

## ***BOOK REVIEW***

### **RACIAL EQUALITY: PROGRESSIVES' PASSION FOR THE UNATTAINABLE**

*The Lost Promise of Civil Rights.* By Risa L. Goluboff. Harvard University Press, 2007.

*Derrick Bell\**

#### THE INTEGRATION COMPULSION

I agreed to review Professor Risa Goluboff's book, *The Lost Promise of Civil Rights*,<sup>1</sup> in the hope that it might explain or at least place in historical perspective the unwavering commitment of so many liberals to school integration. To a substantial degree—although perhaps not as she intended—she has done that. A scholar of history as well as law, Goluboff has done a significant service for all those concerned about racism's continuing viability. Her review of the civil rights history of the 1930s and 1940s unearths the quasi-slave status of many black workers well into the Twentieth Century. In addition, she reviews the origins of a decades-long debate between those who urged policies to strengthen economic opportunities within the racially segregated society, and those who felt that the top priority for black people must be overturning the decision that gave constitutional approval to the "separate but equal" standard.<sup>2</sup>

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\* Visiting Professor, New York University School of Law. At the invitation of Thurgood Marshall, then Director-Counsel of the NAACP Legal Defense Fund, I joined his legal staff in 1960. Within a year or so, I began handling and supervising several dozen school desegregation cases, most of them in the Deep South. In 1965, I left the Fund for a position as Deputy Director of Civil Rights in the Department of Health, Education, and Welfare. There, I worked on enforcing Title VI of the Civil Rights Act of 1964, which authorized denying federal funds to school districts that failed to comply with desegregation mandates.

My thanks to Janet Dewart Bell, Sarah Blanton and Anjana Samant for their research and editing assistance.

<sup>1</sup> Risa L. Goluboff, *The Lost Promise of Civil Rights* (2007).

<sup>2</sup> *Plessy v. Ferguson*, 163 U.S. 537, 550–51 (1896).

I knew of this controversy but had not connected it with what I have come to call the *Brown v. Board* mystique: the continuing commitment by civil rights leaders to implement *Brown v. Board of Education*'s mandate for racial integration of public schools.<sup>3</sup> Their commitment is unwavering despite seemingly universal opposition from white parents (at least when it comes to their own children), increasing hostility from the majority of the Supreme Court, and dying enthusiasm by black parents. Those still enthralled by *Brown* seem unaware that even if the Supreme Court had approved the modest integration plans in last year's Louisville and Seattle case,<sup>4</sup> most black and Latino children's schooling—which occurs in mainly black and Latino schools—would not have been affected.<sup>5</sup>

The Supreme Court's 5–4 decision held that any use of race in student assignment policies violated the rights of the white petitioners, whose children had been denied admission to the schools of their choice. For all but the most intrepid supporters of school integration, the message was clear: The current Court and its two newest members, Chief Justice John Roberts and Associate Justice Samuel Alito, are determined to strike down any laws or policies intended to remedy past and continuing racial discrimination. And yet, the Legal Defense Fund made clear that it will continue its quest to implement *Brown*.<sup>6</sup>

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<sup>3</sup> *Brown v. Bd. of Educ.*, 347 U.S. 483, 493–95 (1954).

<sup>4</sup> *Meredith v. Jefferson County Bd. of Educ.*, involving public schools in Louisville, Ky., and its suburbs, decided together with *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, No. 05-908, slip op. at 25–26 (U.S. June 28, 2007).

<sup>5</sup> Despite literally hundreds of school desegregation suits, many lasting for decades, most black and Hispanic students attend public schools that are both racially separate and educationally ineffective. For example, as of the 2000–2001 school year, white students, on average, attended schools where eighty percent of the student body was white. Black and Latino students increasingly attend schools that are virtually non-white. The mainly black and Latino schools are attended by children burdened by devastating poverty, limited resources, and social and health problems. Erica Frankenberg, Chungmei Lee & Gary Orfield, *A Multiracial Society with Segregated Schools: Are We Losing the Dream?* 4–5 (2003). Lost in the statistics is the fact that many of the black and Latino students attending mainly white schools are tracked into nonacademic courses and in a myriad of ways are not getting either an integrated education or one that meets their schooling needs.

<sup>6</sup> Reviewing the Seattle case on its web site, the Legal Defense Fund headlined its story: "Majority of Court Finds School Diversity a Compelling Interest." Posting of Nicole Dixon to Supreme Court – School Integration,

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One long-time school integration advocate, Jonathan Kozol, is not ready to give up the struggle. In a New York Times op-ed piece, he urged Congress to build on Justice Kennedy's willingness to approve school integration plans as long as race is not the basis for assigning individual children by authorizing and easing cross-district transfers that would enable students from low-performing schools to transfer to high-performing schools.<sup>7</sup> Proponents of racial diversity at the college level took heart that the Seattle opinion had distinguished rather than overruled the narrow support for such considerations in *Grutter v. Bollinger*.<sup>8</sup> Nevertheless, given the Court's language providing the "color-blind" standard an almost sacred status, it appears that if the facts of the Michigan case came before the Court with its current make-up, *Grutter* would be found to fall as far short of the new racial measure as the public school policies in *Parents Involved in Community Schools v. Seattle School District No. 1*.

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<http://scintegration.blogspot.com/2007/06/kennedy-finds-school-diversity.html> (June 28, 2007, 11:02 EST). Evidently seeking to snatch a moral victory from a legal defeat, it explained: "Along with Stevens, Breyer, Souter, and Ginsburg, Kennedy, in a separate opinion, finds that there is a compelling interest in diversity and integration in America's schools." It continues:

Despite his concurrence in the judgment of the plurality opinion that the particular school plans at issue did not have enough justification for their consideration of the race of individual students, Justice Kennedy wrote in favor of the ability, and, indeed, importance of school districts to pursue integrated schools. In his opinion, Kennedy stated that the racial diversity of particular schools could be considered in this pursuit[.]

Id. Quoting from Kennedy's concurrence in bold face, the story reports: "Such measures may include strategic site selection of new schools; drawing attendance zones with general recognition of neighborhood demographics; allocating resources for special programs; recruiting students and faculty in a targeted fashion; and tracking enrollments, performance, and other statistics by race." Id.

<sup>7</sup> Jonathan Kozol, Op-Ed., *Transferring Up*, N.Y. Times, July 11, 2007, at A19; see also Larry Gossett & John A. Powell, *Schools and Race: Picking up the Pieces*, Seattle Times, Jul. 6, 2007 (viewing the Seattle case's potential based on their contention that "for the first time in its history . . . the majority of the court recognizes a compelling government interest not only in ending state-sponsored (de jure) segregation, as in *Brown*, or in pursuing diversity in higher education, as in the University of Michigan affirmative action case *Grutter v. Bollinger*, but also in remedying racial isolation, regardless of its cause."). For a depressing review of segregation and inadequacies in schools across the country, sparking Kozol's continued commitment to integrated schools, see Jonathan Kozol, *Ordinary Resurrections* (2000) and Jonathan Kozol, *Savage Inequalities: Children in America's Schools* (1991).

<sup>8</sup> 539 U.S. 306, 343 (2003).

Truly, in all but name and reputation, *Brown v. Board* is an obsolete precedent. Indeed, the *Brown* decision is the twentieth-century equivalent of the Emancipation Proclamation of 1863: both are important historical artifacts without current substantive significance.<sup>9</sup> We can, and I do, praise those whose skills and persistence led to the now moribund *Brown* decision, but there is a serious disadvantage in expecting that continued commitment to its initial goal can bring about a miraculous resurrection of its authority as legal precedent. And yet, as if searching for the Holy Grail, integration advocates push on, convinced that if *Brown's* interpretation of the Constitution can be fully enforced in public schools across the country, it will serve eventually as the lever to eliminate racial discrimination in all aspects of American life.

#### JIM CROW'S PHYSICAL AND PSYCHOLOGICAL DIMENSIONS

There seems to be little connection between this passionate commitment to school integration and Professor Goluboff's reports of backbreaking toil and shockingly inhumane treatment black men and women had to endure during and after World War II just to scratch out bare survival in a racially hostile environment little changed eight decades after the Civil War and the theoretical abolition of slavery. Civil rights policymakers of the time must have been aware of those stories and may well have witnessed some of them. These leaders knew all too well that neither their education nor status really insulated them from lesser but hardly less difficult to bear manifestations of racial subordination. It is not difficult to imagine their differing perspectives on how best to challenge such a deeply set pattern of racial bias. The desire to try to provide remedies for a few dozen workers had to be balanced against the

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<sup>9</sup> Proclamation No. 17, 12 Stat. 1268 (January 1, 1863). Actually, as a legal matter the proclamation freed no slaves; its terms were carefully limited to those areas still under Confederate control and thus beyond the reach of federal law. Slaveholding territories that had sided with the Union were specifically excluded. But Lincoln's dramatic action had a symbolic effect that far exceeded its legal force, and blacks made no distinction between the areas covered by the proclamation and those excluded from its impact. Slaves did not revolt on a wholesale basis, but as word of the Emancipation Proclamation filtered down to them, increasing numbers simply slipped away or became disloyal, particularly when Union troops approached. John Hope Franklin & Alfred A. Moss, Jr., *From Slavery to Freedom* 225-30 (8th ed. 2000); J.G. Randall & David Donald, *The Civil War and Reconstruction* 385 (2d ed. 1961).

possibility that, given the right cases, properly presented, lawyers might convince the courts to topple the legal pillars of segregation.

The blight of noncitizenship in an alien land—referring to blacks as second-class citizens was terribly inaccurate—for a people held to all the obligations of citizenship, including the payment of taxes and military service, yet denied basic rights, burdened their lives in ways both beyond the obvious and beyond the comprehension of those who did not experience it. All who were so burdened believed that racial segregation protected by law was the culprit. We in the civil rights movement were a dozen years into the difficult implementation phase of the *Brown* decision before a few of us recognized that, as Judge Robert L. Carter, one of the NAACP lawyers who helped direct the *Brown* litigation, wrote years later:

[T]he pre-existing pattern of white superiority and black subordination remains unchanged. . . . Few in the country, black or white, understood in 1954 that racial segregation was merely a symptom, not the disease; that the real sickness is that our society in all of its manifestations is geared to the maintenance of white superiority.<sup>10</sup>

Invalidating state-supported segregation, we learned, simply meant it would shift to different but hardly less dominating forms.

Professor Goluboff describes the system that came to be called Jim Crow—the means by which whites kept blacks from involvement in politics and social relations and maintained the black workforce on which the southern economy relied. Jim Crow led to political structures, intimidation, and violence that kept blacks from voting and required the segregation of public facilities. Beyond the law itself, though, Goluboff explains:

When the Klu Klux Klan, often with the acquiescence of law enforcement officers, lynched black men and women, they enforced Jim Crow. Jim Crow existed because every day, in ways momentous and quotidian, governments, private institutions, and millions of individuals made decisions about hiring, firing, consum-

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<sup>10</sup> Robert L. Carter, *The Warren Court and Desegregation*, 67 Mich. L. Rev. 237, 247 (1968).

ing, recreating, governing, educating, and serving that kept blacks out, down, and under.<sup>11</sup>

Jim Crow's many manifestations flourished in the wake of Supreme Court decisions that undermined potential protections in the post-Civil War Amendments and the federal statutes enacted to provide those Amendments with enforceable meaning. The Great Depression of the 1930s led to President Roosevelt's New Deal policies, which eventually forced the Supreme Court to retreat from the "freedom of contract" fiction that assumed day laborers and corporate heads stood on equal ground in setting work and wage agreements.<sup>12</sup>

These legal developments held little immediate value for black people who continued to labor within a suffocating economic structure that, while not enslavement, was so openly exploitative and so supported by existing laws and policies that it was quite close to the institution of slavery outlawed by the Thirteenth Amendment. In addition to the typical exploitation of sharecroppers and tenant farmers, plantation owners used promises of jobs at good pay to entice black workers into indentured servitude. In one case, black men were recruited with promises of good-paying jobs, and then transported in large numbers to sugar cane plantations in south Florida. Once there, they were forced to work under horrible conditions for \$1.80 per day to pay the debts they had incurred for their "free travel," board, work implements, and other essentials. Remote terrain and the planters' security measures made escape both difficult and dangerous.<sup>13</sup> Similar enticements led men of both races to accept transportation to the shipyards in Portland, Oregon and along the West Coast. Even before they arrived, company representatives began assigning blacks to be general laborers, while some whites were placed in skilled jobs. Segregated labor unions which blacks had to join in order to work gave them no power and

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<sup>11</sup> Goluboff, *supra* note 1, at 7.

<sup>12</sup> Compare *Lochner v. New York*, 198 U.S. 45, 57–58, 64 (1905) (striking down a statute limiting bakers' working hours, as a violation of the "freedom of contract" right protected by the Due Process Clause) with *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 394–95 (1937) (recognizing that the Due Process Clause did not bar legislation intended to protect the health and safety of vulnerable groups).

<sup>13</sup> Goluboff, *supra* note 1, at 1–2.

simply added to the discrimination blacks found in every aspect of their labors.<sup>14</sup>

Professor Goluboff devotes a full chapter to a range of complaints, including debt-based peonage, filed by black agricultural workers and to the open exploitation of black tenant farmers by bookkeeping so one-sided that it hardly deserves the name. Landowners could, and did, evict tenant farmers from the land after crops were planted and ready for harvest. Far from isolated incidents, there were patterns of widespread intimidation, outright theft of crops, and even murder that are heart-wrenching to read about even seventy years later.

She reports as a particularly gruesome example that “[w]hen Wyatt Trueblood refused to give his syrup over to the Bryant brothers . . . they shot him in the head and then beat him with an iron bar.”<sup>15</sup> “Lettie Franklin reported that the farmer on whose land she worked had taken her crop, refused to furnish her or give her barn space, and wanted to throw her out of her house.”<sup>16</sup> Some black tenant farmers and sharecroppers were forced off lands either after crops they raised were ready for harvest, or simply as retaliation for reasons real or fictitious. Other tenants were intimidated into remaining on the farms to pay off alleged debts by threats of arrest or worse. Planters confiscated furniture, cars, and trucks when blacks tried to leave the farms, and had trains and buses refuse passage to those seeking to leave the area.

Jim Crow laws played an active role in aiding this despotism. Vagrancy laws were used to force unemployed blacks to work for planters without pay or face arrest. Anti-enticement laws barred landowners from hiring blacks working on other farms. Draft boards offered deferments to workers who remained on the farms while threatening with induction those who tried to leave for better positions elsewhere. Wartime labor shortages and higher crop prices enabled some black agricultural workers to gain better pay and working conditions, but white planters did all in their considerable economic and political power to keep black workers in conditions hardly better, and frequently identical, to those endured by

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<sup>14</sup> Id. at 2–3.

<sup>15</sup> Id. at 60.

<sup>16</sup> Id. at 61.

their enslaved forebearers, and without even the self-interested protection that owners had provided for their slave property.

Outside the South, the war offered black industrial workers improved job opportunities, but exclusion, segregation, unequal pay, and adverse working conditions were more the rule than the exception. Professor Goluboff sets out in painful detail the corporate means used to keep blacks subordinate. One company, for example, ran an advertisement seeking women without experience to do war work, but when black women applied they found that only white women were being hired. As Bessie Armstrong complained after such an experience in 1942, “each and every day our boys are going to the front and yet the Negro women in supposedly Northern cities are not allowed to work in defense jobs which require no experience.”<sup>17</sup>

Hers was a common refrain for blacks seeking jobs, training, promotions, or union membership, attempting to move from temporary to permanent status, or trying to be retained during layoffs. Prejudice by white workers posed an additional barrier for blacks seeking work in the defense industry, so much so that it is difficult to tell whether the employer or his white employees were more hostile to those blacks who managed to get into “whites only” positions.

Petitions from barely literate black agricultural workers in the South and blacks with varying degrees of education and skill seeking jobs in industry across the country urged both the NAACP and the federal government to take action. Early on, as Professor Goluboff reports, civil rights lawyers for both the NAACP and the government, in their efforts to help, gave priority to legal approaches designed to relieve the stultifying, subordinating, humiliating components of racial segregation, rather than segregation itself.<sup>18</sup>

#### THE FEDERAL GOVERNMENT’S RESPONSE

The federal government enforced its nondiscrimination policies half-heartedly at best. Paper promises failed to alter widespread discriminatory practices by federal agencies themselves and posed

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<sup>17</sup> *Id.* at 85.

<sup>18</sup> *Id.* at 51–80.



little deterrent for employers' openly biased hiring rules. Even so, the small Civil Rights Section in the Department of Justice believed it could invoke the Thirteenth Amendment's bar of slavery and involuntary servitude to challenge the debt-based captivity of black farm workers. The lawyers in this Section filed suits on behalf of workers as part of efforts during the 1940s to challenge myriad forms of economic discrimination. Goluboff reviews in some detail the paucity of personnel, the limited doctrinal field for litigation, and the generally restrictive influence of politics, all of which adversely affected the unit's effectiveness during and after World War II.

Fearing tremendous resistance against challenges to segregation, the Civil Rights Section decided to pursue more politically acceptable cases: election fraud, voting rights, and especially shocking incidents of peonage and involuntary servitude. Cases challenging refusals to pay for crops and large debts based on oral contracts were also deemed available targets, as opposed to those that challenged segregation and other forms of the "southern way of life."

While Goluboff reports some successful cases, she provides much more coverage of policy statements about what the government might do than statistics indicating what it actually did. It is thus difficult to ascertain from Goluboff's history how many cases were actually filed, the win-loss record, and whether or not the Justice Department's litigation made much difference in the overall pattern of exploitative abuse, threats, and actual violence in which southern blacks lived and worked.

We do learn that the small staff had to overcome serious jurisdiction problems under existing laws and that even when cases were brought, "[j]uries frequently refused to indict or convict employers for labor-related violations, and when civil rights victims were black and perpetrators white, all-white juries routinely and defiantly nullified DOJ prosecutions."<sup>19</sup> In light of this, it is disappointing, but hardly surprising, that government lawyers viewed a lynching, no matter how sensational or abhorrent, as a poor candidate for federal prosecution. Finding proof of the state involvement required for federal intervention was difficult, and the chance of gaining indictments and convictions was minimal.

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<sup>19</sup> Id. at 119.

In fact, caution remained a theme for the Justice Department's civil rights activities nearly two decades later. When I joined the newly created Civil Rights Division in 1957,<sup>20</sup> some members of the former Civil Rights Section, including A.B. Caldwell, Henry Putzel, and Maceo Hubbard (at that time one of the few black lawyers in the Department of Justice), were still on the scene, though in diminished capacities under the Republican administration of President Eisenhower. There was dedication to be sure, but even in that post-*Brown* era, caution was the watchword. I spent most of my months in the Division responding to letters from southern blacks alleging serious abuse with the explanation that the government lacked the authority to provide the relief they sought. One factor was the Justice Department's policy of avoiding cases they were not fairly sure to win. In the South, that meant not only having a strong case, but having a case in which a white southern jury would convict. Thus, their prosecutorial standard became an almost insurmountable barrier to government action.<sup>21</sup>

#### THE NAACP'S RESPONSE

Turning to the NAACP's legal work in aid of agricultural and industrial workers, Professor Goluboff's assessment reflects her appreciation of the doctrinal and resource barriers they faced, and she applauds their innovative use of existing doctrine under the Thirteenth Amendment and the Fourteenth Amendment's Due Process Clause. They pursued some labor litigation in the 1940s against both public and private employers, though the state-action requirement posed difficulties to challenging private discrimination. These lessened as the Supreme Court began recognizing and

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<sup>20</sup> Section 111 of the Civil Rights Act of 1957 created the office of Assistant Attorney General for Civil Rights. Pub L. No. 85-315, 71 Stat. 634, 637 (1957). The statute also granted the Attorney General the authority to create a Civil Rights Division. Legal staff was increased from seven to fourteen in 1958, and to twenty-eight the following year.

<sup>21</sup> In 1958, the Division heads decided that my two-dollar NAACP membership was a conflict of interest with their desire to avoid criticism by Southern congressmen. When I refused to surrender it, they moved my desk out of my office and into the hall and until I resigned, they assigned me busy work unconnected with racial issues. See Derrick Bell, *Confronting Authority: Reflections of an Ardent Protester* 17-18 (1994).

dismantling the public-private wall in New Deal era cases.<sup>22</sup> The government's deep involvement in defense contracts during World War II also undermined the traditional view that employment was a private matter between the employer and employee. The NAACP's victory in *Railway Mail Ass'n v. Corsi* further weakened that view by applying New York State's pioneering antidiscrimination law to labor unions.<sup>23</sup>

Staff lawyers also argued, with some success, that union authority under the National Labor Relations Act ("NLRA") rendered unions state actors subject to constitutional rules barring racial discrimination. The Supreme Court agreed to the extent that having gained exclusive bargaining rights under federal law, unions had a statutory duty of fair representation to their minority members.<sup>24</sup> NAACP lawyers also used the toothless Fair Employment Practices Commission ("FEPC") as leverage in efforts to end discrimination against black shipyard workers, arguing successfully in California state court that a union could not maintain both a closed shop and a union closed to blacks.<sup>25</sup>

The NAACP's success in these cases, Goluboff found, came through substantive Due Process and closely related common-law doctrines rather than the Equal Protection Clause. In a way, the NAACP therefore won economic benefits for black workers through accepting, albeit reluctantly, segregated unions. Goluboff believes that by the end of the war, there was much unrealized potential in these labor cases. She wishes that the NAACP lawyers had continued utilizing "the long-revered, if somewhat discredited,

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<sup>22</sup> See, e.g., *Marsh v. Alabama*, 326 U.S. 501, 505–07 (1946) (holding that a state may not ban distribution of religious materials on the street, even if a single company has legal title to the entire town); *Screws v. United States*, 325 U.S. 91, 111 (1945) (holding that acts of police officers while performing their official duties are "under the color of law" even if the officers exceed their state authorization and that such officers may be prosecuted for violating the constitutional rights of their victims); *Smith v. Allwright*, 321 U.S. 649, 662 (1944) (holding that the right to vote in a primary election for U.S. Senate and House candidates is a right secured by the U.S. Constitution which cannot be abridged by the state on account of race and that state court decisions on whether a state or private actor violated this right are not binding on federal courts).

<sup>23</sup> 326 U.S. 88, 93–94 (1945).

<sup>24</sup> *Steele v. Louisville & Nashville R.R. Co.*, 323 U.S. 192, 199 (1944); *Tunstall v. Bd. of Locomotive Firemen & Enginemen*, 323 U.S. 210, 211 (1944).

<sup>25</sup> *James v. Maranship Corp.*, 155 P.2d 329, 335–36 (Cal. 1945).

right to work rooted in the due process clause of the Fifth and Fourteenth Amendments [believing it] offered a resource in labor cases that appeared at least as promising, if not more so, than the equal protection clause.<sup>26</sup> Judicial rejection of *Lochner v. New York*<sup>27</sup> did not, according to two lawyers on the NAACP's small staff, undermine the substantive due process rights-based notion of free labor and entitlement to engage in a gainful occupation unimpeded by government regulation.<sup>28</sup>

The NAACP used these arguments to good effect in state cases like *James v. Marinsip Corp.*,<sup>29</sup> arguing that the right to earn a living was a constitutionally protected property right enhanced by the NLRA's union protections. The lawyers contended that protected unions should not be allowed to violate blacks' rights to work. Goluboff feels that the cases vindicated the substantive right to work, whether in segregated or in nonsegregated environments. She reports that lawyers who recognized that *work*, rather than *de-segregated work*, was black workers' top priority, took "a flexible approach to the pervasive tension between pursuing economic advancement within segregation and attempting to end segregation altogether."<sup>30</sup> While not supporting segregation, the NAACP and its lawyers recognized at times that the anti-segregation principle conflicted with the practical needs of working-class blacks.<sup>31</sup>

#### NAACP DIFFICULTIES IN LABOR LITIGATION

Despite their potential, Goluboff recognizes that labor cases were highly technical, expensive to litigate, and even when won, limited in their impact on black industrial labor. Public school teachers willing to become plaintiffs in salary equalization suits

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<sup>26</sup> Goluboff, *supra* note 1, at 206.

<sup>27</sup> 198 U.S. 45 (1905).

<sup>28</sup> Marian Wynn Perry and Prentice Thomas. Goluboff, *supra* note 1, at 206–10.

<sup>29</sup> 155 P.2d at 335–36, 340; see also *Betts v. Easley*, 169 P.2d 831, 838–39 (Kan. 1946) (holding by the Kansas Supreme Court in an NAACP case that under federal labor law, unions could not exclude black members from equal participation in union activities).

<sup>30</sup> Goluboff, *supra* note 1, at 210.

<sup>31</sup> Interestingly, this is the tack taken by educators structuring often quite successful learning programs for mainly black and Latino schools and after-school programs. Derrick Bell, *Silent Covenants: Brown v. Board of Education and the Unfulfilled Hopes for Racial Reform* 165–79 (2004) [hereinafter Bell, *Silent Covenants*].

faced the loss of their jobs. Agricultural workers in rural areas who challenged their working conditions in court did so at the risk of both their jobs and their lives.

Lawyers who went south to investigate complaints were also in danger. NAACP lawyers were well aware of these dangers and deemed it part of the job of representing blacks who dared to challenge the system. Recognizing that the risks I was taking were small compared to those the lawyers faced in the 1930s and 1940s, I once asked Justice Thurgood Marshall how he dealt with these dangers. In his inimitable way, he told me that when he got off the train in one of those small southern towns, with the hostility evident on the faces of whites watching his arrival, he took out his civil rights—represented by a handkerchief—folded them carefully, put them way down deep in his back pocket, and didn't take them out until he was safely on the train out of that damned place.

Factors beyond safety also caused labor cases to disappear from the NAACP's docket, as the legal department decided in 1950 to make an all-out attack on *Plessy v. Ferguson* by challenging segregation in the public schools. We should not forget that the NAACP's legal staff in the 1940s, and even into the 1950s, was always less than a half-dozen lawyers, often fewer, and their resources were, to put it kindly, minimal. For instance, Robert L. Carter was hired by Thurgood Marshall in November 1944.<sup>32</sup> Carter, a brilliant young lawyer with a law degree from Howard and an LL.M from Columbia, had little legal experience beyond that gained representing a few enlisted men while in the Army.<sup>33</sup> Carter reported that when he joined the legal staff, it was housed in a few rooms in the NAACP's national office. Marshall himself had only one full-time assistant, Edward Dudley, who according to Carter was a decent lawyer and a skilled politician with no interest in research, legal analysis, brief writing, or intellectual exploration. Milton Konvitz, a law professor at Cornell, was skilled but worked part-time and did not work on or argue any of the cases. In addition, Marshall had no law library on the premises, and relied on help from Howard Law faculty to write his briefs. Given his re-

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<sup>32</sup> Goluboff, *supra* note 1, at 259–60.

<sup>33</sup> Robert L. Carter, *A Matter of Law*, 53–59 (2005).

sources, Marshall's accomplishments amazed Carter.<sup>34</sup> By the end of 1945, Marshall was able to add Marian Wynn Perry and Franklin Williams to the staff, and Constance Baker Motley was working part-time until she finished Columbia Law School. Jack Greenberg joined the staff in 1949.<sup>35</sup>

Carter reports that from 1945 through 1947, this tiny staff's caseload included Democratic Party primary cases in South Carolina and Alabama, numerous transportation cases challenging segregated seating and dining car service on interstate railroads, graduate school cases in Texas, Louisiana, and Oklahoma, attacks on the validity of racially restrictive covenants, and black defendants charged with murder and other serious crimes, in addition to the labor cases Goluboff reports. By 1950, the NAACP's heavy workload and Supreme Court victories ruling that excluding blacks from graduate programs violated the "separate but equal" standard led the NAACP to prioritize cases directly challenging *Plessy v. Ferguson*'s "separate but equal" standard in the public schools. In addition to the belief that overruling *Plessy* was the key to ending racial discrimination, another important political concern also influenced that decision.

#### THE NAACP AND THE COMMUNIST MENACE

Goluboff acknowledges that in the post-war, anti-Communist era of the early 1950s, when Joseph McCarthy was at the height of his power, pursuing labor cases conflicted with the NAACP's long history of avoiding any taint of communism.<sup>36</sup> NAACP officials deeply feared that their enemies in Congress and segregationists generally would leap at any opportunity to charge civil rights work as communist inspired or influenced. In anticipation of such at-

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<sup>34</sup> The cases won included *Pearson v. Murray*, 182 A. 590, 592-93 (Md. 1936) (holding that the University of Maryland Law School was part of the state government, and that the denial of admission to a qualified applicant violated the "separate but equal" standard when there was no black law school in the state) and *Smith v. Allwright*, 321 U.S. 649, 663-64 (1944) (holding that black voters could not be barred from voting in the Texas "white primary" that was an integral part of the electoral process). In addition, Marshall obtained at least one famous Supreme Court reversal of a black man's conviction that had been based on a coerced confession. *Chambers v. Florida*, 309 U.S. 227 (1940).

<sup>35</sup> Carter, *supra* note 33, at 55-59.

<sup>36</sup> Goluboff, *supra* note 1, at 219-20.

tacks, the organization scaled back its efforts to link domestic civil rights to human rights advocates in the United Nations, and reached out to labor unions for mutual support, meaning that arguments against segregated unions and biased employers became politically problematic. As a result, the NAACP largely abandoned litigation against unions for racial discrimination, despite the fact that some of these cases had been successful during the war. Looking back, the NAACP's efforts to avoid any taint of communism seem excessive, but at the time there was genuine fear that an investigation for subversion by J. Edgar Hoover's FBI could have doomed the organization.

The same fear of the communist witch hunt that pushed the NAACP to look to labor unions for support led it to take aggressive steps to disassociate itself from groups or individuals with "potentially subversive tendencies."<sup>37</sup> For example, while a staff member at the Legal Defense Fund, I asked Thurgood Marshall why the NAACP had not provided legal assistance to Paul Robeson, a renowned singer and actor whose career was ended by government retaliation against his outspoken criticism of American racial discrimination.<sup>38</sup> Marshall responded that Robeson had gotten too involved with far-left groups, and "we had to cut him off."<sup>39</sup> Similarly, neither the NAACP nor the Legal Defense Fund offered to defend W.E.B. Du Bois, one of the former's founders, when he was indicted in 1951 under the Foreign Agents Registration Act.<sup>40</sup> Finally, even in the 1970s, these organizations took no role in defending Angela Davis when she was charged with conspiracy, kidnapping,

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<sup>37</sup> Id. at 220.

<sup>38</sup> Bell, *Silent Covenants*, supra note 31, at 63; see generally Martin B. Duberman, *Paul Robeson* 429–45 (1989); Paul Robeson, *Here I Stand* 41–42 (1988). When at a 1956 hearing before the House Un-American Activities Committee, a senator asked him derisively why he did not live in the Soviet Union, Robeson responded, "Because my father was a slave, and my people died to build this country, and I am going to stay here and have a part of it just like you." Duberman, supra, at 441.

<sup>39</sup> Bell, *Silent Covenants*, supra note 31, at 63.

<sup>40</sup> David Levering Lewis, *W.E.B. Du Bois: The Fight for Equality and the American Century, 1919–1963*, 547–54 (2000) (describing the circumstances surrounding the indictment and Du Bois' successful defense, based in significant part on Albert Einstein testifying for the defense; the case against Du Bois was dismissed before reaching the jury).

and homicide in connection with her leftist politics and her association with murdered prison activist George Jackson.<sup>41</sup>

#### THE ROOTS OF THE INTEGRATION COMMITMENT

Professor Goluboff also recognizes that the NAACP's opposition to communism was not simple politics. Instead, its position was traceable to the organization's inception and its commitment to ending racial segregation and discrimination within the American legal structure.<sup>42</sup> Similarly, the NAACP's commitment to ending racial discrimination caused internal conflict during the mid-1930s over whether efforts should be directed toward challenging the legality of racial segregation in the courts—the view of lawyers and much of the group's board of directors—or toward improving the economic status of Negroes by building business enterprises and pushing for nondiscriminatory public policies.<sup>43</sup>

W.E.B. Du Bois was a chief supporter of the latter position. He advocated it in a series of editorials in *The Crisis*, the NAACP's official publication, which he had founded. Segregation, he wrote, was a fact that had to be faced.<sup>44</sup> Racial organization was thus “not a necessary evil, but a positive force for black development.”<sup>45</sup> Sensing that he would not prevail in the debate, Du Bois resigned in June, 1934. As Goluboff suggests, he departed when he realized “that his reluctance to embrace integration as the ultimate and only goal was out of step with those holding greater institutional power.”<sup>46</sup>

This debate was actually a reprise of an earlier difference of views within the fledgling NAACP in the years after World War I. At that time, many of the NAACP's Jewish supporters, who had immigrated from Western Europe, wanted the organization to fo-

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<sup>41</sup> Bettina Aptheker, *The Morning Breaks: The Trial of Angela Davis*, at xiii, 25 (2d ed. 1997); Derrick Bell, Letter to the Editor, *Legal Defense Fund, Civ. Liberties Rev.*, April–May 1976, at 7; Jonathan Feldman, *Race-Consciousness versus Colorblindness in the Selection of Civil Rights Leaders: Reflections upon Jack Greenberg's Crusaders in the Courts*, 84 *Cal. L. Rev.* 151, 156 (1996).

<sup>42</sup> Goluboff, *supra* note 1, at 220.

<sup>43</sup> Mark V. Tushnet, *The NAACP's Legal Strategy against Segregated Education, 1925–1950*, at 10 (1987).

<sup>44</sup> W.E.B. Du Bois, *Postscript*, 41 *Crisis* 147, 149 (1934).

<sup>45</sup> Tushnet, *supra* note 43, at 9.

<sup>46</sup> Goluboff, *supra* note 1, at 233.



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cus on in-court challenges to legal segregation because they feared that an influx of politically radical Eastern European Jews would undercut American acceptance of Jewish immigrants generally. Thus, their interests aligned with those in the NAACP who wanted to pursue chiefly legal protection for civil rights. Several black leaders also feared the NAACP might be seen as connected with the radicals who pushed for economic change if they pursued development of jobs and businesses within the segregated system, as Du Bois and Ralph Bunche urged.<sup>47</sup>

By 1951, the NAACP had moved beyond its earlier efforts to obtain economic advancement within segregated structures while simultaneously advancing doctrinally toward desegregation. Pressured by political considerations, and with a majority of its policy-makers committed to overturning legal support for segregation, the annual conference that year passed a resolution making opposition to segregation a tenet of the Association. The resolution also barred the branches from taking part in any cases or activities seeking equality through a framework of segregation.<sup>48</sup> Even decades later, support primarily for integration through legal channels may reflect this early commitment.

#### *BROWN AS A COLD WAR PRECEDENT*

This determination was so strong that it was easy for advocates to miss what was more likely the major motivation for the *Brown* decision. By the early 1950s, the federal government was concerned that Communist nations were publicizing incidents of racial bias in the United States to recruit post-colonial African and Asian nations to their side in the Cold War. Government amicus briefs in *Brown* made much of this concern, urging the Court that striking down constitutional protection for racial segregation would improve America's image both abroad and at home. Indeed, there is

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<sup>47</sup> David Levering Lewis, *Parallels and Divergences: Assimilationist Strategies of Afro-American and Jewish Elites from 1910 to the Early 1930s*, 71 *J. Am. Hist.* 543, 564 (1984) (outlining the linkage between black civil rights efforts and established American Jews' interests in assimilation); see also Tushnet, *supra* note 43, at 8–14 (cataloging the internal debates among the black leadership regarding the importance of attacking segregation head-on versus working within the segregated system for economic rights).

<sup>48</sup> Tushnet, *supra* note 43, at 115.

support for the proposition that a major, if unacknowledged, motivation for the *Brown* decision was an expectation that it would counteract Communist propaganda while reassuring American blacks that their struggles to end racial discrimination had been heard by the Court.<sup>49</sup>

Beyond realizing *Brown*'s foreign and domestic political goals, it is now clear that this half-century-old decision held out far more promise for equal educational opportunity than it could ever deliver. While never reversed, *Brown* has been rendered irrelevant by decisions that undercut its authority.<sup>50</sup> Professor Goluboff is clearly right that, while progress has been achieved because of it, *Brown* did not eliminate every aspect of Jim Crow. In her view, because the Court validated the NAACP's litigation strategy, the group's equal protection arguments on the road to *Brown* became "more culturally available to future lawyers" than the labor-oriented, right-to-work arguments they had shelved.<sup>51</sup>

Given this history, I can better understand why integration advocates, even today, maintain their commitment to utilizing integration as the primary means of effectively educating millions of black and Latino youths now residing in one-race communities and attending one-race schools. Considering the current degree of racial isolation in the public schools and the public opposition to busing, the task seems impossible. It certainly must have seemed even more impossible in 1934 when those who prevailed in the economic development versus litigation debate started on the long and uncertain trail that led to *Brown*.

The adverse court decisions that have erected barriers to the implementation of *Brown*, though, have been prompted and even po-

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<sup>49</sup> Mary Dudziak, *Cold War Civil Rights: Race and the Image of American Democracy* 107 (2000).

<sup>50</sup> See, e.g., *Missouri v. Jenkins*, 515 U.S. 70, 100 (1995) (holding that lower courts are limited in school desegregation cases to eliminating de jure segregation and are not authorized to order state-funded teacher salary increases to fund quality education programs); *Bd. of Educ. v. Dowell*, 498 U.S. 237, 249–50 (1991) (holding that formerly segregated school districts may be released from court-ordered busing even if some segregation persists as long as all "practicable" steps to eliminate the vestiges of discrimination have been taken); *Milliken v. Bradley*, 418 U.S. 717, 744–45 (1974) (ruling that courts cannot impose a multi-district remedy without finding that racial discrimination by one or several districts substantially caused inter-district segregation).

<sup>51</sup> Goluboff, *supra* note 1, at 12.

litically mandated by the resolute opposition of a substantial majority of white parents determined that their children not attend school with more than a few black children. Though civil rights advocates have criticized the Supreme Court for failing to “keep the promise of *Brown* alive,” public opposition, far more than unresponsive judicial decisions, decimated its implementation. *Brown* is now a relic with so little authority that even those opposed to its goals can usurp its legacy, as Chief Justice John Roberts did when he interpreted the decision as prohibiting contemporary school boards from using race to bring about racial diversity in their schools.<sup>52</sup>

#### LABOR LITIGATION IN THE PRESENT WORLD

We cannot turn the clock back to see what success the NAACP might have achieved in the 1950s and beyond had it continued to pursue labor discrimination cases, utilizing the Thirteenth Amendment and the “right to work” doctrine scavenged from the *Lochner* era. Professor Goluboff’s work, by carefully exploring this possibility, places itself with other scholarship seeking to provide varying perspectives on this period.<sup>53</sup> We do know that concerns about discrimination in the job market remained and that civil rights groups lobbied in support of the Civil Rights Act of 1964, including Title VII, its employment discrimination provision.<sup>54</sup> Yet, the history of campaigns to end racial bias in employment and education are similar: early, promising victories led over time to tight-

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<sup>52</sup> *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, No. 05-908, slip op. at 39–40 (U.S. June 28, 2007).

<sup>53</sup> See Kenneth W. Mack, *Rethinking Civil Rights Lawyering and Politics in the Era Before Brown*, 115 *Yale L.J.* 256, 258–62 (2005) (reviewing the literature on civil rights history).

<sup>54</sup> 42 U.S.C. § 2000e-2 (2000). In part, the statute stated that [i]t shall be an unlawful employment practice for an employer—  
(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin; or  
(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a).

ening rules and more difficult litigation with more losses and fewer gains.

The poor record of racial discrimination claims under Title VII suggests that even if civil rights lawyers had pursued the labor claims that Goluboff favors, they would have been unlikely to achieve much success in the long run. Plaintiffs bringing employment discrimination claims have had notoriously low success rates in federal court.<sup>55</sup> Although not many studies have examined empirical data concerning the success rates of race and national origin claims as compared to other types of discrimination claims, the handful that have considered such information have found that these claims fare especially poorly.<sup>56</sup> Many scholars and practitioners have sought to explain this discrepancy by noting employment discrimination law's lack of clarity and resulting inconsistent application by federal courts. However, to the extent that this framework applies to *all* types of employment discrimination claims, it fails to account for the particularly dismal success rate of race discrimination plaintiffs. After reviewing the empirical data concerning employment discrimination litigation in federal courts and considering broader sociological theories, some have posited varying conceptions of "bias" in the courts as a more complete explanation.<sup>57</sup>

In one recent survey of federal claims and selected published opinions, Professor Wendy Parker found that race discrimination plaintiffs had lower success rates than almost all other employment

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<sup>55</sup> E.g., Kevin M. Clermont & Stewart J. Schwab, How Employment Discrimination Plaintiffs Fare in Federal Court, 1 J. Empirical Legal Stud. 429, 429 (2004); Michael Selmi, Why are Employment Discrimination Cases So Hard to Win?, 61 La. L. Rev. 555, 557–58 (2001); see also Ann C. McGinley, Credulous Courts and the Tortured Trilogy: The Improper Use of Summary Judgment in Title VII and ADEA Cases, 34 B.C. L. Rev. 203, 208 (1993) (arguing that the increased use of summary judgment in federal courts is one cause of the low success rate of discrimination claims).

<sup>56</sup> E.g., Pat K. Chew, Freeing Racial Harassment from the Sexual Harassment Model, 85 Or. L. Rev. 615, 627–33 (2006); Wendy Parker, Lessons in Losing: Race Discrimination in Employment, 81 Notre Dame L. Rev. 889, 940 (2006). But see Clermont & Schwab, *supra* note 55, at 445 (“[P]retrial and trial win rates are similar across types of discrimination cases, such as Title VII, the ADA, and the ADEA—despite the different nature of, and resulting reaction to, suits based on race, sex, disability, and age . . .”).

<sup>57</sup> E.g., Parker, *supra* note 56, at 893; Selmi, *supra* note 55, at 562–64.

discrimination plaintiffs.<sup>58</sup> In her survey of employment discrimination cases filed in the Eastern District of Pennsylvania and the Northern District of Texas, Parker found that when judges resolved race claims, plaintiffs almost always lost.<sup>59</sup> She further found that judges dismissed more race cases than gender discrimination cases on pretrial motions and that gender cases were statistically more likely to settle.<sup>60</sup> The most common defenses to race discrimination claims were, in order of frequency: failure to state a prima facie case; existence of a legitimate, nondiscriminatory reason for the allegedly adverse employment action; and failure to follow EEOC rules or procedures.<sup>61</sup> A finding in favor of a defendant on either of the first two of these defenses meant that the judge believed that “as a matter of law reasonable jurors could not find for the plaintiff.”<sup>62</sup>

Professor Parker interprets such judicial action to be a sign of judicial *agreement* with—not merely judicial deference to—employers’ race-neutral explanations for their adverse treatment of plaintiffs. She terms this phenomenon an “anti-race plaintiff ideology” among federal judges, causing courts to treat “race and national origin employment discrimination cases fairly alike, no matter who the plaintiffs and defendants are, no matter what their respective arguments are, and no matter what the race and gender of the judge are.”<sup>63</sup>

Based on his own case studies, Professor Michael Selmi concluded that judges, like all human beings, operate with a particular “way of seeing things” or “bias.”<sup>64</sup> In the case of federal judges dealing with race discrimination claims, this worldview can be analogized to that of the “anti-affirmative action mindset, one that

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<sup>58</sup> Parker, *supra* note 56, at 940. Interestingly, Parker found that plaintiffs alleging age discrimination fared just as poorly as those claiming race discrimination. *Id.* at 928.

<sup>59</sup> *Id.* at 894.

<sup>60</sup> *Id.* at 895.

<sup>61</sup> *Id.* at 908–09.

<sup>62</sup> *Id.* at 896.

<sup>63</sup> *Id.* at 893–94. In reaching this conclusion, Parker explains that race-neutral explanations for such outcomes are inadequate because they do not explain why race plaintiffs lose more than other employment discrimination plaintiffs. *Id.* at 927.

<sup>64</sup> Selmi, *supra* note 55, at 563.

views both the persistence of discrimination and the merits of the underlying claims with deep skepticism.”<sup>65</sup>

It is at least feasible to conclude that plaintiffs bringing race discrimination claims may be losing at such disproportionate rates because they suffer from multiple layers of institutional and attitudinal bias. If, as Selmi suggests, “courts appear hesitant to draw inferences of racial discrimination based on circumstantial evidence, even though courts have long recognized that race discrimination is generally subtle in form and dependent on circumstantial evidence,”<sup>66</sup> then the deck is stacked against a plaintiff alleging racial employment discrimination.

#### RACIAL LESSONS LEARNED AGAIN

It is clear that *Brown* was not able to achieve the impossible dreams so many of us hoped for even in our waking hours. It also seems clear that the Title VII cases predict that the direction Professor Goluboff would have taken in the area of labor litigation in the 1950s would have fared no better than *Brown*, and for the same reason.

In both school and employment discrimination cases, the courts respond to many whites’ deep concern that remedies for perceived discrimination should not burden those who are not directly responsible for the asserted racial harm. In both areas, whatever the applicable precedents, judges either share this view or feel that their decisions must reflect it. If anything, evidence of this priority for whites’ perspective is more obvious in employment than in school cases. The Court’s treatment of affirmative action policies designed to remedy past employment discrimination is a striking illustration of the judicial determination—shared by much of society—to protect “innocent whites” from any loss in the race remediation process.<sup>67</sup> This determination relegates blacks to reforms

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<sup>65</sup> Id. at 562.

<sup>66</sup> Id. at 563.

<sup>67</sup> See, e.g., *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995) (holding that both federal and state racial classifications must serve a compelling governmental interest and must be narrowly tailored to further that interest); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 477–78, 510–11 (1989) (striking down a city’s set-aside program intended to ensure that a percentage of contracts would be awarded to minority-owned businesses); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 270, 283–84

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through law, which will seldom be successful, while resort to more disruptive or violent actions would only provide a reason for a far more violent response, and thus would be both immoral and suicidal.<sup>68</sup> This perceived lack of alternatives may move advocates of *Brown's* unfulfilled integrationist goals, as well as those, like Goluboff, who see unrealized potential in the abandoned labor-oriented litigation, to hold fiercely to their fervent hope that an approach through law will move the country toward racial justice in every important field. Progressives' refusal to concede failure may well be the flip side of racial conservatives' refusal to acknowledge the continued existence of policies reflecting a determination to retain racial domination by imposing barriers and retaliating against those blacks whose success is deemed threatening. The passions of these conservatives and their progressive counterparts blur their vision, blinding them to what should by now be obvious: racial equality for blacks and other people of color is unattainable through law alone.

Dr. Ralph Bunche, then a young political scientist, explained in a 1935 essay that reliance on law rested on the "failure to appreciate the fact that the instruments of the state are merely the reflections

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(1986) (refusing to approve a union contract specifying that in case of teacher lay-offs, a certain percentage of minority teachers would be retained without regard to their seniority).

<sup>68</sup> As James Weldon Johnson, the NAACP's executive secretary, put it in the 1930s: "We would be justified in taking up arms or anything we could lay hands on and fighting for the common rights we are entitled to and denied, if we had a chance to win. But I know and we all know there is not a chance." James Weldon Johnson, *Negro Americans, What Now?* 7 (1934). Even successful economic development within black communities can engender enmity and move whites to violence, often using as pretext an alleged attack on a white woman. See Derrick Bell, *Gospel Choirs: Psalms of Survival for an Alien Land Called Home*, 125–28 (1996) (describing the Tulsa riots of 1921 and the Rosewood, Florida, riots of 1923). Racial tensions were high in the years following World War I. Some whites, often aided by the KKK, responded with violence to any indication that blacks were acting "uppity" or had strayed "from their place." Economic well-being was resented. The key example was Greenwood, the black section of Tulsa, where blacks challenged or disregarded Jim Crow practices: "[Whites] were both enraged at, and jealous of, the material success of some of Greenwood's leading citizens . . . . Indeed, an unidentified writer for one white Tulsa publication, the *Exchange Bureau Bulletin*, later listed 'niggers with money' as one of the so-called causes of the catastrophe." Scott Ellsworth, *The Tulsa Race Riot in Tulsa Race Riot: A Report by the Oklahoma Commission to Study the Tulsa Race Riot of 1921*, 48–49 (2001), <http://www.tulsareparations.org/TRR.htm>.

of the political and economic ideology of the dominant group.”<sup>69</sup> In their efforts to eliminate discrimination against the race, Bunche warned:

They have not realized that so long as this basic conflict in the economic interests of the white and black groups persists, and it is a perfectly natural phenomenon in a modern industrial society, neither prayer, nor logic, nor emotional or legal appeal can make much headway against the stereotyped racial attitudes and beliefs of the masses of the dominant population. The significance of this to the programs of the corrective and reform organizations working on behalf of the group should be obvious.<sup>70</sup>

Without this basic understanding, the NAACP, Bunche said, “ha[d] conducted a militant fight under this illusory banner.”<sup>71</sup> According to Bunche, the problem with pursuing legal change is that “the Constitution is a very flexible instrument and that, in the nature of things, it cannot be anything more than the controlling elements in the American society wish it to be,” adding that public opinion was “seldom enlightened, sympathetic, tolerant or humanitarian.”<sup>72</sup>

Bunche warned that even if occasional, random victories might be won from the courts, they would prove hollow because “the status of the Negro . . . is fundamentally fixed by the functioning and demands of [the economic] order,” a situation the courts could not affect.<sup>73</sup> Lawsuits, “while winning a minor and too often illusory victory now and then, are essentially inefficacious in the long run. They lead up blind alleys and are chiefly programs of escape.”<sup>74</sup>

Bunche’s seventy-year-old analysis finds support in contemporary writing.<sup>75</sup> His suggested alternative approach, that black pro-

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<sup>69</sup> Ralph J. Bunche, *A Critical Analysis of the Tactics and Programs of Minority Groups*, 4 *J. Negro Educ.* 308, 315 (1935).

<sup>70</sup> *Id.* at 310–11.

<sup>71</sup> *Id.* at 315–16.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 316–17.

<sup>74</sup> *Id.* at 320; see also Tushnet, *supra* note 43, at 11–12.

<sup>75</sup> See, e.g., Michael J. Klarman, *From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality* 443, 464–65 (2004). Professor Klarman argues that advances during the civil rights era were more the result of social and political



gress depended on the betterment of, and alliance with, the white working class, has had hardly more success than reliance on law.<sup>76</sup>

Indeed, the almost automatic opposition to black initiatives—most of which bring whites as much or more benefit than they do blacks—is the chief reason why civil rights victories in the courts are so difficult to implement successfully.<sup>77</sup> Goluboff's title, *The Lost Promise of Civil Rights*, has implications beyond what she likely intended. Eighty years of litigation has brought victories that, as Professor Michael Klarman and others have asserted, depended as much on political and economic factors as on the skill of the litigators or the ideology of the courts. Where does that leave us? Those who are committed to racial equality will no doubt shoulder on, pushing litigation and political efforts for whatever gains they may bring. They do so not with any assurance of eventual victory, but with the certain knowledge that their commitment to racial justice is a worthy one.

Yet, in our more thoughtful moments, how can we distinguish these well-intentioned efforts from those of Canada Bill, one of the most legendary gamblers of all time? His gambling immortality comes not from his gambling prowess, nor his formidable wins or losses, but from a single line he once uttered on the Mississippi

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developments than consequences of court decisions that mainly accorded with public opinion. When they were not, as with school desegregation, public resistance slowed implementation.

<sup>76</sup>Note the failure of efforts by the Populist Party in the 1880s and 1890s to unite black and white farmers against the Southern ruling classes. See Stokely Carmichael & Charles V. Hamilton, *Black Power: The Politics of Liberation in America* 68 (1967); Thomas E. Watson, *The Negro Question in the South*, *Arena*, Oct. 1892, at 548; see also Franklin & Moss, *supra* note 9, at 284–86; C. Vann Woodward, *Origins of the New South, 1877–1913*, at 255–58 (1951). More recently, however, Texas legislators representing black, Latino, and rural white districts successfully enacted a law enabling the top ten percent of Texas high school graduates to attend the University of Texas. Lani Guinier & Gerald Torres, *The Miner's Canary: Enlisting Race, Resisting Power, Transforming Democracy* 72–74 (2002).

<sup>77</sup>See Derrick Bell, *Silent Covenants*, *supra* note 31, at 49–58 (explaining in detail the “interest-convergence” phenomenon in which relief from racial injustice is gained only when policymakers recognize that such relief will provide a clear benefit for the nation or portions of the populace). Beyond the influences of this social formula in the *Brown* decision discussed earlier, see text at footnote 73, there is the rather obvious fact that white women have benefited from affirmative action for positions on college faculties far more than blacks or Latinos. See Bob Herbert, *In America: The Wrong Target*, *N.Y. Times*, Apr. 5, 1995, at A25 (stating that “the primary beneficiaries of affirmative action are women”).

River. Bill was once losing his entire bankroll at cards when a friend approached and urged him to quit playing, saying, "Bill, don't you know this game is crooked?" "I know it," answered Canada Bill, "but it's the only game in town."<sup>78</sup>

Canada Bill's quip also applies to the century-long campaign to utilize law to eradicate racial bias. In retrospect, it too is a crooked game. Civil rights gains are less the result of effective pleading of injustices than they are of policymakers recognizing that responding at least in part to those pleadings will advance interests of value to them or to the country generally. Later, when conditions change and the promised remedies are no longer viewed as helpful and instead become a possible economic or political risk, they are repealed, down-graded, or simply forgotten. The history of the once hailed and now irrelevant 1954 decision in *Brown* is the definitive illustration of this phenomenon.

It may well be that, while clearly both are addicted, neither Canada Bill nor the civil rights lawyers are crazy. Recognizing that the game is rigged against them, they also know that skillful play and the fortuity of chance can turn the tables, and occasionally a victory can be wrung from inevitable defeat. Far from an enviable situation, it is, nevertheless, as Canada Bill knew and civil rights advocates have come to understand, the only game in town.

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<sup>78</sup> One of many versions of this tale can be found in Herbert Asbury, *The French Quarter: An Informal History of the New Orleans Underworld* 209 (1936).