.*, Charles H. Martin, *Communists and Blacks: The ILD and the Angelo Herndon Case*, 64 J. NEGRO HIST. 131–141 (1979) (discussing the *Herndon* case as well as other cases).

48. Press Release, NAACP, 1933 Annual Conference (June 25, 1993), *microformed on* Papers of the NAACP, *supra* note 1, at pt. 1, reel 9, frame 399; *see also* Minutes of the Meeting of the Board of Directors (Apr. 11, 1938), *microformed on* Papers of the NAACP, *supra* note 1, at pt. 1, reel 2, frame 876 (resolving that the Association would place "[g]reater emphasis on economic problems affecting the Negro").

49. Press Release, NAACP, N.A.A.C.P. Resolutions Demand Jobs (July 7, 1933), *microformed on* Papers of the NAACP, *supra* note 1, at pt. 1, reel 9, frame 408.

50. *See generally* IRVING BERNSTEIN, TURBULENT YEARS: A HISTORY OF THE AMERICAN WORKER, 1933–1941 (1969); ROBERT H. ZIEGER, THE CIO: 1935–1955 (1995).

51. Meier & Bracey, *supra* note 45, at 18–19.

52. Lester B. Granger, however, pointed out that both the CIO and AFL had their faults and their benefits. Lester B. Granger, The Negro in Labor Unions (June 30, 1938), *microformed on* Papers of the NAACP, *supra* note 1, at pt. 1, reel 1, frame 187, 189.

53. ARNESEN, *supra* note 13, at 86.

54. Proposed Resolutions, 1936 Annual Conference (July 3, 1936), *microformed on* Papers of the NAACP, *supra* note 1, at pt. 1, reel 9, frame 939, 942. NAACP resolutions in 1938 seconded the qualified support: "We urge Negroes to study and follow closely the activities of the various labor organizations. The N.A.A.C.P. condemns the discriminatory practices of any labor organization because of race, creed or color." Resolutions Adopted, 1938 Annual Conference, *microformed on* Papers of the NAACP, *supra* note 1, at pt. 1, reel 10, frame 48, 49. The resolution urged African American workers "not to enter labor organizations blindly but instead appraise critically the motive and practices of all labor unions, and that they bear their full share of activity and responsibility in the building of a more just and intelligent labor movement." *Id.*

The criticisms of individual African Americans also encouraged the NAACP to play a greater role in addressing economic issues. The most stinging critiques of the NAACP's ambivalence about embracing an economic program came from a group of young Howard University intellectuals that W.E.B. Du Bois dubbed the "Young Turks": Abram Harris, a Marxist economist at Howard whom Du Bois managed to appoint to the NAACP Board of Directors, the sociologist E. Franklin Frazier, and the political scientist Ralph J. Bunche, among others.[55] Bunche's writings during the 1930s epitomized an approach that made class, not race, the overriding analytical category and source of protest. He criticized "Negro leadership" for "traditionally put[ting] its stress on the element of race; it has attributed the plight of the Negro to a peculiar racial condition."[56] He lamented the "typical" way "Negro organizations . . . concern themselves not with the broad social and political implications of such policies as government relief, housing, socialized medicine, unemployment and old-age insurance, wages and hours laws, etc., but only with the purely racial aspects of such policies."[57] What was left to such groups, he thought, was only exposure "of the more flagrant specific cases of abuse" and "a campaign of public enlightenment . . . ."[58] The "civil-libertarian struggle," as fellow Young Turk Emmet Dorsey put it, failed on a fundamental level because it was "essentially an appeal to the consciousness of the ruling class."[59]

The NAACP's reluctance to take on economic problems appeared to some observers to originate in the class position—the middle-class position—of the NAACP staff and members themselves. Even though the NAACP's working-class membership grew during the 1930s, before 1939, the NAACP did not actively cultivate labor unions as contributors or cull

55. *See, e.g.*, JONATHAN SCOTT HOLLOWAY, CONFRONTING THE VEIL: ABRAM HARRIS, JR., E. FRANKLIN FRAZIER, AND RALPH BUNCHE, 1919–1941 (2002).

56. Ralph J. Bunche, *A Critical Analysis of the Tactics and Programs of Minority Groups*, 4 J. NEGRO EDUC. 308, 310 (1935) [hereinafter Bunche, *Critical Analysis*]. Bunche lambasted how, for "American Negro organizations . . . [c]olor is their phobia; race their creed. The Negro has problems and they are all racial ones; ergo their solution must be in terms of race . . . . There is impatience with any but race problems. . . . There is but one social force for the Negro," he went on, "and that is color." Ralph J. Bunche, *The Programs of Organizations Devoted to the Improvement Status of the American Negro*, 8 J. NEGRO EDUC. 539, 539–40 (1939) [hereinafter Bunche, *Programs of Organizations*]. "As long as the Negro is black and the white man harbors prejudice, what has the Negro to do with class or caste, with capitalism, imperialism, fascism, communism or any other 'ism'? Race is the black man's burden." *Id.* at 540.

57. Bunche, *Programs of Organizations*, *supra* note 56, at 548.

58. Bunche, *Critical Analysis*, *supra* note 56, at 311.

59. Emmett E. Dorsey, *The Negro and Social Planning*, 5 J. NEGRO EDUC. 105, 107 (1936). *See generally* Goluboff, Work of Civil Rights, *supra* note 11, at 139–56.

them for members.[60] In 1935, Roy Wilkins chalked up the lack of working-class membership in the Association to "differences in interests and in levels of society."[61]

In light of this history and this attitude, numerous contemporaries in the 1930s accused the NAACP of failing to represent working-class African Americans. The Howard intellectuals were most vituperative. Ralph Bunche wrote in 1939: "The N.A.A.C.P. has elected to fight for civil liberties rather than for labor unity; it has never reached the masses of Negroes, and remains strictly Negro middle-class, Negro-*intelligentsia*, in its leadership and appeal." Bunche criticized the NAACP for often having "had to lean heavily upon its white benefactors for monetary aid and advice" and for "cautiously maintain[ing] its respectability."[62] Emmett Dorsey agreed, concluding that the Depression caused "the masses of Negroes [to] have lost their faith" in the NAACP because it "has not and cannot develop an economic program because such a program must necessarily stress labor solidarity and fundamental social reforms. Such a program is incompatible with the Association's middle class and thoroughly racial philosophy."[63]

Even insiders and sympathizers saw a crucial connection between the NAACP's class composition and its approach to racial equality. "[L]eadership in the local branches is made up chiefly of the professional classes," Charles Hamilton Houston acknowledged at the NAACP's 1933 Annual Conference.[64] "This cannot safely be a national organization limited to classes; this cannot safely be an organization which shall dictate to some people what is good for them and what is not good for them."[65] Houston suggested: "If the Negro professional group offers real brotherhood to the masses [and] can convince the masses that it is not exploiting them . . . but is offering a whole-hearted, uncompromising program of fight and struggle for the Negro's rights, we will see immediately a trebled increase in . . . membership."[66] The "class" issues that the NAACP faced in the 1930s thus concerned not only

60. Letter from Roy Wilkins to Daisy E. Lampkin (Mar. 23, 1935), *quoted in* Bates, *supra* note 35, at 345.

61. *Id.*

62. Bunche, *Programs of Organizations*, *supra* note 56, at 546.

63. Dorsey, *supra* note 59, at 107.

64. Address of Charles H. Houston, Twenty-Fourth Annual Conference (July 2, 1983), *microformed on* Papers of the NAACP, *supra* note 1, at pt. 1, reel 8, frame 547, 554.

65. *Id.*

66. *Id.* Lester Granger did not quarrel with "white-collar" leadership because "[i]t is for the person with some leisure and with educational background to assume some of these responsibilities thrust upon the Negro community." Granger, *supra* note 52, at 198. What he wanted was for leaders "to justify the title of 'white-collar leaders' by getting down to bedrock and learning the role of leadership in the long and hard way." *Id.*

the potential significance of working-class unity for racial equality but also the potential significance of the NAACP's own class position for its choices about how to obtain racial equality and what racial equality would entail.

These various pressures, internal and external, from labor organizations and other African Americans, succeeded in somewhat transforming the NAACP's agenda. At annual conferences in the 1930s, the NAACP showed increasing support for working-class African Americans. In 1932, the NAACP resolved "that the American Negro is going to find freedom and adjustment mainly through an improvement in his economic status."[67] The Association was "becoming convinced that it is because we are poor and voiceless in industry that we are able to accomplish so little with what political power we have, and with what agitation and appeal we set in motion."[68] The NAACP concluded "that what the Negro needs primarily is a definite economic program, and such a program we present as our chief plank in a platform for future reform."[69]

During the 1930s, the NAACP took on a variety of projects targeted to help poor and working-class African Americans. The Association, for example, supported local boycotts of retail businesses aimed at increasing black employment in black neighborhoods.[70] More important, the NAACP appealed to the Roosevelt Administration for nondiscriminatory administration of New Deal programs. Many federal programs purposefully excluded African Americans, and many more did so in implementation if not in design. Both the new governmental largesse and the racially discriminatory way in which it was administered prompted responses from the NAACP. In addition to using contacts in Roosevelt's "black cabinet" and other political pressures,[71] the Association lobbied unsuccessfully to amend the National Labor Relations

67. Address to the Country, Twenty-Third Annual Conference (May 17–22, 1932), *microformed on* Papers of the NAACP, *supra* note 1, at pt. 1, reel 9, frame 9.

68. *Id.*

69. *Id.* The 1933 conference was also concerned with economic issues. The very first resolution of the conference declared: "Of paramount concern to the Negro to-day is his economic status." Resolutions Adopted by the Twenty-Fourth Annual Conference (June 29–July 2, 1953), *microformed on* Papers of the NAACP, *supra* note 1, at pt. 1, reel 9, frame 423. It went on to identify class analysis as critical: "[The Negro's] interests in this field are identical with those of all workers." *Id.*

70. The national office endorsed and encouraged these branch-led boycotts, often called "Don't Buy Where You Can't Work" campaigns. These boycotts combined the NAACP's early commitments to racial solidarity with a class solidarity among working blacks. *See* PAUL D. MORENO, FROM DIRECT ACTION TO AFFIRMATIVE ACTION: FAIR EMPLOYMENT LAW AND POLICY IN AMERICA, 1933–1972, at 30–54 (1997).

71. DONA COOPER HAMILTON & CHARLES V. HAMILTON, THE DUAL AGENDA: RACE AND SOCIAL WELFARE POLICIES OF CIVIL RIGHTS ORGANIZATIONS 8–42 (1997).

Act (NLRA) to require the withholding of certification under the Act to any union that discriminated on the basis of race.[72]

The NAACP's embrace of such activities was doubly qualified, however. First, even during the Depression, the "work of the Association in the economic field [was] conducted" in the words of one NAACP report, "as an incidental phase of its civil liberty program."[73] Economic issues, although addressed, never displaced the NAACP's core concerns with the legal and political disabilities of African Americans living under Jim Crow.

Second, the NAACP's economic interventions remained largely in the economic and political realms. The Association generally maintained its conviction that there was no place for labor issues in litigation.[74] Charles Hamilton Houston, for example, thought that the NAACP should appeal to middle-class African Americans with a litigation campaign and to working-class African Americans with an economic program.[75] The NAACP was surely one of the "leading Negro organizations" to which political scientist Louis Kesselman referred in 1945 when he wrote about organizations that "have acted upon the theory that economic rights can be obtained principally by activity in the economic sphere: through education, protest, self-help, and, at times, intimidation."[76]

Even if Kesselman was not consciously thinking of the NAACP, he offered an apt description of the Association's bifurcated agenda in the 1930s. Through articles in *The Crisis* and resolutions at its annual conferences, the NAACP urged unions to cease their deeply ingrained and longstanding discrimination against African Americans. Together with the National Urban League, the Association appealed to the philanthropic impulses of employers to do the same. As the federal government increased its involvement in the economy in the late 1930s in response to the Depression, the NAACP saw that new involvement as a political opportunity to convince the Roosevelt Administration to regulate the economy in a racially nondiscriminatory way.

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72. *See, e.g.*, ARNESEN, *supra* note 13, at 126–28; HAMILTON & HAMILTON, *supra* note 71, at 33–37. Under the NLRA, unions winning representation elections became the representatives of all workers in a bargaining unit, which could put African American workers in particular peril. On the long-term consequences of the absence of a nondiscrimination policy in the NLRA itself, see Paul Frymer, *Race, Labor, and the Twentieth-Century American State*, 32 POL. & SOC'Y 475 (2004).

73. CAROLE ANDERSON, EYES OFF THE PRIZE 18 (2003) (quoting a report from the Papers of the NAACP).

74. *See* Goluboff, Work of Civil Rights, *supra* note 11, at 112–61.

75. TUSHNET, LEGAL STRATEGY, *supra* note 12, at 42.

76. Louis C. Kesselman, *The Fair Employment Practice Commission Movement in Perspective*, 31 J. NEGRO HIST. 30, 33 (1946). However, the NAACP did support litigation defending African American boycotters against injunctions. Mack, *supra* note 36, at 24–25.

The NAACP saw, for example, the National Labor Relations Act as a law that needed revision in the political process, not as a law that it could help interpret through the legal system. As the NAACP broadened its agenda to appeal to working-class African Americans to a greater extent than in the past, its litigation agenda remained tied to racially restrictive covenants and education.

Even when legal cases related to labor issues in the 1930s and early 1940s, the NAACP generally declined to see them that way.[77] Litigation on behalf of African American teachers who received lower salaries than white teachers was, from the start, part of the NAACP's campaign for educational opportunity, not part of a larger assault on wage differentials. Indeed, the Legal Department routinely described the salary equalization cases as education cases, not as labor or employment cases.[78] Part of the Association's zeal for teacher salary equalization cases was its desire to encourage membership among teachers. Teachers were stalwarts of the black middle class—and therefore likely candidates for membership—not because of a particularly high standard of living but because of their professional status and their high standing in African American communities. As the salary equalization cases improved teachers' incomes, more teachers (with greater resources) would join the NAACP.[79] Also, the increased salaries of teachers, Marshall pointed out in 1937, would give "a material benefit to Negroes in general," because other African American professionals benefited from the teachers'

77. Charles Hamilton Houston was the only partial exception to the rule of this approach. In 1937, he wrote a letter to the Garland Fund attempting to eke out more funding. Houston recognized that the Fund was more interested in labor organizing than in education litigation, and he granted that "no attempt has been made to discuss the general relation of the educational program to the whole struggle of labor to organize and obtain greater security and higher living conditions." TUSHNET, LEGAL STRATEGY, *supra* note 12, at 19. But he argued, among other things, that "[t]he drive for equalization of teachers' salaries is a fundamental drive against wage differentials, which is one of the curses of Southern industrial life." *Id.* (quoting a report from the Papers of the NAACP). Even if this relationship existed, nothing else in the NAACP's approach to the equalization cases supports the statement. In addition, Houston generally pushed harder than his colleagues in the NAACP to take on economic issues. And after 1938, he was no longer a staff member, which weakened his influence. Perhaps it is merely coincidence that he died in 1950, the year in which the NAACP retreated from labor cases. *See* GENNA RAE MCNEIL, GROUNDWORK: CHARLES HAMILTON HOUSTON AND THE STRUGGLE FOR CIVIL RIGHTS (1983).

78. Only once in dozens of semimonthly, monthly, and annual reports did the NAACP's Legal Department describe the cases as involving "the right to a job." Annual Report for Legal Department, Year 1945, *microformed on* Papers of the NAACP, *supra* note 1, at pt. 18, reel 4, frame 857, 858.

79. "Black teachers," legal scholar Mark Tushnet writes, "were an important constituency [for the NAACP]." TUSHNET, LEGAL STRATEGY, *supra* note 12, at 160. *See generally* KLUGER, *supra* note 12. Similarly, the graduates of higher education that would result from desegregated graduate schools would fill the thin ranks of African American professionals and middle-class community leaders.

higher incomes.[80] In other words, these cases were chosen because their clients were middle-class or were likely to become middle class.

By describing cases that improved the salaries of middle-class teachers as improving the quality of education for all black children, the NAACP avoided the class implications involved in pursuing employment discrimination cases only on behalf of middle-class teachers. After winning a victory in *Alston v. School Board of Norfolk*,[81] the NAACP tried to garner support for its teacher salary equalization campaign. Because the litigation championed equal pay for equal work, the Association advertised it as "a critical step in the progress of Negro Americans toward cultural and economic equality."[82] Little concrete, however, seemed to accrue from that recognition. The teachers' equal-pay for equal-work campaign gave way at the NAACP not to a wholesale application of the argument to workers, but rather to other education-related litigation on the road to *Brown*.[83] When the national office created a series of pamphlets in 1939 setting forth the (mostly legal) procedures for branches to take toward a variety of problems—including criminal defense, exclusion from jury service, the right to vote, police brutality, and equalizing educational opportunities—labor issues were nowhere to be found.[84]

II. LABOR LITIGATION IN WARTIME

The outbreak of World War II fundamentally transformed the NAACP's approach to the problems of African American workers. In the new political and economic context of the war, labor-related litigation offered the NAACP opportunities for both institutional growth and doctrinal success. Employment and union discrimination cases engendered broad political support, offered the promise of economic progress, and provided an arena for doctrinal

80. TUSHNET, LEGAL STRATEGY, *supra* note 12, at 37 (quoting Thurgood Marshall).

81. 112 F.2d 992 (4th Cir. 1940).

82. TUSHNET, LEGAL STRATEGY, *supra* note 12, at 81 (quoting a publication from the Papers of the NAACP).

83. Others did apply the argument more broadly, especially before the War Labor Board. *See infra* note 120.

84. Procedure for Legal Defense and Voting Cases, *microformed on* Papers of the NAACP, *supra* note 1, at pt. 1, reel 10, frame 622 (containing four sections: General Procedure for the Branches, Exclusion of Negroes from Juries, Refusal to Permit Negroes to Register and Vote, and Police Brutality); Thurgood Marshall, Procedure to Equalize Educational Opportunities, *microformed on* Papers of the NAACP, *supra* note 1, at pt.1, reel 10, frame 635. The major exception to the political characterization of labor was the Association's brief support of the employment discrimination claim of upholsterer J.H. Jones around 1930. *See* Goluboff, Work of Civil Rights, *supra* note 11, at 120–21.

creativity and traction. During the Depression, the NAACP opened itself up to the importance of economic issues but kept those issues separate from its litigation agenda. Wartime opportunities brought such issues into the Legal Department's embrace.

A. Embracing Labor Cases

During World War II, complaints from African American workers of all kinds poured into the national office of the NAACP. The barriers African American men and women faced in the war economy were complex and varied. Job seekers had trouble finding training for work in defense industries; they faced discrimination in hiring; and they encountered racist unions with monopolies over employment in some firms and industries. Even once they found work, African American workers endured long hours and little pay, job segregation and discrimination, harassment and violence, poor conditions and segregated workplaces. And the jobs themselves were hardly secure. Demotions, discharges, and displacements were common. "Last hired, first fired," went the common saying.[85]

Of the cases that presented themselves to the NAACP, three areas drew the most interest and activity from the Legal Department: exclusion of African American shipyard workers from boilermakers unions across the country; discrimination in New York that could be redressed under a pioneering state fair employment practice law; and employer and union discrimination on the railroads.[86]

Of central importance to the NAACP's labor-related litigation were the boilermakers cases. When Marshall flew to San Francisco in 1943, he stepped into an ongoing national controversy within the boilermakers union about racial inclusion and equality. In 1938, the International Brotherhood of Boilermakers adopted bylaws establishing separate African

85. *See, e.g.*, CAYTON & MITCHELL, *supra* note 39 (describing black labor in various industries); LEWIS, *supra* note 13, at 167–87 (describing barriers to economic advancement faced by African American workers); NORTHRUP, *supra* note 39 (describing black labor in various industries); WEAVER, *supra* note 39; Pauli Murray, *The Right to Equal Opportunity in Employment*, 33 CAL. L. REV. 388, 390 (1945). *See generally id.* at 177–82 (discussing particular problems African American women faced).

86. These were the areas in which the NAACP lawyers expended the most energy in labor cases during the war, but they were not the only areas. *See, e.g.*, Letter from Thurgood Marshall to Martin T. Dunkin, General Secretary, United Ass'n of Journeymen, Plumbers, and Steam Fitters (May 16, 1942), *microformed on* Papers of the NAACP, *supra* note 1, at pt. 13, ser. A, reel 13, frame 139 (discussing efforts to end the exclusion of African American plumbers from the union). *See generally* Goluboff, *"We Live's in a Free House," supra* note 11, at 2010–12.

American auxiliaries.[87] And in 1941, as African Americans crowded into San Francisco and other shipyards for war work, the union entered into a closed-shop contract—restricting employment to union members—with a number of West Coast shipyards.[88] Combined, these two actions forced black workers to choose between losing their jobs and joining segregated auxiliary locals that deprived them of virtually all of the rights of union membership.[89] Although African American workers chose union membership and celebrated when the union began referring them to the shipyards for jobs in the wake of federal hearings on the issue, they later condemned the auxiliary unions.[90] After helping the workers file largely ineffectual complaints to the federal government, the NAACP, the Lawyers Guild, and the private lawyers with whom they worked eventually succeeded in obtaining several favorable state court decisions, including the California Supreme Court decisions *James v. Marinship Corp.*[91] and *Williams v. International Brotherhood of Boilermakers.*[92]

The white boilermakers' recalcitrance toward African American inclusion and equality offered the NAACP legal opportunities not only in San Francisco but also across the nation.[93] Numerous NAACP staff members

87. As the draft brief for the black boilermakers put it, "The only matter in which there is entire equality, without discrimination as between Negro and white members is with reference to dues: *the dues are equal.*" Draft Brief, *microformed on* Papers of the NAACP, *supra* note 1, at pt. 13, ser. C, reel 1, frame 376, 377.

88. The black population of San Francisco increased from fewer than 5000 before the war to 43,460 in 1950. Carolyn Hoecker Luedtke, *On the Frontier of Change: A Legal History of the San Francisco Civil Rights Movement, 1944–1970*, 10 TEMP. POL. & CIV. RTS. L. REV. 1, 5 (2000).

89. The business agent for the auxiliary was appointed by a supervising white lodge and had authority to assign men to jobs. The shop committee set up for handling grievances was appointed and controlled by the supervising white lodge. Any upgrading of black workers had to be approved by the white lodge. The auxiliary had no voice or vote in the international conventions. And the auxiliaries and their members, but not white lodges or their members, could be suspended arbitrarily by the international union. Herbert R. Northrup, An Analysis of the Discrimination Against Negroes in the Boiler Makers Unions, *microformed on* Papers of the NAACP, *supra* note 1, pt. 13, ser. C, reel 1, frame 344; Press Release, NAACP, NAACP Aids Coast Shipyard Workers (Dec. 3, 1943), *microformed on* Papers of the NAACP, *supra* note 1, at pt. 13, ser. C, reel 1, frame 42; *see also* 1 HERBERT HILL, BLACK LABOR AND THE AMERICAN LEGAL SYSTEM: RACE, WORK AND THE LAW 185–208 (1977); Lester Rubin, *The Negro in the Shipbuilding Industry*, *in* THE RACIAL POLICIES OF AMERICAN INDUSTRY, REPORT NO. 17 (Univ. of Penn. Press 1970).

90. Press Release, NAACP, War Production Board: Labor Division (Jan. 24, 1942), *microformed on* Papers of the NAACP, *supra* note 1, at pt. 13, ser. C, reel 1, frame 27.

91. 155 P.2d 329 (Cal. 1944).

92. 165 P.2d 903 (Cal. 1946) (granting a preliminary injunction requiring the boilermakers union to include African American workers as members); *see also* Brief for Appellant, Hill v. Int'l Bhd. of Boilermakers, *microformed on* Papers of the NAACP, *supra* note 1, at pt. 13, ser. C, reel 1, frame 1075. On the boilermakers conflict in general, see HILL, *supra* note 89, at 185–208; Rubin, *supra* note 89.

93. Memorandum from Edward R. Dudley to Thurgood Marshall (Mar. 29, 1944), *microformed on* Papers of the NAACP, *supra* note 1, at pt. 13, ser. C, reel 1, frame 532.

spent time and energy addressing the problem. NAACP attorney Edward R. Dudley traveled to upstate New York to talk to the white union men and the African American workers, and to Providence, Rhode Island, to try a case with Marshall. Although "the Urban League and other organizations would cooperate in the prosecution of the case," leaders of the NAACP and the Urban League "agreed that the case would . . . be turned over to the N.A.A.C.P."[94] Prentice Thomas, another NAACP lawyer, was involved in crises in Portland, Oregon and Vancouver, Washington. Roy Wilkins, then assistant secretary of the NAACP, attended several meetings in Portland and spent one afternoon in 1942 "from noon on chasing about in a driving downpour of rain" only to get an appointment with the shipyard personnel for the late afternoon.[95] The following year, executive secretary Walter White himself went to Portland on behalf of the workers.[96] During the war, not only Marshall and his lawyers, but also Walter White and Roy Wilkins traveled the nation to protect African American shipyard workers from the discrimination and inequality they faced in their unions.

A much more localized prospect for labor-related legal action emerged in response to New York's pioneering law against private discrimination in employment.[97] Passed in 1945, the Ives-Quinn Law was the first fair employment practice law passed at the state level: It prohibited private employers and unions from discriminating on the basis of race.[98] Passage of the law invited NAACP assistance in two ways. First, it gave the NAACP an opportunity to file amicus briefs in *Railway Mail Ass'n v. Corsi*.[99] In *Corsi*, the United States Supreme Court upheld the constitutionality of the New York law as it applied to union discrimination. Second, the law provided an administrative forum in which the NAACP lawyers, especially Marian Wynn

94. Memorandum from Thurgood Marshall to Walter White & Roy Wilkins (Dec. 22, 1943), *microformed on* Papers of the NAACP, *supra* note 1, at pt. 13, ser. C, reel 1, frame 872.

95. Letter from Roy Wilkins to Walter White (Nov. 1, 1942), *microformed on* Papers of the NAACP, *supra* note 1, at pt. 13, ser. C, reel 1, frame 574.

96. W.H. Warren, *Negro Leader Scores Union Racial Discrimination Here*, OR. J., Oct. 14, 1943.

97. *See* MARTHA BIONDI, TO STAND AND FIGHT: THE STRUGGLE FOR CIVIL RIGHTS IN THE POSTWAR NEW YORK CITY 17–37 (2003) (discussing the emphasis of the postwar civil rights struggle in New York City on employment and job-related issues); Morroe Berger, *The New York State Law Against Discrimination: Operation and Administration*, 35 CORNELL L.Q. 747 (1950); Elmer A. Carter, *The New York Commission Succeeds*, 20 INTERRACIAL REV. 166–67 (1947); Michael E. Phenner, *Legislation and Administration*, 36 NOTRE DAME LAW. 185, 189–201 (1961); Note, *The New York State Commission Against Discrimination: A New Technique for an Old Problem*, 56 YALE L.J. 837 (1947).

98. N.Y. CIV. RIGHTS § 43 (McKinney 2005) (original version enacted in 1940 and amended in 1945).

99. 326 U.S. 88 (1945).

Perry, could bring complaints of employer and union discrimination before the New York State Committee Against Discrimination (SCAD).

Because their office was in New York City, the NAACP lawyers found it easy and cheap to respond to the kinds of routine labor-related complaints that resource constraints made it difficult to embrace elsewhere.[100] Moreover, a report that Perry filed in 1946 noted: "[O]f necessity, since the states of New York and New Jersey pioneered in the establishment of fair employment practice legislation, much of the work of the National Office of the NAACP has been concentrated in those states."[101] Such cases notably included challenges to discrimination in the merchant marines and New York tunnel construction projects, as well as to the Pennsylvania Railroad's practice of replacing black mechanics hired during the war with returning white veterans with less seniority.[102] Together with other minority advocacy organizations, the NAACP pressed SCAD to restructure whole workplaces and take more proactive steps toward eliminating discrimination.

Finally, the NAACP assisted in litigation championed predominantly by longtime NAACP supporter and lawyer Charles Hamilton Houston on behalf of African American railroad workers against white railroad unions.[103] In these cases, the union and the employer signed a contract that had the effect of eliminating African Americans as firemen on locomotive railroads. Before the Supreme Court, the African American workers argued successfully that the Railway Labor Act's grant of exclusive representation to a bargaining agent selected by a majority of workers prohibited that agent from discriminating against a minority. In *Steele v. Louisville & Nashville Railroad Co.*[104] and *Tunstall v. Brotherhood of Locomotive Firemen*,[105] the Court found a statutory duty of fair representation that the white unions had violated.[106]

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100. TUSHNET, LEGAL STRATEGY, *supra* note 12, at 46–47.

101. Work of the National Office and Branches of the National Association for the Advancement of Colored People in the Field of Employment—New York, *supra* note 7, at 762.

102. *See, e.g.*, Annual Report of Legal Department, 1946, *microformed on* Papers of the NAACP, *supra* note 1, at pt. 18, ser. A, reel 4, frame 958; Legal Department Annual Report, 1947, *microformed on* Papers of the NAACP, *supra* note 1, at pt. 18, ser. A, reel 4, frame 1066, 1083 (listing SCAD cases).

103. *See* ARNESEN, *supra* note 13, at 203–10.

104. 323 U.S. 192 (1944).

105. 323 U.S. 210 (1944).

106. The NLRB interpreted *Steele* and *Tunstall* as also applying to unions regulated by the NLRA. *See In re* Southwestern Portland Cement Co., 61 N.L.R.B. 1217 (1945); *In re* Carter Mfg. Co., 59 N.L.R.B. 804 (1944). Without citing *Tunstall* or *Steele*, in Wallace Corp. v. NLRB, 323 U.S. 248 (1944), the Court also found a duty of fair representation under the National Labor Relations Act. Four justices dissented, finding the Railway Labor Act and the NLRA significantly different on the point. *See id.* at 270–71; *see also* Murray, *supra* note 85, at 407; Clyde W. Summers, *The Right to Join a Union*, 47 COLUM. L. REV. 33, 44–51 (1947). *See generally* Revel

That the NAACP saw the problems of these workers as invitations to legal action represented a sea change in the Association's approach to both its economic agenda and its litigation strategy. Workers' problems rather suddenly had become promising foundations for legal cases. By 1945, Thurgood Marshall could pronounce not only that cases like the San Francisco boilermakers were "definitely within the purview of the program of the N.A.A.C.P.,"[107] but also that employment discrimination was more important than all other issues facing African Americans except for the right to vote. Although the NAACP's lawyers seized these opportunities only briefly, they saw considerable success, and they laid the groundwork for even more fundamental doctrinal change than they ultimately pursued.

B. Political and Institutional Opportunities

1. Gaining Political Momentum

In stark contrast to the NAACP's approach to African American workers' problems during the Depression—which represented a partial and nonlegal embrace—the wartime NAACP took workers' complaints seriously and exploited the legal opportunities they presented. This transformation stemmed from the vastly different economic and political context of the war, as well as from the different institutional situation of the NAACP itself. After the high unemployment rates of the Depression years, war production needs created an economic boom, a far tighter labor market, and greater market power for African Americans. The new economic situation made African American workers ever more aware of the inequalities they faced. "The Negro's economic handicap stood out in bolder relief with the approach of World War II," political scientist Louis Kesselman observed just after the war ended.[108] "Economic insecurity, while feared and disliked was sufferable in a depression which dragged down the entire population."[109] The same insecurity, Kesselman noted, "became psychologically and economically intolerable in a period distinguished by mass job openings and appeals to democratic ideals on the one hand and rising living costs and continuation of the old pattern of segregation, discrimination and inequalities for the Negro on the other."[110]

Schiller, *From Group Rights to Individual Liberties: Post-War Labor Law, Liberation, and the Waning of Union Strength*, 20 BERKELEY J. EMP. & LABOR L. 1, 23–29 (1999) (discussing *Steele* in the context of postwar industrial pluralism and the subjugating of individual rights to union strength).

107. Letter from Thurgood Marshall to Noah W. Griffin, *supra* note 3.

108. Kesselman, *supra* note 76, at 30.

109. *Id.*

110. *Id.*

On the political side, racial discrimination in employment combined the predominant civil rights concern of the 1930s—the rights of workers to organize, strike, and bargain collectively for improved wages, working conditions, and economic security—with a heightened attention to African Americans' political power during the war. Even after the war put an end to the Depression, economic rights remained central to the national political agenda. In 1941, Roosevelt aspired to provide the "Four Freedoms" for Americans: not only freedoms of religion and speech, but also freedom from fear and freedom from want.[111] By 1944, FDR was calling for "an economic bill of rights" in his State of the Union address to provide Americans with "economic security and happiness."[112] Roosevelt promised not only physical security but also "economic security, social security, moral security."[113] Labor journalist Mary Heaton Vorse asked: "What do the "millions of organized workers want?" She answered her own question. "Security first of all," she responded. "They want the right to work."[114]

Political concern about economic rights shared the spotlight with newly pressing questions about the rights of African Americans. African Americans voted overwhelmingly Democratic during the Depression and the war, they served in large numbers in the military, and they were becoming increasingly vocal about their demand for victory over fascism both abroad and at home. The *Pittsburgh Courier* called these twin goals—and the refusal to subordinate domestic to international freedom—the "Double V" campaign.[115] As the old and the new civil rights agendas converged, race discrimination in the context of employment—and the governmental responses to such discrimination—became the most critical and nationally prominent civil rights issues of the day.

During the war, both the most visible African American protests and the most significant federal initiatives on race concerned work. In 1941, A. Phillip Randolph and his all-black union, the Brotherhood of Sleeping Car Porters, threatened to march on Washington with 100,000 African Americans by his side. Randolph, along with other African American leaders like those in the NAACP, demanded that the federal government act to eliminate

111. DAVID M. KENNEDY, FREEDOM FROM FEAR: THE AMERICAN PEOPLE IN DEPRESSION AND WAR, 1929–1945, at 139, 469–70 (2001).

112. CHARLES D. CHAMBERLAIN, VICTORY AT HOME: MANPOWER AND RACE IN THE AMERICAN SOUTH DURING WORLD WAR II, at 162 (2003).

113. Franklin D. Roosevelt, State of the Union Address to Congress (Jan. 11, 1844), *in* THE PUBLIC PAPERS AND ADDRESS OF FRANKLIN D. ROOSEVELT (1948), *quoted in* NELSON LICHTENSTEIN, STATE OF THE UNION 30 (2002).

114. MARY HEATON VORSE, LABOR'S NEW MILLIONS 285–86 (1938), *quoted in* LICHTENSTEIN, *supra* note 113, at 54.

115. PITTSBURGH COURIER, Feb. 14, 1942, at 1.

discrimination in government contracts, war industries, and the military.[116] President Roosevelt successfully appeased Randolph and forestalled the march by issuing an executive order creating the Fair Employment Practice Committee (FEPC). According to some contemporaries, like the African American *Amsterdam News*, the order was "epochal to say the least. . . . If President Lincoln's proclamation was designed to end physical slavery, it would seem that the recent order of President Roosevelt is designed to end, or at least curb, economic slavery."[117] Although many were dissatisfied with the weakness of the FEPC's enforcement mechanisms, the creation of a committee charged specifically with investigating and publicizing racial discrimination in war production placed the federal government on record as opposed to discrimination in at least some forms.[118]

The federal government took additional actions to protect the rights of African American laborers during the war.[119] The War Labor Board repeatedly required the elimination of wage differentials based on race.[120] The

116. *See* DANIEL KRYDER, DIVIDED ARSENAL: RACE AND THE AMERICAN STATE DURING WORLD WAR II, at 53–66 (2000) (describing the March on Washington Movement and Roosevelt's desire to contain it); RICHARD POLENBERG, WAR AND SOCIETY: THE UNITED STATES, 1941–1945, at 103 (1972); John H. Bracey, Jr. & August Meier, *Allies or Adversaries? The NAACP, A. Philip Randolph and the 1941 March on Washington*, 75 GA. HIST. Q. 1 (1991); Richard M. Dalfiume, *The 'Forgotten Years' of the Negro Revolution*, 55 J. AM. HIST. 90, 99 (1968); *see also* HERBERT GARFINKEL, WHEN NEGROES MARCH: THE MARCH ON WASHINGTON MOVEMENT IN THE ORGANIZATIONAL POLITICS FOR FEPC (1959); KRYDER, *supra*, at 88–132; POLENBERG, *supra*, at 117–23; MERL E. REED, SEEDTIME FOR THE MODERN CIVIL RIGHTS MOVEMENT: THE PRESIDENT'S COMMITTEE ON FAIR EMPLOYMENT PRACTICE, 1941–1946 (1991); LOUIS RUCHAMES, RACE, JOBS & POLITICS: THE STORY OF FEPC (1953) (discussing the cooperation and rivalry among the NAACP, A. Philip Randolph, and the March).

117. RUCHAMES, *supra* note 116, at 23 (quoting Editorial, AMSTERDAM NEWS (New York), July 5, 1941, at 14).

118. On the contemporary and historiographical debate about the FEPC's effectiveness, see REED, *supra* note 116, at 1–17.

119. *See generally* CHAMBERLAIN, *supra* note 112 (discussing federal policies that enabled African Americans to improve their social, economic, and political position); KEVIN J. MCMAHON, RECONSIDERING ROOSEVELT ON RACE: HOW THE PRESIDENCY PAVED THE ROAD TO *BROWN* (2004) (arguing that Roosevelt promoted civil rights in ways previously ignored by scholars).

120. In June 1943, in the midst of a war in which African Americans played critical roles as "vigorous fighting men" and producers of "food and munitions," the War Labor Board unanimously agreed with the demands of the Oil Workers' International Union of the CIO that wage differentials at the Southport Petroleum Company in Texas City, Texas, should be abolished. "In this small but significance case," the opinion stated, "the National War Labor Board abolishes the classifications 'colored laborer' and 'white laborer' and reclassifies both simply as 'laborers' with the same rates of pay for all in that classification without discrimination on account of color." *In re* Southport Petroleum Co., 8 WLR 714, 715 (1943). In an opinion equating of "[e]conomic and political discrimination" with "the Nazi program," the Board described the equalization as a partial realization of the "sound American principle of equal pay for equal work as one of those equal rights in the promise of American democracy regardless of color, race, sex, religion, or national origin." *Id.* In 1944, again at the urging of a union, this time the CIO's International Union of Mine, Mill and Smelter Workers, the Board reaffirmed that

Department of Justice's new Civil Rights Section creatively interpreted Reconstruction-era civil rights statutes in order to prosecute cases on behalf of African American workers.[121] And the Roosevelt Administration federalized the myriad state and local employment services into the United States Employment Service (USES).[122] In their role as liaisons between would-be workers and potential employers, the state employment services had long facilitated and complied with employers' racial specifications for particular jobs. The new USES, albeit with some significant exceptions in practice, expounded a new policy of refusing to honor requests specifying race.

Racial discrimination in labor, and departures from it, grew in importance to others besides civil rights leaders and political strategists. Unsurprisingly, discrimination also was vitally important to both white and African American workers. Workers frequently responded violently to even minimal racial change in the workplace, which brought work-related discrimination to the foreground of national consciousness and heightened their urgency.[123] In 1943, a mob of over 3000 white workers at the Pennsylvania Shipyard terrorized an African American ghetto out of fear that the FEPC would give their jobs to African Americans. In Mobile, Alabama, when the Alabama Dry Dock and Shipbuilders Company attempted to upgrade twelve African American welders in compliance with an FEPC directive that same year, 20,000 white workers walked off the job and rioted for four days. Similar fears led to "hate strikes" by white workers in states across the country, including Maryland, Michigan, New York, and Ohio, as well as to additional violence in Pennsylvania.[124]

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its "approach . . . to questions of discrimination in wage rates has always been that it will require equal pay for equal quality and quantity of work without regard to race, sex, color, or national origin." *In re* Miami Copper Co., 15 LRRM 1538, 1539 (1944). Although it did not eliminate all wage differentials created by the Non-Ferrous Metals Commission's categorization of "Anglo-American" male labor and "other" labor, the Board did require the immediate raising of those lower rates as well as a reconsideration of the job rates for the future. *Id.* at 1538. Because of the multitude of job classifications, the Board could not tell exactly the nature of the discrimination. But that very multitude "convinced" the Board that the classification "lends itself to discrimination," and certainly to the suspicion of discrimination. Thus, even though the discrimination did not exist on the face of the classifications, and the jobs appeared to differ in quality, the Board required a change in the pay structure. *Id.*; *see also In re* Pittsburgh Plate Glass Co., 16 LRRM 1529 (1945).

121. *See* Goluboff, *supra* note 23.

122. These steps were nonetheless partial and incomplete. USES continued to allow racial specifications in many circumstances. *See* GUNNAR MYRDAL, AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY 417–18 (1944).

123. Other fertile sources for racial violence were military bases and the crowded cities, where large numbers of migrants shared inadequate transportation, housing, and recreational facilities. *See* POLENBERG, *supra* note 116, at 126–28.

124. Harvard Sitkoff, *Racial Militancy and Interracial Violence in the Second World War*, 58 J. AM. HIST. 661, 672 (1971).

2. Building the Institution

The centrality of labor-related race discrimination to the domestic political and economic developments of the war converged with institutional developments within the NAACP to make labor-related cases newly attractive to the Association. In part, the NAACP's Legal Department was able to take on labor cases during the war simply because it was able to take on more cases. Prior to hiring Charles Hamilton Houston in 1934, the NAACP had had no full-time lawyers on its staff. By the end of the war, it had at least five, plus nonattorney assistants. In 1938, Marshall joined Houston on the staff, and in 1940, he took over the management of the NAACP's litigation strategy when Houston returned to private practice. Born in Baltimore to a sleeping car porter and a sometime teacher, Marshall grew up as part of the black middle class.[125] After attending Lincoln University, Marshall was a student of Houston's when Houston was dean of Howard Law School. Marshall led the legal team until he took a seat as the first African American justice of the United States Supreme Court in 1967. Among the handful of lawyers Marshall took on during the war was Prentice Thomas, whom he hired in 1942 to work on labor issues. Thomas, an African American from Kentucky, ran in circles farther to the left than most of the NAACP lawyers. Thomas left in 1943, and in 1945, Marshall hired a white lawyer named Marian Wynn Perry to take up labor-related litigation.[126] Perry's background, like Thomas's, was somewhat to the left of the other NAACP lawyers, and her credentials when she joined the NAACP lay more with unions than with racial advocacy.[127]

125. The education, economic circumstances, and professional lives of the black middle class differed significantly from the white middle class. *See, e.g.*, CHARLES PETE T. BANNER-HALEY, TO DO GOOD AND TO DO WELL: MIDDLE-CLASS BLACKS AND THE DEPRESSION, PHILADELPHIA, 1929–1941 (1993); KEVIN BOYLE, ARC OF JUSTICE: A SAGA OF RACE, CIVIL RIGHTS, AND MURDER IN THE JAZZ AGE (2004); LYNNE B. FELDMAN, A SENSE OF PLACE: BIRMINGHAM'S BLACK MIDDLE-CLASS COMMUNITY, 1890–1930 (1999); VINCENT P. FRANKLIN, THE EDUCATION OF BLACK PHILADELPHIA: THE SOCIAL AND EDUCATIONAL HISTORY OF A MINORITY COMMUNITY, 1900–1950 (1979); FRAZIER, *supra* note 35; GAINES, *supra* note 32; HIGGINBOTHAM, *supra* note 36; DARLENE CLARK HINE, SPEAK TRUTH TO POWER: BLACK PROFESSIONAL CLASS IN UNITED STATES HISTORY (1996); BART LANDRY, THE NEW BLACK MIDDLE CLASS (1988); DAVID LEVERING LEWIS & DEBORAH WILLIS, A SMALL NATION OF PEOPLE: W.E.B. DU BOIS AND AFRICAN AMERICAN PORTRAITS OF PROGRESS (2003); H. VISCOUNT NELSON, THE PHILADELPHIA N.A.A.C.P.: EPITOME OF MIDDLE CLASS CONSCIOUSNESS (1972); LARRY TYE, RISING FROM THE RAILS: PULLMAN PORTERS AND THE MAKING OF THE BLACK MIDDLE CLASS (2004); THE MIDDLING SORTS: EXPLORATIONS IN THE HISTORY OF THE AMERICAN MIDDLE CLASS (Burton Bledstein & Robert Johnston eds., 2000).

126. TUSHNET, MAKING CIVIL RIGHTS LAW, *supra* note 12, at 33–36.

127. *Id.*

When Executive Secretary Walter White agreed to these and other additions to the Association's staff, he did so expecting the increase in lawyers to improve not only the Association's legal work but also its general resources and membership. Although in 1939 the NAACP formally separated its legal activities into the NAACP Legal Defense and Education Fund (commonly known as the Inc. Fund), it would be difficult to call the NAACP and the Inc. Fund truly separate entities until the mid-1950s. Before that time, the two organizations shared members of the boards of directors, office space, and most significantly, financial resources.[128] Consequently, the NAACP hoped that the work of what it still called its Legal Department would draw in additional Association members. When Thurgood Marshall hired new lawyers during the war, Walter White "trust[ed] that [their] work will, combined with that of ourselves in selling that work to the public, bring in added revenue."[129]

The "public" from whom White sought such revenue changed dramatically during the early to mid-1940s. For most of its history, the NAACP's main financial resources came from middle-class African Americans and wealthy, philanthropic whites. Although these sources of income do not map perfectly onto particular legal priorities, and although we should not necessarily expect them to, the relatively low priority of labor issues can be traced at least partially to the relative marginality of working-class African Americans in the Association's membership. The NAACP had focused its energies on cases that both benefited and helped to create the African American middle class, as well as on issues like lynching and involuntary servitude, whose shock value garnered support from liberal whites. Before the end of the Depression decade, the NAACP had not considered working-class African Americans particularly fruitful targets for membership, and employment-related cases risked alienating white philanthropists who might have made their money at the expense of such workers.

With increasing numbers of African American workers moving north, joining unions, registering to vote, and crucially, beginning to earn wages that might enable them to afford membership dues, the NAACP, like the Democratic Party, began to recognize that the growing African American working class could be a plentiful new constituency. Although the staff of the NAACP, including White and Wilkins in addition to Marshall, had

128. *See id.* at 27, 310.

129. Memorandum from Walter White to Roy Wilkins (May 19, 1942), *microformed on* Papers of the NAACP, *supra* note 1, at pt. 13, ser. C, reel 12, frame 1006.

grown up as part of the African American middle class,[130] the war made them more attuned to African American workers. By 1939, Assistant Secretary Roy Wilkins was urging an expansion of the "association's program in a popular manner to reach the masses of the people."[131] Around the same time, Walter White told Gunnar Myrdal, author of *An American Dilemma*, a pathbreaking 1944 book on American race relations, that the NAACP needed to broaden its reach from middle-class litigation to "the issues which affected the great masses of Negroes who were in dire poverty."[132] Although White thought it important to fight discrimination in places of accommodation that excluded middle-class and elite African Americans despite their ability to pay, he also thought that such legal challenges "failed to attack problems of employment and the like which affect the lives and destinies of persons who are not financially able to go" to nice restaurants and theaters.[133]

African American railroaders offered the Association an opportunity to attack such problems that very year. When the railroaders sought the NAACP's help, Wilkins wrote Marshall, "I vote for our taking an interest in this thing. If we can turn one of these tricks, the laboring groups all over the country will be for us 100%. Now they think we are all right, but not able to help them much."[134] Although it was eventually Houston, in private practice, who spearheaded the railroaders' litigation campaign, Marshall and the NAACP did lend support.[135]

More central to the NAACP's efforts to, in Prentice Thomas's words, "persuade [wage earners] to join the NAACP both as individuals and as union locals" were the Association's attempts to strengthen ties with organized labor.[136] The creation of the more racially inclusive (although still imperfect) CIO and the ascendance of organized labor's power on the

130. *See* HOWARD BALL, A DEFIANT LIFE: THURGOOD MARSHALL AND THE PERSISTENCE OF RACISM IN AMERICA (2001); JANKEN, *supra* note 35; TUSHNET, MAKING CIVIL RIGHTS LAW, *supra* note 12, at 8–9; WILKINS, *supra* note 45; JUAN WILLIAMS, THURGOOD MARSHALL: AMERICAN REVOLUTIONARY (1998).

131. Memorandum from Roy Wilkins to Walter White (Mar. 11, 1939), *quoted in* Bates, *supra* note 35, at 370. *But cf.* ANDERSON, *supra* note 73, at 18–19 (describing how Wilkins was hesitant to embrace an economic program).

132. ANDERSON, *supra* note 73, at 18 (quoting a report from the Papers of the NAACP).

133. *Id.*; *see also* Bruce Nelson, *Organized Labor and the Struggle for Black Equality in Mobile During World War II*, 80 J. AM. HIST. 952, 965–66 (1993) (describing the transformation of John LeFlore, cofounder of Mobile, Alabama's NAACP branch, from concerns with middle-class issues and a disdain for the majority of African Americans, to a concern for African American workers during the war).

134. ARNESEN, *supra* note 13, at 138 (quoting a report from the Papers of the NAACP).

135. *See supra* notes 83–85.

136. Memorandum from Prentice Thomas to Walter White (May 5, 1943), *microformed on* Papers of the NAACP, *supra* note 1, at pt. 13, ser. A, reel 6, frame 568, 572.

national political scene, was key to "prov[ing] that the NAACP is vitally interested in labor problems."[137]

In the aftermath of a major, unifying strike at the River Rouge plant of the Ford Motor Company in 1939,[138] more and more labor leaders spoke at the NAACP's annual conventions, and more and more often the NAACP represented itself at activities sponsored by organized labor.[139] In 1945, the NAACP created a new staff position devoted entirely to labor issues in its Washington office and hired Clarence Mitchell to fill it. A lifelong activist, Mitchell had once run for state office on the Socialist Party ticket, and he joined the NAACP freshly minted from his work at the FEPC.[140]

The new attention to workers paid off in membership terms, as the size of the NAACP expanded considerably during the 1940s. As union numbers grew during the war years, from nine million union members in 1941 to fifteen million in 1945,[141] the NAACP grew as well, from 355 branches and a membership of 50,556 to 1073 branches and a membership of around 450,000 between 1940 and 1946.[142] The Association's budget grew from $54,300 in 1930,

137. *Id.*

138. *See* AUGUST MEIER & ELLIOT RUDWICK, BLACK DETROIT AND THE RISE OF THE UAW (1979). Historians disagree about the extent to which the CIO, or the AFL for that matter, supported interracial unions and successfully supported civil rights efforts. *Compare* Korstad & Lichtenstein, *supra* note 13, *with* Judith Stein, *Southern Workers in National Unions: Birmingham Steelworkers, 1936–1951*, *in* ORGANIZED LABOR IN THE TWENTIETH-CENTURY SOUTH 183 (Robert H. Zieger ed., 1991). On the debate, see Eric Arnesen, *Up From Exclusion: Black and White Workers, Race, and the State of Labor History*, 26 REVS. AM. HIST. 146 (1998); Michael Goldfield, *Race and the CIO: The Possibilities for Racial Egalitarianism During the 1930s and 1940s*, 44 INT'L LAB. & WORKING-CLASS HIST. 1 (1993); Rick Halpern, *Organised Labour, Black Workers and the Twentieth-Century South: The Emerging Revision*, 19 SOC. HIST. 359 (1994).

139. *See, e.g.*, Resolutions Adopted by the Thirty-First Annual Conference (June 22, 1940), *microformed on* Papers of the NAACP, *supra* note 1, at pt. 1, reel 10, frame 740, 744 (applauding "the slow but steady growth of consciousness of American workers towards the realization that white labor will never be free until all labor is free," while "deplor[ing] the continued shortsightedness" of discriminatory unions and warning that "[l]abor union[s] which ask that they be not discriminated against must come into court with clean hands"); Horace R. Cayton, A Strategy for Negro Labor (June 24, 1941), *microformed on* Papers of the NAACP, *supra* note 1, at pt. 1, reel 10, frame 1191, 1196 (describing the "tremendous and momentous changes in the relationship between Negroes and organized labor in the past few years" and how, even though the majority of African Americans favored unionism by then, problems remained); Address of John L. Lewis, *microformed on* Papers of the NAACP, *supra* note 1, at pt.1, reel 10, frame 807, 811 (asserting that "[t]he CIO and this association have a common interest in many matters").

140. *See generally* DENTON L. WATSON, LION IN THE LOBBY (1990) (discussing the career of Clarence Mitchell).

141. LICHTENSTEIN, *supra* note 113, at 54.

142. Dalfiume, *supra* note 116, at 99–100. It is not entirely clear how much of that increase occurred among the working class. In a motion to file an amicus brief in a union discrimination case in 1945, the NAACP asserted: "[m]ost of the members of the Association are workers." Motion for Leave to File Brief as Amicus Curiae, *supra* note 6, at 260. In 1949, however, Roy Wilkins was "not able to estimate to what extent the membership is divided

comprised of a combination of contributions and membership dues, to more than $319,000 in 1947, entirely from membership dues.[143]

The NAACP's tremendous growth was due at least in part to the new membership of working-class African Americans. The San Francisco boilermakers provide a case in point. When they first began their protests in 1943, the San Francisco branch of the NAACP was so nonoperational that the African American workers created their own protest organization. Once Thurgood Marshall joined the effort on their behalf, however, Joseph James, the "president" of the almost defunct branch and one of the key organizers of the workers, arranged for a merger of the boilermakers organization and the NAACP branch. In one fell swoop, the NAACP gained numerous members.[144] Not all of the boilermakers who benefited from the NAACP's legal efforts joined the Association initially, prompting Thurgood Marshall to write James about the need for him to prevail upon his colleagues. "To be perfectly frank," Marshall admonished, "it seems to me that the men working in the Marinship yard who are not paying any labor union dues are getting something for nothing. The something they are getting," Marshall went on, "is full protection by the courts as a result of this case. If they are not willing to pay for the expenses of this case, I do not see how they can expect anyone to have too much sympathy for them."[145] Marshall urged James to "explain to [the workers] that if they do not pay for the case it might be necessary to use the funds sent to the Association by soldiers."[146] Those are soldiers, Marshall

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between what you call working-class people as against white collar people. I am certain that the percentage of so-called working people is very much more than it was in 1940. More than likely it has tripled, but that is only a guess. We have been making efforts to secure membership in the trade union movement and many of the local membership campaigns have teams of workers among union members." Letter from Roy Wilkins to Cy W. Record (Dec. 21, 1949), *microformed on* Papers of the NAACP, *supra* note 1, at pt. 18, ser. B, reel 7, frame 900, 902 (responding to queries for his book). The proportion of working-class members actually may have declined in the late 1940s, because an increase in membership fees at the end of 1948 caused the loss of nearly half of the NAACP's members. August Meier, *Negro Protest Movements and Organizations*, 32 J. NEGRO EDUC. 437, 438 (1963); *see infra* notes 372–376. According to Berky Nelson, both the Chicago and the Philadelphia branches attracted working-class members during the war who later fell away because of the perceived elitism of the branch leadership. Nelson suggests that the working-class members found the national office more responsive than the branches themselves. Berky Nelson, *Before the Revolution: Crisis Within the Philadelphia and Chicago NAACP, 1940–1960*, 61 NEGRO HIST. BULL. 20–25 (1998); *see also* H. Viscount Nelson, *The Philadelphia NAACP: Race Versus Class Consciousness During the Thirties*, 5 J. BLACK STUD. 255 (1975) (finding the Philadelphia branch elitist in the 1930s).

143. TUSHNET, LEGAL STRATEGY, *supra* note 12, at 135.

144. *See* Goluboff, Work of Civil Rights, *supra* note 11, at 330–31.

145. Letter from Thurgood Marshall to Joseph James, President, San Francisco Branch (Jan. 5, 1945), *microformed on* Papers of the NAACP, *supra* note 1, at pt. 13, ser. C, reel 1, frame 219, 220.

146. *Id.*

added, who "earn about one-tenth of the money they earn, who are constantly up against the proposition of being killed and who are, nevertheless, sufficiently interested in the advancement of their people to send money from India, China, France, Italy, Africa, and other theaters of war."[147]

Marshall made clear that the workers who profited from NAACP legal action would be expected to pay for such benefits by becoming members and supporting the Association. In "selling" the Association's work to its new working-class "public," Marshall did not rely solely on press releases and public speeches; he took his sales pitch directly to the people who had already enjoyed the fruits of his labor and therefore bore some duty to become members. The symbiosis Walter White had envisioned just a few years before between legal action and institutional growth had become a reality. Labor-related litigation not only could, but in fact did, strengthen and enlarge the Association. By May 1946, the San Francisco branch had grown to 900 members from near extinction in 1943.[148]

C. Doctrinal Opportunities

In deciding that the time was ripe to take on labor cases during World War II, the NAACP lawyers basically were creating their labor litigation agenda from scratch. The Margold Report, the blueprint for the NAACP's legal work since 1930, had said nary a word about labor litigation. The cases that the NAACP pursued in the 1930s had not followed Margold in all respects, but the NAACP had continued to relegate labor cases to political rather than legal action. Even when the Association made a greater effort to reach out to poor and working African Americans in the 1930s, litigation did not comprise any substantial part of that effort.

Adding labor cases to the education, housing, and transportation cases that the NAACP pursued in the 1940s amplified and diversified opportunities for doctrinal expansion. In thinking about how to approach the labor cases, the lawyers could draw on their accumulated knowledge in other areas.[149] The NAACP saw its litigation strategy as a coherent whole: labor cases, restrictive

147. *Id.*

148. The increase in membership and membership funds meant a concomitant decrease in dependence on white philanthropy. Letter from Thurgood Marshall to Noah W. Griffin, *supra* note 3.

149. Marshall and local counsel in the boilermakers cases discussed, for example, the relevance of two school desegregation cases that appeared "quite . . . important . . . in connection with our Boilermaker's case." Letter from Herbert Resner to Thurgood Marshall (Feb. 10, 1944), *microformed on* Papers of the NAACP, *supra* note 1, at pt. 13, ser. C, reel 1, frame 88; *see also* Letter from Thurgood Marshall to Herbert Resner (Feb. 15, 1944), *microformed on* Papers of the NAACP, *supra* note 1, at pt. 13, ser. C, reel 1, frame 89.

covenant cases, graduate education cases, and transportation cases all appeared profitable avenues for litigation. Indeed, as the NAACP lawyers thought about which cases to take in the 1940s, they moved slowly toward a general anti-discrimination framework in which all such cases would fit. Similar to cases in education, housing, and transportation, the boilermakers cases offered the NAACP an opportunity to attack "discriminat[ion] against Negro workers on account of their race and color."[150]

This incremental movement toward antidiscrimination is visible in the NAACP's changing interpretation of the "rules" by which its lawyers decided which cases to accept. These rules were derived from the Inc. Fund's bylaws, which stated that the organization's first purpose was "[t]o render legal aid gratuitously to such Negroes as may appear to be worthy thereof, who are suffering legal injustices by reason of race or color and unable to employ and engage legal aid and assistance on account of poverty."[151] Early in the decade, interpretations of the bylaws mandated that the Inc. Fund take cases under any of three circumstances: if there was an injustice because of race or color, if there was a denial of due process (in criminal cases), or if there was a possibility of establishing precedent that would benefit African Americans substantially.[152] By the mid-1940s, the bylaws remained the same, but the Inc. Fund's stated requirements had changed. By 1944, "injustice because of race" had transformed into "must definitely be [a case] when the Negro has been discriminated against or denied his civil rights under state or federal laws."[153] The new interpretation specified that the type of "injustice" that would warrant NAACP legal intervention was "discrimination."

The new terminology did not, however, reflect a complete clarity of doctrinal purpose. The labor cases that the Legal Department pursued during World War II revealed that both the lawyers' agenda and the guiding legal doctrine of the NAACP were in considerable flux. In part, these cases reflected tensions in the NAACP's overall litigation strategy. Even as the NAACP attacked

150. Press Release, NAACP, NAACP Aids Coast Shipyard Workers, *supra* note 89.

151. By-Laws of N.A.A.C.P. Legal Defense and Educational Fund, Inc., *microformed on* Papers of the NAACP, *supra* note 1, at pt. 18, ser. A, reel 3, frame 385.

152. Letter from Thurgood Marshall to John Crawford (July 2, 1942), *microformed on* Papers of the NAACP, *supra* note 1, at pt. 13, ser. C, reel 3, frame 50.

153. Substantive changes in the "rules" for deciding which cases to accept could be seen as well. Due process had dropped out altogether, and recommendation by the local branch—a measure of the increased institutional power of members—had been added. *See* Letter from Edward R. Dudley to Glenn C. Adair (May 4, 1944), *microformed on* Papers of the NAACP, *supra* note 1, at pt. 13, ser. C, reel 2, frame 228; *see also* Letter from Milton R. Konvitz to William Carter (Nov. 26, 1943), *microformed on* Papers of the NAACP, *supra* note 1, at pt. 13, reel 3, frame 125 (stating that the Inc. Fund "takes only cases involving race discrimination and cases that are of national importance to the Negro race").

discrimination during the war, it did not commit itself fully as an organization to combating segregation in every aspect of life regardless of the consequences—material or doctrinal. The Legal Department was still working out the practicalities of litigation and the technicalities of doctrinal development, in education cases as in labor cases, in housing cases as in transportation cases.

In part, however, the labor cases offered unique prospects for doctrinal experimentation. The uncertainties of purpose revealed in the NAACP's labor-related cases in the 1940s reflected ambiguities in what it meant to pursue racial nondiscrimination in the context of work. Although the labor cases were similar to the NAACP's other cases in many ways, the fact that they involved labor and economic issues set them apart and invited the NAACP to think creatively about the resources of the law and its potential path.

Most significantly, what was at stake in labor cases was not only discrimination on the basis of race—a comparative question—but also absolute issues like the availability of work, the rate of pay, the hours of work, and the conditions of the job. Although the racially discriminatory aspects of African American workers' complaints were doctrinally severable from their economic aspects, the cases were conceptually embedded in the economic conditions of the United States and the economic status of African Americans within it.[154] As African American workers experienced Jim Crow America, it represented both a system of economic oppression and of racial subordination.[155] "In the United States," Charles Hamilton Houston wrote in 1935, "the Negro is economically exploited, politically ignored and socially ostr[a]cized."[156]

The unique nature of labor-related discrimination, and the conceptual importance of work and material inequality to those cases, frequently surfaced in the terminology used to describe the problem. Some contemporaries described the problem as one of "race discrimination" in employment and unions; others discussed it as a problem of "equal opportunity" in employment. Both of these phrases privileged the general idea of racial nondiscrimination and referred only secondarily to the fact that the discrimination happened to occur in the realm of employment. When others used the term "economic discrimination," on the other hand, they suggested that the arena in which the

154. Both during and after World War II, African American workers sought proportional hiring, affirmative action, and increased jobs rather than only color-blind job opportunities. *See infra* notes 314, 417; *see also* BIONDI, *supra* note 97; MORENO, *supra* note 70; Thomas J. Sugrue, *Affirmative Action From Below: Civil Rights, the Building Trades, and the Politics of Racial Equality in the Urban North, 1945–1969*, 91 J. AM. HIST. 145 (2004).

155. See KORSTAD, *supra* note 13 (discussing Jim Crow as race and class); *see also* ARNESEN, *supra* note 13, at 101 (discussing how African American "railroad porters' and dining car workers' positions could not be advanced without confronting the intertwined realities of class and race").

156. MCNEIL, *supra* note 77, at 134 (alteration in original) (footnote omitted).

racial discrimination occurred (the economy) was so critical to the understanding of the injury that it actually defined the problem rhetorically.[157]

The very centrality of economic issues to the NAACP's labor-related cases during the war exposed frictions between an evolving antisegregation agenda and African American economic advancement, and between an evolving equal protection doctrine and a lingering right to work derived from a substantive reading of the Due Process Clause of the Fourteenth Amendment.[158] The NAACP lawyers thus faced a number of difficult questions in labor-related cases: how to deal with the tension between economic advancement within segregated workplaces and principled desegregation; what kinds of constitutional arguments based in which constitutional authority might succeed; and how to create liability against the private actors—both employers and unions—that often violated the rights of African American workers. The attorneys' creative negotiations of these tensions generated traction and brought substantial success for both the NAACP and African American workers.

1. Pursuing Equality and Desegregation

In the early years of World War II, the Sun Shipbuilding and Drydock Company of Chester, Pennsylvania, established a segregated shipyard for its expanding African American workforce. The local branch of the NAACP in Chester, under the stewardship of Herman Laws, "endorsed the move" of instituting a segregated yard.[159] "We feel," Laws wrote to Roy Wilkins, "that this is the first step toward the end of total integration on a non-racial basis."[160] Likening the situation to segregated schools, he thought that it would be foolish and harmful to force black workers to await the end of segregation idly rather than to take segregated opportunities for advancement

157. *See, e.g.*, Steele v. Louisville & Nashville R.R. Co., 323 U.S. 192, 208–09 (1944) (Murphy, J., concurring); *America on Guard*, *supra* note 1, at 58–59. Philip Randolph's Provisional Committee to Organize Colored Locomotive Firemen similarly called discrimination against black railroad workers "racial-economic discrimination." ARNESEN, *supra* note 13, at 214. A staff member of the United Transport Service Employees of America called the problem one of "economic equality . . . because of . . . color." *Id.* at 216.

158. Throughout this Article, I use the term "substantive due process" to encompass a series of variations on the right to work. Although the term substantive due process was not used during the *Lochner* era itself, by the period that I am discussing, it was beginning to be used in a derogative fashion. *See* G. EDWARD WHITE, THE CONSTITUTION AND THE NEW DEAL 243–45 (2000). To the extent possible, I mean to use the term in its "analytical" capacity and do not mean to adopt the "normative jurisprudential" connotation. *Id.* at 244.

159. Letter from Herman Laws to Walter White (June 16, 1942), *quoted in* John M. McLarnon, *Pie in the Sky vs. Meat and Potatoes: The Case of Sun Ship's Yard No. 4*, 34 J. AM. STUD. 67, 73 (2000).

160. *Id.*

and higher pay.[161] "The situation is comparable to the effort to have colored teachers teach in mixed schools," Laws explained.[162] "The problem is whether to let colored teachers teach segregated now or remain idle until the mixed democratic idea is fixed in the public mind."[163]

Laws's reference to teachers was astute, because around the time he was writing, the NAACP lawyers were involved in teacher salary equalization suits. Although these suits did not necessarily assume the continuation of a segregated school system, they did arise mostly within such systems, and the claimants requested equalization of salaries rather than desegregation as relief. Despite Laws's pointed reference, the national office of the NAACP, along with other national organizations and black newspapers, took a somewhat harder line on the Sun Ship's segregated yard. The NAACP condemned "Jim-Crow Shipbuilders" because segregation "leads inevitably to misunderstanding and antagonism and frequently to differentials in working conditions."[164] Walter White tried to rein Laws in, insisting that the NAACP had been founded to "oppose segregation . . . without compromise."[165]

This conflict between economic advancement and principled desegregation pervaded the labor cases that African American workers presented to the NAACP during the war. Before he joined the NAACP staff, when he was still working as associate director of field operations of the FEPC, Clarence Mitchell had approved a plan to promote African American workers to skilled positions within a segregated shipyard. "We, of course, are not telling the companies that we approve these plans of segregation," Mitchell wrote to the FEPC's director of field operations.[166] But "the weighty problem of segregation" militated in favor of more jobs at better pay, even if it meant accepting segregation itself.[167] The NAACP and other African American organizations opposed the move. Nonetheless the director of the FEPC, a union official, and the company's African American workers were pleased that on the segregated shipways, "Negroes [were] advanced without

161. *Id.*
162. *Id.*
163. *Id.*
164. *Along the N.A.A.C.P. Battlefront*, 49 THE CRISIS 227, 228 (1942) (quoting a letter from the NAACP to John G. Pew).
165. Letter from Walter White to Herman Laws (June 30, 1942), *quoted in* McLarnon, *supra* note 159, at 74. Marshall had similar conflicts in other contexts, like education. *See, e.g.*, TUSHNET, LEGAL STRATEGY, *supra* note 12, at 107–08 (describing the conflict over educational equalization strategies in Texas).
166. CHAMBERLAIN, *supra* note 112, at 141.
167. *Id.*

any restriction."[168] Although the FEPC director was not entirely satisfied with the situation, he did think that "tremendous progress [had] been made."[169]

Finding work in Jim Crow America often entailed accepting segregated work, and the goals of African American workers and their direct advocates, like Herman Laws, sometimes conflicted with the antisegregationist priority of some civil rights leaders.[170] The antisegregationist position of the NAACP, however, was not as doctrinaire or uncompromising in the early 1940s as it became later in the decade. Because it was possible to define success in labor cases either in terms of desegregation or in terms of economic advancement, the NAACP lawyers often succeeded in labor cases in the latter sense even when failing in the former.

In the case of the boilermakers union, for example, the NAACP eventually softened its position on segregation and embraced the possibilities that the cases offered for economic advancement. When Roy Wilkins first traveled to Portland to lend support to the African American shipyard workers, he surmised that a federal government official involved in trying to mediate the dispute would approve of even sham auxiliary union membership for black workers. According to Wilkins, the official seemed to think that "the main job was getting Negroes work and that the working permit system or the auxiliary union seemed to be the answer."[171] Supporters of the auxiliary unions informed Wilkins "that in the San Francisco area the Jim Crow union has 4,000 members and those who favor them tell you very quickly that in SF Negroes, men and women, are working at journeyman trades at skilled labor and high wage rates, with no limit at the top."[172] Despite the economic benefits accruing to the workers in the auxiliaries, Wilkins presumed that "we will stand pat for non-segregated unions with Negroes having all rights

168. Nelson, *supra* note 133, at 982.

169. *Id.* (footnote omitted); *see also* Letter from Adolphus Braithwaite to NAACP (Apr. 15, 1940), *microformed on* Papers of the NAACP, *supra* note 1, at pt. 13, ser. A, reel 7, frame 12 (asking for more segregated African American longshore gangs rather than for desegregation).

170. In Mobile, for example, Walter White called the FEPC plan for segregated shipways a "step backward." Nelson, *supra* note 133, at 970, 982. *See generally* ERIC ARNESEN, WATERFRONT WORKERS OF NEW ORLEANS (1991); WILLIAM H. HARRIS, KEEPING THE FAITH: A. PHILIP RANDOLPH, MILTON P. WEBSTER, AND THE BROTHERHOOD OF SLEEPING CAR PORTERS, 1925–1937 (1977); LEWIS, *supra* note 13; TIMOTHY J. MINCHIN, THE COLOR OF WORK: THE STRUGGLE FOR CIVIL RIGHTS IN THE SOUTHERN PAPER INDUSTRY, 1945–1980, at 73–98 (2001) (describing how black workers in the paper industry preferred segregated unions to integrated ones because they were better able to protect their interests); NEIL R. MCMILLEN, DARK JOURNEY: BLACK MISSISSIPPIANS IN THE AGE OF JIM CROW 290 (1989); BRUCE NELSON, CLASS AND RACE IN THE CRESCENT CITY; Eric Arnesen, *Following the Color Line of Labor: Black Workers and the Labor Movement Before 1930*; 55 RADICAL HIST. REV. 53 (1993); Nelson, *supra* note 133, at 970.

171. Letter from Roy Wilkins to Walter White, *supra* note 95, at 575.

172. *Id.*

and privileges enjoyed by whites. That is the only position we can take."[173] The Portland branch used almost the same language as Wilkins (perhaps having spoken with him on the subject), informing the main office that the black workers "are standing pat against . . . discrimination. The Negro workers on the whole are against such."[174]

Three years later, however, after several lawsuits and appeals aimed at eliminating the boilermakers' Jim Crow auxiliaries, the NAACP applauded when the California Supreme Court took a middle position between the federal mediator's acceptance and Wilkins's condemnation of the segregated auxiliaries. In *James v. Marinship Corp.* and *Williams v. International Brotherhood of Boilermakers*, the court decided that the boilermakers union would have to choose between a closed shop and a closed union. The white boilermakers could enjoy either a market monopoly with racial nondiscrimination (if not inclusion) or give up that monopoly in order to retain their discriminatory and segregating practices.

These decisions mirrored and drew upon National Labor Relations Board (NLRB) opinions around the same time. In a series of cases during the war, the NLRB stated in dicta: "We entertain grave doubt whether a union which discriminately denies membership to employees on the basis of race may nevertheless bargain as the exclusive representative in an appropriate unit composed in part of members of the excluded race."[175] In *In re Larus & Brothers Co.*[176] in 1945, the Board explained further: "[W]e have in closed shop situations held that where a union obtained a contract requiring membership as a condition of employment, it was not entitled to insist upon the discharge of, and the employer was not entitled to discharge, employees discriminately denied membership in the union. In such situations," it concluded, "being without power to order the union to admit them, we have ordered employers to reinstate them."[177] The California Supreme Court cited *Larus* in *Williams* for the proposition that "where a union has obtained a contract requiring membership as a condition of employment, it does not have the right to compel the discharge of employees who are discriminatorily denied membership."[178]

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173. *Id.* at 576.

174. Letter from Rev. J.J. Clow, President, Portland Branch, to Walter White (Dec. 22, 1942), *microformed on* Papers of the NAACP, *supra* note 1, at pt. 13, ser. C, reel 1, frame 618.

175. *In re* Bethlehem-Alameda Shipyard, Inc., 53 N.L.R.B. 999, 1016 (1943); *see also In re* Larus & Bros. Co., 62 N.L.R.B. 1075, 1081 (1945) (quoting *Bethlehem-Alameda Shipyard*, 53 N.L.R.B. at 1016).

176. 62 N.L.R.B. 1075 (1945).

177. *Id.* at 1082; *see also In re* Carter Mfg. Co., 59 N.L.R.B. 804 (1944) (citing *Larus* and *Bethlehem*); *In re* Southwestern Portland Cement Co., 61 N.L.R.B. 1217, 1219 (1945) (citing *Carter*).

178. Williams v. Int'l Bhd. of Boilermakers, 165 P.2d 903, 906 (Cal. 1946).

At the time, this dicta—giving unions a choice between a closed union and a closed shop—was viewed as a step in the right direction.[179] In early 1945, the NAACP predicted that *Williams*, echoing *Larus*, would have "a sweeping effect." It called the *James* case, with its similar holding, "a splendid victory" that would create "a blue print for labor unions in regard to Negro and other minority groups."[180] Despite the fact that unions could still choose to segregate and discriminate, their inability to eliminate the jobs of African Americans in the process was cause for celebration.

Even as late as 1948, not all of the NAACP's lawyers deemed segregation an evil to be avoided always and in every context. Especially if segregation seemed likely to benefit African American workers materially, the NAACP equivocated. An exchange between labor secretary Clarence Mitchell and labor lawyer Marian Wynn Perry about the possibility of attacking the discriminatory and segregationist practices of the United States Employment Service (USES) reflects the differences of opinion within the Association. Although the Roosevelt Administration had federalized previously state-run employment services into the USES, the USES's stated nondiscrimination policy had explicitly allowed state and local offices to make exceptions. If local custom called for segregated offices and discriminatory work orders, local offices had obliged. When the Truman Administration returned the employment services to state control (with continued federal funding) at the end of the war, the problems of discrimination and segregation only intensified.[181] To Mitchell, "the acceptance of discriminatory orders by the employment service in the states is a serious problem"[182] and "the principle involved is fundamental."[183] The principle at stake in attacking USES seemed analogous to that in

179. According to Pauli Murray in 1945, the NLRB had traveled some way down the right road. Although the NLRB would not deny certification to a racially closed union in the initial collective bargaining stages, if later there was a failure to represent the minority, that would be a violation of statutory duty, and the Board would consider rescinding the certification. Murray, *supra* note 85, at 406.

180. Letter from Thurgood Marshall to George R. Andersen & Herbert Resner (Jan. 8, 1945), *microformed on* Papers of the NAACP, *supra* note 1, at pt. 13, ser. C, reel 1, frame 225. The NAACP's press release on *James* said almost exactly what *Larus* did: "The Court ruled that a labor union must admit Negroes to full membership or not try to enforce a closed shop agreement." Press Release, NAACP, California Supreme Court Outlaws Jim Crow Auxiliary Unions (Jan. 4, 1945), *microformed on* Papers of the NAACP, *supra* note 1, at pt. 13, ser. C, reel 1, frame 218.

181. Department of Labor Appropriations Act of July 26, 1946, ch. 672, 60 Stat. 679.

182. Letter from Clarence Mitchell to Oscar R. Ewing, Administrator, Federal Security Agency (Mar. 21, 1949), *microformed on* Papers of the NAACP, *supra* note 1, at pt. 13, ser. C, reel 8, frame 784.

183. Letter from Clarence Mitchell to Robert Carter, Assist. Special Counsel (Apr. 27, 1949), *microformed on* Papers of the NAACP, *supra* note 1, at pt. 13, ser. C, reel 8, frame 785.

attacking segregated southern education—"wherever there is segregation there also is discrimination."[184] For that reason, a challenge had to be made to "Federal monies expended on a basis of underwriting segregation."[185]

Perry disagreed, concluding that separate was not necessarily worse for African Americans, at least in the context of employment agencies. She found "some basis for the kind of argument . . . that the Negro gets better service in the Negro office when he applies for Negro jobs because there are no whites competing with him for those jobs."[186] Perry was "hesitant to recommend filing of a suit involving an employment service because there the discrimination is much more basic and it really cannot be proved to stem in any substantial degree from the segregation in employment service."[187] Thus, although the NAACP did not explicitly support segregation, Perry at least recognized that the antisegregation principle at times conflicted with the practical needs of working African Americans. Navigating between the two goals was neither easy nor straightforward. Although the NAACP's labor cases highlighted this tension, they did not demand its resolution.

The Legal Department's reluctance to commit wholeheartedly to a desegregation strategy regardless of its material effects in labor cases reflected a general hesitance to commit to desegregation in the 1940s. Although the NAACP lawyers realized that they faced a choice between equalization and direct attack in education in 1945, they postponed the choice until 1950.[188] It was not until 1951 that commitment to desegregation became a tenet of the Association and a requirement for membership. Even as Marshall organized the school desegregation cases that eventually made their way to the Supreme Court in 1954, he "left all options open."[189] Those cases "look[ed] suspiciously akin to the old equality approach with the direct challenge thrown in."[190]

2. Arguing Due Process and the Right to Work

The NAACP's choices of doctrinal tools for achieving its dual goals of desegregation and economic improvement in its 1940s labor cases were, like

184. Letter from Clarence Mitchell to Guy Moffett, Chairman, Fair Employment Board, Civil Service Commission (Nov. 12, 1948), *microformed on* Papers of the NAACP, *supra* note 1, at pt. 13, ser. C, reel 4, frame 520, 521.

185. Letter from Clarence Mitchell to Robert Carter, *supra* note 183.

186. Memorandum from Marian Wynn Perry to Will Maslow (copied to Mitchell) (May 12, 1947), *microformed on* Papers of the NAACP, *supra* note 1, at pt. 13, ser. C, reel 8, frame 776.

187. Memorandum from Marian Wynn Perry to Clarence Mitchell (Feb. 25, 1948), *microformed on* Papers of the NAACP, *supra* note 1, at pt. 13, ser. C, reel 6, frame 617.

188. TUSHNET, LEGAL STRATEGY, *supra* note 12, at 113.

189. *Id.* at 109 (quoting James Nabrit).

190. *Id.*

the goals themselves, entrepreneurial and pragmatic. Equal protection analysis came to dominate all types of discrimination cases, regardless of their setting, in the 1940s. Nonetheless, the long if somewhat discredited reign of substantive due process offered a resource in labor cases that appeared at least as promising, if not more so, than the Equal Protection Clause. As a result, the NAACP took advantage of new uses for an old civil rights framework.

The judicial rejection of *Lochner*'s right to work was less clean and less complete than we may think today. Many a state court, and a few lower federal courts as well, continued to adhere to the kinds of substantive due process rights that one no longer expects to see after the end of the *Lochner* era.[191] Such cases harkened directly back to nineteenth-century notions of free labor and emphasized the right "to engage in a gainful occupation."[192] The Supreme Court of North Carolina warned that "[n]o good can come to society from a policy which tends to drive its members from the ranks of the independently employed into the ranks of those industrially dependent, and the economic fallacy of such a policy is too obvious for comment."[193] Commentators agreed. "It should hardly be necessary to state that the right to engage in a gainful occupation and to seek to better one's economic position is of basic importance to the individual," one law review article concluded in 1958.[194] "From a practical standpoint, this right is as important, and as deserving of protection as are first amendment rights."[195] To these judges and commentators,

191. For an example of a federal court that continued to use such reasoning, see *Valle v. Stengel*, 176 F.2d 697 (3d Cir. 1949), which reversed the dismissal of a complaint alleging that the right to contract was violated when an African American bought a ticket to a pool but subsequently was refused entrance.

192. *See, e.g.*, Noble v. Davis, 161 S.W.2d 189 (Ark. 1942) (striking down price and hour regulations for barbers); Kirtley v. State, 84 N.E.2d 712 (Ind. 1949) (striking down a law prohibiting ticket scalping); Moore v. Grillis, 39 So. 2d 505 (Miss. 1949) (striking down the regulation of public accountants); State v. Ballance, 51 S.E.2d 731 (N.C. 1949) (striking down the licensing of photographers); State v. Greeson, 124 S.W.2d 253 (Tenn. 1939) (striking down price and hour regulations for barbers); *see also* John A.C. Hetherington, *State Economic Regulation and Substantive Due Process of Law*, 53 NW. U. L. REV. 226 (1958).

193. State v. Harris, 6 S.E.2d 854, 865 (N.C. 1940). Likewise, a dissenter in the South Dakota Supreme Court criticized that court's validation of a licensing regulation for plumbers that "result[ed] in a forced employer-employee relationship between master and journeyman plumbers." City of Sioux Falls v. Kadinger, 59 N.W.2d 631, 634 (S.D. 1953) (Leedom, J., dissenting). A California Supreme Court case upholding the exclusion of Japanese Americans from eligibility for state fishing licenses in 1947 essentially turned on whether commercial fishing was the kind of calling that was immune from state regulation. The majority, emphasizing the state's ownership of the fish, thought it was not. Takahashi v. Fish & Game Comm'n, 30 Cal. 2d 719, 727–30 (1947). The dissent, using the same standard, found fishing "an age-old means of livelihood," and that "[t]he right to work—to earn a living— . . . [was] secured by the Constitutions, both federal and state." *Id.* at 737–38 (Carter, J., dissenting).

194. Hetherington, *supra* note 192, at 248.

195. *Id.* (citation omitted).

substantive due process stood for much of what it always had: the individual's need for protection from, as opposed to protection of, governmental regulation. They seemed to conceive of the right at issue in much the same way Justice Field did in the *Slaughter-House Cases*[196] and the Court as a whole did in *Allgeyer v. Louisiana*[197] and *Lochner*: the right to a livelihood protected workers from the coercion and indignity of dependence in an increasingly industrial world.

Variations on this work-based notion of civil rights appeared in many of the NAACP lawyers' contemplations and arguments in labor-related litigation in the 1940s. In 1942, for example, Prentice Thomas approved of an "unorthodox" petition sent to him by a lawyer representing workers discriminated against by a federally funded company.[198] Thomas said that "basing the action on Amendment 5 of the Constitution of the United States is sound," but the lawyer "would have to prove that the right to work is a property right. Our Legal Committee has been considering the same approach in these cases of discrimination, but we have not arrived at any agreement as a basis."[199]

A memo Marian Wynn Perry wrote later in the decade to the American Jewish Congress (AJC), a civil rights organization with which the NAACP sometimes cooperated, illustrates perfectly the lawyers' recognition that *Lochner* and its ilk provided substantial doctrinal resources in labor cases.[200] Although Perry was unconvinced of the benefits of desegregating locally run offices of USES, Clarence Mitchell persuaded her to look into the possibility of launching a challenge jointly with the AJC. Perry thus wrote a memo setting forth the legal basis for such a challenge.[201] In addition to making arguments one might expect about how it was "illegal for the federal government itself to sanction racial discrimination in employment," Perry invoked substantive due process arguments about the right to work.[202] She described how "[t]he Supreme Court of the United States has recognized the fundamental

196. 83 U.S. 36 (1872).

197. 165 U.S. 578 (1897).

198. Letter from Prentice Thomas to Clayborne George (Dec. 8, 1942), *microformed on* Papers of the NAACP, *supra* note 1, at pt. 13, ser. C, reel 3, frame 700.

199. *Id.* Thomas stated in another memo: "Negroes, like all other peoples, have the inalienable right to work. This right can be gained in proportion that rights for all are gained." Memorandum from Prentice Thomas to Walter White, *supra* note 136, at 570.

200. It is not clear whether the Memorandum was ever sent, or what happened to the suggested joint attack on USES by the NAACP and the AJC. *See* Letter from Pauli Murray to Marian Wynn Perry (Jan. 27, 1947), *microformed on* Papers of the NAACP, *supra* note 1, at pt. 13, ser. C, reel 8, frame 796.

201. Memorandum on Discriminatory Practices by State Employment Services (June 20, 1949), *microformed on* Papers of the NAACP, *supra* note 1, at pt. 13, ser. C, reel 8, frame 790.

202. *Id.* at 793.

nature of the right to work."[203] Quoting *Allgeyer*, often thought to be one of the fundamental building blocks in substantive due process doctrine, Perry argued that the Fourteenth Amendment "embrace[d] the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation."[204] The bulk of the argument rested on the *Allgeyer* case, and the proposition "that state action discriminating against workers on the ground of color is a violation of the 14th Amendment in that *it restricts the liberty guaranteed by that Amendment without due process of law*."[205]

Thomas and Perry, who both stood somewhat farther to the left than Marshall and the other NAACP lawyers, were not outliers in suggesting the potential of using substantive due process arguments in labor cases. When the NAACP lawyers filed briefs in state supreme court cases involving union discrimination during the war, they seem to have "arrived at . . . agreement" on Prentice Thomas's argument that the laborer's property right in his work could form the doctrinal basis for a work-related race case. In the Providence, Rhode Island, boilermaker case of *Hill v. International Brotherhood of Boilermakers*, the Association's brief stated "[t]hat the right of laborers to organize unions is an exercise of the right of every citizen to pursue his calling, whether of labor or business . . . or of the right guaranteed by the constitution of acquiring, possessing, and protecting property."[206] To support its position, the NAACP wrote in its brief to both the Providence court and the California Supreme Court in *James* that these cases dealt with "discrimination by the Brotherhood against the complainants directly interfering with their right to work and their livelihood."[207] The NAACP's California brief quoted the lower court as having said that "[e]veryone must be free to pursue his lawful calling; that is

203. *Id.* at 791.

204. *Id.* at 791–92 (quoting Allgeyer v. Louisiana, 164 U.S. 578, 589 (1897)). Perry also relied on a statement from the President's Committee on Civil Rights: "A man's right to an equal chance to utilize fully his skills and knowledge is essential." *Id.* at 791 (quoting PRESIDENT'S COMM. ON CIVIL RIGHTS, *supra* note 21, at 23). Perry did refer to "[b]road public policy [that] demands that federal funds be used for the benefit of all citizens without discrimination," but she emphasized that was "particularly so in regard to the basic right to work without which other rights become meaningless." *Id.* at 794.

205. *Id.* at 792–93 (emphasis added).

206. Memorandum Brief for Complainants, Hill v. Int'l Bhd. of Boilermakers, *microformed on* Papers of the NAACP, *supra* note 1, at pt. 13, ser. C, reel 1, frame 1192, 1193 (internal quotation marks omitted) (quoting Am. Steel Foundries v. Tri-City Cent. Trades Council, 257 U.S. 184, 209 (1921)).

207. Draft Brief, *supra* note 87, at 395; Memorandum Brief for Complainants, *supra* note 206, at 1194.

fundamental."[208] The brief also quoted the New Jersey Supreme Court, among numerous others, as having stated that "the right to earn a livelihood is a property right guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution."[209]

Unlike some post-*Lochner* uses of substantive due process that harkened directly back to a pre-industrial, pre-regulatory era, the NAACP's arguments saw unions as potentially enhancing, rather than necessarily undermining, the right to work. The NAACP linked the old right to work with the protections of the interventionist New Deal state by explicitly connecting the common law right to work through constitutional law and into statutory law. "This right has been termed a fundamental right which exists prior to and independently of the National Labor Relations Act," the *James* brief announced.[210] The lawyers viewed "the right of laborers to organize unions [as] an exercise of the right of every citizen to pursue his calling, whether of labor or business, as he in his judgment thinks fit, or of the right guaranteed by the constitution of acquiring, possessing, and protecting property."[211] They went on to say that "the arbitrary exclusion of qualified workers from a union means the deprivation of a livelihood for persons who are willing and able to earn their livelihood by the sweat of their brow."[212]

These statements suggest that the NAACP lawyers did not see a necessary disjunction between *Lochner* reasoning and the New Deal. Rather they saw continuity: New Deal labor regulation represented a deepening of governmental protection for the right to a livelihood precisely by safeguarding unions. In 1940, for example, Thurgood Marshall wrote to Joseph Ryan of the International Longshoremen's Association about complaints from some African American members. "[D]iscrimination against Negroes within a union," Marshall wrote, "is a type of discrimination which tends to destroy the aim of labor which is to consolidate all workers for their common benefit. It is very difficult for a Negro member of a union to feel 100 per cent in favor of organized labor when, after paying his dues and doing all in his power to become a

208. Draft Brief, *supra* note 87, at 399 (quoting Wilson v. Newspaper & Mail Deliverers' Union, 197 A. 720, 722 (N.J. Ch. 1938)).

209. *Id.* at 400 (citing Carroll v. Int'l Bhd. of Elec. Workers, 31 A.2d 223 (N.J. 1943)); *see also id.* at 404 (quoting the New Jersey Supreme Court again in Cameron v. Int'l Alliance of Theatrical Stage Employees, 198 A.2d 692, 697 (N.J. 1935), as stating that "workers have a 'constitutional and inalienable right to earn a livelihood'").

210. *Id.* at 394 (citing Amalgamated Util. Workers v. Consol. Edison Co., 309 U.S. 261 (1940)).

211. *Id.* (footnote omitted).

212. *Id.* at 401–02.

good union man, he is discriminated against by members of the union."[213] Labor law scholar Clyde Summers broadened the point, agreeing that union participation should be supportive of the right to work. "Without a union" he exclaimed, "workers are little more than tools to be bought, used, and discarded according to the employer's pleasure."[214] He thought that "[o]nce it is clearly recognized that unions are economic legislatures engaged in determining the laws by which men work, and eat, and live, the importance of guaranteeing workers the right to share in making those laws is self-evident."[215]

That the NLRA protected the right to work, rather than abridged it (which has long been the conventional wisdom), meant that even unions sheltered by the NLRA should not be allowed to violate the rights of African Americans to work. Summers saw "[t]he underlying problem" as giving "the worker the greatest possible protection against exclusion by a union with the least possible dangers to the independence and effectiveness of the union."[216] The question was how the NLRA would solve that problem. Although the NAACP feared at the time, and scholars have argued since, that the NLRA would hurt African Americans by giving greater power to exclusionary and discriminatory white unions,[217] the NAACP also thought the existence of the NLRA might help its arguments. Indeed, NAACP lawyers proceeded to make the latter interpretation a reality. The NAACP's brief in *James* made clear that the black workers preferred union organization to an open shop: "The Negro workers ask for equal union membership in order to protect the closed shop, and they offer willingly to pay dues to support the union, but with membership on terms and conditions equal with white members."[218] But the thrust of the argument was to place due process limits on the protection that the New Deal could offer to discriminatory unions.

The NAACP lawyers' uses of such rhetoric and doctrine were apparently in step with the views of other lawyers and jurists of the time, and these arguments met with considerable success in the state courts. In deciding *James*

213. Letter from Thurgood Marshall to Joseph P. Ryan (Apr. 10, 1940), *microformed on* Papers of the NAACP, *supra* note 1, at pt. 13, ser. A, reel 7, frame 2, 3.

214. Summers, *supra* note 106, at 73.

215. *Id.* at 74.

216. *Id.* at 66.

217. *See, e.g.*, DAVID E. BERNSTEIN, ONLY ONE PLACE OF REDRESS: AFRICAN-AMERICANS, LABOR REGULATIONS AND THE COURTS FROM RECONSTRUCTION TO THE NEW DEAL (2001); HILL, *supra* note 89; WOLTERS, *supra* note 35; *see also* ARNESEN, *supra* note 13 (discussing the Railway Labor Act, which was similar to the NLRA).

218. Press Release, NAACP, JimCro [sic] Policies Aimed at in Action Against Boilermakers (Sept. 7, 1944), *microformed on* Papers of the NAACP, *supra* note 1, at pt. 13, ser. C, reel 1, frame 194, 195. *But cf.* Frymer, *supra* note 72 (arguing that the individual rights pressed in antidiscrimination cases were fundamentally at odds with the premises of labor organization and union power).

in the NAACP's favor and upholding an injunction prohibiting the boilermakers union from maintaining both a closed shop and a closed union, the California Supreme Court repeatedly made reference to the "fundamental right to work for a living," the "constitutional right to earn a livelihood," and the "fundamental" fact that "[e]veryone must be left free to pursue his lawful calling."[219] In *Williams*, the same court emphasized "the fundamental right to work" and the kind of "unlawful interference with a worker's right to employment" that the union discrimination caused.[220] In *Betts v. Easley*,[221] a similar case involving railroad workers brought by an NAACP branch, the Kansas Supreme Court explicitly linked substantive due process and union participation. It stated that "the guaranty of due process . . . is to be liberally construed to effectuate its purpose of protecting the citizen against arbitrary invasion of his rights of life, liberty and property."[222] The court emphasized that "the denial to a workman, because of race, of an equal voice in determining issues so vital to his economic welfare . . . is an infringement of liberty if indeed it may not also be said to be a deprival of property rights."[223] The court refused to be "blind to present-day realities affecting labor in large industrial plants. The individual workman cannot just 'go it alone,'" it opined.[224] "Every person with an understanding of mass production and other features of modern industry long ago recognized the necessity of collective bargaining by labor representatives, freely chosen, if human rights are to be adequately safeguarded."[225] The NAACP thus argued, and the state courts embraced, *Lochner*-like right to work arguments as justifying limits on union freedom to discriminate. This fact focused the cases at least as much, if not more, on the substantive right to work (as it happened, without racial discrimination) as on the substantive right to be free from racial discrimination (as it happened, in the context of work).[226]

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219. James v. Marinship Corp., 155 P.2d 329, 335–36 (Cal. 1944).

220. Williams v. Int'l Bhd. of Boilermakers, 165 P.2d 903, 905–06 (Cal. 1946).

221. 169 P.2d 831 (Kan. 1946).

222. *Id.* at 843 (citation omitted).

223. *Id.* (citation omitted). "If it could be said that it was necessary in the present instance to show a property interest in the employees in order to justify the court in granting an injunction, we are of the opinion that there was such an interest." *Id.* (quoting Tex. & New Orleans R.R. Co. v. Bhd. of Ry. & S.S. Clerks, 281 U.S. 548, 571 (1930)).

224. *Id.* at 839.

225. *Id.*

226. Such an understanding of the issue also found its way into proposed legislation. The Fair Employment Practice Bill that Congress considered in 1945 called the right to work without discrimination an "immunity of all citizens of the United States," clearly referencing the Privileges and Immunities Clause that the U.S. Supreme Court had rejected as a basis for such a right in the *Slaughterhouse* cases. Murray, *supra* note 85, at 422. The alternative formulations of the right—as inhering in the Equal Protection Clause, *Allgeyer*'s Due Process Clause, and *Slaughterhouse*'s rejected Privileges and Immunities Clause—suggests the considerable uncertainty about the constitutional location of such a right.

A 1945 law review article by Pauli Murray, a civil rights and labor activist who had just completed law school at Howard and a year of graduate study at Boalt Hall, reflected well this multilayered legal approach to labor-related discrimination. Murray began her article about "The Right to Equal Opportunity in Employment" not with the plight of African Americans in the United States generally, nor with the principle of racial nondiscrimination, but rather with the statement that "[t]he interest in freedom from discrimination in employment is part of the broader interest in freely disposing of one's labor."[227] The courts, she said, "have been profuse in their verbal homage to the idea that the right to work is an inalienable and natural right, a logical extension of the right to life and pursuit of happiness, inherent in the guarantees of the Federal Constitution, and rooted in the common law."[228] With regard to the federal constitution, Murray cited *Lochner*, the quintessential substantive due process case. "Numerous courts have characterized labor as . . . a property right. Others have deemed it a personal liberty. In either sense it is within the protection of the Fifth and Fourteenth Amendments."[229] Ultimately, she concluded, "the broad over-all problem of security in our time is the right to employment, the interest which the individual has in obtaining a good livelihood. This interest is on a par with the right to existence itself."[230] Clyde Summers agreed. "The right to work is uniformly recognized as essential," he wrote in 1947, "for it involves not only the right to live but the right to follow one's chosen occupation."[231]

Murray's and Summers's articles, like the memos of Perry and Thomas, the briefs of the other NAACP lawyers, and the judicial analyses of the NAACP's cases, suggest the extent to which labor cases brought with them unique doctrinal challenges and opportunities. The most successful legal arguments the NAACP marshaled in the union discrimination cases were based on a substantive reading of the Due Process Clause and closely related common law doctrine, not on the Equal Protection Clause. Because the complaints of African American workers concerned, at base, the right to work, they enabled the lawyers to invoke arguments specifically about work. These arguments had been successful prior to the New Deal, and they saw considerable success even in the post-*Lochner* era.

227. *Id.* at 388.
228. *Id.*
229. *Id.*
230. *Id.* at 431.
231. Summers, *supra* note 106, at 73.

3. Generating State Action

Prior to World War II, the targets that the NAACP would pursue during the war—the railroad unions, the boilermakers unions, and a host of private actors in New York—would not have been subject to liability for race discrimination. Private actors generally had not been vulnerable to Fourteenth Amendment challenges since the *Civil Rights Cases* limited the Fourteenth Amendment to state action in 1883. Nevertheless, when the NAACP lawyers chose to target private actors in labor cases during the war, they revealed the same willingness to experiment with the state action requirement that they exhibited with regard to both the doctrinal goals and arguments of their labor cases.

In part, the NAACP's choice of targets reflected a larger trend in the 1940s: The state action requirement was in a state of disorder.[232] For example, in *Smith v. Allwright*,[233] a case striking down the white primary in 1944, the Court found state action even though the state of Texas had essentially privatized the primary process.[234] When the privilege of private party membership "is also the essential qualification for voting in a primary to select nominees for a general election," the Court concluded, "the State makes the action of the party the action of the State."[235] The following year in *Screws v. United States*,[236] the Court found that actions taken by state officials in violation of state law were nonetheless taken under color of state law for the purposes of federal criminal liability.[237] And in *Marsh v. Alabama*,[238] the Court considered a privately owned company town to be a state actor for purposes of a First Amendment violation. "The more the owner [of a company] opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory

232. The doctrinal developments I describe below owed much to the theoretical writings of progressive and realist legal scholars. *See, e.g.*, BARBARA H. FRIED, THE PROGRESSIVE ASSAULT ON LAISSEZ FAIRE (1998); Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470 (1923); Robert L. Hale, *Force and the State: A Comparison of "Political" and "Economic" Compulsion*, 35 COLUM. L. REV. 149 (1935).

233. 321 U.S. 649 (1944).

234. *Id.* at 664; *see also* United States v. Classic, 313 U.S. 299 (1941) (finding a constitutional right to vote in a primary election free of state discrimination); Nixon v. Condon, 286 U.S. 73 (1932) (invalidating another Texas statute affecting African American participation in primary elections); Nixon v. Herndon, 273 U.S. 536 (1927) (striking down a Texas statute excluding African Americans from the state Democratic Party). *But see* Grovey v. Townsend, 295 U.S. 45 (1935) (upholding a similar Texas statute).

235. *Allwright*, 321 U.S. at 664–65.

236. 325 U.S. 91 (1945).

237. *Id.* at 108–09.

238. 326 U.S. 501 (1946).

and constitutional rights of those who use it."[239] Scholars saw the state action connections between these disparate cases, concluding,[240] like civil rights lawyer Osmond K. Fraenkel, that "[t]here are possibilities . . . that the rights guaranteed by the 14th Amendment may be extended over areas previously considered wholly private."[241]

Labor-related cases offered a particularly vital arena in which to break down—or find ways around—the state action requirement in the 1940s.[242] State action in labor-related race cases existed without doubt only in government jobs themselves. Such jobs, of course, grew in number along with the expansion of the administrative state in the New Deal and the war. Despite frequent official statements of nondiscriminatory policy by the federal government, claims of discrimination against it, as well as against state and local governments, were not hard to find.[243]

Beyond government employment, however, the doctrine was uncertain. "As to what degree of action or inaction by the state is embraced in the constitutional prohibition against arbitrary interference with the right to work," Pauli Murray wrote in 1945, "there seems to be some question."[244] Drawing on the work of an influential article about state action in the context of racially restrictive covenants, Murray theorized that legislative and administration action as well as "judicial sanction given to contractual arrangements which unreasonably interfere with the right to work [might] come[ ] within the constitutional ban."[245]

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239. *Id.* at 506.

240. *See, e.g.*, Summers, *supra* note 106, at 56–58; John A. Huston, Comment, *Constitutional Law—State Court Enforcement of Race Restrictive Covenants as State Action Within the Scope of Fourteenth Amendment*, 45 MICH. L. REV. 733 (1947) (discussing various cases as they related to state action in the restrictive covenants issue).

241. Osmond K. Fraenkel, *The Federal Civil Rights Laws*, 31 MINN. L. REV. 301, 320 (1947); *see also* George Brody, *Recent Decisions Constitutional Law—Freedom of Speech and Religion—What Constitutes State Action*, 44 MICH. L. REV. 848 (1946) (discussing *Marsh* as an expansion of state action doctrine and worrying about its consequences).

242. *See generally* TUSHNET, MAKING CIVIL RIGHTS LAW, *supra* note 12, at 76–80.

243. In fact, around one quarter of the complaints the FEPC received in one war year were brought against the federal government. PRESIDENT'S COMM. ON CIVIL RIGHTS, *supra* note 21, at 58.

244. Murray, *supra* note 85, at 392.

245. *Id.* In an article presaging *Shelley v. Kraemer*'s finding of state action in the judicial enforcement of private agreements not to sell or lease property to African Americans (through the mechanism of racially restrictive covenants), D.O. McGovney, a professor of law at the University of California, cited a litany of U.S. Supreme Court cases finding violations of the Constitution in which the only state action was that of courts. D.O. McGovney, *Racial Residential Segregation by State Court Enforcement of Restrictive Agreements, Covenants or Conditions in Deeds Is Unconstitutional*, 33 CAL. L. REV. 5, 22–24 (1945). He cited as well *Home Telephone and Telegraph Co. v. Los Angeles*, 227 U.S. 278 (1913), which set the stage for *Screws* in finding government officials liable even when they acted outside the scope of their assigned authority. McGovney, *supra*, at 17.

With regard to such private contracts, change had begun in the late 1930s, when the Supreme Court's validation of New Deal regulation set the stage for wartime arguments for private liability. The constitutionality of the New Deal transformed a fundamental assumption from the *Lochner* era—that employers were completely free to hire and fire whom they liked—by requiring nondiscrimination against union members.[246] To the extent that the NLRA began the process of undermining a private employer's "*absolute* discretion in matters of hiring, firing, and labor policies on the job," Pauli Murray thought the next step to take was "the asserted right to equal opportunity in employment, or freedom from discrimination on a racial or religious basis."[247] Although the New Deal had said nothing about discrimination on the basis of race, Murray was not alone in thinking that the federal government's increased intervention into the wartime economy could make unions and many private employers liable for race discrimination, where once their private status had endowed them with constitutional immunity.[248] The transition to a war economy, and the correlative need to use all available human resources regardless of race, made applying New Deal-like governmental interventions to the race context particularly feasible. As commentator Louis Kesselman put it in a 1946 article on the FEPC: "The old argument that employment is a private affair between the employer and the worker could not be maintained in a period of national emergency when the continued existence of the country depended upon maximum utilization of the labor force."[249]

In *Railway Mail Ass'n v. Corsi*, the NAACP urged the Supreme Court to recognize the validity of state interference in the labor market.[250] Upholding the application of New York's pioneering antidiscrimination law to labor unions, the Court confirmed that it had indeed created space within which the employment relationship could be regulated.[251] As Professor E. Merrick Dodd pointed out in 1945, the *Corsi* decision reinforced the conclusion that discrimination in private employment was no longer constitutionally privileged and therefore could be prohibited.[252] "Whatever might have been thought to be the law in the days when liberty of contract was treated by the Supreme Court as an almost absolute constitutional privilege," Dodd wrote, "the decision in the *Corsi* case

246. *See* Murray, *supra* note 85, at 433.
247. *Id.* at 389.
248. *Id.*
249. Kesselman, *supra* note 76, at 37.
250. Motion and Brief for the National Association for the Advancement of Colored People, Ry. Mail Ass'n v. Corsi, 326 U.S. 88 (1945) (No. 691).
251. *Corsi*, 326 U.S. at 95.
252. E. Merrick Dodd, *The Supreme Court and Organized Labor, 1941–1945*, 58 HARV. L. REV. 1018, 1061 (1945).

was to be expected."[253] The end of the *Lochner* era, in fact, had laid the groundwork for such a conclusion. "Now that employers have lost what were formerly regarded as their constitutional rights of discriminating against union members and of paying less than legislatively determined minimum wages, now that statutory bargaining rights granted to unions have been found to create implied duties not to discriminate against racial or religious groups," Dodd concluded, "a union's claim that anti-discrimination laws infringe its constitutional liberties is a palpable anachronism."[254]

The new, much more liberal view of potential private liability was "a natural consequence" of "the increase in the economic power of unions and of the Supreme Court's increasing recognition . . . that to refuse to treat the economic power of particular private groups as a constitutional justification for their regulation is in effect to substitute private government for government of, by and for the people."[255] By dint of the power unions exercised over the labor market, they had ceased, in important ways, to deserve the protection that their formally private status once had afforded.[256]

Dodd went even further, remarking that if unions could be regulated because of the economic power they wielded, then obviously employers, who possessed far more economic power, could be regulated as well. "[W]hat is true of labor unions, economic institutions which, even when they have no closed-shop agreements, tend to obtain a large measure of job control," he reasoned, "is presumably true *a fortiori* of employers, who are the creators of jobs."[257] That New York's law dealt with discrimination in the labor market was neither accidental nor incidental. According to Dodd, the economic power of private groups simulated and required governmental regulation. Clyde Summers made the same point in a slightly different manner: "If a union which is the statutory bargaining representative is engaged in governmental action when it makes a collective bargaining agreement, then it can no more discriminate in that agreement as to terms of employments than could the legislature in passing a statute regulating working conditions. . . . Should there not," he asked, "be an equal constitutional right of a worker to participate in the selecting of union candidates who will write the economic legislation controlling his livelihood?"[258]

253. *Id.*
254. *Id.*
255. *Id.*
256. *See* Summers, *supra* note 106, at 42 ("A worker may not only be barred from his chosen trade, but in those communities where unionization is almost complete, exclusion from membership may deny him the right to work at all.").
257. Dodd, *supra* note 252, at 1061.
258. Summers, *supra* note 106, at 57–58.

Each time the NAACP filed a complaint with New York's SCAD, it expanded the realm of private liability for work-related discrimination, and each time the New York apparatus intervened on behalf of an African American worker, it undermined the private prerogative of employers. As state laws prohibiting private discrimination in employment grew more widespread after *Corsi*, that prerogative withered further. By 1946, not only New York, but also New Jersey, Wisconsin, Indiana, Utah, and the city of Chicago had such statutes, and one in Massachusetts was pending.[259] In a growing number of states, the state action requirement was losing salience. The era of the private employment relationship immune from governmental regulation was passing.

On the federal level, government intervention into the wartime economy created several new opportunities for finding liability against private actors in the employment context. The FEPC prohibited discrimination by all private firms engaged in production related to the war effort.[260] Although it lacked the power to subpoena witnesses or to enforce its findings without calling on the President for punitive action, the FEPC nonetheless provided a new federal administrative forum for airing grievances, arranging settlements, and sometimes, for creating real change in available employment opportunities for African American war workers.[261] Kesselman, the political scientist, opined that the FEPC "marks a milestone in Negro history" because it supplanted "the theory that economic rights can be obtained principally by activity in the economic sphere . . . with an all-out drive to gain the support of the states and the national government in the elimination of racial discrimination in employment."[262] Whatever its considerable limitations, the FEPC represented yet another governmental intervention into the private employment relationship, yet another erosion of the immunity of private actors for discrimination.

The existence of the FEPC also suggested the growth of a new federal public policy condemning discrimination on the basis of race that ultimately might bind private actors. For example, defense contracts between the federal government and private firms supplied a basis for suggesting, through litigation, that private employers should bear some responsibility to act nondiscriminatorily. Thurgood Marshall recognized in 1940 that determined and skillful argumentation might be able to transform generalized national policy

259. Charles W. Cobb, Jr., *The Outlook Regarding State FEPC Legislation*, 31 J. NEGRO HIST. 247, 248 (1946); Kesselman, *supra* note 76, at 34 n.6, 42–43; *see also* G. James Fleming, *Educational Aspects of FEPC Laws*, 19 J. NEGRO EDUC. 7–15 (1950). Other states had more limited statutes that proscribed discrimination in particular types of employment—civil service, war contracting, public contracting, work relief—and in unions. Cobb, *supra*, at 249.

260. Exec. Order No. 8802, 3 C.F.R. 957 (1938–1943).

261. Kesselman, *supra* note 76, at 38.

262. *Id.* at 33. *See generally* MORENO, *supra* note 70.

into successful legal cases. "There is no law as such which contains a nondiscrimination clause in the matter of employment under the National Defense Program," Marshall acknowledged.[263] "However, the Advisory Council of the National Defense Commission has issued a statement of policy against such discrimination and it is up to Negroes to see to it that the firms awarded contracts under the National Defense Program live up to the spirit of this policy."[264]

Marshall attempted to implement this policy in his first legal action on behalf of San Francisco's African American boilermakers. In a 1943 suit in federal court, the NAACP argued that government contracts with the shipyards entitled the "plaintiffs [to] a federal right under those contracts and that those rights and contracts are paramount to any private agreement between the Boilermaker's Union and Marinship [the company]."[265] The master agreement between the boilermakers and Marinship was underwritten by the U.S. government, the lawyers claimed. Because the Boilermakers claimed rights springing from this contract, the NAACP wanted "to show that into this master agreement must be read the provisions of the President's order on fair employment practices and that this factual situation gives rise to federal rights sustaining federal jurisdiction."[266] Although the federal courts did not agree in that case, when a state court later relied in part on similar arguments, Marshall commented that "we might have even been correct in our theories about the original federal action."[267]

The NAACP had greater success arguing that federal regulation and protection, such as that established by the Railway Labor Act and the NLRA, created concomitant federal obligations on the part of the regulated entities. While in the 1930s the NAACP had tried unsuccessfully to amend the NLRA explicitly to prohibit race discrimination by unions, in the 1940s the NAACP saw that New Deal labor legislation as it already existed might be interpreted by administrative and judicial tribunals to require nondiscrimination just the same. For example, in the railroad union cases of *Steele v. Louisville & N.R. Co.*, and *Tunstall v. Brotherhood of Locomotive Firemen*, the Court declined to

263. *See, e.g.*, Letter from Thurgood Marshall to W.F. Turner, *supra* note 4.

264. *Id.*

265. Letter from George R. Andersen & Herbert Resner to Hon. Michael J. Roche (Dec. 22, 1943), *microformed on* Papers of the NAACP, *supra* note 1, at pt. 13, ser. C, reel 1, frame 247, 248.

266. *Id.* at 248.

267. Letter from Thurgood Marshall to George R. Anderson & Herbert Resner, *supra* note 180. In 1948, however, Marian Wynn Perry concluded that "the federal courts have consistently refused to allow individuals to sue on a third party beneficiary basis based on executive orders" and that "the only cases in which federal courts have been willing to recognize the rights of employees to recover have been those where the contract itself incorporated the provisions of the executive order." Letter from Marian Wynn Perry to Burris, Benton & Baker (Jan. 22, 1948), *microformed on* Papers of the NAACP, *supra* note 1, at pt. 13, ser. C, reel 2, frame 1099.

hold that the unions were state actors for constitutional purposes.[268] However, it did hold that their regulation by the federal government under the Railway Labor Act bound the unions to a statutory duty of fair representation. Unions could not simultaneously gain exclusive power of representation under the Railway Labor Act and use it to eliminate minorities from the best jobs in the railroad industry.[269] Federal regulation and protection brought with them the legal—if not the constitutional—obligation not to discriminate. Pauli Murray pointed out the hybrid public/private status of unions as understood in *Steele* and *Tunstall*: "For purposes of its collective bargaining functions, [a union] is akin to a governmental agency and has analogous power and obligations, but for purposes of membership it remains a private organization immune from judicial regulation in the public interest."[270]

When the NAACP challenged this immunity from interference with the boilermakers' membership rules in state court, it succeeded in marginalizing the state action requirement further. In *James*, the California Supreme Court cited to *Smith v. Allwright* (and to *Steele*) in arguing that discrimination by those who were not formally state actors recently had been prohibited.[271] But the crux of the court's holding that a union could not maintain both a closed shop and a closed union neither sounded in equal protection nor transformed the union into a state actor per se. In accepting and vindicating the African American workers' substantive right to work, the California Supreme Court concluded that the unions themselves were not entitled to the full protection of substantive due process because they fell into the well-established common law exception to substantive due process: businesses affected with a public interest. The NAACP's uses of substantive due process thus opened up arguments not only about why African American workers should be entitled to work in a particular industry or company, but also about why unions potentially should be liable for the discrimination. "Where a union has, as in this case, attained a monopoly of the supply of labor by means of closed shop agreements and other forms of collective labor action," the *James* court stated, "such a union occupies a quasi public position similar to that of a public service business . . . ."[272] As a result, the union "has certain corresponding obligations."[273] Workers' due process rights were thus a function of the quasi-public status of the union.

268. Writing in concurrence, Justice Murphy emphasized that he would have so held. Steele v. Louisville & N.R. Co., 323 U.S. 192, 208–09 (1944) (Murphy, J., concurring).

269. *Id.* at 201–03.

270. Murray, *supra* note 85, at 405.

271. James v. Marinship Corp., 155 P.2d 329, 339 (Cal. 1944) (citing Smith v. Allwright, 321 U.S. 649 (1944)).

272. *Id.* at 335.

273. *Id.*

The *James* court analogized a union holding a labor monopoly to such classic businesses affected with a public interest as innkeepers and common carriers, which at common law had special duties to serve all comers on reasonable terms. The *James* decision rejected legal doctrine going back to 1890, in the New Jersey case of *Mayer v. Journeymen Stonecutters' Ass'n*,[274] that treated unions the same way as other voluntary associations insofar as membership determinations were concerned. The union could "no longer claim the same freedom from legal restraint enjoyed by golf clubs or fraternal associations. Its asserted right to choose its own members does not merely relate to social relations; it affects the fundamental right to work for a living."[275] In *Williams v. International Brotherhood of Boilermakers*, the same court broadened the application of *James*, establishing that even unions without a monopoly were affected by a public interest and would be held to the same common law standard.[276] The ramifications of a closed union and a closed shop were significant. "To exclude a man from a club may be to deny him pleasant dinner companionship," Clyde Summers concluded, "but to exclude a worker from a union may be to deny him the right to eat."[277]

Unlike churches, fraternal orders, and golf clubs, common law businesses affected by a public interest were bound by the public policy of the state. And as the California Supreme Court explained, nondiscrimination, as set forth in President Roosevelt's executive order creating the FEPC, constituted California's public policy. Analyzing the California cases, Pauli Murray suggested that "when exercising monopolistic control of employment or employment opportunity, labor organizations now have a public utility common law status and from such status acquire a common law obligation to abstain from discriminatory activity."[278] The California Supreme Court therefore concluded that the union's actions violated not the Fourteenth Amendment, but the public policy of the state of California.

In the railroad workers' *Betts* case, the Kansas Supreme Court went even further than the California court. It concluded that federal regulation had actually transformed the union from a regulable actor into a government actor.[279] The court found a violation of the Fifth Amendment in "a segregation which carries with it alleged inequality of participation in union affairs relating to hours, wages, grievances, working conditions, and other such

274. 47 N.J. Eq. 519 (1890); Summers, *supra* note 106, at 37.
275. *James*, 155 P.2d at 335.
276. Williams v. Int'l Bhd. of Boilermakers, 165 P.2d 903, 905 (Cal. 1946).
277. Summers, *supra* note 106, at 42.
278. Murray, *supra* note 85, at 433.
279. Betts v. Easley, 169 P.2d 831, 839 (Kan. 1946).

important matters incident to employment . . . ."[280] Because the union held the exclusive power of representation of relevant railway employees under the provisions of the Railway Labor Act, the court held that "the acts complained of are those of an organization acting as an agency created and functioning under the provisions of Federal law."[281] As a result, the court deemed it "unnecessary to consider [the union's] contention that the Fifth Amendment is not here applicable because it relates only to action by the Federal government and not to acts by private persons."[282] The *Betts* court went beyond both the California Supreme Court in *James* and *Williams*, and the United States Supreme Court in *Steele* and *Tunstall*, and unequivocally found the union to be a state actor for the purposes of constitutional liability.[283]

As *Betts* shows, even as courts refrained from condemning segregation itself, they were amenable to expanding state action beyond formally public actors. That is not to say that easier targets for litigation could not be found. Discrimination and segregation in public schools funded and run by states and localities involved much clearer examples of state action than that present in the actions of labor unions or private employers. Labor cases, however, were distinctively situated to enable the NAACP to attack both the sanctity of segregation under *Plessy v. Ferguson* and the constitutional immunity of private actors under the *Civil Rights Cases*. During World War II and immediately after, the NAACP expended considerable resources in making arguments that work-related discrimination of all kinds could, and should, lead to a far broader liability than historically had been the case.

4. Filling out the Fragments

By the end of World War II, the NAACP had made considerable progress in labor cases. More African Americans were employed in industry thanks to the Association's interventions. The destructive combination of the closed shop and the closed union seemed destined for extinction. The private prerogatives of unions to use their regulatory bargaining monopoly

280. *Id.* at 837.
281. *Id.* at 838.
282. *Id.* "[T]he constitutional guaranties of due process . . . are to be liberally construed to effectuate their purposes, and are a restraint not only upon persons holding positions specifically classed as executive, legislative or judicial, but upon all administrative and ministerial officials who act under governmental authority." *Id.* The court posited, "While claiming and exercising rights incident to its designation as bargaining agent, the defendant union cannot at the same time avoid the responsibilities that attach to such statutory status." *Id.*
283. *Id.*

with unbridled discretion were increasingly constrained. Law—state and federal, administrative, statutory, constitutional, and common—had gone some distance toward protecting African Americans in the labor market.

Much work, however, remained. Labor-related cases were difficult to pursue, technical, painstaking, and limited in their potential impact. Charles Hamilton Houston himself, champion of labor litigation in his private practice, recognized that the remaining questions could not all "be fought out in the courts because the courts are too slow and litigation is too expensive."[284] A single case would not change the African American situation in labor, let alone Jim Crow more generally. The same was true of the NAACP's education cases at the end of the 1940s and the beginning of the 1950s. As Walter White explained after the NAACP's Supreme Court victories in *Sweatt v. Painter*,[285] *McLaurin v. State Regents for Higher Education*,[286] and *Henderson v. United States*,[287] "Our legal staff . . . inform[s] us that many score—possibly several hundred—legal actions may have to be initiated and fought to secure Southwide compliance in every professional and graduate school of every Southern state."[288] Even once initial victories were obtained, White counseled, contempt proceedings for noncompliance and additional cases for lower levels of education would be necessary.[289]

The question in the labor cases was what "the filling out of the fragments," as Pauli Murray called it in a related context, would look like and who would pursue it.[290] In the mid-1940s, numerous people within the NAACP's orbit commented on the possibilities for expanding these wartime precedents. Work-related cases, the push toward desegregation, the search for more state action, the protection of more categories of workers—all these areas begged for further attention and litigation. Clarence Mitchell, for example, continued to push the NAACP's lawyers to work toward desegregation in the USES. Mitchell aimed to ensure that discriminatory orders would not be allowed, that all hiring would be required to be on a nondiscriminatory basis, and that separate offices would be abolished.[291] Mitchell urged the

284. MCNEIL, *supra* note 77, at 170.

285. 339 U.S. 629 (1950) (holding that a segregated law school was not substantially equal).

286. 339 U.S. 637 (1950) (holding that a segregation within a graduate school was not substantially equal).

287. 339 U.S. 816 (1950).

288. Walter White, Closing Session Remarks, NAACP 41st Annual Conference (June 25, 1950), *microformed on* Papers of the NAACP, *supra* note 1, at pt. 1, reel 12, frame 1070, 1074.

289. *Id.* White's comment foreshadowed the difficulties of implementing school desegregation that followed *Brown v. Board of Education II*, 349 U.S. 294 (1955).

290. Murray, *supra* note 85, at 433.

291. Monthly Report (Aug. 31, 1946), *microformed on* Papers of the NAACP, *supra* note 1, at pt. 13, ser. A, reel 9, frame 429.

NAACP to "study the legal aspects" of the weak nondiscrimination policies of the new state-run offices in order to "make an effort to prevent the Department of Labor from spending the $42,000,000 it will hand out to states unless adequate safeguards are included."[292]

In addition to suits against employers and Clarence Mitchell's pet defendant, the USES, union discrimination cases continued to look promising for future doctrinal development. The next step in union cases, according to Herbert Resner, a San Francisco attorney with whom the NAACP had collaborated in the boilermakers cases, was to "press for a decision that there is no economic security at all for Negro workers unless they are full members of the union which has the contract and the jurisdiction over the job in question."[293] Pauli Murray agreed. "Does it not follow," she asked, "that this obligation [to abstain from discriminatory activity] can only be met in practical fact by opening the organization's membership without restriction because of race, creed, color, national origin or ancestry?"[294]

A number of civil rights and labor advocates saw *Steele* and *Tunstall* specifically as the key to further development of the law. The CIO suggested that the way to proceed "one step further than the *Steele* and *Tunstall* cases" was to get the NLRB to refuse to certify a discriminatory union as the sole collective bargaining agent for a class of workers.[295] Although the NLRB had taken steps in this direction, the Board still deemed "[n]either exclusion from membership [n]or segregated membership per se" as "evasion . . . of [the] statutory duty to afford 'equal representation'" to workers in a bargaining unit.[296] In fact, although the NAACP did not ultimately take the lead,[297] cases challenging the NLRB's recognition of "its lack of power to pass upon

292. HAMILTON & HAMILTON, *supra* note 71, at 63.

293. Letter from Herbert Resner to Thurgood Marshall (May 31, 1946), *microformed on* Papers of the NAACP, *supra* note 1, at pt. 13, ser. C, reel 2, frame 1048. By 1946, then, much had changed from 1941, when the NAACP and its advisors seemed not to be "prepared at this time to set the legal machinery in motion to test this whole question of exclusion of Negroes from labor unions." Letter from William R. Ming, Jr. to Thurgood Marshall (Sept. 20, 1941), *microformed on* Papers of the NAACP, *supra* note 1, at pt. 13, ser. C, reel 5, frame 227.

294. Murray, *supra* note 85, at 433.

295. Memorandum from Marian Wynn Perry to Thurgood Marshall (Sept. 17, 1948), *microformed on* Papers of the NAACP, *supra* note 1, at pt. 13, ser. A, reel 14, frame 476.

296. Monthly Report, *supra* note 291, at 430 (quoting NLRB Annual Report 1946).

297. In 1953, Herbert Hill also pursued the NLRB's policies, but apparently largely without the help of the NAACP's legal staff. Memorandum from Herbert Hill to Walter White (Sept. 11, 1952), *microformed on* Papers of the NAACP, *supra* note 1, at pt. 13, ser. A, reel 20, frame 304; Lee, *supra* note 24. Although Hill's memorandum laying out his legal and political plans for labor went to White, Wilkins, and Moon, it did not go to Marshall or anyone else on the NAACP legal staff. Memorandum from Herbert Hill to Walter White, *supra*.

eligibility requirements for membership in a labor organization" arose with some regularity in the postwar period.[298] Other lawyers pursued analogous cases under the Railway Labor Act.[299]

In particular, Charles Hamilton Houston and his law partner Joseph C. Waddy vigorously followed up on the railroad cases that had brought them success in *Steele* and *Tunstall*. According to Houston, these cases had laid "the ground work . . . so that in the near future we will be in position to challenge the right of the railroad unions to represent the craft or class at all as long as it excludes Negroes from membership."[300] Houston aimed to "establish the principle that a railroad union has no right to represent a nonmember minority worker unless it gives him the same chance to elect the officials who conduct the collective bargaining process, censure and remove them as possessed by the union members." In the late 1940s and into the early 1950s, Houston and Waddy tried to make that principle a reality.[301]

"If we win these cases," Houston exclaimed, "the Jim-Crow union membership will be nothing but an empty shell."[302] He aimed to expand the precedents "until every vestige of segregation and discrimination, and every limitation on a man's right to hold a job on the railroad based on race, creed, color or national origin, is wiped out."[303] Houston thought that such precedents in the railroad context could apply "to every other public utility: gas, electricity, telephone and telegraph, bus lines and air lines, every industry affected with a public interest."[304]

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298. *In re* Veneer Prods., Inc., 81 N.L.R.B. 492, 493 (1949); *see also In re* Pacific Maritime Ass'n, 110 N.L.R.B. 1647, 1648 (1954); Hughes Tool Co., 104 N.L.R.B. 318, 321 (1953). It was not until 1964, on the same day President Lyndon Johnson signed into law the Civil Rights Act of 1964, that the NLRB concluded that "racial segregation in [union] membership . . . cannot be countenanced by a Federal agency." Hughes Tool Co., 147 N.L.R.B. 1573, 1574 (1964). *See generally* Lee, *supra* note 24, at 48–49.

299. For example, A. Philip Randolph, his Provisional Committee to Organize Colored Locomotive Firemen, and his counsel Joseph Rauh, pursued railroad discrimination cases. ARNESEN, *supra* note 13, at 203–29.

300. *Id.* at 209. African American Chicago lawyer Richard Westbrooks also brought a series of cases on behalf of black railway porters in which the Supreme Court incrementally expanded the rights of black railroad workers beyond what it had found in *Steele* and *Tunstall*. Bhd. of R.R. Trainmen v. Howard, 343 U.S. 768 (1952); Howard v. St. Louis-San Francisco Ry. Co., 191 F.2d 442 (9th Cir. 1951); Howard v. Thomas, 72 F. Supp. 695 (Dist. Ct. Mo. 1947). *See generally* ARNESEN, *supra* note 13, at 221–26.

301. In one district court case, Marshall was also listed as counsel, although he was no longer listed at the appeals court level. *See* Rolax v. Atl. Coast Line Ry. Co., 91 F. Supp. 585 (E.D. Va. 1950); Rolax v. Atl. Coast Line Ry. Co., 186 F.2d 473 (4th Cir. 1951).

302. Charles H. Houston, The Legal Struggle for Protection of Minority Workers' Rights on American Railroads (July 14, 1949) (transcript *microformed on* Papers of the NAACP, *supra* note 1, at pt. 1, reel 12, frame 694, 705).

303. *Id.* at 707.

304. *Id.*

For Houston, the goal was not simply the end of formal discrimination in unions and employment. He also aimed to overturn the 1906 Supreme Court precedent of *Hodges v. United States*.[305] *Hodges* limited federal protection for African Americans prevented from working at their chosen calling by private white citizens. Houston was convinced that "keeping a man down to certain limited jobs in restricted places is nothing but a refined form of involuntary servitude and . . . lawyers must keep digging until they find a way to make the United States Supreme Court change [the] view it took in *Hodges*." Houston's concerns thus escaped the bounds of expanding *Steele* and *Tunstall*. They went to the very heart of constitutional protection for African Americans' rights to work. The target was not *Plessy* but *Hodges*.

Echoing Houston's substantive concerns, Clyde Summers was optimistic in 1947: "[M]ere protection against discrimination is no full solution, for in a democratic society equal treatment is no substitute for equal participation."[306] The excluded worker "is, in a very real sense, disenfranchised in his economic government."[307] Summers acknowledged that "[e]ven to suggest that there is a constitutional right to join a union might seem preposterous."[308] But "with the present pace of constitutional law it is not amiss to discuss the possibilities."[309] The constitutional hurdle, he concluded, "is not insuperable."[310] The *Chicago Defender* was even more hopeful. It generalized from the statutory victories over railroad discrimination in *Steele* and *Tunstall* to the possibility of ending Jim Crow entirely. It seemed that the Court had "discovered that whatever is segregated and Jim Crowed cannot be equal in the true sense . . . It opens the way for striking new powerful blows against Jim Crow in American life."[311]

III. LABOR LITIGATION IN THE POSTWAR ERA

In 1945, then, it appeared that the possibilities for labor cases were robust. The cases that the NAACP pursued in the first half of the decade had, in the view of the NAACP lawyers, "go[ne] far to protect the right of the Negro worker not to be discriminated against by either management or

305. MCNEIL, *supra* note 77, at 195.
306. Summers, *supra* note 106, at 52.
307. *Id.* at 53 (footnote omitted).
308. *Id.* at 56.
309. *Id.*
310. *Id.* at 51.
311. ARNESEN, *supra* note 13, at 208 (quoting Charles Hamilton Houston, Memorandum to ACRT, IARE et al., (Dec. 20, 1944), CHH Papers, Box 163-23, Folder 14).

the few labor unions which practice racial discrimination."[312] From the vantage point of the immediate postwar period, labor, education, transportation, and residential segregation cases all might have seemed to offer possibilities for deepening the attack on segregation and discrimination. Indeed, the economic components of labor-related cases suggested that they offered more varied doctrinal opportunities for finding both constitutional violations and liable defendants than some of the other areas in which the NAACP's lawyers took an interest.

Even as late as 1949, the Legal Department included employment discrimination among the targets of its litigation strategy. Although labor cases were not prominent on the agenda at the first lawyers' conference that year, they nonetheless were on the agenda. Some attention was given to "a discussion of discrimination in employment with special emphasis on public utilities."[313] At the time, although the Legal Department was not actively involved in many labor cases, its lawyers were still "committed to putting greater emphasis on fighting to remove employment discrimination of both labor and management."[314]

The rejection five years later of a labor-related strategy—and the near disappearance of labor-related cases from the history and historiography of civil rights doctrine—consequently warrants explanation. Compare Thurgood Marshall's 1943 claim that labor cases were one of the NAACP's two top litigation priorities with his reaction to labor cases in 1950 and 1951. By the time of the NAACP's 41st Annual Convention in 1950, when Marshall organized his second annual legal conference to take stock of Supreme Court victories to that point and to set the legal agenda for the future, things had

312. First Draft Statement Program Legal Department Action for 1945 and Contemplated Legal Action for 1946 (Dec. 20, 1945), *microformed on* Papers of the NAACP, *supra* note 1, at pt. 18, ser. A, reel 4, frame 853, 856.

313. Report to 40th Annual Conference of NAACP Lawyers' Conference of N.A.A.C.P. (June 23–25, 1949), *microformed on* Papers of the NAACP, *supra* note 1, at pt. 1, reel 12, frame 575, 576.

314. *Id.* A labor-related case in which the Legal Department became unwittingly involved in 1949, however, pushed the lawyers even further from labor cases. *Hughes v. Superior Court*, 339 U.S. 460 (1950), originated out of the boycott activities of an independent group of African American activists and the Communist-heavy Richmond, California, branch of the NAACP. In response to low rates of African American employment at a grocery store in an African American neighborhood, the activists picketed, demanding proportional representation. The California courts enjoined the picketing, and the NAACP joined as amicus when the case arrived at the Supreme Court. The national office's brief carefully condemned proportionality as anathema to its policy while arguing for the protection of picketing regardless of its content. The Supreme Court rejected even these First Amendment arguments and upheld the injunction. Brief of the National Association for Advancement of Colored People as Amicus Curiae, Hughes v. Superior Court, 339 U.S. 460 (1950) (No. 61); MORENO, *supra* note 70, at 84–106.

changed. Clarence Mitchell wrote Marshall to submit three labor-related items for consideration at the legal conference.[315] Mitchell hoped to discuss the possibility of bringing court actions to deny federal labor protection to segregated unions; actions against segregated and discriminatory government employment services; and actions to enforce in court nondiscrimination clauses in government contracts. Recognizing that Marshall's "program will undoubtedly be very heavy," Mitchell asked that at least one recommendation be considered.[316]

Marshall's reply was less than encouraging. Marshall informed Mitchell that the "majority of the time must be spent on education."[317] Time for Mitchell's suggestions would depend on what was left over. In light of the Supreme Court's favorable 1948 decision in *Sipuel v. Oklahoma State Board of Regents*[318] and its promising 1950 decisions in *Sweatt v. Painter* and *McLaurin v. State Regents for Higher Education*, the education cases had gained momentum upon which Marshall hoped to capitalize. Given that the Court seemed to accept that intangible harms resulted from segregation even where African Americans were given access to the same facilities as whites, *Plessy* seemed to be on the verge of collapse in the educational context. Perhaps, Marshall mused, the labor secretary's points could "possibly come in on the discussion of the extent to which the recent Supreme Court decisions will be used."[319]

In 1951, Marshall held another legal conference. No labor issues appear in the minutes of the conference.[320] The Annual Conference that year came up with a list of "the types of cases that would have priority": public education, transportation, health, housing and recreational facilities, public gatherings, and all places of public accommodation. Labor and employment did not make the list.[321] The agenda for the 1950 legal conference and the resolution and priorities that eventually emerged in 1951 show how marginal labor and employment issues were to the Legal Department's agenda as it embarked in

315. Letter from Clarence Mitchell to Thurgood Marshall (June 9, 1950), *microformed on* Papers of the NAACP, *supra* note 1, at pt. 15, ser. A, reel 9, frame 107.

316. *Id.*

317. Letter from Thurgood Marshall to Clarence Mitchell (June 13, 1950), *microformed on* Papers of the NAACP, *supra* note 1, at pt. 15, ser. A, reel 9, frame 106.

318. 332 U.S. 631 (1948) (holding that the state was required to provide legal education to African American students).

319. Letter from Thurgood Marshall to Clarence Mitchell, *supra* note 317.

320. Notes of the Lawyers Session of the 42nd Annual Convention of the NAACP (June 26, 1951), *microformed on* Papers of the NAACP, *supra* note 1, at supp. to pt. 1, reel 3, frame 880.

321. *Id.*

earnest on its attack on segregation.[322] By 1950, the possibility that labor-related cases would provide a site for Marshall's attack on *Plessy* had disappeared.[323]

In the broadest strokes, the Legal Department's decision no longer to undertake labor cases was merely the flip side of its decision to initiate them in the first place. With an entrepreneurial mindset always looking for new opportunities with which to forward its goals, the lawyers had seen labor-related cases as offering such opportunities during the war. When the war created a national momentum toward the elimination of "economic discrimination," the association joined the crusade. But the NAACP's Legal Department had never planned for labor-related issues to play a central role in its long-term agenda.[324]

In the aftermath of the war, the postwar economy, the national political landscape, the NAACP's institutional position within that landscape, and the Legal Department's doctrinal goals all changed. Labor-related cases no longer appeared as promising. As the NAACP and the entire non-Communist Democratic coalition entered a period of retrenchment, the Association distilled and narrowed its institutional and doctrinal goals. The result of these two related developments, the clarified organizational future and refined doctrinal focus, was that the Legal Department's practice of civil rights law left little

322. In 1948, Walter White claimed that the NAACP had handled more than 300 education, restrictive covenants, and jury cases. He did not mention employment cases, and they seem to have been a minimal number with minimal involvement by the Inc. Fund. Walter White, Excerpts From Remarks by Walter White on Occasion of the 39th Annual Meeting of the NAACP (Jan. 5, 1948) (transcript *microformed on* Papers of the NAACP, *supra* note 1, at pt. 1, reel 14, frame 819). In 1949, Marshall described the agenda of the first legal conference as coming up with a "definite legal program as to education cases, voting and registration, Jim Crow transportation and civil rights laws," nowhere mentioning employment. Letter from Thurgood Marshall to Loren Miller (May 11, 1949), *microformed on* Papers of the NAACP, *supra* note 1, at pt. 15, ser. A, reel 9, frame 10. This is not to say that the lawyers' energy was not occasionally expended in labor cases. *See, e.g.*, Letter from Marian Wynn Perry to NLRB (Jan. 30, 1948), *microformed on* Papers of the NAACP, *supra* note 1, at pt. 13, ser. A, reel 7, frame 93 (weighing in on the question of certification of discriminatory union). *But cf.* Memorandum from Marian Wynn Perry to Thurgood Marshall (Jan. 28, 1947), *microformed on* Papers of the NAACP, *supra* note 1, at pt. 13, ser. C, reel 2, frame 1031, 1032 (discussing the possibility of "push[ing] the *Betz* case a little further [to] raise the question absolutely of the validity of segregation regardless of whether or not the Negroes are allowed to vote," although nothing materialized out of the possibility).

323. As I discuss more fully below, and as Sophia Lee has shown, the disappearance of labor cases from the Legal Department's agenda does not mean that the NAACP as a whole ignored labor issues in every guise. Clarence Mitchell and Herbert Hill vigorously protested discrimination in employment and unions through direct-action protests, boycotts, lobbying, and assisting local branches and attorneys in bringing administrative charges and NLRB challenges. With a few exceptions, however, Thurgood Marshall and his legal department were not deeply involved in these activities, and labor cases played little role in their developing legal strategy. To the extent that the lawyers became involved in legal action on behalf of oil workers in the spring of 1954, such involvement was more accurately a product of the *Brown* litigation than a part of its creation. *See generally* Lee, *supra* note 24.

324. *See* Goluboff, Work of Civil Rights, *supra* note 11, at 112–61.

room for the particular concerns of African American laborers. The kinds of arguments that the lawyers had made earlier in the decade—which attacked unions, relied on the due process right to work, and had as their goals the employment of unemployed workers in addition to the elimination of segregation—increasingly stood in tension with Association's goals, constraints, and commitments.

A. Political and Institutional Choices

In 1947, the landmark report of President Truman's Committee on Civil Rights focused much of its attention on the progress minorities had made in employment during the war and on the "danger that some of our wartime gains in the elimination of unfair employment practices will be lost unless prompt action is taken to preserve them."[325] The report quoted African American sociologist Charles S. Johnson as declaring that "the biggest single forward surge of Negroes into the main stream of American life in the past ten years has been their movement into the ranks of organized labor."[326] The first topic discussed under the heading "the right to equality of opportunity" was not education, as one might have expected from the vantage point of 1954, but "the right to employment."[327] Moreover, the report discussed labor-related cases in far more detail than any other issue—spending twice as much space on it than on education, housing, or health care.[328]

The Committee's report in some ways represented a last gasp of labor's centrality to pre-*Brown* civil rights law.[329] By the time the report was published, the danger of backsliding that it had predicted had begun to materialize, the wartime economic boom had faded, and the political conditions favorable to significant legal progress toward the economic equality of African Americans had disappeared. In the postwar economic and political context, labor-related race cases no longer commanded attention from the NAACP's Legal Department. The Cold War and domestic anticommunism offered the NAACP some new opportunities to achieve racial progress, but those opportunities were not obviously in the employment context. In fact, as the NAACP became a central part of the liberal, pro-labor but anticommunist

325. PRESIDENT'S COMM. ON CIVIL RIGHTS, *supra* note 21, at 59.
326. *Id.* at 18.
327. *Id.* at 53.
328. *Compare id.* at 53–62 (discussing employment) *with id.* at 62–79 (discussing education, housing, and health care).
329. *But cf.* BIONDI, *supra* note 97 (discussing the postwar drive for African American economic equality in New York City).

Democratic coalition, its close relationship with organized labor militated against further NAACP litigation on behalf of African American workers.

1. Defending Against the Cold War

The end of World War II created new economic and political constraints and opportunities for the NAACP. Economically, the end of World War II meant the end of the wartime boom. World War II had broken a decade-long Depression, and in pursuing labor-related litigation in the early 1940s the NAACP had wanted African Americans to benefit from the economic boom without facing racial discrimination. The method was race based, but the goal was at least partly economic. The workers who complained to the NAACP wanted nondiscriminatory access to jobs and unions, but they also simply wanted jobs. Where the two goals—one economic and one racial—conflicted, the NAACP and the workers who sought its help sometimes agreed and sometimes disagreed on which goal should be paramount. Although the NAACP opposed explicit and intentional efforts by employers to segregate their workforces, it nonetheless was pleased with the rulings it obtained in union discrimination cases during the war. In cases like *James v. Marinship* and *Williams v. International Brotherhood of Boilermakers*, the courts had required unions either to open their doors to African Americans or to open their previously closed shops. The NAACP embraced the cases because they enabled African Americans to obtain jobs, even though such cases reflected a tolerance for continued segregation.

When the war boom faded, however, many Americans, especially African Americans, lost their wartime jobs in the reconversion to domestic production. Desirable jobs no longer seemed in great supply. Returning soldiers complicated hiring and promotion with questions of seniority and service when seniority rules and veteran status played (usually purposefully) to the benefit of white workers.[330] The ability to work for an open-shop employer alongside the white union members of a segregated union meant little when employers had not only ceased hiring but had begun laying off workers in large numbers.[331] These economic developments did not lessen African American workers' needs for legal counsel—in fact, they arguably increased those needs—but they did undermine the perceived choice between economic advancement

330. ANDERSON, *supra* note 73, at 66.

331. NELSON LICHTENSTEIN, LABOR'S WAR AT HOME: THE CIO IN WORLD WAR II, at 221–22 (1991); GEORGE LIPSITZ, RAINBOW AT MIDNIGHT: LABOR AND CULTURE IN THE 1940S, 99–100 (1994).

and principled doctrinal development. Only the latter seemed to offer much promise in light of fears about the immediate postwar economy.[332]

More important, with the end of the war, and the end of the alliance between the United States and the Soviet Union, the rising power of Republicans and conservative Southern Democrats combined with even liberal Democrats' embrace of the Cold War and domestic anticommunism. The 1946 midterm election ushered in divided governance as the Republican Party took control of Congress, and House Un-American Affairs Committee (HUAC) investigations and witch hunts by those like Senator Joseph McCarthy followed.[333] Domestic repression intensified with the Cold War, as President Truman expounded the Truman Doctrine and the Marshall Plan, committed the United States to noncommunist NATO, and involved the nation in the Korean War in the late 1940s and early 1950s.[334] Unwilling to allow Republicans to monopolize political traction from the issue of communism, Truman instituted his own loyalty program for the federal government.

This increasingly conservative political climate, and especially anticommunism, put the NAACP and other civil rights groups on the defensive.[335]

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332. Eventually, the postwar job market stabilized, as machinery was retooled to produce consumer goods. *See* 10 JAMES T. PATTERSON, OXFORD HISTORY OF THE UNITED STATES, GRAND EXPECTATIONS: THE UNITED STATES 1945–1974, at 59, 51 (1996). In the meantime, inflation far outstripped wage increases, and the dislocations associated with the transition to a peacetime economy especially affected African Americans.

333. *See generally* BENJAMIN L. ALPERS, DICTATORS, DEMOCRACY, AND AMERICAN PUBLIC CULTURE: ENVISIONING THE TOTALITARIAN ENEMY, 1920S–1950S (2003); JAMES R. BARRETT, WILLIAM Z. FOSTER AND THE TRAGEDY OF AMERICAN RADICALISM 226–51 (1999); ELEANOR BONTECOU, THE FEDERAL LOYALTY-SECURITY PROGRAM (1953); ALAN D. HARPER, THE POLITICS OF LOYALTY: THE WHITE HOUSE AND THE COMMUNIST ISSUE, 1946–1952 (1969); JOHN EARL HAYNES & HARVEY KLEHR, VENONA: DECODING SOVIET ESPIONAGE IN THE UNITED STATES (1999); IRVING HOWE & LEWIS COSER, THE AMERICAN COMMUNIST PARTY: A CRITICAL HISTORY 437–99 (1957); MARY SPERLING MCAULIFFE, CRISIS ON THE LEFT: COLD WAR POLITICS AND AMERICAN LIBERALS, 1947–1954 (1978); ELLEN SCHRECKER, MANY ARE THE CRIMES: MCCARTHYISM IN AMERICA 393 (1998) (describing how the Detroit branch decreased from 25,000 during World War II to 5162 in 1952).

334. ANDERSON, *supra* note 73, at 113–65; THOMAS BORSTELMANN, THE COLD WAR AND THE COLOR LINE 45–84 (2001).

335. *See* BIONDI, *supra* note 97, at 386–461 (discussing the effects of the Cold War on the struggle for black equality in New York City); GERALD HORNE, BLACK AND RED: W.E.B. DU BOIS & THE AFRO-AMERICAN RESPONSE TO THE COLD WAR: 1944–1963 (1986) [hereinafter HORNE, BLACK AND RED]; GERALD HORNE, BLACK LIBERATION/RED SCARE: BEN DAVIS AND THE COMMUNIST PARTY 172–91 (1994); WILSON RECORD, RACE AND RADICALISM 133–68 (1964); PENNY VON ESCHEN, RACE AGAINST EMPIRE: BLACK AMERICANS AND ANTICOLONIALISM, 1937–1957 (1997). Paul Robeson's position among civil rights organizations illustrates the shift. In 1945, Howard University presented Paul Robeson with an honorary degree and the NAACP celebrated him with its prestigious Spingarn Medal. By 1951, however, Robeson was an outcast, estranged from the NAACP, well on his way toward being labeled a communist pariah and losing his right to travel. KATHERINE A. BALDWIN, BEYOND THE COLOR

Although the 1948 election seemed to promise civil rights progress, the optimism it generated faded rather quickly. Even as early as 1947, African American activists began to mute their demands for fear of seeming too radical.[336] The NAACP in particular pulled back from some relatively aggressive interventions it had made into the international arena,[337] and it hunkered down at home. Walter White and Roy Wilkins spent considerable energy in the late 1940s scanning news reports and challenging the assertions they found about the NAACP, communism, and race advocacy.[338] The NAACP began to insist that locals insulate themselves from Communist takeovers, and, in 1950, the annual convention passed a resolution that put the NAACP on record "as unequivocally condemning attacks by Communists and their fellow-travelers upon the Association and its officials . . . in order to safeguard

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LINE AND THE IRON CURTAIN: READING ENCOUNTERS BETWEEN BLACK AND RED, 1922–1963, at 202–51 (2002) (discussing Paul Robeson's relationship with communism and the Soviet Union); MARTIN BAUML DUBERMAN, PAUL ROBESON 200–300 (1988); ROBIN D.G. KELLEY, FREEDOM DREAMS: THE BLACK RADICAL IMAGINATION 51–59 (2002); *see also* ANDERSON, *supra* note 73, at 113–67; PATRICIA SULLIVAN, DAYS OF HOPE: RACE AND DEMOCRACY IN THE NEW DEAL ERA 221–47 (1996).

336. James L. Roark, *American Black Leaders: The Response to Colonialism and the Cold War, 1943–1953*, 4 AFR. HIST. STUD. 266 (1971); *see also* MICHAEL L. KRENN, BLACK DIPLOMACY: AFRICAN AMERICANS AND THE STATE DEPARTMENT 1945–1969, at 67 (1999).

337. ANDERSON, *supra* note 73, at 113–65; BRENDA GAYLE PLUMMER, RISING WIND: BLACK AMERICANS AND U.S. FOREIGN AFFAIRS, 1935–1960 (1996); *see also* DUBERMAN, *supra* note 335, at 316–445; HORNE, BLACK AND RED, *supra* note 335, at 97–124, 183–91; VON ESCHEN, *supra* note 335.

338. *See, e.g.*, Letter from Roy Wilkins to Milton Murray (Apr. 2, 1947), *microformed on* Papers of the NAACP, *supra* note 1, at pt. 18, ser. B, reel 6, frame 814; Press Release, NAACP, Walter White Condemns Governor's Statement (Apr. 4, 1947), *microformed on* Papers of the NAACP, *supra* note 1, at pt. 18, ser. B, reel 6, frame 853; Press Release, NAACP, Congress Committee Warned About Loose "Red" Label (Oct. 16, 1947), *microformed on* Papers of the NAACP, *supra* note 1, at pt. 18, ser. B, reel 7, frame 70; Press Release, NAACP, Walter White, A Real Program to Combat Communism (Jan. 2, 1947), *microformed on* Papers of the NAACP, *supra* note 1, at pt. 18, ser. B, reel 6, frame 772. Roy Wilkins wrote:

> Like many another organization on the liberal front we are being sniped at in the current hysteria over the Communists. . . . Perhaps we are more jittery than we ought to be, but it is natural that we would become alarmed lest the many projects we have underway should be endangered by the old cry of "Communism."

Letter from Roy Wilkins to Milton Murray, Pres., American Newspaper Guild (Apr. 30, 1947), *microformed on* Papers of the NAACP, *supra* note 1, at pt. 18, ser. B, reel 6, frame 894; *see also* RECORD, *supra* note 335, at 162–63; TUSHNET, MAKING CIVIL RIGHTS LAW, *supra* note 12, at 295. The ACLU adopted a resolution barring communists and other supporters of totalitarian doctrines from office in the Union as early as 1940. *See* Allen Rostron, *Inside the ACLU: Activism and Anti-Communism in the Late 1960s*, 33 NEW ENG. L. REV. 425 (1999); *see also* WILLIAM A. DONOHUE, THE POLITICS OF THE AMERICAN CIVIL LIBERTIES UNION 139–54 (1985) (offering an unsympathetic portrayal of the resolution); SAMUEL WALKER, IN DEFENSE OF AMERICAN LIBERTIES: A HISTORY OF THE ACLU 130–34 (1990) (offering a relatively sympathetic portrayal of the resolution).

the good-name of the Association."[339] The resolution "direct[ed] and instruct[ed] the Board of Directors to take the necessary action to eradicate [Communist] infiltration, and if necessary to suspend and reorganize, or lift the charter and expel any branch, which, in the judgment of the Board of Directors . . . comes under Communist or other political control and domination."[340] These responses to potential communist "infiltration" stemmed not only from the political dangers of communism in the Cold War, but also from the Association's longstanding ideological antipathy to communism and communist organizations.[341]

The NAACP had from its inception been a largely "liberal" organization committed to eliminating racial discrimination and segregation within the context of the American legal system. Accordingly, when the NAACP responded to anticommunist attacks in the late 1940s, it used its long history of liberal, anticommunist activities to play up the "Americanism" of its goals and tactics. Echoing the "dilemma" that Swedish sociologist Gunnar Myrdal

339. Resolutions Adopted at the 41st Annual Convention of the NAACP (June 23, 1950), *microformed on* Papers of the NAACP, *supra* note 1, at pt. 1, reel 12, frame 939, 940.

340. *Id.* The Association repassed that resolution or a variant of it every year until at least 1962. Compilation of Anti-Communist Resolutions, *microformed on* Papers of the NAACP, *supra* note 1, at pt. 18, ser. B, reel 7, frame 263. The resolution was hardly empty rhetoric designed for official consumption. The Association purged its membership, put pressure on union locals, and generally lived up to its anticommunist decree. Gloster B. Current, Director of Branches, sent a letter to the branches that called their attention to the anticommunist resolution and stated simply: "Under this resolution, members of the Communist Party cannot become members of the NAACP." Letter from Gloster B. Current, Director of Branches, NAACP, to NAACP Branches and Youth Councils (July 18, 1951), *microformed on* Papers of the NAACP, *supra* note 1, at pt. 18, ser. C, reel 7, frame 394; *see also* Draft of Letter on Branch Policy, *microformed on* Papers of the NAACP, *supra* note 1, at pt. 18, ser. B, reel 6, frame 873 (describing "drastic action" taken to prevent and eliminate infiltration).

The NAACP also assiduously stayed away from those organizations with potentially subversive tendencies. The NAACP was particularly suspicious of the Congress of Civil Rights (CRC), created in 1946, suspecting that its opening conference "had been called by the Comrades" as an "amply financed [Communist Party] move." Memorandum from Roy Wilkins to Walter White (May 1, 1946), *microformed on* Papers of the NAACP, *supra* note 1, at pt. 18, ser. C, reel 7, frame 9; *see also* Letter from Roy Wilkins to Ellis Byrd, Executive Secretary, New Orleans Branch (May 25, 1946), *microformed on* Papers of the NAACP, *supra* note 1, at pt. 18, ser. C, reel 7, frame 58, *see also* Telegram from Roy Wilkins to Dr. Carlton B. Goodlet (Apr. 20, 1949) (stating that the CRC was "definitely not on list of approved organizations with which Association cooperates"), *microformed on* Papers of the NAACP, *supra* note 1, at pt. 18, ser. C, reel 7, frame 208. The NAACP's quarrel with the CRC over funds and representation of a criminal defendant was quite reminiscent of the conflict with the ILD over the *Scottsboro* case. *See, e.g.*, Letter from Walter White to George Marshall, Civil Rights Congress (Apr. 2, 1948), *microformed on* Papers of the NAACP, *supra* note 1, at pt. 18, ser. C, reel 7, frame 150. Wilkins even invoked Scottsboro, describing the CRC as containing the "remnants of the ILD" and repudiating any relationship with the group. The Patterson-Wilkins Correspondence (Nov. 23, 1949), *microformed on* Papers of the NAACP, *supra* note 1, at pt. 18, ser. C, reel 7, frame 227. *See generally* GERALD HORNE, COMMUNIST FRONT? THE CIVIL RIGHTS CONGRESS, 1946–1956 (1988).

341. *See supra* text accompanying notes 47–49.

pointed out in his groundbreaking 1944 book, *An American Dilemma*, the NAACP emphasized that it intended not to change American society but rather to encourage Americans to live up to fundamental American promises of equality and freedom.[342] Thus, the NAACP protested to the House Un-American Activities Committee in 1949 that "there has never been any question of the loyalty of the Negro to the United States."[343] The NAACP made every effort to prove that the "American Negro is not a revolutionary. He is an old-line American whose roots go back to the founding of the country. . . . And being the most American of Americans [he] would have none of the Communist doctrine."[344] The NAACP criticized the Civil Rights Congress, the National Negro Congress, "the Communists," and "the Stalinists" as insincere in their civil rights commitments. By contrast, the NAACP sought "the enactment of civil rights legislation to the end that minority groups may be more fully protected in their rights under the American Constitution and the American concept of democracy."[345]

The NAACP's liberal, anticommunist commitment to the legal reform of Jim Crow enabled it to capitalize on some of the new political opportunities created by the Cold War. Pointed international attention to the United States' racial practices, along with competition between the Soviet Union and the United States for the allegiance of people of color the world over, actually assisted some forms of civil rights advocacy. The NAACP and other civil rights groups referenced the international implications of segregated housing and education in their rhetoric and their legal strategies, and government officials seemed to find the arguments at least somewhat persuasive.[346]

Labor-related civil rights was not one of the areas, however, that generated much momentum from the Cold War. As early as 1946, when Congress halted appropriations for the FEPC, momentum for African American rights to work had begun to wane. Although the NAACP's labor secretary Clarence

342. MYRDAL, *supra* note 122.

343. *Id.* at 359.

344. *The Crisis* argued that Communists were never able to garner much support among African Americans because "[i]t was evident to Negroes that a foreign ideology, propounded mainly by people they regarded as declassed, could hold out no hopes of racial salvation." Kremlin Gremlins, *Communism Versus the Negro*, 59 THE CRISIS 59 (1952) (reviewing WILLIAM A. NOLAN, COMMUNISM VERSUS THE NEGRO (1951)). Historical evidence suggests that communists did obtain some black support. *See, e.g.*, ROBIN D.G. KELLEY, RACE REBELS: CULTURE, POLITICS, AND THE BLACK WORKING CLASS (1996); VON ESCHEN, *supra* note 335.

345. The Patterson-Wilkins Correspondence, *supra* note 340, at 228; *see also* Walter White, Closing Session Remarks, *supra* note 288, at 1070–73. *See generally* ANDERSON, *supra* note 73, at 20–25.

346. ANDERSON, *supra* note 73; BORSTELMANN, *supra* note 334; MARY DUDZIAK, COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY (2000).

Mitchell (and later Herbert Hill) continued to fight for a permanent FEPC, the struggle was increasingly against the political tide. This battle for a permanent federal FEPC was hard-fought but never won.[347]

In part, this failure was due to the fact that pro-labor activity of all kinds was floundering in the Cold War era.[348] Both the CIO and the AFL attempted to capitalize on northern wartime organizing successes and bolster northern unions against cheaper southern labor by initiating organizing drives in the South in the 1940s. The task was difficult. Southern hostility to unions and deep racial antagonisms often stymied organizing. Even though both unions attempted to distance themselves from communism and purge communists, the organizing drives foundered on race-baiting and red-baiting.[349]

The change in labor's fortunes was even more pronounced on the national political scene. In the late 1940s, organized labor found itself ever more on the defensive against the same conservative, anticommunist block of Republicans and southern Democrats who targeted the NAACP.[350] Writing in 1948, court-watcher Herman Pritchett described how the pendulum of political and legal opinion had already begun swinging back to the right in the context of labor relations.[351] The failure of the fight for a permanent FEPC and for a Full Employment Act, the success of conservatives in limiting the reach of the Fair Labor Standards Act in the Portal-to-Portal Act, and the Administrative Procedure Act weakened both unions and the goals of workers.[352] The promise of labor's power in the 1930s and the apparent judicial

347. Anthony S. Chen, From Fair Employment to Equal Opportunity and Beyond: Affirmative Action and the Politics of Civil Rights in the New Deal Order, 1941–1972 (2000), *microformed on* UMI 3082137 (Univ. Microforms Int'l).

348. *See, e.g.*, RONALD L. FILIPPELLI & MARK MCCALLOCH, COLD WAR IN THE WORKING CLASS: THE RISE AND DECLINE OF THE UNITED ELECTRICAL WORKERS (1995); DAVID M. OSHINSKY, SENATOR JOSEPH MCCARTHY AND THE AMERICAN LABOR MOVEMENT (1976).

349. MICHAEL K. HONEY, SOUTHERN LABOR AND BLACK CIVIL RIGHTS: ORGANIZING MEMPHIS WORKERS 245–78 (1993); LICHTENSTEIN, *supra* note 113, at 113; ZIEGER, *supra* note 50.

350. Ira Katznelson et al., *Limiting Liberalism, The Southern Veto in Congress, 1933–1950*, 108 POL. SCI. Q. 283 (1993); Sean Farhang & Ira Katznelson, The Southern Imposition: Congress and Labor in the New Deal and Fair Deal (2002) (unpublished paper presented at the Annual Political Science Association Meeting) (on file with author). The attack on labor actually began during the war, although it grew increasingly virulent over the rest of the decade. In the early 1940s, Alfred Baker Lewis was already counseling Prentice Thomas to stay away from an amendment to the NLRA "which would deny the advantages of the law to unions which discriminate" that Lewis himself had supported in 1937. Letter from Alfred Lewis to Prentice Thomas, *microformed on* Papers of the NAACP, *supra* note 1, at pt. 13, ser. A, reel 6, frame 565, 566. "I am inclined to think that now, with the anti-labor climate of opinion, it is unwise to make any suggestions for an amendment to the [NLRA]." *Id.*

351. C. HERMAN PRITCHETT, THE ROOSEVELT COURT: A STUDY IN JUDICIAL POLITICS AND VALUES, 1937–1947, at 232–38 (1948).

352. *See* CHRISTOPHER L. TOMLINS, THE STATE AND THE UNIONS: LABOR RELATIONS, LAW, AND THE ORGANIZED LABOR MOVEMENT IN AMERICA, 1880–1960, at 247–328 (1985).

sanction of federal protection for labor rights—with successes in the Norris-LaGuardia Act, the NLRA, and the FLSA—began to seem a fleeting victory rather than a lasting regime change.

The Taft-Hartley Amendments to the NLRA especially restricted the power of organized labor overall. The amendments placed new limitations on union activity and legitimized state "right to work" laws prohibiting closed shops and protecting the rights of nonunion employees to work.[353] In particular, its requirement that union officers sign a "loyalty" or "noncommunist" affidavit in order for their unions to participate in the Act's regulatory system debilitated unions.[354] The loyalty oath meant that the very left-leaning union members who were most likely to advocate racial equality were purged from many unions.[355] The turn of unions in the 1950s away from broad social issues and toward a "bread and butter unionism," concerned more with wages and benefits than social transformation, can be explained at least partly by the loyalty-oath-induced removal of the most socially active members from unions in the late 1940s and early 1950s. In addition, the bureaucratization of labor conflict in the postwar era had profound effects on the relationship between many union leaders and the rank and file as well as on the relationship of the unions to social issues like racial nondiscrimination.[356]

The result of postwar politics was to place both civil rights groups and labor organizations on the defensive. In World War II, the rising political and economic power of African Americans had converged with the rising power of organized labor to make racial nondiscrimination in labor the most critical civil rights issue on the national stage. Although civil rights groups and unions continued to lobby for protective legislation for workers generally and for African

353. 29 U.S.C. § 164(b) (2000). By 1958, nineteen states had passed such laws. J.R. DEMPSEY, THE OPERATION OF THE RIGHT-TO-WORK LAWS 24–27 (1961); GILBERT J. GALL, THE POLITICS OF THE RIGHT TO WORK 230–31 (1988); Schiller, *supra* note 106, at 42–43.

354. Labor Management Relations Act, ch.120, § 9(h), 61 Stat. 136, 146 (1947), *repealed by* Labor-Management Reporting and Disclosure Act of 1959, § 201(d), 73 Stat. 519, 525 (1959); *see also* IRVING RICHTER, LABOR'S STRUGGLES, 1945–1950: A PARTICIPANT'S VIEW 47 (1994); TOMLINS, *supra* note 352, at 282–316; *see, e.g.*, NELSON LICHTENSTEIN, THE MOST DANGEROUS MAN IN DETROIT: WALTER REUTHER AND THE FATE OF AMERICAN LABOR 310–315 (1995).

355. HONEY, *supra* note 349, at 122, 182, 210, 212, 216–17, 227–29, 236 (describing how the CIO excluded left-leaning and progressive southerners from "Operation Dixie," its postwar southern organizing drive); SULLIVAN, *supra* note 335, at 206–10. On the racial egalitarianism of left-leaning unions, see, for example, RICK HALPERN, DOWN ON THE KILLING FLOOR: BLACK AND WHITE WORKERS IN CHICAGO'S PACKINGHOUSES 1904–54 (1997); HONEY, *supra* note 349; ROGER HOROWITZ, "NEGRO AND WHITE, UNITE AND FIGHT!": A SOCIAL HISTORY OF INDUSTRIAL UNIONISM IN MEATPACKING, 1930–1990 (1997).

356. This was not the case for all unions. *See* BIONDI, *supra* note 97, at 267, 277, 286 (describing unions with robust social action goals in the postwar era); THE CIO'S LEFT-LED UNIONS (Steven Rosswurm ed., 1992).

American workers more specifically after the war, their efforts struggled against the political mainstream. NAACP lawyers who had followed the political tide toward pursuing labor-related cases at its high point would find little politically appealing about such cases in the postwar political world.

2. Clarifying the Institutional Mission

The Cold War context did more than just sap the political and economic momentum that had spurred the NAACP lawyers to take on labor cases during the war. It also made such cases affirmatively unappealing to the NAACP lawyers for institutional reasons. In particular, the NAACP's increasingly close relationship with organized labor changed its relationship to labor litigation. Although the NAACP's affiliation with unions had taken a positive turn in the early 1940s, the alliance grew tighter later in the decade. Civil rights groups like the NAACP and labor unions, both on the defensive against red-baiting, Republicans, and southern Democrats, turned to each other for support. In 1947, Walter White wrote William Green of the AFL about the "vital and mutual interest" of the NAACP and the AFL in "anti-lynching bills [and] fair employment practice legislation" as well as their "unwholesome twin"—"the drive to shackle the labor movement with the Taft-Hartley Act."[357] The NAACP's legislative agenda included items dear to both the NAACP and organized labor, each embraced the goals of the other, and they shared a "common fight for justice."[358] As witness to these new relationships, the NAACP made the International Longshoremen's Association a life member, A. Philip Randolph of the Brotherhood of Sleeping Car Porters a vice president, and liberal anticommunists Philip Murray of the United Steel Workers and Walter Reuther of the United Auto Workers members of the NAACP's board.[359]

This increasingly intimate political alliance with organized labor proved complicated for the NAACP's labor-related litigation in the late 1940s. The defensive posture of organized labor made the NAACP hesitate to appear hostile

357. Letter from Walter White to William Green, President, American Federation of Labor (Oct. 6, 1947), *microformed on* Papers of the NAACP, *supra* note 1, at pt. 13, ser. C, reel 2, frame 350.

358. *Id.*; *see, e.g.*, HAMILTON & HAMILTON, *supra* note 71; Meier & Bracey, Jr., *supra* note 45, at 23 (discussing joint advocacy for minimum wages, public housing, antilynching legislation, and a permanent FEPC).

359. Letter from Roy Wilkins to Cy W. Record, *supra* note 142, at 903 ("We are working in close cooperation with the CIO and AF of L on the national level on the civil rights program and also in a number of localities on the local level"); *see also* Memorandum from Herbert Hill to Roy Wilkins (Mar. 3, 1949), *microformed on* Papers of the NAACP, *supra* note 1, at pt. 13, ser. A, reel 20, frame 346.

to labor, lest the NAACP unwittingly aid organized labor's—and hence its own—political enemies.[360] As a result, the NAACP lawyers became skittish about siding with one union against another when the unions competed to organize the same group of workers. In 1943, the NAACP had written an amicus brief on behalf of a CIO union in a representation fight with the AFL's boilermakers. The NAACP argued that if two bargaining units were proposed, one of which would be represented by a nondiscriminatory union, the other by a discriminatory union, the NLRB should certify the nondiscriminatory unit.[361] By 1948, however, Marian Wynn Perry was leery of raising "the constitutional issue of the right of [the NLRB] to certify as the sole collective bargaining agent any union which either refused to admit Negroes to membership or placed them in segregated locals with limited voting power."[362] Perry hesitated to "be in the position of taking sides in a battle between the AF of L, CIO, or an independent union."[363] Organized labor as a whole was a critical part of the Democratic coalition to which the NAACP gave allegiance, and that coalition would lose strength if the NAACP took sides in union disputes.

Union discrimination cases that once had appeared promising looked institutionally problematic to the NAACP lawyers after the war in another, even more fundamental way. The most promising labor-related precedents on which the NAACP lawyers could build coming out of the war were those attacking unions for racial exclusion, discrimination, and segregation. The NAACP's alliance with organized labor, and organized labor's vulnerability, made such attacks politically problematic in the postwar era.

Recall the lawyers' jubilation at the 1945 decisions of the California Supreme Court in *James* and *Williams*. These cases, like the NLRB's *Larus* case, had given unions the choice of opening their closed shops to nonunion workers or opening their closed unions to African American workers. By 1949, however, *Larus* had become a case, according to Clarence Mitchell, "with which we are in vigorous disagreement."[364] The benefit *Larus* offered African

360. For example, Alfred Baker Lewis told Prentice Thomas that he opposed a nondiscrimination amendment to the NLRA. "[A]dvocating [such] an amendment . . . would not be wise, as one of our main purposes is to establish the N.A.A.C.P. in the minds of the members of organized labor as an organization which is in general friendly to their main purposes." Letter from Alfred Lewis to Prentice Thomas, *supra* note 350, at 566.

361. Brief of NAACP as Amicus Curiae at 8, *In re* Bethlehem-Alameda Shipyard, Inc., 53 N.L.R.B. 999 (1943) (No. R-5693, No. R-5694), *microformed on* Papers of the NAACP, *supra* note 1, at pt. 13, ser. C, reel 1, frame 850, 859.

362. Memorandum from Marian Wynn Perry to Thurgood Marshall, *supra* note 295, at 476.

363. *Id.*

364. Statement of Clarence Mitchell, Labor Secretary, NAACP, submitted to the Senate Committee on Labor and Public Welfare on the Repeal of the Taft-Hartley Law (Feb. 10, 1949), *microformed on* Papers of the NAACP, *supra* note 1, at pt. 13, ser. A, reel 6, frame 754, 755.

Americans, an open shop if not an open union, was no longer one the NAACP could accept. The NAACP's political and institutional situation had changed considerably since the beginning of the war: The open-shop movement was devastating labor, with whom the NAACP was in a much closer alliance. Indeed, the NAACP went to great pains to ensure that no one mistook its arguments about union discrimination for attacks on unionism per se. Whereas in the past, discrimination in unions had led the NAACP to distrust them as a whole, by the 1940s it had reason to differentiate between the possibilities of unionism and the problems of discriminatory unions. Thus, Charles Hamilton Houston protested that although a speech he gave at an NAACP annual convention "may sound anti-labor or anti-union," the NAACP was "not fighting the Brotherhoods as such. What we are fighting is the discrimination and Jim-Crow in the Brotherhoods."[365]

The NAACP's two most labor-oriented staff members, labor secretary Clarence Mitchell and lawyer Marian Wynn Perry, strategized about how best to get the word out that the NAACP was not antiunion, and especially not against closed shops. "We have a responsibility," Perry wrote Mitchell, "to keep the Negro community from getting confused on this issue."[366] After years of facing closed union shops and closed white unions, Perry and Mitchell assumed that there was "strong feeling in the Negro community that the closed shop is harmful to Negroes, and we know there is enough evidence of misuse of this to warrant such a fear on the part of the Negro people."[367] Indeed, the NAACP's own arguments in its briefs to the California courts in the boilermakers cases suggested just such a strategic, if not principled, hostility to the closed shop. Emphasizing that the right to work both preceded and survived the NLRA, the NAACP had suggested that union power under the NLRA might still be subject to the constitutional limitations of an earlier era.

The NAACP consequently felt that it had to convince its own members, other African Americans, and the larger public that it supported closed shops. It aimed to target discriminatory and exclusionary unions where necessary rather than condemn unionism itself or eschew its potential benefits for African Americans. "[I]t is a delusive misstatement of fact," Clarence Mitchell stated in congressional hearings, "to say that the elimination of the closed shop will cut down discrimination against any minority."[368] Mitchell

365. Houston, *supra* note 302, at 698.

366. Letter from Marian Wynn Perry to Clarence Mitchell (Jan. 27, 1947), *microformed on* Papers of the NAACP, *supra* note 1, at pt. 13, ser. A, reel 6, frame 639.

367. *Id.*

368. Statement of Clarence Mitchell, *supra* note 364, at 756. He emphasized that "strong democratic trade unions are indispensable to freedom in our society." *Id.*

made clear his belief in the protective power of unions and in the possibility of addressing their shortcomings through other means: "[T]he remedy for this type of discrimination is contained in the enactment of fair employment practice legislation rather than by taking from workers—colored and white alike—the protection of various forms of union security which have operated for their benefit."[369]

With suits against labor unions politically problematic for the NAACP, its lawyers might have turned to other kinds of litigation on behalf of workers. From a doctrinal perspective, the union cases offered a greater likelihood for finding state action, but other possibilities for labor-related litigation persisted. New York and an increasing number of states with fair employment practice laws offered up the possibility of private employer liability. President Truman's 1948 executive order prohibiting discrimination in federal employment gave impetus to claims against federal agencies and officials. Challenges to state-sanctioned practices of discrimination were still available as well.

By the late 1940s, however, the NAACP's lawyers essentially returned to their Depression-era position that "labor" issues, separate from "race" issues, were not appropriate for legal action. In answering the question "where and how shall we attack" segregation, Marshall stated in 1946: "By fighting for legislation we can secure equal job opportunities for Negroes and we will have broken down segregation a little bit."[370] In contrast, Marshall thought, legal battles could achieve equal education and destroy restrictive covenants.[371] Although the fight for legislation was clearly legal in some sense—trying to establish laws to prevent discrimination—both the goals (statutory remedies) and the form of NAACP activity (lobbying) set labor issues apart from the constitutional goals of Marshall's litigation agenda. When Marian Wynn Perry, the lawyer hired to pursue labor litigation during the war, resigned from the NAACP for personal reasons in 1949, Marshall did not replace her. By 1950, labor issues had become essentially the purview of Clarence Mitchell, the NAACP's labor secretary in Washington, to the general

369. *Id.*; *see e.g.*, Press Release, NAACP, JimCro [sic] Policies Aimed at and in Action Against Boilermakers, *supra* note 218, at 19 ("The Negro workers ask for equal union membership in order to protect the closed shop, and they offer willingly, to pay dues and to support the union, but with membership on terms and conditions equal with white members."); Joseph James, Report on Auxiliary Situation (Mar. 24, 1944), *microformed on* Papers of the NAACP, *supra* note 1, at pt. 13, ser. C, reel 1, frame 118, 120 (stating that the black workers unsuccessfully tried to register at the union hall in order to "register the fact that we are not an antiunion group").

370. Thurgood Marshall, Address at the 1946 NAACP Conference (June 28, 1946) (transcript *microformed on* Papers of the NAACP, *supra* note 1, at pt. 1, reel 11, frame 768, 775).

371. *Id.*

exclusion of involvement by the legal office in New York City. Although both Mitchell and his successor, Herbert Hill, tried to involve the NAACP lawyers in labor-related cases into the 1950s, they rarely succeeded. The deeper organizational split between the Legal Department's Inc. Fund and the rest of the NAACP in 1956 solidified the division between labor and the legal team's litigation.

For Marshall and the lawyers who remained after 1949, then, the new alliance with labor proved liberating as well as limiting. Where once the legal team had been expected to take on labor-related cases as a spur to increase membership among African American workers, now the Association's legislative activities would suffice. So long as both African American workers and the NAACP had remained hesitant to embrace unionism, the association had found other means, like litigation, to convince working-class African Americans of the benefits of membership. The NAACP's legislative agenda, and in particular its political alliance with organized labor, freed the Legal Department to pursue litigation toward achieving the goals with which its lawyers were historically and most fundamentally concerned—desegregating transportation and graduate education (and eventually all education) and eliminating racially restrictive covenants.

In fact, the NAACP's new institutional relationship with unions tended to replace, rather than augment, the prior relationship with individual African American workers. The NAACP targeted unions aggressively for financial as well as political support, thereby reducing what reliance the Association had earlier placed on the membership of individual African American workers. In 1948, the NAACP made the decision to double its membership dues from one dollar to two dollars. At least for the 40 percent of African Americans earning under $200 per year,[372] the increase was substantial. Although the Association predicted that the increase would reduce membership by one third,[373] the result was a loss of almost half its membership.[374] The most dramatic decreases occurred in branches in cities that had attracted many working-class African Americans to war industries.[375] In Detroit, for example, the NAACP branch decreased from 25,000 during World War II

372. ANDERSON, *supra* note 73, at 80.

373. 1950 Annual Report, *microformed on* Papers of the NAACP, *supra* note 1, at pt. 1, reel 14, frame 943, 947.

374. Membership declined from 420,000 at its postwar peak to 248,000. BEN GREEN, BEFORE HIS TIME: THE UNTOLD STORY OF HARRY T. MOORE, AMERICA'S FIRST CIVIL RIGHTS MARTYR 111 (1999); TUSHNET, LEGAL STRATEGY, *supra* note 12; TUSHNET, MAKING CIVIL RIGHTS LAW, *supra* note 12; VOSE, *supra* note 26; Meier, *supra* note 142, at 438.

375. 1950 Annual Report, *supra* note 373, at 947.

to 5162 in 1952.[376] These predictable results demonstrated a lack of commitment to those at the economic bottom of the NAACP's membership. The Association seemed to prefer a smaller group of wealthier members to a larger group with perhaps a wider range of economic ability. What happened on a financial level happened on a programmatic level as well. The litigation approach of defending individuals or groups in labor-related cases gave way to an institutional alliance in the political realm.

The portrayal of the NAACP as an historically middle-class organization is commonplace, but recognition of the connection between that orientation and the substantive civil rights doctrine that the Association created is rare.[377] Charles Hamilton Houston, from his perch just outside the NAACP in the late 1940s, recognized the class divisions between his own representation of workers and some of the NAACP's membership. In a speech at the 1949 annual convention about his cases representing railroad firemen and brakemen, Houston acknowledged: "Some of you friends who may be white collar or professional workers may have looked down on the Negro firemen and brakemen, and may not have realized what a strategic role they play in the struggle to democratize the industrial structure of the United States."[378]

The political developments of the late 1940s, domestic and international, thus placed the NAACP in a precarious position. The Cold War and domestic anticommunism, the rise of conservative political power, and the entrenchment of labor unions into more bureaucratic and less socially active forms all narrowed the scope of possibility. The new opportunities of the postwar era, unlike those during World War II, pushed the NAACP away from labor-related cases. Instead, the political department once again received full responsibility for labor issues and the legal team returned to its Margold Report agenda of pursuing equality and desegregation in education, housing, and transportation.

376. SCHRECKER, *supra* note 333, at 393.

377. For rare examples of discussions of the relationship between the class status of lawyers and the cases they pursue, see Tomiko Brown-Nagin, *Race as Identity Caricature: A Local Legal History Lesson in the Salience of Intraracial Conflict*, 151 U. PA. L. REV. 1913 (2003); Lani Guinier, *From Racial Liberalism to Racial Literacy:* Brown v. Board of Education *and the Interest-Divergence Dilemma*, 91 J. AM. HIST. 92 (2004); Wendell E. Pritchett, *Where Shall We Live? Class and the Limitations of Fear Housing Law*, 35 URB. LAW. 399 (2003); Kenneth Mack, From Race Uplift to Civil Rights: The Languages of Progressivism in Black Lawyering, 1920–1940 (2002) (unpublished paper presented at the "Law & the Disappearance of Class in the Twentieth-Century United States" Conference, University of Pennsylvania Law School, Nov. 15–17, 2002).

378. Houston, *supra* note 302, at 695.

B. Doctrinal Choices

In 1946, Marshall wrote to the publisher of the Baltimore *Afro-American* about his plans for attacking segregated education. "We are now working on the problem of having a complete study made of the evil of segregation," he explained, "to demonstrate that there is no such thing as 'separate but equal' in any governmental agency."[379] Although the NAACP as a whole would not commit itself unconditionally to ending segregation in education until the beginning of the 1950s, the Legal Department's lawyers began clarifying their doctrinal goals in the years following the war.

The lawyers set their sights clearly and resolutely on the fifty-year-old precedent of *Plessy v. Ferguson*.[380] When it was decided, *Plessy* received little public attention and much less opprobrium from African Americans than the *Civil Rights Cases* of 1883.[381] Yet *Plessy* had come to epitomize for the NAACP the essence of Jim Crow. The Equal Protection Clause, long thought "the usual last resort of constitutional arguments,"[382] was the terrain on which African Americans had lost much of the federal protection that the Civil War and Reconstruction had promised, and it was the terrain on which they would try to win it back. Despite the progress that the NAACP had made in the 1930s and 1940s in various areas, *Plessy* itself remained virtually invulnerable until the late 1940s.

The increasingly single-minded pursuit of *Plessy* represented a departure from the war era. In the early 1940s, labor cases brought success because the NAACP lawyers sought creative ways of negotiating between the sometimes conflicting goals of desegregation and economic advancement, of constructing doctrinal arguments for constitutional violations, and of finding liable defendants. Marshall's statement of purpose in 1946 intimated an end to this era of experimentation. As Marshall and his lawyers began to clarify their doctrinal agenda in the late 1940s, their goal became overturning segregation in government agencies. "The 'separate but equal' doctrine of *Plessy v. Ferguson*," the lawyers concluded in 1949, "must be exposed and overruled."[383] The critical doctrinal advance would be reinterpreting the Equal Protection Clause, not obtaining favorable precedents of whatever constitutional ilk. The critical aspect

379. TUSHNET, LEGAL STRATEGY, *supra* note 12, at 114.

380. 163 U.S. 537 (1896).

381. 109 U.S. 3 (1883); *see also* Richard Primus, The Civil War in Constitutional Interpretation: Race, Regime Change, and the Civil Rights Cases (unpublished manuscript, on file with author).

382. Buck v. Bell, 274 U.S. 200, 208 (1927).

383. Report to the 40th Annual Conference of NAACP Lawyers' Conference of N.A.A.C.P., *supra* note 313, at 575.

of the Equal Protection Clause at issue was *Plessy*'s 1896 sanction of segregation, not the problem of private discrimination that the *Civil Rights Cases* had removed from constitutional scrutiny in 1883. And the goal was complete desegregation, not economic advancement or material equality within the confines of Jim Crow. Once Marshall's sights were set decidedly on *Plessy*, the labor cases that had once held out so much promise fell by the doctrinal wayside.

1. Avoiding Due Process

The NAACP's most successful legal arguments in labor cases in the early part of the decade were rooted in substantive due process and common law precedents. Although the Equal Protection Clause buttressed and provided context for some of the arguments, both liability for private actors and vindication of workers' rights largely relied on the Due Process Clause, state and federal statutory law, and the common law. In the boilermakers cases, the California Supreme Court relied on substantive due process and the common law of common carriers. In the New York SCAD cases, state statutory and administrative remedies provided the basis for liability. In *Steele* and *Tunstall*, it was federal statutory law. By the late 1940s, however, equal protection was the target, and a nondiscrimination framework was the goal.

In particular, substantive due process seemed increasingly relegated to a discredited, discarded framework that could serve no valid purpose in a new doctrinal world. The Supreme Court made clear in the latter half of the decade that arguments based on the due process right to work no longer garnered much support when they conflicted with an antidiscrimination norm. The Court treated as incoherent, at least as applied to labor-related cases, the simultaneous vindication of a Due Process Clause emphasizing the right to work and an Equal Protection Clause emphasizing nondiscrimination. In *Corsi*, the Railway Mail Association argued that it should be allowed to exclude African Americans because New York's Ives-Quinn Law "offends the due process clause of the Fourteenth Amendment as an interference with its right of selection to membership and abridgement of its property rights and liberty of contract."[384] The Court rejected that old version of the Fourteenth Amendment as inconsistent with a newer, antidiscrimination version. Citing *Steele*, the Court commented: "We have here a prohibition of discrimination in membership or union services on account of race, creed or color. A judicial determination that such legislation violated the Fourteenth Amendment," the

384. Ry. Mail Ass'n v. Corsi, 326 U.S. 88, 93 (1945).

Court pronounced, "would be *a distortion of the policy manifested in that amendment, which was adopted to prevent state legislation designed to perpetuate discrimination on the basis of race or color.*"[385]

Justice Frankfurter, writing in concurrence, emphasized the point: "[I]t is urged that the Due Process Clause of the Fourteenth Amendment precludes the State of New York from prohibiting racial and religious discrimination against those seeking employment. Elaborately to argue against this contention is to dignify a claim devoid of constitutional substance."[386] He suggested that using "the Fourteenth Amendment as a sword against such State power would stultify that Amendment.[387] The Court saw a conflict in the labor cases between right to work and right to contract claims under the Due Process Clause and discrimination claims under the Equal Protection Clause. Faced with conflict, the Court explicitly sided with the latter.

In 1949, the Court also rejected substantive due process claims to the right to work in a different kind of case. State "right to work" laws essentially prohibited closed union shops by promoting the rights of workers to work without being forced to join a union. These laws represented a more extreme, explicitly anti-union manifestation of the *Lochner*-based arguments that the NAACP itself had made in its union cases earlier in the decade. Both unions challenging the right to work laws and the nonunion workers defending them invoked substantive due process. The former claimed the right to contract freely for a closed shop, and the latter claimed the right to work without having to join a union.

Unlike the state courts, which received these substantive due process arguments favorably,[388] the Supreme Court rejected *Lochner* reasoning as a basis for upholding state right to work laws. In one such case, the Supreme Court could not be persuaded of the union's arguments for the vitality of the liberty of contract issue—the unions' alleged right to contract with employers for a closed shop.[389] Nor did the Court countenance the anti-union workers' due process right to work without joining a union. In *Lincoln Federal Labor Union v. Northwestern Iron and Metal Co.*,[390] the Court unsurprisingly "refused to return . . . to the due process philosophy that has been deliberately discarded."[391] It chose instead to reduce the question of the validity of right to

385. *Id.* at 93–94 (citing Steele v. Louisville & N.R. Co., 323 U.S. 192 (1941)) (emphasis added).
386. *Id.* at 98 (Frankfurter, J., concurring).
387. *Id.*
388. State v. Whitaker, 45 S.E.2d 860, 874 (N.C. 1947). *See generally* Goluboff, Work of Civil Rights, *supra* note 11, at 41–42.
389. Lincoln Fed. Labor Union v. Northwestern Iron & Metal Co., 335 U.S. 525, 537 (1949).
390. *Id.*
391. *Id.*

work laws entirely to the principle of antidiscrimination. These laws, and the Court's approach to them, placed the right not to join a union on the same moral plane as the right to join one.[392] The Court emphasized that "in identical language these state laws forbid employers to discriminate against union and non-union members. . . . If the states have constitutional power to ban such discrimination by law, they also have power to ban contracts which if performed would bring about the prohibited discrimination."[393] Even for labor cases in which racial discrimination was not at issue, then, the Court began applying a framework taken from a nondiscrimination norm, rather than from the substantive right to work.

That the Supreme Court perceived a conflict between the Equal Protection and the Due Process Clauses did not mean the NAACP could not obtain traction with due process arguments elsewhere. The California Supreme Court's decision in *Williams*, for example, postdated *Corsi*, indicating that the state courts took a different approach to the continuing vitality of the right to work. Nevertheless, the Supreme Court's approach reflected the NAACP lawyers' emphasis on nondiscrimination as opposed to the substantive right to work. The lawyers had not been particularly committed to the economic rights of African American workers as an independent value. Added to the political and institutional obstacles to labor-related cases resulting from the Cold War was the fact that such cases provided imperfect vehicles for equal protection claims. As a result, the lawyers pulled back from representing working-class African Americans.

2. Targeting State Actors

The NAACP lawyers not only retreated from their embrace of African American workers, but they also retreated from their attacks on the private labor market that oppressed such workers. During World War II, the NAACP took on labor cases with a variety of defendants—federal and state governmental entities, labor unions, and private employers. By the late 1940s, the *Civil Rights Cases*' state action requirement seemed even more fundamentally vulnerable than it had at mid-decade. In *Shelley v. Kraemer*[394] in 1948, the Supreme Court vindicated theories predicting that judicial action could constitute state action for Fourteenth Amendment purposes. In that case, which addressed racially restrictive covenants on housing, the Court (with urging

392. LICHTENSTEIN, *supra* note 113, at 119.
393. *Lincoln Fed.*, 335 U.S. at 532–33.
394. 334 U.S. 1 (1948).

from the NAACP lawyers) found state action in the judicial enforcement of an entirely private agreement between private parties.[395] As Pauli Murray pointed out in 1945, if the judicial imprimatur of the state could transform a purely private property transaction into state action, then the field was clearly open for claims against private companies and unions.[396]

The continued existence of the state action requirement, then, did not itself rule out the possibility that the NAACP lawyers might continue to pursue labor cases. In fact, if challenging, overturning, or marginalizing the *Civil Rights Cases* had been part of the lawyers' goals, the labor cases would have provided an excellent opportunity for continuing the progress of *Steele*, *Tunstall*, *Larus*, *James*, *Williams*, and *Betts*. To be sure, finding obvious state actor defendants, such as those in public elementary education, was easier than pursuing some defendants in labor cases. And moreover, the Cold War and the NAACP's alliance with organized labor removed the most vulnerable private actors—unions—from the Legal Department's litigation strategy after World War II. However, numerous other labor market participants remained potentially liable for labor-related discrimination cases. Federal and state governments with pay disparities, discriminatory hiring and promotion practices, as well as segregated and discriminatory facilities, presented no state action difficulties whatsoever. Clarence Mitchell's commitment to challenging the expenditure of federal funds on segregated state employment services and to challenging the state services themselves similarly raised no state action obstacles. Private employers in the ever-increasing number of states with fair employment practice laws also remained vulnerable to legal sanction. Creating federal constitutional liability for private employers, then, might have been attainable through the kinds of sophisticated doctrinal machinations that the NAACP had used with facility during the war.

The clear doctrinal goal of the Legal Department in the late 1940s, however, was challenging *Plessy*, not the *Civil Rights Cases*. The NAACP's participation in *Shelley* was reactive not proactive: Marshall found himself unwillingly challenging racially restrictive covenants in the late 1940s because other lawyers had brought cases that he thought might make bad precedent without his help.[397] Indeed, success in *Shelley* did not make the NAACP

395. *Id.* at 23.

396. Murray, *supra* note 85, at 392.

397. The fact that the NAACP's lawyers had been committed to the elimination of racially restrictive covenants since the Margold Report also militated toward involvement. Although the timing seemed premature to Marshall, he thought it necessary to take part in order to make the best of the situation. The NAACP's involvement was not, then, the result of a considered challenge to the state action requirement. *See* TUSHNET, MAKING CIVIL RIGHTS LAW, *supra* note 12, at 81–98; VOSE, *supra* note 26, at 50–73.

lawyers any more inclined to seek out private liability. The NAACP followed up the case with arguments about extending *Shelley* to other aspects of government discrimination in housing, rather than extending its broad state action analysis to other forms of private liability.

Attacking *Plessy* did not have to mean leaving the *Civil Rights Cases* intact, however. Although challenging segregation would be facilitated by leaving creative readings of state action to one side, thereby isolating the segregation issue, the lawyers might have taken on both segregation and state action. That they chose not to do so in labor cases reflected not only their determination about the relative importance of *Plessy* and the *Civil Rights Cases*, and not only their beliefs about the relative importance of the Equal Protection and the Due Process Clauses. It reflected as well the fact that throughout its history, material inequality in the labor market was not the NAACP's prime concern. "[T]he Negro as a Negro suffers disabilities which the white laborer does not face," the NAACP-dominated committee had explained to the Garland Fund in 1930.[398] Twenty years later, the NAACP lawyers' attack on *Plessy* indicated that they still thought it was necessary first to change "these precedent conditions" before addressing the economic problems of African American workers.[399]

Such economic problems, although certainly part of and created by Jim Crow, were not what the NAACP thought of as the essence of the problem. The very determination that state-mandated segregation—rather than state-supported private segregation and discrimination—was the crux of American racial subordination stemmed from a discounting of the problems of working African Americans and of the fundamentally economic as well as racial hierarchies embedded in Jim Crow.[400] The lawyers' decision to target *Plessy* reflected, once again, the Legal Department's return to the Margold Report and the legal instantiations of racial subordination visible to the NAACP lawyers in their daily lives.

3. Reinterpreting Equal Protection

At the end of the day, the NAACP decided that equal protection was the terrain on which it had to fight; and that state-sanctioned segregation was the

398. Memorandum from the Committee on Negro Work, to the Directors of the American Fund for Public Service, *supra* note 42, at 376.

399. *Id.*

400. *See* Gary Peller & Mark Tushnet, State Action and a New Birth of Freedom, 92 GEO. L.J. 779 (2004) (describing the analytic relationship between state action and the inability to constitutionalize economic rights).

target. Once the NAACP as an organization embraced the anti-*Plessy* goal of demonstrating that segregation was inherently discriminatory, accepting segregation of any kind—even where economic advancement accrued—became anathema. During World War II, the NAACP lawyers had sometimes procured solutions to the economic but not the entire racial harm that African American workers faced. Thus, the African American boilermakers on the West Coast kept their jobs, but desegregation of their unions was a longer time coming. By the end of the decade, economic opportunities could not, according to the lawyers, compensate for the inherent discrimination of segregation. As early as 1947, Marshall spoke of the "need to educate our branch officers and in turn the membership, and finally, the people in the need for complete support in this all-out attack on segregation."[401]

Indeed, in 1951, the NAACP passed a resolution that for the first time made opposition to segregation a tenet of the Association. The Annual Conference resolved that the Association "is opposed to racial segregation" and "requires all branch officers, members and attorneys to refrain from participation in any cases or other activities which in any manner seek to secure 'equality' within the framework of racial segregation."[402] The resolution authorized the Board of Directors to take disciplinary action against anyone within the Association acting inconsistently with the policy.[403] Gloster Current, Director of Branches, sent a missive to the branches criticizing those "individuals [who] have taken issue specifically with the NAACP's stand against segregation and for complete integration. These persons have embraced the separate but equal theory and have, in the past, embarrassed a number of branches by so stating their views specifically and creating division with the community."[404]

That the NAACP did not pass such a resolution until 1951 is telling. Certainly, NAACP staff and members had vetted the question of the Association's position on segregation many times in the past, most famously in the 1934 *Crisis* episode in which W.E.B. Du Bois suggested that he could countenance self-segregation. Du Bois' resignation from the NAACP signaled at least in part that his reluctance to embrace integration as the ultimate and the only goal was out of step with those holding greater institutional power.[405] Nonetheless,

401. TUSHNET, LEGAL STRATEGY, *supra* note 12, at 115.

402. Excerpts from Resolutions Adopted by NAACP, 42nd Annual Convention (June 30, 1951), *microformed on* Papers of the NAACP, *supra* note 1, at pt. 18, ser. C, reel 7, frame 395.

403. *Id.*

404. Letter from Gloster B. Current, Director of Branches, NAACP, to NAACP Branches and Youth Councils, *supra* note 340.

405. *See, e.g.*, DAVID LEVERING LEWIS, W.E.B. DU BOIS: THE FIGHT FOR EQUALITY AND THE AMERICAN CENTURY, 1919–1963, at 335–47 (2000); TUSHNET, LEGAL STRATEGY, *supra* note 12, at 8–10; Elliot M. Rudwick, *W.E.B. Du Bois in the Role of* Crisis *Editor*, 43 J. NEGRO

it was not until over fifteen years later that the Association affirmatively made commitment to desegregation a requirement for NAACP staff and for all of its members. The resolution itself recognized that some members had "embraced the separate but equal theory," finally committed the NAACP definitively to integration, and made clear that past efforts at economic advancement while tolerating segregation were at an end.[406]

In this new context, the *Larus/James/Williams* approach of giving unions the choice of a closed shop or a closed union offered the NAACP very little. The approach no longer looked like a step in the right direction, but a step in the wrong direction. According to Mitchell, it now stood for the proposition "that unions could segregate colored persons into auxiliaries and B-class locals without violating the National Labor Relations Act."[407] Even though *Larus* itself seemed to legitimate only separate unions that were equal in every respect,[408] separate but equal was no longer enough for the NAACP in 1949. The NAACP's changed doctrinal goals, no less than its changed political and institutional constraints, made *Larus* a case "with which we are in vigorous disagreement."[409] Once the lawyers deemed it time to make an all-out attack on segregation, countenancing victories within the framework of Jim Crow became deeply problematic.

What the NAACP had to figure out by the end of the decade was how to show that "racial segregation [was] a violation of the 14th Amendment."[410] *Plessy* and its progeny acknowledged that state-created material inequalities on

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HIST. 214, 237–40 (1958); Mark Tushnet, *The Politics of Equality in Constitutional Law: The Equal Protection Clause, Dr. Du Bois, and Charles Hamilton Houston*, 74 J. AM. HIST. 884, 890–96 (1987).

406. Letter from Gloster B. Current to NAACP Branches and Youth Councils, *supra* note 340.

407. Statement of Clarence Mitchell, *supra* note 364, at 755. Mitchell also cited as problematic *In re Atlanta Oak Flooring Co.*, 62 N.L.R.B. 973 (1945), and *In re Texas & Pacific Motor Transport Co.*, 77 N.L.R.B. 87 (1948).

408. Read carefully, *Larus* did not seem to countenance "B-class locals." Rather, the Board in *Larus* found that an AFL union "fail[ed] to perform its full statutory duty," even though it did not discriminate against African American workers "as to wages, hours and working conditions." *In re* Larus & Brother Co., 62 N.L.R.B. 1075, 1084 (1945). The AFL union included African Americans (sometimes in equal numbers) in negotiations with management and on union committees, and it permitted African Americans "to speak freely and participate as members of committees working with white committees in meetings with the Company." *Id.* at 1080–81. The union's certification warranted retraction because the African American auxiliary was not officially a party to the union's contract with the employer and the requirement that its members pay dues to the white union to which they did not belong left the auxiliary's participation at the "sufferance of both the Company and the white Local." *Id.* at 1081.

409. Statement of Clarence Mitchell, *supra* note 364, at 755.

410. Letter from William R. Ming, Jr. to Thurgood Marshall (May 4, 1949), *microformed on* Papers of the NAACP, *supra* note 1, at pt. 15, ser. A, reel 9, frame 6. Marshall was intent on "get[ting] the theory straight," which would make the rest "comparatively easy." Letter from Thurgood Marshall to Walter R. Ming, Jr. (June 3, 1949), *microformed on* Papers of the NAACP, *supra* note 1, at pt. 15, ser. A, reel 9, frame 40.

the basis of race were constitutionally impermissible under the Equal Protection Clause. The premise of *Plessy* was that a racial distinction, on its own, with no material inequality to accompany it, was only harmful if African Americans allowed it to be. That was the proposition the NAACP had to refute. Marshall needed to demonstrate that racial distinctions were inherently harmful, and in order to do so he needed to find instances of formal separation unaccompanied by material inequalities. The stigma of such formal separation—ultimately supported by sociological and psychological evidence—became the essence of Jim Crow's injury.[411]

Building on their longstanding interest in education, the NAACP lawyers chose to craft such arguments in the context of graduate education, and they saw considerable success. Marshall's most critical victory in the process of proving separate as inherently unequal came in the case of *McLaurin v. Oklahoma State Regents*[412] in 1950. Earlier, the Court had emphasized the intangible "qualities which are incapable of objective measurement but which make for greatness in a law school" in *Sweatt v. Painter*;[413] however, the white University of Texas Law School and the shotgun segregated law school created in response to the litigation hardly could be deemed materially equal. *McLaurin* was a different story. McLaurin, an African American teacher who wanted to attend graduate school in education in Oklahoma, was admitted to the previously all-white graduate school. Although he was required to sit in a separate anteroom or alcove, he attended the same school as the white students. Even this accommodation was insufficient. Keeping McLaurin separate from the other students would affect his education in intangible ways, the Court found, and thus it was not constitutional.[414]

That these victories came in the education context rather than in the labor context make sense in light of the NAACP's historical interest in education dating back to the Margold Report, its middle-class orientation, and the political context of the Cold War. That said, the evolution of the lawyers' doctrinal goals did not in itself require the rejection of labor cases. That the education context seems today the obvious and natural site for the stigma argument

411. Daryl Michael Scott has argued that mid-century lawyers and social scientists misunderstood *Plessy*. The heart of the harm in *Plessy* was an injury to reputation, not to psyche, but the emphasis on the personality in the postwar period made lawyers read psychological harm back into *Plessy* itself. For my purposes, whether the harm was one of reputation or psychology, it was not material, nor did the NAACP lawyers see it as such. DARYL MICHAEL SCOTT, CONTEMPT AND PITY: SOCIAL POLICY AND THE IMAGE OF THE DAMAGED BLACK PSYCHE, 1880–1996, at 120 (1997).

412. 339 U.S. 637 (1950).

413. 339 U.S. 629 (1950).

414. *McLaurin*, 339 U.S. at 641. *See generally* TUSHNET, LEGAL STRATEGY, *supra* note 12, at 105–37.

is at least partly the product of the NAACP's success in *Brown*. Indeed, union discrimination cases like *Larus* offered up suitable doctrinal vehicles to argue what Marshall ultimately argued in *Brown*—"that there is no such thing as 'separate but equal.'"[415] Once the workers in a separate African American local enjoyed all the rights white union workers enjoyed, the question would become whether the mere fact of separation constituted a violation of equal protection. The indignity of separation and the stigma of rejection would remain. Then the intangible harm of separate unions, like the intangible harm of separation within graduate school, could be isolated and attacked. *Larus* and cases like it were no longer attractive as an institutional and political matter, however, because of the NAACP's ties with organized labor. Nor were they attractive because of their complicated state action status and amenability to due process arguments. Consequently, the most obvious labor cases in which to apply the new doctrinal apparatus proved institutionally unsatisfactory.

Other labor cases the NAACP had pursued in the early part of the decade were less amenable to the new doctrinal claims of stigma. The injuries of Jim Crow in the labor market could rarely be confined to such intangibles, as material harms systematically resurfaced. In 1949, for example, Clarence Mitchell announced his opposition "to any makeshift plan which establishes certain job categories or shifts which are given over to colored people."[416] The problem, as he saw it, was not the intangible harm of segregation, but the fact that such segregation was inseparable from material harm: "Always in such arrangements we find that the worst possible spots go to the non-whites."[417] It was certainly the case that in work as in education, "an unconstitutional inequality in intangibles would remain"[418] even once material equality within segregation was achieved. Because of the structure of the workplace and the pervasive economic inequalities of the private labor market, and the NAACP lawyers' political, institutional, and

415. TUSHNET, LEGAL STRATEGY, *supra* note 12, at 114.

416. Speech of Clarence Mitchell (July 14, 1949) (transcript *microformed on* Papers of the NAACP, *supra* note 1, at pt. 1, reel 12, frame 684, 692.

417. *Id.* Similar concerns played into the lawyers' opposition to the proportional hiring that the Richmond, California branch had supported in *Hughes v. Superior Court* in 1949. Although the issue there was proportional hiring rather than segregation, the concern was the same. "There are few things more dangerous than tying Negro employment to Negro patronage," Marian Wynn Perry wrote Clarence Mitchell, "since it appears to condone a quota system of hiring and would be, of course, disastrous to any campaign to secure jobs for Negroes outside of Negro areas and Negro patronized areas." Letter from Marian Wynn Perry to Clarence Mitchell (Feb. 18, 1948), *microformed on* Papers of the NAACP, *supra* note 1, at pt. 13, ser. C. reel 3, frame 514. Although proportional hiring might have accrued short-term material benefits, it was antithetical to the antidiscrimination ideal the lawyers embraced.

418. TUSHNET, LEGAL STRATEGY, *supra* note 12, at 119.

cultural aversion to labor cases, imagining the case (especially outside the union discrimination context) that would allow the NAACP to isolate the intangible harm was no easy task. Ultimately, this was a task the NAACP lawyers did not undertake.

As the NAACP lawyers pursued *Plessy* in earnest, labor-related cases disappeared from their litigation agenda. The NAACP had come a long way from its roots in progressive ideology and its financial base in philanthropic donations. It had embraced labor unions and created a labor secretary. Its lawyers briefly had championed African American workers with some vigor. But the moment that would make the Association's legacy was the moment in which its lawyers returned to its roots in middle-class life and the Margold Report. Making *Plessy* the target, and interpreting *Plessy* as requiring the isolation of intangible harm, both compelled and liberated the NAACP to transform its class interests in integrated graduate schools, railroad dining cars, and middle-class neighborhoods into apparently classless race interests that would endure as modern civil rights.

CONCLUSION

At the beginning of World War II, Robert Ming, a member of the NAACP's legal advisory committee, recognized "[t]he peculiar position of Negro workers beset as they are with problems arising from their relationship not only with employers and government but also from their relationship with white workers and the Negro middle class."[419] Segregated by government, discriminated against by employers, excluded by white workers, and essentially snubbed by middle-class African American lawyers, African American workers were in a tough spot. Their experience of Jim Crow—as public and private oppression, as racial and economic subordination—differed from the experience of those with the resources and energy to challenge it. Because of this peculiar position, providing legal redress for African American workers required an attack on more than state-mandated segregation. It required as well an attack on the private economic orderings that were equally a part of Jim Crow America. Providing legal redress meant not only establishing

419. Memorandum from Walter R. Ming, Jr. to Walter White (June 5, 1941), *microformed on* Papers of the NAACP, *supra* note 1, at pt. 13, ser. A, reel 6, frame 559. "The reality of racial oppression guaranteed that black workers would remain cognizant of race," historian Eric Arnesen wrote. Arnesen, *supra* note 138, at 159. "[B]ut the often harsh conditions of working-class life ensured that black workers' experiences would differ from those of black elites." *Id.*; *see also* ARNESEN, *supra* note 170, at x–xi; Thomas J. Sugrue, *Segmented Work, Race-Conscious Workers*, 41 INT'L REV. SOC. HIST. 389, 395 (1996).

a norm of racial nondiscrimination but also shoring up the right to work, to join a union, to participate in the labor market. Providing legal redress meant not only attempting to establish principles but also to create real material change.

During World War II, the NAACP had taken on these problems. Its lawyers had seen the cases of African American workers as opportunities for both doctrinal development and material advancement. And their efforts had met with some success. After the war, however, the situation changed. By the late 1940s, the NAACP's Legal Department essentially returned to the Association's Depression-era position that "labor" issues, separate from "race" issues, were not appropriate for legal action. When the NAACP's institutional and political needs found affinity in the doctrinal attack on *Plessy*'s stigma rationale—and the idea that stigma was the heart of the injury of state-sponsored racial classification—the NAACP lawyers set to one side "the peculiar position of Negro workers."[420] Once the NAACP had obtained its victories in the education realm, Thurgood Marshall began to think about how "to extend that doctrine to other areas,"[421] including labor. But the nondiscrimination paradigm had already begun to take hold of the legal imagination, and it was a paradigm with little space for the kinds of claims that the NAACP had made on behalf of African American workers a decade earlier.[422] The loss of recognition for African American workers' peculiar position in the resulting civil rights doctrine has had tremendous ramifications.

In no small part, the fact that *Brown* was an education case has shaped the stories legal scholars tell about the successes and failures of civil rights doctrine. Current examinations of the origins of modern civil rights doctrine might look different if the paradigmatic civil rights case had concerned labor rather than education. Although many *Brown* retrospectives survey the entire state of race relations and inequality in America today, many more focus on education specifically. Scholars ask: How desegregated are our schools? Does the quality of education one receives depend on one's race? Economic issues thread through such discussions, but they are usually secondary to educational achievement. Had the paradigm-shifting civil rights case come in the context of labor, perhaps scholars would ask more about the economic progress of

420. *See generally* Paul Frymer, *Acting When Elected Officials Won't: Federal Courts and Civil Rights Enforcement in U.S. Labor Unions, 1935–85*, 97 AM. POL. SCI. REV. 483, 486 (2003) (describing how in light of the NAACP's disinterest, very few cases of labor discrimination were brought in the courts between 1935 and 1964).

421. Thurgood Marshall, Address at the Annual Meeting of the NAACP (Jan. 3, 1956), *microformed on* Papers of the NAACP, *supra* note 1, at supp. to pt. 1, reel 1, frame 508.

422. *See* Lee, *supra* note 24, at 5–6.

African Americans. They might analyze the persistence of job segregation, wage differentials, and intentional and unintentional discrimination. They might reveal and condemn the different earning capacities and job prospects of similarly situated African Americans and whites. They might pay more attention to those African Americans the sociologist William Julius Wilson calls "the truly disadvantaged"—the inner-city minorities now segregated by both race and class from labor markets and economic opportunity—and ask what their plight means for the relationship between economic and racial subordination. The idea of a right to work, probably in a different guise and with new attendant meanings, might have remained relevant to such questions today.

Indeed, the nature of civil rights doctrine itself, and our legal imagination about its possibilities, might look different from the point of view of the African American workers whose cases lost out to other types of litigation. Unearthing the NAACP's choices reveals the peculiarities of a civil rights framework sapped of the power to redress material inequality as well as formal discrimination. As labor issues disappeared from the modern notion of civil rights, the distillation of racial classification as a harm in itself came to be expressed in terms of psychological injury. This Article suggests that the controversies surrounding the use of psychological evidence in *Brown v. Board of Education*—whether the Supreme Court should ever rely on such evidence and whether the *Brown* data in particular was reliable—have missed what is truly dramatic, radical, and potentially quite troubling about the psychological harm emphasized in *Brown*. We take for granted, fifty years later, that the crux of legally cognizable racism in the United States is the psychological, stigmatic, and symbolic injury of state-sanctioned racial classification. But that abstracted notion of harm might well have looked odd from the perspective of the poor and the working-class African Americans who complained to the NAACP about the intertwined racial and economic oppression of living and working in Jim Crow America.

The combined effect of pursuing only desegregation isolated from material inequality, of pursuing desegregation outside of the labor market, and of leaving the problem of private discrimination for another day was to treat Jim Crow solely as a problem of government actions concerning race. But Jim Crow was a system of both racial hierarchy and economic oppression.[423] The NAACP lawyers' partial attack on that system created a legal doctrine that addressed only the former and left the latter, to some extent, intact.

The burden of this failure does not lie solely with the NAACP lawyers. They did not create this civil rights doctrine wholesale. They acted within

423. *See* Peller & Tushnet, *supra* note 400.

economic, political, institutional, and doctrinal constraints that shaped both their choices and their victories. Their success no doubt was the product of both good lawyering and propitious times. But the very fact of the NAACP's successes makes its choices so important. The NAACP lawyers eliminated "the peculiar position of Negro workers" from their agenda, and our civil rights doctrine has a hard time addressing the kind of material inequality they faced. Marshall and his team chose not to challenge the *Civil Rights Cases*, and they remain the only legacy of the post-Reconstruction judicial retreat in good legal standing today.[424] Of course, it is possible that all this would be true even had the NAACP lawyers embraced the legal claims of African American workers in the 1940s. We cannot know what an alternative strategy would have produced.

We can know, however, that during and after World War II, the possibilities for labor-related civil rights cases were robust, and that they looked quite different from the civil rights doctrine eventually established. Reconstructing the NAACP's labor-related cases in the 1940s reveals that the meaning of civil rights was up for grabs in the decade and a half before *Brown*. The choice to target state actors and create new civil rights doctrine by overturning *Plessy* in an education case was not an unreasonable one, but it was not the only one. Challenges to the very idea of state action coexisted with challenges to state-sanctioned segregation; fighting for economic advancement within segregated workplaces coexisted with the principled objection to segregation; and substantive right to work arguments accompanied, and at times overshadowed, equal protection arguments about nondiscrimination. Clearly, the meaning of civil rights was not fixed. The civil rights doctrine we have today, the doctrine born in education cases and grown into an anticlassification rule, was not inevitable. It was chosen.

424. *See* Primus, *supra* note 381.