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## Rethinking Civil Rights Lawyering and Politics in the Era Before *Brown*

**ABSTRACT.** This Article argues that scholarly accounts of civil rights lawyering and politics have emphasized, incorrectly, a narrative that begins with *Plessy v. Ferguson* and ends with *Brown v. Board of Education*. That traditional narrative has relied on a legal liberal view of civil rights politics—a view that focuses on court-based and rights-centered public law litigation. That narrative has, in turn, generated a revisionist literature that has critiqued legal liberal politics. This Article contends that both the traditional and revisionist works have focused on strains of civil rights politics that appear to anticipate *Brown*, and thus have suppressed alternative visions of that politics. This Article attempts to recover these alternatives by analyzing the history of civil rights lawyering between the First and Second World Wars. It recovers debates concerning intraracial African-American identity and anti-segregation work, lawyers' work and social change, rights-based advocacy and legal realism, and the legal construction of racial and economic inequality that have been elided in the existing literature. It thus contends that the scholarly inquiries that have been generated in both the traditional and the revisionist work should be reframed.

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## INTRODUCTION

The *Brown v. Board of Education* litigation, and the Supreme Court decision that it produced,<sup>1</sup> have cast a long shadow over the legal historiography of the civil rights movement. The *Brown* litigation has become the lodestar for a “legal liberal” interpretation of civil rights history.<sup>2</sup> Its core elements have become familiar: courts as the primary engines of social transformation; formal conceptual categories such as rights and formal remedies such as school desegregation decrees, as the principal mechanisms for accomplishing that change; and a focus on reforming public institutions (or, in some versions, public and private institutions without much distinction) as a means of transforming the larger society.<sup>3</sup> Legal liberalism, of course, is an ideal type, and scholars have given varying emphases to its core elements in their accounts of civil rights law and politics. Nonetheless, the legal history of civil rights has been written with the *Brown* decision at its centerpiece, telling the story, in effect, of the antecedents and consequences of *Brown*. Civil rights history remains, at its core, the story of how African-American communities, and the lawyers and organizations that supported them, struggled to overturn *Plessy v. Ferguson*,<sup>4</sup> attack de jure segregation, produce the triumph of legal liberalism in *Brown*, and effectively implement *Brown*’s antidiscrimination mandate.<sup>5</sup>

I will argue in this Article that the legal liberal interpretation of civil rights history is a myth—at least as it applies to the African-American civil rights bar during the period between World War I and II. That is, this interpretation is

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1. 347 U.S. 483 (1954); see also *Brown v. Bd. of Educ. (Brown II)*, 349 U.S. 294 (1955) (deciding the question of remedy).
  2. In choosing to name it “legal liberalism,” I employ Laura Kalman’s terminology rather than leftist scholars’ preferred term, “liberal legalism.” See LAURA KALMAN, *THE STRANGE CAREER OF LEGAL LIBERALISM* (1996); Wendy Brown & Janet Halley, *Introduction to LEFT LEGALISM/LEFT CRITIQUE* 1, 5-7 (Wendy Brown & Janet Halley eds., 2002).
  3. Perceptive observers have recognized that civil rights protest in the era before *Brown* also targeted discrimination by putatively private entities such as common carriers and innkeepers, all-white political organizations, neighborhood associations that employed racially restrictive covenants, and discriminatory unions. See, e.g., MARK V. TUSHNET, *MAKING CIVIL RIGHTS LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1936-1961*, at 67-115 (1994). A preoccupation with the attack on public institutions nonetheless dominates the scholarship.
  4. 163 U.S. 537 (1896).
  5. See *infra* Part I. Here I refer principally to African-American civil rights history, which accounts for the bulk of the literature. There are other variants. See, e.g., IAN F. HANEY-LÓPEZ, *RACISM ON TRIAL: THE CHICANO FIGHT FOR JUSTICE* (2003).

less an engagement with the complicated civil rights politics that had emerged by the middle of the twentieth century than a historical interpretation that helped scholars, commentators, and civil rights lawyers themselves make sense of American politics in the late twentieth century.

The first group of scholars who studied the interwar generation of black lawyers charted a variety of objectives for these lawyers' professional practice. But in the aftermath of the NAACP's success in *Brown* and its companion cases, led by a predominantly African-American legal team, the prevailing conception of those lawyers began to change: Both historians and legal scholars began to imagine instead that legal liberalism had been the primary object of their efforts. By the 1970s, the new interpretation was in full bloom, with a spate of books and articles chronicling what was assumed to be the legal liberal struggle of African-American lawyers, civil rights organizations, and local communities that achieved its longstanding objective in *Brown*.

By the late 1970s, the new interpretation of civil rights history was generating its own counter-literature, with a variety of scholars critiquing legal liberalism as a limiting rather than emancipatory approach to law and social change. Leftist scholars, many associated with the Critical Legal Studies (CLS) movement, focused mainly on rights-talk and Supreme Court decisionmaking in the aftermath of *Brown*. They argued that the abstract, contradictory, and unstable nature of the legal liberalism that took shape in and after the *Brown* decision limited the effectiveness of that rights discourse as a means of changing the status quo.<sup>6</sup> A somewhat different group of scholars critiqued the

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6. See, e.g., Alan Freeman, *Antidiscrimination Law from 1954 to 1989: Uncertainty, Contradiction, Rationalization, Denial*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 285 (David Kairys ed., 3d ed. 1998); Lani Guinier, *From Racial Liberalism to Racial Literacy: Brown v. Board of Education and the Interest-Divergence Dilemma*, 91 J. AM. HIST. 92 (2004); Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1129-48 (1997); see also Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980) [hereinafter Bell, *The Interest-Convergence Dilemma*]. But see Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over Brown*, 117 HARV. L. REV. 1470 (2004) (arguing for the emancipatory potential of the rights discourse mobilized in and immediately after *Brown*). See generally Duncan Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFF. L. REV. 205 (1979) (critiquing the liberal legal theory more generally); Mark Tushnet, *An Essay on Rights*, 62 TEX. L. REV. 1363 (1984) (critiquing rights discourse more generally). Critical race theorists responded to the CLS version of these critiques with both sympathy and the contention that CLS had underestimated the pragmatic usefulness of rights. Thus, the work of many scholars lies on both sides of the debate between CLS and Critical Race Theory on this issue. See *CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT* (Kimberlé Crenshaw et al. eds., 1995).

practice of public interest lawyering that grew up after the success of the *Brown* litigation as ineffective in achieving its objectives, counterproductive in diverting resources away from progressive goals, and conservative in reinforcing the power of existing institutional arrangements and structures of subordination.<sup>7</sup>

In 1991, yet another critique of legal liberalism emerged with the publication of Gerald Rosenberg's *The Hollow Hope*. This newer critique was neo-institutionalist,<sup>8</sup> shifting the focus away from rights-talk and lawyers' practices to institutions—the interactions between courts, legislatures, and public opinion—and its overwhelming message was of institutional constraint in the civil rights arena.<sup>9</sup> Rosenberg argued that the Supreme Court's decree in

The work of Derrick Bell is difficult to categorize as a whole and contains elements that support all the critiques of legal liberalism that are outlined in the text. See, e.g., DERRICK BELL, *SILENT COVENANTS: BROWN V. BOARD OF EDUCATION AND THE UNFULFILLED HOPES FOR RACIAL REFORM* (2004) [hereinafter BELL, *SILENT COVENANTS*]; Derrick A. Bell, *Bell, J., Dissenting*, in *WHAT BROWN V. BOARD OF EDUCATION SHOULD HAVE SAID: THE NATION'S TOP LEGAL EXPERTS REWRITE AMERICA'S LANDMARK CIVIL RIGHTS DECISION 185, 185-200* (Jack M. Balkin ed., 2001) [hereinafter Bell, *Dissenting*]; Bell, *The Interest-Convergence Dilemma*, *supra*; Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 *YALE L.J.* 470 (1976) [hereinafter Bell, *Serving Two Masters*].

7. See MICHAEL W. MCCANN, *TAKING REFORM SERIOUSLY: PERSPECTIVES ON PUBLIC INTEREST LIBERALISM* (1986); STUART A. SCHEINGOLD, *THE POLITICS OF RIGHTS: LAWYERS, PUBLIC POLICY, AND POLITICAL CHANGE* (1974); Bell, *Serving Two Masters*, *supra* note 6.
8. I call it neo-institutionalist to distinguish it from older work that also focused on the Supreme Court as the centerpiece of civil rights scholarship, although with a different set of concerns. See, e.g., LOREN MILLER, *THE PETITIONERS: THE STORY OF THE SUPREME COURT OF THE UNITED STATES AND THE NEGRO* (1966).
9. See MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY* (2004); GERALD ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 339 (1991); Davison M. Douglas, *The Limits of Law in Accomplishing Racial Change: School Segregation in the Pre-Brown North*, 44 *UCLA L. REV.* 677 (1997). Much of the institutionalist thrust of this work had been anticipated in the 1970s and 1980s critiques of public interest lawyering, see *supra* note 7, as well as in an even older tradition in political science. See Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 *J. PUB. L.* 279 (1957). Mary Dudziak gave the neo-institutionalists support, although that was not her primary objective, by emphasizing that the *Brown* decision fit in with American foreign policy objectives. See MARY L. DUDZIAK, *COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY* (2000). For subtle rejoinders to the emerging neo-institutionalist distinction between litigation and other forms of protest, see Robert Jerome Glennon, *The Role of Law in the Civil Rights Movement: The Montgomery Bus Boycott, 1955-1957*, 9 *LAW & HIST. REV.* 59 (1991); and Randall Kennedy, *Martin Luther King's Constitution: A Legal History of the Montgomery Bus*

*Brown* was largely ineffective until the executive branch and Congress began to support civil rights reform a decade later. He concluded that black communities and the NAACP had misplaced their resources by relying on legal liberal transformation and should have supported lobbying, community mobilization, and direct action instead.<sup>10</sup>

More recently, Michael Klarman has generalized Rosenberg's argument that the civil rights advances of the late twentieth century had little to do with court decrees and much more to do with social phenomena and trends that occurred largely outside of the bounds of judicial action, and that *Brown* helped mobilize opponents of integration.<sup>11</sup> Klarman argued that between *Plessy* and *Brown*, Supreme Court decisions in the civil rights arena were largely in accord with public opinion, and the Court's decrees, for the most part, were effective only where public opinion supported them. In fact, he asserted, the principal short-term effect of *Brown* itself was to inspire a white segregationist backlash in the South.<sup>12</sup> A related line of scholarship has combined the argument that courts rarely push social change ahead of contemporary mores with the assertion that the legal liberal faith in desegregation remedies helped destroy intraracial institutions, such as segregated schools, that served a salutary purpose in local African-American communities.<sup>13</sup> Derrick Bell has taken this

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*Boycott*, 98 YALE L.J. 999 (1989). Both argue convincingly that (1) the Montgomery bus boycott intertwined litigation and extrajudicial protest action, (2) the turn to litigation actually radicalized the boycotters, and (3) without *Brown* the boycott most likely would not have succeeded.

10. See ROSENBERG, *supra* note 9, at 39-169, 336-39.
11. For Rosenberg's earlier and less-developed version of Klarman's argument, see *id.* at 157-69, 341-42.
12. See KLARMAN, *supra* note 9, at 344-62. Klarman did concede, however, that the segregationist backlash helped advance the civil rights movement's goals. He argued that when segregationists overplayed their hands in repressing civil rights demonstrators a decade later, national sentiment was mobilized behind desegregation. See Michael J. Klarman, *Brown, Racial Change, and the Civil Rights Movement*, 80 VA. L. REV. 7 (1994); Michael J. Klarman, *How Brown Changed Race Relations: The Backlash Thesis*, 81 J. AM. HIST. 81 (1994).
13. See, e.g., BELL, *SILENT COVENANTS*, *supra* note 6; DAVID S. CECELSKI, *ALONG FREEDOM ROAD: HYDE COUNTY, NORTH CAROLINA, AND THE FATE OF BLACK SCHOOLS IN THE SOUTH* (1994); Bell, *Dissenting*, *supra* note 6; Bell, *The Interest-Convergence Dilemma*, *supra* note 6, at 532; Bell, *Serving Two Masters*, *supra* note 6. For examples of recent historical writing in this vein, see Adam Fairclough, *The Costs of Brown: Black Teachers and School Integration*, 91 J. AM. HIST. 43 n.1 (2004) (citing examples of such historical writing). For a challenge to this interpretation of the relation between desegregation litigation and intraracial African-

argument so far as to claim that the Court should have rejected the *Brown* lawyers' claims and instead vigorously enforced separate-but-equal.<sup>14</sup>

By the time of the fiftieth anniversary of *Brown* in 2004, much of the thrust of the leftist and neo-institutionalist critiques had become mainstream. Indeed, a central message of the books and symposia published to commemorate that occasion was of civil rights lawyers and organizations that were wedded to a legal liberalism that had apparently triumphed in *Brown*, only to be frustrated in its aftermath.<sup>15</sup>

The background assumption underlying the critiques of both the neo-institutionalist and leftist scholars was that there existed a vibrant legal liberalism that had come into being by mid-century, with its greatest exemplar being the *Brown* decision and the struggle to implement it.<sup>16</sup> That struggle, it was assumed, was the product, in part, of the apparent successes of a civil rights movement wedded to rights, courts, and an attack on de jure segregation. Indeed, the central debates that have occupied these scholars—rights as tools for reform versus rights as supports for the status quo, and courts as engines of social change versus courts as powerless institutions—only make sense given this background assumption.

In this Article, I will analyze the intellectual and cultural history of African-American lawyers and civil rights politics between the First and Second World Wars without the background assumption of legal liberalism. In the standard interpretation of civil rights history, the interwar period is the formative era for modern civil rights politics. During that period, the African-American lawyers who would take charge of the NAACP's litigation came to the bar, established

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American institutions and groups, see Tomiko Brown-Nagin, *Race as Identity Caricature: A Local Legal History Lesson in the Saliency of Intra-racial Conflict*, 151 U. PA. L. REV. 1913 (2003).

14. See BELL, SILENT COVENANTS, *supra* note 6, at 20-28; Bell, *Dissenting*, *supra* note 6; see also Alex M. Johnson, Jr., *Bid Whist, Tonk, and United States v. Fordice: Why Integrationism Fails African-Americans Again*, 81 CAL. L. REV. 1401, 1409 (1993) (calling the *Brown* litigation and remedy "a mistake").
15. See, e.g., SHERYLL CASHIN, *THE FAILURES OF INTEGRATION: HOW RACE AND CLASS ARE UNDERMINING THE AMERICAN DREAM* (2004); CHARLES J. OGLETREE, JR., *ALL DELIBERATE SPEED: REFLECTIONS ON THE FIRST HALF CENTURY OF BROWN V. BOARD OF EDUCATION* (2004); Jack M. Balkin, *What Brown Teaches Us About Constitutional Theory*, 90 VA. L. REV. 1537 (2004); Nathaniel R. Jones, *The Judicial Betrayal of Blacks—Again: The Supreme Court's Destruction of the Hopes Raised by Brown v. Board of Education*, 32 FORDHAM URB. L.J. 109 (2004). See generally Round Table, *Brown v. Board of Education, Fifty Years After*, 91 J. AM. HIST. 19 (2004); Symposium, *Brown at Fifty*, 117 HARV. L. REV. 1302 (2004).
16. See KALMAN, *supra* note 2, at 2 (arguing that the success of the *Brown* litigation was the greatest exemplar of legal liberalism).

themselves in practice, displaced the white lawyers who handled the NAACP's early cases, and secured the first of the Supreme Court precedents that are thought to have laid the groundwork for *Brown*. If there is anywhere that the antecedents of legal liberalism should be found, it would be in these lawyers' practices during this period.

I will argue, however, that the professional project of the African-American bar during this formative era encompassed far more than the creation of a juridically cognizable right to be free of segregation. In fact, that project generated disputes within civil rights politics and arguments about law, social change, and African-American identity that far exceed the scope of the debates that have animated standard legal histories of the civil rights movement, or the more recent work of its leftist and neo-institutional critics. I will argue that legal liberalism should be abandoned as an organizing principle for understanding civil rights history in the interwar period. Although the analysis presented here ends during World War II, I will suggest that scholars should also be wary of concluding, as recent work has suggested, that a pervasive, coherent, and unsophisticated legal liberalism had taken shape within civil rights politics by the time of the *Brown* decision. If that is so, the scholarly debates that have been premised, in part, on this assumption should also be reframed.

One methodological shift that this Article calls for is a shift in the locus of civil rights law and politics. Traditional accounts have incorporated the legal liberal assumption that the locus of civil rights lawyering lies in rights claims directed at the state and, in particular, at the Supreme Court. That, in turn, has generated a static view of civil rights history in the work of many of the revisionists, who tend to see civil rights history as the story of status relationships perpetuating themselves over time due to the malleability of judicial deployment of rights discourse, or of court powerlessness making itself manifest over time. As such, this view seems out of step with recent legal history and law-and-society scholarship, which has argued that the terrain of legal contestation, conflict, and cooptation extends far beyond the bounds of formal legal institutions.<sup>17</sup> In this Article, I attempt to carry forward the project

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17. See, e.g., WILLIAM E. FORBATH, *LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT* (1991); HENDRIK HARTOG, *MAN AND WIFE IN AMERICA: A HISTORY* (2000); LAW IN EVERYDAY LIFE (Austin Sarat & Thomas R. Kearns eds., 1993); DYLAN C. PENNINGROTH, *THE CLAIMS OF KINFOLK: AFRICAN AMERICAN PROPERTY AND COMMUNITY IN THE NINETEENTH-CENTURY SOUTH* 131-61 (2003); AMY DRU STANLEY, *FROM BONDAGE TO CONTRACT: WAGE LABOR, MARRIAGE, AND THE MARKET IN THE AGE OF SLAVE EMANCIPATION* (1998). In a related vein, a wave of new scholarship on the legal profession has identified a



of this newer work. For instance, I recover vibrant strands of voluntarist and Marxist civil rights politics during the interwar era that defined themselves in opposition to legalist claims on state power. These strands called for a quite different idea of the role of civil rights lawyering and politics than is recognized in the traditional literature.

The approach that I employ here also breaks with traditional accounts of civil rights law during this period by focusing not on the NAACP's national office, but rather on the legal consciousness that the African-American civil rights lawyers developed in their own professional lives and carried with them into their NAACP work. Traditional civil rights histories have treated civil rights lawyers outside the national office as "cooperating attorneys," implementing strategies that had their origins in the NAACP's desegregation litigation. These lawyers, however, were heirs to a tradition of professional identity and civil rights strategy that began long before the founding of the NAACP. Most of them interacted with each other in black lawyers' professional groups, and many articulated visions of black citizenship—including what I will call "race uplift"—that remain invisible within a framework that focuses on the national office and its presumed struggle to invalidate *de jure* segregation.

Part I of this Article charts the making of the legal liberal interpretation of civil rights lawyering and politics. It argues that this interpretation only appeared in the aftermath of *Brown* and that, prior to that decision, the scholarly literature charted a variety of objectives for the civil rights bar, none of which encompassed legal liberalism.

Part II examines the African-American bar between Reconstruction and World War I, arguing that the professional identity that the pre-*Brown* generation of civil rights lawyers inherited from their predecessors was not legal liberal in orientation, but rather focused as much on building up intraracial African-American institutions as on attacking segregation.

Part III examines the period between World War I and the beginning of the New Deal, arguing that many of the civil rights bar leaders in this period continued to adhere to race uplift, particularly its voluntarist strand. It also

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rich world of reform-lawyering practices that do not match the legal liberalism that has been subject to such vigorous critique. See, e.g., Michael McCann & Helena Silverstein, *Rethinking Law's "Allurements": A Relational Analysis of Social Movement Lawyers in the United States*, in *CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES* 261, 266 (Austin Sarat & Stuart Scheingold eds., 1998); Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1015 (2004); Ann Southworth, *Lawyers and the "Myth of Rights" in Civil Rights and Poverty Practice*, 8 B.U. PUB. INT. L.J. 469 (1999).

challenges the scholarly perception of Charles Houston's "social engineering" view of reform lawyering. Houston's approach influenced many of his students and associates at Howard Law School, including Thurgood Marshall. I will argue that, rather than primarily preparing the ground for *Brown*, as is often assumed, Houston's vision was initially more voluntarist than legalist, and focused more on training lawyers for intraracial institutional work than on training a cadre of lawyers who would attack de jure segregation.

Part IV examines the period between the onset of the Great Depression and the beginning of World War II. The conventional story of civil rights lawyering during this period focuses on efforts to secure the initial court precedents for an eventual attack on racial segregation in public institutions, culminating in *Brown*. This Part reframes the period as one in which civil rights attorneys such as Charles Houston and William Hastie began formulating an attack on private discrimination in the labor market. It does so by relating the civil rights lawyers' efforts to a law reform movement whose objectives are usually seen as opposed to those of the civil rights bar—legal realism.

Part V argues that the professional project of the civil rights bar of the late 1930s was closely aligned with the economic citizenship guarantees of the late New Deal. As World War II began, the leaders of the African-American civil rights bar argued that the future of the civil rights movement lay in cross-racial, class-based economic alliances with whites rather than in legalist transformation through the courts.

## I. THE MAKING OF A LEGAL LIBERAL INTERPRETATION

The legal liberal interpretation of civil rights lawyering and politics emerged only after the apparent success of a particular mode of civil rights lawyering in the *Brown* litigation. Scholars and commentators who wrote in the era before *Brown* and examined the African-American bar mapped a variety of political objectives, allegiances, and arguments taking place within the world of black lawyering and middle-class African-American politics. All that began to change after the *Brown* decision. Both historians and legal scholars began to imagine that something like *Brown* had always been the central objective of the black bar in the era of segregation. The new interpretation—which was, in fact, created with the help of African-American lawyers with direct experience with the complicated civil rights politics of the interwar period—would define scholarly agendas for the next half-century.

The first attempt to grapple with the professional project of the generation of black lawyers that came to the bar after World War I was Charles Hamilton Houston's 1928 survey of the African-American legal profession. The principal challenge that Houston—the first black editor of the *Harvard Law Review* and

future Vice-Dean of Howard Law School—grappled with was neither rights advocacy nor transformative litigation, but rather the relationship between black lawyers and African-American business interests. While briefly mentioning that litigating “case[s] of discrimination or oppression” was an important function of the black bar, he devoted far more space in his report to outlining the ways that black lawyers could aid in business development.<sup>18</sup>

Six years later, Carter G. Woodson’s *The Negro Professional Man and the Community*, the most comprehensive study of black professionals of the era, adopted a similar framework. In analyzing how those lawyers were helping African-American communities, Woodson focused on black lawyers’ service to intraracial institutions rather than reform litigation.<sup>19</sup> Even Philadelphia lawyer Fitzhugh Lee Styles—who represented the legalist pole of the postwar black bar—hedged his bets when it came to the transformative potential of litigation. Styles hoped that his 1937 book, *Negroes and the Law*, would help “spur us on to unceasing efforts in the Courts to obtain and defend our rights”; but, he argued, when litigation ran up against its limits, “we must seek legislative remedies for the remaining social injustices” by mobilizing black voting strength.<sup>20</sup> In sum, Styles argued that only litigation wedded to political mobilization could transform black citizenship.

Social scientists following up Houston’s and Woodson’s efforts came to similar conclusions. William Hale’s 1949 unpublished dissertation, *The Career Development of the Negro Lawyer in Chicago*, the best social scientific study of the black bar to be conducted before the 1970s, almost never mentioned antidiscrimination work when discussing the career motivations, practices, community perceptions, and future of black lawyers in the locale that

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18. Charles Houston, Tentative Findings re Negro Lawyers 3, 7-9 (Jan. 23, 1928) (revised copy) (unpublished manuscript, on file with the Laura Spelman Rockefeller Memorial Papers (LSRMP), Rockefeller Archive Center, Sleepy Hollow, N.Y., Series 3.8, Box 101) [hereinafter Houston, Tentative Findings (revised copy)]; see also Charles Houston, Findings on the Negro Lawyer (May 3, 1928) (unpublished manuscript, on file with LSRMP, Series 3.8, Box 101) [hereinafter Houston, Findings on the Negro Lawyer]; Charles Houston, Tentative Findings re Negro Lawyers (Jan. 23, 1928) (uncorrected copy) (unpublished manuscript, on file with LSRMP, Series 3.8, Box 101). There are actually three somewhat different versions of the report, although scholars have often focused on the tentative revised draft because a copy of it is also available in the Roscoe Pound Papers at Harvard Law School.
  19. See CARTER GODWIN WOODSON, *THE NEGRO PROFESSIONAL MAN AND THE COMMUNITY*, at v, 240-49 (1934).
  20. Fitzhugh Lee Styles, *Dedication to NEGROES AND THE LAW*, at v, v (Fitzhugh Lee Styles ed., 1937).

contained the largest population of black lawyers of any city in the nation, as well as the second largest population of such lawyers with major civil rights litigation experience.<sup>21</sup> The legal liberal interpretation was also absent from the three most comprehensive pre-1950s social science studies of African-American life and the place of the professional class within it: Gunnar Myrdal's *An American Dilemma*, St. Clair Drake and Horace Cayton's *Black Metropolis*, and E. Franklin Frazier's *The Negro Family*. All three studies lumped black lawyers in with a relatively undifferentiated African-American professional class that was as much, if not more, concerned with maintaining its own position at the apex of black life as with using its professional skills to eliminate de jure segregation. Myrdal in particular noted the deep ambivalence among middle-class blacks about attacking segregation, arguing that many favored intraracial institutions. Myrdal, like Drake and Cayton, duly noted the strong support among the traditional black middle class for the NAACP's program of litigation and lobbying, but both works shared the conclusion that the traditional bourgeoisie, including the black bar, would not be at the helm of any project for a radical reconstruction of race relations.<sup>22</sup>

Views about the black bar began to change in the wake of the NAACP's victory in *Brown v. Board of Education*, which was planned and executed by a predominately African-American legal team. For instance, the first major post-*Brown* survey of the mid-century black bar, G. Franklin Edwards's 1959 study of Washington, D.C. black professionals, entitled *The Negro Professional Class*, noted that "[t]he conception of the Negro lawyer as a champion of the group, reinforced in recent years by the dramatic successes in the Supreme Court, has done much to create a new image of the Negro's place in law."<sup>23</sup> Edwards argued that the successes of individual black lawyers had done much to reverse prior perceptions of them, and that "[p]erhaps the single outstanding personality in this respect . . . was Charles Houston."<sup>24</sup>

As Edwards's account indicates, Charles Houston was key to the emergence of the new interpretation of the black civil rights bar. He inspired his former

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21. William Henri Hale, *The Career Development of the Negro Lawyer in Chicago* 44-149 (Sept. 1949) (unpublished Ph.D. dissertation, University of Chicago) (on file with the University of Chicago Library).
  22. See ST. CLAIR DRAKE & HORACE R. CAYTON, *BLACK METROPOLIS: A STUDY OF NEGRO LIFE IN A NORTHERN CITY* 526-27, 730-46 (1945); E. FRANKLIN FRAZIER, *THE NEGRO FAMILY IN THE UNITED STATES* 322-26 (rev. ed. 1948); 2 GUNNAR MYRDAL, *AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY* 794-96 (4th ed. 1996).
  23. G. FRANKLIN EDWARDS, *THE NEGRO PROFESSIONAL CLASS* 137 (1959).
  24. *Id.*

students and colleagues at Howard Law School, including Thurgood Marshall and William Hastie, to do reform work. He followed up his service at Howard with a post as a full-time staff lawyer for the NAACP. He was also selfless and sacrificing—so much so that friends and relatives believed that his exhausting schedule of reform activities contributed to his untimely death in April 1950, just six weeks before the Court handed down its key decisions in the last of the NAACP's major pre-*Brown* desegregation cases. Four years later, former students, associates, and colleagues of Houston would make up much of the team that succeeded in having school segregation declared unconstitutional. He was in many ways, as William Hastie famously eulogized him, “the Moses of that journey,” a prophet who would lead his people to the promised land but not enter in himself.<sup>25</sup>

The question was, which journey? The recovery of Charles Houston as an exemplary lawyer and public figure in the aftermath of *Brown* made it natural that scholars and friends remembered his career—and by extension the careers of his generation of black lawyers—as a continuous set of activities whose unifying theme was a desire to produce something like the result in *Brown*. The process began as early as 1963, when Geraldine Segal completed the first monographic study of Charles Houston's career,<sup>26</sup> subsequently published in slightly revised form under the title *In Any Fight Some Fall*.<sup>27</sup> Segal's study shared many elements with subsequent interpretations of the mid-century black bar, and in fact defined the new paradigm: (1) that “discrimination” or “segregation” was the evil to be overcome—either primarily in state institutions, or in public and private life without much distinction, (2) that litigation was the primary means of such transformation, and (3) that the professional project of the African-American civil rights bar was relatively unchanging over time, with Houston and his generation carrying forward a single civil rights vision from the beginning of their professional lives to its fruition in *Brown*.

Some of the more influential efforts to erect the legal liberal model came from the African-American civil rights bar itself. William Hastie's invocation of

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25. William H. Hastie, *Charles Hamilton Houston (1895-1950)*, 57 THE CRISIS 364, 365 (1950). For a similar view, see Unattributed Obituary for Charles Hamilton Houston (transcript on file with the Charles H. Houston Papers (CHHP), Moorland-Spingarn Research Center, Howard University (M-SRC), Box 163-1).

26. Geraldine R. Segal, *A Sketch of the Life of Charles Houston* (1963) (unpublished M.A. thesis, University of Pennsylvania) (on file with the University of Pennsylvania Library).

27. GERALDINE R. SEGAL, *IN ANY FIGHT SOME FALL* (1975).

Houston as “the Moses of that journey” encouraged even Houston’s former friends and associates to remember, decades after he began his reform efforts, that those efforts were primarily directed at producing a *Brown v. Board of Education*. In 1963, for instance, Thurgood Marshall would summarize Houston’s achievements to Geraldine Segal by writing that “the fruits of his teachings can best be measured by two admitted facts,” (1) that the NAACP’s legal work from 1933 up to the present time was the product of Houston’s efforts, and (2) that nearly all the lawyers who argued *Brown* had been taught or influenced by Houston.<sup>28</sup>

All of this was true, but Marshall’s recollections also subtly shaded the central story of Houston’s professional life into a continuous effort to achieve something like the *Brown* decision. By the late 1970s, Marshall remembered that he, Houston, William Hastie, and Leon Ransom began to work out “this attack on the segregated school system” while he was in law school.<sup>29</sup> When Oliver Hill, Marshall’s law school classmate, published his important autobiography in 2000, Hill remembered that the reason he went to law school was to “challenge the constitutionality of the Virginia segregation laws.”<sup>30</sup> No one would deny that Hill, Marshall, Houston, and other post-World War I black lawyers entered their profession with an abiding desire to do something to improve the lot of their fellow African-Americans, or that some part of that desire encompassed public law litigation. However, as the succeeding sections of this Article will show, the professional vision of the interwar black bar encompassed far more than legal liberalism.

Perhaps the strangest convert to the legalist vision among the members of the pre-*Brown* generation was Los Angeles lawyer Loren Miller. Two decades before *Brown*, Miller had been an inveterate critic of the NAACP’s use of litigation, and of Houston’s hiring as its chief lawyer in 1935.<sup>31</sup> In the intervening years, however, Miller had been absorbed into civil rights litigation efforts, earning a trip to the Supreme Court to argue the racially restrictive covenant cases alongside Houston, Thurgood Marshall, and other attorneys affiliated with the NAACP. By 1966, when Random House published his legal

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28. See Segal, *supra* note 27, at 67-68.

29. THURGOOD MARSHALL, *The Reminiscences of Thurgood Marshall*, in THURGOOD MARSHALL: HIS SPEECHES, WRITINGS, ARGUMENTS, OPINIONS, AND REMINISCENCES 413, 416 (Mark V. Tushnet ed., 2001).

30. OLIVER W. HILL, SR., *THE BIG BANG: BROWN V. BOARD OF EDUCATION, AND BEYOND: THE AUTOBIOGRAPHY OF OLIVER W. HILL, SR.* 76 (Jonathan K. Stubbs ed., 2000).

31. See Loren Miller, *How Left Is the NAACP*, *NEW MASSES*, July 16, 1935, at 12.

history of race relations, entitled *The Petitioners*, Miller cast the Supreme Court as the “guardian” of black citizenship, and African-Americans as its “ward[s].”<sup>32</sup> He now defended the NAACP’s legal strategy as principled and well thought-out, and celebrated “the rise of a corps of talented and resourceful young Negro lawyers” and other professionals dedicated to litigation that would make segregation disappear.<sup>33</sup> Few interpretations of civil rights history could be as persuasive as one written by a prominent lawyer with direct experience of that history.

When Richard Kluger’s *Simple Justice*—the most influential historical account of civil rights law and politics in the era before *Brown*—was published a decade later, it adopted both Miller’s chronology and his framework. Kluger brought a journalist’s eye for detail to what he called “Black America’s Struggle for Equality,” but also popularized the new paradigm by defining the core of the struggle as the effort to overturn *Plessy* and achieve *Brown*.<sup>34</sup> Mark Tushnet followed up Kluger’s efforts with *The NAACP’s Legal Strategy Against Segregated Education*, in which Tushnet outlined a wide range of debates among the NAACP staff, its lawyers, and its funders. However, by focusing on “the constraints placed on litigation strategy by organizational needs,” Tushnet’s work implicitly reinforced the prevailing tendency to focus on problems of juridical strategy within the legalist paradigm rather than question the paradigm itself.<sup>35</sup> Genna Rae McNeil’s *Groundwork: Charles Hamilton Houston and the Struggle for Civil Rights*, the definitive account of Houston’s life, skirts the bounds of the legalist paradigm at many points. Yet, with a title that suggests that the main story of Houston was his laying the groundwork for *Brown*, and with an introductory quotation from Thurgood Marshall to the same effect, McNeil’s work may leave readers with the impression that it supports rather than challenges the legalist interpretation.<sup>36</sup> These new works were rich and complex, but also placed the *Brown* litigation at the center of civil

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32. LOREN MILLER, *THE PETITIONERS: THE STORY OF THE SUPREME COURT OF THE UNITED STATES AND THE NEGRO* 8, 259-60 (1966).
  33. *Id.* at 260.
  34. RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA’S STRUGGLE FOR EQUALITY* (1976).
  35. MARK V. TUSHNET, *THE NAACP’S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925-1950*, at xi (1987).
  36. GENNA RAE MCNEIL, *GROUNDWORK: CHARLES HAMILTON HOUSTON AND THE STRUGGLE FOR CIVIL RIGHTS* 3 (1983).

rights history in a way that helped cement the scholarly and public perception that legal liberalism was the central animating vision of that movement.

Consider, for instance, three historical interpretations that will be challenged later in this Article. The first is the tendency to view the historical works of the 1970s and 1980s as standing for the proposition that Charles Houston's famous "social engineering" school of black lawyers at Howard Law School was primarily intended to produce lawyers who would attack de jure segregation. As one recent scholar has asserted: "Houston believed that the campaign against the separate-but-equal doctrine must be led by an elite core of black lawyers specially trained as 'social engineers' for black rights. To that end, Houston ruthlessly transformed Howard Law School . . . ."<sup>37</sup>

The second interpretation has been put forth by scholars who accept the traditional identification of civil rights protest with claims against the state. These scholars have argued that litigation was the only avenue of legal protest available to African-Americans, who were excluded from full participation in other institutions of government.<sup>38</sup> A third interpretation has been put forward in the leading historical interpretation of the twentieth-century American bar, which argued that "civil rights" for the black bar was composed of a different set of issues than the economic citizenship issues that occupied the energies of the New Deal reformers.<sup>39</sup>

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37. David B. Wilkins, *Social Engineers or Corporate Tools? Brown v. Board of Education and the Conscience of the Black Corporate Bar*, in *RACE, LAW, AND CULTURE: REFLECTIONS ON BROWN V. BOARD OF EDUCATION* 137, 137 (Austin Sarat ed., 1997) (endnote omitted); see also OGLETREE, *supra* note 15, at 115 ("The time had come, Houston believed, to claim, to demand, and to expect equal protection under the law, and through litigation the social institution of law could be utilized to challenge institutional racism effectively."); JAMES T. PATTERSON, *BROWN V. BOARD OF EDUCATION: A CIVIL RIGHTS MILESTONE AND ITS TROUBLED LEGACY* 12 (2001) ("Led by Charles Houston, its passionate, demanding dean, the school maintained high educational standards. Marshall idolized Houston, who saw litigation as the key to better civil rights . . . ."); Leland Ware, *A Difference in Emphasis: Charles Houston's Transformation of Legal Education*, 32 *HOW. L.J.* 479, 483-84 (1989) ("Houston intended to train a generation of Black lawyers who would serve as generals in the war against racial discrimination.").
38. See LAWRENCE M. FRIEDMAN, *AMERICAN LAW IN THE 20TH CENTURY* 286 (2002); KLARMAN, *supra* note 9, at 164.
39. See JEROLD S. AUERBACH, *UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA* 210-17 (1976). Of course, Auerbach's account was written before the full array of historical works of the 1970s and 1980s had been published.



Like the scholarship of the 1970s and 1980s, the work propounding these three interpretations was often subtle and illuminating.<sup>40</sup> However, its emergence signaled that an understanding of the conflicting objectives and perceptions of black lawyers in the era of segregation—described in the pre-*Brown* scholarly literature and even by Houston himself—had been lost. In its place, legal scholars, historians, and even veterans of the civil rights politics of that era had substituted the legal liberal interpretation. The remaining portion of this Article contests this interpretation.

## II. SETTING THE STAGE:

### **LOCHNER, THE POLICE POWER, AND RACE UPLIFT**

The professional inheritance of the post-World War I generation of African-American civil rights lawyers was developed during the years between Reconstruction and World War I, when the first significant population of African-American lawyers came to the bar. The central problem that the leading black lawyers of that era grappled with was the erosion of the citizenship rights guaranteed by postbellum civil rights laws and constitutional provisions, symbolized in the historical literature by the Supreme Court's decision in *Plessy v. Ferguson*. The leaders of the black bar adopted several approaches to this problem. One relied on the judicially created doctrines, made famous during the *Lochner* era,<sup>41</sup> that were intended to rein in exercises of the police power. A second relied on the police power itself to argue for extensions of state legislative power to combat private discrimination.

By the turn of the century, however, these lawyers had adopted a new professional consciousness—race uplift. Race uplift narrowed the scope of the black bar leaders' constitutional and civil rights vision and increased attention to cultural and institutional work to be done within African-American communities. As a result, when the post-World War I generation of black lawyers came to the bar, it inherited a professional vision that often focused less on attacking de jure segregation and more on using their professional energies to further this intraracial work.

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40. David Wilkins, for instance, has argued that Houston was aware of the value of racial loyalty and intraracial organization, and that he was probably acquainted with contemporary arguments that litigation was ineffective. See Wilkins, *supra* note 37, at 141, 144.

41. I use the term "*Lochner* era" to refer loosely to the late-nineteenth- and early-twentieth-century era in which the doctrines outlined in this Part were articulated and deployed by the courts.

### A. *Civil Rights Lawyers and the Lochner Tradition*

The first impulse of the postbellum African-American bar grew out of the same set of concerns that produced the new judicial doctrines of the *Lochner* era: that states would rely on the police power—their inherent power to regulate for the sake of common health, safety, and morals—in ways that overstepped constitutional bounds.<sup>42</sup> Black attorneys feared that novel uses of state power would be employed to constrain the citizenship rights of African-Americans. That worry quickly proved valid. Postbellum Southern state governments enacted the infamous Black Codes to limit the civil rights of freedmen and freedwomen, although Congress quickly countered with the Civil Rights Act of 1866, the Fourteenth Amendment, and the onset of a more radical Reconstruction. As federal power waned in the former Confederacy, however, a segregationist legal imagination took shape. By the turn of the century, Southern governments had enacted regulations requiring racial separation in almost every aspect of civil and social life.<sup>43</sup>

The nation's small corps of black attorneys recognized the danger and began to formulate arguments that would protect African-Americans from such measures. One of the earliest was put forward by John Mercer Langston, the most prominent member of the nineteenth-century black bar and future dean of Howard Law School.<sup>44</sup> As early as 1865, Langston argued that black citizenship rights were “not created by constitutions simply, nor . . . uncreated by them” but, rather, were “a constituent element of manhood.”<sup>45</sup> This was the

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42. For useful discussions of the police power, see 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: THE CRISIS OF LEGAL ORTHODOXY* 27-30 (1992); and WILLIAM J. NOVAK, *THE PEOPLE'S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA* 1-18 (1996).

43. See, e.g., ERIC FONER, *RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863-1877*, at 198-210 (1988); C. VANN WOODWARD, *THE STRANGE CAREER OF JIM CROW* 97-102 (3d rev. ed. 1974); Kenneth W. Mack, *Law, Society, Identity, and the Making of the Jim Crow South: Travel and Segregation on Tennessee Railroads, 1875-1905*, 24 *LAW & SOC. INQUIRY* 377 (1999).

44. See WILLIAM CHEEK & AIMEE LEE CHEEK, *JOHN MERCER LANGSTON AND THE FIGHT FOR BLACK FREEDOM 1829-65* (1989); JOHN MERCER LANGSTON, *FROM THE VIRGINIA PLANTATION TO THE NATIONAL CAPITOL* (photo. reprint 1969) (1894).

45. John Mercer Langston, *Citizenship and the Ballot*, Address Before the Colored Men's Convention of Indiana (Oct. 25, 1865), in *FREEDOM AND CITIZENSHIP* 99, 110 (photo. reprint 1969) (1883). The gendered language was no accident, for the Reconstruction-era Congress would reject arguments for extension of suffrage to women. See Ellen Carol DuBois,

legal framework through which black attorneys would argue for suffrage, as well as for civil rights for African-Americans.

Black lawyers who encountered the problem of state power in the postbellum era drew on the natural rights tradition to argue that rights—neither “created by” nor “uncreated by” positive law, as Langston put it—limited certain types of state action. Post-Civil War black lawyers ran their citizenship arguments through the classic gamut of natural rights frameworks, including the language of the Declaration of Independence,<sup>46</sup> the distinction between alienable and inalienable rights,<sup>47</sup> and the attempt to expand the private sphere of “liberty” protected by the Fourteenth Amendment from arbitrary deprivation, as articulated by Justice Stephen Field.<sup>48</sup> They relied on

*Outgrowing the Compact of the Fathers: Equal Rights, Woman Suffrage, and the United States Constitution, 1820-1878*, 74 J. AM. HIST. 836 (1987).

46. See CHARLES W. CHESNUTT, *Resolutions Concerning Recent Southern Outrages* (1892), reprinted in *ESSAYS AND SPEECHES* 88, 88 (Joseph R. McElrath, Jr. et al. eds., 1999) (arguing that state tolerance for and endorsement of railroad segregation, exclusion from public accommodations, and racial violence violated “[t]he only legitimate object and use of any government,” which “is to protect its citizens in the enjoyment of life, liberty and the pursuit of happiness”); D. Augustus Straker, Address to Citizens’ Meeting at Bethel A.M.E. Church, Detroit, Michigan (July 17, 1892), in 9 A.M.E. CHURCH REV. 188, 188 (1892) [hereinafter Straker, Address] (condemning disfranchisement, discrimination in public accommodations, and lynching by citing the protections of life, liberty, and the pursuit of happiness that ran back to the Declaration); D. Augustus Straker, Civil Rights, A Legal Argument Delivered at the Detroit Bar in the Civil Rights Case of *William W. Ferguson vs. Edward Gies*, Decided in the Supreme Court, September, 1890, in 7 A.M.E. CHURCH REV. 264, 266 (1891) [hereinafter Straker, Civil Rights] (arguing that the rights enshrined in the Fourteenth Amendment “do not depend upon statutes or even constitutions” for their validity).
47. See D. AUGUSTUS STRAKER, *THE NEW SOUTH INVESTIGATED* 114 (Arno Press 1973) (1888) (asserting that the rights of “personal security, . . . personal liberty, and the right of private property” are pre-political and inalienable).
48. See Charles W. Chesnutt, Rights and Duties, Speech to the Bethel Literary and Historical Association, District of Columbia (Oct. 6, 1908), in *ESSAYS AND SPEECHES*, *supra* note 46, at 252, 256 [hereinafter Chesnutt, Rights and Duties]; Robert Browne Elliot, The Civil Rights’ Bill, Speech Delivered in the U.S. House of Representatives (Jan. 6, 1874), in *MASTERPIECES OF NEGRO ELOQUENCE* 67, 70 (photo. reprint 1970) (Alice Moore Dunbar ed., 1914); Aaron A. Mossell, *The Unconstitutionality of the Law Against Miscegenation*, 5 A.M.E. CHURCH REV. 72, 74-75 (1888); D. Augustus Straker, *The Negro in the Profession of Law*, 8 A.M.E. CHURCH REV. 178, 179 (1891). Chesnutt acquired fame as a novelist, but also passed the Ohio bar in 1887 and maintained a court reporting business. He wrote on law (and also wrote fiction) throughout his life and considered himself a lawyer, although he was quick to acknowledge that others with more experience in legal practice had greater knowledge of law than he. But his career stayed well within the bounds of the colorful careers pursued by the post-Civil

all these frameworks in arguing that the natural rights tradition protected African-Americans' right to access public accommodations, vote, marry interracially, and pursue their callings free of race-based restrictions.<sup>49</sup>

By the late nineteenth century, black bar leaders turned to a more forward-looking set of legal tools to rein in segregationist state power. Thomas Cooley's rejection of natural rights arguments in favor of the definitional limitations of governmental power in his famous treatise *Constitutional Limitations*<sup>50</sup> became a standard rhetorical device in the writings, speeches, and occasional court arguments of the black bar leaders.<sup>51</sup> Other black lawyers argued that segregation laws lay outside the inherent limits of the police power without specifically citing Cooley's arguments.<sup>52</sup> Still other black lawyers argued that segregation laws violated state or federal constitutional due process protections, or alternatively that they were unconstitutional class legislation.<sup>53</sup>

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War black bar, and thus he will be treated in this Article as a lawyer. See Joseph R. McElrath, Jr. et al., *Introduction* to CHARLES W. CHESNUTT, *ESSAYS AND SPEECHES*, *supra* note 46, at xxiii, xxvi (detailing Chesnutt's bar passage and his court reporting business); see also Charles W. Chesnutt, *Some Requisites of a Law Reporter*, Speech to the Ohio Stenographers' Association, Dayton, Ohio (Aug. 25, 1891), *reprinted in* *ESSAYS AND SPEECHES*, *supra* note 46, at 84, 86 (detailing Chesnutt's opinion that "[a] good law reporter should be a lawyer" (emphasis omitted)); Charles W. Chesnutt, *The Courts and the Negro*, Speech Delivered c. 1908 (1908), *in* *ESSAYS AND SPEECHES*, *supra* note 46, at 262, 263 [hereinafter Chesnutt, *The Courts and the Negro*] (examining the legal status of African-Americans, but acknowledging his limitations as a non-practicing lawyer).

49. On the classic natural rights arguments in American political discourse, see generally DANIEL T. RODGERS, *CONTESTED TRUTHS: KEYWORDS IN AMERICAN POLITICS SINCE INDEPENDENCE* 45-79 (1987).
50. THOMAS M. COOLEY, *A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION* (photo. reprint 1987) (1868).
51. See BHD. OF LIBERTY, JUSTICE AND JURISPRUDENCE: AN INQUIRY CONCERNING THE CONSTITUTIONAL LIMITATIONS OF THE THIRTEENTH, FOURTEENTH, AND FIFTEENTH AMENDMENTS (Negro Univ. Press 1969) (1889) (adopting Cooley's rhetoric in its title); W. Ashbie Hawkins, *The Negro Lawyer: His Opportunity, His Duty* (Oct. 1, 1913), *in* *NEGROES AND THE LAW*, *supra* note 20, at 235, 238. There is some dispute over the authorship of *Justice and Jurisprudence*. J. Clay Smith contends that black lawyers in Baltimore participated in drafting the entire book, although he acknowledges that this is a disputed position. See J. Clay Smith, Jr., *Justice and Jurisprudence and the Black Lawyer*, 69 *NOTRE DAME L. REV.* 1077, 1085 n.41 (1994).
52. See Elliot, *supra* note 48, at 74; Mossell, *supra* note 48, at 75 (referring to both natural rights and the inherent limitations on the police power).
53. See Mossell, *supra* note 48, at 78-79; see also STRAKER, *supra* note 47, at 111; Chesnutt, *Rights and Duties*, *supra* note 48, at 252, 257; Letter from Charles W. Chesnutt to Wendell P.

*B. Civil Rights Lawyers and the Police Power*

Black bar leaders also recognized that *Lochner*-style invalidation of police power regulations would leave the contours of African-American citizenship to be defined by the common law, which had not been kind to their civil rights claims.<sup>54</sup> In the wake of emancipation, Northern state and federal courts—looking to common law as well as statutes—had decided a series of influential cases that permitted common carriers to segregate black customers and allowed other businesses open to the public to exclude blacks, clarifying what had been unclear law in both areas.<sup>55</sup> However, following the Supreme Court’s invalidation of the federal Civil Rights Act of 1875 in the *Civil Rights Cases*,<sup>56</sup> many Northern states used the police power to enact new statutes requiring nondiscrimination (rather than segregation) in public accommodations.<sup>57</sup> Building on these developments, black lawyers lobbied for Northern public accommodations laws and brought cases under the new nondiscrimination statutes, arguing that private discrimination was a matter of public import

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Stafford (June 25, 1909), reprinted in AN EXEMPLARY CITIZEN: LETTERS OF CHARLES W. CHESNUTT 1906-1932, at 69-70 (Jesse S. Crisler et al. eds., 2002). On class legislation, see GILLMAN, *supra* note 42, at 10, 61-71, 101-14.

54. David Bernstein has argued that the judicial doctrines of the *Lochner* era offered the best protection to African-Americans during the Jim Crow era. DAVID E. BERNSTEIN, ONLY ONE PLACE OF REDRESS: AFRICAN-AMERICANS, LABOR REGULATIONS, AND THE COURTS FROM RECONSTRUCTION TO THE NEW DEAL (2001) [hereinafter BERNSTEIN, ONLY ONE PLACE OF REDRESS]; David E. Bernstein, *Philip Sober Controlling Philip Drunk: Buchanan v. Warley in Historical Perspective*, 51 VAND. L. REV. 797, 872-75 (1998). That argument, however, fails to consider fully that the common law baseline of rights was not neutral with regard to race, but was subject to discriminatory decisionmaking. Indeed, both nineteenth- and twentieth-century black lawyers critiqued liberty of contract as validating segregation and coercion by private entities. See *infra* Sections II.B, IV.A-B. Bernstein’s argument also internalizes the court-centered legal liberal assumptions that have dominated civil rights histories, and thus fails to give adequate consideration to the full range of positions within black politics—from affirmative uses of the police power, to race uplift, to the anti-legalism of voluntarism and Marxist politics—that are outlined in this Article.
55. See, e.g., *W. Chester & Phila. R.R. Co. v. Miles*, 55 Pa. 209 (1867); see also CHARLES A. LOFGREN, THE PLESSY CASE: A LEGAL-HISTORICAL INTERPRETATION 118-24 (1987); Joseph William Singer, *No Right To Exclude: Public Accommodations and Private Property*, 90 NW. U. L. REV. 1283 (1996).
56. 109 U.S. 3 (1883).
57. See FRANKLIN JOHNSON, THE DEVELOPMENT OF STATE LEGISLATION CONCERNING THE FREE NEGRO 26-28, 50-55 (1918); Elizabeth Dale, “Social Equality Does Not Exist Among Themselves, nor Among Us”: Baylies v. Curry and Civil Rights in Chicago, 1888, 102 AM. HIST. REV. 311, 324 & n.44 (1997).

rather than the mere private act of the proprietor.<sup>58</sup> David Augustus Straker, for example, argued to a Michigan jury that “[a] man may regulate his home as he may; . . . but he cannot carry this power in a public place protected and sustained by the police power . . . .”<sup>59</sup> Some black attorneys extended the argument to purportedly private entities such as railroads and labor unions, maintaining that their activities were of sufficient public import as to be subject to police power regulation.<sup>60</sup> Charles Chesnutt, for instance, argued that the civil rights laws should extend to such entities because they were “either chartered by the State or enjoying special benefits by statute or by common law.”<sup>61</sup>

In short, the pre-*Brown* generation of civil rights lawyers inherited a professional discourse that placed it on all sides of late-nineteenth-century debates over the scope of the police power and the Civil War Amendments. A new impulse, however, soon counseled them to look to an entirely different source of protection for black citizenship.

### C. *The Voluntarist Alternative*

A third impulse that arose within the postbellum black bar was explicitly anti-legalist and emphasized black autonomy and voluntary private arrangements among African-Americans as the best guarantor of equality in American life. The pure voluntarist-autonomy view held that blacks should be suspicious, or at least skeptical, of the ability of innovations in either public or private law to guarantee equality with whites. Aside from a few basic ground rules designed to protect the autonomy of private-law-based decisionmaking by African-Americans, the voluntarist position emphasized the intraracial work that African-Americans needed to do to achieve equal status with whites.<sup>62</sup>

John Mercer Langston articulated this position at an early date. In the same 1865 speech in which he situated citizenship rights in the natural rights

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58. See Dale, *supra* note 57, at 328-30; Straker, *Civil Rights*, *supra* note 46; see also Peter Vickery, *The Genesis of the Black Law Firm in Massachusetts*, 5 MASS. LEGAL HIST. 121, 127-36 (1999).

59. Straker, *Civil Rights*, *supra* note 46, at 270.

60. See BHD. OF LIBERTY, *supra* note 51, at 37; Chesnutt, *The Courts and the Negro*, *supra* note 48, at 262, 266.

61. Chesnutt, *The Courts and the Negro*, *supra* note 48, at 262, 266.

62. For examples of related, although distinct, voluntarist impulses among labor organizers and women's rights activists, see FORBATH, *supra* note 17; and William E. Forbath, *The Shaping of the American Labor Movement*, 102 HARV. L. REV. 1109 (1989).

tradition, he also offered an alternative justification for granting suffrage and basic civil rights to freed slaves. Langston argued that African-Americans deserved equality because “we have made surprising advancement in all things that pertain to a well-ordered and dignified life,” such as the establishment of schools and black civic organizations, and success in professional occupations.<sup>63</sup> Langston repeated his argument that equal rights rested on black civic advancement during a series of postwar trips through the South, in which he instructed former slaves to “[a]pe the virtues of white men . . . [B]e economical and saving, recollecting that the higher your pile of greenbacks the loftier your position will be.”<sup>64</sup>

As segregationist sentiment grew, prominent black lawyers began to argue along similar lines for civil and political rights based on the progress of African-Americans in achieving practical equality in civic life. They now emphasized black adherence to the duties of citizenship—thrift, hard work, and the formation of black civic institutions.<sup>65</sup> Accompanying this shift in emphasis was a shift in constitutional framework. If postwar black lawyers initially mined constitutional theory to define the source and scope of political and civil rights, by the turn of the century some had begun to link those arguments to inquiries into the duties—to race, family, community, and society at large—that attended membership in civil society. As D. Augustus Straker argued: “We have need now but to understand what our rights of citizenship mean, then demand them; comprehend our duties, then perform them.”<sup>66</sup>

Soon even the demand for political rights became attenuated, and black lawyers began arguing that African-American citizenship depended primarily on racial autonomy, self-development, and possession of only the core

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63. Langston, *supra* note 45, at 105.

64. MAXWELL BLOOMFIELD, AMERICAN LAWYERS IN A CHANGING SOCIETY, 1776-1876, at 302, 326 (1976) (internal quotation marks omitted).

65. See, e.g., Charles W. Chesnutt, *The Disfranchisement of the Negro*, in THE NEGRO PROBLEM: A SERIES OF ARTICLES BY REPRESENTATIVE NEGROES OF TO-DAY 77, 80, 81 (Arno Press 1969) (1903) [hereinafter Chesnutt, *The Disfranchisement of the Negro*]; Charles W. Chesnutt, *Race Prejudice: Its Causes and Its Cure*, ALEXANDER'S MAG., July 15, 1905, reprinted in CHARLES W. CHESNUTT, SELECTED WRITINGS 85, 87 (SallyAnn H. Ferguson ed., 2001); Hawkins, *supra* note 51, at 236-37; William H. Lewis, An Address Delivered Before the House of Representatives of Massachusetts (Feb. 12, 1913), in NEGROES AND THE LAW, *supra* note 20, at 198, 204; Straker, Address, *supra* note 46, at 191; Straker, Civil Rights, *supra* note 46, at 269; George H. White, A Defense of the Negro Race, Speech Delivered in the U.S. House of Representatives (Jan. 29, 1901), in MASTERPIECES OF NEGRO ELOQUENCE, *supra* note 48, at 233-34, 238-39.

66. STRAKER, *supra* note 47, at 114; see also Chesnutt, Rights and Duties, *supra* note 48, at 252.

common law rights that would provide them with an opportunity to participate in civil society. Louisiana lawyer J. Madison Vance, for example, declared that “[t]he romance of ‘Emancipation’ is fading out.”<sup>67</sup> Pointing out that Congress had rejected new civil rights legislation and refused to expand federal power in the South, he argued that “the sentiment of the times is against paternalism. ‘Every tub must stand on its own bottom,’ . . . .”<sup>68</sup> Black lawyers began to eschew the colorful careers that had characterized the post-Civil War period and instead formed African-American law firms and concentrated on business.<sup>69</sup> Even Straker, the prominent civil rights practitioner, had traveled similar ground by the turn of the century, asserting that “[I] once favored the so-called Force Bill [a proposed voting rights statute], and think the remedy is needed, but can see no future good to arise to us as a race of people [from political action]. . . . Our need is education, money and opportunity to participate in the industries of life equally with our white brethren; . . . .”<sup>70</sup>

The lawyers, however, did not maintain a hard distinction between legalism and voluntarism: Most black lawyers internalized elements of both.<sup>71</sup> Langston, after all, had emphasized both voluntarism and rights advocacy in

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67. J. Madison Vance, In the Wake of the Coming Ages (Oct. 4, 1894), in *NEGROES AND THE LAW*, *supra* note 20, at 227, 228.

68. *Id.* at 228.

69. See, e.g., Joseph Gordon Hylton, *The African-American Lawyer, the First Generation: Virginia as a Case Study*, 56 U. PITT. L. REV. 107, 136-48 (1994); Judith Kirkpatrick, (*Extra*)Ordinary Men: African-American Lawyers and Civil Rights in Arkansas Before 1950, 53 ARK. L. REV. 299, 301, 345-80 (2000); Irvin C. Mollison, *Negro Lawyers in Mississippi*, 15 J. NEGRO HIST. 38 (1930); John Oldfield, *The African American Bar in South Carolina, 1877-1915*, in *AT FREEDOM'S DOOR: AFRICAN AMERICAN FOUNDING FATHERS AND LAWYERS IN RECONSTRUCTION SOUTH CAROLINA* 116-26 (James Lowell Underwood & W. Lewis Burke, Jr. eds., 2000).

70. Straker, Address, *supra* note 46, at 192; see also Elaine K. Freeman, Harvey Johnson and Everett Waring—A Study of Leadership in the Baltimore Negro Community 1 (1968) (unpublished M.A. thesis, The George Washington University) (on file with The George Washington University Library). The most famous expression of the voluntarist position was Booker T. Washington's controversial “Atlanta Compromise” speech. Booker T. Washington, *Untitled Address Before the Atlanta Exposition (1895)*, reprinted in 1 *A DOCUMENTARY HISTORY OF THE NEGRO PEOPLE IN THE UNITED STATES* 753 (Herbert Aptheker ed., Citadel Press 1990) (1951).

71. See Tom Dillard, *Scipio A. Jones*, 31 ARK. HIST. Q. 201 (1972) (describing the dual business and rights focus of black lawyers); Kirkpatrick, *supra* note 69, at 353-79 (same); Vickery, *supra* note 58 (same).



defining the professional project of the postwar civil rights bar.<sup>72</sup> Similarly, Wilford H. Smith was both a trusted advisor to Booker T. Washington (the most famous proponent of voluntarism) and the attorney who brought the pivotal disfranchisement case of *Giles v. Harris*<sup>73</sup> to the Supreme Court (with secret support from Washington).<sup>74</sup> Indeed, by the late nineteenth century, black lawyers had fused legalism and voluntarism into a series of rhetorics, practices, and legal theories that composed race uplift.

*D. Conclusion: The Emergence of Race Uplift*

Race uplift had two strands—a voluntarist strand that emphasized intraracial progress, and a legalist strand that centered on moral and legal claims directed to the larger white majority.<sup>75</sup> Thus, race uplift affirmed both the rights and duties of citizenship, and based its equality claims on the argument that African-Americans were exhibiting the type of civic responsibility required of those who deserved equal civil rights. The proponents of race uplift celebrated African-American progress in reducing illiteracy, eliminating immorality, and accumulating property.<sup>76</sup> For lawyers in particular, race uplift emphasized the promotion of local African-American institutions—law firms, businesses, churches, newspapers—while remaining cognizant of the discrimination and segregation that hemmed them in. It was a discourse and practice of citizenship that little resembled modern legal liberalism, and it would be the principal inheritance of the pre-*Brown* civil rights lawyers when they came to the bar after World War I.

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72. See Langston, *supra* note 45, at 105, 110.

73. 189 U.S. 475 (1903).

74. See J. CLAY SMITH, JR., *EMANCIPATION: THE MAKING OF THE BLACK LAWYER, 1844-1944*, at 346-47 (1993).

75. I call this second strand of uplift “legalist” because black lawyers tended to translate this strand’s moral claims on the larger white populace into the language of law.

76. See KEVIN K. GAINES, *UPLIFTING THE RACE: BLACK LEADERSHIP, POLITICS, AND CULTURE IN THE TWENTIETH CENTURY*, at xiv, 1-5 (1996); EVELYN BROOKS HIGGINBOTHAM, *RIGHTEOUS DISCONTENT: THE WOMEN’S MOVEMENT IN THE BLACK BAPTIST CHURCH, 1880-1920*, at 185-229 (1993); VICTORIA W. WOLCOTT, *REMAKING RESPECTABILITY: AFRICAN AMERICAN WOMEN IN INTERWAR DETROIT* (2001). In terming it “race uplift,” or “racial uplift,” I have followed Gaines. Evelyn Brooks Higginbotham applies the term “the politics of respectability” to a similar tendency within black cultural life. HIGGINBOTHAM, *supra*, at 185-229.

### III. CIVIL RIGHTS LAWYERING IN THE ERA OF MIGRATION: VOLUNTARISM, LEGALISM, AND RACE UPLIFT

Post-World War I civil rights lawyers carried forward the race uplift view of their professional role and put it into practice during the 1920s. That role incorporated the voluntarist strand of race uplift, which focused on intraracial cultural and institutional work, as well as the legalist strand, which focused on moral and legal claims directed at the white majority. In the 1920s, the voluntarist strand often predominated. For instance, when Charles Houston formulated his famous “social engineering” theory of reform lawyering at Howard Law School, he did not believe that he was preparing his students to mount a litigation-based attack on de jure segregation. Rather, his focus was more on intraracial institution-building. His peers at the African-American bar tended to stress similar aims during the 1920s.

Race uplift, however, was not simply a choice of voluntary intraracial segregation over integration, or of extrajudicial action over ineffective legal strategies. Such distinctions have animated revisionist scholarly assessments of civil rights law and politics, but they would have been foreign to the black lawyers of the post-World War I era. The postwar black bar saw no inherent conflict between their emphasis on intraracial institution-building and their continued attacks on the legal segregation that hemmed them in, for much of their civil rights imagination was filtered through contemporary ideas of cultural and institutional pluralism.

#### *A. Voluntarism, Anti-Legalism, and Equal Citizenship*

The importance of intraracial identity in civil rights politics depended on the strength of the voluntarist strand of race uplift. Several factors combined to bolster that strand within the generation of civil rights lawyers that came to the bar after World War I. The most important of these was the Great Migration of African-Americans out of the rural South and into border-state and Northern cities. The migration, which began during World War I, had two principal effects on voluntarist politics. First, it created all-black enclaves in many of the nation’s industrial cities where a leadership class of lawyers, doctors, teachers, ministers, and others took shape. These leaders depended on the vibrancy of black civic and social life for their own livelihoods. As Charles Houston noted: “The Southern Negro coming North brought within him race

consciousness in business and the professions, and has pointed the way to the Northern Negro in conferring patronage upon the Negro lawyers.”<sup>77</sup>

Second, the migration elevated the professional standing of the African-American lawyers who practiced in the new urban black enclaves. By the early twentieth century, census records showed a substantial increase in the population of black lawyers in migration-augmented jurisdictions such as Illinois, New York, and Washington, D.C., and an actual decrease in the number of black lawyers in the deep South states.<sup>78</sup> It was no accident that almost all of the lawyers who became prominent in civil rights politics during the 1920s and 1930s hailed from Northern and border-state cities, including, for example, Thurgood Marshall (Baltimore), Charles Houston and William Hastie (Washington, D.C.), Raymond and Sadie Alexander (Philadelphia), and Earl Dickerson (Chicago).<sup>79</sup>

During the 1920s, urban civil rights lawyers tended to define their professional roles in terms of the intraracial cultural, economic, and institutional work that needed to be done to prepare African-Americans for citizenship. At the beginning of his professional career, Philadelphia lawyer Raymond Pace Alexander articulated distinctly voluntarist themes in speeches to both black and white audiences. In 1925, for instance, he urged a group of local whites to support antidiscrimination work. Alexander’s speech did not cite the universal citizenship guarantees that had so occupied the post-Civil War generation. Rather, he relied on the argument that African-Americans had made “great progress in letters, science, and the professions—particularly in music and the arts.”<sup>80</sup> Black citizens had advanced greatly, forming a middle class, building businesses, and entering the professions. This progress, he

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77. Houston, Tentative Findings (revised copy), *supra* note 18, at 6.

78. SMITH, *supra* note 74, at 624-37.

79. With regard to the Great Migration, Washington, D.C. is somewhat different from the other cities that produced the black bar leaders because it was not an industrial city. However, it had been experiencing its own in-migration since the nineteenth century, when employment in the federal government helped cement a black middle class and create African-American institutions. See WILLARD B. GATEWOOD, *ARISTOCRATS OF COLOR: THE BLACK ELITE, 1880-1920*, at 39-69 (1990); CONSTANCE McLAUGHLIN GREEN, *THE SECRET CITY: A HISTORY OF RACE RELATIONS IN THE NATION’S CAPITAL 117-18* (1967).

80. See Raymond Pace Alexander, *The Significance from a Standpoint of Reflecting Racial Adjustment of 3 Major Cases Now in Litigation in the American Law Courts in Which the Negro Plays a Material Part 16-17* (1925) (unpublished manuscript, on file with the Raymond Pace Alexander Papers (RPAP), University of Pennsylvania Archives and Records Center, Philadelphia, Pa., Box 95).

argued, should warrant a grant of equal citizenship rights.<sup>81</sup> Three months later, he made similar arguments before a black audience at a local church, urging his listeners to get behind local school desegregation efforts. This time he did cite the positive rights guaranteed in the Civil War Amendments, but he also went further. He argued that, because white culture and society defined the standards for civic participation in American society, “we must study and train up to that standard . . . we must—of necessity ape the white man—or consider him our preceptor, if only for the selfish purpose of gaining what he has to give us or teach us . . . .”<sup>82</sup> Before both audiences, in short, Alexander framed desegregation in terms of the internal cultural work that African-Americans needed to do, and were doing, as the centerpiece for claims to equal citizenship.

Raymond Alexander’s wife and law colleague, Sadie Alexander, articulated a similar civil rights vision in her first public statement on the place of African-Americans in civil society. Her doctoral dissertation in economics at the University of Pennsylvania analyzed the economic status of the Southern blacks who had been migrating to Philadelphia since the middle of World War I.<sup>83</sup> Absent from her list of factors affecting the migrants’ standard of living was what modern observers call employment discrimination—race-based hiring and membership decisions that kept blacks out of unions and skilled occupations and relegated them to low-wage work. Instead, she posed the problem of economic advancement in voluntarist terms: The solution to the problem of the migrants’ economic advancement, she argued, was the internalization of what she called “the education and culture of the great American middle class!”<sup>84</sup> The keys to that progress were intraracial civic engagement by the migrants themselves and the intervention of middle-class African-Americans, so that the migrants might develop middle-class savings and consumption habits.<sup>85</sup> The professional program that she outlined for herself and her fellow black professionals had little to do with antidiscrimination work and much to do with institution-building and cultural uplift within the local black community.

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81. *Id.*

82. Raymond Pace Alexander, A Challenge to North Philadelphia Men, Address Before the A.M.E. Church, at add. 6 (Feb. 7, 1926) (on file with RPAP, Box 95).

83. Sadie Tanner Mossell, *The Standard of Living Among One Hundred Negro Migrant Families in Philadelphia*, 98 ANNALS AM. ACAD. POL. & SOC. SCI. 173 (1921) (published dissertation).

84. *Id.* at 217-18.

85. *Id.*

Charles Houston likewise framed African-American progress in voluntarist terms in his early writings. Houston is now remembered for his famous “social engineering” view of lawyering, which he implemented at Howard Law School<sup>86</sup> and which scholars have linked to the *Brown v. Board of Education* litigation.<sup>87</sup> Shortly before assuming the vice-deanship at Howard, however, in a tentative report on the conditions of the black bar and its future, Houston set out a vision for the development of the black bar that was far more voluntarist than legalist. The questionnaires that he developed in connection with the report focused on his fellow black attorneys’ relationships with business interests, but made no inquiries about their antidiscrimination work.<sup>88</sup> Similarly, in the tentative draft of the report, he devoted the majority of his attention to the relationship between black lawyers and business interests. Houston argued that African-Americans’ future status depended on building better black businesses (which would then employ black workers)—the standard voluntarist claim during the 1920s.<sup>89</sup> The principal professional task of black lawyers, Houston urged, was to facilitate this transition by familiarizing themselves with the workings of business, maintaining better libraries, and forming law partnerships to pool their skills.<sup>90</sup>

Houston based his tentative report on data taken from Northern and Midwestern black lawyers, but wrote the final draft of the report after touring Southern cities to assess the state of the black bar there. In the final draft, his focus shifted away from business development, but even here he rejected the idea that transformative litigation was the mission of the black bar. While African-American law schools like Howard needed to train their graduates to go South, he emphasized in a letter accompanying the report that “[i]t is not my idea that such a man would go into his community and proceed to dictate a solution of the race question.”<sup>91</sup> Instead, Houston envisioned that he would

move about in the courts and the community—just doing his routine professional work—he would be a bulwark of community strength and

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86. See, e.g., TUSHNET, *supra* note 3, at 6-19.

87. See, e.g., MCNEIL, *supra* note 36, at 3.

88. See Howard Law School Survey (on file with LSRMP, Series 3.8, Box 101-1019).

89. See Houston, Tentative Findings (revised copy), *supra* note 18, at 8-9.

90. See *id.* at 8-10.

91. Letter from Charles H. Houston, Dir., Prelim. Survey: Status and Activities of Negro Lawyers, Howard Univ. Law Sch., to Leonard Outhwaite 1 (Apr. 7, 1928) (on file with LSRMP, Series 3.8, Box 101-1018).

solidarity. Then as he gained the respect and confidence of the community, he could whittle away on the immediate concrete local problems of the mixed community life: better schools, improved streets, specific abuses of justice, and so forth.<sup>92</sup>

The revised law school curriculum that would support such an effort would not focus on specialized training for civil rights litigation. Instead it would impart “the dignity of independence which unquestioned professional competence would give,” enabling black lawyers to “command the complete respect of the profession and the community.”<sup>93</sup>

Houston thought that a revamped African-American law school would make its graduates better at the everyday professional tasks of the lawyer, enabling them to promote the growth of local African-American institutions, gain the confidence of local whites and blacks, and gradually push for social change. Such a program would necessarily include antidiscrimination work, but Houston did not argue that such work would transform society, or even that it would be the primary job of practicing black lawyers in the South. Intraracial institutions, Houston assumed, would do much of the hard work needed to transform African-American citizenship.<sup>94</sup>

It was this vision that Houston sought to implement when he began his celebrated transformation of Howard Law School in 1929. For example, the years of his vice-deanship (1929-1935) produced numerous records of discussions between Houston, the law school’s faculty, the student body, and the university president (Mordecai Johnson), as well as the school’s public reports of its activities. These discussions and reports focused on the school’s business law offerings, practice-oriented instruction in “laboratory” courses on evidence and criminal law, and gaining accreditation for the school from the appropriate certifying bodies.<sup>95</sup> Typical were several extensive reports from 1931-1933 in which Houston described the present status of the school and his

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92. *Id.*

93. *Id.* at 2.

94. See Houston, Findings on the Negro Lawyer, *supra* note 18.

95. See, e.g., Memorandum from A.J. Buscheck to Members of the Faculty of Howard Univ. Sch. of Law (Feb. 25, 1932) (on file with the Howard University Archives (HUA), Box 1209); Charles H. Houston, The Howard University School of Law (Apr. 7, 1930) (unpublished manuscript, on file with HUA, Box 1308); Letter from Charles H. Houston, Vice-Dean, Howard Univ. Law Sch., to Mordecai W. Johnson, President, Howard Univ. (Dec. 16, 1931) (on file with HUA, Box 1308); Letter from Leon A. Ransom to Charles H. Houston, (Jan. 29, 1935) (on file with HUA, Box 1209).

future objectives, none of which made any mention of training for antidiscrimination litigation.<sup>96</sup> Indeed, the chief pedagogical innovation of Houston's tenure as Vice-Dean was the reorganization of the school's business law curriculum.<sup>97</sup>

If Houston had intended Howard to become a training ground for civil rights litigators, it is likely that such an intention would have manifested itself somewhere in these documents, particularly in private letters or internal memoranda intended for limited distribution to the student body or to trusted friends or colleagues. Moreover, President Mordecai Johnson, who believed strongly in civil rights litigation and tolerated various types of radicalism on campus at substantial risk to his own position, had created an environment where such an intention could have been stated openly. However, no such intention appears in the documentary record.<sup>98</sup>

Houston's best-known expression of his view of reform lawyering, his 1935 essay entitled *The Need for Negro Lawyers*, drew on many of the themes that he had first sketched out in his 1928 report. Published shortly before his departure from Howard for full-time NAACP work, the essay placed somewhat more rhetorical emphasis on antidiscrimination work than had his late 1920s reports, arguing that black lawyers should go South where they could "wage their fight for true equality before the law."<sup>99</sup> With regard to legal education, however, the essay closely tracked the themes of his earlier reports. In proposing the manner in which a black law school's curriculum should differ from that offered in a white law school, he offered examples that dealt with business and commercial practice, suggesting, for example, that a course on business associations should focus on small businesses rather than large ones; that the

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96. See Charles H. Houston, Annual Report of the School of Law 1931-1932 (June 30, 1932) (unpublished manuscript, on file with HUA, Box 1308) [hereinafter Houston, Annual Report]; Charles H. Houston, Condensed Annual Report of the School of Law 1932-1933 (June 30, 1933) (unpublished manuscript, on file with HUA, Box 1308) [hereinafter Houston, Condensed Annual Report]; Memorandum from Charles H. Houston, Vice-Dean, Howard Law Sch., to Mordecai W. Johnson, President, Howard Univ., Re-Organization of School of Law, Howard University (Feb. 20, 1933) (on file with HUA, Box 1209) [hereinafter Houston, Memorandum on Reorganization].

97. See *infra* Section IV.B.

98. On President Mordecai Johnson's toleration of radicalism and support for civil rights litigation, see RAYFORD W. LOGAN, HOWARD UNIVERSITY: THE FIRST HUNDRED YEARS 1867-1967, at 293-94, 408, 541 (1969) (noting Johnson's toleration of radicalism on campus); and *National Bar Association Ends Session: Dr. Johnson Speaks at Mass Meeting*, CHI. DEFENDER, Aug. 11, 1928, at 1 (describing Johnson's advocacy for aggressive civil rights litigation).

99. Charles H. Houston, *The Need for Negro Lawyers*, 4 J. NEGRO EDUC. 49, 52 (1935).

law of common carriers should be approached from the standpoint of a passenger rather than a shipper; and that the law of life and fire insurance might be emphasized over marine insurance.<sup>100</sup>

Howard Law School would not offer its first course in civil rights law until the 1938-1939 academic year, when James Nabrit began to teach the course.<sup>101</sup> This was several years after Houston had resigned his vice-deanship and half a decade after his most famous student, Thurgood Marshall, had graduated. Houston took over the course in 1940 after leaving his NAACP post.<sup>102</sup> Perhaps this led even some of his contemporaries to remember, decades later, that his earlier transformation of Howard Law focused on preparing cadres of black lawyers to join in the antidiscrimination work that he turned to later.

The new black lawyers of the 1920s often emphasized the voluntarist strand of uplift, rather than rights-advocacy, as the professional mission of the African-American bar. Indeed, the voluntarist mission helped to shape the central research questions in all pre-*Brown* social scientific studies of African-American lawyers and the black middle class.<sup>103</sup> The post-World War I generation of black lawyers, however, subsequently became known as civil rights lawyers, and for good reason. Questions of intraracial identity and rights claims—the two strands of race uplift—were bound up with one another. As these lawyers began to present the case to the larger white public for inclusion of African-Americans in all aspects of American life, they crafted a strategy that made intraracial work the basis for rights claims directed outward to the white majority.

### *B. Legalism, Pluralism, and Equal Citizenship*

The same factors that helped create the voluntarist impulses of the 1920s also produced a new group of African-American lawyers who established their professional reputations in antidiscrimination work. A new generation of black lawyers took root in urban enclaves in the post-World War I era, a generation

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100. See *id.* at 51. Of course, this does not mean that antidiscrimination concepts would be completely absent from these courses. No African-American of that era could talk about passenger travel on common carriers without confronting the Jim Crow transit in the South. Cf. Mack, *supra* note 43 (recounting numerous encounters with segregated transit).

101. See *The School of Law: 1938-1939*, HOW. U. BULL., Dec. 15, 1938, at 18.

102. See Letter from William H. Hastie, Dean, Howard Univ. Law Sch. to Charles H. Houston (Nov. 28, 1939)(on file with CHHP, Box 163-6).

103. See *supra* note 22 and accompanying text.



that could now, for the first time, establish self-supporting practices.<sup>104</sup> Many of these lawyers made their livings in the courts and, by the mid-1920s, a new class of civil rights litigators was beginning to emerge.

Many of the same lawyers who advocated voluntarist politics engaged in vigorous civil rights work. Raymond Alexander, for instance, was elected president of the National Bar Association (NBA)—the black lawyers' professional group—at its 1929 convention, where he delivered a speech that stressed voluntarist institution-building.<sup>105</sup> He followed up his election, however, by quickly announcing “a new program of cooperation” between the NBA and the NAACP (which was already known for its legal work), as well as with other groups that supported African-American causes.<sup>106</sup> Within a few years of his acceptance of the vice-deanship of Howard Law School, Charles Houston also began cooperating extensively with the NAACP's national office in its legal strategies.<sup>107</sup> Chicago lawyer Earl Dickerson's earliest professional achievement was a voluntarist one—assisting in the founding of a black insurance company in Chicago. Dickerson went on to become president of the firm, which netted him his biggest civil rights case when it loaned funds to the father of future playwright Lorraine Hansberry to purchase a home that was burdened by a restrictive covenant. The result was the famous restrictive covenant case, *Hansberry v. Lee*.<sup>108</sup>

In fact, the legal status of African-Americans and their participation in voluntarist politics reinforced one another. The segregation of African-Americans from white civic and political life, enforced through both segregationist statutes and the common law, was partly responsible for creating the separate black society in which voluntarist politics thrived. Indeed, lawyers and other middle-class African-Americans depended on occupational,

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104. See, e.g., WOODSON, *supra* note 19, at 184, 190-94; Houston, Tentative Findings (revised copy), *supra* note 18, at 6-7.

105. See Raymond Pace Alexander, Specialization of Practice and Law Partnership or Association Needed To Enhance Position of Bar, Address Before the National Bar Association Annual Convention (Aug. 1, 1929), in NAT'L BAR ASS'N, ADDRESSES DELIVERED BEFORE THE FIFTH ANNUAL CONVENTION OF THE NATIONAL BAR ASSOCIATION 33-40 (1930) (on file with RPAP, Box 85) [hereinafter ADDRESSES DELIVERED BEFORE THE FIFTH ANNUAL CONVENTION]; *6th Annual Session of Lawyers End*, CHI. DEFENDER, Aug. 16, 1930, at 4 (noting Alexander's election).

106. See *Lawyers Offer Services to Negro Welfare*, PHILA. TRIB., Oct. 24, 1929, at 1.

107. See MCNEIL, *supra* note 36, at 86-105.

108. 311 U.S. 32 (1940); see also Karen Gardner, *Earl B. Dickerson at 88*, 26 U. CHI. L. SCH. REC. 24 (1980) (recounting biographical details).

residential, and social segregation for the existence of the communities that provided them with their clientele, making every question of opposition to segregation intersect with related questions of voluntarist politics and intraracial identity. For example, it was clear that eliminating school segregation would threaten the jobs of black teachers and principals who staffed the African-American schools and, because teachers made up the backbone of the black middle class, this would significantly reduce the size of that class. It was equally clear that segregation was crucial to the formation and persistence of African-American institutions that provided support for antidiscrimination work. Thus, the civil rights lawyers saw no inherent conflict between their emphasis on the intraracial identities that segregation had helped produce and their arguments for inclusion of African-Americans in the fabric of mainstream life. In fact, many of their arguments about intraracialism and desegregation relied on a set of intellectual constructs that contemporary American thinkers were beginning to call cultural pluralism.<sup>109</sup>

Cultural pluralism was a descriptive and normative theory of citizenship that accommodated itself to the persistence of minority subcultures within an America that still had some unitary national ethos.<sup>110</sup> It was a way of viewing racial and ethnic identity in America that a later generation would term multicultural. In the discourse and practice of the interwar African-American bar, however, the tendency to rely on such concepts might be called cultural-institutional pluralism, as these lawyers emphasized not only plural cultural forms, but also plural institutions.

Cultural-institutional pluralism makes sense of the fact that the post-World War I generation of civil rights lawyers could emphasize both voluntarist intraracial organizing and legalist opposition to race segregation. It explains, for instance, how Raymond Alexander could argue for an African-

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109. Gunnar Myrdal wrote eloquently of the paradoxes that made those middle-class blacks who owed their professional and economic positions to segregated life into sometime advocates for desegregation. 2 MYRDAL, *supra* note 22, at 794-96.

110. Horace Kallen and Alain Locke were formulating the ideas that came to be known as cultural pluralism during the 1910s and 1920s, and Kallen coined the term in 1924. See H.M. Kallen, *Alain Locke and Cultural Pluralism*, 54 J. PHIL. 119 (1957); Alain Locke, *The New Negro*, in THE NEW NEGRO 3 (Alain Locke ed., Simon & Schuster 1992) (1925); Horace M. Kallen, *Democracy Versus the Melting Pot: A Study of American Nationality* (pts. 1 & 2), THE NATION, Feb. 18, 1915, at 190, THE NATION, Feb. 25, 1915, at 217; see also Dalia Tsuk, *The New Deal Origins of Cultural Pluralism*, 29 FLA. ST. U. L. REV. 189, 199-202 (2001).

American intraracial politics “fully capable of self sustenance [and] support,”<sup>111</sup> and at the same time exhort his black constituents to “ape the white man” (i.e., to adopt the cultural forms of middle-class whites).<sup>112</sup> In a 1925 speech, for instance, Alexander posited the existence of distinct “races” — each with its own separate path of development dictated by its environment. He did so, however, in order to create space for African-Americans to develop their own institutions and, most importantly, a black middle class that would be the engine of antidiscrimination efforts.<sup>113</sup> Indeed, Alexander often emphasized that intraracial politics would create a class of what he and others called “representative Negroes” who would make contact with whites and demonstrate the race’s progress.<sup>114</sup> This formulation closely resembles that offered by Alain Locke, one of the originators of the cultural-pluralist idea, in his most famous essay, *The New Negro*, written at about the same time.<sup>115</sup> Alexander believed that intraracialism and anti-segregation work reinforced one another: Separate racial identity would provide the impetus for opposing discriminatory barriers that separated blacks from the mainstream of American life.

The rise of cultural-institutional pluralism also explains why Sadie Alexander’s first public statement on racial advancement was so focused on intraracial development, and why she was simultaneously a fierce critic of the race discrimination that hemmed blacks in from white civic life. Alexander had posed the migrants’ problems in terms of the hard work necessary to imbue them with middle-class culture,<sup>116</sup> by which she meant majority American culture. She believed that distinct black cultural forms and institutions could be

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111. Raymond Pace Alexander, *The Obligation Negro Men Owe to Their Race* 2-3 (undated) (unpublished manuscript, on file with RPAP, Box 95).

112. Alexander, *supra* note 82, at 6.

113. Alexander, *supra* note 111, at 12-13.

114. See Alexander, *supra* note 80, at 17-18 (lamenting the fact that interracial politics are driven by “our most unrepresentative persons”). For examples of the evolution of the “representative Negro” idea, see the essays contained in *THE NEGRO PROBLEM: A SERIES OF ARTICLES BY REPRESENTATIVE NEGROES OF TO-DAY*, *supra* note 65; and CHARLES W. CHESNUTT, *An Inside View of the Negro Question*, in *ESSAYS AND SPEECHES*, *supra* note 46, at 57, 61 (“A race has a right to be judged by its best men.”).

115. See Locke, *The New Negro*, *supra* note 110, at 9 (recommending increased contact between “the more intelligent and representative elements” of black and white society as a strategy for racial rapprochement).

116. Mossell, *supra* note 83, at 216 (“[C]ulture and education are bred after years, yes sometimes, generations of toil.”).

tolerated and even sometimes celebrated.<sup>117</sup> African-American intraracial development, however, was simply a way of proving that blacks could eventually fit into the mainstream of American life, and segregation was to be opposed precisely because it cut black Americans off from that mainstream.

Charles Houston relied on similar pluralist concepts in his early writings. Early in his career, for instance, he invited his mentor, Harvard Law Dean Roscoe Pound, for a visit in order to show off both Howard University and Washington's *segregated* school system. He wrote in a letter to Pound that "[t]he University has a *Class A* medical school, of which we are quite proud. And all public school instruction for Negro children is by Negro teachers from kindergarten through high school."<sup>118</sup> He took evident pride in the segregated schools as African-American institutions staffed by a black teaching staff, even though his name would be indelibly linked to the invalidation of segregated education in *Brown*. Indeed, Houston would serve on the District of Columbia's Board of Education during the 1930s, and one of his last civil rights cases was an attempt to seek equal resources within the District's segregated school system. A half-century later, former NAACP lawyer Jack Greenberg would express puzzlement that Houston was not in the "vanguard" of the attack on segregation at that time. Pluralism perhaps supplies a partial explanation.<sup>119</sup>

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117. In 1928, for instance, she delivered a speech in which she celebrated distinctive forms of black literary and artistic cultural production, and argued that they should be recognized precisely because they had proved themselves to be a part of mainstream American and European culture. See Sadie T.M. Alexander, *The Contributions of the Negro to American Life* 11-13 (undated) (unpublished manuscript, on file with the Sadie Tanner Mossell Alexander Papers (STMAP), University of Pennsylvania Archives and Records Center, Phila., Pa., Box 71) [hereinafter Alexander, *Contributions of the Negro*]. Compare *Negro Woman Attorney Gives Her Race Good Advice*, EVERY EVENING (Wilmington, Del.), June 23, 1928 (unpaginated photocopy, on file with author) (recounting Alexander's view of the distinct contributions African-Americans had made to American civic and cultural life), with Locke, *The New Negro*, *supra* note 110, at 11-12 ("The Negro mind reaches out as yet to nothing but American wants, American ideas."). Raymond Alexander incorporated many elements of Sadie Alexander's address into a speech he gave several years later attacking race-oriented thinking. See *Attorney Speaks at Frankford High School on "Race" Topic*, PHILA. TRIB., Dec. 10, 1931, at 1.
118. Letter from Charles H. Houston, Attorney, Houston & Houston, to Roscoe Pound (Dec. 15, 1925), *microformed on Roscoe Pound Papers*, Reel 77, Frame 600 (Harvard Law Sch.).
119. Jack Greenberg, *In Tribute: Charles Hamilton Houston*, 111 HARV. L. REV. 2161, 2165-66 (1998); see also KLUGER, *supra* note 34, at 512-17; MCNEIL, *supra* note 36, at 123-25; TUSHNET, *supra* note 3, at 164-65.

Houston's adoption of a pluralist legal imagination also helps explain why his first important essay on the African-American bar (his 1928 report) would have made Booker T. Washington proud, as well as how, within a few years, he became one of the principal advisors to the NAACP—an organization usually considered antithetical to Washington's ideas. Indeed, Houston's most famous essay, his 1935 *The Need for Negro Lawyers*, applied a pluralist framework to the question of whether white lawyers should take the lead in civil rights litigation. He questioned the commitment of white lawyers in this area, arguing that civil rights battles were the job of the black bar.<sup>120</sup> Houston, however, was not arguing for the exclusion of white lawyers from the movement. Even as he wrote his 1935 essay, he was actively cooperating with the mostly white lawyers of the International Labor Defense organization in civil rights cases.<sup>121</sup> Houston simply viewed the development of black civic institutions (such as Howard Law School) as the key to both intraracial development and opposition to race segregation.

By the 1920s, then, a set of ideas had begun to take shape within the black bar that combined the voluntarist and legalist strands of race uplift into a pluralist interpretation of African-American citizenship. One crucial site where those ideas began to take shape was Harvard Law School, where many of the leading civil rights lawyers of the pre-*Brown* generation met and began to exchange ideas in the 1920s, including Charles Houston, Raymond Pace Alexander, future NAACP national legal committee member Jesse Heslip, and future NAACP lawyers Louis Redding and William Hastie. Both voluntarist politics and antidiscrimination activism cemented together the cohort of black law students at Harvard. The defining moment occurred when Harvard's president, A. Lawrence Lowell, endorsed a decision to bar black students from residence in the freshman dormitories shortly after dormitory residence had been made compulsory for freshman students. When the discriminatory policy became public in 1921, the debate over its wisdom reached the national media, and Houston and others joined Alexander in support of a protest action.<sup>122</sup> The

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120. See Houston, *supra* note 99, at 49 (“[T]he social justification for the Negro lawyer . . . is the service he can render the race as an interpreter and proponent of its rights and aspiration.”).

121. See Kenneth W. Mack, *Law and Mass Politics in the Making of the Civil Rights Lawyer, 1931-1941*, 93 J. AM. HIST (forthcoming June 2006).

122. See Raymond Pace Alexander, Address Topics Before the Congregation of the Synagogue [sic] Temple Beth Hillel (Jan. 15, 1971) (unpublished manuscript, on file with RPAP, Box 100) (recalling the dormitory protest); see also MCNEIL, *supra* note 36, at 53 (briefly describing Houston's participation in the protest). On the dormitory crisis more generally, see Nell Painter, *Jim Crow at Harvard: 1923*, 44 NEW ENG. Q. 627 (1971); and Raymond

students took their arguments to a national audience in the pages of the Urban League's journal, *Opportunity*, in an essay authored by Raymond Pace Alexander.

The article was Alexander's first piece of civil rights advocacy directed to a national audience, and it combined both the voluntarist and legalist strands of uplift into a rationale for the elimination of race segregation. Alexander attacked the formal logic behind Lowell's decision, arguing that the opposite logic was more compelling: Admit the black students to the dormitories and let those who object to their presence decide to move out.<sup>123</sup> Moving from logic to social context, he noted that the initial group of black students excluded from the dormitory came from what he called "very representative Negro families."<sup>124</sup> Their fathers included a physician, graduates of Yale and Harvard colleges, and a Harvard Law School alumnus. In fact, "[i]t is probably fair to conclude that no half dozen men picked at random among the Harvard freshmen class could present any better family history or training."<sup>125</sup> Alexander had identified the most stable basis of white support for a nondiscrimination policy, and just as his broadside went to press, the public outcry had its intended effect: Harvard's Board of Overseers reversed the exclusion policy.<sup>126</sup>

Alexander's attack on the dormitory policy built upon the classic voluntarist strategy of emphasizing intraracial progress as the key to equal citizenship—in this instance the progress of what Alexander called "representative" Negroes. First, he attempted to demonstrate his own status as a racial representative whose progress (intellectual in this case) stood in for that of his race—hence his choice to start the article with an analysis of the formal logic of Lowell's decision. Second, he put forward his clients, or in this case those he claimed to represent, as representative Negroes. He was well aware of a related discussion at Harvard about the presence of purportedly unassimilated immigrants, particularly Jewish students,<sup>127</sup> and he used the dormitory controversy to

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Wolters, *The New Negro on Campus*, in *BLACKS AT HARVARD: A DOCUMENTARY HISTORY OF AFRICAN-AMERICAN EXPERIENCE AT HARVARD AND RADCLIFFE 195* (Werner Sollors et al. eds., 1993).

123. See Raymond Pace Alexander, *Voices from Harvard's Own Negroes*, *OPPORTUNITY*, Mar. 1923, at 29, 30.

124. *Id.*

125. *Id.*

126. See Wolters, *supra* note 122, at 201-02.

127. At about the same time that Lowell approved the dormitory policy, he also proposed a cap on the number of Jewish students attending Harvard. See HARRY BARNARD, *THE FORGING*

present the excluded black freshman as exemplifying the most traditional of Harvard's values. If he had any doubts about the effectiveness of this strategy, they were quickly erased when Harvard law Professor Felix Frankfurter wrote *Opportunity* to praise his argumentative technique.<sup>128</sup>

In employing voluntarist impulses in the service of antidiscrimination, the response to the Harvard dormitory crisis provided the template for Alexander and his cohort of black lawyers as they began their civil rights work. Alexander's chance came soon after his law school graduation, and produced one of his first civil rights cases. The case involved the showing of Cecil B. DeMille's *The Ten Commandments* in 1924 at the Aldine Theater in Philadelphia. The Aldine's choice to exclude black theatergoers sparked perhaps the most sustained set of conflicts over public accommodations in the city during that decade. Alexander brought one case challenging the Aldine's policy and lost,<sup>129</sup> but he found more suitable plaintiffs when, as he later remembered, several "very refined young colored women . . . incidentally from our very best families" were denied admission.<sup>130</sup> The case came to trial before Judge William M. Lewis, whom Alexander later remembered for his liberal public views and with whom he later established a cordial professional correspondence.<sup>131</sup> In the Aldine dispute, Alexander had found perhaps the perfect case to produce the same type of recognition of African-American progress as he had in the Harvard dormitory crisis: respectable black plaintiffs, potential white supporters who could view him on terms of professional equality, and DeMille's pedagogical scenes equating biblical and modern sin (there is a decent chance that the judge had seen the movie).<sup>132</sup> Judge Lewis condemned the Aldine's actions, prompting a settlement. The Aldine's

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OF AN AMERICAN JEW: THE LIFE AND TIMES OF JUDGE JULIAN W. MACK 292-300 (1974); MICHAEL E. PARRISH, FELIX FRANKFURTER AND HIS TIMES: THE REFORM YEARS 155-56 (1982); Wolters, *supra* note 122, at 201-02 (describing the exclusion of Jewish students from selective social clubs).

128. Felix Frankfurter, Correspondence, 1 OPPORTUNITY 279 (1923) (commenting that "[t]he work is characteristic of Alexander—careful and thorough-going").
129. See *Manager of Aldine Fails To Appear at Scott's Court*, PHILA. TRIB., Mar. 29, 1924, at 1; *Aldine Theatre Case Settled in Manager's Favor*, PHILA. TRIB., Mar. 28, 1925, at 1.
130. See Raymond Pace Alexander, The Struggle Against Racism in Philadelphia from 1923 to 1948, Address Before the Business & Professional Group of the American Jewish Congress 4 (Feb. 15, 1950) (transcript on file with RPAP, Box 97).
131. See Letter from William M. Lewis to Raymond Pace Alexander (June 11, 1931) (on file with RPAP, Scrapbook 1931-35).
132. For background on the movie, see SUMIKO HIGASHI, CECIL B. DEMILLE AND AMERICAN CULTURE: THE SILENT ERA 179-201 (1994).

management issued a public apology and promised to end its discriminatory policy.<sup>133</sup> Raymond Alexander achieved similar success a decade later in challenging race discrimination at the Earle Theater using Ivy League-educated black plaintiffs.<sup>134</sup>

Philadelphia lawyer Sadie Alexander would credit an earlier incident, quite similar to that at the Earle, with launching her on a lifetime of civil rights advocacy. As Alexander remembered it, she, her future husband (Raymond Alexander), and two Ivy League-educated friends were turned away from the prestigious Shubert Theater in downtown Philadelphia. As a counterstrategy, each began speaking the Continental European language they knew best—one spoke Spanish, another French, and another German. The bewildered manager, who didn't understand a word of it, decided that they could be admitted, remarking that “[t]hey're not niggers.”<sup>135</sup> There are many possible interpretations of this statement, but the one that seemed to stick with Sadie Alexander was that the group's demonstration of black progress—indeed their cultural resemblance to the most educated whites around them—was a convincing argument in attacking racial barriers to equal participation in civic life. In fact, in the Shubert, Earle, and Aldine incidents, Alexander and her husband began to formulate the strategy that they used repeatedly as they successfully attacked the color barrier in downtown restaurants, theaters, and hotels. Using respectable plaintiffs (or their own professional status), appeals to common bonds of class or professionalism, and a precedent or statute that arguably banned the practice, they crafted a strategy that turned intraracial identity into an effective claim for inclusion in civic life.<sup>136</sup>

In the following decade, as they took charge of the NAACP's civil rights litigation, the new black lawyers of the 1920s brought their intraracial-progress

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133. See Alexander, *supra* note 130, at 5.

134. See *Slaps at Jim Crow Policy of Earle Theater*, PHILA. TRIB., Aug. 31, 1933, at 1.

135. Interview by Walter M. Phillip, with Sadie Alexander 5 (Oct. 20, 1976) (transcript on file with STMAP, Box 1).

136. See, e.g., *id.* at 6; Interview by Unknown with Sadie Alexander 13-14 (Oct. 12, 1977) (transcript on file with STMAP, Box 1); Letter from Sadie Alexander to H.A. Enocks, Chief of Personnel, Pa. R.R. (May 19, 1936) (on file with STMAP, Box 10); see also *Noted Philadelphian Has Had Brilliant Scholastic and Legal Career in Establishing Negro's Rights*, J. & GUIDE (Norfolk, Va.), Sept. 17, 1932, at 7; *Two Newspapers Report the Same Incident; One Is True The Other Distorts the Facts*, PHILA. TRIB., Aug. 9, 1928, at 1; Interview with Gussella Gelzer, in Phila., Pa. 18 (June 23, 1999) (transcript on file with author).



civil rights strategy to a larger stage.<sup>137</sup> Charles Houston's chance came in 1933, in his first major civil rights case. It involved George Crawford, accused of murdering two white women in Loudoun County, Virginia. Crawford, hardly a "representative Negro," was a poor, peripatetic laborer. To make matters worse, shortly before trial Houston apparently became convinced of his guilt. Instead of emphasizing his client's respectability, Houston promoted his own, turning the trial into a demonstration of the progress of the black bar toward the standards of the highest reaches of the profession. He declined to ask for a change of venue in a case that many thought could not be won because of local prejudice, stating publicly that he believed in the fairness of Loudoun County justice. He so impressed local authorities with his professionalism that both the trial judge and prosecutor complimented him in open court. The strategy apparently swayed the judge and jury. Although his client was convicted, Crawford received life in prison instead of the expected death sentence.<sup>138</sup> The end of the trial produced so many public statements of mutual respect from the defense, prosecution, and judge that one newspaper headlined its report: *Crawford Case Ends in Legal Love Feast*.<sup>139</sup>

Houston's strategy closely resembled the one that his friend, fellow Harvard law alum, and protégé William Hastie used that same year to great effect in North Carolina. The case was a lawsuit, supported by the NAACP, for the admission of a black student to graduate study at the University of North Carolina. Many within the NAACP worried that the suit might prompt a harsh reaction from local whites. In response, Hastie played his strongest suit: He used his sterling educational credentials to make the proceedings as much about the progress of the black lawyer as about the substance of the issues at trial. Hastie pointedly exchanged pleasantries with Duke law students and professors who had come to see a Harvard graduate in action, and even won

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137. On the takeover of the NAACP's litigation by black attorneys, see August Meier & Elliott Rudwick, *Attorneys Black and White: A Case Study of Race Relations Within the NAACP*, 62 J. AM. HIST. 913 (1976).

138. See Mack, *supra* note 121.

139. *Crawford Case Ends in Legal Love Feast* (unidentified, undated newspaper article, on file with James Guy Tyson Papers, M-SRC, Box 108-2). The strategy was not without its critics, however, who charged that his emphasis on professionalism also included failing to question prosecution witnesses on their veracity or recall, challenge the fairness of Loudoun County justice, or pursue a clear appeal after trial. See HELEN BOARDMAN & MARTHA GRUENING, *THE CRAWFORD CASE: A REPLY TO THE "N.A.A.C.P."* 14-27 (1935).

compliments from the opposing counsel.<sup>140</sup> Although the case was lost on a technicality, much of the NAACP's post-trial discussion of the case was devoted to Hastie's credentials, his impeccably professional performance, and what they signified for the progress of the African-American bar and the race as a whole.<sup>141</sup>

What had started as voluntarism—an anti-legalist way of talking about citizenship in a world where law had become oppressive—had been transformed, by the end of the 1920s, into a legal claim against racial segregation. In the civil rights lawyers' hands, the emphasis on intraracial cultural work and progress that had been building since the late nineteenth century became a way to infuse the universal citizenship guarantees of the Civil War Amendments with new vitality.

### C. *Citizenship Claims and Public Opinion*

The civil rights lawyers of the 1920s had fashioned a new way of talking about citizenship, but the new language was accompanied by a conceptual problem that had its source in voluntarism. The voluntarist impulse had been strengthened by the knowledge that law had become oppressive. The standard explanation that black lawyers offered for this turn of events was that changes in law responded to something they called “public sentiment” or “public opinion,”<sup>142</sup> by which they meant the social mores of the majority of the population that did not support equal citizenship rights for blacks.<sup>143</sup> If public opinion was opposed to granting legal equality to blacks, and if law followed public opinion, then one solution was the voluntarist one—simply to be let alone to concentrate on intraracial development.

The voluntarist impulse, then, called into question the efficacy of litigation and lobbying. Charles Chesnutt tried to work around this problem. Conceding that “[c]ourts and Congress merely follow public opinion, seldom lead it,” he argued that lawsuits were still needed because they would at least put the issue of black citizenship before the larger public, force a public discussion of the issue, and help stimulate African-Americans themselves to organize

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140. See WALTER WHITE, *A MAN CALLED WHITE* 157-59 (Arno Press 1969) (1948); Meier & Rudwick, *supra* note 137, at 940.

141. See WHITE, *supra* note 140, at 157-59; Meier & Rudwick, *supra* note 137, at 940-44.

142. E.g., E. J. Waring, *The Judicial Function in Government*, 2 A.M.E. CHURCH REV. 437, 439 (1886).

143. *Id.*

politically.<sup>144</sup> Litigation might not directly produce results that contravened the majority's social mores, but it might bring issues before the court of public opinion, where the real work would take place.

The standard position on law and public opinion was reinforced by the social scientific ideas that held sway over many of the post-World War I generation of black lawyers. For instance, Chicago lawyer C. Francis Stradford, who earned law and master's degrees at Columbia, argued in a 1930 speech that law was merely a superstructure erected atop more fundamental social and economic forces, and that the causal arrow ran from social change to legal change rather than the other way around.<sup>145</sup> Like Chesnutt, however, he argued that litigation and lobbying could be effective as propaganda in the war for public opinion.<sup>146</sup> The organized black bar took the same position. The NBA, flush with several civil rights victories in the early 1930s, passed a resolution at its annual meeting that read: "Inasmuch as law is merely crystallized public sentiment, we urge that the National Bar Association conduct a country-wide program of agitation . . . so that we may not only have the proper legislation, but that it shall be grounded in a sound and wholesome public opinion."<sup>147</sup>

The emergence of the voluntarist impulse had been, in part, the product of doubts about the ability of litigation or lobbying to create a truly equal citizenship status, particularly given that so much of white public opinion seemed opposed to it. The civil rights lawyers had struggled with this problem since the late nineteenth century, but had found no resolution by the beginning of the Great Depression. The standard position within the civil rights bar remained that their efforts, if unaided by political mobilization and the battle for white public opinion, would be unsuccessful in gaining equal citizenship status for their fellow African-Americans.

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144. Chesnutt, *The Disfranchisement of the Negro*, *supra* note 65, at 114.

145. C. Francis Stradford, *Changes in the Law Wrought by Economic and Social Forces*, Address Before the National Bar Association Annual Convention, in *ADDRESSES DELIVERED BEFORE THE FIFTH ANNUAL CONVENTION*, *supra* note 105, at 2. Sadie Alexander took a similar position, analogizing law to a simple organic outgrowth of the unitary mores of society. See Sadie Tanner Mossell, *Sociology I Notes 1-5* (Feb. 1917) (unpublished class notes, University of Pennsylvania) (on file with STMAP, Box 19) ("Social Organization unites differentiated groups of people into one Society which follows certain customs and laws automatically and involuntarily.").

146. See Stradford, *supra* note 145, at 7.

147. NAT'L BAR ASS'N, *PROCEEDINGS OF THE SEVENTH AND EIGHTH ANNUAL CONVENTIONS* 110 (1933) [hereinafter *PROCEEDINGS OF THE SEVENTH AND EIGHTH ANNUAL CONVENTIONS*].

*D. Conclusion*

By the end of the 1920s, the questions regarding black citizenship that had occupied the attention of the post-Civil War generation of black lawyers had returned, but by a circuitous route. The voluntarist strand of race uplift had led the African-American bar leaders back to a new way of making legal rights claims directed at the majority. In addition, black bar leaders' concession that rights claims directed at both courts and legislatures could not succeed without concomitant changes in public opinion led many to imagine that litigation might be one means of changing that opinion. The questions of the legal contours of African-American citizenship and the relationship between legal and social change would return during the following decade, under the twin influences of legal realism and Marxist politics.

**IV. SOCIAL ENGINEERING IN PRACTICE:  
AN ALTERNATIVE HISTORY OF THE DEPRESSION ERA**

The African-American civil rights bar leaders began the 1930s with a professional consciousness that oriented them neither toward nor away from legal attacks on de jure segregation. Race uplift as a legal consciousness could have led them to focus their professional energies on any number of projects. One project in particular that came to the fore during the 1930s was a critique of discrimination by labor unions and private employers. The formulation of that critique was aided, in crucial places, by Charles Houston's "social engineering" view of reform lawyering and by legal realism.

Scholars have identified Houston's social engineering ideas with a vision of law reform that inspired his students and associates at Howard Law School, such as Thurgood Marshall, to plan an attack on de jure segregation that would reach its fruition in *Brown*. I will offer a contrasting interpretation that ties social engineering to progressive and legal realist jurisprudence. For Houston and many of his fellow black lawyers, legal realism reinforced their skepticism about the efficacy of courts, acting alone, in transforming society. Indeed, as Charles Houston initially formulated it, social engineering did not encompass attempts to transform American society through litigation. Even in the litigation context, legal realist impulses helped Houston and his colleagues at the black bar formulate a critique of private labor market discrimination that led many of them to endorse the legislative experimentation of the late New Deal.

The standard interpretation of progressive legal realist jurisprudence views it as having existed in tension with the civil rights lawyers' project. Progressive and legal realist lawyers, judges, and law professors critiqued early-twentieth-

century jurisprudence for privileging what they called formal or conceptual reasoning and paying insufficient attention to the consequences of legal rules for public policy and society. Many realists argued for a legal method that used social scientific methods to make law more functional and responsive to modern social problems. Some realists stressed the indeterminacy of traditional legal reasoning and some critiqued the private labor market as a regime of coercion rather than liberty.<sup>148</sup> During the New Deal era, many realists advocated for both the administrative state and governmental regulation of the private labor market before an often hostile judiciary that they viewed as remaining in the grip of both conceptualism and rights-based reasoning.<sup>149</sup>

Much of the scholarly work on legal realism has been shaped by, or is responsive to, CLS critiques of rights-advocacy and private law theory. CLS scholars have emphasized the coherence of legal liberalism as a rights-based project and its incompatibility with legal realism.<sup>150</sup> That work has reinforced the tendency to view realist jurisprudence as antithetical to the black bar leaders' presumed public-law-based rights advocacy.

When scholars rediscovered the pre-*Brown* generation of civil rights lawyers during the 1970s, they downplayed these lawyers' connections to the realist project and emphasized legal liberalism instead. Some did note the intriguing connections between Charles Houston's "social engineering" ideas and the social engineering ideas of progressive-realist figures at Harvard such as Roscoe Pound and Felix Frankfurter. Further, some scholarship, including several excellent efforts by student authors, also recognizes that Houston's

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148. See HORWITZ, *supra* note 42, at 3-7, 169-92; KALMAN, *supra* note 2, at 13-17; EDWARD A. PURCELL, JR., THE CRISIS OF DEMOCRATIC THEORY: SCIENTIFIC NATURALISM AND THE PROBLEM OF VALUE 74-94 (1973); Gary Peller, *The Metaphysics of American Law*, 73 CAL. L. REV. 1151, 1219-59 (1985); Joseph William Singer, *Legal Realism Now*, 76 CAL. L. REV. 465, 468-69 (1988) (reviewing LAURA KALMAN, *LEGAL REALISM AT YALE, 1927-1960* (1986)); cf. MORTON WHITE, *SOCIAL THOUGHT IN AMERICA: THE REVOLT AGAINST FORMALISM* (1949) (placing realism in the context of larger philosophical developments). See generally AMERICAN LEGAL REALISM (William W. Fisher III et al. eds., 1993) (collecting realist sources and explaining realism).

149. See HORWITZ, *supra* note 42, at 213-16; PETER H. IRONS, *THE NEW DEAL LAWYERS* (1982); KALMAN, *supra* note 2, at 17-19; Duncan Kennedy, *From the Will Theory to the Principle of Private Autonomy: Lon Fuller's "Consideration and Form,"* 100 COLUM. L. REV. 94, 113-14 (2000). On late-nineteenth-century conceptualism, see HORWITZ, *supra* note 42, at 9-31.

150. See Morton J. Horwitz, *The Jurisprudence of Brown and the Dilemmas of Liberalism*, 14 HARV. C.R.-C.L. L. REV. 599, 602 (1979). Edward Purcell's influential interpretation of realism also reinforced this trend by framing the resurgence of fundamental-rights-based ideas in the 1940s and 1950s as a counterreaction to realism. See PURCELL, *supra* note 148.

legal reformism and jurisprudential experimentation may have received an impetus from Pound and Frankfurter.<sup>151</sup> The conventional wisdom, however, was encompassed by Houston's biographer's conclusion that "Houston's 'social engineering' is to be distinguished from earlier Progressive era notions regarding 'correction' of society."<sup>152</sup> The consensus remained that his project, and that of his colleagues at the black bar, was a court-centered one that focused on race rather than the class and economic regulatory projects that occupied the core intellectual energies of the realists.<sup>153</sup> Likewise, scholars who studied the white realists paid little attention to their connection to the African-American civil rights bar.<sup>154</sup>

I argue here that for several reasons the civil rights lawyers, like their white realist counterparts, spent much of the 1930s grappling with the limitations of nineteenth-century jurisprudence, as well as with the public nature of the private labor market. First, the Great Depression called into question the civil rights lawyers' core assumptions about the private labor market, opening up new frames for analyzing the employment market. Second, the civil rights lawyers' absorption of many progressive-realist critiques, generally at Harvard and Howard law schools, gave them a new way of looking at law and jurisprudence. Third, Depression-era public works and labor market regulations provided them with the doctrinal tools to put their new professional identity into practice. Alongside their well-known challenges to de jure segregation emerged a realist-influenced critique of private labor market discrimination.

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151. Richard Kluger, for instance, mentioned Houston's exposure to Felix Frankfurter's interdisciplinary legal analysis while at Harvard. KLUGER, *supra* note 34, at 116.
152. MCNEIL, *supra* note 36, at 267 n.46; *see also id.* at 216-18.
153. *See* Roger A. Fairfax, Jr., *Wielding the Double-Edged Sword: Charles Hamilton Houston and Judicial Activism in the Age of Legal Realism*, 14 HARV. BLACKLETTER L.J. 17, 18 (1998) ("Houston's encouragement of judicial activism is significant . . . for its incompatibility with Legal Realism . . ."); Note, *Legal Realism and the Race Question: Some Realism About Realism on Race Relations*, 108 HARV. L. REV. 1607, 1619 (1995) (authored by Christopher Bracey) (stating that "[n]ational concerns, such as unionization, economic reform, and the expansion of federal bureaucracy, dominated the white liberal [realist] agenda during this era and largely overshadowed [the] racial matters" that were important to Houston); *see also* J. Clay Smith, Jr. & E. Desmond Hogan, *Remembered Hero, Forgotten Contribution: Charles Hamilton Houston, Legal Realism, and Labor Law*, 14 HARV. BLACKLETTER L.J. 1 (1998).
154. Standard surveys of realist work that overlook the connection between white realists and black civil rights lawyers include HORWITZ, *supra* note 42; LAURA KALMAN, *LEGAL REALISM AT YALE, 1927-1960* (1986); JOHN HENRY SCHLEGEL, *AMERICAN LEGAL REALISM AND EMPIRICAL SOCIAL SCIENCE* (1995); Horwitz, *supra* note 150, at 602.

A. *Three New Frames for the Private Labor Market:  
Antidiscrimination, Marxist Politics, and the New Voluntarism*

Scholarly accounts of *Brown* and its preceding history have emphasized that the private labor market only emerged in the professional consciousness of the civil rights bar in the late 1930s and the early 1940s, when Charles Houston began challenging labor union discrimination under the Railway Labor Act, and A. Philip Randolph's threat of a march on Washington convinced President Roosevelt to sign an executive order creating the wartime Fair Employment Practice Committee.<sup>155</sup> Even these accounts see the labor cases as a secondary concern of Houston's that emerged from his traditional NAACP work.<sup>156</sup> The civil rights lawyers, however, had been shifting their attention to the private labor market for almost a decade when Houston began to take up the labor cases. As early as 1931, three new frames for viewing the private labor market had emerged—one rooted in antidiscrimination, another rooted in Marxist politics, and a third that emphasized new forms of voluntarist activity. All three would compete to supplant race uplift as the professional ethos of the civil rights bar in the 1930s.

The voluntarist strand of uplift led to a conception of the private labor market as a regime of liberty rather than coercion. Sadie Alexander, professionally trained as both an economist and a lawyer, communicated this with a lucidity that few of her colleagues could match. Analyzing the economic status of black women workers in the late 1920s, she found that they earned less than their white counterparts and occupied unskilled positions. Alexander, however, believed that this was not cause for concern. "[I]n the natural process of events," she argued, "Negro women must eventually push on to more skilled, better paying jobs" as firms seeking greater profits capitalized on their skills by promoting them.<sup>157</sup> Racial as well as individual progress would inevitably result from labor market participation, she argued, provided that

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155. See MCNEIL, *supra* note 36, at 156-63; TUSHNET, *supra* note 3, at 76-80.

156. See ERIC ARNESEN, BROTHERHOODS OF COLOR: BLACK RAILROAD WORKERS AND THE STRUGGLE FOR EQUALITY 204 (2001); MCNEIL, *supra* note 36, at 156; Smith & Hogan, *supra* note 153, at 5. Perceptive observers know that by the 1920s the civil rights lawyers had begun to attack discrimination by putatively private actors, such as common carriers and innkeepers, and putatively private institutions, such as all-white political primaries and neighborhood associations that employed racially restrictive covenants. See, e.g., TUSHNET, *supra* note 3, at 67-115. Most scholars assume, however, that the critique of the private labor market emerged much later.

157. Sadie T.M. Alexander, *Negro Women in Our Economic Life*, 8 OPPORTUNITY 201-02 (1930).

African-Americans disciplined their individual efforts with “a stabilizing sense of group-responsibility.”<sup>158</sup>

During the 1920s, lawyers such as Raymond Alexander and Charles Houston tended to share Sadie Alexander’s view of the private labor market as a regime of liberty rather than coercion.<sup>159</sup> If African-Americans were allowed basic common law liberties and left alone, their individual and collective efforts would lead to individual and racial progress. The job of the black lawyer in this process was to foster the creation of institutions like black businesses, law firms, and law schools, and to provide examples of thrift, hard work, and property accumulation that would inspire working-class blacks to internalize respectable middle-class culture. When the civil rights lawyers critiqued employment discrimination during the 1920s, they tended to focus their efforts on the civil service and other governmental positions that were easily accommodated to the obligation of public entities to be evenhanded with respect to race.<sup>160</sup>

The pre-Depression civil rights lawyers did formulate a sustained critique of one form of private labor market coercion: that of labor organizations, particularly those associated with the American Federation of Labor (AFL), which excluded black workers from membership, relegated them to segregated, secondary black locals, and actively campaigned to replace black workers with white ones.<sup>161</sup> Most black lawyers, as a general matter, endorsed collective worker organization as a means of ameliorating the externalities of industrial capitalism.<sup>162</sup> Many, however, remained suspicious of specific legal reforms

158. *Id.* at 203.

159. On Houston and Alexander’s voluntarist writings, see *supra* Section III.A.

160. See, e.g., Francis M. Dent, Legal Problems To Be Overcome, Address Before the National Bar Association Annual Convention, in ADDRESSES DELIVERED BEFORE THE FIFTH ANNUAL CONVENTION, *supra* note 105, at 45 (discussing public employment). Black lawyers had formulated a critique of private discrimination in access to public accommodations, but formulating a similar critique for the private labor market proved difficult. Discrimination in public accommodations had been addressed by both federal and state statutes during the nineteenth century, providing a clearer source for intellectual and doctrinal critique than existed for private labor market discrimination.

161. On the discriminatory practices of organized labor, see ARNESEN, *supra* note 156; BERNSTEIN, ONLY ONE PLACE OF REDRESS, *supra* note 54; PHILIP S. FONER, ORGANIZED LABOR AND THE BLACK WORKER 1619-1973, at 64-102 (1974); HERBERT HILL, BLACK LABOR AND THE AMERICAN LEGAL SYSTEM 1-34 (1977); and BRUCE NELSON, DIVIDED WE STAND: AMERICAN WORKERS AND THE STRUGGLE FOR BLACK EQUALITY (2001).

162. See, e.g., STRAKER, *supra* note 47, at 186; C. Francis Stradford, Changes in the Law Wrought by Economic and Social Forces, Address Before the National Bar Association Annual



that might boost the power of discriminatory unions. When the legislation that would become the Norris-LaGuardia anti-labor-injunction statute was proposed, Cleveland lawyer Harry Davis opposed it for that very reason.<sup>163</sup> Harvard law student John P. Davis announced in 1929 that he would adopt the motto “hurrah for the Scab and the Open Shop and To Hell with the Unions,” at least until labor stopped excluding black workers.<sup>164</sup> In short, lawyers like Harry Davis and John P. Davis viewed anti-labor legal measures as preserving worker liberty, and saw the collective power of unions as coercive.

Their positions on civil rights, employment, and labor, would shift dramatically during the next decade. The Great Depression called into question the assumption of progress, a core tenet of uplift: both collective racial progress toward economic equality with whites, and intraracial progress of working-class blacks toward middle-class status.<sup>165</sup> With the onset of the Depression, the incomes of black industrial workers fell severely and their unemployment levels rose precipitously in the cities that housed the leaders of the African-American bar.<sup>166</sup> Urban black workers accounted for a good portion of the clientele of African-American lawyers, who in turn faced severe economic difficulties. After several decades of twenty to thirty percent decennial growth, the size of the black bar actually decreased by over fifteen percent during the 1930s—even though the number of lawyers in the country increased by over ten percent during the decade.<sup>167</sup> One survey of black professionals found that the median income for African-American lawyers dropped by almost one-third between 1932 and 1936, a far larger drop than for any other profession

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Convention, in ADDRESSES DELIVERED BEFORE THE FIFTH ANNUAL CONVENTION, *supra* note 105, at 9; Sadie Alexander, Lecture on Segregation in the Public Schools, Delivered at Dunbar Theater 3 (Dec. 5, 1925) (unpublished manuscript, on file with STMAP, Box 71).

163. Editorial, *Spokesman for Negroes Condemns Anti-Injunction Bill*, 11 L. & LAB. 24, 24 (1929).

164. John P. Davis, Letter to the Editor, *The Black Man's Burden*, THE NATION, Jan. 9, 1929, at 44.

165. On race uplift's assumption of progress, see *supra* Section II.D.

166. See, e.g., NANCY J. WEISS, FAREWELL TO THE PARTY OF LINCOLN: BLACK POLITICS IN THE AGE OF FDR 45-46 (1983); Bureau of Labor Statistics, U.S. Dep't of Labor, *Long-Term Unemployment in Philadelphia*, 49 MONTHLY LAB. REV. 1079 (1939) (detailing local economic conditions).

167. See RICHARD L. ABEL, AMERICAN LAWYERS 280 (1989) (proposing slightly different figures for 1940); JEROLD S. AUERBACH, UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA 128 (1976); SMITH, *supra* note 74, at 631-37.

surveyed.<sup>168</sup> The erosion of race uplift's promises of racial progress called for a new theory of the black professional's role in economic advancement.

Two such theories appeared in the August and September 1931 issues of *Opportunity*. An essay by Raymond Pace Alexander, originally titled *The Negro Lawyer: His Duty in a Rapidly Changing Social, Economic and Political World*, introduced one theory.<sup>169</sup> The beginning of the essay departed little from 1920s uplift, enumerating cases of discrimination involving respectable African-Americans.<sup>170</sup> But Alexander shifted his tone halfway through, arguing that “[w]e find today, however, a type of discrimination where the Negro seeks employment in industry and the manufacturing trades, in the service occupations . . . that is more dangerous and far-reaching in effect than any kind we have heretofore experienced.”<sup>171</sup> He maintained that established race uplift organizations could not remedy increasing competition between black and white workers for low-wage jobs, and that the black bar therefore needed to shift its attention to defend “the fundamental right to work, free from race influences.”<sup>172</sup>

In his 1931 essay and his NBA presidential speech, Raymond Alexander began to lay the groundwork for what would become modern employment discrimination practice. Prior versions of race uplift had emphasized the duties of citizenship with regard to the private labor market—ensuring that African-American workers internalized proper work habits and engaged in collective voluntarist enterprise. The new theory, however, recommended an enhanced focus on rights—what Alexander called “the fundamental right to work”—a right infringed when African-Americans were denied jobs because of their race.<sup>173</sup>

One month earlier, Los Angeles lawyer Loren Miller had published an article in *Opportunity* that articulated a far more radical civil rights program.

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168. See CHARLES S. JOHNSON, *THE NEGRO COLLEGE GRADUATE* 375 (1938).

169. Raymond Pace Alexander, *The Negro Lawyer*, 9 *OPPORTUNITY* 268 (1931) [hereinafter Alexander, *The Negro Lawyer*]; Raymond Pace Alexander, *The Negro Lawyer: His Duty in a Rapidly Changing Social, Economic and Political World*, Address Before the National Bar Association Annual Convention (Aug. 7, 1930), in *NAT'L BAR ASS'N, PROCEEDINGS OF THE SIXTH ANNUAL CONVENTION OF THE NATIONAL BAR ASSOCIATION* 4 (1930).

170. Alexander, *The Negro Lawyer*, *supra* note 169, at 268–69.

171. *Id.*

172. *Id.*

173. *Id.* at 270; see also Jesse S. Heslip, Address Before the Eighth Annual Convention of the National Bar Association (Aug. 4, 1932), in *PROCEEDINGS OF THE SEVENTH AND EIGHTH ANNUAL CONVENTIONS*, *supra* note 147, at 65.

Three decades later, Miller would do as much as anyone to create the legal liberal interpretation of the pre-*Brown* civil rights bar.<sup>174</sup> In 1931, however, he had other concerns. Miller started from a different vantage point than Alexander. Both strands of uplift, he argued, had become irrelevant. The voluntarist strand was based on the “far fetched possibility that the concentration of capital in the hands of the professional class may evolve a black capitalist class which will, in turn, establish factories to employ the black workers,” an unlikely occurrence during the Depression.<sup>175</sup> Miller also excoriated what he called “the fight for civil and political rights.”<sup>176</sup> “The black worker,” he argued, was “imbibing here and there the new psychology of working class” and “rather unconsciously takes the view that his ills are purely economic and is less grateful for political victories than he might be.”<sup>177</sup> Miller was skeptical about the autonomy of law and the efficacy of legalism, arguing that the more fundamental work, as well as the new consciousness of the black workers, should focus on the economic struggle between contending classes. Miller’s essay announced a new theory of the black professional’s role that was rooted in Marxism.

Miller’s essay was the product of several trends that had brought Marxist questions to the fore by the fall of 1931. Many civil rights lawyers had exchanged ideas as part of the Harvard black graduate student cohort of the 1920s and early 1930s, where they befriended and debated figures such as the economist Robert Weaver and the political scientist Ralph Bunche, who penned his essay *Marxism and the “Negro Question”* soon after leaving Harvard.<sup>178</sup> More important was the influence of the Scottsboro Boys’ trials of 1931, where nine black youths were accused of raping two white women in Alabama. After eight of the youths were sentenced to death, the International Labor Defense (ILD), a Communist Party-affiliated group, represented the defendants in their appeals and used the case to publicize Marxist-influenced theories of civil rights lawyering. Just as Miller’s essay went to press, ILD lawyers and activists were presenting their radical theories of law at the NBA

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174. See *supra* text accompanying notes 32-33.

175. Loren Miller, *The Plight of the Negro Professional Man*, 9 OPPORTUNITY 239, 239-40.

176. *Id.*

177. *Id.*

178. See RALPH BUNCHE: THE MAN AND HIS TIMES 52 (Benjamin Rivlin ed., 1990); RALPH BUNCHE, *Marxism and the “Negro Question,”* in SELECTED SPEECHES AND WRITINGS 35 (Charles P. Henry ed., 1995).

convention, spurring the black lawyers in attendance to an unprecedented, and heated, debate about the nature of lawyering for social change.<sup>179</sup>

The African-American civil rights lawyers' endorsement of Marxist politics can be distinguished from the rigid yet ever-changing official policies of the American Communist Party.<sup>180</sup> For black civil rights lawyers, the Marxist critique usually translated into the argument that workers needed to be unified into a common interest group that could contend with capital—a prescription consistent with the general Marxist impulse, but also with sentiments shared by a growing group of Americans, including Justice Holmes and the New Dealers who pushed for the National Labor Relations Act.<sup>181</sup> In civil rights politics, the Marxist position led to a program that emphasized breaking down the barriers that separated black workers from white organized labor.

A third alternative was also available to the civil rights lawyers—one that ran through the voluntarist strand of uplift. After an initial endorsement of New Deal public works and industrial recovery measures, Sadie Alexander, for instance, focused on voluntarist measures for much of the rest of the 1930s, continuing her traditional focus on black progress in accumulating property and moving up the rungs of the employment ladder. Alexander's New Voluntarism tended to emphasize opportunity rather than coercion in the private labor market. In particular, Alexander urged African-American organizations to monitor black employment patterns and to train black workers to seek out the opportunities that remained available.<sup>182</sup> Influenced by W.E.B. DuBois's Depression-era writings, she counseled exploration of new forms of collective, race-based action, and urged African-Americans to assist in the formation of black consumers' cooperatives that would allow the middle

179. See Mack, *supra* note 121.

180. On the Communist Party's evolving ideology, see NELL IRVIN PAINTER, *THE NARRATIVE OF HOSEA HUDSON: HIS LIFE AS A NEGRO COMMUNIST IN THE SOUTH* 16-17, 22, 25-28 (1979).

181. See *Vegeahn v. Guntner*, 44 N.E. 1077, 1081-82 (Mass. 1896) (Holmes, J., dissenting); ELLIS W. HAWLEY, *THE NEW DEAL AND THE PROBLEM OF MONOPOLY: A STUDY IN ECONOMIC AMBIVALENCE* 195-97 (Fordham Univ. Press 1995) (1966); see also RODGERS, *supra* note 49, at 185-86, 203-11.

182. See Sadie T.M. Alexander, *Address on Negro Achievement Delivered for Tindley Temple Negro Achievement Week* (1936) (unpublished manuscript, on file with STMAP, Box 71) [hereinafter Alexander, *Address on Negro Achievement*]; Sadie T.M. Alexander, *Address to Educational Economic Conference—Elks* (Aug. 13, 1935) (unpublished manuscript, on file with STMAP, Box 71) [hereinafter Alexander, *Address to Educational Conference*]; Sadie T.M. Alexander, *Economic Status of Negro Women, an Index to the Negro's Economic Status, Address to the Urban League* 2, 7 (undated) (unpublished manuscript, on file with STMAP, Box 71) [hereinafter Alexander, *The Economic Status of Negro Women*].

and working classes to share a consumerist economic identity.<sup>183</sup> The most significant consumerist-voluntarist efforts of the decade, however, were the African-American civic movements that boycotted businesses located in black neighborhoods that failed to hire and promote black workers.<sup>184</sup>

Each of these three theories of the role of the civil rights lawyer in economic life would have to surmount significant problems before it could claim to be the successor to 1920s-era race uplift. Emerging theories of employment discrimination lacked a doctrinal or jurisprudential frame. Statutory and common law precedents provided little support for disciplining the race-based actions of private employers or labor unions. The preferred solution of Marxist-influenced lawyers—uniting black and white workers against the owners of capital—seemed to be extremely unlikely when much of organized labor excluded African-Americans from membership. The voluntarists' solution, for all of its anti-legalism, would ultimately run up against legal constraints in the form of the injunctive relief mobilized against the prime voluntarist activity—the black boycott movements.

### *B. The Influence of Progressive-Realist Jurisprudence*

Each of the competing Depression-era theories of civil rights lawyering and economic citizenship would be aided by progressive and legal realist insights in its struggle with the private labor market. Many of the civil rights lawyers who took the lead in this struggle were trained in the brand of progressive-realist jurisprudence promoted by Felix Frankfurter and Roscoe Pound at Harvard Law School.<sup>185</sup> Others were exposed to realist methods at Howard Law School, where Charles Houston implemented pedagogical and jurisprudential reforms

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183. See Alexander, Address on Negro Achievement, *supra* note 182, at 5-6.

184. See *infra* Section IV.C.

185. Although important differences exist between the individuals who have been identified in the scholarly literature as contributing to progressive-realist thought, I have chosen to follow the recent work that has emphasized the continuities between Pound, Frankfurter, and the realist figures located at Yale, Columbia, and Johns Hopkins. See, e.g., AMERICAN LEGAL REALISM, *supra* note 148; HORWITZ, *supra* note 42; N.E.H. HULL, ROSCOE POUND AND KARL LLEWELLYN: SEARCHING FOR AN AMERICAN JURISPRUDENCE 173-222 (1997); KALMAN, *supra* note 2, at 14 (adopting the expansive view of the legal realist project for the purposes of argument); Karl N. Llewellyn, *A Realistic Jurisprudence—The Next Step*, 30 COLUM. L. REV. 431, 454-55 & n.22 (1930) (citing Frankfurter as one whose work was taking the realist movement “beyond the stage of chatter”). Other definitions of progressive or realist jurisprudence will, of course, generate other definitions of realism.

that drew on both the Pound-Frankfurter brand of progressive realism as well as the realist innovations at Yale and Columbia Law Schools.

During the post-World War I era, Harvard Law School saw the development of what Dean Erwin Griswold would later call “a long line of eminent Negro lawyers who have been students at the School,” including Charles Houston, “Raymond Pace Alexander, of the Class of 1923, [and] Judge William H. Hastie, of the Class of 1930 (a fellow student of my own time).”<sup>186</sup> A number of these students came under the influence of Roscoe Pound and Felix Frankfurter. Pound became an intellectual mentor and occasional correspondent of both Houston and Alexander’s, and he sent both men on to their professional careers accompanied by letters of recommendation.<sup>187</sup> For his part, Frankfurter publicly endorsed Alexander’s protest article about the Harvard dormitory crisis.<sup>188</sup>

With Pound’s enthusiastic endorsement, Houston stayed on for an extra year of S.J.D. work after completing his LL.B in 1922, taking two courses each from Pound and Frankfurter.<sup>189</sup> Just before the beginning of Houston’s graduate year, Pound and Frankfurter published their social scientific study, *Criminal Justice in Cleveland*,<sup>190</sup> one of the more successful examples of the

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186. Erwin N. Griswold, Charles Hamilton Houston, Address Before the 41st Annual Convention of the NAACP, Boston, Massachusetts (June 15, 1950), in 13 NEGRO HIST. BULL. 216, 210 (1950).

187. See Raymond Pace Alexander 2-3 (undated) (unpublished manuscript by unknown author, on file with RPAP, Box 1) (noting that Alexander received a letter of recommendation from Pound); Letter from Roscoe Pound, Dean, Harvard Law Sch., to Hon. Fenton W. Booth (Dec. 31, 1923) (on file with CHHP, Box 163-12).

188. See Frankfurter, *supra* note 128. Alexander took two classes with Frankfurter, and would continue to rely on Pound’s ideas in speeches and writings into the 1940s. See HARVARD LAW SCH. CATALOGUE, 1922-23, at 321 (1922); Harvard Law Sch., Official Transcript of Raymond Pace Alexander (1921-1923) (on file with Office of the Registrar, Harvard Law School (ORHLS)); see also Raymond Pace Alexander, The Abolishing of the Magistrate Courts and a Recommendation for the Enlargement of and the Extension of the Powers of the Municipal Court as a Substitute, Address Before the Law Academy (May 23, 1934) (on file with RPAP, Box 95); Raymond Pace Alexander, Administrative Law: A Threat to Our Constitutional Guarantees? (1945) (unpublished manuscript, on file with RPAP, Box 96).

189. See Griswold, *supra* note 186, at 210; Letter from Roscoe Pound to Hon. Fenton W. Booth, *supra* note 187; Letter from Roscoe Pound, Dean, Harvard Law Sch., to Unknown Recipient (Sept. 27, 1921) (on file with CHHP, Box 162-12); Harvard Law Sch., Official Transcript of Charles Hamilton Houston (1919-1923) (on file with ORHLS).

190. CRIMINAL JUSTICE IN CLEVELAND (Roscoe Pound & Felix Frankfurter eds., 1922). Pound and Frankfurter co-directed and supervised the research. See DAVID WIGDOR, ROSCOE POUND: PHILOSOPHER OF LAW 242-43 (1974).

application of progressive-realist social science to law,<sup>191</sup> in which both men endorsed sociological approaches to law. Frankfurter's introduction to the Cleveland crime survey, for example, hailed the work as a groundbreaking application of "social sanitation and social engineering" ideas to law reform.<sup>192</sup> In Pound's jurisprudence class, Houston read excerpts from many of the classic articles in which Pound formulated his sociological approach to law.<sup>193</sup> Houston's class notes chart his absorption of Pound's idea that legal decisionmaking should be based on functional tests that attempt to identify the "social interests" at issue in a particular legal setting.<sup>194</sup> This was the "social engineering" model of law reform that Pound intended to replace nineteenth-century legal methods.<sup>195</sup>

Charles Houston presented his S.J.D. thesis—his first extended statement on law—as an elaboration of the principles that he had internalized in his graduate courses with Pound and Frankfurter.<sup>196</sup> The thesis analyzed the scope of the notice and hearing that should be given to potentially affected parties before an administrative body could take action. Its legal method bore many of the hallmarks of progressive-realist jurisprudence: (1) a critique of formal or conceptual reasoning,<sup>197</sup> (2) arguments that law should respond to social forces

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191. The assessment of the Cleveland crime survey as a relatively successful realist project comes from AMERICAN LEGAL REALISM, *supra* note 148, at 236.

192. Felix Frankfurter, *Preface to CRIMINAL JUSTICE IN CLEVELAND*, *supra* note 190, at v, v; *see also* Roscoe Pound, *Criminal Justice and the American City*, in *CRIMINAL JUSTICE IN CLEVELAND*, *supra* note 190, at 559.

193. Houston's reading included Roscoe Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12 (1910) [hereinafter Pound, *Law in Books*]; Roscoe Pound, *Liberty of Contract*, 18 YALE L.J. 454 (1909); Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605 (1908); Roscoe Pound, *The Scope and Purpose of Sociological Jurisprudence*, 24 HARV. L. REV. 591 (1911); and RUDOLPH VON JHERING, *LAW AS A MEANS TO AN END* (Isaac Husik trans., MacMillan 1924) (1877).

194. Charles H. Houston, *Jurisprudence Notes* (undated) (unpublished class notes, Harvard Law School) (on file with CHHP, Box 163-5).

195. *See* Houston, *supra* note 194, at 1, 3. On Pound's legal method, *see* Thomas A. Green, *Freedom and Criminal Responsibility in the Age of Pound: An Essay on Criminal Justice*, 93 MICH. L. REV. 1915, 1983-95 (1995); and Kennedy, *supra* note 149, at 119-21. *See also* HULL, *supra* note 185, at 81-85; WIGDOR, *supra* note 190, at 183-205.

196. Charles H. Houston, *A Functional Study of the Requirements of Notice and Hearing in Governmental Action in the United States: Government Is a Practical Affair 1* (1923) (précis to unpublished S.J.D. thesis, Harvard Law School) (on file with the Harvard University Library).

197. *See, e.g.*, John Dewey, *Logical Method and Law*, 10 CORNELL L.Q. 17 (1924).

and trends—particularly changes in urban and industrial life,<sup>198</sup> (3) a focus on defining the proper institutional locations for legal decisionmaking,<sup>199</sup> (4) consequentialist legal reasoning,<sup>200</sup> (5) a functionalist method, rooted in the social sciences,<sup>201</sup> and (6) an endorsement of administrative expertise and flexibility.<sup>202</sup>

Nineteenth-century courts, Houston argued, had insisted on “formalism for the sake of its own logical consistency” in this area,<sup>203</sup> applying outdated concepts of separation of powers, even as industrialization and urbanization made the old forms inadequate. Houston insisted that legal decisions should instead rely on functional tests that focused on the consequences of legal rules for modern social relations.<sup>204</sup> This method, he argued, would lead courts to compare the relative decisionmaking capacities of institutional actors, and would counsel greater deference by the courts to the institutional capacities and expertise of administrative agencies.<sup>205</sup>

While Houston’s thesis grappled with formalist concepts of separation of powers, he could have easily applied these same critiques to the rights-based jurisprudence that has been associated with his legacy. Indeed, Pound had taught him how to interpret and critique the various theories of rights.<sup>206</sup> From Pound he learned that the idea of a “legally delimited interest is [the] real basis

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198. See, e.g., Pound, *Law in Books*, *supra* note 193.

199. See, e.g., *Int’l News Serv. v. Associated Press*, 248 U.S. 215, 248-67 (1918) (Brandeis, J., dissenting).

200. See, e.g., Llewellyn, *supra* note 185.

201. See KALMAN, *supra* note 154, at 3-10.

202. See JAMES M. LANDIS, *THE ADMINISTRATIVE PROCESS* (1938). Two legal realist methodologies that are largely absent from Houston’s thesis are (1) an attack on the indeterminacy of legal reasoning (Houston critiqued traditional jurisprudence solely as failing to correspond to social interests), and (2) a critique of the public-private distinction. A partial version of the public-private critique would come later. See *infra* Section IV.D.

203. See Charles H. Houston, *Notice and Hearing as a Condition Precedent to Governmental Action 3* (June 1923) (unpublished preliminary report, on file with author).

204. *Id.* at 20 (declaring that “nothing is gained and much lost by applying the terms ‘judicial’ and ‘legislative’” to administrative action).

205. See *id.* at 17-19. He made his methodological premises clear in his précis to the full thesis, noting in the title that his was a “Functional Study,” and for emphasis adding the subtitle “Government Is a Practical Affair.” See Houston, *supra* note 196.

206. Houston, *supra* note 194, at 267-72. Houston had also heard Pound lecture on Wesley Hohfeld’s famous analysis of rights-talk. See *id.* at 271.



for unifying these conceptions.”<sup>207</sup> If nothing else, Houston learned that rights were not a priori concepts but rather mechanisms for securing the various social interests at stake in modern life. Much of modern rights discourse would have seemed like empty conceptualism to Houston: talk that should be replaced by the more purposive and naturalistic language of social engineering.

Houston’s graduate studies were the source of much of the vision that he would implement as Vice-Dean of Howard Law School. He would later recall that he “first got [the] idea about the functional teaching of law from Spain,” which was his next stop after completing his graduate work.<sup>208</sup> Houston received a traveling fellowship to study law at the University of Madrid during the 1923-1924 academic year. Although critical of the method of instruction there, he was impressed with classes in which students analyzed “concrete problems based on actual litigation,” and “[a]ctual legislative problems are also dealt with, the students being called upon to compile statistics, criticize existing legislation, [and] propose and recommend reforms. Field excursions are often made to determine the actual effect of the law or administration of justice in operation.”<sup>209</sup> This, Houston reasoned, was a legal method that “we well might copy” in American law teaching.<sup>210</sup>

Three years after Houston’s return from Spain, the Laura Spelman Rockefeller Memorial gave additional impetus to the formulation of his social engineering ideas when it hired Houston to study the interactions of African-Americans with the legal system.<sup>211</sup> Houston viewed his study as an application of the social scientific approach to law reform that he had learned at Harvard.<sup>212</sup> He eventually completed several drafts of a report on the state of the black bar, as well as several other reports.<sup>213</sup> In the final draft of the report, he argued that

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207. *Id.* at 270.

208. Letter from Charles H. Houston, Dir., Prelim. Survey: Status and Activities of Negro Lawyers, Howard Univ. Law Sch., to Leonard Outhwaite 1 (Jan. 29, 1928) (on file with LSRMP, Series 3.8, Box 101-1018).

209. Charles Houston, Report Under the Sheldon Travelling Fellowship in Law 1923-1924, at 12-13 (Feb. 28, 1925) (unpublished manuscript, on file with LSRMP, Series 3.8, Box 101-1019).

210. *Id.* at 13.

211. See Letter from Beardsley Ruml to Charles H. Houston (Nov. 11, 1927) (on file with LSRMP, Series 3.8, Box 101-1018).

212. See Letter from Charles H. Houston, Dir., Prelim. Survey: Status and Activities of Negro Lawyers, Howard Univ. Law Sch., to Leonard Outhwaite (Feb. 1, 1928) (on file with LSRMP, Series 3.8, Box 101-1018).

213. See *supra* note 18.

the primary function of reformed legal education for African-Americans was to prepare them for practice in the South.<sup>214</sup>

Houston thought that what he called “the functional teaching of law” would prepare black lawyers for this Southern practice. As his data took shape, he argued that it supported a revised law school curriculum at Howard Law School, the nation’s premier training ground for black lawyers, that would provide more business-oriented, economic, and practical training for black law students.<sup>215</sup> It was a vision that was far from the legal liberal orthodoxy. Houston envisioned that functionalist legal education should train black lawyers to go South, but argued that his revised law school curriculum would train them to do ordinary lawyer’s work, interact with local communities, and help slowly change Southern mores.<sup>216</sup> While he thought that antidiscrimination work would be a product of this process, he did not think that his social engineers would transform American society directly. Indeed, in his graduate thesis, he argued that litigation was generally ineffective in producing social change, particularly when it involved “questions of broad economic or social polic[y].”<sup>217</sup> In Houston’s view, then, the lessons of sociological jurisprudence and the voluntarist strain of uplift reinforced one another.

Houston’s social science survey put him in a position to put his recommendations into practice as Vice-Dean and de facto head of Howard Law School. Houston and a Rockefeller Memorial representative arranged a meeting with Howard University’s president, Mordecai Johnson, to discuss applying his findings to Howard and gaining accreditation for the school from the Association of American Law Schools.<sup>218</sup> The trustees of Howard appointed him Vice-Dean of the law school in June of 1929.<sup>219</sup> Appropriately enough, shortly before taking office Houston proposed a “study of the entire

214. Houston, Findings on the Negro Lawyer, *supra* note 18, at 16-17.

215. Leonard Outhwaite, Memorandum of Interview with Charles Houston 2 (Jan. 18, 1928) (on file with LSRMP, Series 3.8, Box 101-1018).

216. See *supra* Section III.A.

217. Houston, *supra* note 203, at 17.

218. See Letter from Charles H. Houston to Leonard Outhwaite (Jan. 5, 1928) (on file with LSRMP, Series 3.8, Box 101-1018) (describing how Howard had been denied accreditation); Outhwaite, *supra* note 215, at 4.

219. See Cobb, James A., in DICTIONARY OF AMERICAN NEGRO BIOGRAPHY 117, 118 (Rayford W. Logan & Michael R. Winston eds., 1982).

curriculum” of the law school “to give [it] a more functional aspect.”<sup>220</sup> As Vice-Dean, Houston viewed his pedagogical reforms at Howard as a continuation of the critiques of conceptual jurisprudence that he had begun in his S.J.D. thesis. He now applied these critiques to law school education, explaining: “There has been a common complaint that legal education has been too dry, and too abstract; that all of the economics and social substance has been squeezed out.”<sup>221</sup> “Social engineering” was his term for the process of putting that economic and social context back into legal education. Announcing to his students in a 1932 memorandum that “as social engineers we must be cognizant of the forces and factors we have to deal with and must be acquainted with modern economic difficulties,” Houston advised them to attend an exhibition on automobile construction, which would give them the background knowledge they would need to undertake personal injury litigation.<sup>222</sup>

The new social engineering pedagogy should track that of the leading law schools, Houston argued, and he and his faculty cast about widely for the most attractive innovations to be emulated. After studying the offerings at major law schools, they found most inspiration from the innovations of the legal realist teachers associated with Yale and Columbia.<sup>223</sup> For instance, the faculty proposed that Howard Professor Leon Ransom be sent away to take a new summer course in credit transactions offered by future Yale Dean Wesley Sturges.<sup>224</sup> Howard Law School’s 1931-1932 annual report announced a proposed “regrouping of commercial subjects following the system now in effect at Yale and Columbia.”<sup>225</sup> Walter Wheeler Cook, then affiliated with

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220. MCNEIL, *supra* note 36, at 77 (quoting Charles H. Houston, Personal Observations 15 (May 28, 1929) (internal quotation marks omitted)).

221. Memorandum from Charles H. Houston, Vice-Dean, Howard Law Sch., to Dean Holmes 2 (July 16, 1930) (on file with HUA, Box 1357).

222. Memorandum from Charles H. Houston, Vice-Dean, Howard Law Sch., to Student Body, Howard Law Sch. (Oct. 20, 1932) (on file with HUA, Box 1387).

223. Houston, Annual Report, *supra* note 96, at 5. Although Houston and his colleagues looked to Harvard’s graduate law program to supply them with the intellectual tools they needed to fashion a reformed LL.B. curriculum, they looked elsewhere for models for that revised curriculum. At the same time as Houston was proposing his revised LL.B. curriculum at Howard, his mentor, Pound, was moving in the other direction, rejecting suggestions for educational innovation at Harvard that Frankfurter and others favored. See KALMAN, *supra* note 154, at 56-57; PARRISH, *supra* note 127, at 152-54.

224. Houston, Annual Report, *supra* note 96, at 6.

225. *Id.* at 5.

Johns Hopkins, taught at Howard as a visiting professor during the 1932-1933 academic year,<sup>226</sup> and found so much affinity between his own pedagogical goals and Houston's vision that he proposed that Howard reappoint him for one additional year as "Acting Dean," in order to spend more time at the school and help reorder its program. Cook argued that the proposed reordering at Howard would be as revolutionary as the spread of the case method had been a generation earlier.<sup>227</sup>

In 1933, four years after his appointment as Vice-Dean, Houston set out his mature vision for a school of social engineering in a memorandum to the university's president, Mordecai Johnson. Arguing that "[l]aw cannot be separated from government and business," Houston proposed that Howard's law school, its commerce and finance department, and its government department be combined into "one big school" with a unified course of study.<sup>228</sup> Much in the manner of his realist counterparts at Columbia and Yale, Houston argued that the legal curriculum should be reorganized around institutional practices rather than traditional legal concepts: "[L]aw schools are shifting away from the old limited case method of instruction with purely legal materials, to a method of instruction that takes more cognizance of modern economic facts and business trends and developments."<sup>229</sup>

Houston's proposed reorganization stalled, but his social engineering ideas did result in several more immediate concrete changes in the curriculum at Howard. The first was the general emphasis on supplementing or replacing legal concepts and categories with practical knowledge, particularly from the sciences and social sciences.<sup>230</sup> The second change was Howard Professor Leon Ransom's realist-inspired reorganization of the business law offerings upon his return from his 1934-1935 graduate studies at Harvard. The new courses included the business units course pioneered by the Columbia realists, creditor's rights—using Columbia Professor John Hanna's groundbreaking

226. See Houston, Condensed Annual Report, *supra* note 96, at 1.

227. See *id.* at 1; Letter from W.W. Cook, Professor, Johns Hopkins Univ. Inst. of Law, to Charles Houston, Howard Univ. Law Sch., (March 29, 1933) (praising the idea of reordering) (on file with HUA, Box 1345).

228. Houston, Memorandum on Reorganization, *supra* note 96, at 3.

229. *Id.* at 5. Three years later, Houston's protégé, Howard Law Professor William Hastie, would offer a similar, albeit far more modest, vision for combining study at the law school with undergraduate social science study. See William Hastie, The School of Law in Prospect 2 (Aug. 1, 1936), (unpublished manuscript), *microformed on* William H. Hastie Papers, Part II, Reel 11, Frames 569-70 (Harvard Law Sch.).

230. See, e.g., Houston, *supra* note 222.

*Cases and Materials on the Law of Creditors' Rights*—and credit transactions.<sup>231</sup> The third change was Houston's program, carried out with the assistance of Roscoe Pound, of sending Howard's leading graduates and professors on to Harvard for graduate training in innovative legal methodologies, beginning with Howard Professors Milton Kallis and William Hastie in 1932.<sup>232</sup>

William Hastie had carried forward Houston's interest in progressive-realist legal methods upon his arrival at Harvard Law School in 1927. Hastie produced one of the many student theses to emerge from Felix Frankfurter's federal jurisdiction and procedure class, and became one of the protégés whose careers Frankfurter aided when possible.<sup>233</sup> When Hastie returned to Harvard for his S.J.D. in 1932, he elected to pursue his graduate work under the direction of Joseph Beale rather than Frankfurter, perhaps because Frankfurter was being drawn into Franklin Roosevelt's circle of advisors and would spend much of the year with his attention focused elsewhere.<sup>234</sup> Like Houston before him, Hastie also completed Pound's jurisprudence course.<sup>235</sup>

In his S.J.D. thesis, Hastie took on a subject that occupied the core interests of both Beale and Frankfurter—jurisdictional and conflict-of-laws issues raised by workmen's compensation statutes.<sup>236</sup> In good progressive-realist fashion, Hastie sought to resolve the conflicts questions through what he called "a functional approach,"<sup>237</sup> or one that looked to the "end which rules about a particular subject matter are intended to serve."<sup>238</sup> Hastie spent much of his

231. See *The School of Law: 1936-1937*, HOW. U. BULL., Dec. 15, 1936, at 19. For background on the business units course and the casebooks, see KALMAN, *supra* note 154, at 71, 83-84.

232. See Houston, Annual Report, *supra* note 96, at 4; Letter from Charles H. Houston Professor, Howard Univ. Law Sch., to Roscoe Pound, Dean, Harvard Law Sch., (Jan. 12, 1932) (on file with HUA, Box 1345); Letter from Roscoe Pound, Dean, Harvard Law Sch., to Charles H. Houston, Professor, Howard Univ. Law Sch. (Mar. 23, 1932) (on file with HUA, Box 1345).

233. William H. Hastie, *Doctrine and Practice of Foreign Receiverships in the Federal Courts* (May 1930) (unpublished student thesis, Harvard Law School) (on file with the Harvard University Library); see also GILBERT WARE, *WILLIAM HASTIE: GRACE UNDER PRESSURE* 31 (1984).

234. On Frankfurter's activities, see PARRISH, *supra* note 127, at 197-219, 234-37.

235. See Harvard Law Sch., *Official Transcript of William Henry Hastie (1927-1933)* (on file with ORHLS); *HARVARD LAW SCH. CATALOGUE* 1932-33, at 517 (1932).

236. See William H. Hastie, *Workmen's Compensation: A Proving Ground of Common Law and Constitutional Limitations upon Legislative Jurisdiction* (May 1, 1933) (unpublished S.J.D. thesis, Harvard Law School) (on file with the Harvard University Library).

237. *Id.* at 52.

238. *Id.* at 60.

thesis splitting the difference between Beale, whom many realists derided as a formalist, and Beale's critics, while making clear his adherence to a policy-oriented legal method.<sup>239</sup> Hastie turned it in to Beale in May of 1933 and returned to Washington committed to a legal method that sought to discard older juristic categories (many of which Hastie criticized in his thesis) in order to reform legal institutions to accord with social life.

Howard Law School Professor Leon Ransom made the trip to Harvard for additional training in 1934, staying a year to complete his S.J.D. thesis *Fiduciary Standards in Suretyship*. Ransom earned very high marks in Jurisprudence, now co-taught by Pound, remarking to Houston: "Boy! What a Hell-cat this man Pound is! I never realized there was so much about law, and particularly Jurisprudence that I did not know."<sup>240</sup> Edward Lovett, the top graduate in the Howard Law School class of 1932, followed the next year for his LL.M. Houston arranged for Pound to introduce him to faculty members in advance of his arrival, and Lovett eventually wrote a thesis on administrative law under Frankfurter's direction.<sup>241</sup> After Lovett returned to Washington with letters of recommendation from several Harvard professors, Hastie proposed him for a faculty position at Howard.<sup>242</sup> Howard law graduate James Tyson arrived at Harvard the same year as Lovett, although he left before completing his

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239. See, e.g., *id.* at 45-64. Beale's chief critic was Walter Wheeler Cook, whom Houston (likely with Hastie's endorsement) hired to teach at Howard while Hastie was on leave. On the realists' view of Beale, see KALMAN, *supra* note 154, at 25-26. For a different interpretation of Beale, see TONY FREYER, HARMONY AND DISSONANCE: THE SWIFT AND ERIE CASES IN AMERICAN FEDERALISM 113-14 (1981); and Tony Freyer, Book Review, 88 AM. HIST. REV. 1335, 1336 (1983).
240. Letter from Leon A. Ransom to Charles H. Houston, Professor, Howard Univ. Law Sch. (Oct. 2, 1934) (on file with HUA, Box 1209); see also Harvard Law Sch., Official Transcript of Leon Andrew Ransom (1934-1935) (on file with ORHLS); Leon A. Ransom, *Fiduciary Standards in Suretyship* (1935) (unpublished S.J.D. thesis, Harvard Law School) (on file with the Harvard University Library).
241. Edward P. Lovett, *The Public Utilities Commission of the District of Columbia* (1936) (unpublished LL.M. thesis, Harvard Law School) (on file with the Harvard University Library).
242. See Harvard Law Sch., Official Transcript of Edward Pharoah Lovett (1935-1936) (on file with ORHLS); Letter from William H. Hastie to Mordecai Johnson, President, Howard Univ. (May 29, 1936), *microformed on* William H. Hastie Papers, Part II, Reel 11, Frame 568, (Harvard Law Sch.); Letter from Charles H. Houston, Vice-Dean, Howard Univ. Law Sch., to Roscoe Pound, Dean, Harvard Law Sch. (Mar. 26, 1935), *microformed on* Roscoe Pound Papers, Reel 28 (Harvard Law Sch.).

studies.<sup>243</sup> Thurgood Marshall, the top graduate of the 1933 class, turned down an opportunity to join the Harvard exodus in order to begin practice in Baltimore.<sup>244</sup> The attitudes of the black graduate students toward Pound and Frankfurter's method varied somewhat, but all bore traces of the legal method that Houston began to articulate in the early 1920s.

By the mid-1930s, then, a core group of civil rights lawyers had emerged who had been exposed to progressive-realist jurisprudence. Charles Houston had absorbed the Pound-Frankfurter legal method at Harvard, which helped inspire his reforms at Howard. The result was a law school curriculum that borrowed liberally from the progressive-realist innovations at Harvard, Yale, and Columbia, and adapted them to the training of black lawyers. Among its faculty were two professors—Leon Ransom and William Hastie—who had followed Houston to Harvard for graduate training. Other African-American Harvard graduates, like Raymond Pace Alexander, took their own lessons from Pound and Frankfurter's jurisprudence into their professional lives. These sources of intellectual experimentation within the civil rights bar contributed to new ways of thinking about law as the black bar leaders began to be drawn into one of the leading legal controversies of the Depression—the attempt to bring the private labor market within the ambit of regulatory law.

### C. *Civil Rights in the Private Labor Market: The Emergence of Labor Law*

During the 1930s, the leadership of the African-American civil rights bar began to articulate a sustained critique of private labor market discrimination. That critique had several sources, most prominent among them the black boycott movements that sprang up in the early years of the Depression. The boycotters adopted “Don't Buy Where You Can't Work” and similar catchphrases as their slogan. They sought jobs for black workers in businesses that served African-American neighborhoods but hired few black employees. Over the next decade, boycott movements sprang up in cities across the nation, from Los Angeles to Boston.<sup>245</sup> Defending the boycotters required the civil

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243. See Harvard Law Sch., Official Transcript of James Guy Tyson (1935) (on file with ORHLS).

244. See KLUGER, *supra* note 34, at 181-82.

245. See AUGUST MEIER & ELLIOTT RUDWICK, *The Origin of Nonviolent Direct Action in Afro-American Protest: A Note on Historical Discontinuities*, in ALONG THE COLOR LINE: EXPLORATIONS IN THE BLACK EXPERIENCE 307, 316 (1976).

rights lawyers to immerse themselves in the intricacies of labor law. That immersion led them back to progressive-realist jurisprudence.

The boycotts produced a vigorous debate within civil rights politics. Advocates of Marxist politics and those of the New Voluntarism quickly pointed out that the boycotts might result in black workers being employed in black residential areas, but then perhaps only white workers would be employed in white ones.<sup>246</sup> Many of these critiques targeted the New Negro Alliance, the Washington, D.C. boycott organization. William Hastie, the Alliance's chief lawyer, responded: "The New Negro Alliance does not sponsor [a] Jim Crow economy. But we must organize our purchasing power behind a demand for equal opportunity to work."<sup>247</sup> Responding to the Marxist-inspired critiques, Alliance activists argued that "intelligently controlled racialism" could help combat employment discrimination without accepting labor segregation.<sup>248</sup> Hastie and his colleagues at the Alliance thought that they were simply advocating a form of voluntarism in service of what Hastie called "equal opportunity to work"—one that steered a middle path between the more openly racialized voluntarism favored by some and the interracial labor agenda advocated by others.

Hastie's efforts were quickly undercut because the boycotters' tactics raised similar legal issues as those elicited by labor union direct action. The New Negro Alliance, like similar movements across the nation, employed boycotts and picketing, both of which were key to its ability to influence merchants, publicize its efforts, and persuade African-Americans to support the movement. However, courts regarded picketing and boycotts—the traditional tactics of organized labor—with hostility. The boycotted businesses eventually turned to anti-picket and anti-boycott injunctions, and by 1934 boycott movements in many cities had either been squelched by the injunctions or labored under increasing legal repression. That repression drew in lawyers such as Thurgood Marshall in Baltimore and Raymond Pace Alexander in Philadelphia to defend the boycotters, and would eventually force these and

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246. See *Boycott*, 41 THE CRISIS 117 (1934); Michele Francine Pacifico, A History of the New Negro Alliance of Washington, D.C., 1933-1941, at 113-41 (May 8, 1983) (unpublished M.A. thesis, The George Washington University) (on file with the New York Public Library).

247. Letter from William H. Hastie to *The Crisis* (Apr. 5, 1934), microformed on William H. Hastie Papers, Reel 38 (Harvard Law Sch.).

248. Pacifico, *supra* note 246, at 127.



other civil rights lawyers to take a position on the legal struggles of organized labor.<sup>249</sup>

The anti-boycott injunctions forced William Hastie and his colleagues to spell out what Hastie meant when he argued that the boycott movements' aim was "equal opportunity to work," or as Raymond Alexander put it in his 1931 essay, "the right to work, free from race influences."<sup>250</sup> Alexander's and Hastie's invocations of the right or opportunity to work tapped into a strain of legal discourse about the labor market that reached back at least to Justice Field's dissent in the *Slaughter-House Cases*, which called for a constitutional right to pursue one's calling.<sup>251</sup> They also built on the twentieth-century formulations of Charles Chesnutt and Sadie Alexander, who argued for some form of "liberty of contract" to sell one's skills in the labor market as part of the citizenship rights guaranteed to African-Americans by the Fourteenth Amendment.<sup>252</sup> For the civil rights lawyers, the right to work in the labor context had previously meant the right of individual workers, or minority worker groups, to be free of the collective power of discriminatory unions.<sup>253</sup> As Cleveland lawyer Harry Davis put it in the late 1920s, legal measures that buttressed the power of such unions were "artificial restrictions" on the individual African-American's "right to work."<sup>254</sup>

The tension between individual and collectivist ideas of the right to work also played out in the judicial doctrine that governed labor injunctions. An older body of doctrine reasoned from ideas of liberty and property to support the decision to grant injunctive relief in a labor dispute in order to protect the rights of individual workers who dissented from the collective. The liberty interest at issue was that of the individual—the liberty of individual workers to enter employment contracts with an employer, and the liberty of the individual employer to employ them.<sup>255</sup> Collective worker organization was permissible, but labor organizations could not use threats, coercion, fraud, or

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249. See Letter from Thurgood Marshall to Charles H. Houston (Dec. 14, 1933) (describing Marshall's work defending boycotters in Baltimore) (on file with CHHP, Box 163-36).

250. Alexander, *The Negro Lawyer*, *supra* note 169, at 270.

251. 83 U.S. (16 Wall.) 36, 83 (1872) (Field, J., dissenting).

252. See Chesnutt, *Rights and Duties*, *supra* note 48, at 256; see also Alexander, *Contributions of the Negro*, *supra* note 117, at 9.

253. See *supra* Section IV.A.

254. *Spokesman for Negroes*, *supra* note 163, at 24.

255. See, e.g., *Vegehlahn v. Guntner*, 44 N.E. 1077, 1077-78 (Mass. 1896) (applying the old doctrine).

misrepresentation to achieve their ends. Under this doctrine, if an employer could demonstrate that a labor action actually or potentially used such improper means, and that it would suffer damage as a result, it could obtain an injunction.<sup>256</sup>

The test was not as neutral as it might seem. The whole point of striking, boycotting, or picketing was to coerce management and individual workers into acceding to the desires of the union. If liberty was defined as the complete freedom of individual workers and management to deal with one another, it was almost always infringed by collective activity. Picketing inevitably discouraged some dissenting or nonunion workers from crossing picket lines to come to work. Moreover, in a concerted action by hundreds or perhaps thousands of workers, there was almost always the potential for violence, particularly when scab workers were brought in to take the striker's jobs. Some courts held that the simple fact of picketing was enough to warrant injunctive relief, regardless of how orderly the picketers were in going about their activities.<sup>257</sup>

Competing with the older doctrine was a newer formulation of the labor injunction standard that Justice Holmes helped popularize in an influential law review article and in several dissenting opinions on the Massachusetts Supreme Judicial Court. Holmes reasoned that concepts like "liberty" and "coercion" simply stood in for substantive judgments of policy that judges were reluctant to make explicit. He argued that the actions that many judges regarded as coercive could be reframed as simple economic competition. Collective organization of both capital and labor was inevitable in industrial life, reasoned Holmes, as was competition between organized labor and capital. The injunction standard, he asserted, should focus on distinguishing the kinds of competition that should be enjoined as a matter of policy from the kinds that should be permitted.<sup>258</sup> Thus, Holmes's new framework anticipated

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256. See, e.g., *Green v. Samuelson*, 178 A. 109, 111-13 (Md. 1935) (explaining this principle); *A.S. Beck Shoe Corp. v. Johnson*, 274 N.Y.S. 946, 949-55 (Sup. Ct. 1934) (same).

257. For an extended discussion of the development of labor injunction doctrine, see FORBATH, *supra* note 17; FELIX FRANKFURTER & NATHAN GREENE, *THE LABOR INJUNCTION* 1-53 (Peter Smith 1963) (1930); and HERBERT HOVENKAMP, *ENTERPRISE AND AMERICAN LAW 1836-1937*, at 207-40 (1991).

258. See, e.g., *Vegeahn*, 44 N.E. at 1079 (Holmes, J., dissenting); Oliver Wendell Holmes, Jr., *Privilege, Malice, and Intent*, 8 HARV. L. REV. 1 (1894). See generally DANIEL R. ERNST, *LAWYERS AGAINST LABOR: FROM INDIVIDUAL RIGHTS TO CORPORATE LIBERALISM* 83-85 (1995) (discussing Holmes's critique of the old standard); HORWITZ, *supra* note 42, at 154-55.

progressive-realist critiques of late-nineteenth-century jurisprudence as conceptual and divorced from social reality and policy considerations.<sup>259</sup>

By the time the black boycott movements took shape in the early 1930s, a new judicial attitude toward the labor injunction had begun to take root. First, Holmes's new formulation of the labor injunction standard found its way into Felix Frankfurter and Nathan Greene's influential book *The Labor Injunction*, which argued that injunction doctrine should focus on a policy-driven examination of the facts of a particular controversy.<sup>260</sup> Second, the Norris-LaGuardia Act of 1932 imposed additional substantive and procedural hurdles before a federal court could grant an injunction in a labor dispute, and a number of states adopted their own anti-injunction laws modeled on the federal statute.<sup>261</sup> Many of the civil rights lawyers were familiar with these developments. At Harvard, both Charles Houston and Raymond Alexander had taken labor law from Francis Sayre, who helped draft the legislation that eventually became the Norris-LaGuardia Act. Frankfurter, of course, was well-known to the Harvard-Howard cohort, and in particular to New Negro Alliance lawyers William Hastie and Edward Lovett, both of whom had worked under his direction at Harvard.<sup>262</sup>

Despite their familiarity with the new labor law doctrines, the civil rights lawyers would have ordinarily sympathized with the old individualist injunction doctrine. Black workers were far more likely to be scab nonunion laborers who might provoke threats or violence by crossing picket lines than they were to be a part of a union. In the boycott movement, however, the civil rights bar represented the collective rather than the individual or the minority interest, leading to some tension between their long-held views and the exigencies of their current situation. The New Negro Alliance, for instance, became embroiled in controversy when G. David Houston, a prominent local African-American, decided to cross an Alliance picket line around a drug store in Washington, D.C. David Houston alleged that he was accosted by a "thug"

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259. Of course, it was not self-evident what exactly was "policy" analysis and how to engage in it—a question with which modern lawyers still struggle.

260. See FRANKFURTER & GREENE, *supra* note 257, at 24-46.

261. Norris-LaGuardia Act of 1932, ch. 90, 47 Stat. 70 (codified at 29 U.S.C. §§ 101-115 (2000)); CHARLES O. GREGORY & HAROLD A. KATZ, LABOR AND THE LAW 185 (3d ed. 1979) (discussing the state statutes).

262. See HARVARD LAW SCH. CATALOGUE (1922); HARVARD LAW SCH. CATALOGUE 8 (1921); Harvard Law Sch., Official Transcript of Raymond Pace Alexander (1921-1923) (on file with ORHLS); Harvard Law Sch., Official Transcript of Charles Hamilton Houston (1919-1923) (on file with ORHLS); see also Forbath, *supra* note 62, at 1230 n.559; *supra* Section IV.B.

who became “violently belligerent” and that “blows were narrowly averted.”<sup>263</sup> In a letter to the editor of *The Afro-American*, a black newspaper with wide circulation, he argued that the Alliance had interfered with “my God-given right to deal where I please and buy what I want.”<sup>264</sup> This statement incorporated the individualistic notion of liberty that lay behind the old injunction doctrine, a notion to which Alliance lawyers would have traditionally subscribed.

Charles Houston (no relation) took the trouble to respond to David Houston’s letter, and made it clear where the boycott movement stood on the old and new labor law doctrines. With regard to David Houston’s alleged natural right to contract freely, Charles Houston argued that “[a]s a Negro he can neither deal where he pleases nor buy where he chooses” because of racial segregation.<sup>265</sup> He pointed out that David Houston could not even be served at a soda fountain in the drug store at issue because of his race, asserting that “[t]he truth is Professor Houston does not deal where he pleases; he deals where the other people please to let him.”<sup>266</sup>

By emphasizing this point, Charles Houston mobilized the black bar’s longstanding critique that common law categories, such as liberty of contract, validated coercion and segregation by private businesses.<sup>267</sup> Moreover, he argued, the Depression had made a mockery of the old version of liberty of contract. If David Houston would “spend a lean and hungry year trying to find a job in the trades where a black face would not be a handicap,” Charles Houston argued, “he might find out that before he exercises his ‘God-given right’ to spend his money where he pleases, he would first have to make it.”<sup>268</sup> The alleged individual liberty encapsulated in David Houston’s asserted right

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263. Letter from G. David Houston, Principal, Armstrong High Sch., to Eugene Davidson 1 (July 16, 1938) (on file with the Eugene C. Davidson Papers, M-SRC, Box 91-1).

264. Letter from Charles H. Houston to Carl Murphy, Editor, *The Afro-American* 1 (Aug. 30, 1938) (on file with CHHP, Box 163-12) (quoting David Houston’s letter to the editor) (internal quotation marks omitted). Another local black educator offered a similar critique of the Alliance. See Bill of Complaint, *New Negro Alliance v. Sanitary Grocery Co.* (D.D.C. 1936), at 1, in RECORDS AND BRIEFS OF CASES ARGUED IN THE SUPREME COURT OF THE UNITED STATES.

265. Letter from Charles H. Houston to Carl Murphy, *supra* note 264, at 2.

266. *Id.*

267. See *supra* Section II.B. Houston was essentially offering a critique of the view of Depression-era civil rights law and history later put forth in BERNSTEIN, ONLY ONE PLACE OF REDRESS, *supra* note 54.

268. Letter from Charles H. Houston to Carl Murphy, *supra* note 264, at 5.

to deal with whom he chose was an illusion, Charles Houston argued, an outdated concept that failed to capture what was really at stake in the boycott movement.

The injunction litigation itself also pushed the boycotters to choose the new collectivist doctrine over the old. Judges responding to the boycotted businesses' injunction requests assumed that they had the power to enjoin the boycotts under the old doctrine, whether or not the black boycotters' actions were analogous to those of labor unions.<sup>269</sup> In response, the lawyers representing the "Don't Buy" movement argued that the boycotts were a labor dispute, but one that should be analyzed under the new labor injunction doctrines—either Norris-LaGuardia (where it applied) or the general liberalization of state injunction law during the 1930s.<sup>270</sup>

At the onset of the injunction litigation, then, Hastie's idea of "equal opportunity to work" was coming to mean opportunity to engage in collective organizing analogous to that of labor unions. For that reason, African-American lawyers needed to immerse themselves in labor law in order to save the boycott movement. The District of Columbia litigation took center stage because it would be heard in the federal courts and thus the Norris-LaGuardia Act would apply. Washington was also home to Howard Law School—Charles Houston's school of social engineering—many faculty and alumni of which would staff the boycott litigation. Indeed, during the 1937-1938 academic year, while the District of Columbia boycott litigation was in the appellate courts, Howard Law School would add a labor law course to its curriculum.<sup>271</sup>

The District of Columbia boycott litigation, *New Negro Alliance v. Sanitary Grocery Co.*, reached the Court of Appeals, and eventually the Supreme Court.<sup>272</sup> In the summer of 1936, Sanitary Grocery obtained a permanent injunction against both picketing and the Alliance boycott itself. William Hastie and Howard Law School graduate Belford Lawson brought the case to the Court of Appeals, where two issues were presented: (1) whether the boycotts were a "labor dispute" that came within the terms of Norris-

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269. See, e.g., *A.S. Beck Shoe Corp. v. Johnson*, 274 N.Y.S. 946, 950 (Sup. Ct. 1934).

270. *Green v. Samuelson*, 178 A. 109, 111 (Md. 1935); see also *A.S. Beck Shoe*, 274 N.Y.S. at 953-54 (holding that a Harlem boycott was a racial rather than a labor dispute, and that it could be enjoined as a matter of public policy).

271. See *School of Law: 1937-1938*, HOW. U. BULL., Dec. 15, 1937, at 18 (including a labor law course entitled "Industrial Law"). This was one year before the school would add a course called "Civil Rights." *The School of Law: 1938-1939*, *supra* note 101.

272. 92 F.2d 510, 512 (D.C. Cir. 1937), *rev'd*, 303 U.S. 552 (1938).

LaGuardia, and (2) whether the injunction was properly granted.<sup>273</sup> The justices of the Court of Appeals decided both in favor of Sanitary Grocery, in an opinion that deployed both the old doctrine and the old reasoning. The court reasoned from what it called Sanitary's "free right to choose its employees" to the proposition that all picketing, whether peaceful or not, interfered with that right and could be prohibited.<sup>274</sup> With regard to the applicability of Norris-LaGuardia, the court reasoned from the proposition that "[e]very person conducting a legitimate business is entitled to select his own employees" to the conclusion that the Norris-LaGuardia Act would not apply until an employer-employee relationship existed.<sup>275</sup> Because the boycotters were only potential employees, the picketing could be enjoined.<sup>276</sup>

Thus far, Hastie and Lawson had conducted the Alliance litigation through a combination of the old and new doctrine and reasoning, but that was about to change. They had argued that the pickets were peaceful rather than coercive, and also mobilized the newer injunction doctrine, but to no avail. The Alliance's fortunes looked even bleaker when its star attorney, William Hastie, was unable to participate in the Supreme Court proceedings because of conflicting commitments. Edward Lovett, back from his work with Frankfurter at Harvard, and Howard law graduate Thurman Dodson, joined in drafting the petition for certiorari.<sup>277</sup> At that point, Charles Houston intervened. Lawson, Lovett, and Dodson requested financial assistance from the NAACP's National Legal Committee and Houston, now Special Counsel for the NAACP, wrote back assessing the litigation with characteristic forthrightness.<sup>278</sup> Houston urged the three Howard graduates to abandon the old style of reasoning in

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273. See Bill of Complaint, *supra* note 264, at 22, 25-27; see also A. Mercer Daniel, History of Howard Law School, app. (memorializing Lawson's graduation from Howard Law School) (unpublished manuscript, on file with the Mercer Daniel Papers, M-SRC, Box 177-02)

274. *New Negro Alliance*, 92 F.2d at 512.

275. *Id.*

276. *Id.* The court's reasoning conflicted with the clear language of the statutory provision that it purported to interpret, which stated that the provision applied regardless of the existence of an employer-employee relationship. See Norris-LaGuardia Act of 1932, ch. 90, § 13(c), 47 Stat. 70, 73. Justice Stephens dissented from this part of the opinion. See *New Negro Alliance*, 92 F.2d at 513 (Stephens, J., dissenting in part).

277. See Petition for Writ of Certiorari, *New Negro Alliance v. Sanitary Grocery Co.*, 303 U.S. 552 (1938) (No. 511), in RECORDS AND BRIEFS, *supra* note 264; WARE, *supra* note 233, at 78.

278. See Memorandum from Charles H. Houston, Special Counsel, NAACP, to Belford V. Lawson et al., Attorneys for the New Negro Alliance, *New Negro Alliance Case* (Oct. 25, 1937) (on file with the Edward P. Lovett Papers (EPLP), M-SRC, Box 174-1).

favor of a legal method that relied explicitly on policy and social science arguments. He criticized the prior handling of the case:

The economic issues and the economic background of the controversy were not sufficiently stressed. In our opinion this is not the type of case which should be tried on the pleadings. The scope of pleading is too narrow to embrace the full atmosphere of these socio-economic controversies. Testimony should always be taken to put on the record as broadly as possible the economic background . . . .<sup>279</sup>

Houston's advice was grounded in the progressive-realist legal method that he had sought to impart to his students at Howard. This was not the type of case to be won on the strength of conceptual legal reasoning, or as Houston put it, "tried on the pleadings." Policy, not doctrine, would dictate any decision in the case, and Houston counseled that the courts needed to be supplied with the socio-economic data to analyze those issues. Moreover, Houston argued, "it would have been better ideologically" if the first case to define the term "labor dispute" under Norris-LaGuardia had presented more facts and data that brought the case within the ambit of the struggles of organized labor.<sup>280</sup> Here Houston mobilized the realist insight that political struggles as well as policy differences were obscured by traditional legal reasoning, and reminded the Alliance's attorneys that the Court needed additional socio-economic data to view those political struggles in the clearest light. A humbled Belford Lawson wrote back that the Alliance's attorneys were grateful for the advice.<sup>281</sup>

Houston's admonishment pointed the way to a different approach to the case. Lawson and Dodson's Supreme Court brief in *New Negro Alliance v. Sanitary Grocery* was quite different in tone, reasoning, and emphasis from the previous briefs in the Alliance's boycott litigation. After quickly running through their standard arguments about coercion and liberty, the Alliance attorneys argued that the case was really about the ability of organized capital and organized labor to compete on equal terms without the judiciary taking the

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<sup>279</sup>. *Id.* at 1.

<sup>280</sup>. *Id.* at 2.

<sup>281</sup>. See Letter from B.V. Lawson, Jr. to Charles H. Houston (Oct. 26, 1937) (on file with EPLP, Box 174-1). Lawson was a 1929 Howard law graduate, but he was familiar with and endorsed the changes that Houston introduced after his graduation. See MCNEIL, *supra* note 36, at 73; Daniel, *supra* note 273, at 11.

side of capital.<sup>282</sup> Citing Frankfurter and Greene, they asserted that “[g]overnment of the relations between capital and labor by injunction [was] a solecism . . . [and] an absurdity.”<sup>283</sup> Citing Holmes, they argued that the real issue in the case was policy and that a decision in favor of the New Negro Alliance would better the economic position of workers, particularly African-Americans, even though it “injure[d] the trade of the person picketed.”<sup>284</sup> Collective action invariably harmed individuals’ liberty, they argued, but should be justified or condemned on policy grounds rather than conceptual reasoning.

Lawson and Dodson took Houston’s admonishment to heart most explicitly in the final section of their brief, in which they argued that “[t]his case involve[d] not only legal questions but complex socio-economic principles.”<sup>285</sup> Invoking Holmes, they reframed the case as one involving competition for economic resources,<sup>286</sup> and citing Benjamin Cardozo and Frances Sayre (Houston’s labor law professor), they argued that the Court should apply a fact and policy-driven analysis instead of formal logic.<sup>287</sup> Lawson and Dodson ended their brief with a bevy of charts and statistics showing the economic circumstances of black workers in Washington and nationwide, including a chart assembled by Howard sociologist E. Franklin Frazier.<sup>288</sup> Referencing New Deal-era legal reforms, they argued that picketing, boycotts, and collective organization were being promoted to better the lot of white workers, with the only difference in this case being that the controversy involved black workers. What was really at stake in the case, they contended, was “*the right to work for an honest living*,”<sup>289</sup> by which the Alliance’s attorneys meant the right to organize collectively. Lawson and Dodson rested their claims on both progressive-realist critiques of the old labor injunction doctrine and the collective right to work.

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282. See Brief for the Petitioners at 10-19, *New Negro Alliance v. Sanitary Grocery Co.*, 303 U.S. 552 (1938) (No. 511), in *RECORDS AND BRIEFS*, *supra* note 264.

283. *Id.* at 19. The phrase “Government by Injunction” was one of the rallying cries of organized labor in opposition to the widespread grant of injunctive relief. See Forbath, *supra* note 62, at 1148-78.

284. Brief for Petitioners, *supra* note 282, at 24.

285. *Id.* at 29.

286. *Id.*

287. *Id.*

288. *Id.* at 31-41.

289. *Id.* at 38.



The Supreme Court did not explicitly take up Lawson and Dodson's invitation to rest the case on "complex socio-economic principles" rather than doctrinal reasoning, but there were hints that the progressive-realist critique had played some role in the decision. Reversing the Court of Appeals, the Supreme Court held that the case was a labor dispute as defined in *Norris-LaGuardia* and that the language of the statute was broad enough to cover the Alliance.<sup>290</sup> The Court's opinion reasoned from the policies at issue rather than from the liberty interest of the employer, explaining that "[t]he desire for fair and equitable conditions of employment on the part of persons of any race, color or persuasion . . . is quite as important to those concerned as fairness and equity in the terms and conditions of employment can be to trade or craft unions."<sup>291</sup> Neither the statutory language nor the policies behind it, the Court concluded, expressed any intent to exclude cases like those involving the boycotters.<sup>292</sup>

The Supreme Court victory in *New Negro Alliance* helped revive the African-American boycott movements in a number of cities, and renewed "Don't Buy" movements broke out across the nation between 1938 and 1941.<sup>293</sup> While the holding only applied in the federal courts, it remained persuasive authority elsewhere. Even in states without anti-injunction laws, the boycott disputes generally turned on whether the cases in question were "labor disputes" that should be decided under old or new approaches to labor injunctions. In states with statutes modeled on *Norris-LaGuardia*, the holding provided even more persuasive authority. In Philadelphia, for instance, Raymond Pace Alexander and Maceo Hubbard quoted extensively from the *New Negro Alliance* decision in arguing that the Pennsylvania anti-injunction law should apply to the local boycott movement.<sup>294</sup>

The Philadelphia boycott litigation demonstrated the success of the boycott movements in both doctrinal and strategic terms. In ruling on that litigation,

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290. *New Negro Alliance v. Sanitary Grocery Co.*, 303 U.S. 552, 559-62 (1938).

291. *Id.* at 561.

292. Justice McReynolds dissented, joined by Justice Butler, arguing that the majority opinion disregarded the individual liberty interests of employers and threatened to make labor law into an instrument of politics. *See id.* at 563-64 (McReynolds, J., dissenting). Justice Cardozo took no part in the decision, leaving the result a six-to-two victory for the Alliance.

293. *See Meier & Rudwick, supra* note 245, at 326. Some renewed boycotts had begun to break out as early as 1937. *Id.*

294. *See* Brief in Behalf of Defendants in Support of Motion To Discharge Rule for Preliminary Injunction at 10-11, *Stevens v. W. Phila. Youth Civic League* (Phila. Ct. Com. Pleas. 1938) (No. 1179) (on file with RPAP, Box 56).

the local court reasoned that “[n]o one disputes the right of negroes or any other persons to combine together for the purpose of bettering their condition and in endeavoring to obtain their object they may inflict more or less inconvenience and damage upon an employer.”<sup>295</sup> This was the point that Holmes had made long before: The whole point of collective organization was to constrain an employer’s liberty to hire employees and make profits. The black boycotters, ruled the state court, had an unambiguous right to picket,<sup>296</sup> and their tactics would now be analyzed under the new, collectivist labor injunction doctrine and the new policy-driven reasoning.

On the strategic front, in Philadelphia and elsewhere boycotted businesses were signing agreements with movement leaders to hire black workers, leading to lawsuits by white workers and unions who feared displacement. Partly as a result of the boycott movements, employment patterns changed in the nation’s black urban centers as World War II approached. White merchants in black neighborhoods began to hire African-Americans for clerical positions—a core demand of the boycotters—as a matter of course. The “Don’t Buy” movements, assisted by larger demographic trends, succeeded in placing thousands of blacks in clerical jobs and in indirectly placing many more in businesses whose owners feared potential boycotts.<sup>297</sup> When A. Philip Randolph organized the 1941 March on Washington to demand (successfully) federal action against discrimination in defense-related employment, Eugene Davidson, President of the New Negro Alliance, was elected Assistant National Director of the effort.<sup>298</sup>

New Negro Alliance co-founder John Aubrey Davis summed up the significance of the boycott movement in the pages of *Opportunity*.<sup>299</sup> Davis argued that the Alliance’s litigation had been an effort to erect what he called “an ideological super-structure in the law which can check-mate the anti-social

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295. Adjudication at 4, *Stevens v. W. Phila. Youth Civic League* (Phila. Ct. Com. Pleas. 1938) (No. 1179) (on file with RPAP, Box 59).

296. *See id.* at 6-9.

297. *See* Meier & Rudwick, *supra* note 245, at 326-32; Gary Jerome Hunter, “Don’t Buy From Where You Can’t Work”: Black Urban Boycott Movements During the Depression 1929-1941, at 283-87, 299 (1977) (unpublished Ph.D. dissertation, University of Michigan) (on file with the University of Michigan Library); *see also* CHARLES H. LOEB, *THE FUTURE IS YOURS: THE HISTORY OF THE FUTURE OUTLOOK LEAGUE 1935-1946* (1947); *Recent Items of Interest: Rights of Negroes: Negroes Get a Third of Jobs in Harlem*, 7 INT’L JURIDICAL ASS’N MONTHLY BULL. 29 (1938).

298. *See* Hunter, *supra* note 297, at 292-93.

299. John A. Davis, *We Win the Right To Fight for Jobs*, 16 OPPORTUNITY 230 (1938).

forces of unbridled self-interest, profit-seeking, and racial exploitation.”<sup>300</sup> By framing the boycott litigation as an ideological struggle, Davis acknowledged that the Alliance lawyers’ and activists’ immersion in labor law had helped refocus their ideas of what the boycotts were all about. Indeed, he praised the *New Negro Alliance* decision as a victory in what he called an ideological struggle to limit “absolute freedom of individual economic activity for the sake of social justice.”<sup>301</sup> Davis argued that the new program of the boycott movement took as its baseline “that concept of liberal democratic government which limits individual economic enterprise by principles of social justice and equal opportunity.”<sup>302</sup> That, not coincidentally, was quite similar to the reform program of the late New Deal.<sup>303</sup>

As Davis argued, the legal struggle to escape the injunctions had become an ideological one, forcing the boycotters and their lawyers to choose between the substantive social theories that underlay the old doctrine and those that underlay the new. Although Davis was not a lawyer, Alliance lawyers tended to agree with his position. Leon Ransom, now back from his graduate work at Harvard, was given the task of summing up the *New Negro Alliance* decision in an Alliance publication in 1939. Ransom hailed the victory as an advance in labor law, arguing that “it marks a far cry from the days (not long ago) when it was a criminal offense for persons having similar labor interests to agree among themselves to unite efforts in the alleviation of their condition.”<sup>304</sup> Ransom, echoing Davis, regarded the boycott litigation as an ideological struggle in which old and new ideas of the right to work had been pitted against each other, and he came down firmly on the side of the new.<sup>305</sup> This was a sea change from the position of the mainstream civil rights bar a decade earlier, when black lawyers often opposed anti-injunction laws and other legal measures intended to spur collective organization.<sup>306</sup>

The victory in *New Negro Alliance* also represented a triumph for Charles Houston’s social engineering theory of lawyering, one that has been overlooked in the rush to equate Houston’s project with *Brown v. Board of*

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300. *Id.* at 233.

301. *Id.* at 230.

302. *Id.* at 237.

303. On the late-New Deal program, see *infra* Part V.

304. Leon A. Ransom, *The Supreme Court Speaks*, NEW NEGRO ALLIANCE YEARBOOK 17, 18 (1939).

305. *See id.*

306. *See supra* Section IV.A.

*Education.* At the same time that Houston and his protégés were beginning the attack on segregation in public institutions, the Howard law group was litigating the boycott injunction cases, which focused on labor law and a critique of private labor market discrimination. At a crucial juncture, Houston's ideas had supplied the impetus for the change of focus in the Supreme Court proceedings. The victory was also an object lesson in the role of litigation in social change. If litigation alone was of limited effectiveness as a protest tactic, court victories could help stimulate mass movements to push for social change, as they did with such great effect in the *New Negro Alliance* case.

Houston and his colleagues looked on the labor law victories with caution, however. The boycotters' endorsement of collective organization still left in place the longstanding problem that organized labor, particularly those unions affiliated with the AFL, practiced widespread racial discrimination. This embrace of collective organization also did not address the problem of finding jobs for black workers outside the boycott context. They would grapple with both problems as part of their New Deal-era professional project.

*D. Civil Rights in the Private Labor Market:  
The Emergence of Antidiscrimination Practice*

As Raymond Pace Alexander observed in his 1931 essay,<sup>307</sup> private labor market discrimination by employers and unions was on the agenda for the civil rights bar by the beginning of the 1930s. The civil rights lawyers, however, faced several intellectual and doctrinal problems that made it difficult for them to view and attack private labor discrimination in terms that would be recognizable as modern employment discrimination practice. For example, they lacked clear doctrinal or statutory sources that would be familiar to modern lawyers, such as employment discrimination laws or expansive interpretations of existing civil rights statutes. Thus, their critiques of labor market discrimination tended to be directed at public entities, which had an obligation to be evenhanded in the allocation of public resources. Expanding these criticisms to the private labor market would be a more difficult legal and intellectual enterprise.

In spite of these difficulties, several factors led civil rights lawyers to articulate a critique of private discrimination by the end of the decade. In particular, Depression-era public works projects, which mixed public power

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307. Alexander, *The Negro Lawyer*, *supra* note 169, at 268-69.

with private employment, allowed civil rights lawyers to transfer their critiques of public employment discrimination to private entities that exercised public power. New Deal-era labor market interventions, beginning with the National Industrial Recovery Act (NIRA), had the same effect on a much larger scale. Harvard Law School graduate John P. Davis, having arrived in Washington during the summer of 1933, fresh from Felix Frankfurter and James Landis's public utilities seminar, began to articulate a sustained critique of the NIRA. It all started in a seemingly unlikely place—a construction project named after President Herbert Hoover.

The Hoover Dam project was the largest public works venture in American history when construction began in 1931. The project mixed public and private efforts in a manner that provided an opening wedge for the civil rights lawyers' critique of private employment discrimination. The then-named Boulder Dam project had its genesis in the Boulder Canyon Project Act of 1929 and the Colorado River Compact, which President Hoover negotiated with seven states of the Southwest to divide up the water and the electric power produced by the dam. Federal authorities created and exercised dictatorial authority over a model town, Boulder City, built to house the thousands of dam workers near Las Vegas. The main construction work, however, was undertaken by private contractors. Six Companies Contractors organized the effort, so most workers were formally private employees, despite the fact that the company delegated hiring decisions to the federal and state governments. The project employed three thousand workers by 1932, none of whom were black.<sup>308</sup>

In response to complaints from local African-Americans, the NBA began to focus on the Hoover Dam employment practices at its 1931 convention. Only one year before, Raymond Alexander had used his presidential address to urge the bar association to refocus its efforts on a new program defending the "right to work." The Hoover Dam controversy stirred the NBA to an unusual vigor and led to the first attempt by the group to spell out what this new program might mean.

From the beginning, NBA lawyers took the position that public rather than private discrimination was at work in the dam project. A 1931 NBA resolution condemned "the failure of the government to employ colored labor in the

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308. JOSEPH E. STEVENS, HOOVER DAM: AN AMERICAN ADVENTURE 10-26, 39-46, 51, 70-71, 120-24 (1988); Thomas Campbell, Governmental Policy Regarding Employment at the Hoover Dam, Address Before the Eighth Annual Convention of the National Bar Association, *in* PROCEEDINGS OF THE SEVENTH AND EIGHTH ANNUAL CONVENTIONS, *supra* note 147, at 93-95; *see also* PAUL L. KLENSORGE, THE BOULDER CANYON PROJECT: HISTORICAL AND ECONOMIC ASPECTS 37-52, 55-105, 204-06, 219-26 (1941).

construction of the Boulder Dam.”<sup>309</sup> The following May, Loren Miller, accompanied by Langston Hughes, visited Las Vegas to investigate the charges.<sup>310</sup> Miller’s subsequent article documenting his findings charged that “the Government denies that it is active in discrimination. But that denial is only a legal sham, behind which swivel chair patriots can squirm and evade the facts.”<sup>311</sup> Denver lawyer Thomas Campbell was equally pointed at the 1932 NBA convention, arguing that

notwithstanding the fact that the government, through the Interior Department, has let the contract . . . any one seeking a job, or a position to work on the DAM, must go though the Civil Service Commission and at the same time the government puts forth the alibi that the matter of employment is up to the Six Companies Contractors. It is but a shameful subterfuge and a sham . . . .<sup>312</sup>

The NBA contended that the Hoover Dam workers were government employees, whatever their formal employment status.

Following the 1931 convention, the NBA Publicity Committee, headed by Stradford, and the bar association’s new president, Jesse Heslip, decided to make the Hoover Dam project a centerpiece of its activities during the coming year. The NBA helped collect affidavits from black workers in Las Vegas, and in early 1932, Heslip wrote the NAACP, the National Urban League, and other interested organizations, asking them to join in the effort. In May, a joint NBA-NAACP delegation met with the Secretary of the Interior, Ray Wilbur. Charles Houston, representing the NBA, and Walter White, representing the NAACP, obtained a promise that black workers would be hired for the project. Following the meeting, Houston wrote to both the Secretary and Six Companies president W.A. Bechtel, calling on them to honor Wilbur’s commitment.<sup>313</sup> The matter appeared to reach its resolution on July 6, when a

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309. Report of the Committee on Resolutions for the Seventh Annual Convention (Aug. 6, 1931), in PROCEEDINGS OF THE SEVENTH AND EIGHTH ANNUAL CONVENTIONS, *supra* note 147, at 53, 54.

310. See 1 ARNOLD RAMPERSAD, THE LIFE OF LANGSTON HUGHES 237-38 (1986).

311. *Id.*; [Loren] Miller, *Denial of Work Makes Las Vegas City of Des[p]air*, CAL. EAGLE, reprinted in PROCEEDINGS OF THE SEVENTH AND EIGHTH ANNUAL CONVENTIONS, *supra* note 147, at 96-97.

312. Campbell, *supra* note 308, at 95.

313. See STEVENS, *supra* note 308, at 176; Roosevelt Fitzgerald, *Blacks and the Boulder Dam Project*, 24 NEV. HIST. SOC’Y Q. 255, 258 (1981); Heslip, *supra* note 173, at 67-68.

Las Vegas resident wrote to Heslip that “[e]ight of our race went to work for Six Companies, Inc., this morning.”<sup>314</sup>

When the NBA gathered for its annual convention in August, speaker after speaker extolled the Hoover Dam protest as a breakthrough victory for the organization.<sup>315</sup> Jesse Heslip’s presidential address invoked the protest action to great rhetorical effect. Heslip spent the first half of his address assailing private employers, unions, and governmental entities for employment discrimination, with the Hoover Dam protest as the centerpiece of his talk. “The direct and proximate cause for the Negro’s economic plight,” he argued, “is the selfish and intolerant attitude assumed by the American white man toward the Negro race, and particularly toward the Negro worker.”<sup>316</sup> Charles Houston called Heslip’s speech “one of the best addresses ever made by a young Negro,” and the NBA passed a unanimous motion to have it printed and distributed to the public.<sup>317</sup> The struggle to define the Hoover Dam project’s exclusion of black workers as illegitimate race discrimination—and to remedy it—had put both the public and private labor markets on the bar association’s agenda.

As it turned out, the Hoover Dam agitation was merely a rehearsal for the concerted antidiscrimination effort that focused on the centerpiece of Franklin Roosevelt’s industrial recovery program, the NIRA, enacted in June 1933.<sup>318</sup> The Act permitted industry and trade groups to draw up codes of fair competition, which could be then approved by the President. The NIRA mixed private and public economic ordering in a manner whose only precedent lay in the economic regulation imposed during World War I. Section 7(a) of the Act also recognized the right of employees to organize and bargain through their own representatives, granting labor organizations general federal recognition as part of the industrial order for the first time.<sup>319</sup> Under the supervision of the National Recovery Administration (NRA), representatives of industry and

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314. Heslip, *supra* note 173, at 68.

315. See, e.g., C. Francis Stradford, Social Unrest and the Law, Address Delivered Before the Eighth Annual Convention (Aug. 4, 1932), in PROCEEDINGS OF THE SEVENTH AND EIGHTH ANNUAL CONVENTIONS, *supra* note 147, at 77, 83.

316. Heslip, *supra* note 173, at 69.

317. Letter from Charles H. Houston to Raymond Pace Alexander (Oct. 1, 1932) (on file with HUA, Box 1357); Letter from Charles H. Houston to Jesse S. Heslip (Dec. 14, 1932) (on file with HUA, Box 1357).

318. National Industrial Recovery Act, Pub. L. No. 73-67, 48 Stat. 195 (1933), *invalidated in part* by Pan. Ref. Co. v. Ryan, 293 U.S. 388 (1935), and A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

319. *Id.* § 7(a), 48 Stat. at 198-99.

labor would meet and draw up codes specifying minimum prices and wages, maximum work hours, and production quotas for major industries. Many New Dealers thought that the minimum wage and maximum hours provisions would raise real wages and stimulate re-employment by reducing the number of hours worked for each individual worker, while keeping the expected consumer price increases from matching the rise in real wages.<sup>320</sup>

The NRA imported public values and public oversight into the regime of private industrial governance. Public power was delegated to private groups to manage the economy, and the codes drafted by private groups acquired the force of law, enabling the state to police industrial behavior. In its expansion of the public powers of private groups and its enlargement of the power of the state to intervene in private economic ordering, the NRA dwarfed previous public-private partnerships, such as that which created the Hoover Dam. Black lawyers and civil rights leaders expected that the public values imported into labor relations would include the obligation not to discriminate based on race. That expectation, however, was proved profoundly mistaken in the early years of the New Deal.

The private governance regime of the NRA required that the groups drafting the fair competition codes represent the interests of the public as a whole, and in this respect the aspirations of the NRA's proponents were frustrated. The wage and price structure imposed under the NRA served the interests of business rather than organized labor, and the interests of large businesses at the expense of smaller ones.<sup>321</sup> Southern industrialists traveled to the code hearing to testify in favor of lower minimum wages in the South and, in particular, for black workers. Advocates of regional and race-based wage differentials brought forth a number of arguments, including that (1) the cost of living was lower in the South (where most blacks still resided) than in the North, (2) blacks' living expenses were less than whites', (3) black workers were less efficient than their white counterparts, (4) occupations dominated by black workers were historically less well paid than those occupied by whites, and (5) if black and white wages were equalized, black workers would be

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320. See ALAN BRINKLEY, *LIBERALISM AND ITS DISCONTENTS* 27-30 (1998); HAWLEY, *supra* note 181, at 19-146; THEODORE ROSENOF, *PATTERNS OF POLITICAL ECONOMY IN AMERICA: THE FAILURE TO DEVELOP A DEMOCRATIC LEFT SYNTHESIS, 1933-1950*, at 61-62 (Frank Friedel ed., 1983); RAYMOND WOLTERS, *NEGROES AND THE GREAT DEPRESSION: THE PROBLEM OF ECONOMIC RECOVERY* 83-90 (1970).

321. See BRINKLEY, *supra* note 320, at 27-30.



displaced by whites.<sup>322</sup> These arguments partly carried the day. While the NRA codes did not employ explicitly race-defined terms, they incorporated many provisions that effectively excluded black workers from their minimum wage and maximum hours mandates, or that resulted in code-mandated black wages remaining lower than those paid to white workers.<sup>323</sup> The industrial codes also cemented previous racial differentials in wages. Prior to the New Deal, it had been customary in many parts of the country to set wages for occupations dominated by blacks substantially lower than similar occupations dominated by whites. The NRA codes largely accepted these historical differentials.<sup>324</sup> As a result, a practice that had previously been customary and a matter of private discriminatory decisionmaking now became a public obligation written into federal law.

There was no obvious solution to the racial distinctions being written into the law that governed the labor market. It was true that the racial differentials saved some African-American jobs. There were widespread reports of blacks being fired from their jobs and replaced by unemployed whites even before the NRA, and where the codes equalized black and white wages the process was often accelerated.<sup>325</sup> Thus, civil rights advocates protesting the racial differentials found themselves on the horns of a dilemma: Equal wages might result in blacks being displaced by whites in employment, particularly in the South. However, accepting wage differentials, or outright exclusion from the codes, meant that the expected consumer price increases under the NRA would not be matched by wage increases for workers in excluded occupations. Nor, according to the theory behind the NRA, would re-employment of unemployed black workers in these occupations occur without the maximum-hours provisions.

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322. See WOLTERS, *supra* note 320, at 99-103; Ira De A. Reid, *Black Wages for Black Men*, 12 OPPORTUNITY 73, 74-75 (1934).

323. John P. Davis, *What Price National Recovery?*, 40 THE CRISIS 271 (1933); Alexander, *The Economic Status of Negro Women*, *supra* note 182, at 6; Hilmar Ludvig Jensen, *The Rise of an African American Left: John P. Davis and the National Negro Congress* 412-13 (1997) (unpublished Ph.D. dissertation, Cornell University) (on file with the Cornell University Library).

324. See WOLTERS, *supra* note 320, at 130-32; Davis, *supra* note 323; Jensen, *supra* note 323, at 412-13.

325. See WOLTERS, *supra* note 320, at 113-24; Davis, *supra* note 323; William Pickens, *NRA—“Negro Removal Act”?*, 16 THE WORLD TOMORROW 539 (1933); see also 1 MYRDAL, *supra* note 22, at 397-99 (discussing the employment of black workers in the 1930s and 1940s and the effects of other federal labor laws).

The NRA seemed ripe for a critique of racial discrimination in the labor market. Still, such a critique was not forthcoming from the mainstream civil rights organizations or bar in mid-1933, when the codes began to take effect. In June and July of 1933, just as hearings on the proposed Cotton Textile Code were beginning, Charles Houston—in consultation with Raymond Alexander, Perry Howard, and several other lawyers—began to draft a list of civil rights proposals to be presented to the NBA convention that fall. They proposed a series of measures calling for federal action to protect African-American interests in suffrage, public works, government employment, relief, and public accommodations—but they ignored the NRA. With the Hoover Dam controversy fresh in their minds, the portions of the NIRA that garnered the most attention from the lawyers were those that created the Public Works Administration, rather than those that created the NRA.<sup>326</sup>

As with the boycott litigation, progressive-realist ideas provided a crucial impetus in the debates surrounding the NRA codes—this time in the person of John P. Davis. Davis had entered Harvard Law School in 1928 but took time off for other interests, including literary pursuits that he had begun during the Harlem Renaissance.<sup>327</sup> Upon his return to law school in 1932, however, Davis began to internalize a social scientific approach to law and to downplay his past literary avocations. Outside of class he roomed with the economist Robert Weaver, while William Hastie, back for his S.J.D., lived next door. The three men spent a substantial amount of time discussing current political and economic issues as Franklin Roosevelt prepared to take office.<sup>328</sup> In class, Davis's record improved, and he spent a year in Felix Frankfurter's public utilities class, which Frankfurter co-taught that year with his protégé James Landis.<sup>329</sup> Frankfurter and Landis were both drawn into Franklin Roosevelt's

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326. Letter from Raymond Pace Alexander to Charles H. Houston, Chairman, Drafting Committee, Nat'l Bar Ass'n (July 6, 1933) (on file with RPAP, Box 85); Memorandum from Charles H. Houston to the Drafting Comm., Nat'l Bar Ass'n (June 27, 1933) (on file with RPAP, Box 85); Memorandum from Perry W. Howard, Partner, Howard & Hayes, to Dean Charles Houston (undated) (on file with CHHP, Box 163-10). On the mainstream civil rights community's initial response to the NRA, see WEISS, *supra* note 166, at 48-50; WOLTERS, *supra* note 320, at 92-93, 97 n.12; and Bureau of Labor Statistics, U.S. Dep't of Labor, *Washington Conference on the Economic Status of the Negro*, 37 MONTHLY LAB. REV. 42 (1933).

327. See Jensen, *supra* note 323, at 250-94.

328. See *id.* at 298-99.

329. See Harvard Law Sch., Official Transcript of John Preston Davis (1928-1933) (on file with ORHLS); see also HARVARD LAW SCH. CATALOGUE 1932-33, at 515 (1932).

circle of advisors later that year, and Davis appeared to take an interest in the emerging New Deal recovery plan as well.<sup>330</sup>

Like Frankfurter, Davis worried about the prospects for economic concentration under the NRA; Davis in particular was concerned about the concentration of discriminatory economic power. Following law school, Davis, along with Weaver, formed several organizations that developed a set of critiques of racial discrimination under the NRA regime.<sup>331</sup> Hastie, now finished with his graduate work, soon joined the effort as an advisor. Davis's new organizations did the empirical and analytical work that documented the effects of the NRA codes on black workers, publicized those effects in the black press, and became the driving force in converting the country's African-American leadership into NRA critics. Out of Frankfurter and Landis's public utilities seminar, as well as his discussions with Hastie and Weaver, Davis began to develop the civil rights lawyers' principal set of critiques of race discrimination in the private labor market.

By the fall of 1933, mainstream civil rights organizations cautiously endorsed John P. Davis's efforts and merged his organization into the Joint Committee on National Recovery.<sup>332</sup> When the NAACP's Walter White critiqued the NRA in a meeting with Eleanor Roosevelt in January 1934, a Davis memo supplied the necessary ammunition.<sup>333</sup> When Charles Houston took issue with the Virginia governor's sanguine interpretation of the NRA at a 1934 meeting of the Virginia Commission on Interracial Cooperation, John Davis again supplied the needed data. Davis's influence was felt again later that year when his published exposés prompted Eleanor Roosevelt to launch an internal investigation of race discrimination within the NRA.<sup>334</sup> In recognition of these efforts, the NAACP invited Davis to give the keynote address at its national convention in Oklahoma City in the spring of 1934.<sup>335</sup> Indeed, the well-known columnist George Schuyler campaigned for Davis, only one year

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330. See PARRISH, *supra* note 127, at 197-219, 234-37.

331. See Jensen, *supra* note 323, at 315-24. On Frankfurter's attitude toward the NIRA, see IRONS, *supra* note 149, at 24.

332. Jensen, *supra* note 323, at 347.

333. *Id.* at 403-04.

334. *Id.* at 464-65.

335. *Id.* at 430.

out of law school, to be awarded the Spingarn medal, the NAACP's highest honor.<sup>336</sup>

Davis's investigations of discrimination under the NRA regime soon drew in his fellow black lawyers. Hastie had involved himself in Davis's project at its early stages, and by August 1933 the NBA considered protest proposals concerning NRA discrimination at its annual meeting.<sup>337</sup> Two months before the 1934 NAACP convention, Charles Houston praised Davis's investigations of the NRA in a speech in Philadelphia, and following the convention the two lawyers set out by car, conducting a two-week investigation of employment and public works discrimination in the South, particularly in the Tennessee Valley Authority (TVA).<sup>338</sup> The two Harvard-trained lawyers published a searing indictment of the TVA in the October issue of *The Crisis*.<sup>339</sup>

Sadie Alexander had reluctantly endorsed the NRA regime initially, but in response to the growing criticism she formulated her own critiques of the exclusion of agricultural and domestic laborers from the coverage of the NRA codes, as well as of state legislation regulating the labor market. She spent the latter part of the decade as a trenchant critic of the partly race-based distinctions that continued to be incorporated into New Deal programs and similar state programs.<sup>340</sup> In 1935, for instance, she lobbied hard against a Pennsylvania protective labor bill for women because the bill excluded domestic workers, disproportionately black women, from its scope.<sup>341</sup> By the time that the Supreme Court invalidated the NRA in 1935, John P. Davis's NRA critiques had become mainstream within the African-American bar. When the Fair Labor Standards Act was proposed later in the decade, NBA

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336. *Id.* at 430; see also JOHN B. KIRBY, *BLACK AMERICANS IN THE ROOSEVELT ERA: LIBERALISM AND RACE* 156-60 (1980); PATRICIA SULLIVAN, *DAYS OF HOPE: RACE AND DEMOCRACY IN THE NEW DEAL ERA* 49-50 (1996); WARE, *supra* note 233, at 36-37.

337. See *Untitled National Bar Association Resolutions* (Aug. 3-5, 1933) (on file with CHHP, Box 163-19).

338. See Charles H. Houston, *An Approach to Better Race Relations*, Address Before the National Convention of the Y.W.C.A. (May 5, 1934), *microformed on Roscoe Pound Papers*, Reel 28 (Harvard Law Sch.); Jensen, *supra* note 323, at 441-45.

339. See Charles H. Houston & John P. Davis, *TVA: Lily-White Reconstruction*, 41 *THE CRISIS* 290 (1934).

340. Sadie T.M. Alexander, *Address Before the Eastern Federation of Negro Republicans* (1935), (on file with STMAP, Box 71).

341. See *Dr. Sadie Alexander in Domestic Bill Fight* (unidentified, undated newspaper article, on file with STMAP, Box 2); Letter from Thomas Hunt, President, Domestic Workers of Am., to Sadie Alexander (undated) (on file with STMAP, Box 2).

leaders resolved to monitor the legislation to ensure that the NRA differentials were not reenacted into law.<sup>342</sup>

The NIRA precedent naturally made many civil rights lawyers cautious when, in late 1934, a legislative aide to Senator Robert Wagner began drafting a bill that would expand the protections for labor organizations that had been written into section 7(a) of the NIRA.<sup>343</sup> Like the main portions of the NIRA, section 7(a) had worked against the interests of black workers, in this case by strengthening the bargaining position of the discriminatory constituent unions of the AFL, the country's largest labor federation. John P. Davis had roundly criticized the strengthened power of the AFL under the NIRA,<sup>344</sup> and when the new labor relations statute was proposed, civil rights advocates were ready with both critiques and a counterproposal calling for a nondiscrimination provision to be added to the new statute.<sup>345</sup> William Hastie argued that such a provision would provide African-Americans with "a strong weapon . . . for compelling unions to accept into membership all qualified employees."<sup>346</sup> Raymond Alexander charged that Senator Wagner's bill "gives virtual unlimited control to the A.F. of L. in its right to organize workers."<sup>347</sup> The AFL opposed the nondiscrimination measure, however, and the Wagner Act was passed without it.<sup>348</sup>

The civil rights bar also learned the affirmative uses of labor law to promote black unionization. The watershed year was 1934, when A. Philip Randolph's Brotherhood of Sleeping Car Porters (BSCP) joined other labor organizations in successfully lobbying for the inclusion of Pullman porters within the protections of the Railway Labor Act. In June of the following year, the BSCP crushed its company-friendly rival union in a National Mediation

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342. Alexander, Address to Educational Conference, *supra* note 182; Sadie T.M. Alexander, Untitled Address on the Economic Status of the Negro (undated) (on file with STMAP, Box 71); Alexander, The Economic Status of Negro Women, *supra* note 182; Press Release, Office of the President, Nat'l Bar Ass'n, Objectives for Upcoming Year (1937) (on file with RPA, Box 85).

343. See IRONS, *supra* note 149, at 226.

344. See John P. Davis, *A Black Inventory of the New Deal*, 42 THE CRISIS 141 (1935).

345. John P. Davis, *NRA Codifies Wage Slavery*, 41 THE CRISIS 298, 304 (1934); Davis, *supra* note 164, at 44.

346. WOLTERS, *supra* note 320, at 183 (quoting Letter from William Hastie to Walter White (Mar. 27, 1934)).

347. Raymond Pace Alexander, The Negro's Changing Status in American Political and Civic Life 4 (May 26, 1935) (unpublished manuscript, on file with RPAP, Box 95).

348. See WOLTERS, *supra* note 320, at 186-87.

Board-sponsored vote, capping the African-American union's ten-year quest for legal recognition.<sup>349</sup> The NBA had begun paying increased attention to black union organization in 1934, when it passed a resolution commending the BSCP for its successful lobbying campaign and calling on black workers to organize.<sup>350</sup> In the wake of the union's election victory of the following year, the NBA passed a bevy of resolutions dealing with civil rights and union organizing, calling on black and white workers to organize together, commending the AFL's long overdue appointment of a committee on black unionism (convened after John P. Davis and Randolph organized protests at the AFL convention), and congratulating the BSCP on its victory. The NBA also called for the Department of Labor to refuse to recognize discriminatory unions.<sup>351</sup>

While most of these proposals came to naught, the civil rights bar could take credit for the one notable success. Pittsburgh lawyer and state legislator Homer Brown joined the local New Deal coalition when the Democratic Party swept the Pennsylvania legislative elections in 1936, and Brown achieved on the state level what his colleagues were unable able to do nationally. When Pennsylvania sought to enact its own labor relations law, Brown introduced and carried through to enactment, over AFL opposition, an amendment that prevented any union that discriminated based on race, creed, or color from receiving the benefits of the state's labor relations law.<sup>352</sup>

The movement to ban discrimination within labor unions would have to content itself with state-level victories until the 1940s. During that decade, Charles Houston would secure several important Supreme Court rulings that labor unions' duty of fair representation under the Railway Labor Act required them to act in the interests of all workers in a bargaining unit, black and white.<sup>353</sup> Homer Brown would continue his efforts at the state level,

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349. See ARNESEN, *supra* note 156, at 94-95.

350. See Report of the Committee on Resolutions, National Bar Association in Convention at Baltimore, Maryland 4 (1934) (on file with RPAP, Box 85).

351. See Nat'l Bar Ass'n, Resolutions Adopted at 11th Annual Conference 2 (Aug. 1-3, 1935) (on file with RPAP, Box 85).

352. See Constance A. Cunningham, *Homer S. Brown: First Black Political Leader in Pittsburgh*, 66 J. NEGRO HIST. 304, 308 (1982); *In the News Columns—Homer S. Brown*, 17 OPPORTUNITY 16, 17 (1939); Richard C. Keller, *Pennsylvania's Little New Deal*, in 2 THE NEW DEAL: THE STATE AND LOCAL LEVELS 45-76 (John Braeman et al. eds., 1975).

353. See, e.g., *Tunstall v. Bhd. of Locomotive Firemen & Enginemen*, 323 U.S. 210 (1944); *Steele v. Louisville & Nashville R.R. Co.*, 323 U.S. 192 (1944).

introducing a fair employment practices bill after World War II.<sup>354</sup> In the crucible of Depression-era regulation of employment and labor relations, labor market discrimination had entered fully into the legal consciousness of the nation's civil rights lawyers.

The struggles over the Hoover Dam project and over New Deal labor market regulation had supplied the civil rights lawyers with both the intellectual and doctrinal tools to articulate and put into effect something that began to resemble modern antidiscrimination practice. Expanded public works projects—beginning with the Hoover Dam and continuing into the New Deal—implicated public entities in previously private discrimination. Similarly, by importing public authority into private decisionmaking, the New Deal labor market regulations provided both the intellectual and legal tools for a larger critique of private discrimination by both employers and labor unions. And as with so many innovations of the decade, the new critiques owed part of their impetus to lawyers who had been exposed to progressive-realist jurisprudence. By the end of the decade, the issue of private labor market discrimination was firmly on the core agenda for the civil rights lawyers, and they were beginning to fashion the legal tools to do something about it.

#### *E. Conclusion*

The social engineering ideas and practices that Charles Houston and his colleagues deployed during the 1930s were linked closely to contemporary ideas put forth by progressive-realist thinkers and scholars. Houston and his colleagues did not need legal realism to understand that legal reasoning stood in for arguments about politics and policy—the central realist claim. That would have been evident to lawyers who had seen their constituencies' constitutional rights vanish with the onset of the Jim Crow era. Nor was the sum total of their intellectual experimentation the simple redeployment of ideas that had been formulated by Pound, Frankfurter, and the Yale and Columbia realists. For the African-American civil rights bar leaders, legal realism was more a language for thinking and writing about law than a unified methodology to be universally applied. It was a language that they adapted as they brought it to bear on their central professional problem—expanding the contours of black citizenship. That new language had ideological content. It made many of them sympathize with the collective right to work. It gave them a new way of analyzing labor market coercion by unions and private employers.

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354. See Cunningham, *supra* note 352, at 313.

It turned them toward new legal tools such as social scientific evidence. Indeed, by the end of the decade it would result in a new professional agenda coming to the fore within the civil rights bar.

## V. THE REVOLUTIONS OF 1938: LEGAL LIBERALISM AND ITS ALTERNATIVES

Nineteen thirty-eight is often regarded as a dividing line in American constitutional law and history—one that separates two types of legal liberalism. One type was what the historian Peter Irons has called a “uniquely modern brand of legal liberalism” associated with the New Deal lawyers’ attempts to justify the expansion of the administrative state and regulation of the private labor market. Its program was “furthering federal power to ensure a basic standard of living and to counter the erratic swings of the business cycle.”<sup>355</sup> That brand of legal liberalism is generally thought to have won out among New Dealers and in the Supreme Court by 1938, in part because of jurisprudential changes within the Court that had been in motion for quite some time.<sup>356</sup>

The civil rights lawyers, in contrast, are usually associated with an even more recent version of legal liberalism—one based on the affirmative use of litigation to combat race discrimination, particularly in public institutions. Nineteen thirty-eight is the year that Charles Houston emerged victorious in *Missouri ex rel. Gaines v. Canada*,<sup>357</sup> the first of the Supreme Court victories in the graduate school discrimination cases that provided the key legal precedents for the *Brown* litigation. That year, Houston also began to hand off his NAACP work to his former student, Thurgood Marshall.<sup>358</sup> Nineteen thirty-eight is also the year that the Supreme Court decided *United States v. Carolene Products*.<sup>359</sup> That case’s famous footnote four signaled that the legal liberalism of the New

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355. IRONS, *supra* note 149, at 295.

356. Scholars have known for quite some time that the crucial changes within the Court occurred before President Roosevelt proposed his famous court-packing plan in 1937 and prior to the well-known Court rulings of 1937 and 1938. *See id.* at 272-80; *see also* BARRY CUSHMAN, *RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION* (1998).

357. 305 U.S. 337 (1938).

358. *See* MCNEIL, *supra* note 36, at 147-52 (describing how Houston was doing less work for the NAACP at this time).

359. 304 U.S. 144 (1938).



Dealers, which required the courts to defer to legislative regulation of the labor market, might not compel the same deference to legislation that evidenced “prejudice against discrete and insular minorities.”<sup>360</sup> Thus, *Carolene Products* appears to be a dividing line between the economic populism of the New Dealers and a newer type of race, rights, and court-centered legal liberalism that would replace it.<sup>361</sup> I offer a different interpretation.

By 1938, the three contending professional identities within the civil rights bar—voluntarism, antidiscrimination, and Marxist politics—began to converge into something far more complicated than legal liberalism. The new consciousness had crystallized in the thinking of Raymond Alexander as early as the fall of 1937. In an address in advance of the annual convention of the National Negro Congress, the principal alternative civil rights group to the NAACP, Alexander sketched out an agenda for the organization that centered around what he called the “Right of Employment in all industries, of whatever character,” in which the government exercised control through loans, contracts, subsidies, or administrative regulation.<sup>362</sup> This was an updated version of Charles Chesnutt’s old argument that civil rights laws should extend to private entities that enjoyed special benefits from the state,<sup>363</sup> now deployed in the context of the New Deal. For Alexander, the expansion of the New Deal administrative and regulatory state, in which the state involved itself in the affairs of putatively private industries, had opened up a new area of civil rights advocacy.

Charles Houston later offered a similar justification for his litigation on behalf of black railroad workers, arguing that the “[b]roader base of struggle is that principles established in litigation over railroads will apply to any public

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360. *Id.* at 152 n.4.

361. Alan Brinkley has crafted an influential interpretation of twentieth-century American history that supports this periodization. ALAN BRINKLEY, *THE END OF REFORM: NEW DEAL LIBERALISM IN RECESSION AND WAR* 268-69 (1995) (arguing that during the late 1930s, an economic- and class-based “reform liberalism” began to give way to a consumption- and rights-based liberalism); see also WILLIAM E. NELSON, *THE LEGALIST REFORMATION: LAW, POLITICS, AND IDEOLOGY IN NEW YORK, 1920-1980*, at 7 (2001) (arguing that, in 1938, a “legalist reformation” took hold among New York legal reformers).

362. See Raymond Pace Alexander, Notes for an Address: Why Philadelphia Needs “The National Negro Congress” 2 (Sept. 24, 1937) (on file with RPAP, Box 95).

363. Chesnutt, *The Courts and the Negro*, *supra* note 48, at 262, 266. See generally *supra* Section II.B.

utility.”<sup>364</sup> By “public utility,” Houston referred to industries that were subject to significant government regulation and faced limited competition, envisioning that labor relations in all such entities might eventually be subjected to nondiscrimination mandates.<sup>365</sup> New Deal and World War II-era expansions of federal power made more of these industries visible to civil rights advocates, resulting in the creation of the Fair Employment Practice Committee (FEPC) in 1941 at the urging of labor leader A. Philip Randolph. The FEPC mandate was to investigate complaints of discrimination in war industries and government. Chicago lawyer Earl Dickerson, who served as one of only two African-Americans on the newly minted Committee, hailed the FEPC as the modern-day equivalent of the Emancipation Proclamation. Three years later, Charles Houston was appointed to the committee.<sup>366</sup> By the early 1940s, lawyers like Houston, Dickerson, Alexander, and Philadelphian Lewis Tanner Moore, as well as the NBA itself, were devoting significant professional energy to advocating fair treatment for black workers under the New Deal- and World War II-era labor market regulatory scheme.<sup>367</sup>

Extending their professional energies to industrial employment posed a familiar problem for the civil rights lawyers: The expansion of the New Deal state threatened to imbue labor union discrimination with the sanction of positive law. Charles Houston noted that, by 1939, two positions had emerged on this issue within the mainstream civil rights community—in this case the NAACP. Proponents of one position argued that civil rights advocates should not seek any special protection for minority workers under the Wagner Act and other New Deal-era labor laws because, in the long run, African-Americans, being disproportionately poorer and working class, would benefit from the

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364. Charles H. Houston, Notes for Address Before the City Club of Rochester 2 (Mar. 5, 1949) (unpublished manuscript, on file with CHHP, Box 163-18).

365. See *id.*; see also Charles H. Houston, *The Highway*, PHILA. AFRO-AM., Sept. 6, 1947, at 7.

366. See MERL E. REED, SEEDTIME FOR THE MODERN CIVIL RIGHTS MOVEMENT: THE PRESIDENT’S COMMITTEE ON FAIR EMPLOYMENT PRACTICE, 1941-1946, at 12-17, 33-34, 148 (1991); Earl B. Dickerson, Our Second Emancipation, Speech Delivered on “Wings over Jordan” Program 2 (Jan. 4, 1941) (transcript on file with the William L. Patterson Papers, M-SRC, Box 208-26).

367. See Amended Complaint, *Wonham v. Penn. Greyhound Lines* (E.D. Pa. 1940) (No. 1138) (on file with RPAP, Box 49); NAT’L BAR ASS’N, SOUVENIR PROGRAM OF THE SIXTEENTH ANNUAL CONVENTION (Aug. 1-3, 1940) (on file with RPAP, Box 85); Letter from Maceo W. Hubbard, Bhd. of R.R. Station Porters, Am. Fed’n of Labor, to Interstate Commerce Comm’n (Sept. 3, 1940) (on file with RPAP, Box 49).

new regime.<sup>368</sup> This was a vestige of the familiar Marxist, anti-statist position that focused on black and white worker unity outside the ambit of state power. Proponents of a second position, Houston noted, thought that the civil rights community should give only qualified support to the Wagner Act regime, while simultaneously working for the addition of a nondiscrimination mandate. Houston counted himself in the second camp, remarking that “all Negroes must, it seems to me, endorse the principle of collective bargaining.”<sup>369</sup> This view merged the old Marxist position with the antidiscrimination framework that Raymond Alexander had articulated in 1931, and much of the leadership of the civil rights bar adopted this position. Indeed, it defined a good part of their agenda for the succeeding decade, as lawyers like Homer Brown in Pittsburgh and George Crockett in Detroit joined Houston in battling race discrimination within the New Deal labor relations regime.<sup>370</sup>

A new professional agenda, then, had crystallized for the civil rights bar by 1938 and was in full swing by 1941. Growing out of the boycott movement and the struggles with New Deal labor market regulations, it committed the lawyers to an attack on discrimination in the sectors of the private labor market in which the government was significantly involved. The new agenda essentially combined the concerns of the antidiscrimination and Marxist positions within civil rights politics. Most of the civil rights bar leadership struggled to make some accommodation between the New Deal regulatory state and antidiscrimination policies. Indeed, John P. Davis, the most effective critic of discrimination in the early New Deal, was by this time on the left wing of the New Deal coalition.<sup>371</sup>

The new professional consciousness also extended to the role of litigation in producing social change. Many African-American civil rights lawyers had been drawn into the NAACP's litigation apparatus during the 1930s, displacing the white lawyers who had once conducted the organization's important litigation.<sup>372</sup> Their entry into sustained NAACP work, however, coincided with the emergence of a Marxist critique of litigation within the civil rights

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368. See INT'L LAB. DEF., NATIONAL CONFERENCE, WASHINGTON, D.C., PROCEEDINGS AND REPORT 16 (1939) (on file with CHHP, Box 163-6).

369. *Id.* (internal quotation marks omitted).

370. See NELSON LICHTENSTEIN, THE MOST DANGEROUS MAN IN DETROIT: WALTER REUTHER AND THE FATE OF AMERICAN LABOR 208-11 (1995); Cunningham, *supra* note 352, at 308.

371. See *John P. Davis Predicts New Deal Victory* (unidentified, undated newspaper article, on file with author).

372. See Meier & Rudwick, *supra* note 137.

community, which emphasized that the fundamental source of inequality was rooted in extra-judicial class conflict, and that litigation, by itself, was the wrong strategy.<sup>373</sup> At the same time, W.E.B. Du Bois sparked a firestorm within civil rights politics by advocating for the voluntarist position, arguing that African-Americans should make some accommodation with separate-but-equal rather than pursuing all available legal challenges to segregation.<sup>374</sup>

Thus, when Houston joined the NAACP as a full-time staff attorney in 1935, he assumed responsibility for articulating both the possibilities and the limits of litigation to a sometimes skeptical civil rights community. In a memorandum to the American Fund for Public Service (the Garland Fund)—the principal outside funding source for the NAACP’s civil rights litigation—he argued that litigation would help: “(1) to arouse and strengthen the will of the local communities to demand and fight for their rights; [and] (2) to work out model procedures through actual tests in court which can be used by local communities . . . on their own initiative and resources.”<sup>375</sup> This emphasis on the role of litigation in inspiring local African-Americans signaled the beginnings of the merger of the antidiscrimination position with voluntarist and Marxist anti-legalism.

Houston’s position was also supported by the sociological theories of law that he had internalized in law school. In Roscoe Pound’s jurisprudence class, Houston had absorbed Pound’s characteristic stress on the “limits of effective legal action,”<sup>376</sup> and in his doctoral writing he had carried Pound’s skepticism forward, arguing that courts were generally ineffective in dealing with “problems or questions of broad economic or social policies,” and that “[t]he courts seem to function best as a great fly-wheel or regulator, which keeps the rest of the social machine working regularly, but (they do) not supply the motive power.”<sup>377</sup>

When Houston, assisted by Thurgood Marshall, won his first graduate school discrimination case against the University of Maryland Law School slightly more than a decade later, he framed the victory as a confirmation,

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373. See *supra* Section II.D.

374. See DAVID LEVERING LEWIS, W.E.B. DUBOIS: THE FIGHT FOR EQUALITY AND THE AMERICAN CENTURY, 1919-1963, at 334-48 (2000). DuBois was notable for advocating for both the Marxist and the voluntarist positions within civil rights politics. See *id.* at 302-14, 349-78.

375. Memorandum from Charles H. Houston to the Joint Comm. of the NAACP and the Am. Fund for Pub. Serv. (Oct. 26, 1934), *microformed on* Part III, Series A, Reel 1 (NAACP).

376. Pound, *supra* note 192, at 559, 574; Houston, *supra* note 194, at 27.

377. Houston, *supra* note 203, at 17 (internal quotation marks omitted).

rather than a refutation, of this view of court power. In an article entitled *Don't Shout Too Soon*, he mobilized Pound's familiar distinction between "law in the books" and "law in action," reminding his NAACP constituency that "[l]aw suits mean little unless supported by public opinion. Nobody needs to explain to a Negro the difference between the law in the books and the law in action."<sup>378</sup> Houston argued that the "real American public" – the "[m]illions of white people, North, East, West and even South" – still needed to be convinced before the legal victory could be effective.<sup>379</sup> That, he argued, was the "really baffling problem" raised by the victory.<sup>380</sup>

The debate over the effectiveness of litigation was renewed in the 1930s, when the civil rights lawyers turned, in earnest, to the problem of labor union discrimination. Houston submitted a request for additional support from the Garland Fund, this time including a proposal "to safeguard the rights of Negro workers under the collective bargaining acts."<sup>381</sup> The Garland Fund had a decidedly leftist orientation, and some members of its board, particularly Socialist leader Norman Thomas, thought that the money could be better spent on organizing rather than litigating.<sup>382</sup> This was now a familiar critique, and Houston took time to articulate what had become a more developed position on the role of litigation. Writing to another Garland Fund board member, he noted that "we were aware of the limitations of trust which are to be imposed in the courts as instruments of social change." Houston explained that (1) "we use[] the courts as dissecting laboratories to extract from hostile officials the true machinations of their prejudices," (2) "we use the courts as a medium of public discussion, since it is the one place that we can force America to listen," and (3) "we attempt to activate the public into organized forms of protest and support behind these cases, under the theory that a court demonstration

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378. Charles H. Houston, *Don't Shout Too Soon*, 43 *THE CRISIS* 79 (1936). Houston's formulation in his article was somewhat different than Pound's. Both stressed the need to bring formal doctrine and social action into line with one another, although Pound's stress was on bringing doctrine into compliance with social action, while Houston's was the reverse. See Pound, *Law in Books*, *supra* note 193, at 12-14.

379. Houston, *supra* note 378.

380. *Id.*

381. Memorandum from Charles H. Houston to the Trs. of the Am. Fund for Pub. Serv., Inc. 5 (June 22, 1937), *microformed on* American Fund for Public Service Papers (AFPSP), Reel 23 (Scholarly Res., Inc.).

382. See Letter from Charles Houston, Attorney, Houston & Houston, to Roger Baldwin 1-2 (June 28, 1937) (laying out Thomas's concerns that the lawyers might take "too legalistic" an approach), *microformed on* AFPSP, Reel 23 (Scholarly Res., Inc.).

unrelated to supporting popular action is usually futile and a mere show.”<sup>383</sup> The explanation apparently convinced Thomas, who wrote Houston that he had been persuaded that both the school litigation and the labor cases “are the sort of things that may encourage action by the Negroes themselves” and should therefore be supported.<sup>384</sup>

Two years later, with the Supreme Court victory in *Gaines* in hand, Thurgood Marshall, echoing Houston, argued that litigation could help “build a body of public opinion” in support of the legal changes that alone would be ineffective.<sup>385</sup> As late as 1948, Loren Miller followed up the victory in *Shelley v. Kraemer* by arguing that “[t]he legal victory will prove a hollow triumph unless the battle against residential segregation is also won in the field of public opinion.”<sup>386</sup>

When Houston and his colleagues at the civil rights bar turned in earnest to education and labor union cases in the late 1930s, they brought with them a half-decade of experience responding to vigorous critiques of the efficacy of litigation, along with their traditional caution about legal strategies that ran counter to public opinion. Their primary objective was to gain a court decree and make it effective. Most, however, expressed skepticism about the ability of their work to achieve meaningful reforms without local and national efforts by supporters, as well as changes in white public opinion. They were also beginning to understand that litigation and social movement politics reinforced each other—demonstrated, most saliently, by the Supreme Court victory in the *New Negro Alliance* case. The civil rights lawyers believed that litigation was a necessary, but not sufficient, part of the movement to make African-American citizenship real.

The merging of the various theories of professional identity that had competed within the civil rights bar since 1931 reinforced that view. Many of the reform lawyers’ critics were being drawn into the mainstream civil rights community, and the mainstream lawyers began to internalize some of the criticism and apply it to their own work. Loren Miller, for instance, had been one of the most vociferous of the Marxist critics during the early- and mid-1930s. By the mid-1940s, however, Miller was cooperating actively with Houston, Hastie, and Thurgood Marshall as one of the principal attorneys in

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383. *Id.* at 2.

384. Letter from Norman Thomas to Roger Baldwin (June 28, 1937) (describing the correspondence), *microformed on AFPSP*, Reel 23 (Scholarly Res., Inc.).

385. Thurgood Marshall, “*Equal Justice Under Law*,” 46 *THE CRISIS* 199, 201 (1939).

386. Loren Miller, *A Right Secured*, 166 *THE NATION* 599, 600 (1948).

the restrictive covenant litigation.<sup>387</sup> Similarly, Louis Redding had pushed the Marxist agenda within the mid-1930s NAACP, arguing that traditional civil rights litigation better served the needs of the talented tenth (the black bourgeoisie) than those of “the Negro mass[es].”<sup>388</sup> Nonetheless, Redding was also drawn into NAACP litigation, eventually handling the Delaware school desegregation case that would make up part of the *Brown* litigation.<sup>389</sup> Sadie Alexander had been an articulate proponent of voluntarism throughout the 1930s, offering visions of an intraracial voluntarist African-American economy. But by the end of the decade she had given her qualified endorsement to New Deal economic regulation.<sup>390</sup> On the other side of the ledger, Houston, Alexander, Hastie, and Leon Ransom had endured withering criticism earlier in the decade for what many called their legalism, but by 1938 they had endorsed most of the Marxist-derived agenda of interracial labor organization, and had begun to incorporate it into their professional agenda.

Nineteen thirty-eight, therefore, was a dividing line in civil rights and constitutional history, but not between the economic populism of the past and the race- and rights-based, court-centered legal liberalism of the future. Rather, 1938 divided the competing theories of civil rights lawyering of the early 1930s from the merged approach of the years that followed. As they went forward with the labor market advocacy and the education cases, the civil rights lawyers remained both cautious about the efficacy of litigation and attuned to the possibility that litigation might help generate social action. Moreover, the black bar leadership remained just as committed to attacking discrimination in private economic life as they were to combating it in public institutions. Many regarded the economic litigation as more fundamental. In 1940, for instance, Houston stated that he considered his labor cases to be a

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387. See, e.g., CLEMENT E. VOSE, CAUCASIANS ONLY: THE SUPREME COURT, THE NAACP, AND THE RESTRICTIVE COVENANT CASES 58, 153 (1959); Miller, *supra* note 31.

388. Letter from Louis Redding to Joel Springarn 2 (Sept. 2, 1933) (on file with the Joel Springarn Papers, M-SRC, Box 95-8)

389. See KLUGER, *supra* note 34, at 429-50; 1 Annette Woolard, A Family of Firsts: The Reddings of Delaware 262-95 (Fall 1993) (unpublished Ph.D. dissertation, University of Delaware) (on file with the University of Delaware Library).

390. Compare Sadie T.M. Alexander, Untitled Essay (undated) (on file with STMAP, Box 71) (criticizing the proliferation of economic regulation and advocating intraracial organizing instead), with Sadie T.M. Alexander, Address Delivered in Detroit 8-9 (1939) (on file with STMAP, Box 71) (advocating widespread government regulation of the economy).

“greater service” than had been his victory in the *Gaines* case.<sup>391</sup> Raymond Alexander, writing at the beginning of 1938 and looking forward to the next decade of civil rights politics, argued that it would center on:

New political alignments built around a labor worker organization similar to the American Labor Party Movement which, if successful in molding both the AFL and CIO factions, will be the dominant political factors that will hold the balance of power in American politics. The Negro will rise politically as this movement gains headway and will fall as it fails.<sup>392</sup>

This vision would remain the core professional consciousness for many leaders of the civil rights bar until at least the end of World War II, and it bears little resemblance to a program centered on formal juristic deployment of rights-based liberalism. Looking forward from the World War II era, many of these lawyers envisioned a reform politics that escaped the bounds of the legal liberalism that has been associated with their legacy.

## CONCLUSION

One recent critique of legal liberalism has defined it as “a cluster of ideas associated with the Warren Court, the ACLU, the NAACP Legal Defense Fund” and others, which took shape around the time of the *Brown* decision and dominated liberal politics for a half century.<sup>393</sup> This same scholar concedes, however, that “[t]here is no canonical definition of Legal Liberalism, but we know it when we see it.”<sup>394</sup> In this Article, I have argued that scholars have seen legal liberalism in the formative era for modern civil rights law and politics only by looking through the lens of the victory in the *Brown* litigation itself. Even many participants in the civil rights politics of the 1920s, ’30s, and ’40s later viewed their own pasts through the lens of *Brown*, thus helping to cement

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391. Letter from Charles Houston to Walter White (Jan. 2, 1940) (on file with CHHP, Box 163-18).

392. Raymond Pace Alexander, *The Next Decade: A Philosophy of Life for the Negro College Student of Today*, Address Delivered at Youth Educational Rally, University of Pennsylvania 11 (May 7, 1938) (on file with RPAP, Box 95).

393. William H. Simon, *Solving Problems vs. Claiming Rights: The Pragmatist Challenge to Legal Liberalism*, 46 WM. & MARY L. REV. 127, 130 (2004).

394. *Id.*



an interpretation that made their own complicated histories into a struggle to overturn *Plessy v. Ferguson* and achieve *Brown*.

I have emphasized the ideological and discursive effect of *Brown* on the history and memory of civil rights law and politics. The legal liberal interpretation of civil rights history has led scholarly accounts to de-emphasize or elide much of the story of the era before *Brown* that this Article reconstructs. If one discards the assumption that *Brown* is the end point of the story, one would end up with a history of civil rights lawyering and politics in the era preceding *Brown* that begins not with legal liberalism and the attack on de jure segregation but rather with race uplift. Race uplift, particularly its voluntarist strand, emphasized lawyers' everyday, practice-oriented work rather than transformative litigation. The voluntarist strand of uplift counseled the civil rights lawyers to devote their legal expertise to the support of businesses and local institutions that they imagined would aid in voluntarist social transformation. It was voluntarism that Charles Houston sought to put into practice when he began transforming Howard Law School into a school of "social engineering" through law. He did not imagine that he was training a cadre of lawyers who would use the courts to overturn segregation. Indeed, he counseled against such a course of action. Even in 1933 and 1934, when Houston was drawn out of the confines of 1920s-style race uplift and into a more sustained engagement with civil rights litigation, he took time to sketch the possibilities for local self-organization that litigation could create. Houston and his colleagues did not view themselves as choosing between litigation and other forms of social transformation.

Some of race uplift's core propositions were reinforced by the progressive-realist legal method that Charles Houston and his cohort of civil rights lawyers absorbed at Harvard Law School, and that Houston and William Hastie sought to put into practice at Howard. The legal liberal interpretation of the civil rights lawyers has made them appear isolated from the issues that engaged the realists: the interdependence of legal reform and social action, the policy judgments that inevitably lie behind the formality of legal argument and decisionmaking, coercion in the private labor market, and the rise of the New Deal-era administrative state. This traditional interpretation threatens to relegate the civil rights lawyers to what Randall Kennedy has called the "academic ghetto,"<sup>395</sup> where their intellectual and professional lives are treated

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395. Randall Kennedy, *Race Relations Law in the Canon of Legal Academia*, 68 FORDHAM L. REV. 1985, 1990 (2000).

as involving solely race-related issues disconnected from the larger themes of American jurisprudence and professional history in the twentieth century.

I have also argued that a parallel critique of private discrimination and economic inequality emerged alongside the civil rights lawyers' attack on segregated education. Charles Houston's turn to labor law in the late 1930s grew out of an engagement with economic inequality that had been present within the civil rights bar throughout the decade. Even race uplift, the professional language of the 1920s, mandated a sustained degree of professional engagement with economic inequality, albeit on terms that may sometimes seem strange to modern observers. When the Great Depression made uplift less tenable, part of the civil rights bar's reformist energy shifted into Marxist-derived strategies that counseled a focus on labor organization and economic inequality, as well as an increased skepticism about litigation. Even lawyers like Houston, Alexander, and Hastie—who did not adopt a labor focus immediately—were drawn into labor law and into progressive-realist critiques of coercion in the private labor market through their involvement in the black boycott movements. Discrimination by private employers, as well as the intellectual tools to combat it, also forced their way onto the civil rights lawyers' agenda through New Deal labor market regulations.

Thus, when the civil rights lawyers began to score successes in the educational reform cases in the 1930s, it was less a turn to race-based and noneconomic legal liberalism than part of a complicated series of professional impulses that would count the achievement of something like the *Brown* decision as only one of its objectives. Indeed, it suggests that the famous *Carolene Products* moment's place in constitutional history, at least as it applies to the civil rights lawyers, should be reframed as the opening wedge of something quite different than race- and rights-based legal liberalism.

Of course, the World War II era, where this Article ends its story, does not extend to 1954. It is possible that a pervasive, coherent, and stable legal liberalism emerged by the time of the *Brown* decision, and presented the choices that have been outlined in the revisionist literature: litigation versus extra-judicial social transformation, liberal rights formalism versus more robust forms of socio-legal discourse, and integration versus intraracialism. However, there are reasons to doubt this. It would seem unlikely, for instance, that a civil rights politics that had been protean, plural, and heterogeneous for so long would become stable, unilinear, and hegemonic in the decade that separated the end of World War II from the middle of the 1950s. Moreover, at least some within the African-American civil rights bar leadership, such as

Detroit lawyer George Crockett, later remembered that they adhered to a decidedly un-legal liberal politics into the 1960s.<sup>396</sup> Civil rights politics undoubtedly became more recognizably liberal by the 1950s than it had been a decade before. However, liberalism, like the variants of civil rights politics that preceded it, almost certainly contained its own plural, discontinuous, and dissenting voices.

Historians inevitably impose their own interpretive frameworks in order to organize knowledge of the past. I have argued that the legal liberal framework is one that cannot be squared with a sustained engagement with the history of civil rights lawyering in the pre-*Brown* era, and thus has outlived its usefulness. Revisionists have often deployed the idea of a disempowering past as a counterpoint for imagining a better future. Perhaps instead, the seeds of a better future can be found in an engagement with a past that is often as complex and polymorphous as any imagined progressive future.

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396. See Interview by James M. Mosby, Jr. with George W. Crockett, in Detroit, Mich. (July 9, 1970) (transcript on file with the Ralph J. Bunche Oral History Collection, M-SRC) (recalling Crockett's participation in labor organizations, challenges to economic discrimination, left-wing causes, and the Southern civil rights movement); see also Brown-Nagin, *supra* note 13, at 1913-17, 1966-70 (critiquing Derrick Bell's analysis of the choices available to civil rights lawyers, litigants, and African-American communities in the decades after *Brown*).