

Brown and the Remaking of Civil Rights

The basic law dealing with race relations in the United States is fairly well settled.

Jack Greenberg, *Race Relations and American Law*,
1959

IN 1952, THE FOREWORD to Thomas Emerson and David Haber's pioneering treatise described the field of civil rights as deeply "unsettled." Seven years later, Jack Greenberg, a ten-year veteran of the NAACP's legal team, came to the opposite conclusion. Greenberg acknowledged the existence of "sectors of indecision" within the field. He was confident, however, that "in all situations we can identify the relevant, fundamental principles" governing civil rights law. Indeed, Greenberg's very terminology—his equation of "civil rights" with "race relations"—indicated how much had changed. Between 1952 and 1959, civil rights doctrine had evolved from a state of disarray to one of considerable clarity.¹

The pivotal moment in that transformation was the Supreme Court's 1954 decision in *Brown v. Board of Education*. The NAACP's victory in *Brown* fundamentally changed the scope of civil rights lawyering and the constitutional imagination. Like all cases, *Brown* reflected a partial view of the social reality that produced it.² Generally, at each step in the litigation process, parties, lawyers, and judges filter out factual scenarios, sites of legal contestation, doctrinal theories, and experienced harms. By the time a case reaches the Supreme Court, the complexities not only of social life but also of the lawyering process itself have been winnowed into neat legal questions. Those questions represent only a small slice of the social milieu and legal practice that generated and nurtured the original complaint.

This process of doctrinal distillation was particularly powerful in the

years leading up to *Brown*. The multiplicity of the civil rights practices of the 1940s reflected both the unsettled nature of legal doctrine and the complexity of challenging a seventy-five-year-old racial and economic caste system. As lawyers transformed into legal claims attacks on the unwieldy thing called Jim Crow, they chose particular cases, particular legal theories, and particular formulations of injury that they thought legal doctrine could remedy. As a result, the civil rights case that took the definitive step toward undermining Jim Crow would, as *Brown* did, both embody a legal understanding of what Jim Crow was and begin to define the constitutional response to it. In so doing, that case would, as *Brown* also did, elide the forms of civil rights and understandings of Jim Crow that lawyers had chosen to filter out of the litigation process.

The *Brown* litigation thus represented several critical choices the NAACP lawyers had made for a decade, supported from the late 1940s on by lawyers in the Justice Department's Office of the Solicitor General (OSG or SG's office). The lawyers culled from the diversity of 1940s civil rights practice equal protection claims focused on state-imposed segregation in public education. And they extracted from the multilayered system of Jim Crow the psychological wounds such segregation inflicted. In the end, the NAACP's legal department created a litigation strategy devoid of the myriad labor-oriented civil rights complaints of the prior fifteen years and the material harms they had sought to redress.

The iconic image of Jim Crow the Supreme Court's decision in *Brown* projected and the civil rights framework it inaugurated helped shape the contours of civil rights law for decades to come. *Brown's* invalidation of school segregation did not, as Greenberg recognized, create a single, coherent approach to civil rights; nor did it purport to colonize the entire field. The Court's purposefully brief opinion left many questions about the future of civil rights doctrine and enforcement unanswered.³

Even so, *Brown* represented a key moment in the history of American civil rights doctrine and constitutional understandings. *Brown* consolidated a critical shift in control over the Justice Department's civil rights agenda away from the labor-based civil rights practice of the Civil Rights Section (CRS) and toward a more equal-protection-based approach within the OSG. It validated the NAACP's *Plessy*-oriented liti-

gation strategy and reinforced key elements of that strategy for the lawyers' future efforts. And it set on its path the legal and intellectual framework that continues to dominate how lawyers and laypeople alike think about civil rights.

When *Brown* reached the Supreme Court, it represented the culmination of the NAACP's long-term litigation strategy. In particular, it vindicated the lawyers' 1950 decision to attack *Plessy v. Ferguson* directly in the context of public education. Even though material inequalities pervaded segregated education, the lawyers had made it their mission to tackle the principle of segregation itself. In 1950, the legal team convinced the Court that even intangible inequalities in segregated graduate education violated *Plessy v. Ferguson*'s "separate but equal" command. The lawyers then turned their attention to proving that such inequalities were inevitable in grade-school education as well. They succeeded wildly in *Brown*. The Court concluded that "[s]eparate educational facilities are inherently unequal," that attending legally segregated schools deprived African American schoolchildren of educational benefits by making them feel inferior to whites, and that "[a]ny language in *Plessy v. Ferguson* contrary to this finding is rejected." With *Brown*, the lawyers achieved their major doctrinal goal of establishing the constitutional harm of government-enforced segregation in the absence of any accompanying material inequality.⁴

Brown also enshrined as the supreme law of the land and as a new cultural icon a civil rights devoid of the hallmarks of both the CRS's and the NAACP's 1940s labor-related civil rights practices. Neither the legal strategies those practices had employed nor the image of Jim Crow they had reflected survived the filtering process of the school segregation litigation.

Consider the constitutional basis for the decision in *Brown*. As the NAACP lawyers constructed their legal theories on the road to *Brown*, they came to understand *Plessy* as the lynchpin of Jim Crow. Because *Plessy* had legitimated segregation in the face of an equal protection clause challenge, *Brown* had to delegitimize it on the same basis. The equal protection clause "precludes a state from imposing distinctions or classifications based on race and color alone," the NAACP accordingly argued. The "doctrine of 'separate but equal,'" the United States elaborated in an amicus brief, "is an unwarranted departure . . . from

the fundamental principle that all Americans, whatever their race or color, stand equal and alike before the law.”⁵

Without much fanfare, the Court embraced the NAACP’s and the government’s constitutional reasoning. Concluding that “in the field of public education the doctrine of ‘separate but equal’ has no place,” Chief Justice Earl Warren held that the plaintiffs had been “deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment.” The Court went out of its way to clarify that its decision was based on the equal protection clause alone. “This disposition makes unnecessary any discussion whether such segregation also violates the Due Process Clause of the Fourteenth Amendment.”⁶

Indeed, when the Court found itself forced to look beyond the equal protection clause, it did so only reluctantly. *Bolling v. Sharpe* was a companion case to *Brown* from Washington, D.C. Because the district was not a state, the Fourteenth Amendment’s command that “[n]o State shall . . . deny . . . the equal protection of the laws” did not apply there. The Court seemed somewhat flummoxed by the fact that the Fifth Amendment, which did apply to the district, “does not contain an equal protection clause.” Forced to rely on that amendment’s due process clause, the Court concluded that “the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive. . . . [D]iscrimination may be so unjustifiable as to be violative of due process.” Due process thus did not function as an independent source of constitutional analysis. Rather, as the Court had previously done in cases like *Hirabayashi v. United States* and *Korematsu v. United States*, it imported equal protection concerns into the due process clause in order to scrutinize federal racial classifications. Even where due process provided the doctrinal basis for decision, then, equal protection provided the conceptual framework.⁷

This dominance of equal protection was not foreordained. Because civil rights lawyers in the 1940s had not targeted *Plessy* exclusively, they had not viewed the equal protection clause as the only constitutional basis for their arguments. The lawyers in the Civil Rights Section, for example, often avoided the equal protection clause. Instead, they exploited a variety of understandings of the Thirteenth Amendment in their involuntary servitude and peonage cases. For both political and doctrinal reasons, the government lawyers had avoided challenging

Plessy directly. Politically, attacking *Plessy* and the segregation it legitimated would have alienated powerful southern elements of Franklin Roosevelt's Democratic coalition. Doctrinally, the lawyers chose instead to expand upon favorable precedents, like those concerning peonage. Moreover, the labor pedigree of the CRS, the lawyers' political interest in peonage cases, and the lawyers' responsiveness to complaints opened up arguments rooted elsewhere in the Constitution. When farmworkers like Col. Elton D. Wright VI wrote to the federal government that they were "only asking for rights" under the Constitution not to work at a "low wage unfair and inhuman treatment," it was the Thirteenth Amendment rather than the Fourteenth that could answer their prayers for relief.⁸

Even within the NAACP's legal department during the 1940s, the equal protection clause had not reigned alone. To be sure, the lawyers launched equal protection claims on behalf of workers as well as students. But the workers who complained to the NAACP had wanted economic advancement as much as racial nondiscrimination. As the New York City longshoremen had told the NAACP, the issue for them was less the segregation of work on the city's piers than "the chance to make a fair living" at all. More often than not, arguments based on the right to work—rooted in the Fifth and Fourteenth Amendments' due process clauses as well as the common law—accompanied and even dominated equal protection arguments in these cases. The NAACP had revamped the right to work from its *Lochner* roots for service in the New Deal era. It had capitalized on the unique doctrinal resources the right to work offered in labor cases. *Brown's* exclusive attention to the equal protection clause submerged these arguments, as well as the Thirteenth Amendment claims of the CRS.⁹

Just as the *Brown* litigation and opinion filtered out some of the core constitutional arguments of the 1940s, so too they painted only a partial picture of the harms of Jim Crow. Once again, the focus on *Plessy* was partly responsible. More than a half-century before the school segregation litigation, the *Plessy* Court had concluded that if "the enforced separation of the two races stamp[ed] the colored race with a badge of inferiority," it was only because "the colored race [chose] to put that construction upon it." As the lawyers embarked on their attack on *Plessy*, they felt they had to prove the contrary. They had to show that the state's act of segregation, rather than African Americans'

own assumptions, placed upon the latter the “badge of inferiority.” In order to do so, the lawyers had to isolate the harm of state-mandated segregation from the larger milieu of private and public discrimination and inequality that pervaded Jim Crow America. That, in turn, required the NAACP to bracket the question of material inequality that had marked both labor and education cases in the 1940s. Contrary to *Plessy*, state racial classifications alone, they argued, caused African Americans intrinsic harm.¹⁰

Worried that the Court would not accept a mere assertion that such classifications violated the Constitution, the NAACP looked for a way to prove how these state rules stigmatized African Americans. The “badge of inferiority” about which Homer Plessy had complained referred to his reputation. By 1954, a therapeutic ethos had taken such hold of American culture that psychological had replaced reputational harm as the natural form of the stigma argument. In the late 1940s and 1950s, concern with the development of personality and the healthy psyche had become an American preoccupation. In 1946, Congress passed legislation creating the National Institute of Mental Health. Between 1950 and 1960, the number of psychiatrists in the United States almost doubled to 12,000. The White House held conferences with titles like “A Healthy Personality for Every Child.” That culture shapes, and damages, personality became a tenet of modern American psychology. The psychologizing of race in particular led to studies on both the psychological causes of racism and the effects of racism on the human personality.¹¹

Drawing on these trends and especially the growing body of social science data on race and psychology, the NAACP introduced evidence and testimony in the lower courts about how school segregation psychologically damaged African American children. They used so-called doll studies that black social scientists Kenneth and Mamie Clark had conducted in the South. The Clarks showed African American children black and white dolls. When asked which was the nice doll, or the one the child would like to play with, the child would point to the white doll. When asked by a psychologist to identify with a doll, the child would point to a black doll. According to the Clarks, these identifications revealed psychological damage. These studies, the NAACP argued in both the lower courts and the Supreme Court, revealed that even under conditions of material equality, “unconstitutional inequality in-

heres in the retardation of intellectual development and distortion of personality which Negro children suffer as a result of enforced isolation in school.” In a lengthy appendix to its Supreme Court brief, the NAACP also submitted a statement by a long list of social scientists expert in “race relations.” They emphasized the sense of “inferiority and . . . personal humiliation segregation caused in children.”¹²

Taking its cue from the NAACP, the Court set to one side the continuing material inequalities in the segregated school systems under attack. It cited “findings below that the Negro and white schools involved have been equalized, or are being equalized, with respect to . . . ‘tangible’ factors.” The Court then explicitly embraced the NAACP’s stigma argument as to “intangible” factors. To separate black children “from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone,” the Court concluded. “Whatever may have been the extent of psychological knowledge at the time of *Plessy v. Ferguson*, this finding is amply supported by modern authority.” In what would become an infamous footnote, the Court then cited several of the studies that purported to prove school segregation’s psychological harm to children.¹³

Enshrined in constitutional law, then, was *Brown*’s image of a Jim Crow that had as its central harm the psychological injury of inferiority. That harm and the harms highlighted in the 1940s labor cases could not have been more different. Stigmatic harm was not unimportant to the workers who complained to the NAACP, but they more often emphasized the economic harms that segregation entailed: less work, worse work, inadequate salaries, and economic insecurity and lack of advancement. The NAACP’s labor cases had attempted to redress both the stigmatic and the material components of the workers’ claims. In the West Coast boilermakers cases, for example, the NAACP aimed to desegregate the all-white boilermakers’ unions. The lawyers nonetheless celebrated when their litigation efforts produced more and better jobs without achieving union desegregation.

The Civil Rights Section’s Thirteenth Amendment practice focused even more directly on the material, attending as it did to the most economically deprived African Americans. The agricultural and domestic workers who came to the attention of the federal government also

sought dignitary relief. They complained that they did not share in any of the “privileges of a free person.” But for the most part their material needs were more urgent. They worked “long, hard hours” for little or no pay; they lacked adequate food, shelter, and clothing; and they lacked the ability to leave such conditions. The first task of the CRS, then, was to free these workers from their servitude, to open up labor markets and provide government protection. When the NAACP pressed, and the *Brown* Court accepted, stigmatic harm as the essence of Jim Crow, the image of civil rights the Court projected eclipsed the deep and abiding material inequalities that characterized the nation’s caste system for most African Americans.¹⁴

The NAACP further marginalized material injury in *Brown* by emphasizing the specific harms of government-imposed segregation. The NAACP’s decision to attack *Plessy* without also trying to undermine the state action requirement of the 1883 *Civil Rights Cases* privileged the place of governmental action in the maintenance of Jim Crow. The problem as *Plessy* had defined it in 1896 was whether “[l]aws permitting, and even requiring” segregation violated the Fourteenth Amendment. *Plessy* did not involve the constitutionality of privately created discrimination, segregation, and inequality. By challenging only *Plessy*, and therefore only state action, the NAACP parsed the public from the private aspects of Jim Crow. Public education provided an ideal locus for attacking *Plessy* alone, as it ensured that the state action requirement would not constitute a barrier to success. Once the NAACP demonstrated that the challenged public school segregation was in each instance enforced by law—an uncontroversial fact on its face—it met its burden of proving state action.¹⁵

And yet the NAACP, the United States, and the Court all treated state action not only as a technical jurisdictional requirement in the school segregation litigation but also as a substantive component of the harm of Jim Crow. Throughout the course of the litigation, the NAACP linked psychological stigma directly to governmental action. Neither the NAACP nor its experts denied the force of privately sanctioned segregation, but they emphasized that the legitimacy of the law enhanced Jim Crow’s harm. Because segregation was often based on the myth of black inferiority, the NAACP argued, when “the state enforces segregation, the community at large is supported in or converted to the belief that this myth has substance in fact.” The NAACP’s

experts acknowledged the difficulty of assigning causation to state-enforced segregation itself. Legal segregation was, after all, “only one feature of a complex social setting.” They nonetheless claimed that “enforced segregation gives official recognition and sanction to [the] other factors of the social complex, and thereby enhances the effects of the latter in creating the awareness of social status differences and feelings of inferiority.” The experts stressed that they were “not here concerned with such segregation as arises from the free movements of individuals which are neither enforced nor supported by official bodies.” The United States echoed the sentiment in its own brief to the Supreme Court. It stated, “The constitutional right invoked in these cases is the basic right, secured to all Americans, to equal treatment before the law.” The government emphasized that “[t]he cases at bar do not involve isolated acts of racial discrimination by private individuals or groups.”¹⁶

The Supreme Court also treated state action as not only a jurisdictional requirement but also a significant component of the harm itself. The Court quoted the Kansas court in *Brown* as finding that “the impact [of segregation] is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group.” The Court did not rule out the possibility that the private aspects of Jim Crow might be constitutionally problematic. But it emphasized the sanction of government as a critical part of the harm of segregation.¹⁷

This emphasis on state-derived harm represented yet another partial reflection of the civil rights practices of the 1940s. The NAACP’s choice to abide the public-private line was something of a departure from both the CRS’s and the NAACP’s own approach to the state action question in the 1940s. One of the attractions of the Thirteenth Amendment for the CRS lawyers was that it had no state action requirement. Alone among the Reconstruction-era amendments, the Thirteenth Amendment provided constitutional authority to redress private wrongs. The complaints farmworkers and domestic workers presented to the Civil Rights Section revealed how difficult it was to disaggregate private from public harm. When a planter apprehended an “escaped” worker, brought him before a court, obtained a conviction, brought him back to work on his plantation, and kept him there through violence and threats of imprisonment, the line between

public power and private, between the state's contributions to Jim Crow and the individual's, blurred to the point of extinction. When the Civil Rights Section attacked Jim Crow, it did so with cognizance of the line between public and private but with no intention of abiding by it. The CRS's Thirteenth Amendment practice had epitomized the 1940s "extension of civil rights," as President Harry Truman had put it, from "protection of the people *against* the Government [to] protection of the people *by* the Government."¹⁸

So, too, when the NAACP's legal department took on labor cases in the 1940s, it purposefully attempted to undermine the line between state and private action. Responsibility for the problems that plagued black industrial workers no less than those that plagued agricultural or domestic workers lay with both public and private actors. The problems resulted not only from discriminatory referrals from the United States Employment Service, discriminatory government training programs, and discriminatory government hiring. The obstacles industrial workers faced resulted as well from the decisions of private employers, many of whom had contracts with the federal government. Their problems stemmed from the decisions of co-workers and unions, which the government also sanctioned in important ways. Deeming the state action doctrine vulnerable, the NAACP lawyers targeted unions, private employers, and government agencies alike. They seemed to view as significant the straitjacket the *Civil Rights Cases* imposed on potential racial equality no less than that imposed by *Plessy*. Whereas the attacks of the lawyers in the 1940s targeted both the private and the public aspects of racial and economic subordination, the Court's iconic construction of Jim Crow in *Brown* privileged the harms inflicted specifically by the state.

The NAACP's litigation choices similarly transformed the role of education in *Brown*, elevating it from a background condition of the litigation into an important substantive component of the case. By the time the Court issued its opinion in *Brown*, education had become the paradigmatic site for the reproduction of Jim Crow and the crucial battleground for a new civil rights. The education context—and the children who inhabited it—infused the case with its particularities. At every turn, education affected the doctrinal arguments as well as the image of Jim Crow and the embodiment of its victims.

The specific attributes of educational inequality had long made an

impression on the NAACP's litigation strategy. From the association's early school equalization cases to its teacher salary cases to its graduate school cases, the nitty-gritty facts of education had been omnipresent. The cases, like many of the complaints that initiated them, dwelt at length on the lack of school buses, the outdated textbooks, the underpaid teachers, and the shotgun segregated black law schools operating in basements with only a few part-time professors. Without "substantial equality in . . . educational opportunities," the Court had concluded in *Sweatt v. Painter*, it could not find the *Plessy* standard satisfied.¹⁹

When the NAACP lawyers decided that satisfying *Plessy* would no longer satisfy them, the strategic burdens on education grew more substantial. To be sure, especially at the trial level, the parties continued to haggle over the magnitude of the material inequalities between white and black schools. But the direct challenge to *Plessy* raised two strategic problems that required education to do more work than simply provide a site for revealing such inequalities. First, as the NAACP's social science experts recognized, it was not easy to prove that the psychological damage they had observed stemmed from segregated education. It could have stemmed instead from the many other formal and informal indignities and inequalities African American children endured. One way to solve that problem was to demonstrate the importance of education as a site for the production and maintenance of the American caste system in toto. If education played a major role in American life, then it must also play a major role in fostering the feelings of inferiority the social scientists had documented.

Second, the NAACP needed to address hard questions about the expectations of the Fourteenth Amendment's framers regarding segregated schools. After the initial oral arguments but before rendering a final decision in *Brown*, the Court ordered the parties to prepare additional briefs concerning the original intent and historical understanding of the Fourteenth Amendment. The lawyers' efforts to find evidence that the framers intended to outlaw segregation in public education in 1867 yielded at best nothing definitive and at worst evidence that the framers accepted the segregated education then scattered across the nation. One way the NAACP neutralized the historical evidence was to suggest that education in the 1950s meant something wholly different—and far more important—to Americans than it had in the 1860s. Education in general, and especially in the South, had

not yet become an essential public good after the Civil War. Both the NAACP and the United States thus attempted to reframe the question away from whether school segregation existed in the nineteenth century to whether, “under the far different conditions existing today,” school segregation violated the Constitution.²⁰

Toward both these ends—proving that segregated education was the specific cause of psychological damage and the primary American institution for racial and civic indoctrination—the NAACP waxed eloquent about the “basic function of the public school” as the instruction of “each succeeding generation in the fundamental traditions of our democracy.” Again the NAACP drew on the trend toward psychologizing America’s race problem. In particular, it relied on the growing intercultural education movement. The movement suggested that interracial contact in schools was critical to counteracting the societal pressures toward racism that undermined democracy. “The public school,” the NAACP argued, “even more than the family, the church, business institutions, political and social groups and other institutions, has become an effective agency for giving to all people that broad background of attitudes and skills required to enable them to function effectively as participants in a democracy.” It emphasized how “‘education’ comprehends the entire process of developing and training the mental, physical and moral powers and capabilities of human beings.” Schools provided opportunities “to develop citizenship skills and to adjust . . . personally and socially in a setting comprising a cross-section of the dominant population.”²¹

The Court embraced this privileged role of education. “Today,” it announced, “education is perhaps the most important function of state and local governments.” Education was not only “the very foundation of good citizenship.” It also promoted democracy and acculturation to American ways of life. The Court echoed the NAACP in describing education as “a principal instrument in awakening the child to cultural values . . . and in helping him adjust normally to his environment.” Education prepared African Americans “for later professional training,” and it was essential to success in life. The Court described education as so distinctive that when it overruled *Plessy* in *Brown*, it did so only “in the field of public education.”²²

In this way, education moved from litigation context to “the most important function of state and local governments.” The effect was to

make African American children the focus of the Court's opinion in *Brown*. These children became the central and iconic figures representing the casualties of legal segregation. Drawing on the graduate education cases, the Court argued that considerations of intangible inequality applied "with added force to children in grade and high schools." In that context, separation "generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone." The victims of Jim Crow in *Brown* were grade-school children, and the salient harms were to their psychological well-being and their capacity for citizenship. As the *New Republic* editorialized just after *Brown*, "Above the [political] tumult will remain the children themselves."²³

The emphasis on schools and schoolchildren is striking from the perspective of pre-*Brown* civil rights practice. As an initial matter, black support for desegregated primary education was fairly weak before *Brown*, and white opposition to educational desegregation passionate and unyielding. In contrast, African Americans felt more ardently and whites less so about black economic advancement.²⁴

In part, this stemmed from the centrality of labor to pre-*Brown* civil rights. Between the end of the *Lochner* era in the 1930s and the eve of *Brown*, the worker had been the central figure of American civil rights. When the *Lochner* era disintegrated, legal commentators thought workers, not racial groups, would be the next beneficiaries of Supreme Court protection. Moreover, into the 1940s—when the rights of African Americans joined those of workers as critical civil rights issues on a national level—lawyers and commentators referred to laborers as "weak and unpopular minorities" in the same terms as racial and religious groups.²⁵

The black worker in particular came into his own with the start of World War II. The rights of black workers drew support from both the rights of white workers and the wartime economic imperative for total mobilization. Discrimination against the black industrial worker had been the focus of what Thurgood Marshall identified during World War II as the most significant problem facing African Americans other than being denied the right to vote. These workers suffered from the "feeling[s] of inferiority" that afflicted schoolchildren. But more immediately, they suffered from depressed wages, inadequate work, unacceptable working conditions, segmented labor markets, and segre-

gated accommodations on the job. The central rights of the NAACP's 1940s labor cases, in contrast to the rights the lawyers purposefully isolated and highlighted in *Brown*, were those of the black worker to obtain a job and make a living.

In the Civil Rights Section's Thirteenth Amendment practice, black workers also dominated the stage. In the government's approach, however, the central figure, the prototypical litigant, was an African American agricultural or domestic rather than industrial worker. These workers were poor. They were usually physically, politically, economically, and psychologically isolated from the rest of the world. They enjoyed few of the benefits of modern American life. Their hopes for civil rights protection focused largely on escaping poverty and improving upon their limited opportunities for a livelihood. Recall Robert Hammond's complaint to the NAACP: "we live's in a free house such as it is, but you can't live in the free house with nothing to eat one half of the time and no shoes and cloth to wear in the winter."²⁶

Because *Brown* concerned education, the labor-market context that had marked both complaints like Hammond's and the cases they generated in the 1940s was predictably absent in the Court's opinion. There could be no language about the fundamental right to work, the right to work as the right to live, or the centrality of work to American life. The fact that *Brown* was an education case accordingly reinforced the doctrinal and cultural imprint of *Plessy* on *Brown*. Without challenging work, the due process right to work disappeared as a readily available constitutional resource in the case. The obvious need to challenge private as well as public action dissipated. And material harms receded behind psychological ones. Although many of the schoolchildren who would benefit from *Brown* were poor and isolated, the NAACP ensured as a matter of litigation strategy that it was their psychological rather than their material well-being that concerned the Court in *Brown*. Their economic circumstances were beside the point.

Brown thus constructed a partial and particular image of Jim Crow—as a problem of state-mandated segregation causing psychological harms. It divorced the seventy-five-year-old caste system from its economic roots, from its material inequalities, from the farmworkers who complained about their immobility and the industrial workers who complained about their inability to make a living. Because the com-

plaints of the workers—agricultural, domestic, and industrial—depicted Jim Crow as a system of both racial oppression and economic exploitation, so too did the cases lawyers had pursued in response. In cases on behalf of black workers, the Civil Rights Section and the NAACP's legal department took seriously both the economic and the racial aspects of workers' problems. They targeted material inequality and privation. They challenged the practices of private individuals, groups, and institutions as well as those of governments and state actors. And they used a variety of constitutional texts and statutory and administrative authorities to do so.

By the time *Brown* reached the Court, the NAACP had already bracketed material harms. The stigmatic understanding of state-imposed harm the Supreme Court embraced instead brought with it clear class implications. Working-class and poor African Americans no less than middle-class and elite African Americans suffered psychologically from Jim Crow. And middle-class and elite blacks suffered as well from stunted economic opportunities and inequalities. But the focus on both stigma and state action in *Brown* subordinated the material to the psychological. In doing so, it subordinated the problems most acute for working African Americans to those most acute for the more privileged of the race.

With banner headlines, newspapers announced the end of segregated education and the end of an era. The new era *Brown* initiated was one of upheaval and change, though not always in predictable directions. The Court's decision in *Brown* led to some desegregation of public schools, especially in border states that had already begun moving slowly toward desegregation before 1954. It led to scattered desegregation that affected rather small numbers of schoolchildren elsewhere in the South as well. *Brown* inspired hope among African Americans who had long resisted Jim Crow. And it galvanized Congress to pass the first national civil rights legislation since 1875. At the same time, *Brown* radicalized southern whites and led to massive and even violent resistance to the changes *Brown* itself had inaugurated.²⁷

The era *Brown* ended was not only the era of judicially legitimated segregation. It was also the era of civil rights experimentation in the face of Jim Crow. As lawyers and legal academics implemented, expanded upon, and made sense of both what *Brown* effectuated and

what it purposefully left undone and unsaid, they responded not only to the opinion itself but also to developments outside the Supreme Court. Together, the opinion in *Brown* and nonlegal historical developments made some constitutional arguments more culturally available than others. The Cold War—in both highlighting racial injustice for diplomatic purposes and narrowing domestic discourse by fostering anti-Communism—limited and structured how legal professionals understood *Brown*. So too did the larger world of domestic politics, especially as the southern hold on Congress loosened and national civil rights legislation supplemented constitutional change. And as lawyers increasingly came into contact with participants in the broader civil rights movement, the challenges that movement generated and the foundational symbols and myths it propagated affected the lawyers' work as well.

Within this larger context, *Brown* exerted a substantial gravitational pull. Its consequences for the future of civil rights practice and doctrine were both immediate and long term. When lawyers sought guidance about the best strategies for the continued development of civil rights law, they turned neither to *Lochner*-era holdovers nor to New Deal conceptions of rights. Instead, they drew on *Brown* as both a doctrinal and a cultural resource.

Within the Department of Justice itself, *Brown* magnified and institutionalized changes in the federal protection of civil rights that had been brewing since the late 1940s. When Attorney General Frank Murphy established the Civil Rights Section in 1939, it had been the sole locus of civil rights activity within the Department of Justice. The portfolio of the CRS was relatively open ended. The lawyers had considerable leeway to set their own civil rights agenda. Criminal prosecutions were the mainstay of their work and required approval only from the assistant attorney general for the Criminal Division and occasionally from the attorney general himself.

The lawyers supplemented their trial work with appeals and amicus curiae briefs in privately initiated civil rights cases. They viewed briefs from the government acting as a "friend of the court" as underscoring the importance of civil rights cases and signaling to the courts that federal executive will stood behind the rights claims of the private parties. Both appeals and amicus briefs required additional approval from the Justice Department's Office of the Solicitor General. That small, elite

group of lawyers decided when the United States would appear in the Supreme Court and the federal appeals courts. The OSG sometimes rejected the amicus requests of the Civil Rights Section as too political or precedent setting. Beginning with the wartime peonage case of *Taylor v. Georgia*, however, it began to approve them. For the early years of the section's existence, then, the CRS's civil rights agenda dominated both its own criminal prosecutions and the Justice Department's interventions into civil rights cases initiated elsewhere.²⁸

Two simultaneous developments in 1947 led the SG's office to take a new and sustained interest in civil rights cases that would eventually eclipse the CRS's approach to civil rights within the Justice Department. First, President Truman's Committee on Civil Rights published *To Secure These Rights*. This final report on the committee's work assessed the state of civil rights in the United States and recommended steps for the future. The report praised the efforts of the Civil Rights Section. It nonetheless lamented that without more potent legislative tools and greater resources, the CRS would not be able to address the wide range of civil rights violations the committee had identified. Due to the power of white southerners in Congress, the committee's recommendations for civil rights legislation seemed unlikely to succeed in the short term. Its calls for greater Justice Department civil rights activity fell on more sympathetic ears in the OSG. Philip Perlman, Truman's solicitor general and political advisor, saw greater involvement in civil rights cases as potentially valuable for the upcoming 1948 election. A higher profile in civil rights litigation promised to improve Truman's low opinion-poll ratings, the Democrats' appeal to critical black voters, and the bleak Democratic prospects for retaining the presidency.²⁹

At the same time the report spurred Perlman and his lawyers to look for civil rights opportunities, Under Secretary of the Interior Oscar L. Chapman offered them one. Chapman was concerned about the effects of racially restrictive covenants on Native Americans. He suggested that the Justice Department take action in *Shelley v. Kraemer* and its companion cases then pending in the Supreme Court. Perlman was primed for the call: *To Secure These Rights* had specifically mentioned restrictive covenants as an area in which the Justice Department should intervene. Moreover, civil rights organizations like the NAACP, the ACLU, and the American Jewish Congress, among others, also urged

federal action in those cases. The day after the committee's report was released, Perlman announced his intention to file an amicus brief in *Shelley*.³⁰

Shelley was the turning point in the institutional geography of the DOJ's civil rights work. Although the CRS was involved in seeking input from other federal agencies, Philip Elman, an OSG lawyer with friends at the various civil rights organizations, took charge of writing the brief. Elman later described the victory in *Shelley* as putting the SG's office "in business looking for Supreme Court civil rights cases in which to intervene as amicus curiae." As the NAACP racked up high-profile legal victories in the late 1940s and early 1950s, the OSG not only allowed amicus briefs in civil rights cases to proceed but also saw them as part of its own agenda. The SG's office wrote and submitted amicus briefs in *Sweatt v. Painter* and *McLaurin v. Oklahoma*, the graduate education cases the NAACP litigated, and in *Henderson v. United States*, an NAACP case challenging segregated and unequal dining facilities on railroads.³¹

By the time *Brown* and its companion cases reached the Supreme Court for the first time in 1952, the SG's office had created a second locus of civil rights in the DOJ. The contours of that civil rights approximated the anti-*Plessy* agenda of the NAACP far more closely than it did the agenda of the CRS. It was not that the OSG and the NAACP agreed on every legal theory, every tactical move, in the civil rights cases they pursued. They most certainly did not. The OSG did not even limit itself to NAACP cases themselves. But as to the kinds of cases that warranted attention and the broad outlines of a litigation strategy for civil rights, the OSG took the NAACP's lead.³²

By 1949, the CRS was no longer involved in either the decision to act as amicus curiae in civil rights cases or in the preparation of the amicus briefs themselves. Between 1949 and 1956, the CRS did not file a single amicus brief. The lawyers in the OSG, especially Elman and his colleague Robert Stern, had gained their own expertise in civil rights cases. They had their own ideas about which ones were worthy of pursuit.³³

At the critical moment in the creation of modern civil rights, then, the OSG overtook the CRS as the definitive voice of the Department of Justice, and hence the executive branch, on questions of civil rights law. That remained largely constant even after Dwight Eisenhower's

election to the presidency in 1952. Despite President Eisenhower's own misgivings about racial change, the Republican appointees to the DOJ who replaced Truman's Democrats largely accepted the civil rights agenda that had preceded them. The supplemental briefs they submitted after the Court requested reargument in *Brown* in 1953 opposed segregation more equivocally than had the Truman briefs. But at oral argument, Assistant Attorney General J. Lee Rankin made clear that the United States still backed the NAACP in opposing school segregation.³⁴

The Supreme Court's vindication of the OSG's approach to civil rights in *Brown* amplified these changes in the civil rights practice of the DOJ. The lawyers in the Civil Rights Section still pursued involuntary servitude, police brutality, and lynching cases—cases combining the issues of race, labor, and economic security and protecting the safety and security of the person. Even so, those cases began to make way for a whole new litigation agenda. The question the lawyers asked themselves was no longer what the future of civil rights should look like. Rather, they began to ask what their place would be in the new regime the NAACP, the OSG, and the Supreme Court had set in motion.

The CRS lawyers embraced the new civil rights, though with some reluctance about letting go of the past. By the time the OSG took over the federal civil rights agenda from the CRS, the CRS's origins in the labor struggles of the 1930s had been largely lost to history everywhere but in the CRS itself. In the spring of 1954, as the OSG lawyers were awaiting the Supreme Court's decision in *Brown*, the lawyers in the CRS approached them for permission to file an appeal. In *United States v. Bailes*, a federal district court in West Virginia dismissed an indictment the CRS had procured in a labor rights case under the National Labor Relations Act (NLRA). The judge had concluded that the National Labor Relations Board (NLRB) had exclusive jurisdiction over violations of the NLRA. The dismissal undermined one of the CRS's foundational beliefs from the Harlan County case on—that it had jurisdiction to prosecute violations of labor rights. But when the CRS lawyers pushed the OSG vigorously for permission to appeal, the OSG declined the request. The OSG deemed the assertion of jurisdiction in labor cases a "broad expansion of federal criminal jurisdiction" that would deluge the Department with labor complaints. In response, the lawyers of the Civil Rights Section chided the OSG lawyers for being

“wholly unaware of [the CRS’s] repeated efforts to apply the civil rights statutes to rights secured by the Labor Act.” When the solicitor general nonetheless refused to authorize the appeal, the CRS was forced to accept defeat.³⁵

The CRS lawyers’ commitment to protecting their historical vision of federal civil rights enforcement notwithstanding, the new, higher profile of civil rights reinvigorated the CRS’s role within the department. As the CRS lawyers experimented with a number of ways to assist the NAACP and local black communities in post-*Brown* school desegregation efforts, they cooperated with lawyers in the DOJ’s OSG, Civil Division, and Office of Legal Counsel. By 1956, the Civil Rights Section was once again submitting amicus briefs. Now, however, they were in school desegregation rather than peonage, labor, or police brutality cases. The implementation of desegregation dominated the civil rights agenda in the DOJ, and the questions were how aggressively and with what tools to pursue it.³⁶

The answer to those questions changed considerably as a result of the passage of federal civil rights legislation after *Brown*. The Civil Rights Act of 1957 disappointed civil rights proponents, as it remained hampered by the continuing power of white southerners in Congress. In particular, the new law lacked authorization for the attorney general to sue for injunctive relief in civil rights cases. Even the voting rights protections that survived the House and Senate were greatly watered down.³⁷

From the perspective of the CRS, however, the Civil Rights Act was revolutionary: It finally granted the attorney general authority to expand the seven or so lawyers of the Civil Rights Section into their own Civil Rights Division. The creation of the division institutionalized the changes *Brown* had initiated. The new division doubled in size in 1958 and again in 1959, bringing the number of lawyers from seven to twenty-eight in just two years. A few of the lawyers of the CRS continued the work of the section in other parts of the Justice Department. Henry Putzel migrated with the CRS’s traditional interest in voting rights to head a new Voting and Elections Section. Maceo Hubbard, the only black lawyer, became chief of the new Due Process Unit (called the Constitutional Rights Unit after 1960). Hubbard and his lawyers continued to enforce the Reconstruction criminal statutes that had once provided the mainstay of the Justice Department’s civil rights

work. But their work was marginal within the Civil Rights Division, and responsibility for a number of labor statutes had been transferred elsewhere.³⁸

Other former CRS lawyers scattered elsewhere in the division. A. B. Caldwell, who had served as chief of the CRS between 1952 and 1957, lost his status as chief and became an assistant to the assistant attorney general of the division. A lawyer with whom Caldwell had worked on a 1955 school desegregation case complained about Caldwell's fate. The lawyer had been impressed with Caldwell's work, and he worried that the government lawyer had been "shunted into virtual oblivion" in the new division.³⁹

Rather than bolster the CRS's traditional activities, the division applied its increased funding and personnel to a new civil litigation agenda. That agenda seemed to take the rights of African Americans, to the exclusion of other groups the CRS had previously protected, like workers in general, as its core. The division increasingly focused on the racial segregation and discrimination claims that had occupied the lawyers in the NAACP and then the OSG. The proliferation of grassroots civil rights protests among African Americans in the early 1960s reinforced the new directions. Where in the past, the section had avoided racial discrimination and segregation cases, the new division, still with caution, embraced them.⁴⁰

By 1964, in fact, the CRS's labor legacy had been so far submerged under the weight of *Brown* and subsequent developments that the Justice Department's Civil Rights Division was seen as an unlikely agent of aggressive enforcement of employment discrimination laws. The Civil Rights Act of 1964 finally prohibited as a legislative matter the kind of employment discrimination the NAACP lawyers had first attacked through litigation in the early 1940s. During congressional wrangling over the institutional location of the new prohibitions, civil rights activists pushed Congress to give authority to bring lawsuits to the newly created Equal Employment Opportunity Commission. Congress, however, decided to lodge that power instead in the Civil Rights Division. With the history of the CRS's long-standing commitment to protecting the rights of black workers forgotten behind *Brown's* momentum, Congress thought DOJ would be less aggressive. In public memory at least, the DOJ had come far from its origins in a civil rights that targeted both economic and racial oppression, far from its role as pioneer in federal

civil rights protection. It had become the place where laws against employment discrimination would rest in underenforced peace.⁴¹

Unsurprisingly, *Brown's* victory proved somewhat less transformative for the NAACP than for the CRS. *Brown* served primarily to reinforce the decisions—both institutional and doctrinal—the NAACP lawyers had been making for some time. On an institutional level, *Brown* precipitated a further split between the NAACP and its lawyers that conclusively divorced the lawyers' legal agenda from the particular concerns of working-class African Americans. On a doctrinal level, it laid the groundwork for further inroads against state-enforced segregation.

Among the white South's responses to the NAACP's school desegregation campaign was an attack on the NAACP as an organization. Southerners and their governments charged the lawyers with ethical violations, passed statutes intended to hamper the lawyers' ability to bring cases, and instituted aggressive campaigns to shut down the NAACP's operations. As part of these attacks, and in response to pressure from southern congressmen, the Internal Revenue Service (IRS) began to take a close look at the relationship between the NAACP lawyers and the NAACP. The work of the lawyers, formally incorporated since 1939 in the NAACP Legal Defense and Educational Fund (the Inc. Fund), was tax-exempt. The NAACP's lobbying work was not. If the formal separation of the organizations masked the reality of a single, relatively integrated one, the Inc. Fund could lose its tax-exempt status. Indeed, even after the greater physical and programmatic separation in 1952, the boards of the two organizations had remained intertwined, and the lawyers had occasionally contributed financially to branches they represented in litigation.⁴²

By 1956, the lawyers and the NAACP felt they needed to cut ties to a much greater extent to satisfy the IRS. Robert Carter, an NAACP lawyer with a more working-class perspective than his colleagues, had sometimes clashed with Thurgood Marshall. He moved to the NAACP as its general counsel. Marshall and the rest of the lawyers remained with the Inc. Fund. Although some connections remained, Marshall resigned as special counsel of the NAACP, and the Inc. Fund resolved that no one could be a member of both the NAACP and the Inc. Fund boards. The impetus for the split came from the IRS, but Marshall had sought just

such independence for several years. He later recalled that the government had done the lawyers "a favor" by instigating the separation.⁴³

The consequences for any future labor litigation agenda in the Inc. Fund were substantial. The membership of the NAACP, the lay African Americans who had grounded the litigation program of the lawyers at least somewhat, remained with the NAACP. This further attenuated the lawyers' ties with what Marshall called the "little Joes." Also with the NAACP went the labor department and its ferocious director since 1951, Herbert Hill. Hill and Clarence Mitchell, who had advanced to the head of the NAACP's Washington Bureau, continued their multi-pronged campaign for nondiscrimination in employment and unions. Carter sometimes assisted their efforts, bringing lawsuits and filing claims before the NLRB. As the NAACP and the Inc. Fund finally split, then, the last remnants of the 1940s labor litigation migrated away from the purely litigative work of the Inc. Fund to the coordinated negotiation, lobbying, and litigation efforts of the NAACP. Although employment discrimination was occasionally on the Inc. Fund's radar screen in the decade after *Brown*, its lawyers expended little energy litigating on behalf of black workers.⁴⁴

On a doctrinal level as well as an institutional one, the victory in *Brown* fortified the lawyers' previous choices. Before the Inc. Fund and NAACP split in 1956, the NAACP and its lawyers together capitalized on *Brown* in the most obvious and necessary way: by trying to make *Brown*'s promise of school desegregation a reality. Days after the Supreme Court's first decision in *Brown*, the NAACP held a massive strategy conference in Atlanta. The NAACP mobilized and expanded local NAACP chapters. Both the lawyers and the nonlegal staff educated black communities about the benefits and risks of attempting desegregation. Despite the Court's failure to specify in *Brown* exactly what school boards had to do to comply with the decision, the NAACP set forth its own procedures for black communities across the South to begin the legal process of desegregation. Once local attempts at negotiation for desegregation failed, the lawyers assisted in the filing of lawsuits. These efforts continued after the Court's disappointing opinion in *Brown v. Board of Education II* required only that desegregation proceed "with all deliberate speed."⁴⁵

At the same time, the lawyers followed and reinforced other central characteristics of *Brown*. In particular, the class implications of at least

some of the Inc. Fund's cases came into sharper relief in the post-*Brown* years. Many of the cases—challenging segregated public transportation and beaches, for example—benefited African Americans across a wide, though still hardly complete, socio-economic spectrum. But the lawyers puzzled over why so many of their challenges to segregated golf courses originated with complaints from dentists, for example. The dentists, some of the lawyers surmised, sought status equivalent to doctors, and golf was a route to such status. Or perhaps, they thought, dentists just had enough free time for the pastime. Either way, the Inc. Fund pursued the cases. As Inc. Fund lawyer Jack Greenberg later summarized their reasons, "Dentists had rights too, any defeat of segregation contributed to its ultimate destruction, and last, but not least, these middle-class professionals were then the mainstay of the civil rights movement."⁴⁶

More substantively, the cases the NAACP and the Inc. Fund pursued largely followed and reinforced *Brown's* emphasis on the state's role in the perpetuation of Jim Crow. The NAACP's recreational facilities, public library, and public transportation cases successfully challenged government-enforced segregation. Although these new cases by definition extended beyond *Brown's* emphasis on education, they remained within the equal-protection-based, antisegregation, traditional state action parameters of *Brown*.⁴⁷

The ability to reach beyond state action was a secondary goal, less theorized and less coordinated than the first. The Inc. Fund occasionally challenged segregation where state action was uncertain. Shortly after *Brown*, the lawyers challenged the segregation of a Louisville, Kentucky, amphitheater that had been leased by the city to a private party. When the Court remanded the case "for consideration in the light of the Segregation Cases . . . and conditions that now prevail," it suggested that the Court, like the NAACP, viewed *Brown* as perhaps effecting a broader understanding of state action. In a subsequent case challenging segregation in a restaurant leased from the city of Wilmington, Delaware, the Inc. Fund's Louis Redding again succeeded in convincing the Court to strike down segregation where it resulted from something less than a direct command from government.⁴⁸

Indeed, when Greenberg wrote about the state of the law concerning race relations in 1959, he considered the state action problem at some length. He thought there was a need for greater clarity about

the state action requirement and predicted “considerable activity” on the question. Still, he gave no indication that such activity was high on the agenda of the Inc. Fund. Rather than take any ownership of the issue, he found it “impossible to predict what will move people to file suits, the manner in which cases will be handled, and what encouragement will be offered by the course of decision.”⁴⁹

When the lawyers forayed into the question of state action in the early 1960s, their efforts were largely reactive rather than proactive. Responding to the student sit-ins and widespread protests of the new decade, the Inc. Fund coordinated the defenses of those arrested and provided many with counsel. Although these cases often turned on whether the quashing of demonstrations involved the requisite level of state action, the protestors and local prosecutors set the agenda. The Inc. Fund lawyers accordingly found it difficult to build and follow the kind of coherent litigation campaign they had mounted in the school segregation cases.⁵⁰

Where the lawyers could control their agenda in the 1960s, they did so largely by expanding other parameters set by *Brown*. The lawyers continued to bring school desegregation cases, as well as cases challenging segregation in other areas, like hospitals and public accommodations. Sometimes these required creative state action arguments. For the most part, however, the lawyers began to challenge not only state-enforced segregation but also state-created racial classifications of all kinds. In 1964's *McLaughlin v. Florida*, for example, the lawyers challenged prohibitions on, and criminal penalties for, interracial cohabitation. They argued that “race is constitutionally an irrelevance” and cited *Hirabayashi v. United States* and *Korematsu v. United States*. The Court struck down the law. It viewed the case “in light of the historical fact that the central purpose of the Fourteenth Amendment was to eliminate racial discrimination emanating from official sources in the States.” Fully twenty years after the Court's decisions in *Hirabayashi* and *Korematsu*, the Court embraced its own suggestion that racial classifications be subject to the “most rigid scrutiny.”⁵¹

A few years later, in *Loving v. Virginia*, the Inc. Fund lawyers challenged a statute prohibiting interracial marriage. Again, the NAACP cited *Korematsu*. Again, the Court struck down the statute, finding it to “rest solely upon distinctions drawn according to race.” It quoted *Korematsu* and *Hirabayashi* and concluded that racial classifications had

long been considered “‘odious to a free people’” and subject “to the ‘most rigid scrutiny.’” In both cases, the Inc. Fund moved from arguing the principle that the equal protection clause prohibited segregation to arguing that all racial classifications were at least suspect under the Constitution. The Court agreed.⁵²

In the decade after *Brown*, then, undermining the constitutionality of state racial classifications was the Inc. Fund’s main goal, and the growing civil rights movement itself essentially constituted its new constituency. The lawyers continued to allot little time to the kinds of work-related cases they had pursued in the 1940s. Only after passage of the Civil Rights Act of 1964 prohibited race discrimination in employment did the Inc. Fund reenter the realm of work and economic inequality. Together with the NAACP, the Inc. Fund lawyers once again capitalized on national momentum and new statutory tools for work-related civil rights. It was after that point, recalled Greenberg, that it “became apparent that black poverty was inextricably wound up” with what he considered “classic civil rights issues.”⁵³

Brown’s impact on the law reverberated past the bar itself and into the legal academy. As *Brown* came under attack both within and without the academy, legal scholars spent considerable effort analyzing and justifying the Court’s decision in the case. As is their wont, such scholars not only commented on but refined and systematized the emerging legal doctrine. In so doing, they reinforced the aspects of *Brown* most at odds with the labor-infused civil rights of the 1940s and the complex understanding of Jim Crow it reflected.

By the time scholars began responding seriously to *Brown*, the Court—largely in response to the NAACP’s follow-up litigation—had given a few additional hints about the meaning and scope of its purposefully vague and incomplete opinion in *Brown*. It appeared that, much as the Court had emphasized education, the new civil rights doctrine actually eschewed all state-enforced segregation. With critics already skeptical about *Brown*’s doctrinal footing, the Court’s unexplained extension of *Brown* added to their doubts. In 1959, legal scholar Herbert Wechsler published an influential article called “Neutral Principles.” He was unable to find such principles to justify *Brown*. Wechsler likened the judicial activism he saw in *Brown* to that practiced by the reviled *Lochner* Court.⁵⁴

Wechsler hit a raw nerve among liberal legal scholars who supported both the New Deal and racial equality. During the 1940s, the Civil Rights Section's and the NAACP's labor cases had linked the New Deal and racial equality by addressing the rights of African Americans as in some ways an extension of New Deal protections for labor and economic rights. *Brown* itself largely eclipsed that possibility as a historical if not an analytical matter. Instead, scholars felt they had to find other ways to defend *Brown* and distinguish it from *Lochner*. Louis Pollack, one such scholar, turned to *Carolene Products*' footnote four to provide *Brown* with a more secure doctrinal pedigree and constitutional rule than the Court had given it. *Carolene Products* suggested that the courts scrutinize government action involving "discrete and insular minorities" more stringently than other action, especially that involving economic regulation. The invocation of *Carolene Products* echoed the Court's citation of *Hirabayashi* and *Korematsu* in the Washington, D.C., school segregation case of *Bolling v. Sharpe*. And it presaged the Court's similar citations in *McLaughlin* and *Loving*. Race was different, Pollock argued, and it justified a different level of judicial scrutiny.⁵³

Pollock's theory, eventually embraced by the Court, the bar, and the legal academy, finally interred any linkage of economic and labor rights with racial rights. The reemergence of *Carolene Products* doctrinally separated economics from race and justified judicial interference with the latter but not the former. Substantive due process—striking down economic legislation—was problematic. *Carolene Products*' protection of racial minorities—striking down racial segregation and classification—was not. Although the Court had articulated the basis for treating race differently as early as 1938, it did not actually establish such a rule until *McLaughlin* in 1964. It was not until after *Brown* that the legal academy saw the jurisprudential advantages of such bifurcated constitutional review.

More generally, academic treatments of civil rights and constitutional law winnowed out the diversity of approaches that had characterized the pre-*Brown* years. Before and just after *Brown*, treatises and casebooks reflected considerable variety in both the subjects they included within the field of civil rights and the way they analyzed those subjects. Legal scholars treated "civil rights" as encompassing issues like involuntary servitude and labor rights as much as racial segregation; they saw rights as falling into categories like "the security of the

person” as much as “discrimination”; and they described the vindication of civil rights as an affirmative responsibility of government as much as the responsibility of private litigants.

As scholars began a gradual but unmistakable process of filtering out many of these subjects and schematic approaches, they drew not only on *Brown* itself. Over the decade that followed *Brown*, subsequent cases (many brought by the Inc. Fund), the rise of the civil rights movement, and legislative developments all contributed to the transformation. To an extent, these developments reinvigorated some aspects of pre-*Brown* civil rights. The pivotal civil rights protest of 1963 was called the March on Washington for Jobs and Freedom. The Johnson administration’s War on Poverty tried to attack economic deprivation in part out of a recognition of the continuing connection between racial and economic inequality. And Title VII of the 1964 Civil Rights Act legislatively prohibited discrimination in the private labor market and labor unions as well as among state actors themselves.

Even so, these developments often reinforced, rather than undermined, the image of Jim Crow and racial harm that *Brown* depicted. Media representations of the 1963 March on Washington largely forsook the protest’s economic emphasis for Martin Luther King, Jr.’s, focus on formal color-blindness—in which people would “not be judged by the color of their skin but by the content of their character.” The War on Poverty took as its mission the redress of economic inequality not for its own sake but rather as a cause of the psychological alienation that underlay rising racial violence across the nation. And Title VII prohibited “discrimination on the basis of race” in the same terms as it prohibited discrimination in education and public accommodations. The law addressed work-related inequality as simply an ordinary manifestation of the general problem of race discrimination. Title VII, like *Brown* itself, submerged the substantive right to work that had been a hallmark of the pre-*Brown* years for the antidiscrimination paradigm that was a hallmark of the post-*Brown* era.⁵⁶

Moreover, these and other developments remained largely separate from constitutional law itself. Title VII was not constitutionally mandated. The *Civil Rights Cases*, with their state action requirement, remained good constitutional precedent. And attempts to translate legislative and social movement momentum for protection of the poor into constitutional guarantees ultimately failed.

As legal scholars increasingly converged on a general framework for making sense of the constitutional law of civil rights, then, that framework was predominantly the one *Brown* had set into motion in 1954. This is apparent in changes in succeeding editions of civil rights and constitutional law casebooks and treatises. In their seminal 1952 treatise, for example, Thomas Emerson and David Haber's first chapter was entitled "The Right to the Security of the Person." It discussed the lynching, police brutality, involuntary servitude, and other cases that made up the mainstay of the CRS's 1940s civil rights practice. Where the first chapter of the treatise covered harms in that category, the final chapter discussed "discrimination." The two separate chapters not only covered different types of civil rights, they also revealed the multiple forms of civil rights practice in the pre-*Brown* era. The chapter on discrimination featured privately litigated cases, often brought by the NAACP, against mostly government actors. By contrast, "The Right to the Security of the Person" focused on the increasing power of the federal government affirmatively to protect Americans from civil rights violations. Each approach to civil rights had its own place, its own arena in the 1952 edition. Moreover, even within the chapter on discrimination, no single area of law dominated. Emerson and Haber divided the discussion into housing; a combined grouping of "Education, Transportation, and Public Accommodations"; and employment. Education and employment filled around the same number of pages (37 and 33, respectively) out of the 180 on discrimination.⁵⁷

By the second edition in 1958, *Brown*-induced changes were apparent. As a result of legal developments relating to civil rights coming "thick and fast," Emerson and Haber doubled in size and expanded to two volumes. Significantly, discussion of the school segregation cases and resistance to them received their own new sections. They constituted almost 100 pages of the now 290 devoted to discrimination. Employment increased only to 61 pages. By the third edition, in 1967, the changes were even more dramatic. Although the authors retained a section on the security of the person, they subsumed it under the larger heading "Discrimination," which filled the entire second volume. The security of the person no longer offered an independent approach to civil rights.⁵⁸

Milton Konvitz, a former NAACP lawyer and professor at Cornell's School of Industrial and Labor Relations, also modified his *Bill of*

Rights Reader to reflect the emerging post-*Brown* scholarly synthesis. In both the 1954 and 1960 editions, Konvitz reflected the pre-*Brown* tendency to consider labor rights civil rights. He included independent sections titled "Freedom from Race Discrimination" and "Freedom of Labor." The first issue in "Freedom of Labor" was peonage, and the main case was *Pollock v. Williams*. Even within the chapter on discrimination, *Brown* did not initially make its weight felt. Education was represented only by *Brown*, just as the sections on "Equality of Job Opportunities," "Equality in Interstate Transportation," and property issues each received only one or two cases. By 1965, however, "Freedom of Labor" had been eliminated altogether, and six education cases dwarfed the other categories within the regnant chapter titled "Freedom from Race Discrimination."⁵⁹

The popular constitutional law casebook of Paul G. Kauper, a University of Michigan law professor, was slower to change, but change it did and in the same direction. Both the 1954 and the 1960 editions included a chapter titled "Substantive Rights: Freedom of the Person" that began, like Konvitz's "Freedom of Labor" chapter, with the main case of *Pollock v. Williams*. Kauper included multiple chapters on the various "substantive" due process rights of property ownership, business enterprise, and vested interests. And he included a separate final chapter titled "Freedom from Discrimination" that included *Brown* and other race-based equal protection cases. Among them was the labor-related case of *Takahashi v. Fish and Game Commission*.⁶⁰

In the third and fourth editions in 1966 and 1972, Kauper filtered out these heterogeneous understandings of civil rights. By the third edition, he omitted *Pollock* as a main case and discussed involuntary servitude only in a note in "Substantive Rights: Freedom of the Person." By the fourth edition, he eliminated the chapter on freedom of the person altogether. Kauper excluded any significant discussion of the labor case of *Takahashi* as well. He also consolidated the many chapters on substantive due process into a single chapter and moved them to the end of the book. Perhaps most significantly, Kauper edited his main, introductory chapter on due process and equal protection subtitled "Some General Considerations." He included there for the first time the race-based equal protection cases that had previously occupied their own chapter. By 1972, they had become the definitive individual rights cases, as opposed to one subset of the subject.⁶¹

The changes in these three casebooks were representative of the field. Treatise and casebook authors eliminated sections on the freedom of the person; they condensed or eliminated discussions of *Pollock v. Williams* and involuntary servitude; and they eliminated chapters on freedom of labor altogether. Work-related civil rights were largely reduced to the question of job discrimination under the equal protection clause, akin to discrimination in other arenas. As early as 1959, Greenberg could describe peonage as “outside the main channels of job discrimination” in contrast to “discrimination in government employment,” which was “[s]quarely in these channels.” Moreover, although the Supreme Court had largely undermined substantive due process by the late 1930s, casebooks did not lessen their attention to the category until after *Brown* had made the equal protection clause the obvious new constitutional provision of choice. One typical casebook renamed its “Substantive Due Process” chapter “Economic Affairs—Power to Regulate.” As “discrimination,” “equal protection,” and “equal opportunity” came to dominate scholarly conceptions of civil rights, cultural space for and conceptual clarity about substantive due process began to shrink.⁶²

As scholars winnowed out the varieties of pre-*Brown* civil rights, they converged on a race-based, privately litigated, equal-protection-oriented civil rights framework that *Brown* had inaugurated. It was not until the post-*Brown* years privileged a race-focused equal protection clause, and contrasted stringent judicial review of government actions affecting racial minorities with deferential review of actions affecting the economy, that race and labor truly diverged in constitutional law. It was not until then that constitutionally grounded civil rights became squarely rights against the government, in contrast to both rights against private power and rights protected by the government. It was not until then that it would become clear how partial the victory in *Brown* was and how much of Jim Crow would remain intact in the face of the new civil rights *Brown* had helped construct.⁶³

These developments were still largely immanent and unformed in the days just after the Supreme Court decided *Brown* in May of 1954. *Brown* represented the culmination of years of hard work by the NAACP lawyers and a tremendous victory for both those lawyers and African Americans generally. The constitutional energy it unleashed

served as the driving force for a major revolution in civil rights doctrine. Absent from that new energy, however, was the legacy of the labor-related civil rights practices of the 1940s: the African-American worker, the rights of labor more broadly understood, and the use of constitutional texts other than the equal protection clause—like the Thirteenth Amendment and the due process clause—as foundational resources for promoting civil rights.

The disappearance of the African American worker as a relevant legal character, work as a relevant doctrinal category, and the 1940s labor practices of the CRS and the NAACP as relevant historical resources for constitutional civil rights has had major ramifications. At least in part because of the decisions described in this book, our imagination of the civil rights plaintiff, the civil rights complaint, and the scope of constitutional civil rights protections is significantly different today. We take for granted, fifty years after *Brown*, that the crux of legally cognizable racism in the United States is the psychological, stigmatic, and symbolic injury of state-sanctioned racial classification.

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 CRS and the NAACP about the problems they endured living and working in Jim Crow America. To them, Jim Crow was a system of both racial hierarchy and economic oppression. Although workers would, and did, benefit from the decision in *Brown* and those that followed, those benefits did not reach all of the harms black workers faced under Jim Crow. Even after both legislative and doctrinal developments after *Brown* went some distance toward treating work as an appropriate site for government intervention and civil rights advancement, the constitutional framework largely remained the one created in *Brown*. That framework left the material, private-labor-market side of Jim Crow not only unredressed but also unaddressed. Without recognizing both the formal and the informal, the legal and the customary, the public and the private aspects of Jim Crow, constitutional law was unlikely effectively to undermine the entirety of the harms black workers experienced.

To be sure, the *Brown* decision did not by itself cause the narrowing of constitutional discourse. That narrowing is also a product of how judges, lawyers, constitutional theorists, historians, and laypersons think about *Brown*. The myth that ours is a negative constitution, com-

mitted to protecting rights against, rather than rights protected by, the government, remains vibrant in part because we have erased the affirmative protections the CRS sought to implement in the 1940s. And the myth that a race-oriented, equal-protection-based civil rights immediately replaced *Lochnerism* flourishes because it ignores the alternative frameworks with which both the CRS and the NAACP experimented before *Brown*.

These myths limit our imaginations—lay and professional, scholarly, lawyerly, and judicial—about the possibilities for constitutional redress of material inequalities. They are a product of the canonization of a *Brown*-inspired, race-based understanding of civil rights that has served to mask alternatives that black working-class clients and their lawyers once proposed. This book serves as a reminder of what *Brown* has erased. It opens up the future of constitutional understandings of civil rights by revealing the contingencies in their pasts.

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30. Mitchell, “Statement on Taft-Hartley,” in *NAACP Papers*, pt. 13A, rl. 6:754–757, 755. See In re *Larus & Brother Co.*, 62 N.L.R.B. 1075, 1080–1081, 1084 (1945). 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).
 31. See generally Kenneth Walter Mack, “Race Uplift, Professional Identity and the Transformation of Civil Rights Lawyering and Politics, 1920–1940” (Ph.D. diss., Princeton University, 2005).
 32. Tushnet, *NAACP’s Legal Strategy*, 114.
 33. Clarence Mitchell, address at the 40th annual conference of the NAACP, Los Angeles, July 14, 1949, 9, in *NAACP Papers*, pt. 1, rl. 12:684–693, 692.
 34. Conference of NAACP Lawyers, “Report to 40th Annual Conference of [NAACP],” June 23–25, 1949, in *NAACP Papers*, pt. 1, rl. 12:575–577. See Walter White, “Excerpts from Remarks” (39th annual meeting of the NAACP, New York, Jan. 5, 1948), in *NAACP Papers*, pt. 1, rl. 14:819–824.
 35. Mitchell to Marshall, June 9, 1950, in *NAACP Papers*, pt. 15A, rl. 9:107.
 36. Marshall to Mitchell, June 13, 1950, in *NAACP Papers*, pt. 15A, rl. 9:106. See *Sweatt*, 339 U.S. 629; *McLaurin*, 339 U.S. 637.
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9. *Brown* and the Remaking of Civil Rights

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2. *Brown v. Board of Education*, 347 U.S. 483 (1954).
3. For a recent discussion of the contestation over *Brown*, see Tomiko Brown Nagin, “Black Ambivalence about Legal Liberalism: A Pragmatically Conservative Path to Civil Rights, Atlanta, 1895–1979” (manuscript, University of Virginia Law School, n.d.); see also Derrick Bell, “Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation,” *Yale Law Journal* 85 (1976): 470–516; Lani Guinier, “From Racial Liberalism to Racial Literacy: *Brown v. Board of Education* and the Interest-Divergence Dilemma,” *Journal of American History* 91 (2004): 92–118; Reva B. Siegel, “Equality Talk: Antisubordi-

- nation and Anticlassification Values in Constitutional Struggles over Brown,” *Harvard Law Review* 117 (2004): 1470–1547.
4. *Brown*, 347 U.S. 483, 494–495. See *Sweatt v. Painter*, 339 U.S. 629 (1950); *McLaurin v. Oklahoma*, 339 U.S. 637 (1950).
 5. Brief for Appellants[, 1952,] at 5, *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (No. 8), reprinted in *Landmark Briefs and Arguments of the Supreme Court of the United States: Constitutional Law*, ed. Philip B. Kurland and Gerhard Casper (Arlington, Va., 1975–), 49:23–42; Brief for the United States as Amicus Curiae[, 1952,] at 25–26, *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (Nos. 8, 101, 191, 413, 448), in *ibid.*, 49:113–147, 140–141.
 6. *Brown*, 347 U.S. at 495.
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 10. *Plessy v. Ferguson*, 163 U.S. 537, 551 (1896). See Brief for Appellants at 5, 1952, *Brown*, 347 U.S. 483 (No. 8), in *Landmark Briefs*, ed. Kurland and Casper, 49:23–42, 31.
 11. See Daryl Michael Scott, *Contempt and Pity: Social Policy and the Image of the Damaged Black Psyche, 1880–1996* (Chapel Hill, N.C., 1997), 71–91, 119–136; Rebecca Lyn de Schweinitz, “‘If They Could Change the World’: Children, Childhood, and African-American Civil Rights Politics” (Ph.D. diss., University of Virginia, 2004), 130–194; Ellen Herman, *The Romance of American Psychology: Political Culture in the Age of Experts* (Berkeley, Calif., 1995), 174–207.
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 33. Elliff, *United States Department of Justice*, 268.
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 35. *United States v. Bailes*, 120 F. Supp. 614 (S.D.W. Va. 1954); Elman to solicitor general, memorandum, May 5, 1954, DOJ Files, 144–84–14, quoted in Elliff, *United States Department of Justice*, 386; Leo Meltzer to Caldwell, memorandum, May 26, 1954, DOJ Files, 144–84–14, quoted

- in *ibid.*, 388. Voluminous records on the *Bailes* case can be found in the Department of Justice Records at the National Archives, RG 60, no. 144–84–14. Unlike most of the CRS’s NLRA cases, *Bailes* aimed to vindicate the right to work without joining a union (the United Mine Workers), rather than the right to join a union. Some Eisenhower administration officials took interest in the case because of its antiunion implications and its potential to undermine West Virginia Democrats reliant on the UMW. Such politics were largely beside the point for the CRS lawyers, however, who saw their interest in the case as defending their traditional jurisdiction over labor rights writ large. The only political motivation they even implied was the possibility that *Bailes* might disabuse observers of the belief that the CRS was systematically biased in favor of liberal groups and causes. *Ibid.*, 387–388.
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48. *Muir v. Louisville Park Theatrical Ass'n*, 347 U.S. 971, 971 (1954) (mem.). See *Burton v. Wilmington Parking Auth.*, 365 U.S. 715 (1961); Greenberg, *Crusaders*, 199.
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