Introduction

LAURA KALMAN

"She was always poking holes in balloons," a friend said of the late and justly beloved Kathryn Preyer.[1] These two outstanding articles, the first winners of the Preyer Competition, do that too. Together, they suggest that the Cold War affected domestic life in different ways than we have assumed.

Sophia Lee maintains that we should question scholars who say that the NAACP took "a conservative Cold War turn" away from workers' rights, ceded leadership to a conservative middle class, and shifted its attention to winning *Brown* after World War II. Rather, she contends, the NAACP continued working with local branches, many controlled by working-class members, to make collective working-class action possible. Specifically, the NAACP struck a blow for labor constitutionalism when it challenged African American workers' exclusion from skilled jobs and insisted on their right to join the unions that would give them a collective voice in the workplace. Its campaign to destroy the state action barrier and undermine the public/private distinction bore fruit. After two decades of litigation, in 1964 the National Labor Relations Board decertified the segregated Independent Metal Workers Union as the collective bargaining agent at the Hughes Tool Company, declaring an end to a half-century of Jim Crow unionism. More important, Lee points out, the NLRB ruled that a union's racial discrimination illegally violated the National Labor Relations Act. *Hughes Tool,* as Michael Botson has demonstrated, was the *Brown v. Board of Education* of workplace rights.[2]

1. Tom Long, "Kathryn Preyer, 80; Scholar in History Taught at Wellesley," *Boston Globe* (April 21, 2005), C15.

2. Michael R. Botson, Jr., *Labor, Civil Rights, and the Hughes Tool Company* (College

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Scholars always hope to uncover new evidence and revise old understandings, but I think there is a deeper motivation behind Lee's work. *Brown,* once a feel-good story,[3] has become a downer. As Reva Siegel more elegantly puts it, a narrative of redemption has become one of betrayal.[4] For instance, Gerald Rosenberg has argued that *Brown* spawned "the hollow hope" courts could transform society;[5] Mary Dudziak, that it reflected judicial and political anxiety that racism undermined the ability of the United States to make the case for the superiority of capitalism over communism;[6] Michael Klarman, that it produced racial retrogression;[7] and Derrick Bell, that the Court might better have decided to give teeth to "separate but equal."[8]

Surely, it is partly as a response to the disillusionment with *Brown* (in addition to the sense, as Reuel Schiller points out in his fine comment, that the *Brown* furrow is overplowed), that a new generation has moved back to the period before *Brown.* The story many of us once told in our courses rooted the civil rights movement in *Brown* and the Montgomery Bus Boycott. We made the NAACP Legal Defense Fund the litigation arm of the movement and read the immediate prehistory of *Brown* onto the 1920s, 1930s, and 1940s. We anachronistically assumed that legal liberalism, with its emphases on integration and the Supreme Court as shield, always lay at the foundation of civil rights lawyering. We behaved as if civil rights lawyers always believed rights were the right remedy and that they would succeed if they just managed to make the South like the rest of the United States.

Recent scholarship outside and inside the law schools leaves the conventional story in tatters. Outside the legal academy, Glenda Gilmore and Jacquelyn Dowd Hall have uncovered a vibrant civil rights movement in the South during the period between World War I and the end of World War II.[9] As Gilmore demonstrates, the left played a large role in the "first

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Station: Texas A&M Press, 2005), 4, 181; *Brown v. Board of Education,* 347 U.S. 483 (1954); *Hughes Tool,* 147 NLRB 1573 (1964).

3. Richard Kluger, *Simple Justice: The History of Brown v. Board of Education and Black America's Struggle for Equality* (New York: Knopf, 1976).

4. Reva Siegel, "Equality Talk: Antisubordination and Anticlassification Values in Struggles over *Brown,*" http://www.law.yale.edu/documents/pdf/Equality Talk - Hein.pdf

5. Gerald Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (Chicago: University of Chicago Press, 1991).

6. Mary Dudziak, *Cold War Civil Rights: Race and the Image of American Democracy* (Princeton: Princeton University Press, 2000), 104.

7. Michael Klarman, *From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality* (New York: Oxford University Press, 2004), 385.

8. Derrick Bell, *Silent Covenants: Brown v. Board of Education and the Unfulfilled Hopes for Racial Reform* (New York: Oxford Univesity Press, 2004), 21–27.

9. Jacquelyn Dowd Hall, "The Long Civil Rights Movement and the Political Uses of the

civil rights movement," which "redefined the debate over white supremacy and hastened its end."[10] Martha Biondi has detailed the grassroots struggle against racial discrimination in New York City a decade before *Brown.*[11] Arnold Hirsch,[12] Tom Sugrue,[13] Robert Self,[14] and others[15] have exposed the deep-seated segregation outside the South before, during, and after *Brown.*

Meanwhile, within the legal academy, Ken Mack has recovered the civil rights lawyers outside the NAACP, who were Marxist-influenced and viewed litigation as a complement to mass politics. He has also shown how Thurgood Marshall and others rewrote the NAACP's history in the context of the Cold War and *Brown* to say that the eyes had always been on the school desegregation prize.[16] And Risa Goluboff has demonstrated that in the fifteen years prior to *Brown,* "the world of civil rights was conceptually, doctrinally, and constitutionally, up for grabs."[17] That world included workers' rights and challenges to state-supported private segregation. According to Goluboff, however, after World War II ended, the anticommunist climate of the Cold War, their own relative indifference to economic inequality, and other factors sent NAACP lawyers off on an "increasingly single-minded" jaunt to topple state-mandated segregation that resulted in the "marginalization" of cases involving African American industrial workers.[18] Like Mack's, Goluboff's voice is heavy with regret: Had the paradigmatic civil rights case come in labor, rather than education, Jim Crow might have been seen for what it really was—a system of both racial hierarchy and economic oppression.

Lee, however, maintains that the NAACP's labor constitutionalism remained intact despite the Cold War and led to a paradigmatic victory in

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Past," *Journal of American History* 91 (2005): 1233–53; Glenda Gilmore, *Defying Dixie: The Radical Roots of Civil Rights, 1919–1950* (New York: W. W. Norton, 2008).

10. Gilmore, *Defying Dixie,* at 9, 6.

11. Martha Biondi, *To Stand and Fight: The Struggle for Civil Rights in Postwar New York City* (Cambridge: Harvard University Press, 2003).

12. Arnold Hirsch, *Making the Second Ghetto: Race and Housing in Chicago, 1940–1960* (Chicago: University of Chicago Press, 1983,1998).

13. Thomas Sugrue, *The Origins of the Urban Crisis: Race and Inequality in Postwar Detroit* (Princeton: Princeton University Press, 1996).

14. Robert Self, *American Babylon, Race and the Struggle for Postwar Oakland* (Princeton: Princeton University Press, 2003).

15. Jeanne Theoharis and Komozi Woodard, eds., *Freedom North: Black Freedom Struggles outside the South, 1940–1980* (New York: Palgrave Macmillan, 2003).

16. Kenneth Mack, "Rethinking Civil Rights Lawyering and Politics in the Era before Brown," *Yale Law Journal* 115 (2005): 256–354.

17. Risa Goluboff, *The Lost Promise of Civil Rights* (Cambridge: Harvard University Press, 2007), 5.

18. Ibid., at 227, 218.

NLRB case law against economic oppression in *Hughes Tool.* In addition to demonstrating Robert Carter's continuing commitment to workers' claims during the 1950s, she shines the spotlight on the work of the NAACP's labor secretary, Herbert Hill, a onetime Trotskyite turned from communism, though not the left, by "Stalinophobia" during the Cold War.[19] Hill's long experience with racism in the labor movement left him permanently embittered—first, by unions, and later, by the labor historians he alleged downplayed or even denied "the racist practices of organized labor" and created a mythical past of "interracial solidarity" for "ideological" reasons.[20]

Here is a fruitful controversy that should keep legal historians engaged and employed for years. Both Lee and Goluboff acknowledge that the NAACP's labor litigation continued after World War II. Citing Lee's work, Goluboff maintains that while the NAACP sometime assisted with litigation pushing labor unions to desegregate, "for the most part, cases in which discriminating unions were the target became less appealing as unions and the NAACP allied against a rising conservatism and a chilling Cold War."[21] Both have the evidence, both weigh it differently, and the stakes—the nature of the impact of the Cold War on institutions and individuals—are high.

Was the reliance on litigation misguided? *Hughes Tool,* Herbert Hill mourned, proved a symbolic victory. "If *Hughes Tool* did not live up to its initial promise, however, it was not due to a failure of effort on the NAACP's part," Lee concludes. That *Brown* did not live up to its promise was not due to a failure of effort on the NAACP's part, either. As Schiller says, it is bracing to see legal historians acknowledge the administrative dimensions of legal liberalism, whose scope Lee forces us to reconceive. Yet—and here my critique would be one of legal liberalism, rather than Lee—was not legal liberalism still a "big nothing"?[22]

Just as Lee forces us to rethink the interrelationship between the Cold

19. Nancy Maclean, "Achieving the Promise of the Civil Rights Act: Herbert Hill and the NAACP's Fight for Jobs and Justice," *Labor: Studies in Working-Class History of the Americas* 3 (Summer 2006): 17.

20. Herbert Hill, "The Problem of Race in American Labor History," *Reviews in American History* 24 (1996): 189, 196.

21. Risa Goluboff, "Let Economic Equality Take Care of Itself: The NAACP, Labor Litigation, and the Making of Civil Rights in the 1940s," *UCLA Law Review* 52 (2005): 1400; Goluboff, *Lost Promise,* at 226.

22. I had always assumed that the phrase, "big nothing," was invented by W. Randall Garr during the 1970s, but I may have been mistaken. See, e.g., Ingrid Schaffner, Bennett Simpson, Jutta Kother, Claudia Gould, Jo Baer, Gareth James, Mike Kelley, Yves Klein, Louise Lawler, Richard Prince, *The Big Nothing* (Philadelphia: ICA Philadelphia, 2004). My question here is intended to provoke. I have argued that legal liberalism was something more than a big nothing in Kalman, *The Strange Career of Legal Liberalism* (New Haven: Yale University Press, 1996).

War and civil rights, so Karen Tani leads us to reconsider the connection between the Cold War and the welfare state. Her discussion of *Flemming v. Nestor* highlights the confusion about the "welfare state." Tell undergraduates that their Social Security contributions don't go into an account with their names on it, and watch their eyes widen. We think of social insurance benefits as our property, just as FDR intended.[23] But in *Flemming,* the Court refused to treat them as property or contractual rights. The case highlights the fact that, during the Cold War, "political repression often occurred through revocation of government-funded privileges and entitlements." That is, Tani says, McCarthyism worked not through threats of death and imprisonment, "but by removing security and dashing expectations—by taking away a job, revoking a license to work, or rescinding a promised old-age pension."

And from whom? Not a genuine threat to American security, but some nebish whose own wife declared his attention "nauseating" and seems only to have cared about getting her hands on his Social Security benefits. Mrs. Nestor, however, ran up against a provision of the 1954 amendments to the Social Security Act, enacted long after her husband had ceased to be a member of the Communist Party, permitting termination of benefits to an alien deported for participation in subversive activities. The Court upheld the provision in *Flemming,* with the majority declaring that earned Social Security benefits were neither property nor contractual rights.

With characteristic insight, Dan Ernst once predicted that it would take a younger generation to change our understanding of the Cold War.[24] For better or worse, memory suffuses our histories of this period. Mention the fifties, a period I think of as extending from about 1947 to 1963, and I think of "duck and cover" drills. Perhaps because of that, I have been inclined to share David Abraham's interpretation of the outcome in *Flemming* as "Court rationalization of the persecution of a Communist who had been deported in 1956" and who had the chutzpah to insist on his right to government entitlements.[25]

Tani, however, maintains that by 1960, "the climate of fear associated with Senator McCarthy had lifted. If most of the justices had taken a conservative stance on loyalty and security issues during the early Cold War

23. "We put those payroll contributions there," Roosevelt famously said of the tax on employee wages, "so as to give the contributors a legal, moral and political right to collect their pensions and unemployment benefits. With those taxes in there, no damn politician can ever scrap my social security program." W. Andrew Achenbaum, *Social Security: Visions and Revisions* (New York: Cambridge University Press, 1986), 22–23.

24. Email, Daniel Ernst to Laura Kalman, August 4, 2006.

25. David Abraham, "Liberty without Equality: The Property-Rights Connection in a 'Negative Citizenship' Regime," *Law and Social Inquiry* 21 (1996): 24, n. 79.

period, by 1956 the Court had welcomed one of its most liberal members ever (William J. Brennan) and the 1956–1957 term became famous for limiting political persecution." In her hands, "[a] case that once fit with classic McCarthy-era controversies was by 1960 about guarding the boundaries of property, preventing leftist lawyers from carving out new rights, and respecting Congress as it grappled with the complexities of running a welfare state."

Perhaps. Still, no one knew how liberal Brennan would be at the time he was named to the Supreme Court: If anyone had guessed, Eisenhower would not have appointed him, and Brennan would not have been confirmed. And while the Court did stress the importance of restricting political persecution on "Red Monday" in *Watkins,*[26] *Yates,*[27] *Sweezy,*[28] and *Service,*[29] here were more big nothings. Scot Powe observes that "a close reading of the decisions revealed more lecture than law."[30] Moreover, he reminds us that during the same term as *Flemming,* the Court handed down a number of decisions that "almost fully restored" the domestic-security program.[31] "The fact that the Court is sustaining this action," Justice Black wrote of the majority's decision to deprive Fedya Nestor of his old-age benefits in *Flemming,* "indicates the extent to which people are willing to go these days to overlook violations of the Constitution perpetrated against anyone who has ever even innocently belonged to the Communist Party." As Tani shows, journalists treated *Flemming* "as just another [case] involving a 'Red,' not applicable to loyal Americans." She is right to say that *Flemming* was something more than a communist case, but it may have been a communist case as well.[32]

Just as the Cold War may have played a role in explaining *Flemming,* so it had an impact on Charles Reich, one of the most brilliant legal liberals of the postwar period. Too many today ahistorically characterize Reich as a "sixties person." As Tani and Rodger Citron have demonstrated, nothing could be further from the truth. Even in the late sixties, when he was enjoying drugs but warning imbibers to experiment with caution,[33] Reich remained the product of an earlier period. Tani's illuminating discussion

26. *Watkins v. U.S.,* 354 US 178 (1957).

27. *Yates v. U.S.,* 354 US 298 (1957).

28. *Sweezy v. New Hampshire,* 354 US 234 (1957).

29. *Service v. Dulles,* 354 US 363 (1957).

30. Lucas Powe, Jr., *The Warren Court and American Politics* (Cambridge: Harvard University Press, 2000), 98.

31. Ibid. at 154.

32. 363 U.S. 622.

33. Rodger Citron, "Charles Reich's Journey from the *Yale Law Journal* to the New *York Times* Best-Seller List: The Personal History of the Greening of America" (forthcoming, *New York Law School Law Review,* TAN n. 81).

of his seminal 1964 article, "The New Property," grounds it in the 1950s and the Cold War just where it belongs. It also recovers Reich as one of the rare law professors actually to have influenced public policy. Reich's "New Property" lay the groundwork for the 1970 case of *Goldberg v. Kelly.* There, Brennan drew on "The New Property" to hold that welfare rights more closely resembled "'property' than 'gratuity'" and that the state could not cut an individual's welfare benefits without first holding evidentiary pre-termination hearings.[34]

But how much good would such a hearing have done Fedya Nestor? How much good did such hearings do anyone? A symbolic triumph for legal liberals, *Goldberg v. Kelley* may been another big nothing that simply exposed the emptiness of procedural justice.[35] Will future historians brand *Goldberg, Brown,* and *Hughes Tool* monuments to the hollow hope that courts and/or administrative agencies can bring about meaningful social change?

Plenty of hot air still lifts aloft the balloons of the Cold War and legal liberalism. But these two wonderful articles by historians relatively unburdened by memory begin the job of piercing them. Somewhere, surely Kitty is smiling.

34. *Goldberg v. Kelly*, 397 U.S. 254, 261, n. 8 (1970). Of course, one can never be certain whether legal scholarship actually influences judges. See, e.g., Kalman, *Strange Career,* at 242–44. But it seems likely that Brennan regarded "The New Property" as something more than mere window dressing that enabled him to rationalize a result he wanted to reach. "The New Property" apparently helped him think his way to his destination.

35. Jerry Mashaw, "Administrative Due Process: The Quest for a Dignitary Theory," *Boston University Law Review* 61 (1981): 888; Mashaw, *Due Process in the Administrative State* (New Haven: Yale University Press, 1985), 26; Felicia Kornbluh, *The Battle for Welfare Rights: Politics and Poverty in Modern America* (Philadelphia: University of Pennsylvania Press, 2007), 172–76. Reich himself said, "Judged by the experience of twenty years, the moderate due process, cost-benefit approach to individual security must surely be deemed a failure. We have given it a fair trial, and it does not work." Charles Reich, "Beyond the New Property: An Ecological View of Due Process," *Brooklyn Law Review* 56 (1990): 732–33.

Hotspots in a Cold War: The NAACP's Postwar Workplace Constitutionalism, 1948–1964

SOPHIA Z. LEE

June of 1955 was a busy month for the NAACP. Throughout the country, members and officials used direct action and a variety of legal tools to further the organization's fight against workplace discrimination. At the NAACP's annual convention, the organization reaffirmed that it "vigorously supports the purposes of organized labor." But it also urged that "[w]here labor unions still practice any form of racial discrimination," its members should "bring all the pressure they can against these undemocratic and discriminatory practices," including using publicity, filing complaints with President Eisenhower's Committee on Government Contracts (PCGC), and, "wherever possible, by court action."[1] The audience hardly seemed to need this reminder.

1. NAACP Annual Convention Resolutions, June 25, 1955, Randolph Boehm, August Meier, and John H. Bracey, Jr., eds., *Papers of the NAACP, Supplement to Part 1, 1951–1955* (Bethesda: University Publications of America [hereafter cited as UPA], 1987), microfilm, reel 12. The PCGC was not a congressionally created agency but an executive body charged with implementing non-discrimination clauses in government contracts. I refer to both the PCGC and NLRB as agencies for simplicity's sake.

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Around the San Francisco Bay, where local branches were still led and fed by militant trade unionists, "Don't Buy Where You Can't Work" campaigns blossomed. The Terra Haute, Indiana, chapter enlisted Herbert Hill, the NAACP's labor secretary, to explore legal action against local construction unions that barred black workers from membership.[2] The NAACP's fight against employment discrimination, however, went beyond protests and court action. Surprisingly, the organization's most coordinated and far-reaching efforts to win the right to join unions and access decent jobs occurred not in the courts or in the streets, but in administrative agencies such as the National Labor Relations Board (NLRB) and the PCGC. Here, the NAACP faced both the NLRB's refusal to use its powers to counter workplace discrimination and the government's traditionally ineffective enforcement of its contracts' non-discrimination clauses. In order to overcome these obstacles, the NAACP not only relied on labor law and PCGC complaints, but also on the claim that the Constitution prohibited agencies—as well as the unions and employers they oversaw—from participating in racial discrimination.

Unlike the NAACP's well-known challenge to segregation in the schools, its workplace cases were not concerned with overturning *Plessy v. Ferguson* and its "separate but equal" command. Instead, they confronted the Supreme Court's 1883 decision in the *Civil Rights Cases,* which established the "state-action" doctrine. This legal rule limited the Fourteenth Amendment's guarantee of racial justice to actions taken by the state and its agents.[3] The state-action doctrine drew a strict line between public and private acts of discrimination, prohibiting the former and protecting the latter. Furthermore, the Court deemed economic transactions, including decisions about whom to sell to and whom to hire, quintessentially private and thus not governed by the Constitution. For nearly seventy-five years, this doctrine had put black workers' exclusion from workplaces and unions beyond the Constitution's reach.

In June 1955, however, the NAACP's national office announced a new, ambitious round in its legal attack on discrimination in jobs and unions. In this elaborately planned campaign, the NAACP, with the support of national labor leaders, filed NLRB petitions and PCGC complaints on behalf of

2. Executive Office Reports, June 13, 1955, ibid., reel 2; "NAACP Membership Unanimous on Yellow Cab Boycott," June 6, 1955, press release, Bracey and Meier, eds., *Papers of the NAACP, Part 13, Series A: Subject Files on Labor Conditions and Employment Discrimination* (Bethesda: UPA, 1991), microfilm, reel 11.

3. *Plessy v. Ferguson,* 163 U.S. 537 (1896); *Civil Rights Cases,* 109 U.S. 3 (1883). The Fourteenth Amendment limits state governments. By the mid-twentieth century, the Fifth Amendment incorporated the Fourteenth Amendment's equal protection guarantees, but against the federal government. This article uses the general term "constitutional" to refer to claims that sought to surmount these amendments' state-action barrier.

dozens of black workers, charging a number of Gulf Coast oil companies and unions with discriminating against the workers and violating their constitutional rights. In these and other cases, the NAACP sought to use government regulation and contracting to breach the state-action barrier and to prod the NLRB and PCGC into action. The organization's attorneys argued that unions and employers were themselves state actors, constitutionally prohibited from segregating black workers into the lowest-skilled and worst-paid jobs and that the government agencies that regulated them had to prohibit these discriminatory practices. The NAACP initiated the actions under pressure from its local membership, but the organization's goals were of national proportion. As Herbert Hill explained, the NAACP hoped these coordinated actions would "establish a new body of labor law to safeguard the rights of the Negro wage earner not only in the oil refining industry but also in other major production industries." Also that June, as a result of a similar interplay of local and national NAACP action, Hill agreed to help two African-American seamen stuck on a ship where a potent mix of racial and union warfare put their lives, as well as their jobs, in danger. In the past year, one of the NAACP's local branches had taken sides in a legal battle between the black seamen's union and some of their shipmates' white-only union. The local branch's lawyers had argued that it was unconstitutional for the NLRB to certify the historically discriminatory and racially exclusive union. Now, it seemed, the black seamen's white crewmates were taking revenge.[4]

This June 1955 snapshot came midway through a circuitous labor-advocacy campaign that stretched from the 1940s into the 1960s. In 1964, the NAACP finally won its workplace constitutional claims, garnering one of the mid-century's broadest state-action rulings. It did so not in the courts, but in front of the NLRB. The Board's *Hughes Tool* decision relied on the Supreme Court's 1948 ruling in *Shelley v. Kraemer* that courts could not constitutionally assist private discrimination by enforcing homeowners' racially restrictive covenants. The Board reasoned that it was similarly barred from certifying unions that discriminated in membership, bargained-for contract terms, or the processing of workers' grievances. The NLRB also found that it could issue cease-and-desist orders against discriminatory locals and suggested that the Constitution might require it to do so. *Hughes Tool* put the NLRB's constitutional interpretation out ahead of Congress's and the Supreme Court's. Congress had based its recently passed 1964 Civil Rights Act, which prohibited discrimination in public accommodations and

4. "NLRB Gets Specific Job Bias Charges," June 1, 1955, press release, Bracey and Meier, *Part 13, Series A,* reel 13; Herbert Hill to William Pollard and Woodrow Redo, June 7, 1955, ibid.; William Anderson and Richard Fulton to Hill, ibid., reel 11.

employment, on the Commerce Clause as well as the Fourteenth Amendment. The bill's supporters had been concerned that the state-action doctrine would not reach the targeted businesses even though they were licensed or regulated by the state. The Board's decision also went beyond the Supreme Court's state-action rulings: the justices had just shown themselves to be deeply divided over whether *Shelley*'s government non-assistance principle extended beyond the narrow context of property sales.[5]

June 1955, as well as the NAACP's prior and succeeding years of Cold War labor activism and litigation, challenges our current understanding of the NAACP's organizational history, of Cold War politics, and of the scope of civil rights-era constitutional change. Legal historians Risa Goluboff and Kenneth Mack have complicated our understanding of civil rights lawyering in the decades before *Brown v. Board of Education*, revealing a richer array of constitutional claims and greater emphasis on class issues than was previously known to have existed.[6] Nonetheless, most historians depict the NAACP's participation in this varied and class-conscious litigation, particularly its challenges to workplace discrimination and to the state-action doctrine, as dying by the early 1950s with the start of the Cold War. The NAACP's employment litigation is then described as being reborn in the 1960s amid the burgeoning of black protest politics.[7] This history of the

5. *Hughes Tool,* 147 NLRB 1573 (1964). *Shelley v. Kraemer,* 334 U.S. 1 (1948). The 1964 Civil Rights Act, among other things, prohibited discrimination by employers, unions, and in public accommodations. Civil Rights Act of 1964, 78 Stat. 241 et seq. (1964). On Congress's view that only the Commerce Clause provided established legal authority for the Act, see Leslie A. Carothers, *The Public Accommodations Law of 1964: Arguments, Issues and Attitudes in a Legal Debate* (Northampton, Mass: Smith College, 1968), 56–57; Robert D. Loevy, *To End All Segregation: The Politics of the Passage of the Civil Rights Act of 1964* (Lanham, Md.: UPA, 1990), 49–50. *Hughes Tool* also appeared to put the Board out ahead of the attorney general. In the fall of 1963, Attorney General Robert Kennedy told the House Judiciary Committee that he did not think it would be unconstitutional for a state to license or otherwise sanction a business that discriminated. House Committee on the Judiciary, *Civil Rights Act: Hearings on H.R. 7152,* 88th sess., 1963, 269–2700. For the Supreme Court's divided views on the scope of *Shelley*'s reach, compare Justice Douglas's concurrence and Justice Black's dissent in *Bell v. Maryland,* 378 U.S. 226, 257–59, 326–33 (1964), decided a little over a week before the Board's *Hughes Tool* decision.

6. *Brown v. Board of Education,* 347 U.S. 483 (1954). Risa Lauren Goluboff, *The Lost Promise of Civil Rights* (Cambridge: Harvard University Press, 2007); Goluboff, "'Let Economic Equality Take Care of Itself': The NAACP, Labor Litigation, and the Making of Civil Rights in the 1940s," *UCLA Law Review* 52 (June 2005): 1395; Goluboff, "The Thirteenth Amendment and the Lost Origins of Civil Rights," *Duke Law Journal* 50 (2001): 1609; Kenneth W. Mack, "Rethinking Civil Rights Lawyering and Politics in the Era before *Brown,*" *Yale Law Journal* 115 (2005): 258.

7. Scholars who argue that the NAACP's labor litigation ended with the Cold War's onset include Goluboff, *Lost Promise;* Goluboff,"'Let Economic Equality'"; Mark Tushnet, *Making Civil Rights Law: Thurgood Marshall and the Supreme Court, 1936–1961* (New York: Oxford

NAACP's Cold War workplace litigation builds on Goluboff and Mack's work, extending it into the decade following *Brown*. However, it also revises their conclusions, demonstrating that *Brown* did not mark a critical break with the diverse, working-class-focused civil rights lawyering that preceded it. The NAACP, African Americans' predominant vehicle for advancing civil rights during the Cold War 1950s, did not abandon economic rights and working-class issues. Instead, from 1948 into the 1960s, the NAACP worked to redress discrimination in a range of industries using a variety of legal tools. These included using the post-New Deal administrative state both as a site to lodge claims and as a means to extend the state-action doctrine to reach discrimination by employers and unions. Furthermore, although these attorneys continued to challenge the state-action doctrine and fight workplace discrimination, they did so in ways that sought to facilitate class-based collective action.[8] The NAACP varied its approach depending on the racial politics of different unions, collaborated with the labor movement, favored strategies that would bolster worker organization, and antagonized labor only when it felt cooperation was futile.

Political historians have also emphasized the Cold War's chilling effect on the NAACP and on the civil rights movement more generally. However,

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University Press, 1994), 70–80, 116. Goluboff's important work explores topics similar to this article's but comes to quite different conclusions. Goluboff argues that by the late 1940s NAACP lawyers had, for various reasons, chosen to forego employment related litigation and that by 1950 these cases had "disappeared" from its litigation agenda. In particular, she argues that they ceased seeking to extend the state-action doctrine to reach unions and workplaces. Goluboff, *Lost Promise,* 12, ch. 8, especially 235; Goluboff, "'Let Economic Equality,'" 1456–72, 1476–78. Jack Greenberg argues that NAACP workplace civil rights litigation was born in the 1960s. Greenberg, *Crusaders in the Court: How a Dedicated Band of Lawyers Fought for the Civil Rights Revolution* (New York: Basic Books, 1994), 412–29. Recent works recognize that the NAACP continued to pursue economic rights in the 1950s. However, they do not address the NAACP's constitutional litigation. Nancy MacLean, *Freedom Is Not Enough: The Opening of the American Workplace* (Cambridge: Harvard University Press, 2006), ch. 2; Paul Moreno, *From Direct Action to Affirmative Action: Fair Employment Law and Policy in America, 1933–1972* (Baton Rouge: Louisiana State University Press, 1997), chs. 5–7; Gilbert Jonas, *Freedom's Sword: The NAACP and the Struggle against Racism in America, 1909–1969* (New York: Routledge, 2005), ch. 9.

8. This contradicts labor historians' argument that rights-based legal action undermined worker collective action. See, for example, Nelson Lichtenstein, *State of the Union: A Century of American Labor* (Princeton: Princeton University Press, 2002). Reuel E. Schiller provides a more contingent account: "From Group Rights to Individual Liberties: Post-War Labor Law, Liberalism, and the Waning of Union Strength," *Berkeley Journal of Employment and Labor Law* 10 (1999): 1. Civil rights labor histories also trouble this dichotomy. Robert Rodgers Korstad, *Civil Rights Unionism: Tobacco Workers and the Struggle for Democracy in the Mid-Twentieth-Century South* (Chapel Hill: University of North Carolina Press, 2003), 7; MacLean, *Freedom Is Not Enough*; Eric Arnesen, *Brotherhoods of Color: Black Railroad Workers and the Struggle for Equality* (Cambridge: Harvard University Press, 2001).

while the Cold War certainly shaped and constrained the NAACP's fight for African Americans' right to decent jobs and a union voice, it did not quash it. The organization's national leadership may have abandoned its transnational fight against colonialism and for human rights, and local chapters may have jettisoned their working-class agendas, but the organization was not a monolith.[9] Instead, many within the NAACP—from local members, attorneys, and leaders to regional and national officials—continued to pursue a hot battle for African Americans' workplace rights during this ostensibly Cold decade.

The NAACP's administrative litigation also revises our understanding of the scope and nature of civil rights–era constitutional change. Unlike the more familiar battle against *Plessy v. Ferguson*, these cases reveal a forgotten—and successful—postwar struggle to extend the *Civil Rights Cases*'s state-action doctrine so as to reach the network of customary employer and union practices that excluded and subordinated African-American workers.[10] This struggle for workplace rights differed from attorneys' Cold War challenge to state-enforced Jim Crow laws not only in terms of the legal

9. Penny Von Eschen, *Race against Empire: Black Americans and Anticolonialism, 1937–1957* (Ithaca: Cornell University Press, 1997); Carol Anderson, *Eyes Off the Prize: The United Nations and the African American Struggle for Human Rights, 1944–1955* (Cambridge: Cambridge University Press, 2003); Martha Biondi, *To Stand and Fight: The Struggle for Civil Rights in Postwar New York City* (Cambridge: Harvard University Press, 2003); Robert Korstad and Nelson Lichtenstein, "Opportunities Found and Lost: Labor, Radicals, and the Early Civil Rights Movement," *Journal of American History* 75 (1988): 805, 808 (hereafter cited as *JAH*). On the Cold War's general deradicalization of civil rights, see Jacquelyn Dowd Hall, "The Long Civil Rights Movement and the Political Uses of the Past," *JAH* 91 (March 2005): 1248–50; Mary Dudziak, *Cold War Civil Rights: Race and the Image of American Democracy* (Princeton: Princeton University Press, 2000), 13; Glenda Elizabeth Gilmore, *Defying Dixie: The Radical Roots of Civil Rights* (New York: W. W. Norton & Co., 2008), ch. 9; Thomas J. Sugrue, *The Origins of the Urban Crisis: Race and Inequality in Postwar Detroit* (Princeton: Princeton University Press, 1996), 156. However, historians are beginning to recover exceptions to the Cold War's conservatizing effects on national and local civil rights advocates. Thomas F. Jackson, *From Civil Rights to Human Rights: Martin Luther King, Jr., and the Struggle for Economic Justice* (Philadelphia: University of Pennsylvania Press, 2007); Judy Kutulas, *The American Civil Liberties Union and the Making of Modern Liberalism, 1930–1960* (Chapel Hill: University of North Carolina Press, 2006).

10. For the multiple factors that shut black workers out of jobs and unions, see Sugrue, *Origins of the Urban Crisis,* 91–123. Historians are beginning to recover the NAACP's postwar direct action against racially exclusive customs. Lizabeth Cohen, *A Consumers' Republic: The Politics of Mass Consumption in Postwar America* (New York: Alfred A. Knopf, 2003), ch. 4; Thomas Sugrue, "Affirmative Action from Below: Civil Rights, the Building Trades, and the Politics of Racial Equality in the North, 1945–1969," *JAH* (June, 2004): 145. Better-known courtroom challenges to the state-action doctrine include the NAACP's white-primary, racially restrictive-covenant, and sit-in cases. Tushnet, *Making Civil Rights,* 81–115; Greenberg, *Crusaders,* chs. 20, 23.

precedent it confronted. The administrative campaign, from its inception, targeted national, not regional, discriminatory practices. And unlike the carefully orchestrated and top-down school-desegregation litigation, the employment and union cases blended local, bottom-up, spontaneous efforts with nationally coordinated legal action. Like the campaign against *Plessy*, the NAACP's workplace constitutionalism pursued integration. But unlike the *Plessy* campaign, which is thought of as a fight for formal equality, the NAACP's workplace claims pursued integration toward distinctly substantive ends: well-paying, skilled jobs and a collective voice at work. Also unlike the exclusively court-based school-desegregation litigation, the NAACP's workplace constitutionalism blended law and politics—organizationally, institutionally, and doctrinally. Organizationally, the NAACP's political as well as legal staff pursued these cases; institutionally, they involved constitutional claims brought in a political branch, not only in state and federal courts; and doctrinally, they produced a legal-political hybrid, *Hughes Tool*: a constitutional decision by an administrative agency.[11]

Three trends in civil rights legal historiography have helped conceal the NAACP's Cold War workplace litigation. As a growing number of legal scholars have noted, *Brown* overshadows most accounts of civil rights constitutional change, eclipsing all preceding, concurrent, and competing trajectories.[12] In addition, Title VII of the 1964 Civil Rights Act, which guarantees equal opportunities in jobs and unions, currently dominates employment discrimination litigation, diverting historians from other means

11. The classic account of the road to *Brown* is Richard Kluger, *Simple Justice: The History of Brown v. Board of Education and Black America's Struggle for Equality* (New York: Knopf, 1975). Mark V. Tushnet emphasizes the ways in which this litigation was orchestrated according to the interests of the national NAACP office. Tushnet, *The NAACP's Legal Strategy against Segregated Education, 1925–1950* (Chapel Hill: University of North Carolina Press, 1987). Risa Goluboff argues that by the 1950s, the NAACP's campaign against *Plessy* and segregated education targeted only state-sanctioned discrimination, stigmatic, not material, harms, and pursued the single goal of ending formal racial classifications. Goluboff, *Lost Promise,* 14–15, 228–35, 243–45, 251–52. She also describes the school-segregation litigation as reflecting and being aided by the NAACP Legal Defense Fund's (LDF) increasing separation from the political work of the NAACP. Ibid., 226.

12. Legal scholars who correct the way *Brown*'s present-day meaning distorts civil rights historiography include Goluboff, *Lost Promise,* 4–5; Goluboff, "'Let Economic Equality,'" 1396; Mack, "Rethinking Civil Rights Lawyering"; Reva B. Siegel, "Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over *Brown,*" *Harvard Law Review* 117 (2004): 1470. Risa Goluboff and Kenneth Mack focus on the period preceding *Brown.* However, Reva Siegel has demonstrated that the meaning and sweep of *Brown* remained up for grabs for decades following the Court's landmark decision. This prolonged process indicates the value of extending Goluboff and Mack's work, demonstrating that the workplace reach of pre-*Brown* civil rights constitutionalism persisted in new forms and unexplored fora during and after the LDF's successful assault on Jim Crow laws.

of legal redress.[13] Lastly, the strictures of legal scholarship, particularly constitutional scholarship, lead historians to look primarily at court doctrine, draw sharp divisions between law and politics, and highlight the NAACP Legal Defense Fund (LDF) to the exclusion of other civil rights lawyers. As a result, historians of the civil rights Constitution focus almost exclusively on the docket of the Supreme Court and the work of LDF and its leader, Thurgood Marshall.[14] These three historical conventions have contributed to an accepted wisdom: that the major postwar civil rights legal agitator, the NAACP, took a conservative Cold War turn and forsook African Americans' workplace-constitutional rights.

The way legal historians conceptualize constitutionalism and the arenas in which it gets shaped affects the stories they tell and the conclusions they draw about the past. The NAACP's fight to win economic rights for

13. *Cases and Materials on Employment Discrimination,* ed. Michael J. Zimmer et al. (New York: Aspen Publishers, 2003); Maclean, *Freedom Is Not Enough*; Timothy Minchin, *The Color of Work: The Struggle for Civil Rights in the Southern Paper Industry, 1945–1989* (Chapel Hill: University of North Carolina Press, 2001); Judith Stein, *Running Steel, Running America: Race, Economic Policy, and the Decline of Liberalism* (Chapel Hill: University of North Carolina Press, 1998). Moreno, *From Direct Action,* discusses postwar fair employment statutes but treats them as precursors to Title VII. Michael R. Botson, Jr.'s *Labor, Civil Rights, and the Hughes Tool Company* (College Station: Texas A&M University Press, 2005), Paul Frymer's *Black and Blue: African Americans, the Labor Movement, and the Decline of the Democratic Party* (Princeton: Princeton University Press, 2008), especially ch. 5, and Frymer's "Racism Revised: Courts, Labor Law, and the Institutional Construction of Racial Animus," *American Political Science Review* 99 (2005): 373 are welcome exceptions.

14. The most comprehensive history of civil rights constitutionalism is Michael Klarman's magisterial *From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality* (New York: Oxford University Press, 2004). While Klarman disputes court-centric accounts of civil rights change, arguing that courts followed rather than led the civil rights revolution, he looks only to the Supreme Court for constitutional law and separates his analyses of doctrine and politics. Goluboff incorporates the NAACP's wartime NLRB cases, but she is primarily interested in its court-based constitutional litigation. Goluboff also recognizes that the NAACP's Labor Department remained active on employment issues into the 1950s, but does not consider this part of the NAACP's civil rights constitutionalism or of LDF's agenda. In addition, while she highlights the previously overlooked work of the Department of Justice's Civil Rights Section, in terms of non-governmental actors, she focuses exclusively on the litigation strategy of LDF and Thurgood Marshall. Goluboff, *Lost Promise,* 226, 260; Goluboff, "Let Economic Equality," 1396, n 10; 1471; Goluboff, "The Thirteenth Amendment." See also Tushnet, *Making Civil Rights.* Mack significantly challenges this methodological tradition, arguing that civil rights legal history must step outside LDF, the NAACP's national office, and the docket of the Supreme Court. Mack, "Rethinking Civil Rights Lawyering," 263–64. This article attributes the labor advocacy it recounts to the NAACP generally. This best captures the cooperation these cases involved among the NAACP's Labor Department, National Legal Committee, LDF, and attorneys affiliated with its regional and local offices. After 1956, the NAACP's newly distinct General Counsel's office supplanted LDF's role in this litigation.

African Americans in the administrative state has remained obscured, much of it buried among the voluminous papers of the NAACP's own General Counsel's office, rather than those of the better-known LDF; in the files of its Labor—not only its Legal—Department; and in the records of its local branches, not only its national office. Recent scholarship on the legal significance of the Constitution's life outside of the courts challenges legal historians to work across these organizational and disciplinary divides.[15] Previously, this scholarship has focused on how social movements, Congress, and the president have interpreted the Constitution in ways that diverge from the Supreme Court. Expanding extra-court constitutionalism to include advocacy in the administrative state reveals that in the wake of the New Deal, amid the web of regulatory agencies and laws it produced, legal actors had to rework the relationship between courts and administrative agencies and between law and politics. Attorneys pursued *constitutional* civil rights outside the courts. Furthermore, even some struggles for *court* findings of civil rights under the Constitution had to begin in administrative agencies. These changes make attending to constitutional advocacy outside of the courts and by players other than LDF particularly fruitful for evaluating the NAACP's postwar litigation strategies.

Broadening the historical frame beyond LDF and the NAACP's national office and expanding constitutional history beyond the courts, another story can be told, one in which the NAACP's labor litigation and challenges to the state-action doctrine did not die out, but revitalized and persisted during the Cold War 1950s. From 1948 to 1964, the NAACP wended its way through the postwar minefield of Cold War anti-communism, Southern Democrats' massive resistance, and growing Republican antipathy toward the NLRB. Despite the treacherous terrain, the NAACP and the workers on whose behalf it advocated made their claims to unions, employers, the NLRB, presidential commissions, and the courts. These efforts spanned the nation and reached industries ranging from agriculture to automobile production.[16] In particular, the NAACP's work in the oil and shipping industries, captured in the opening June 1955 snapshot, exemplifies how it varied and evolved its tactics depending on unions' racial politics, developing legal doctrines, and the fast-changing industrial landscape.

15. Larry Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (New York: Oxford University Press, 2004); Keith Whittington, *Constitutional Construction: Divided Powers and Constitutional Meaning* (Cambridge: Harvard University Press, 1999); William E. Forbath, "The New Deal Constitution in Exile," *Duke Law Journal* 51 (2001): 165; Robert Post and Reva B. Siegel, "Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act," *Yale Law Journal* 112 (2003): 1943.

16. Jonas, *Freedom's Sword,* 240–53.

The NAACP's work in these industries also demonstrates how its use of administrative law and agencies to surmount the state-action barrier and reach workplace discrimination generated a civil rights constitutionalism that not only sought jobs and training, but also aimed to invigorate and cross-fertilize race- and class-based social-change organizations.

This article provides a brief background on the constitutional theories, new regulatory bodies, and Cold War political context that both fed and shaped the NAACP's workplace litigation, followed by narrative layers exploring how the NAACP pursued its claims in the oil industry ("Oil") and the shipping industry ("Water"). It describes how, despite early signs of success, by the late 1950s the NAACP's hope for this litigation faded and the organization became increasingly frustrated with a labor movement it found insufficiently committed to reforming unions' racial practices. As a result, the NAACP took a more public and adversarial approach to workplace discrimination. As the final section demonstrates, the NAACP's next wave of coordinated NLRB actions proceeded primarily despite, not in alliance with, labor. By then, however, the NAACP's cause had garnered a new and powerful supporter: President Kennedy. Its Cold War litigation finally bore fruit in 1964 with the Board's *Hughes Tool* order.

Workplace Constitutionalism and the Rise of Cold War Politics

By 1955, the NAACP had been honing its workplace-constitutional claims for over a decade. For fifty years after the Supreme Court's *Civil Rights Cases* decision, employers and unions had seemed safely outside the Constitution's reach. However, during the Depression, President Roosevelt's New Deal government blanketed the workplace with legislation. In particular, in 1935, Congress passed the National Labor Relations Act (NLRA), which guaranteed workers' right to organize, and established the NLRB to oversee everything from union organizing campaigns to the negotiation of workplace contracts.[17] After its adoption, the NAACP began to fashion this law into a tool with which to fight.

17. National Labor Relations Act § 1, ch. 395, 74 Stat. 450 (1935). For the NLRA's passage, see James A. Gross, *Making of the National Labor Relations Board: A Study in Economics, Politics, and the Law* (Albany: State University of New York Press, 1981); Christopher L. Tomlins, *The State and the Unions: Labor Relations, Law, and the Organized Labor Movement in America, 1880–1960* (Cambridge: Cambridge University Press, 1985), 103–47. New Deal economic regulation was hardly unprecedented. There was a long tradition of state, local, and, by the twentieth century, federal oversight of economic actors. Morton Keller, *Regulating a New Economy: Public Policy and Economic Change in America, 1900–1933* (Cambridge: Harvard University Press, 1990); William Novak, *The People's Welfare: Law and Regulation in Nineteenth-Century America* (Chapel Hill:

Amid the vibrant World War II–era civil rights and union activism, the NAACP first sought to breach the state-action barrier on behalf of black workers. In cases before the NLRB and the Supreme Court, NAACP attorneys argued that, after the New Deal, the economy did not look so private anymore. Instead, they asserted that government regulation of workplace organizing created sufficient state action to encompass unions' and employers' racially disadvantaging practices.[18]

This campaign met with mixed results. In 1944, the Supreme Court ruled that unions must represent the interests of black workers in their bargaining units, known as a union's "duty of fair representation." But the Court specifically stated that it was *not* requiring unions to let those workers join their organizations. Moreover, the Court was ambiguous as to whether the Constitution was the source for unions' limited duty. Also, in the mid-1940s the NLRB issued several decisions suggesting that it disfavored certified unions that excluded black workers from membership. The Board's statement that the NLRA "should not be made the vehicle of discriminatory racial practices by labor organizations" even implied that its disfavor stemmed from the constitutional restraints on state action. Nonetheless, the NLRB never acted upon claims that the Constitution prevented it from certifying racially discriminatory unions.[19]

University of North Carolina Press, 1996). However, the New Deal marked a sea-change in the scope and depth of economic regulation. For the scholarly debate on whether the New Deal was a legal revolution, see Laura Kalman, "Law, Politics, and the New Deal(s)," *Yale Law Journal* 108 (1999): 2165.

18. African Americans' decades-old labor activism accelerated in the 1930s, nurtured by Popular Front politics. Arnesen, *Brotherhoods of Color,* 85–86; Michael Denning, *The Cultural Front: The Laboring of American Culture in the Twentieth Century* (London: Verso, 1997); Gilmore, *Defying Dixie*; Michael Honey, *Southern Labor and Black Civil Rights: Organizing Memphis Workers* (Urbana: University of Illinois Press, 1993), 67–144. World War II gave this activism a further boost. Korstad, *Civil Rights Unionism*; Korstad and Lichtenstein, "Opportunities Found and Lost," 786; Bruce Nelson, "Organized Labor and the Struggle for Black Equality in Mobile during World War II," *JAH* 80 (1993): 952. Popular Front politics also affected civil rights lawyering. Goluboff, "'Let Economic Equality,'" 1413–51; Kenneth W. Mack, "Law and Mass Politics in the Making of the Civil Rights Lawyer, 1931–1941," *JAH* 93 (June 2006): 37. Herbert Hill, *Black Labor and the American Legal System: Race, Work, and the Law* (Madison: University of Wisconsin Press, 1977), 107.

19. *Steele v. Louisville & Nashville R. Co.,* 323 U.S. 192 (1944). The Court did not rule that the Constitution *directly* bound labor agencies or unions, instead reasoning that the labor statute would be unconstitutional unless it was interpreted to *implicitly* impose the duty of fair representation. Justice Frank Murphy, for one, was unsure of this duty's constitutional status. His concurrence noted that Congress could not authorize a union to ignore African-American workers' constitutional rights without violating the Fifth Amendment. "If the Court's construction of the statute rests upon this basis," he wrote, "I agree. But I am not sure that such is the basis." *Steele,* 208–9. See Deborah C. Malamud, "The Story of *Steele v. Louisville & Nashville Railroad:* White Unions, Black Unions, and the Struggle

In 1948, the NAACP geared up once again to use the state-action doctrine to battle workplace discrimination by asserting that the Constitution constrained the actions of both unions and the Board. Assuming that the duty-of-fair-representation decisions had made union discrimination unconstitutional, the NAACP wanted to extend this constitutional prohibition to include unions' membership policies. In particular, it took aim at unions that excluded African Americans or segregated them into auxiliary locals with limited voice in union affairs and the collective bargaining process. In one NLRB action the NAACP argued that, given the Supreme Court's fair-representation decisions, "the Fifth Amendment extends to the union's activities" and it "called upon [the Board's members] to enforce their policy of refusal to certify a union in whose activities Negroes will not be entitled to participate fully nor benefit equally." Perhaps inspired by the Supreme Court's recent decision in *Shelley v. Kraemer,* the NAACP also worked with the left-leaning and most racially progressive labor group, the Congress of Industrial Organizations (CIO) to raise "the constitutional issue of the right of that Board to certify as the sole collective bargaining agent any union" that refused African Americans membership or made them join separate auxiliary locals.[20] In other words, the NAACP argued that under the Constitution neither the Board nor unions could relegate black workers to depending on an all-white union to guard their interests.

Yet, just as the NAACP seemed poised to bring its fledgling workplace constitutionalism to fruition, early Cold War legal and political changes complicated its advocacy. The CIO had good reason to support the NAACP's efforts. If the NLRB embraced these constitutional arguments, it would undercut any white-only American Federation of Labor (AFL) or independent union's ability to use racist appeals to raid or defeat the CIO's interracial unions. Across the nation, such raids were proving a major barrier to the CIO's unionization attempts. But for the NAACP, cooperation with the CIO

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for Racial Justice on the Rails," in *Labor Law Stories,* ed. Laura J. Cooper and Catherine L. Fisk (New York: Foundation Press, 2005) for a nuanced history of the case. *Larus & Bro. Co., Inc.,* 62 NLRB 1075, 1082 (1945). *Bethlehem-Alameda Shipyard, Inc.,* 53 NLRB 999, 1015–16 (1943); *Carter Manufacturing Co.,* 59 NLRB 804 (1944); *Atlanta Oak Flooring Co.,* 62 NLRB 973 (1945); *General Motors Corp.,* 62 NLRB 427 (1945); *Larus,* 1075.

20. Marian Wynn Perry to NLRB, January 30, 1948, Bracey and Meier, eds., *Part 13, Series C: Legal Department Files on Labor* (Bethesda: UPA, 1991), microfilm, reel 7; Legal Department Report, February, 1948, Boehm and Meier, eds., *Papers of the NAACP, Part 1: Meetings of the Board of Directors, Records of Annual Conferences, Major Speeches, and Special Reports, 1909–1950* (Bethesda: UPA, 1982), microfilm, reel 7; Perry to Thurgood Marshall, Sept. 17, 1948, in Bracey and Meier, eds., *Papers of the NAACP, Part 13, Series A: Subject Files on Labor Conditions and Employment Discrimination* (Bethesda: UPA, 1991), microfilm, reel 14.

had become increasingly risky. By the late 1940s, an alliance of Southern Democrats and Republicans in Congress had both the NAACP's legislative campaigns and the unions' protective New Deal legislation in its crosshairs. The recently passed Taft-Hartley Act had amended the NLRA, undercutting union power and taking aim at the left-leaning CIO by requiring that all union leaders disavow Communist Party involvement. By 1948, the CIO was struggling over whether to fight or oblige the law's anti-Communist mandate. Due to the hostile political environment, the NAACP needed to stay friendly with the CIO's rival, the AFL, despite its being home to the most notoriously white-only unions. As a result, the NAACP, its attorney advised the CIO, would prefer to take part in cases where it "would not be in the position of taking sides in a battle between the AF of L, CIO, or an independent union." Loyalty-security programs, House Un-American Activities Committee investigations, and the rising tide of McCarthyite witch hunts often conflated civil rights, union, and Communist activity, pushing the major unions and the NAACP further into the same defensive corner.[21]

Many in the NAACP also believed that unionization was essential to gaining black Americans' full economic and political citizenship. Throughout the late 1940s and 1950s, national officers consistently urged all "members who are eligible to do so to join a union and take an active part in its affairs." At the same time, the organization increasingly turned to unions both to develop its own membership and to solicit contributions. The NAACP hired Herbert Hill, a Jewish former CIO organizer, Socialist, and strident anti-Communist, to implement an increasingly systematic union-focused

21. Raiding involves one union luring away the members of a competitor union. For examples of all-white unions' raids, see Perry to NLRB, January 30, 1948, Bracey and Meier, *Part 13, Series C,* reel 7; Perry, February 5, 1948, ibid. Robert H. Zieger, *The CIO, 1935–1955* (Chapel Hill: University of North Carolina Press, 1995), 253. Taft-Hartley Act, 61 Stat. 136 (1947). On the Taft-Hartley Act, see James A. Gross, *Broken Promise: The Subversion of U.S. Labor Relations Policy, 1947–1994* (Philadelphia: Temple University Press, 1995); Tomlins, *The State and the Unions*; Nelson Lichtenstein, "Taft Hartley: A Slave-Labor Law?" *Catholic University Law Review* (Spring 1998): 763. On the Southern Democrat-Republican alliance and its stranglehold on labor and civil rights policy, see Ira Katznelson et al., "Limiting Liberalism: The Southern Veto in Congress, 1933–1950," *Political Science Quarterly* 108 (Summer 1993): 283. Quote is from Perry to Thurgood Marshall, Sept. 17, 1948, Bracey and Meier, *Part 13, Series A,* reel 14. William H. Hastie, "The Government's Responsibility for Civil Rights," July 13, 1949, speech, Boehm and Meier, *Part 1,* reel 12; 43rd Annual Convention Resolutions, June 28, 1952, Boehm, Meier, and Bracey, eds., *Supplement to Part 1, 1951–1955,* reel 5; Goluboff, "'Let Economic Equality,'" 1460–66. On anti-communism and civil rights, see note 9 above and Jeff Woods, *Black Struggle, Red Scare: Segregation and Anti-Communism in the South, 1948–1968* (Baton Rouge: Louisiana State University Press, 2004). On anti-communism and unions, see Harvey Levenstein, *Communism, Anticommunism and the CIO* (Westport: Greenwood, 1981); Ellen Schrecker, *Many Are the Crimes: McCarthyism in America* (Boston: Little, Brown, 1998).

campaign. Beginning in 1949, Hill traveled the country speaking at union conventions and NAACP conferences. He pushed unionists to start, join, and support NAACP branches and pressed NAACP branches to develop labor campaigns and alliances with local non-Communist unions. As Hill pitched this campaign to Roy Wilkins, "[t]he active and sustained participation of the NAACP on the lower levels of the union movement . . . would be a means of making known the program of the Association to the most highly organized and articulate group in American life." By the early 1950s, the national NAACP had developed a strong union presence at its annual conventions and a growing interest in local and international unions' financial contributions. Thus, as the Southern Democrat and Republican coalition gained strength in the late 1940s and early 1950s, the NAACP grew increasingly wary of challenging union discrimination lest its efforts play into the hand of these anti-labor forces.[22]

At the same time, the principle of solidarity led labor to disfavor workers' turning to the courts to pursue their grievances against their unions. The NAACP recognized its allies' self-help norm, urging its members to work within unions to fight the "color bar" and to "give unions a chance to clean up their own houses wherever possible." Toward this end, the NAACP invited the CIO's George L .P. Weaver to train NAACP-affiliated attorneys "to get a problem of discrimination practiced by a local before the union officials who have ultimate authority to act." Weaver was a staunch anti-Communist who had been one of the first African Americans to join the CIO's national office when he began directing its Civil Rights Committee during World War II. Only as a last resort did the NAACP publicly sponsor legal action.[23] These political delicacies gave the NAACP reason

22. Annual Convention Records, June 26, 1948, Boehm and Meier, *Part 1,* reel 12; Annual Convention Records, June 23, 1950, ibid.; Annual Convention Records, June 28, 1952, Boehm, Meier, and Bracey, *Supplement to Part 1, 1951–1955,* reel 5. Statements that the NAACP was anti-union *discrimination,* not anti-*union,* include Clarence Mitchell, July 14, 1949, Boehm and Meier, *Part 1,* reel 12; Charles Hamilton Houston, July 14, 1949, ibid.; Walter White, June 1950, ibid. For the NAACP's shift from suspecting unions to embracing them, see Goluboff, "'Let Economic Equality,'" 1404–7, 1467–71. Mack argues that civil rights attorneys were already focused on the twin goals of fighting union discrimination and fostering cross-class alliances in the 1930s. Mack, "Rethinking Civil Rights Lawyering." Nelson, *Divided We Stand,* 215; Hill, n.d., Bracey and Meier, *Part 13, Series A,* reel 20. Lucille Black to White, March 31, 1949, ibid. Hill's union campaign raised over $11,600 in its first eight months. Hill to Gloster Current, Sept. 23, 1949, ibid.; Hill, Nov. 1949, ibid. This was over four times Hill's annual salary. Roy Wilkins to Mrs. Waring, April 14, 1949, ibid. Quote from Herbert Hill to Wilkins, ibid. See generally, Jonas, *Freedom's Sword,* 236–38.

23. For union disfavor of legal action, see Nelson, *Divided We Stand,* 122, 125. For representative NAACP resolutions, see Annual Convention Records, June 23, 1950, Boehm

to approach a potentially antagonizing legal campaign against unions with care.

Concurrently, as the sites for labor advocacy proliferated, the NAACP shifted its resources away from constitutional claims. By the late 1940s, New York's pioneering fair-employment law was drawing its lawyers' energies away from NLRB claims. The NAACP also had to guide workers through an increasingly elaborate array of union grievance mechanisms before it could bring a claim in front of the Board or the courts. As the NAACP warned attorneys at one of its employment discrimination workshops, "the lawyer who combats discrimination . . . will have to realize that 'the doctrine of exhaustion of administrative remedies' presents him the greatest procedural obstacle to success." In particular, as of the early 1950s, it was "not yet settled" whether workers would have to exhaust NLRB remedies before taking discrimination claims to the courts.[24]

In addition, the NAACP lobbied successfully for several presidential fair employment policies, including a relatively toothless committee President Truman charged with ensuring that work conducted under federal contracts occurred free from racial discrimination. Though Walter White, the NAACP's executive secretary, immediately proclaimed Truman's committee "disappointing" and the New York State NAACP Conference soon

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and Meier, *Part 1,* reel 12; Annual Convention Records, June 27, 1953, Boehm, Meier, and Bracey, *Supplement to Part 1, 1951–1955,* reel 6; Annual Convention Records, June 26, 1956, Bracey and Meier, eds., *Papers of the NAACP, Supplement to Part 1, 1956–1960* (Bethesda: UPA, 1991), microfilm, reel 4. Quotes are from the text of a 1954 workshop on legal strategies for combating employment discrimination. Unauthored, n.d. [1954], manuscript, "Oil Workers" Folder, box 8, part III-J, National Association for the Advancement of Colored People Records, Library of Congress, Manuscripts Division, Washington, D.C. (hereafter cited as NAACP Records) (year of undated sources derived from the procedural posture of cited cases). For George Weaver's work for the CIO and how his and other CIO officers' anti-communism shaped and constrained the CIO's civil rights efforts, see Stevenson F. Marshall, Jr., "Challenging the Roadblocks to Equality: Race Relations and Civil Rights in the CIO, 1935–1956" (unpublished manuscript, 1991) http://eric.ed.gov (May 21, 2007). On the devastating effects the CIO's leftist expulsions had on African-American labor, see Gerald Horne, *Red Seas: Ferdinand Smith and Radical Black Sailors in the United States and Jamaica* (New York: New York University Press, 2005); Korstad, *Civil Rights Unionism.* The NAACP, by supporting and even assisting in these purges, also bears responsibility for this damage. Frymer, *Black and Blue,* 62–63. For the elaborate steps NAACP attorneys took to work problems out within non-Communist unions prior to pursuing court action, see U. Simpson Tate to Hill, December 11, 1953, "Labor Cases—Texas, 1953–55" Folder, box 346, part II-A, NAACP Records.

24. "Work of the National Office," April 16, 1946, Bracey and Meier, eds., *Papers of the NAACP, Part 18: Special Subjects, 1940–1955, Series A: Legal Department Files* (Bethesda: UPA, 1994), microfilm, reel 7; Unauthored, n.d. [1954], manuscript, "Oil Workers" Folder, box 8, part III-J, NAACP Records.

passed a resolution protesting the Committee's "'failure . . . to take a clear-cut stand against segregation . . . [or] against employers and contracting agencies that refuse to hire qualified negro workers for skilled and professional occupations,'" the NAACP did not want Truman to think he had acted in vain. The organization brought scores of cases to Truman's fair employment committee, hoping to strengthen this legal avenue from within while using its inadequacies to fight for stronger national laws.[25]

The NLRB was also becoming an increasingly inhospitable host, further discouraging the NAACP's workplace constitutional litigation. Faced with employers' union-dodging claim that the unions organizing their plants discriminated on the basis of race and thus were ineligible for Board certification, the Board made unions' racial practices irrelevant to their certifiability. By 1946, the Board was certifying representatives with a history of racial discrimination so long as they promised not to discriminate against workers in the prospective unit. In addition, the NLRB defined discrimination narrowly, deciding that it lacked "authority to insist that labor organizations admit all the employees they purported to represent to membership, or to give them equal voting rights." Instead, according to the Board, its only weapon was to assure that a union fairly represented all employees in its bargaining unit. While it repeatedly asserted that it would decertify any union that failed to do so, no decertifications were ordered.[26]

The 1947 Taft-Hartley Act had potentially changed this policy, but the NLRB soon demonstrated that the NAACP's hope for the new law had been misplaced. Taft-Hartley barred unions and employers from discriminating against workers on the basis of union membership. In addition, it gave the Board the power, for the first time, to issue unfair-labor-practice orders (ULPs) against unions, as it already did for employers. A Board ULP would require a union to cease and desist from certain practices, seemingly undermining the Board's oft-stated claim that it lacked the power to inquire into unions' internal policies and possibly providing a new remedy for union discrimination. While this was not the anti-discrimination provision

25. Executive Orders 9980, 9981 (1948); Executive Order 10308 (1951); White, Nov. 1951, Boehm, Meier, and Bracey, *Supplement to Part 1, 1951–1955*, reel 2; White, March 1951, ibid.; Hill to Henry Moon, October 22, 1952, *Part 13, Series A*, reel 19; Executive Office Reports, May 12, 1952, ibid. Moreno, *From Direct Action*, 178–79.

26. *Larus,* 1082; *Atlanta Oak,* 975. For instance, the Board ordered an election for a union that excluded African-American workers from membership in *Witchita Falls Foundry & Machine Co.,* 69 NLRB 458 (1946). *General Motors,* 431 (1945); *Waterfront Employers Ass'n of the Pacific Coast,* 71 NLRB 121, note 7 (1946).

the NAACP had fought for, it held out hope that the new provisions might create a legal wedge for its campaign.[27]

Over the next two years, the NLRB repeatedly stated that it would not sanction racially discriminatory unions, even as its decisions clarified that it did not see the recent non-discrimination provisions as a mandate for more aggressive action. Citing its earlier decisions, the Board continued to assert that it would "not pass on the internal organization of the petitioning unions in the absence of proof that they will not fairly represent all employees regardless of race, color, or creed." Nor did it give any indication that it saw its new ULP powers as an alternative means to counteract workplace discrimination. Referring to Taft-Hartley's non-discrimination language as a "pure unadulterated fake," Clarence Mitchell sardonically described the Board's interpretation of the Act to attendants at the NAACP's 1949 Annual Convention. "In each of these cases the [NLRB] announced a principle which may be summarized in this fashion," he quipped, "'Unions may exclude colored people from membership, they may segregate them into separate locals and they may refuse to let them share in the full benefits of the union, but no union may discriminate against them because of race.'"[28]

These Cold War legal and political changes shaped the NAACP's workplace-discrimination claims in the oil and shipping industries. When targeting industrial unions in the oil industry, the NAACP's revitalized labor litigation was planned with allies in the non-Communist CIO leadership and was most vital in the many locales where union members still dominated the leadership of the local NAACP branch. These well-coordinated cases sought to alter the fate of labor and civil rights throughout the nation and took the meaning of constitutional non-discrimination beyond desegregation of unions to include access to skilled jobs. In contrast, in the shipping industry, the NAACP faced a renegade branch that threatened to antagonize the AFL and ally itself with Communist-affiliated unions. It also confronted some of the oldest and most notorious all-white craft unions, leading the NAACP branch to fight for African Americans' basic right to join the unions that controlled admission to shipping jobs. In both oil and shipping, while some cases found their way to the Supreme Court, the NAACP lodged its most coordinated attack not in the courts, but in the NLRB and the PCGC.

27. Taft-Hartley Act, 61 Stat. 136 (1947), sec. 8; Frymer, *Black and Blue,* 29–30.

28. *Plywood-Plastics Corp.,* 85 NLRB 265, 265 (1949). See also *Norfolk Southern Bus Corp.,* 76 NLRB 488, 489 (1948); *Texas & Pacific Motor Transport Corp.,* 77 NLRB 87, 89 (1948). *Veneer Products, Inc.,* 81 NLRB 492 (1949); *Plywood-Plastics*; Clarence Mitchell, July 14, 1949, Boehm and Meier, *Part 1,* reel 12.

Oil and Water

Oil

In the postwar years, the NAACP developed close relationships with African-American oil workers and an acute awareness of the discrimination they faced in the nation's oil industry. In 1949, in one of his first campaigns for the NAACP, Hill used a rally against segregated schools to inspire an Argo, Illinois, local of the CIO's Oil Workers International Union ("Oil Workers") to start an NAACP branch. Over the next years, complaints of discrimination in West Coast oil fields circulated among the NAACP's Labor and Legal Departments. When Hill embarked on a southern speaking tour in December 1952, he made sure to speak at mass meetings in several Texas oil towns.[29]

By the time Hill embarked on his tour, the NAACP was still fighting workplace segregation, but now it saw integration of workers' seniority and lines of promotion, not only of union membership, as necessary to counter African-American workers' economic disadvantage. At the same time, it viewed the labor movement, not litigation, as the preferred vehicle for producing these changes. African-American workers in oil refineries, like those in many industrial plants, were hired into an unskilled labor pool where they remained throughout their tenure. In contrast, white workers were hired into and progressed up through a separate line of more-skilled and better-paying jobs. In Beaumont, Texas, during his 1952 speaking tour, Hill met with the segregated locals representing workers at the Magnolia Oil Refinery. After several sessions involving Oil Workers Local 229 (an all-black local, many of whose board members also sat on the local NAACP branch's board), district and national Oil Workers and CIO officials, and the all-white Oil Workers Local 243, union officials agreed to combine Locals 243 and 229. The locals promised to integrate not only their membership but also the plant's seniority and promotion lines so as to open up skilled jobs to black workers. If the merged local fulfilled its pledge, it would mark a radical change in African Americans' economic opportunities, affirming the union movement's potential for black workers.[30]

When Hill reported on his southern tour to the head of the NAACP's Texas State Conference, he emphasized this promise and reiterated the national office's commitment to bringing about change through collaboration, rather than litigation, wherever possible. "[W]e have a fundamental responsibility

29. Hill to Current, October 21, 1949, Bracey and Meier *Part 13, Series A,* reel 20; "Mass Rally," October 26, 1949, ibid.; Hill to Current, February 2, 1951, ibid. Jack Greenberg to Josephine Peters, June 19, 1950, ibid. Hill to A. Maceo Smith, February 2, 1953, ibid.

30. Hill to Smith, ibid.

to the many thousands of Negro industrial workers in Texas who . . . suffer the effects of racial discrimination in industrial employment," Hill wrote. He noted that "[t]housands of these workers belong to labor unions" so that "it is quite possible, in certain instances, to use the trade union as an instrument to eliminate racial discrimination in industrial employment"—quite possible, and, Hill implied, certainly preferable.[31] Nonetheless, the NAACP hardly repudiated litigation. In fact, Hill's modest effort to integrate one of the Oil Workers' last segregated locals soon became the first step in a much more elaborate and ambitious legal strategy that used the Constitution, labor law, and administrative agencies to win African-American workers access to decent jobs and a voice in their unions.

Throughout 1953, the NAACP rededicated itself to strengthening African-American workers' legal claims, spending months developing legal theories and presenting them to affiliated lawyers from across the country. In the spring of 1953, LDF attorneys made "extensive study . . . of the numerous problems of discrimination in employment." Over the spring and summer, they took their litigation strategies to a national audience. The LDF staff held multiple conferences with members of the NAACP's National Legal Committee and NAACP-affiliated attorneys, both honing and disseminating their claims. These were followed by a workshop in July at the NAACP's Annual Convention. The workshop was conducted by Robert L. Carter, an LDF attorney since 1945 who had grown up in Newark, New Jersey, earned degrees from Howard and Columbia Law Schools, and then forged his commitment to civil rights lawyering during his World War II military service. His workshop, titled "Legal Techniques in Civil Rights Cases," covered, among other topics, challenges to segregation in the workplace. The materials developed in 1953 became the template for the employment discrimination workshops the NAACP continued to offer in the following years.[32]

31. Ibid.

32. Legal Department Report, February–March 1953, Boehm, Meier, and Bracey, *Supplement to Part 1, 1951–1955,* reel 2; Legal Department Report, May 1953, ibid.; Legal Department Report, June 1–15 1953, ibid.; Marshall and Robert L. Carter to Lawyers' Conference Participants, memo, June 12, 1953, ibid., reel 7; unauthored, n.d. [1954–1955], manuscript, "Oil Workers Background Information, 1954, n.d." Folder, box J-8, part III, NAACP Records. Robert L. Carter, *A Matter of Law: A Memoir of Struggle in the Cause of Equal Rights* (New York: The New Press, 2005). Risa Goluboff notes that the NAACP and LDF increased their organizational separation in 1952, a move she argues further contributed to LDF and the NAACP's abandonment of workplace litigation and the NAACP's relegation of economic inequality to its political advocacy. *Lost Promises,* 226, 237. LDF's research and workshops on employment discrimination in 1953 suggest its separation from the NAACP did not end its interest in these claims. Furthermore, LDF attorneys and the NAACP political staff's concerted and coordinated efforts to translate these theories into action demonstrate that LDF's move also did not rend the NAACP's political and legal pursuits.

In its research, reports, and conferences, the NAACP singled out union and non-governmental employers' discrimination as the primary areas in which to develop new workplace-discrimination claims and it identified the PCGC and NLRB as the best places to advance them. The NAACP identified three legally distinct types of employment discrimination: by government employers, by unions, and by non-governmental employers. For the most part, especially after *Brown* was decided, the NAACP viewed constitutional challenges to discrimination in government employment as straightforward since there was no state-action hurdle. As a result, the attorneys directed most of their efforts toward developing legal theories to counter union discrimination and discrimination by non-governmental employers. For both legal and political reasons, the NAACP concluded that where the NLRB regulated a workplace, the "initial approach should be via the Labor Board," not the courts. Initially, the NAACP was skeptical of the use of non-discrimination clauses in government contracts, noting that President Truman's Committee on Government Contract Compliance had acknowledged that "'most [government] contracting agencies have followed a line of least resistance in enforcement of the [non-discrimination] clause.'" However, after President Eisenhower created his own committee, the PCGC, in August 1953, the NAACP held out hope that, although "[t]he President's Committee has no direct power of enforcement," nonetheless, "the threat of a recommendation that the government withdraw its business from the concern involved and grant it to another [would be] enough of a hammer to secure compliance." The NAACP also recognized the importance of bringing court cases, particularly to guard and further develop the Supreme Court's wartime duty-of-fair-representation doctrine.[33]

In addition to identifying the prime targets for enhancing the law against workplace discrimination and the best venues in which to do so, the NAACP spent considerable time during 1953 and 1954 developing the legal theories to be used in its attack and expanding the modes of discrimination it would challenge. Whereas in the 1940s, the NAACP had focused on the unconstitutionality of unions' membership practices, now it expanded the scope of impermissible discrimination to include challenging union-employer agreements that tracked African-American workers into the worst-paying, lowest-skilled jobs. These agreements, the NAACP was learning, often remained in place despite the integration of union membership. In order to achieve economic equality, jobs, not just union rosters, would have to be integrated.

33. Report of the Committee on Discrimination in Employment, n.d. [1953], manuscript, "Oil Workers Background Information, 1954, n.d." Folder, box 8, part III-J, NAACP Records; Introduction, n.d. [1953], ibid.; unauthored, n.d. [1954–1955], manuscript, ibid.

Along with recognizing these modes of discrimination, the NAACP was also looking to update its legal theories. In particular, NAACP attorneys focused on those that would garner NLRB unfair-labor-practice remedies and shore up the constitutional basis for the duty of fair representation. In the 1940s, NAACP attorneys had argued that the NLRB could not constitutionally certify discriminatory unions. Now, the NAACP also urged affiliated attorneys to seek ULPs. The organization developed the theory that the National Labor Relations Act (NLRA) had to be interpreted to make a right to fair representation part of the basic rights the statute guaranteed to workers. If so, the NAACP reasoned, the Board could issue a ULP for union discrimination. The NLRA, after all, made ULPs available against a union that "restrained or coerced" workers' exercise of their rights under the statute. The NAACP suggested that a union that violated its duty to fairly represent African-American workers might also be subject to a ULP on the grounds that it had failed to bargain with the employer on these workers' behalf. Finally, the organization argued that the Board could issue a ULP against an employer that awarded more favorable contract terms to the members of racially exclusive unions than it did to African-American employees excluded from these unions as this would constitute employer discrimination on the basis of union membership against the excluded black workers. The Constitution played a shadow role in these arguments, functioning both as the basis for the duty of fair representation and the reason this duty should be read into the section of the NLRA which laid out workers' rights.[34]

Throughout the 1940s, NAACP attorneys had assumed, as had other court watchers, that unions' duty of fair representation, which the Supreme Court had read into the labor statutes, was at its base a constitutional obligation; their legal goal had been to extend this constitutional duty to reach union membership. Now, however, the lower courts were disputing the duty's constitutional basis and limiting its reach. In particular, a 1953 decision by the Third Circuit Court of Appeals had held that where African-American workers claiming union discrimination had joined the challenged union,

34. Report of the Committee on Discrimination in Employment, n.d. [1953], manuscript, ibid.; Introduction, n.d. [1953], ibid.; unauthored, n.d. [1954–1955], manuscript, ibid. For the central role the Constitution played in duty-of-fair-representation claims and reasoning during this period, see Sophia Z. Lee, "'Almost Revolutionary': Race, Labor, and Administrative Constitutionalism, 1935–1964" (paper presented at the Yale Law Women Works-in-Progress Series, Yale Law School, April, 2005). The NAACP attorneys assembling these arguments seemed conflicted about the Constitution's role in the duty of fair representation. One document asserted that the duty was merely like a constitutional right while another argued that it was a constitutional right. Compare Report of the Committee on Discrimination in Employment, n.d. [1953], manuscript, "Oil Workers Background Information, 1954, n.d." Folder, box 8, part III-J, NAACP Records with Introduction, n.d. [1953], ibid.

the union's discriminatory practices did not involve state action and did not impose a duty of fair representation. In such cases, the Third Circuit reasoned, the union's bargaining authority derived from worker consent, not a labor board's certification. The NAACP devoted an entire presentation to teaching lawyers how to refute the Third Circuit's decision. This included an exposition of the myriad ways the NLRA had altered the collective bargaining process as well as the relationships between employers and unions, employers and workers, and unions and workers, infusing all with state action. It also included a section titled "Union Officers State Officers?" This urged attorneys to counter doubts as to unions' state-actor status by noting, among other things, that the Supreme Court's most recent duty-of-fair-representation case, *Brotherhood of R.R. Trainmen v. Howard,* had expanded the scope of the duty of fair representation, clarifying "that the duty *now* imposed on the union is like the duty imposed on the State." The presentation concluded that the NAACP should announce that it was "ready to aid plaintiffs who complain against discrimination in employment, from whatever source." In particular, it recommended that the organization file amicus briefs in any case that might reverse the Third Circuit's decision.[35] By 1954, the NAACP had made considerable progress refining and promulgating its workplace-constitutional claims.

Yet, even as it honed and promoted its legal arguments, the NAACP emphasized the continuing importance of working within unions whenever possible and sought out legal claims that would facilitate, not thwart, workplace organizing. Attorneys at NAACP presentations were told that "we must attempt to give unions a chance to clean up their own houses wherever possible. Hence . . . it is suggested that you bring the [discrimination] matter to the attention of various hierarchy of the union before proceeding with litigation." The NAACP contemplated the Board's promise to decertify a union found guilty of racial discrimination, but advised against seeking this outcome. "The remedy of de-certification has the obvious disadvantage," NAACP attorneys noted, "that, if the threat of de-certification is ineffective and the de-certification actually takes place, the result is that there is no union, no collective bargaining relationship, and, therefore, no protection whatsoever against discrimination by the employer." Instead, the Committee thought it would be better to ask the Board to issue a ULP. Reflecting many labor leaders' claim that employers, not unions, were responsible for

35. See discussion of the NAACP and CIO's efforts to have unions' discriminatory membership practices and Board certification of such unions declared unconstitutional above at note 20. *Williams v. Yellow Cab Co. of Pittsburgh, Pa.,* 200 F.2d 302 (3rd Cir., 1953); Introduction, n.d. [1953], "Oil Workers Background Information, 1954, n.d." Folder, box 8, part III-J, NAACP Records; *Brotherhood of R.R. Trainmen v. Howard,* 343 U.S. 768 (1952).

workplace discrimination, the NAACP urged attorneys to bring these ULP claims against employers, not only unions. But "[t]he law, with respect to this kind of proceeding," they cautioned, "is completely unsettled."[36] Defending civil rights without undermining union rights would require that the NLRB interpret its ULP powers in the NAACP's favor.

In 1954, the NAACP's Houston branch let the national office know that it was primed to put these legal theories to test. The branch reported that its Labor & Industry Committee had called on LDF's Southwest Regional Counsel for advice and had "asked that the [local] bar association especially the Negro attorneys will make a special study in the field of labor because of the terrible employment situation." The branch also stated that "at least one Negro lawyer is giving all his time to these type of cases and spending much time in study with the various crafts so as to learn how to go to [them] for advice."[37] With legal theories circulating from the national to the local and back again and with members pressuring their branches into action, momentum for a legal assault on workplace discrimination built within the NAACP.

The NAACP's political staff, like its lawyers, was still focusing on unions both as a boon and a barrier for African-American workers. Due to Hill's massive turn-out efforts there was high union attendance for the NAACP's first "National Labor Conference" at the June 1953 convention. This side-meeting allowed NAACP unionists to blend national and regional NAACP activities with a host of labor-themed events. For example, Charles Webber, a delegate for the Richmond, Virginia, NAACP branch and the CIO, met with national union officials, heard labor speakers decry segregation, and pressed local NAACP branches to fight for minimum-wage laws. However, the convention resolutions also pushed back against some of the organization's labor allies, putting the labor movement on notice that the NAACP was prepared to help any "democratic non-Communist union pledged to secure equal job rights for the Negro worker" win government certification when competing against a racially discriminatory union.[38]

That fall, when Executive Secretary Walter White called for recommen-

36. Unauthored, n.d. [1954–1955], manuscript, "Oil Workers Background Information, 1954, n.d." Folder, box 8, part III-J, NAACP Records; Report of the Committee on Discrimination in Employment, n.d. [1953], manuscript, ibid.

37. Annual Report of Branch Activities, April 19, 1954, "Houston, TX, 1954" Folder, box 195, part II-C, NAACP Records (typographical errors corrected).

38. "Major Trade Unions," Annual Convention Records, June 18, 1953, ibid., reel 8; Patrick E. Gorman, Annual Convention Records, June 25, 1953, ibid.; Charles C. Webber, Annual Convention Records, June, 1953, ibid.; Annual Convention Resolutions, June 27, 1953, Boehm, Meier, and Bracey, ibid., reel 6. On the NAACP's anti-communism during the 1950s, see Jonas, *Freedom's Sword,* ch. 5.

dations for the NAACP's ten-year plan, Hill echoed the conventioneers' warning, responding with a "Plan to Secure the Full Integration of Negro Workers within the Organized Labor Movement." First on Hill's list was making it the law that government-certified unions "are amenable to the requirements of the Constitution."[39] Within months, the national NAACP staff was collaborating with African-American oil workers, NAACP branch officials, and local attorneys to actualize this goal. True to the NAACP's expressed faith in the union movement, the national CIO office and the Oil Workers' International also helped advance this workplace-constitutional strategy.

The impetus for this litigation began at the local level, where working-class African Americans were fed up with their limited job prospects. In January 1954, a Houston attorney, Roberson King, filed a case in a Texas state court against the Oil Workers' International and its Local 367, which organized workers at Shell Oil's Houston plants. King brought a range of constitutional claims throughout the 1950s on behalf of black trade unionists, many of them members of the Houston NAACP branch. In the Shell case, the African-American workers represented by King claimed that the integrated Local's preservation of segregated jobs, lines of promotion, and seniority violated the Constitution's requirement that unions' "representation be non-discriminatory, without difference as to race or color" and "deprived the [black workers] of property without due process of law."[40]

This local spark soon spurred coordinated national action as the interests of the CIO and the NAACP aligned. In March, George Weaver sent Robert Carter a copy of the workers' complaint. "It would seem to me that this is an unexplored route and could be used with effect in eliminating discrimination," Weaver mused. Noting that the practices at the Shell plant existed throughout the oil industry, he cautioned that similar action should be taken against non-CIO oil-worker unions. This would prevent "the possibility of a group of [white] workers in Shell Oil from agitating to go independent or into the AFL" should the black workers win their constitutional claim. Carter seemed to like the idea. He responded that he would have Jack Greenberg, another LDF attorney, look into the case. He suggested that he, Greenberg, and Weaver "sit down and discuss this" with Arthur Goldberg, the CIO's general counsel, and his colleague David Feller who worked closely with the NAACP on its civil rights

39. Hill to White, Oct. 6, 1953, Bracey and Meier, *Part 13, Series A,* reel 20.

40. *Holt v. Oil Workers International Union,* No. 430-707, complaint, District Court, Harris County, Texas (January 12, 1954), 4. Risa Goluboff has noted that substantive due process claims, like this one by King, persisted long after the New Deal supposedly interred them. Risa L. Goluboff, "Deaths Greatly Exaggerated," *Law and History Review* 24 (Spring 2006): 201; Goluboff, *Lost Promise,* 24, 206, 207, 266–67.

litigation.[41] The CIO may have been interested in protecting its unions from race-based raiding, but the strategy made sense for the NAACP as well: to break racial stratification in the industry and its unions, the NAACP would have to fight them all at once, not one by one.

In Houston, local workers and attorneys continued to pursue workplace constitutionalism, but their efforts began to reflect the national NAACP and CIO's interest in this litigation. In May 1954, workers at the Gulf Oil Corporation plant in nearby Port Arthur, Texas also decided to take legal action. The all-white Local 23 and the all-black Local 254 had begun to amalgamate earlier that year, electing a single negotiating committee. The resulting all-white committee, contrary to earlier promises to integrate lines of seniority and promotion, agreed to separate seniority lines for the nearly all-black Labor Division and the skilled, all-white Operating Mechanical Division. Just days after the Supreme Court issued its decision in *Brown,* Roberson King once again filed a suit on behalf of NAACP branch members, charging that the Gulf Oil union had violated their constitutional rights. The complaint argued that the union, by negotiating a contract that barred African-American workers from the more "desirable" skilled jobs, had "deprived plaintiffs of their rights without due process of law as condemned by the Fifth Amendment of the United States Constitution." This time, however, King brought his case in federal, not state, court, increasing its chance of changing the law beyond Texas. He also charged Gulf Oil, not only its all-white union, "with denial of rights to plaintiffs under the Constitution, laws, and public policy of the United States." Thus, this case echoed the NAACP's strategy of suing employers as well as unions and promised to set a constitutional precedent for both defendants' discriminatory practices. In addition, the Oil Workers' International office joined the suit on behalf of its African-American local and against its all-white Local 23, reflecting the national CIO's support for these civil rights claims.[42] As workplace-constitutional litigation bubbled up at the local level, turning the legal heat high on the Texas plants and the all-white Oil Workers locals, time grew short for the NAACP's national office to initiate an industry-

41. George L. P. Weaver to Carter, March 5, 1954, Bracey and Meier, *Part 13, Series C,* reel 4. Carter to Weaver, March 23, 1954, "Labor: *Holt et al. v. Oil Workers International Union,* 1954" Folder, box 89, part II-B, NAACP Records.

42. *Syres v. Oil Workers International Union,* Local 23, May 25, 1954, Bracey and Meier, *Part 13, Series C,* reel 4. Oral histories suggest that *Brown* may have made interracial organizing more difficult but also inspired legal action to integrate jobs. Michael Honey, *Black Workers Remember: An Oral History of Segregation, Unionism, and the Freedom Struggle* (Berkeley: University of California Press, 1999), 136, 150–54; Horace Huntley and David Montgomery, eds., *Black Workers' Struggle for Equality in Birmingham* (Urbana: University of Illinois Press, 2004), 19. This fits Michael Klarman's thesis about the decision's impact. Klarman, *From Jim Crow to Civil Rights,* 377, 381.

wide strategy that, it hoped, would end segregation in membership and promotion throughout the South.

Thus commenced a nearly year-long scramble to secure plaintiff members of AFL and independent unions so that the NAACP—true to its litigation strategy, but also to its raid-wary CIO allies—could launch coordinated complaints in the NLRB and with the PCGC. In June 1954, the NAACP, fresh from LDF's success in *Brown,* arrived in Dallas for its annual convention. Greenberg and Carter, having just led another round of lawyers' conferences on employment discrimination, held a special meeting about the oil cases. Meanwhile, Hill immediately began urging NAACP branch officials throughout the Gulf Coast region to help recruit plaintiffs. Noting that the cases against the CIO's Oil Workers locals had already been filed, Hill wrote the Louisiana State Conference of NAACP Branches that "[i]t is absolutely essential that at the earliest possible moment the NAACP secure plaintiffs in a suit against the AFL unions and against independent unions operating in the oil industry." While he thought that victory in these cases would affect unionized industries throughout the South, he especially urged that "[s]imultaneous action against all three groups of unions is extremely necessary and important to break once and for all the vicious tradition and practice of racial discrimination and segregation in this major industry."[43]

In the meantime, word from the NAACP's branches confirmed that winning changes in contracts negotiated by AFL and independent unions, in addition to CIO locals, was necessary not merely to shore up the CIO's base, but also to preserve the material benefits the NAACP's members stood to win. The few CIO unions whose contracts already allowed African-American workers to bid on skilled positions were afraid they would face raids if they tried to enforce these provisions. As Daniel Byrd, a New Orleans attorney and NAACP stalwart who was helping recruit plaintiffs in Louisiana, explained to Carter, the one CIO union in that region whose contract did not bar African Americans from skilled jobs "fear[ed] an exodus of white workers to the extent that they will demand an election and the C.I.O. may lose out to the A.F.L. or Independent." As a result, the union had asked its black members to hold off requesting job upgrades until after the upcoming election.[44] If the courts ruled for the plaintiffs in the pending Houston-area

43. Legal Department Report, April, 1954, *Supplement to Part 1, 1951–1955,* reel 2; Elizabeth to Hill, June 25, 1954, Bracey and Meier, *Part 13, Series A*, reel 20. Hill to Leonard P. Avery, July 13, 1954, "Labor Cases: Oil Industries, 1945–55" Folder, box 345, part II-A, NAACP Records; see also Hill to U. Simpson Tate, July 12, 1954, Bracey and Meier, *Part 13, Series A,* reel 13.

44. Daniel E. Byrd to Carter, n.d., "PCGC, Complaint to, 1954–55" Folder, box 9, part III-J, NAACP Records.

cases, more CIO locals and their African-American members would face the same threat.

Meanwhile, the Houston cases were rapidly moving ahead, increasing the pressure on the NAACP to file its coordinated NLRB and PCGC actions. In the fall of 1954, Weaver and Hill went to Dallas to meet with the plaintiffs and officials of the Oil Workers' International. By January 1955, the District Court had rejected King's constitutional arguments, dismissing his case against Gulf Oil and its Houston Oil Workers local for lack of jurisdiction. But the pressure to find plaintiffs from AFL and independent unions was hardly off. King appealed the District Court's decision. The Oil Workers' International threw its weight behind King's appeal, arguing to the Fifth Circuit Court of Appeals that the discriminatory contract had violated the African-American workers' constitutional rights. According to the Oil Workers, in a brief that echoed many of the legal theories the NAACP had honed over the previous years, there was plenty of state action: the NLRA limited the self-help alternatives black workers could use to protest the contract; the Board had authorized the discriminatory contract; and the union itself was a state actor because the NLRB, and not the workers' consent, gave the union its authority.[45] The Fifth Circuit could issue its ruling at any time.

By the start of 1955, the NAACP was nearly, but not quite, ready to file its claims. Hill and Carter had already secured plaintiffs from AFL and independent oil-worker locals in Texas and Louisiana and had begun exhausting the necessary administrative procedures. But one major Gulf oil-refining region remained to be canvassed: Arkansas. In February, Hill set off for an investigatory "tour of [the] deep south." Among his stops were Little Rock and El Dorado. There he found a similar pattern of racially integrated but white-dominated unions that bargained for segregated hiring and lines of progression. But the pervasiveness of segregation at these plants shocked even Hill. At the El Dorado Lion Oil Company, Hill reported, even the "*time clocks* are segregated." By March, seven El Dorado workers, members of both the AFL's International Union of Operating Engineers, Local 381, and Oil Workers, Local 434, had signed on to the suit.[46]

45. Herbert Hill to Roy Wilkins, September 15, 1954, memo, *Part 13, Series A,* reel 20. Oil Workers International Union, January 13, 1955, motion and brief, "*Syres v. Oil Workers Int'l Union,* Local 23, 1955" Folder, box 2337, part V, NAACP Records.

46. Hill to White, Sept. 3, 1954, Bracey and Meier, *Part 13, Series A,* reel 13; Hill to Wilkins, Sept. 14, 1954, ibid., reel 20; Hill to Lawrence H. Conley, Oct. 19, 1954, ibid., reel 13; Hill to Carter, Nov. 17, 1954, ibid.; Executive Office Reports, December 13, 1954, Boehm, Meier, and Bracey, *Supplement to Part 1, 1951–1955,* reel 2; Hill to Moon, February 1, 1955, Bracey and Meier, *Part 13, Series A,* reel 20; Hill to Wilkins et al., March 2, 1955, ibid., reel 13; Executive Office Reports, April 11, 1955, Boehm, Meier, and Bracey, *Supplement to Part 1, 1951–1955,* reel 2.

The legal team was now ready to commence the coordinated actions that Hill believed would "be a historic step forward in creating a new body of labor law to protect the rights of Negro workers." As suggested in its numerous employment discrimination workshops, the NAACP attorneys charged employers as well as unions. In April 1955 Carter, with Thurgood Marshall's co-signature, filed a complaint with the PCGC, arguing that multiple oil companies and unions had not only violated the terms of their collective bargaining and government contracts, but had also "deprived complainants and all other Negroes employed of rights and privileges guaranteed to them by the Constitution and laws of the United States." The complainants sought changes in the five named companies, but also urged that "[a] comprehensive investigation of employment patterns of this entire industry . . . should be undertaken by this Committee." Then, in June, the NAACP filed an additional eight NLRB complaints on behalf of thirty-one workers at Louisiana, Texas, and Arkansas refineries. The complaints accused employers as well as unions and asserted black workers' constitutional rights. In the oil industry, the NAACP used administrative law and agencies to make its most concerted constitutional attack on workplace discrimination.[47]

In addition to using the administrative state to expand the state-action doctrine and reach discrimination by employers and unions, the NAACP's PCGC and NLRB complaints also reflected its support for unionization and its evolving understanding of discrimination. In line with the legal strategy developed over the preceding years, the NAACP did not merely ask the Board to wield the hard stick of decertification, but preferably to issue union-preserving ULPs. At the same time, instead of seeking integration of union membership, the NAACP's PCGC and NLRB actions challenged racially exclusive apprenticeship programs and the segregated jobs, seniority, and lines of promotion that relegated African-Americans to the lowest paying work. Thus, while the NAACP fought segregation, it did so toward undeniably substantive ends: well-paying, skilled jobs.[48]

47. Hill to White, Sept. 3, 1954, *Part 13, Series A,* reel 13. The PCGC charges addressed discrimination at Esso Standard Oil Corp., Carbide and Chemical Co., Lion Oil Co., and Cities Service Refining Corp. Carter and Marshall, n.d. [1955], complaint, "PCGC, Complaint to, 1954–55" Folder, box 9, part III-J, NAACP Records; LDF, June 1, 1955, Bracey and Meier, *Part 13, Series A,* reel 20; Legal Department Report, June–Aug., 1955, Boehm, Meier, and Bracey, *Supplement to Part 1, 1951–1955,* reel 2. Unfortunately no copies of the NLRB petitions appear to exist either in the NAACP's papers at the Library of Congress or in the NLRB's papers at the National Archives. The substance of the legal claims is derived from the NAACP's statements, its prior NLRB petitions, and the legal theories it developed in advance of its claims.

48. Carter and Marshall, n.d. [1955], complaint, "PCGC, Complaint to, 1954–55" Folder, box 9, part III-J, NAACP Records; LDF, June 1, 1955, Bracey and Meier, *Part 13, Series A,* reel 20; Legal Department Report, June–Aug., 1955, Boehm, Meier, and Bracey, *Supplement to Part 1, 1951–1955,* reel 2.

Over the next months, the NAACP's claims drew immediate administrative action even as the status of their constitutional theories remained uncertain in the courts. Over the summer of 1955, the PCGC opened an investigation while the NLRB's regional officers held hearings on the NAACP's petitions. Meanwhile, the NAACP received some mixed news from the federal courts in the case against Gulf Oil and Local 23. The Fifth Circuit rejected the plaintiffs' constitutional theory and affirmed the lower court's dismissal of the suit. However, Judge Richard Rives, writing in dissent, found ample state action to reach the Local's discriminatory contract with Gulf. He observed that, according to *Shelley v. Kraemer* and the duty of fair representation cases, it seemed that where the Board sanctioned a contract negotiated by a union and employer, "there can be no discrimination based on race or color." Emphasizing the constitutional principles underlying his dissent, Judge Rives reasoned that "[a]ll men are entitled to equal protection of the law and . . . the law will not lend its aid to keep any man down or to prevent his advancement or promotion." It was unclear what influence the decision or dissent would have, but overall, the NAACP's outlook was upbeat: the Legal Department's end-of-the-summer report noted that, in response to the PCGC and NLRB actions, at least one union had notified its members that it would stop the complained of contracting practices.[49]

The oil cases targeted discrimination in the newer industrial unions, were supported by a racially progressive International and the CIO's national office, and focused on a constitutional right not only to join unions on an equal basis, but also to access decent jobs. Through a mix of local initiative and national planning, the oil cases involved a coordinated strategy that blended court, NLRB, and PCGC advocacy. Simultaneously, the NAACP embarked on a quite different workplace-constitutional course.

Water

As work cooled and the waiting began on the oil cases, a conflict between the Seafarers' International Union and two African-American sailors aboard the ship the *S.S. P&T* heated up. In late June 1955, Hill received a letter from William Anderson and Richard Fulton, an assistant cook and chief steward—and the only African Americans—on the *P&T*. Their letter recounted months of verbal harassment and violent threats by a white officer. Reporting that efforts to push African Americans out of the trade were common, Anderson and Fulton asserted that "we are one of the ships on

49. Legal Department Report, June–Aug., 1955, ibid.; Executive Office Reports, Oct. 10, 1955, ibid.; *Syres v. Oil Workers Intern. Union,* Local No. 23, 223 F.2d 739 (5th Cir., 1955) (Rives, J., dissenting); Legal Department Report, June–Aug., 1955, Boehm, Meier, and Bracey, *Supplement to Part 1, 1951–1955,* reel 2.

which the men will fight for the right to work at their chosen trades." They asked the NAACP to help them in this fight.[50]

The NAACP's challenge to discrimination in the shipping unions would not proceed like its oil cases. As in the oil cases, it would face older AFL craft unions that had a long and virulent history of racial exclusion. But instead of a racially progressive, safely anti-Communist CIO union as an ally, it would find itself amid a battle between the AFL unions and unions recently expelled from the CIO for Communist affiliation. Rather than cooperation between national and local NAACP officials, the national office confronted a branch still charged by radical politics, whose constituency was sympathetic with, if not members of, these left-led unions. The litigation that resulted was a far cry from the carefully orchestrated oil cases. Instead, the local branch took things into its own hands, and the national office was left to catch up and, in its view, clean up.

Legally, these cases used the Constitution to a different end. The oil cases argued that the Constitution set the terms of collective bargaining agreements. In contrast, the shipping cases harkened back to the claims of the 1940s, arguing that the Constitution barred the NLRB from certifying unions that failed to give black workers membership or a full voice in the union. The shipping cases thus bucked the national office in this regard as well. As NAACP legal strategists had concluded after their 1953 study of workplace-discrimination claims, while challenging the certifiability of discriminatory unions might be a potent threat for black workers to wield against recalcitrant unions, it also ran the danger of leaving workers without any union at all.

In June 1955 the *P&T* stopped in New Jersey long enough for Anderson and Fulton to meet with Hill and sign legal retainers before shipping out for California. Hill immediately contacted the Coast Guard and Pope & Talbot, the ship's owner, requesting that they take action to protect the men from violence. "Association will hold company responsible for any acts of violence committed against Fulton and/or Anderson," Hill's telegram warned the ship's owner. However, his advice went unheeded. In a series of letters sent from different ports of call, Anderson and Fulton recounted the mounting tension with the violent officer, who had the passive support of the ship's captain and some of its crew. The secret, frightened sympathy Anderson and Fulton received from several of their white shipmates only heightened their concern. These crew members alerted the two that the union was circulating a petition to order them off the ship once it reached California.[51]

50. William Anderson and Richard J. Fulton to Hill, June 25, 1955, Bracey and Meier, *Part 13, Series A,* reel 11.

51. Hill to Lt. Spinella, June 29, 1955, ibid.; Hill to Pope & Talbot, Inc., June 29, 1955, ibid.; Fulton to Hill, July 1, 1955, ibid.; Anderson and Fulton to Hill, July 11, 1955, ibid.

By mid-July, the officer's threats had translated into action. According to Fulton, the officer "kicked in the door of [Fulton's] room" and attacked him and another man with a knife. "We were very lucky to be able to ward him off with the two chairs which were in my room," Fulton wrote. Fulton reported that before the attack, the officer had been "raving around on deck about 'niggers' not supposed to be on the ship and that he and his union were going to see that they got off." Hill forwarded this information on to Franklin Williams, LDF's West Coast Regional Counsel, and watched from afar as the backstory to this incident unfolded.[52]

For years, the NAACP's relationship with the Seafarers Union, an AFL-affiliated federation of resolutely racist craft unions, had been a contentious one. In 1947, the NAACP had intervened on behalf of black workers in Mobile, Alabama, after a Seafarers local ignored a black worker's seniority and passed him over for a job assignment. By the summer of 1951, this strategy of pure negotiation had shifted to one of negotiation in the shadow of legal action. LDF used a range of tactics, including petitioning the union, filing complaints with the New York State fair employment office, and threatening a lawsuit to secure a New York Seafarers local's promise to end racial discrimination in its grants of membership, work permits, and job referrals.[53]

Then, in the winter of 1954, a rebellious branch embroiled the politically cautious NAACP in precisely the sort of communism-tinged, inter-union battle it assiduously sought to avoid. The San Francisco NAACP branch had defied the national hierarchy, filing an amicus brief in an NLRB action without first alerting the state, regional, or national office. The branch's brief challenged the NLRB's ability to certify a racially discriminatory union in a heated—and factually complex—election battle between the Seafarers and two unions expelled during the CIO's anti-Communist purges: the International Longshore and Warehouse Union (ILWU) and the National Union of Marine Cooks and Stewards (NUMCS). In the NLRB election, workers in the West Coast shipping industry were choosing between the Seafarers and the ILWU. The Seafarers was a federation of three unions, two of which had a long history of racial exclusion but one of which, the Marine Cooks and Stewards union, had a better reputation. The ILWU was

52. Fulton to Hill, July 17, 1955, ibid.; Hill to Franklin H. Williams, July 28, 1955, ibid.

53. The Seafarers was founded in 1938. It incorporated the International Seamen's Union and the Sailors' Union of the Pacific, whose collective history of nativism and racial exclusion stretched back into the nineteenth century. Bruce Nelson, *Workers on the Waterfront: Seamen, Longshoremen, and Unionism in the 1930s* (Chicago: University of Illinois Press, 1988), 49, 241. Labor Secretary Report, March 1, 1947, Bracey and Meier, *Part 13, Series A,* reel 9; Legal Department Report, May 1951, Boehm, Meier, and Bracey, *Supplement to Part 1, 1951–1955,* reel 2; Executive Office Reports, July–Aug. 1951, ibid.

challenging the Board's designation of a bargaining unit that included both stewards and workers organized by the Seafarers' two racially exclusive unions. According to the ILWU, the stewards should be given a separate bargaining unit because the Seafarers could not fairly represent them due to its confederate unions' discriminatory practices. By challenging the notoriously discriminatory but anti-Communist Seafarers in a battle with its Communist-affiliated competitors, the NAACP had walked into the union turf war and Communist-tainted alliance that the organization had shunned from its 1940s litigation up to the ongoing oil-worker cases.[54]

National NAACP staff quickly sought to distance the organization from the allegedly Communist unions and smooth its relations with local AFL officials. LDF's Franklin Williams immediately sent a mollifying letter to the vice-president of the Seafarers explaining that the San Francisco branch's intervention before the NLRB "when the question of racial discrimination was [also] raised by the ILWU" did not mean that the NAACP was taking the ILWU's side. Citing the organization's non-cooperation policy with the expelled CIO unions, Williams stated that the action had simply been in accordance with the NAACP's position "that wherever discrimination is alleged the full facts should be adduced." Nonetheless, local publicity about the NAACP's partisanship mushroomed and Williams was forced to make public and private declarations of its neutrality. "NAACP Not Supporting ILWU in Union Dispute," the headline of one of his press releases screamed. Meanwhile, supporters of the ILWU pressured the NAACP to back the union publicly in its battle with the Seafarers. When the Seafarers then claimed that *it* had received the NAACP's backing, the West Coast regional office was deluged with protests. "Communications, phone calls, and personal contacts are being received daily," Williams complained. Soon Williams sent an emergency request to the national office asking for help managing the situation. "Important!! For Immediate Action," read Williams's memo. For assistance, he turned to those national officers whose work most bridged the tangle of law and politics involved: "the professional advice or thinking of either Mr. Hill or Mr. Mitchell," the head of the NAACP's Washington lobbying office, "would be desirable," he wrote.[55]

54. Pacific Maritime Ass'n, 110 NLRB 1647 (1954). Branches were required to notify the state conference before bringing legal action. Annual Convention Records, June 27, 1953, Boehm, Meier, and Bracey, *Supplement to Part 1, 1951–1955,* reel 6. The San Francisco branch ignored this policy. Williams to White et al., January 31, 1955, Bracey and Meier, *Part 13, Series A,* reel 11.

55. Williams to Ed Turner, Nov. 24, 1954, ibid.; Williams to White et al., January 31, 1955, ibid. "NAACP Not Supporting ILWU in Union Dispute," January 14, 1955, ibid.; Williams to White et al., January 31, 1955, ibid.; "NAACP Charges Misrepresentation by ILWU and AF of L in Election Dispute," February 7, 1955, ibid.; Williams to White et al.,

If the politics of the Board-monitored election were explosive, the legal outcome of the branch's intervention was less decisive. The Board dismissed the challenge to the Seafarers' certifiability. "[T]he Board, while not condoning such [discriminatory] practice, has no express authority to pass on eligibility requirements for membership in a labor organization." The NLRB then provided its discrimination boilerplate: the Seafarers Union could be certified because it had pledged to fairly represent all members of its bargaining unit. "However, the Board will police its certification of a statutory bargaining agent to see to it that it represents equally all employees in the bargaining unit regardless of race, color, or creed. Should the certified bargaining agent fail to do so, the Board may revoke its certification." After ten years without a single decertification, these words were of little comfort. The ILWU appealed the ruling, while the San Francisco branch fought the hold the national staff had placed on its further participation. In January 1955, the Ninth Circuit Court of Appeals agreed with the Board without comment.[56]

If the NAACP's constitutional theories about union membership and board certification were failing to garner the Board's or the courts' endorsement, its renegade shipping-industry action nonetheless inspired unexpected support for its oil-industry claims. Judge Walter Lyndon Pope, writing in a separate opinion to the Ninth Circuit's Seafarers decision, explained that, should the Seafarers continue to discriminate, African-American stewards would have sufficient avenues for legal redress. Among the options he suggested was one that bolstered the NAACP's challenge to the oil industry's discriminatory contracts. The NLRB, as a state actor, Pope reasoned, might be constitutionally prohibited from enforcing agreements negotiated by racially discriminatory unions. Noting that the Supreme Court's decision in *Shelley* and another racially restrictive covenant case had recently suggested as much, Judge Pope mused that "the last chapter on this question has not been written."[57]

As the NAACP officer who Williams assigned to meet the *P&T* when it arrived in Southern California began to sort out Richard Fulton's case, it became clear that these same battles over racial, political, and union turf had sparked the officer's violent attack. Fulton, it turned out, had sup-

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February 8, 1955, ibid.; Williams to Wilkins, February 11, 1955, ibid.; "NAACP Issues Policy Statement in ILWU and AF of L Election Controversy," February 13, 1955, ibid.

56. *Pacific Maritime,* 1648. The NLRB twice ruled that it would have decertified a union but refrained in both instances due to extenuating circumstances. *Larus*; *Hughes Tool,* 104 NLRB 318 (1953). Williams to White et al., January 31, 1955, *Part 13, Series A,* reel 11. NLRB v. Pacific Ship. Ass'n, 218 F.2d 913 (9th Cir., 1955).

57. *Pacific Ship. Ass'n,* 915–16, citing *Shelley; Hurd v. Hodge,* 334 U.S. 24 (1948). *Hurd* extended *Shelley*'s non-enforcement prohibition to federal courts.

ported the ILWU in the past winter's election against the white officer's Seafarers union. Though the officer was promptly arrested, the Seafarers ordered Fulton off the *P&T* when it reached San Francisco. Thus began a new, lower-profile legal campaign, as the NAACP tried to help win Fulton membership in the union that now controlled his livelihood.[58] Unfortunately for Fulton, there proved to be more effective laws for punishing the officer's violent attack than for redressing the economic and racial warfare that followed the contentious election.

Oil

Back in the oil fields, the summer's waiting stretched into the fall. The Shell Oil workers, with the oversight of the PCGC, negotiated contract changes with their union and employer. A September 1955 judgment recognized the settlement and allowed the two sides to dismiss the African-American Shell workers' action. In his order, Judge William M. Holland of Harris County District Court suggested the plaintiffs' constitutional claims had merit, finding that the amended contract "complies with the constitutional and statutory requirements applicable to this case." Meanwhile, NLRB investigators fanned out across the region, seeking to corroborate the NAACP's claims. The reports back from the field seemed promising. Daniel Byrd, the New Orleans attorney helping with the oil-workers' cases, told Carter that the NLRB examiner had told him that "the matter was shaping up in accordance with the complaint."[59]

There was another positive, if ambiguous, sign. In November 1955 the Supreme Court reversed the Fifth Circuit's ruling in the Gulf Oil case, but its per curiam opinion provided little explanation why, simply citing the Court's past duty-of-fair-representation cases. Whether the Court agreed with the dissenting Fifth Circuit judge that the union and employer's contract had violated the Constitution was a matter for speculation. But these events, which could leave the Gulf Oil union newly vulnerable to race-based raiding, also put pressure on the NAACP's still-pending NLRB and PCGC actions.[60]

58. Lester P. Bailey to Hill, Aug. 2, 1955, Bracey and Meier, *Part 13, Series A,* reel 11; Hill to Moon, Aug. 3, 1955, ibid.; Bailey to Hill, Aug. 1, 1955, ibid.; Bailey to Hill, Aug. 4, 1955, ibid.

59. *Holt v. Oil Workers International Union,* No. 430-707, judgment, District Court, Harris County, Texas (September 22, 1955), 8; Byrd to Carter, August 17, 1955, "PCGC, Complaint to, 1954–55" Folder, box 9, part III-J, NAACP Records.

60. *Syres v. Oil Workers International Union,* Local No. 23, 350 U.S. 892 (1955); Edward W. Powers, "LMRA: Duty of Certified Union to Represent Bargaining Unit Fairly," *Michigan Law Review* 54 (February 1956): 567, 570.

In December 1955 the political field for the NAACP's workplace-constitutional claims changed dramatically. The AFL and CIO announced that they were merging into a single federation. The new AFL-CIO required all member unions to operate without racial discrimination and established a Civil Rights Department charged with remedying errant locals. These developments suggested that the merger would bring union policy up to the CIO's interracial par, rather than down to the AFL's racially exclusive floor, signaling hope for the southern oil workers. The merger also meant that the NAACP would no longer have to gingerly negotiate competing union allies. But just as the avenues of relief seemed to be opening, the NLRB shut the NAACP's constitutional claims down. In March 1956, the NLRB rejected the NAACP's appeal after its regional office dismissed all of the oil workers' ULP charges.[61]

Nonetheless, when Hill updated the plaintiffs on these unfortunate developments, he also reported that the legal actions seemed to have sparked a willingness to negotiate among some of the defendants. A triumphant Hill was soon announcing "the first significant breakthrough in the jim crow pattern within the Southern oil refining industry." At the Beaumont, Texas, Magnolia Oil plant a new agreement had resulted in the promotion of thirty-two African-American workers into previously white-only jobs. Over the next months, he reported modest numbers of similar promotions in several other Texas refineries, the end of segregation in a Louisiana plant, and a pledge from O. A. Knight, the president of the Oil Workers' International, "that the International Union will not ratify any collective bargaining agreements containing discriminatory provisions." To top it all off, Hill proudly reported that he had helped organize a mass eat-in at the Houston Shell plant's segregated lunchroom and, after being rebuffed, a boycott by the workers. Pleased with his successes, Hill sent the AFL-CIO's new Civil Rights Department materials on the oil-worker cases, which, he believed, would "document . . . the progress we have made in the fight to eliminate discriminatory practices in the oil refining industry."[62] Hill's enthusiasm and hope, however, soon was transformed into frustration.

61. On the AFL-CIO merger and the CIO's negotiation of an anti-discrimination guarantee, see Arthur J. Goldberg, *AFL-CIO, Labor United* (New York: McGraw-Hill Book Co., 1956); Zieger, *The CIO,* 360-64. Legal Department Report, March 1956, Bracey and Meier, *Supplement to Part 1, 1956–1960,* reel 1.

62. Hill to Warner Brown, March 12, 1956, Bracey and Meier, eds., *Papers of the NAACP, Supplement to Part 13: The NAACP and Labor* (Bethesda: UPA, 1997), microfilm, reel 12; Hill to E. D. Sprott, March 21, 1956, ibid.; Hill to Florence Irving, June 12, 1956, ibid.; Muriel S. Outlaw to Moon, April 9, 1956, ibid.; Executive Office Reports, May 14, 1956, Bracey and Meier, *Supplement to Part 1, 1956–1960,* reel 1. The Oil Workers' name had recently changed to the Oil, Chemical and Atomic Workers International Union. I continue to use "Oil Workers" for simplicity's sake. Like the Shell Oil workers, other African-American

Promotions of African-American workers out of unskilled labor pools failed to accelerate or spread and Hill began filing complaints calling for the Civil Rights Department's action in the stalled oil-industry cases. Likewise, the PCGC's action fizzled once a few Oil Workers locals' lines of promotion had been integrated. Over the next three years, Hill, Carter, and Roy Wilkins, the NAACP's executive secretary, sent letters and issued press releases decrying the Committee's failure to act. The PCGC repeatedly assured them that action was imminent, but as of 1958, little had happened. Wilkins wrote again warning the Committee that he planned to issue a report on the NAACP's dormant PCGC cases at the organization's Annual Convention. The threat produced a meeting for Hill with members of the PCGC, and Hill promptly alerted all the involved NAACP branches that relief might finally be coming. But all his meeting produced was a series of letters to Carter stating that the Committee's reinvestigation of the NAACP's claims indicated that business conditions or African-American workers' own disinterest, not discrimination, were to blame for the paltry number of black workers promoted out of unskilled jobs.[63]

Neither the NAACP nor its members agreed with the PCGC's dismissive assessment of their claims. In September 1959 Hill wrote the PCGC, passing on a letter from the Lake Charles, Louisiana, branch that complained of persistent discrimination at the local Cit-Con refinery plant. Noting that the branch members filed their original complaint in April 1955, Hill wrote that "[i]t is evident that little or no change has occurred in the status of Negro workers who are limited to menial or unskilled job classifications." In the end, the PCGC claimed victory for getting concessions from Oil Workers locals that probably would have made them without the Committee's involvement. It got nothing from the historically racist and still

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workers combined legal action with direct action. *Pittsburgh Courier* (March 8, 1952), n.p.; Cornelius Simmons to Hill, May 18, 1959, Bracey and Meier, *Supplement to Part 13,* reel 1. Hill to Boris Shishkin, May 7, 1956, *Supplement to Part 13,* reel 12.

63. Hill to Shishkin, December 4, 1958, Bracey and Meier, *Supplement to Part 13,* reel 12. Carter to Richard Nixon, June 5, 1957, "Labor: PCGC, 1956–58" Folder, box 190, part III-A, NAACP Records; "New Policy for Bias Unit 'Badly Needed'—Wilkins," November 21, 1957, press release, ibid.; Hill to A. Philip Randolph, January 9, 1958, ibid.; Wilkins to Nixon, April 2, 1958, ibid.; "President's Bias Committee to Report on Pending Cases," press release, April 24, 1958, ibid. An example of Hill's letters to local branches involved in the oil litigation is Hill to C. B. Rainey, April 17, 1958, "El Dorado, AK, 1956–58" Folder, box 3, part III-C, NAACP Records; Jacob Seidenberg to Carter, October 21, 1958, "Labor: PCGC, 1956–58" Folder, box 190, part III-A, NAACP Records; Margaret Garrity to Carter, August 18, 1960, "Labor: PCGC, 1959–62" Folder, box 190, part III-A, NAACP Records. For the mixed success of the oil workers' litigation, see Ray Marshall, "Some Factors Influencing the Upgrading of Negroes in the Southern Petroleum Refining Industry," *Social Forces* (Dec. 1963): 186.

recalcitrant AFL and independent unions. Thus, any Oil Workers locals that lived up to their newly negotiated non-discriminatory contracts remained vulnerable to race-based raiding, demonstrating exactly why the sweep of an NLRB or court order—or even the industry-wide solution the NAACP had initially urged on the PCGC—was far preferable to the Committee's plant-by-plant approach.[64]

With these developments, the oil cases entered their steady decline. Instead of a model of success they became the NAACP's exemplar of the PCGC's ineffectiveness, the NLRB's indifference, and the recently merged AFL-CIO's failure to address the concerns of black workers.

Dragging Heels and Mounting Tensions

As the 1950s drew to a close the NAACP's challenge to workplace discrimination persisted even as the organization found itself under attack due to a potent southern cocktail of anti-communism and massive resistance. At the same time that the AFL and CIO were merging, LDF and the NAACP were growing increasingly distinct. In 1956, soon after the NLRB dismissed the oil cases, the NAACP and LDF increased their financial and organizational separation. Robert Carter left LDF to become the first general counsel in the NAACP's own Legal Department. Ideally, this move would proliferate and energize the organization's workplace-constitutional campaign by broadening the resources devoted to its success. But in reality, Carter's main charge was to defend the NAACP against the wave of harassing legislation and lawsuits—often disguised as anti-Communist measures—that its branches were facing throughout the South. In addition to draining the NAACP's legal resources, these state laws, which banned NAACP chapters that refused to turn over their membership lists to the state, also sharply limited Hill's ability to work with local unions and branch offices.[65] None-

64. Hill to Joseph Houchins, September 2, 1959, "Labor: PCGC, 1959–62" Folder, box 190, part III-A, NAACP Records. Timothy Thurber's look at the PCGC, while uncovering its staff's desire to be more effective, which included trying less individualized approaches to discrimination, largely confirms the NAACP's view that the PCGC won few tangible changes in employment practices. Timothy M. Thurber, "Racial Liberalism, Affirmative Action, and the Troubled History of the President's Committee on Government Contracts," *Journal of Policy History* 18 (2006): 446.

65. Tushnet, *Making Civil Rights,* 310; Woods, *Black Struggle,* especially ch. 2; George Lewis, *The White South and the Red Menace: Segregationists, Anticommunism, and Massive Resistance, 1945–1965* (Gainesville: University Press of Florida, 2004). On southern states' restrictions on the NAACP and their effect on the organization's work in those states, see August Meier and John H. Bracey, Jr., "The NAACP as a Reform Movement, 1909–1965: 'To Reach the Conscience of America,'" *Journal of Southern History* 59 (February 1993): 3,

theless, while Hill and Carter waited for further action in the oil cases, the NAACP continued to use negotiation, collaboration, and AFL-CIO Civil Rights Department complaints to prevent African-American workers from remaining locked out of a union voice and locked in to the rapidly dwindling pool of unskilled industrial jobs.

When the organization saw little change in the CRD cases it brought, it began to publicly confront the AFL-CIO over what the NAACP saw as the merged unions' failure to live up to its own civil rights policies. At the NAACP's annual meeting in January 1959, it released an exhaustive and scathing report by Hill. After detailing the vulnerability of African-American workers in an era of mechanization and rising unemployment rates, Hill sharply denounced the "significant disparity between the declared public policy of the National AFL-CIO and the day to day reality as experienced by Negro wage earners in the North as well as in the South." Given the many unaddressed complaints the NAACP had filed with the department over the past three years, Hill proclaimed, "We are forced to note [its] inability . . . to effectively enforce AFL-CIO policy resolutions against discrimination and segregation." By March, Roy Wilkins had publicly patched up his dispute with AFL-CIO president George Meany but the tenor of the organizations' relationship had changed.[66]

The NAACP kept its growing rift with the labor movement in the public eye. At its July 1959 convention, A. Philip Randolph gave a speech decrying segregation and racial exclusivity in union membership, whether urged by black or white workers. The convention resolutions, in turn, pointed out the gap between AFL-CIO policy and its unions' practice. "Particularly," they emphasized, "we deplore the failure of the AFL-CIO to take a stronger stand against the continued existence of segregated locals in the affiliated unions and among the Federal locals." During the spring of 1960, the NAACP and the AFL-CIO battled openly over the exclusion of black workers from prominent Washington, D.C., building projects, including White House renovations and new offices for House Representatives.[67]

25; C. V. Adair to Current, September 2, 1957, "Houston, TX" Folder, box 149, part III-C, NAACP Records; Viola Scott to NAACP, November 5, 1957, "El Dorado, AK, 1956–58" Folder, box 3, ibid.; Conley to Wilkins, May 2, 1957, "Lake Charles, LA, 1956–65" Folder, box 53, ibid.

66. Herbert Hill, January 5, 1959, Bracey and Meier, *Supplement to Part 1, 1956–1960,* reel 2; A.H. Raskin, "NAACP Accuses Labor of Bias Lag," *New York Times* (January 5, 1959), 29 (hereafter cited as *NYT*). "Joint Statement of NAACP Executive Secretary and AFL-CIO President," March 20, 1959, Bracey and Meier, *Supplement to Part 13,* reel 1; Executive Office Reports, April 13, 1959, Bracey and Meier, *Supplement to Part 1, 1956–1960,* reel 2.

67. A. Philip Randolph, July 15, 1959, Bracey and Meier, *Supplement to Part 1, 1956–1960,* reel 10. African-American unionists were divided on separate versus interracial union-

Nonetheless, at that summer's convention, Wilkins declared that the "reports going around about friction between the NAACP and labor" were pure nonsense. "The NAACP has only one enemy, discrimination and segregation." Conference participants were encouraged to use boycotts and pickets to press employers to open up jobs, and the usual parade of union leaders urged the twin goals of labor and civil rights. But, for the first time in many years, the conference resolutions signaled a more aggressive legal stance. Affirming its support of the closed-shop agreements favored by the labor movement and reviled by its foes, the NAACP made clear that, when closed unions used closed shops to exclude African-American workers, it would "as a last resort call upon the National Labor Relations Board to enforce the anti-closed shop provision of the National Labor Relations Act."[68] The resolution, which significantly diverged from the labor movement's line, was a sign of things to come.

Oil and Water, Redux

At the start of 1961, the NAACP released another report by Herbert Hill titled "Racism within the Organized Labor Movement: A Report of Five Years of the AFL-CIO." The report covered white-supremacist domination of Southern unions, the persistence of segregated locals, racially exclusive membership, separate lines of promotion, and the exclusion of African Americans from trade and industry apprenticeship programs. Declaring that these discriminatory practices were "not limited to any one area of the country or to some few industries or union jurisdictions," Hill detailed charges against oil and shipping, railroads and construction, general manufacturing and craft unions throughout the country. Hill also termed the Civil Rights Department an impotent figurehead that existed solely "to create a

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ization. See Arnesen, *Brotherhoods of Color*; Nelson, *Divided We Stand.* This issue often put all-black locals in conflict with integrationist national labor and civil rights leadership. See Executive Office Reports, Sept. 9, 1957, Bracey and Meier, *Supplement to Part 1, 1956–1960,* reel 1. Wilkins to Meany, May 25, 1960, Bracey and Meier, *Supplement to Part 13,* reel 1; Meany to Wilkins, May 27, 1960, ibid.; *NYT* (May 25, 1960): C10.

68. "Randolph Hails NAACP Role in Fighting Labor Union Bias," June 26, 1960, Bracey and Meier, *Supplement to Part 1, 1956–1960,* reel 12; Annual Convention Records, June 23, 1960, ibid.; Wilkins to Members of Board, June, 1960, ibid. In a closed shop, the employer agrees to only hire union members. Here, a closed union is one that excludes African Americans from membership. A closed union that negotiates a closed shop effectively shuts black workers out of that employer's workplace. The Taft-Hartley Act banned closed shops but allowed workers to choose a union shop, which requires all new hires to join the union. On the NAACP's tactic of blending public pressure on the labor movement with continued alliance, see Meier and Bracey, "NAACP," 28.

'liberal' public relations image" for the AFL-CIO, thereby clarifying that the NAACP no longer regarded working within union governance structures as an efficacious strategy.[69]

Over the next three years, the NAACP geared up for an aggressive, public, and coordinated campaign against workplace discrimination in all the industries named in Hill's report. As before, it made equality claims toward decidedly substantive ends. This time, however, there were also changes. Politically, the NAACP's actions demonstrated the strains in its relationship with the labor movement. Legally, they reflected changes in constitutional doctrine, the evolution of labor law, and the NAACP's growing emphasis on job training as a linchpin of economic inequality. The other big difference was that, this time around, the NLRB finally endorsed the NAACP's constitutional- and labor-law theories.

In October 1962, the NAACP announced its "Legal Attack on Trade Union Bias," the very terms of which evinced the NAACP's newly confrontational approach. This "Attack" included NLRB actions against the Seafarers, the union that had thrown Richard Fulton off his ship seven years earlier, and against the white local of the segregated Independent Metal Workers Union at the Houston, Texas, Hughes Tool Company, an oil drilling equipment manufacturer. The NAACP assured that "in each instance . . . the complaint was filed only after efforts to secure remedial action through negotiation with the union had failed." However, in other respects, the actions exposed the NAACP's less conciliatory stance toward labor. No longer concerned with balancing charges against unions with claims against employers, the NAACP only targeted discrimination in the labor movement. In addition, while it still sought ULPs, the NAACP put a premium on having the Board declare that it would decertify discriminatory unions.[70]

In each case, the NAACP defined discrimination broadly. The first workplace-constitutional cases had sought African Americans' right to join unions. Those of the mid-1950s had broadened out to argue that the Constitution required unions and employers to ensure black workers' access to the best-paying jobs. Access to training, while addressed, had been ancillary to opening up lines of promotion. These earlier claims were echoed in this next round of litigation. But the cases also revealed the NAACP's changing understanding of the structures of economic inequality and thus of what rights the Constitution should guarantee. In

69. Hill, "Racism within Organized Labor: A Report of Five Years of the AFL-CIO, 1955–1960," January 3, 1961, Bracey and Meier, *Supplement to Part 13,* reel 7.

70. "NAACP in Legal Attack," Oct. 16, 1962, Bracey and Meier, *Supplement to Part 13,* reel 11.

the Seafarers case, the NAACP continued its past efforts to win access to racially exclusive unions and entry to higher-paying all-white jobs. Nonetheless, the NAACP recognized that integrated membership without equal participation in the union did not ensure black workers a full voice in workplace collective action and that integrated lines of promotion did little good when African Americans lacked the skills needed to qualify for newly opened positions. Thus, its Metal Workers petition emphasized access to union voice and what the NAACP now saw as the key to black Americans' economic future: training for an increasingly mechanized workplace.[71]

The NAACP's actions against the Seafarers and the Metal Workers synthesized its changed political framework and evolved understanding of discrimination with the latest labor law and its broad state-action theories. In advance of the latest round of NLRB cases, NAACP lawyers had held a conference on employment discrimination. Michael Sovern, a professor at Columbia University's School of Law and the author of a forthcoming article on using the NLRA to check racial discrimination, presented. His article's detailed explication of labor law reproduced, updated, and expanded the arguments the NAACP had developed in the early 1950s.[72] Joining it with the NAACP's decades of constitutional argumentation proved to be a potent mix.

As it had in the past, the NAACP argued that the Constitution imbued all stages of NLRB oversight of unions—from organizing campaigns to collective bargaining—making unions state actors and requiring that the Board police the actions of those it certified. Similar to the oil cases, it also sought ULPs against discriminatory unions, something the Board had, as of yet, refused to issue. Noting that the Metal Workers Union derived its exclusive bargaining rights from the NLRA, the NAACP reasoned that it "is thus bound by the Fifth Amendment not to violate the rights of Negro employees it represents." The NAACP also argued that the NLRB itself was "governed by the Constitution." Were it to certify a union that denies a black worker "the right to bargain for his own terms of employment" or that, like the Metal Workers, denies black members equal access not only to jobs and promotion, but also to the training necessary to qualify

71. *James C. Dixon v. Seafarers International Union,* draft NLRB petition, Oct. 1962, Bracey and Meier, *Supplement to Part 13,* reel 11; *Hughes Tool Company,* NLRB case no. 23-RC-1758, Oct. 24, 1962, ibid.

72. Michael Sovern, "The National Labor Relations Act and Discrimination," *Columbia Law Review* 62 (1962): 563. "Lawyers' Conference," March 2–4, 1962, schedule, ed. Bracey and Meier, *Papers of the NAACP, Part 22: Legal Department Administrative Files, 1956–1965* (Bethesda: UPA, 1997), microfilm, reel 19.

for them, it would "violate the Fifth Amendment."[73] Formal access to jobs was no longer sufficient; equal citizenship in the workplace required that African-American workers receive the training necessary to take advantage of these new opportunities.

The NAACP made sure to emphasize African-American workers' substantive stake in their asserted constitutional right. When the NAACP announced its new round of workplace litigation, Robert Carter compared the claims in these labor cases to the "'basic constitutional principle'" at stake in *Brown*. "'The right to equality in job opportunity is equally as basic, if not more so, as the right to an unsegregated education,'" Carter insisted. He continued, "'[a]ttainment of this goal will contribute immeasurably to improving the economic status of the entire Negro community and thus . . . the total economy.'" Even more than the school desegregation cases, Carter implied, the workplace campaign would strike at the heart of economic inequality.[74]

In December 1962, the NAACP's NLRB-focused constitutional campaign received doctrinal boosts from unlikely quarters. That month, the NLRB, for the first time, issued union and employer ULPs where it deemed that a union had violated its duty of fair representation against a worker in its bargaining unit. The case did not involve racial discrimination, but it made the NAACP's ULP claims much easier to argue and quite likely to succeed. The NAACP's primary challenge would now be convincing the Board that it had to decertify discriminatory unions. Luckily, that same month, the NLRB indicated that it might be warming up to the NAACP's constitutional theories. In response to a petition brought by an AFL-CIO union, the NLRB held that it could not recognize a bus company's union contracts because they segregated black and white workers into separate bargaining units with separate representation and lines of promotion. "Consistent with clear court decisions in other contexts which condemn governmental sanctioning of racially separate groupings as inherently discriminatory," the NLRB held, "the Board will not permit its . . . rules to be utilized to shield contracts such as those here." The decision cited *Brown* as well as recent non-employment-

73. James C. Dixon v. Seafarers International Union, draft NLRB petition, Oct. 1962, Bracey and Meier, *Supplement to Part 13,* reel 11; Hughes Tool Company, NLRB case no. 23-RC-1758, Oct. 24, 1962, ibid. For another NLRB action and the strains it put on the NAACP's relationship with organized labor, see Bruce Nelson, "'The CIO Meant One Thing for the Whites and Another Thing For Us': Steelworkers and Civil Rights, 1936–1974," in *Southern Labor in Transition,* ed. Robert H. Zeiger (Knoxville: University of Tennessee Press, 1997). On automation's decimation of African Americans' industrial employment, see Sugrue, *Origins of the Urban Crisis,* 143–52.

74. "NAACP in Legal Attack," Oct. 16, 1962, Bracey and Meier, *Supplement to Part 13,* reel 11.

related Supreme Court cases that had expanded the state-action doctrine to reach ostensibly private actors.[75] It seemed the NLRB might be ready to embrace the NAACP's claim that the Board was constitutionally prohibited from certifying unions that discriminated in jobs, membership, and access to training.

But doctrine would not be enough to win the organization's NLRB claims. Just as with the PCGC, it would take a heavy dose of politics to see these cases through. When the NAACP annual meeting convened in January 1963, the attendees vowed to press their fight against workplace discrimination to the finish, even as they reiterated their support for unionization and clarified that they were battling inequality in *employment,* not merely in the labor movement. Roy Wilkins charged that "the desperate plight of the Negro worker is our mandate as we press this year against the racial restrictions and policies imposed by employers." Publicity, complaints to government agencies, and selective buying campaigns would be their tools. As for the remaining racial restrictions in the labor movement, Wilkins promised cooperation with any serious and speedy union plan. However, "in cases of stand-pat-ism and malingering," the NAACP promised to file charges with the NLRB.[76] The NAACP was marshaling political pressure to back its NLRB claims.

The NAACP would not wage this battle alone. On February 28, during his special address on civil rights, President Kennedy detailed his administration's successes in the field of employment discrimination. Among other efforts, the president announced, "I have directed the Department of Justice to participate in [the pending NLRB union-discrimination] cases and to urge the National Labor Relations Board to take appropriate action against racial discrimination in unions."[77] With the president putting pressure on the Board to act, the NAACP's prospects raised considerably.

That same day, the Board's Trial Examiner issued his decision in the NAACP's Hughes Tool petition. *Hughes Tool* blended the old and the new from the NAACP's labor campaigns. For decades, Metal Workers' Locals 1 and 2 had operated with segregated membership, segregated seniority, and segregated jobs. During their 1961 contract negotiations the all-black

75. *Miranda Fuel,* 140 NLRB 181 (1962); *Pioneer Bus Co. v. Transport Workers Union of America,* 140 NLRB 54, 55, n3 (1962), citing *Brown,* 349 U.S. 294; *Bailey v. Patterson,* 369 U.S. 31 (1962); *Boynton v. Virginia,* 364 U.S. 454 (1960); *Burton v. Wilmington Parking Authority,* 365 U.S. 715 (1961).

76. Wilkins, Annual Meeting, remarks, January 7, 1963, Bracey and Meier, *Supplement to Part 1, 1961–1965*, reel 2.

77. Office of the White House Press Secretary, "The White House Special Message on Civil Rights," February 28, 1963, Congresslink: The Dirksen Congressional Center, www.congresslink.org/civil/cr1.html (June 2, 2007).

Local 2 protested the racially segregated lines for jobs, seniority, and promotions, requesting a clause promising to equalize job opportunities within two years. Instead, the white local and the employer signed the existing contract and added a special side agreement that created six apprenticeship positions for the all-white, well-paying Tool and Die Department. Local 2 refused to sign the new contract.[78]

Ivory Davis had worked at Hughes Tool for twenty years and was an official in Local 2. Despite the new apprenticeship's clear racial demarcation, when Hughes Tool asked for applicants, Ivory Davis signed up. After the employer ignored his request, Davis filed a complaint with Local 1. The union's grievance committee failed to respond. Davis, along with other Local 2 officials, filed a ULP petition with the regional NLRB office challenging Local 1's failure to grieve Davis's complaint. In August 1962, the Board's General Counsel announced that he would pursue Davis's case, noting that it would be a first "in the 27–year history of the National Labor Relations Act." Within weeks, Local 2 had asked the NAACP to represent it in the action. Carter and Maria Marcus, a young lawyer in Carter's office and a co-architect of the NAACP's 1960s Board campaign, soon filed motions expanding the petition to include a request that the Board decertify the Metal Workers—a request backed by the NAACP's workplace-constitutional theories.[79] After decades of refusing to take the NAACP's cases, the Board would finally hear its claims.

Using the same ambiguous reasoning as the Supreme Court's wartime fair-representation decisions, the *Hughes Tool* Trial Examiner ruled in favor of the all-black Metal Workers Local 2, recommending both that the Board issue ULPs against Local 1 and decertify the union. But he stopped short of declaring clear constitutional reasons for doing so. Nonetheless, his constitutionally inflected recommendations embraced African-American workers' full and equal access not only to job training, but also to the statutorily protected mechanisms of collective action and workplace citizenship; in the words of the *New York Times,* their "union rights" to voice and participation.[80]

The day of the decision, an exultant Carter wrote to the NAACP leadership. While the Trial Examiner's recommendations were not final, President Kennedy's announcement of his support suggests that "the Board will fol-

78. *Hughes Tool,* 1593–1608. For a rich case study of the *Hughes Tool* litigation and, especially, the decades-long interplay of local labor and civil rights activism that led up to it, see Batson, *Labor.*

79. *Hughes Tool,* 1593–1608; "NLRB General Counsel Authorizes Unfair Labor Practice Complaint," August 20, 1962, press release, folder 1, box 2309, part V, NAACP Records; L.A. Ashley to Carter, September 23, 1962, ibid.; Carter and Maria Marcus to NLRB, complaint, ibid.; Carter to Wilkins et al., February 28, 1963, Bracey and Meier, *Supplement to Part 13,* reel 5.

80. *NYT* (March 1, 1963), 5. *Hughes Tool,* 1593–1608 (1964).

low in toto this recommendation." Carter concluded, "We are now . . . in a very strong position vis-a-vis our effort to fight discrimination by labor unions. I hope that we will utilize our strength for all it is worth, albeit with responsibility." Carter also wrote to Local 2, detailing the Trial Examiner's report. "We are almost home free," he predicted.[81]

Home, however, quickly receded from the horizon. Over the next year, *Hughes Tool* got swept into local and national political tempests. Local 1 challenged the Trial Examiner's recommendations, which required the full Board to review the case. In the spring of 1963 both sides filed their briefs with the Board. Over the next few months, Local 2's hand strengthened. The Department of Justice fulfilled President Kennedy's promise, filing an amicus brief in support of the Trial Examiner's recommendations. The American Civil Liberties Union and the United Auto Workers also signed on as amici. On August 28, the March on Washington for Jobs and Freedom drew nearly a quarter-million marchers, heightening pressure on the federal government to address racial inequality in the workplace. The next day, President Kennedy swore in Howard Jenkins, Jr. as a member of the Board. Jenkins was a Republican and former Howard Law School professor known for his civil rights work as well as his years of service at the Department of Labor. He was also the first African American ever to serve on the NLRB. On a board of only five members, Jenkins's appointment might secure Local 2's home run.[82]

Or so it seemed. In the meantime, President Kennedy had proposed his omnibus Civil Rights Act to Congress, carefully excluding any fair-employment provisions as he had deemed them too politically explosive. In late September, the House announced its own version of the Act, which added an employment title. Concern spread that a favorable decision in *Hughes Tool* would derail the proposed legislation. Meanwhile, organized labor debated whether the *Hughes Tool* recommendations would help end workplace inequality or merely enable employers to deter unionization through accusations of racial discrimination.[83] The NAACP no longer had

81. Carter to Wilkins et al., February 28, 1963, Bracey and Meier, *Supplement to Part 13,* reel 5; Carter to Columbus Henry and Ivory Davis, February 28, 1963, Bracey and Meier, eds., *Papers of the NAACP, Part 23, Legal Department Case Files, 1956–1965, Series A: The South* (Bethesda: UPA, 1997), microfilm, reel 41.

82. Exceptions to Trial Examiner's Report, April 4, 1963, ibid.; Charging Party's Brief in Support of Trial Examiner's Report, April 25, 1963, ibid.; Department of Justice, amicus brief, June 24, 1963, ibid.; American Civil Liberties Union, amicus brief, July 12, 1963, ibid.; United Auto Workers, amicus brief, Oct. 11, 1963, ibid. "Equality is Their Right," *NYT* (August 29, 1963), 23; *NYT* (August 30, 1963), 12.

83. Despite his support for the NAACP's NLRB litigation and his appointment of Jenkins to the Board, historians have deemed President Kennedy's commitment to civil rights equivocal and his eventual support expedient. For a recent account, see Nick Bryant, *The Bystander: John F. Kennedy and the Struggle for Black Equality* (New York: Basic Books,

to worry about drawing attention to workplace discrimination. Instead, as the months passed without any word from the Board, it now had to fight to keep its NLRB campaign from getting swept aside by the surge of high politics surrounding the issue.

Back in Texas, the Hughes Tool Company used the pending action to evade contract negotiations with the Metal Workers. Local 1 petitioned the Board to order negotiations and stepped up pressure on Local 2 to end its NLRB action. In October, Local 1 petitioned Congress to investigate the Board for "pussyfooting around" on the *Hughes Tool* case, asserting that while the Kennedy administration used the union as "a political football," the delay was "stripping the union of its usefulness as a bargaining agent." Carter wrote back informing Henry that the Board was getting "pressures on both sides." He cautioned that "since this is a political issue . . . the Board may well put this matter off for a long time." He noted that the Locals could probably settle the matter privately, but that he hoped Local 2 "would be willing to hold out for a little longer so that we can make some law that will be helpful to Negro workers throughout the country."[84]

Local 2 held on and, only days after President Kennedy's assassination, Carter sent off letters to Attorney General Robert Kennedy and the Board urging them to proceed with the case. In his communication with the Board, Carter referenced "unconfirmed but persistent reports" that the Board itself was urging settlement so as to dodge deciding the issue. Local 2's members "unalterably oppose" settlement, Carter asserted, and "reject and repudiate any such efforts as contrary to their best interests and [the] best interests of Negro workers generally." The Board telegrammed back that it was not pressing for settlement, but merely "according this case the analysis and consideration commensurate with its complexity and importance."[85] Whether the Board was pressing for settlement, stymied by political pressures, or merely being ponderous, the result was the same: pressure on Local 2 built as the months stretched on without a new contract.

Meanwhile, the Civil Rights Act, its fair employment title intact, slowly journeyed from the House into the Senate. As of June 1964, the Board had yet to act on *Hughes Tool.* Once again Carter sent a letter to the Board reminding it of the "great importance of this case" and detailing the settlement pressure Local 1, the company, and officials in Houston's regional NLRB

2006). For concerns that a Board decision would derail national fair employment legislation, see unsigned to Will [Maslow], February 29, 1964, ibid. For debates about its implications for the labor movement, see Carter to Henry, Nov. 8, 1963, ibid.

84. Henry to Carter, Oct. 28, 1963, Bracey and Meier, *Part 23, Series A,* reel 41; Carter to Henry, Nov. 8, 1963, ibid.

85. Carter to Robert Kennedy, December 2, 1963, ibid.; Carter to NLRB, December 2, 1963, ibid.; Ogden W. Fields to Carter, December 5, 1963, ibid.

office were putting on Local 2. After assuring the Board that the NAACP's Washington Bureau did not think a favorable decision in *Hughes Tool* would adversely affect the pending civil rights legislation, Carter "respectfully submitted that it is not the function of the [Board] to act off such considerations, but solely to carry out the law with respect to the [NLRA]."[86] However, Carter's admonishment was no sooner sent than it became moot.

The next day, the Senate logjam on the Civil Rights Act broke. Then, on July 2, the very day President Johnson signed the 1964 Civil Rights Act into law, Howard Jenkins penned an unpretentious, technical, even dry, opinion, declaring that the Constitution prohibited the NLRB from sanctioning the Metal Workers' discriminatory practices. The three-member Board majority held that Local 1's failure to grieve Davis's exclusion from the apprenticeship program was an unfair labor practice. Furthermore, the Board indicated that it would now issue ULPs against unions that negotiated discriminatory contracts and, because "racial segregation in membership, when engaged in by such a representative, cannot be countenanced by a Federal agency," that these membership practices would likely be additional grounds for a ULP.[87]

Overturning its decisions stretching back to the 1940s, the Board also concluded that the Metal Workers must lose its certification for negotiating and administering racially discriminatory contracts as well as for segregating African-American members into separate unions. "[T]he Board cannot validly render aid under Section 9 of the Act to a labor organization which discriminates racially when acting as a statutory bargaining representative." The opinion also asserted that the Constitution prohibits both segregation and racial discrimination "in determining eligibility for full and equal membership." In case the state-action theory underlying these holdings was unclear, the Board backed them up with citations that, like Judge Pope in the Seafarers' election case, linked the Supreme Court's public-school desegregation decisions with its racial-covenant state-action decisions.[88]

The next day, the Board's *Hughes Tool* ruling made the front page of the *New York Times*, a space it shared with the 1964 Civil Rights Act. Carter, one article reported, "called the decision 'almost revolutionary.'" Another article considered the NLRB ruling "more sweeping" than the Civil Rights Act because it was "effective immediately, subject only to judicial review." Title VII, the Civil Rights Act's new employment title, in contrast, would not go into effect for a year, and, when it did, it would require the government first to seek voluntary compliance and then to exhaust state anti-discrimination

86. Carter to NLRB, June 4, 1964, ibid.

87. *Hughes Tool,* 1574. *Hughes Tool* was decided on July 1, 1964, but publicly released on July 2.

88. *Hughes,* 1577–78, citing *Brown, Bolling, Shelley,* and *Hurd.*

machinery before the courts could intervene. Needless to say, after decades of trying these routes, the NAACP had reason to be unsure of the new law's potential.[89]

A Lost Path

The *Hughes Tool* decision affected a small independent union whose policy of segregated locals was increasingly obsolete, but the principles the NLRB declared had the potential to reach far beyond the Metal Workers' union. Indeed, in subsequent decisions, the Board confirmed that its ruling in favor of African-American workers' "union rights" had not been a chimera. The Board instead expanded its *Hughes Tool* decision, ordering more powerful unions to affirmatively oppose employer discrimination and requiring employers to bargain with them when they did so. Encouraged by these victories, the NAACP excitedly publicized its new "formidable weapon" with which "to eliminate employment discrimination." Carter urged all NAACP branches to broadcast the organization's new "weapon," to investigate members' claims of discrimination, and to forward these cases to the national office which stood ready to "spend a major part of [its] time in assisting employees who desire representation before the Board." In his September 1964 report to the NAACP Board, Carter celebrated this "landmark decision in the field of labor law" and Roy Wilkins hailed it as a "key advance" at the NAACP's 1965 Annual Meeting. Indeed, for fifteen years after *Hughes Tool*, the NAACP's expansive state-action argument continued to guide NLRB decisions and spark debate over whether and how the Constitution should shape this administrative agency's policies.[90]

Nevertheless, by 1977, Herbert Hill wrote despairingly of the Board's *Hughes Tool* decision. While the NLRB "has the potential to serve as an important vehicle for the redress of racial discrimination in employment," he wrote, its "history in the area of civil rights has been one of great possibility and little practical effect." If *Hughes Tool* did not live up to its initial promise, however, it was not due to a failure of effort on the NAACP's

89. *NYT* (July 3, 1964), 1.

90. *Galveston Maritime Assn., Inc.,* 148 NLRB 897, 898 (1964); *Rubber Workers (AFL-CIO) Local 12 (Business League of Gadsden),* 150 NLRB 312, 314–15 (1964), affirmed in *Local Union No. 12 v. NLRB,* 368 F.2d 12 (5th Cir., 1965). *Farmers' Cooperative Compress,* 169 NLRB 290 (1968) targeted an employer. See also *United Packinghouse, Food and Allied Workers' Union v. NLRB,* 416 F.2d 1126 (9th Cir., 1969). Carter to Branch Presidents, Aug. 13, 1964, Bracey and Meier, *Supplement to Part 13,* reel 11. Board of Directors Meeting, Sept. 14, 1964, Bracey and Meier, *Supplement to Part 1, 1961–1965,* reel 1; Annual Meeting, January 4, 1965, ibid., reel 2. *Bekins Moving and Storage, Inc.,* 211 NLRB 138 (1974); *Handy Andy,* 228 NLRB 447 (1977); *Bell & Howell Co. v. NLRB,* 598 F.2d 136 (D.C. Ct. App., 1979).

part. Instead, the NAACP's workplace constitutionalism faded out in the late 1970s due to the general rightward turn of American law and politics. Politically, these claims' valence shifted as an increasingly coordinated and well-funded right-to-work legal movement adopted the NAACP's state-action arguments for its own anti-union campaign. Where the NAACP had used the increasingly public nature of jobs and unions to argue for black workers' right to unionize, right-to-work legal strategists used these same arguments to assert workers' constitutional right *not* to join or support a union. In addition, just as some labor supporters had long worried would happen, employers latched on to the NLRB's promise that it would withhold certification from discriminatory unions. Charges of union discrimination became one of anti-union employers' favored tactics for obstructing unions' organizing campaigns.[91] Add to this what Hill perceived to be the Board's lack of interest in these cases, and *Hughes Tool* soon faded from civil rights memory.

If *Hughes Tool*'s legal force proved fickle, its significance for Cold War political history, civil rights legal history, and the NAACP's own legacy did not. The path from 1948 to the Board's 1964 decision demonstrates that the NAACP's state-action challenges and fight on behalf of working-class African Americans did not die with the Cold War, but revitalized and persisted. Just when the NAACP is said to have forsaken workplace civil rights, the organization undertook its most concerted attack on the public-private divide so as to win black workers' constitutional right to join unions and access decent jobs. These claims were arguably less radical than some of the workplace claims of the 1930s and 1940s. They were shaped, and in some instances frustrated, by anti-communism—the NAACP's own and that of its labor movement allies. Nonetheless, they alter our understanding not only of the NAACP and the Cold War's effect on the organization, but also of mid-century civil rights constitutionalism. As the NAACP's fight for workplace-constitutional rights strengthened and grew in the Cold War 1950s, in many ways it charted a quite different course than LDF's better-known litigation against segregation in the schools.

Like the NAACP's education cases, one prong of this campaign targeted the South. But it did so at a time when the region's opportunities for civil rights unionism are thought to have died out. And unlike the education cases, this campaign never challenged a form of discrimination that was thought to be distinctly southern. Instead, the NAACP's workplace constitutional claims addressed employer and union discrimination in the North, South,

91. Hill, *Black Labor,* 95. Right-to-work claims included First Amendment freedom of association claims and due process liberty claims. See, for example, *Reid v. McDonnell Douglas Corp.* 443 F.2d 408 (Okl. Ct. App., 1971). For an example of employers' race discrimination claims, see *Bekins.*

East, and West. It was also not a lock-step campaign of the sort historians have depicted for education. Instead, it involved a mix of coordinated and spontaneous, top-down and bottom-up, national and local legal action. Rather than demonstrating a sharp divide between the civil rights lawyering that Risa Goluboff and Kenneth Mack have described in the 1930s and 1940s, and the civil rights litigation of the 1950s and beyond, the lawyers who brought these cases continued to use the law to facilitate class-based collective action.[92]

Moreover, while the NAACP used these cases to fight racial exclusion and segregation much as it did in the education cases, its workplace-constitutional claims fought for integration as a means to distinctly substantive ends. In the 1940s, the NAACP had focused on unions' racially exclusive membership policies because these could lock African-American workers out of the jobs those unions controlled. It also challenged unions' practice of segregating black workers into auxiliary locals because these often powerless locals denied their members a voice in union and workplace governance. Reflecting the NAACP's changing understanding of the structures of economic inequality, in the 1950s, it added constitutional claims to fair collective bargaining contracts. In the NAACP's cases, fair contracts were ones that integrated lines of promotion so as to open-up skilled jobs to African Americans and that integrated lines of seniority so that those who took advantage of these opportunities would not be penalized by losing previously accrued time on the job. By the 1960s, the organization's claims had evolved once again, now also emphasizing a constitutional right to equal access to training so that African-American workers could gain the skills needed to make use of their formal admission to better-paying jobs.

Finally, with cases brought in administrative agencies and presidential committees, not only in state and federal courts, the NAACP's workplace-constitutional challenges blended law and politics—organizationally, institutionally, and doctrinally. Organizationally, they involved the NAACP's legal, labor, and Washington, D.C. lobbying departments. These cases demanded all the traditional elements of litigation. But they also required the NAACP to navigate complex political fields, using negotiation, compromise, public pressure, and popular mobilization to win its claims. Fittingly for this politically delicate and demanding litigation, as LDF became more distinct, these cases remained in the NAACP's own general counsel's office, which was still deeply connected to the organization's political offices and mission. Institutionally, the NAACP's campaign involved constitutional claims

92. Goluboff, *Lost Promise*; Goluboff, "'Let Economic Equality'"; Goluboff, "The Thirteenth Amendment"; Mack, "Rethinking Civil Rights Lawyering"; Mack, "Law and Mass Politics."

brought in the executive branch, not only in the courts. Legally, the fruit of the NAACP's labor, a constitutional decision by an administrative agency, was a doctrinal form that itself straddled the line between law and politics.

The Constitution lives in many places other than the courts. Its meaning and compulsions get made through the rallying cries of marchers, the paeans of legislators, the interpretations of presidents, and even the obscure and technical orders of administrative agencies like the NLRB. Likewise, LDF, while predominant, was not the exclusive actor in civil rights legal history—or even in the NAACP's own. Looking beyond the courtroom walls and outside LDF reveals a lost legacy of civil rights constitutional litigation. The NAACP's labor advocacy was undeniably shaped by the constraints of a Cold War political economy and the pragmatics of the New Deal coalition. Throughout, the organization attempted to work within, not against, the labor movement as it pursued its decades-long fight to win black workers' constitutional right to jobs and a union voice. *Hughes Tool* the NAACP campaign that led up to it, and the decision's lingering life serve as a reminder that the NAACP's legal struggle for constitutional rights in the ostensibly private workplace was not a battle forsaken, but one that has simply been forgotten.

Flemming v. Nestor: Anticommunism, the Welfare State, and the Making of "New Property"

KAREN M. TANI

Ephram (Fedya) Nestor, a Bulgarian-born immigrant to the United States, was "an unusual person," according to his second wife Barbara. She met him in 1933 when he was selling vegetables from his car and remembers not really liking him. "He stayed too long," he "talked too much," and worst of all to this devoted radical, he "passionately espoused the cause of Communism [but] he didn't know too much about it." Interviewed when she was ninety, sharp-witted Barbara Nestor still recalled how Fedya embarrassed her at a Marxist study group with his "foolish" statements and obvious lack of knowledge about Marx or communism. His family agreed he was "not much of a Communist" when he joined the local party in 1936 and could not be trusted with the simplest duties.[1] Nonetheless, the federal

1. Barbara Nestor, interview by Sherna Berger Gluck, December 27, 1974, interview 06c segment 6 segkey: a1602, "Women's History: Reformers and Radicals," The Virtual Oral/Aural History Archive, California State University, Long Beach, Calif., http://www.csulb.edu/voaha (16 January 2006); Dorothy Healey and Maurice Isserman, *Dorothy Healey Remembers: A Life in the American Communist Party* (New York: Oxford University Press, 1990), 122.

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government deported Fedya in 1956 for his brief Communist Party (CP) membership.

Fedya would have been just another quiet casualty of Cold War anticommunist zeal had it not been for his wife's discovery of his accrued Social Security benefits the previous year. In 1955 Barbara Nestor signed Fedya's name to an Application for Old-Age Insurance Benefits and submitted a Wife's Insurance Benefits application for herself. She was pleasantly surprised at her award of $27.80 per month, since she believed Fedya could never hold a steady job. After Fedya was deported, however, an official from the Department of Health, Education, and Welfare (HEW) informed Barbara in the curt language of bureaucracy that "no additional payments [were] due under the social security law." She took Fedya's case all the way to the Supreme Court, with the assistance of the American Committee for the Protection of the Foreign Born, arguing that the federal government had deprived Fedya of a vested property interest without due process of law and subjected him to cruel and unusual punishment.[2] Ultimately the Court disagreed. In the matter of *Flemming v. Nestor* (1960) the justices split five to four in favor of the government, reversing a district court ruling.[3]

No one at the time perceived *Nestor* as one of the most significant decisions of the term. The debate among the justices was brief. The press paid little attention.[4] But in retrospect the case was important for several reasons. First, it revealed confusion among even the most learned Americans about the legacy of the New Deal and the character of their so-called "welfare state," a term that had only recently come into use. The program at issue in Fedya Nestor's case, federal Old-Age Insurance ("Social Security"), was foundational to American security by the mid-twentieth century yet

2. Case file for *Nestor v. Folsom,* Civ. A. No. 1154-58, National Archives, College Park, Md.

3. *Flemming v. Nestor,* 363 U.S. 603 (1960) *rev'g Nestor v. Folsom,* 169 F. Supp. 922 (1959).

4. As John Attarian, a historian of Social Security, summarizes, there were "[n]o big headlines, front-page stories, reprints of the full text of the opinion, or editorials. The mass-circulation news magazines such as *Time* and *Newsweek* did not mention the case. The decision and its shattering, momentous implications went undiscussed in the mainstream press. It was not like the aftermath of *Helvering v. Davis* [the 1937 case establishing the constitutionality of the Social Security program]." John Attarian, *Social Security: False Consciousness and Crisis* (New Brunswick, N.J.: Transaction Publishers, 2002), 221. I found minimal coverage in the *New York Times* and the *Los Angeles Times* but none in other major papers like the *Wall Street Journal* or the *Chicago Defender.* See "High Court Rejects Pension Plea by Man Deported as Former Red," *New York Times,* June 21, 1960; "Supreme Court Actions," *New York Times,* June 21, 1960; "Competition in Pacific Shipping OKd by Court," *Los Angeles Times,* June 21, 1960.

Americans fundamentally misunderstood it.[5] In support of the deported Nestor's claim, his attorneys parroted the language of politicians and government officials, describing Social Security in terms of "contributions," "premiums," and "earned rights" (as opposed to "charity" or "relief").[6] This language resonated with a district court judge and several Supreme Court justices. Yet Social Security was not insurance, the majority in *Nestor* made clear. "Earned" social insurance benefits were neither "property" nor contractual right.[7] This was a major pronouncement about the nature of America's welfare state, one that has never been overturned.[8]

Second, *Nestor* is important for exemplifying the important role that courts and legal disputes played in the development of the welfare state. Historically and institutionally oriented political scientists and sociologists,

5. Recent debates over the privatization of Social Security suggest that the program is still misunderstood. See, e.g., Deroy Murdock, "It's Not Your Money," *American Enterprise* 10 (1999): 76; Charles E. Rounds, Jr., "You Have No Legal Right to Social Security," *Consumers' Research Magazine* 80 (2000): 4; Robert Samuelsen, "Lots of Gain and No Pain!" *Newsweek* 145 (2005): 41 (discussing the pervasive belief that Social Security is an entitlement; citing *Nestor* as the myth-busting decision "you've never heard of").

6. President Franklin Delano Roosevelt famously claimed that this rhetoric would guarantee contributors "a legal, moral, and political right to collect their pensions." Quoted in William E. Leuchtenburg, *Franklin D. Roosevelt and the New Deal* (New York: Harper & Row, 1963), 133.

7. *Nestor* became an important precedent for the Social Security Administration (SSA), which today maintains the full text of the decision on its website. Social Security Administration, "Supreme Court Case: Flemming v. Nestor," http://www.ssa.gov/history/nestor.html (25 April 2006). *Nestor* is also a case that conservative judges cite whenever a person challenges a restricted or terminated social welfare benefit. For example in *Weinberger v. Salfi,* where Concetta Salfi challenged a provision of the Social Security Act that prohibited her from receiving widow's benefits because she had not been married to her wage-earner husband long enough, Justice Rehnquist used *Nestor* as "the standard for testing the validity of Congress' Social Security classification." To him this meant that a restriction passed muster unless it "manifests a patently arbitrary classification, utterly lacking in rational justification." 422 U.S. 749, 768 (1975). See also *Richardson v. Belcher,* 404 U.S. 78 (1971) (upholding a HEW decision to reduce Social Security benefits to beneficiaries also receiving state workmen's compensation).

8. It has, however, been called into question by subsequent Supreme Court characterizations of other government benefits. As attorney Matthew Hawes writes, "Logic dictates that any property interests recognized by the Court for welfare recipients should be more ephemeral than those 'bought' through contribution as in Social Security. Yet, just ten years after refusing to recognize any protectable rights for Social Security recipients, the Supreme Court first found constitutional protections for welfare beneficiaries in *Goldberg v. Kelly.*" Hawes calls *Nestor* "outdated case law." Matthew H. Hawes, "So No Damn Politician Can Ever Scrap It: The Constitutional Protection of Social Security Benefits," *University of Pittsburgh Law Review* 65 (Summer 2004): 898, 907; *Goldberg v. Kelly,* 397 U.S. 254 (1969). See also *Mathews v. Eldridge,* 424 U.S. 319, 333 (1976) (holding that continued receipt of Social Security disability benefits is a "statutorily created 'property' interest protected by the Fifth Amendment").

who have done the bulk of the work on the development of the American welfare state, have overlooked this point. While attentive to lawmakers and statutes, their accounts of the welfare state have generally failed to consider litigation as a creator of policy capable of shaping and constraining future policy; they have not brought their insights about "path dependence" and "policy feedback" to bear on administrative and judicial decisions.[9] Historians have also overlooked this point, perhaps because of the enduring belief that while Franklin Delano Roosevelt lost his court-packing battle, he won the war, securing a New Deal Court that would no longer pass judgment on the wisdom of social and economic legislation. Cases like *Nestor* suggest that the courts after 1937 continued to influence social and economic policies, even if they now refrained from invalidating legislation wholesale. After all, the civil liberties, due process, and racial discrimination controversies that flooded into the courts throughout the next decades were often entangled with social welfare policies; litigants asked courts not only to vindicate their individual liberties, but to pass judgment on what the state owed them and what it could ask of them in return.[10]

Cases raising these questions about the welfare state became more frequent as domestic anticommunist fervor increased—a third point that *Nestor* illustrates—because during this Red Scare, political repression often occurred through revocation of government-funded privileges and entitlements. McCarthyism[11] punished thousands of targets not, for the most part, through

9. For an excellent review of the literature on law and the American state and a discussion of how scholars could examine law and courts more fruitfully, see John D. Skrentny, "Law and the American State," *Annual Review of Sociology* 32 (2006); see also Reuel Schiller, "'Saint George and the Dragon': Courts and the Development of the Administrative State in Twentieth-Century America," *Journal of Policy History* 17 (2005): 114–17 (noting that most of the literature on the American welfare state "ignores courts and the role the judiciary has played" and describing some of the ways that courts may have affected social welfare bureaucracies in the 1970s).

10. As Risa Goluboff has illustrated in the civil rights context, the 1940s and 1950s were not "a relatively uneventful interlude" between the New Deal and the drama of "the Sixties" but "a signal period of ferment, in which the boundaries of the bureaucratic state, the form of individual rights, and the relationships between them were still unclear." Risa L. Goluboff, *The Lost Promise of Civil Rights* (Cambridge, Mass.: Harvard University Press, 2007), 5.

11. Historians have long recognized "McCarthyism" as a problematic term. To borrow the words of M. J. Heale, "[Joseph R. McCarthy] did not inspire the anticommunist cause, to which he came very late. He contributed no new ideas, fashioned no legislation, commanded no coherent organization; he only briefly chaired a Senate committee, and that a minor one, and his tactics did lasting harm to his own mission." M. J. Heale, *American Anticommunism: Combating the Enemy Within,1830–1970* (Baltimore: Johns Hopkins University Press, 1990), 150. The term "McCarthyism" is also "invariably pejorative," suggesting at best "an unfortunate overreaction to a genuine danger" and at worst "a conscious campaign to wipe out dissent." Ellen Schrecker, *Many Are the Crimes: McCarthyism in America* (Boston: Little,

death or imprisonment, but by removing security and dashing expectations—by taking away a job, revoking a license to work, or rescinding a promised old-age pension. Those who wanted to root out subversives took advantage of the dramatic growth of the state and its direct or indirect control over Americans' social welfare. For example, as the federal government deported Fedya Nestor and revoked his Social Security benefits, other political radicals lost public housing, unemployment insurance, government-regulated licenses, and public-sector jobs.[12] *Nestor* shows how the breadth of the American welfare state and its hooks into American lives offered a new technology for policing, monitoring, and coercing American citizens.[13]

Finally, *Nestor* not only highlighted a problem in post-war American life, it helped trigger a creative solution. At a time when it seemed that a communist presence was certain and national morals were in peril, when communities struggled with dramatic social and demographic changes, many people wanted the government to impose order and reinforce tradi-

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Brown, 1998), xii. Furthermore, "McCarthyism" denotes an aberrant period rather than one grounded in beliefs many Americans share today: that some ideologies are simply outside the sphere of "politics," that the nation's protections do not extend to its enemies, and that civil liberties must yield in times of war. Yet there are also good reasons for accepting the term. Heale notes that "before the eyes of the country and indeed of the world it was McCarthy who became the personification of American anticommunism, and for a time press and politicians, bureaucrats and businessmen, Congress and White House treated him as a power in the land." Heale, *American Anticommunism,* 150. Historians have also adopted the term as their own, using it to refer to the efforts of "a broad coalition of politicians, bureaucrats, and other anticommunist activists" during the late 1940s and 1950s to "eliminate the alleged threat of domestic Communism" by "hound[ing]" a generation of radicals, their associates, and their institutions. Schrecker, *Many Are the Crimes,* xii. I use the term in this broader context and with a wariness of the crusade-like imagery it invokes.

12. See, e.g., *Blackman v. Chicago Housing Authority,* 122 N.E.2d 522 (Ill. 1954) (eviction of tenants who would not sign loyalty oaths); *Ault v. Unemployment Compensation Board of Review,* 157 A.2d 375 (Pa. 1960) (denial of unemployment compensation for failing to answer questions about CP affiliation); *Barsky v. Board of Regents,* 347 U.S. 442 (1954) (suspension of a surgeon's medical license after he was convicted of contempt of Congress); *Homer v. Richmond,* 292 F.2d 719 (D.C. Cir. 1961) (denial of a radiotelegraph operator's license to an applicant who refused to answer questions about membership in subversive organizations); *Garner v. Board of Public Works,* 341 U.S. 716 (1951) (termination and withholding of salaries from employees who failed to comply with municipal loyalty and security procedures); *Lerner v. Casey,* 357 U.S. 468 (1958) (dismissal of a transit worker for being of "doubtful trust" and refusing to answer questions about CP membership); *Faxon v. School Committee of Boston,* 120 N.E.2d 772 (Mass. 1954) (firing of a public school teacher for declining to answer questions about communist activities before a subcommittee of the U.S. Senate).

13. For a discussion of the connection between Cold War political persecution and the administrative state, see Daniel Levin, "The Communist Party Cases and the Origins of the Due Process Revolution" (paper presented at the annual meeting of the Southwestern Political Science Association, New Orleans, La., March 26–29, 1997).

tional values. But what tactics were appropriate? How should the government wield its growing power as welfare guarantor? And what mechanisms existed to prevent government agencies and administrators from abusing their discretion? The *Nestor* case and related controversies led Yale law professor Charles Reich to articulate a legal theory that spoke in conservative terms yet promised to protect the subsidies, benefits, and opportunities that the government provided. Reich's famous 1964 article "The New Property"—in which he called *Nestor* "the most important of all judicial decisions concerning government largess"—likened the "valuables dispensed by the government" to the private property of the Founders. Reich urged courts to provide these new forms of wealth the same protections as the old in order to maintain an independent citizenry.[14] Eventually courts agreed, deciding in the late sixties and early seventies that the Constitution protected welfare payments, public housing, and other nontraditional forms of property from being taken without rigorous administrative procedures.[15] The Court has since stepped back from the redistributive implications of these decisions, but not from the acknowledgment that the state creates valuable interests on which many Americans depend.

In sum, *Flemming v. Nestor* is in one sense the story of a single deportee, a colorful, self-proclaimed "Tolstoyan" who lost his Social Security benefits in an unfortunate but not exceptional manner. But in another sense it is much bigger: it captures a complicated moment in American history, when Americans grappled with political repression, a growing expectation of government largess, and the intersection of the two. The case also had real consequences. It not only clarified one aspect of an "open-textured"

14. Charles A. Reich, "The New Property," *Yale Law Journal* 73 (1964): 733–87, 768. The article had dramatic implications: it suggested that economic rights—for even the nation's least "deserving"—should be on par with the freedoms in the Bill of Rights. But "The New Property" was not a radical text. Although Reich associated with various "leftwing" individuals and causes throughout his career, he wrote "The New Property" when he was part of a cohort at Yale Law School that was "relentlessly ambitious," "politically timid," and averse to activism. Laura Kalman, *Yale Law School and the Sixties: Revolt and Reverberations* (Chapel Hill: University of North Carolina Press, 2005), 50. As Reich himself describes the article, "I sought to restore the original meaning and function of property as a safeguard of democracy; in this sense 'The New Property' is profoundly conservative in the true sense of the word." Charles Reich, e-mail message to author, October 19, 2006.

15. In the most significant case, *Goldberg v. Kelly*, Justice Brennan's majority opinion adopted "The New Property" as its analytical framework and held that entitlements to welfare benefits merited the same procedural protections as rights to traditional forms of property. 397 U.S. 254 (1970). Other decisions suggesting a "new property" jurisprudence include *King v. Smith,* 392 U.S. 309 (1968) (striking down an Alabama welfare regulation disqualifying otherwise eligible children from receiving aid if their mother "cohabits with a man") and *Shapiro v. Thompson,* 394 U.S. 618 (1969) (overturning a state law denying welfare assistance to persons who have not resided within the state for one year).

welfare state, making law for millions of Americans, it contributed to a jurisprudence that attempted to reconcile the Constitution's promises with the optimism, anxiety, and insecurity of post-war American life.

Fedya and Barbara Nestor: Dilettante and Crusader

Fedya Nestor's encounter with the American legal system truly began with his second wife, Barbara Nestor (née Herman), and her children from her first marriage, who were far more engaged with politics than he. Barbara arrived in the United States from Hungary in 1888, at age four, and found socialism by age sixteen. She was a member of the Socialist Party in Denver until the Bolshevik Revolution of 1919 when she became a charter member of the Communist Labor Party in Denver,[16] and she remained an active grassroots organizer until her death in 1979.[17] She also passed her radical politics onto her children: her feisty daughter Dorothy went on to become the twenty-year chair of the CP in the Los Angeles area.[18]

Ironically the U.S. government deported not Barbara but her bumbling second husband Fedya, a childish dreamer who dabbled in communism but truly loved the "perpetual motion machine" he was building in the backyard.[19] Fedya came from Bulgaria in 1913 when he was twenty-three. Not wanting to fight in the Balkan Wars, Fedya fled to Switzerland where a doctor friend enabled his immigration to the United States. Barbara met him during the Great Depression when he was selling vegetables door-to-door in Los Angeles.[20] Although Barbara claimed she "didn't like him

16. Nestor, interview, October 11, 1974, interview 01a segment 5 segkey: a1485; Healey and Isserman, *Dorothy Healey Remembers,* 17–24.

17. According to her grandson Richard Healey, Barbara "never went out of the house without some kind of little shopping bag, something to carry literature, because you never knew who you were going to bump into, you never knew when you were going to make a convert." Healey and Isserman, *Dorothy Healey Remembers,* 122.

18. Barbara took care to educate her children about the great battles between labor and capital, and she frequently took them to demonstrations and meetings of leftist organizations. Barbara remembered Dorothy yelling at scabs during a labor strike at age six and distributing radical literature throughout her childhood. Nestor, interview, October 11, 1974, interview 01b segment 5 segkey: a1493; Nestor, interview, December 20, 1974, interview 05a segment 5 segkey: a1566.

19. Dorothy remembered Fedya as "a sweet, amiable man, without much sense." Barbara described him as a self-declared poet, an amateur inventor, and "a crackpot in many ways." Healey and Isserman, *Dorothy Healey Remembers,* 122; Nestor, interview, December 27, 1974, interview 06c segment 6 segkey: a1602.

20. According to Barbara, "Nestor" was the name of Fedya's doctor friend; Fedya appropriated it after using the friend's passport to enter the U.S. Nestor, interview, December 27, 1974, interview 06c segment 6 segkey: a1602.

very much" and found his admiration "nauseating," he won her over with his good looks, spirited teasing, and love for her children. By 1933 Fedya was living with her and by 1936 they were married.[21]

Nineteen thirty-six was also the year in which Fedya joined the Communist Party. Fedya had a great love for the Soviet Union, but politically he was not very involved.[22] Although Barbara remembered Fedya joining picket lines and helping her shelter an accused murderer sent by the local CP branch, she was adamant that "[t]he most [Fedya] could do—and he didn't do that well—was to help distribute The People's World."[23] Furthermore Fedya had little understanding of the Party's ideology. "He thought he was a Communist," mused Barbara, but "he really didn't know much about Marxism." He had been a "Tolstoyan" in Bulgaria and "a very weird kind of socialist."[24] Barbara, who at age sixteen considered Marx's manifesto her "bible,"[25] distinctly remembered taking the impish Fedya to her local John Reed club for Marxist intellectuals and being "so embarrassed" by his ignorance.[26] Barbara's daughter Dorothy agreed: "He was basically a dreamer," she said, whose politics were an incoherent mixture of anarchism and De Leon-style socialism.[27]

Dorothy, dubbed "the Little Dictator" by the local press for her leadership style, fiery temperament, and diminutive stature, was the real "subversive"

21. Nestor, interview, December 27, 1974, interview 06c segment 7 segkey: a1603.

22. Barbara said Fedya used to make her go to the theater where they showed all the Soviet films (prompting her to declare "Look, I'm not going to go see Swan Lake again!"), but he never made political speeches and "wasn't that important" in the local party. Nestor, interview, June 11, 1975, interview 10b segment 6 segkey: a1680.

23. Once when Fedya was distributing the publication he told an unemployed black female acquaintance that he knew of a maid job for her, a remark she interpreted as chauvinistic and racist. Party officials planned to sanction Fedya but stopped when Dorothy, then a high-ranking Party figure, told them not to pursue the "fool." Nestor, interview, December 27, 1974, interview 06c segment 7.

24. Nestor, interview, December 27, 1974, interview 06c segment 6 segkey: a1603.

25. Nestor, interview, October 11, 1974, interview 01b segment 2 segkey: a1490.

26. "Who is Marx to tell me that I had to be a wage slave until you had a developed economy?" Barbara remembered Fedya demanding. "Who is Marx to tell the peasants in Germany that they couldn't win because they didn't have a developed economy?" When Dorothy finally asked, "Fedya, what did you ever read of Marx?" he admitted "not very much." Nestor, interview, December 27, 1974, interview 06c segment 6 segkey: a1602. Barbara also insisted that Fedya was not "independent in his thinking" about the Party, instead following her and her daughter. "He wouldn't read things himself unless [Dorothy] told him to." Nestor, interview, December 27, 1974, interview 06d segment 4 segkey: a1608.

27. Healey and Isserman, *Dorothy Healey Remembers,* 122. On these two strains of leftist thought, see Paul Buhle, *Marxism in the United States: Remapping the History of the American Left* (London: Verso, 1987).

in the family.[28] She joined the Young Communists League at age fourteen, mobilized farm and cannery workers throughout the 1930s, and worked as lead organizer for the Los Angeles County Communist Party in the 1940s. She was also the frequent object of FBI surveillance[29] and one of the eleven California Communist Party leaders famously arrested in 1951 for conspiring to bring about the violent overthrow of the U.S. Government. (The Supreme Court overturned her conviction under the Smith Act in the renowned case *Yates v. United States*.)[30] When federal immigration authorities commenced deportation proceedings against Fedya, the family assumed it was to get at Dorothy.[31] No one predicted how important his case would become.

28. "Communism in L.A.—How It Works," *Los Angeles Mirror,* August 21, 1950, quoted in Healey and Isserman, *Dorothy Healey Remembers,* 133.

29. Agents reported on her as early as 1945, and from 1946 until at least December, 1949, the FBI continuously tapped her phone. Dorothy recalled that "[b]y 1951 the FBI was following my every move" and that every day she woke up to find "three carloads of FBI men" sitting in front of her house, which followed her as she drove her son to school and ran her errands. Government inquisitors at both the state and federal level also demanded her testimony. Healey and Isserman, *Dorothy Healey Remembers,* 114–18; "Contempt Laid to Five in U.S. Red Inquiry," *Los Angeles Times,* June 15, 1949.

30. 354 U.S. 298 (1957) (holding that the statute of limitations barred the Smith Act convictions of Healey and others; convictions for conspiring to advocate the violent overthrow of the government could stand, but only where it was clear that evidence supported the advocacy charge apart from the organizing charge). *Yates,* which left the Smith Act a "helpless cripple," was the most important of the major cases that the Court decided on the last day of the 1956–57 term, a day known as "Red Monday" for the Court's refusal to sustain prosecutions of communists. Michal R. Belknap, *Cold War Political Justice: The Smith Act, the Communist Party, and American Civil Liberties* (Westport, Conn.: Greenwood Press, 1977), 268; Morton J. Horwitz, *The Warren Court and the Pursuit of Justice* (New York: Hill and Wang, 1998), 59.

31. "They would never have deported him except they were getting back at Dorothy," Barbara stated. Nestor, interview, December 27, 1974, interview 06d segment 3 segkey: a1606. This observation highlights the role of gender in Cold War political culture and practice, as well as how federal officials may have used the gendered nature of the welfare state for their punitive purposes. As Linda Gordon and others have discussed, the American welfare state developed in a fundamentally gendered way, privileging traditionally male occupations and rewarding male heads of families. Gordon, *Pitied But Not Entitled: Single Mothers and the History of Welfare, 1890–1935* (New York: Freedom Press, 1994). By deporting Fedya, the family member with the most honorable and legitimate claims on the American welfare state, federal officials covertly punished Barbara and Dorothy. On women's growing reliance on Social Security in the Cold War era, see "Millions of Elderly Women Depend on Social Security Benefits," *America's Women: Report of the President's Commission on the Status of Women, 1963* (Washington, D.C.: U.S. Government Printing Office, 1963), p. 13, reprinted online in Kathryn Sklar and Thomas Dublin, eds., Women and Social Movements in the United States, 1600–2000, vol. 9 (2005), http://www.alexanderstreet6.com/wasm/index.html (22 January 2007).

Fedya's legal history begins in 1953. A new law allowed federal authorities to deport aliens who were or had been members of the CP,[32] and they easily found three "stool pigeons" to testify about Fedya's CP membership. The informants' motives were suspect and their recollections inconsistent, but the judge overlooked all objections. The evidence constituted "reasonable, substantial and probative evidence of Communist Party membership," he found, which Fedya's silence (his attorney advised him not to testify) "further corroborat[ed]."[33] Meanwhile, as Fedya's deportation case was on appeal, Barbara applied for Social Security benefits on the couple's behalf. To her surprise HEW issued Fedya an award of $55.60 per month.[34] By July 1956, however ("right after Khrushchev's speech," Barbara remembered), the Immigration and Naturalization Service (INS) had sent her white-haired husband on his way to Sofia, Bulgaria.[35] (His appeal was unsuccessful and some evidence suggests he actually wanted to go.)[36] HEW then terminated Fedya's benefits, citing an obscure provision of the 1954 amendments to the Social Security Act.[37]

32. Immigration and Nationality Act, 8 U.S.C. 1251 § 241(a)(6)(i).

33. In re: Daniel Nestor or Ephraim or Prodan Nestoroff, File E-069450—Los Angeles, November 9, 1954, Case file for *Nestor v. Folsom,* National Archives, College Park, Md. As Fedya's attorney would soon find out (he was appealing an almost identical case on behalf of a Mexican American worker named Jose Angel Ocon), neither the deportation law nor its application raised concerns for the Court of Appeals. *Ocon v. Del Guercio,* 237 F.2d 177 (9th Cir. 1956).

34. Total wages of $10,936.95 between 1936 and 1955 entitled Fedya Nestor to $55.60 and his wife to $27.80. Department of Health, Education, and Welfare, Determination of Award, March 7, 1956, Case file for *Nestor v. Folsom,* National Archives, College Park, Md. This surprised Barbara because Fedya "never supported [her]" and "never earned very much." She claims he contributed five dollars a week to the family income when he was working. Nestor, interview, December 27, 1974, interview 06d segment 2 segkey: a1605.

35. Notice of Deportation for Daniel Nestor, alias Ephraim Nestor, Prodan Nesteroff, Case file for *Nestor v. Folsom,* National Archives, College Park, Md.; Nestor, interview, October 11, 1974, interview 01b segment 8 segkey: a1496 (the reference is to Khrushchev's famous "secret speech" from the twentieth Congress in which he denounced Stalin and, in the eyes of many observers, further discredited the CP).

36. According to Barbara, Fedya considered it a "feather in his cap" that the government would pay for his $600 trip to Bulgaria and "[h]e was really very anxious to see what was going on in Bulgaria now under socialist rule." Dorothy recalled that Fedya wanted to market his "perpetual motion machine" to the Bulgarian government. Barbara also insisted that Fedya's deportation was his fault: the socialist regime in Bulgaria normally would not accept deportees, but Fedya surreptitiously got a friend in the Bulgarian government to grant him the visa he needed. Nestor, interview, June 11, 1975, interview 10b segment 6 segkey: a1680; Healey and Isserman, *Dorothy Healey Remembers,* 122.

37. George R. Krets to Barbara Nestor, November 15, 1956, Case file for *Nestor v. Folsom,* National Archives, College Park, Md.; Social Security Act of 1954, 68 Stat. 1084 § 202(n), as amended 42 U.S.C.A. § 402(n).

Historians of the welfare state often characterize the 1954 amendments as a triumph for the Social Security program because they extended coverage to previously uncovered sectors of the labor market and liberalized eligibility requirements. A program that legislators once restricted mainly to white, urban workers opened up, giving more Americans security and creating an even bigger constituency for the popular program.[38] But the amendment that applied to Fedya was illiberal and ungenerous, a reminder of a political climate that historians of the welfare state often forget. Section 402(n) allowed for the termination of old-age, survivor, and disability insurance benefits to an alien deported for participation in, inter alia, "subversive" activities.[39] The amendment was likely part of the flurry of legislation aimed at suspected Soviet spy and State Department official Alger Hiss.[40] In 1954, when Hiss was serving a prison sentence for perjury, legislators discovered he was due to receive a government pension of $700 a year, a development that left at least one representative "shocked—aghast—enraged—boiling mad."[41] Section 402(n) aimed to prevent people like Hiss from reaping the rewards of the country they betrayed. This amendment prompted little discussion in Congress, but it mattered to Barbara Nestor. Her U.S. residency ensured the safety of her monthly Social Security check, but she believed HEW unfairly terminated her husband's.[42] Accordingly, when her contestation of the agency's decision failed, the Los Angeles Committee for Protection of the Foreign Born found attorneys to file a complaint for her in federal court.[43]

38. See, e.g., Edward D. Berkowitz, *America's Welfare State: From Roosevelt to Reagan* (Baltimore: The Johns Hopkins University Press, 1991); Daniel Beland, *Social Security: History and Politics from the New Deal to the Privatization Debate* (Lawrence: University Press of Kansas, 2005).

39. 42 U.S.C.A. § 402(n).

40. Hiss's guilt of espionage was never proven in court, but recent research in archives from the former Soviet Union suggests that he was a Soviet spy. See Michael E. Parrish, "Soviet Espionage and the Cold War," *Diplomatic History* 25 (Winter 2001): 114 (reviewing eight recent works on Soviet espionage and American communism during the Cold War and concluding that Alger Hiss was a Soviet agent from the mid-1930s until at least 1945); G. Edward White, *Alger Hiss's Looking-Glass Wars: The Covert Life of a Soviet Spy* (Oxford: Oxford University Press, 2004) (starting from the premise of Hiss's guilt).

41. The legislator who introduced Section 402(n) was Katharine St. George, a Republican congresswoman from New York. That same year St. George sponsored bills revoking the mailing privileges of senders of subversive propaganda, rescinding Hiss's government pension, and denying pension benefits to all government employees convicted of a felony. Social Security Act of 1954, 83rd Cong., 2nd sess., Congressional Record 100 (January 25, 1954), quoted in *Nestor v. Folsom,* 169 F. Supp. 922, 927 (D.C. Cir. 1959); "Bill Would Deny Mail Aid to Reds," *New York Times,* May 8, 1954; "Administration for Hiss Pension; House Sponsors of Ban 'Enraged,'" *New York Times,* June 23, 1954.

42. Case file for *Nestor v. Folsom,* National Archives, College Park, Md.

43. Barbara requested a hearing with HEW on Fedya's behalf on February 26, 1957. A

"[T]he sordid controversies of the litigants," Benjamin Cardozo once said, "are the stuff out of which great and shining truths will ultimately be shaped." Cardozo was describing the way in which a system of case law develops: cases become precedents that judges must follow, and thus principles rather than "chance and favor" dictate the outcome of controversies.[44] But Cardozo's quote also describes how, when litigants bring their complicated, contradictory stories to court, the law and its functionaries impose order. Lawyers and judges shape the facts into a narrative that makes sense to them, pruning off the bits that straggle. Perhaps Barbara Nestor thought that litigating the Social Security issue would affect her husband's deportation case, perhaps she wanted to make a point to the administrators that jilted her family, perhaps she simply wanted access to Fedya's benefits, but in initiating a formal legal complaint she gave the story to others to tell. Along the way the legal system lost sight of the Nestors as individuals and instead connected their story to a larger debate about the relationship between liberty and security in a Cold War welfare state.

Barbara Nestor did not have much contact with the attorneys that the Committee for the Protection of the Foreign Born found for her. She remembered them simply as "able."[45] Able indeed—and deeply embedded in the legal history of American anticommunism. The lawyers who took the Nestors' case were partners Joseph Forer and David Rein, both Jewish, Ivy League law school graduates, and members of the left-wing National Lawyers Guild.[46] At a time when most lawyers were unwilling to associate with the politically unpopular targets of anticommunist politics and rigorously policed their own ranks,[47] Forer and Rein repre-

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HEW referee heard the case in Glendale, Califonia, on December 30, 1957, and Fedya lost. HEW denied Barbara's request for a review of the decision. Case file for *Nestor v. Folsom,* National Archives, College Park, Md.

44. Benjamin N. Cardozo, *The Nature of the Judicial Process* (New Haven: Yale University Press, 1921), 35.

45. Nestor, interview, June 11, 1975, interview 10c segment 1 segkey: a1681.

46. The two lawyers once worked for the government but they left in 1946—just in time, they said. They believed that the Cold War brought a "wave" of government repression "such as this country has never seen before." Intending to become "prosperous corporation lawyers" they instead became, as they liked to joke, "unprosperous civil liberties lawyers." Folder 14, Series II, The Forer and Rein Research Collection, 1941–2000, Historical Society of Washington, D.C.

47. According to Schrecker, the FBI eagerly provided information to the ABA and local bar associations about left-wing lawyers' groups and lawyers to facilitate internal anticommunist purges. Meanwhile, any attorney who relied on the Fifth Amendment risked disbarment for

sented hundreds of alleged subversives and communists.[48] Between 1948 and 1964 the United States Supreme Court granted certiorari to at least eighteen of Forer and Rein's cases,[49] and the partners were involved in such famous proceedings as *American Committee for Protection of Foreign Born v. Subversive Activities Control Board,*[50] *Rowoldt v. Perfetto,*[51]

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poor "moral character." Not all members of the bar joined in anticommunist persecution, but "[t]he bar's timidity made it almost impossible for Communists and alleged Communists to obtain counsel—especially if they did not want to be represented by someone who was already tainted [by having defended a communist]." Schrecker, *Many Are the Crimes,* 301–5; Belknap, *Cold War Political Justice,* 219–31. Bar associations at all levels also imposed loyalty oaths and refused admission to applicants with the slightest leftist leanings. See, e.g., *Schware v. Board of Examiners,* 353 U.S. 232 (1957) (reviewing a 1954 decision by the New Mexico State Board of Bar Examiners to deny Rudolph Schware's application to take the bar exam because of his past CP membership, prior arrest record, and use of aliases); *Konigsberg v. State Bar,* 353 U.S. 252 (1957) (reviewing the California State Bar's refusal to grant certification to Raphael Konigsberg for his refusal to answer questions about his political associations). In 1950 the ABA House of Delegates adopted a resolution urging that all attorneys be required to file affidavits declaring whether they were or had been members of the CP. In 1951 the House of Delegates voted unanimously to urge lawyers' groups to expel all communists and advocates of Marxism-Leninism from legal practice. In 1953 the same body called for lawyers' groups to examine any attorneys who invoked the Fifth Amendment for "fitness to continue to practice." Belknap, *Cold War Political Justice,* 220. As late as 1957 the ABA took a strong anticommunist stance. For example after the *Yates* decision (eviscerating the Smith Act), the House of Delegates favored a legislative reversal of the Court. Ibid., 254.

48. "Between them, and sometimes with other lawyers, they handled every important McCarran Act case as the government tried to deny passports, make the Communist party register, and so on." David Riley, "The Antiestablishment Lawyers," *The Washingtonian* 6.2 (November 1970): 54.

49. The partners took on other cases in their individual capacities. Joseph Forer represented Herbert Aptheker and other alleged subversives in their effort to overturn the part of the Subversive Activities Control Act that made it a felony for a member of a communist organization to apply for or use a passport (the Supreme Court agreed). *Aptheker v. Secretary of State,* 378 U.S. 500 (1964). Forer also represented the defendant in *Watts v. United States,* 394 U.S. 705 (1969) (seeking to overturn Watts's conviction for threatening the life of the president after the anti-war protester declared, "if they ever make me carry a rifle the first man I want in my sights is LBJ"). David Rein represented one of the resident aliens who challenged the Alien Registration Act of 1940 in the famous immigration case *Harisiades v. Shaugnessy,* 342 U.S. 580 (1952) (holding that the government could validly deport nonresident aliens for past membership in the Communist Party). Later Rein represented the W. E. B. DuBois Club of America in its effort to declare communist-front registration provisions of the Internal Security Act unconstitutional. *W. E. B. DuBois Clubs of America v. Clark,* 389 U.S. 309 (1968). By 1970, each partner had argued about twenty cases in the Supreme Court. Riley, "The Antiestablishment Lawyers," 54.

50. 380 U.S. 503 (1965) (vacating an appellate court judgment that the American Committee for Protection of Foreign Born register as a communist front under the Subversive Activities Control Act of 1950).

51. 355 U.S. 115 (1957) (holding that an alien's one-year membership in the CP and his work in a communist book store were too insubstantial to support an order of deportation).

Gold v. United States,[52] and the civil rights case *District of Columbia v. John R. Thompson Co.*[53]

In fact the pair's very first civil liberties case was "a whopper," to use Forer's words: the case of Soviet spy Gerhardt Eisler, a German intellectual who worked for the Comintern while living in the United States in the 1930s.[54] From late 1946 when his case broke to 1949 when he escaped to East Germany, Eisler faced prosecutions for deportation, perjury, and contempt of Congress, each of which the public watched with fascination and horror. Eisler by then was homeless, penniless, and lacking any CP authority, but to the public he was "the quintessential embodiment of the specter of international Communism" and "the personification of the foreign elements that allegedly controlled the American Communist Party."[55] Although Fedya Nestor was not nearly as important as Eisler, one of the most vilified characters of the early Cold War, the fact that the two shared attorneys suggests the role that everyone expected Nestor to play in the ensuing legal drama.

On May 5, 1958, Forer and Rein filed a complaint on Fedya Nestor's behalf in the United States District Court for the District of Columbia, arguing that the government acted unconstitutionally in revoking Nestor's Social Security benefits. For one thing, they said, the deprivation was a penalty inflicted without a judicial trial. For another, it was an ex post facto punishment. In addition they called the government's decision irrational (and thus a violation of due process)—it had nothing to do with the purposes of the Social Security program. Last, they invoked the First Amendment: the government was punishing Nestor for past membership in the Communist Party, which constituted protected speech.[56] For Forer and Rein this was a classic Cold War civil liberties case, one more battle for the rights of an unpopular minority.

Nestor won, but not for the reasons anyone expected. The case went to

52. 352 U.S. 985 (1957) (holding that a defendant convicted of filing a false Taft-Harley affidavit—false because it denied that he supported the CP—was entitled to a declaration of a mistrial because the jury had intruded into his privacy).

53. 346 U.S. 100 (1953) (holding that the District of Columbia could prosecute Thompson Company for refusing to serve African Americans under a nineteenth-century Act that criminalized race-based discrimination).

54. Folder 14, Series II, The Forer and Rein Research Collection, 1941–2000, Historical Society of Washington, D.C. In an interview with historian Ellen Schrecker, Joseph Forer claimed that taking on Eisler as a client "immediately" cost him and his partner "half of our business." Schrecker, *Many Are the Crimes,* 304.

55. Schrecker, *Many Are the Crimes,* 122–25.

56. Memorandum in Support of Plaintiff's Motion for Summary Judgment, *Nestor v. Folsom,* 169 F. Supp. 922 (D.C. Cir. 1958) (Civil Action No. 1154-58); Brief for Appellee, *Flemming v. Nestor,* 363 U.S. 603 (1959) (No. 54).

Judge Edward Allen Tamm, a protégé of J. Edgar Hoover's from the Federal Bureau of Investigation.[57] Tamm was so tied to Hoover, in fact, that when President Truman nominated him to the federal bench in 1948 the local bar association objected. Out of desperation some critics even questioned his law degree.[58] Tamm survived and in some ways was everything his opponents feared: a predictable conservative on the bench who continued to correspond with Hoover about everything from the socialist leanings of Hoover's judicial enemies to the need for FBI-trained court administrators to "knock some sense into the heads of freaks" on the federal bench.[59] Yet in the case of the Bulgarian ex-communist, Fedya Nestor, Tamm wrote a lengthy decision in Nestor's favor.

What Tamm cared about was not one man's civil liberties, but the sanctity of Social Security for the American people. He believed the politicians and administrators who described Social Security as an insurance program; he believed that workers, through their contributions to the program, earned their Social Security benefits. In legal terms, the program seemed to deserve the protections of contract or property. Tamm accepted that Congressional appropriations were not binding promises: Congress needed the ability to deal with inevitable political and economic fluctuations. But the ability to absolutely deprive a person of pension-like benefits after they had accrued—must that also follow? "This Court," Tamm answered, "does not believe so."[60]

If the law of contract did not protect Social Security Benefits, the law of property should, Tamm reasoned. Some case law directly contradicted that logic,[61] but a few cases at least suggested "that the nature of such benefits

57. Tamm joined the FBI in 1930; four years later he became assistant director. From 1940 to 1948 he worked as Hoover's personal assistant. "Judge Edward Tamm, Ex-F.B.I. Official, 79," *New York Times,* September 24, 1985.

58. "Truman Names 11 Rebuffed by GOP," *New York Times,* June 23, 1948; Editorial, "Balanced Accounts," *New York Times,* September 27, 1985.

59. Quoted in Alexander Charns, *Cloak and Gavel: FBI Wiretaps, Bugs, Informers, and the Supreme Court* (Urbana: University of Illinois Press, 1992), 124, 136 n 24. Charns also implicates Tamm in Hoover's early efforts to spy on the judiciary. Ibid., 17–31. On the other hand, some evidence suggests that Tamm's allegiance to Hoover had waned by the time Tamm reached the court. According to H. Graham Morison, who dealt with both men in his capacity as executive assistant to the attorney general, Hoover was ready to give Tamm the "axe" in 1948 for insubordination. H. Graham Morison, interviewed by Jerry N. Hess, August 1, 1972, Harry S. Truman Library, Independence, Missouri, http://www.trumanlibrary.org/oralhist/morison1.htm (10 January 2007).

60. *Nestor v. Folsom,* 169 F. Supp. 922, 934 (D.C. Cir. 1959).

61. See, e.g., *Helvering v. Davis,* 301 U.S. 672 (1937) (giving Congress wide latitude in decisions about how to spend for the general welfare); *Norman v. Baltimore & Ohio Railroad Co.,* 294 U.S. 240, 307–8 (1935) ("Contracts, however express, cannot fetter the constitutional authority of the Congress. Contracts may create rights of property, but, when

make [sic] them property rights."[62] Furthermore, Tamm had statements from the secretary of HEW himself stating that the act of working in covered employment established "rights to benefits." Once the right had been earned, an individual's actions were not supposed to modify or restrict it.[63] Tamm knew that the HEW secretary had no authority to bind the courts, but it mattered to him that that the head of HEW thought of—and marketed—Social Security this way. Conveniently ignoring Nestor's heritage and politics, Tamm concluded that the government deprived him of his Social Security benefits, his property, without due process of law.[64]

HEW appealed the case directly to the Supreme Court. Judge Tamm's decision not only looked like judicial intrusion into legislative territory (a separation of powers problem), it threatened to expand that sacred category of rights and obligations that the government protects as "property."[65] The phrase "property rights" may not be used lightly in American jurisprudence. As Richard Adelstein notes, "property stands at the center of the relationship between the individual and the state"; "whom the state recognizes as having the authority to control the disposition of objects and ideas"

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contracts deal with a subject-matter which lies within the control of the Congress, they have a congenital infirmity"); *Mullowney v. Folsom,* 156 F. Supp. 34, 36 (D.C.N.Y 1957) (holding, in a case where a claimant's Social Security payments were adversely affected by legislation passed after he became entitled to benefits, that "Payments made as a result of Congressional appropriation have not been thus far construed as contractual in nature"). Tamm, however, was a judge who did not fear reversal when he felt strongly enough. "When one is convinced that his dissent is predicated upon lawful grounds then there's no hesitancy in continuing to dissent," Tamm once told an interviewer, "and while the fact that a majority of the court may take the opposite side is sometimes frightening, it nevertheless is no reason for altering or changing one's position." Edward Tamm, interview by Alice O'Donnell, November 12, 1983, Federal Judicial Center, Washington, D.C.

62. *Nestor v. Folsom,* 169 F. Supp. 922, 934 (D.C. Cir. 1959).

63. Ibid., 925 n 3 (citing a 1956 letter from the secretary of Health, Education, and Welfare to the Senate Finance Committee in which the secretary characterized the Social Security program as establishing "rights to benefits," earned through work, that "the individual's actions do not modify or restrict" and that Congress was not entirely free to amend).

64. Ibid., 934. The due process clause of the Fifth Amendment provides that the federal government may not deprive any person of "life, liberty, or property, without due process of law." The Fourteenth Amendment places the same restriction on state and local governments. U.S. Const. Amends. V, XIV.

65. Warren J. Samuels offers a useful definition of "property rights" in contemporary American legal thought: they are "interests given legal protection as property"; as such they enable their holders "to participate in economic decision making." Warren J. Samuels, "An Introduction to Essays on the Fundamental Interrelationships between Government and Property," in *The Fundamental Interrelationships between Government and Property,* ed. Nicholas Mercuro and Warren J. Samuels (Stamford, Conn.: JAI Press, 1999), 1–23, 3.

determines a society's institutions, customs, and hierarchies.[66] In the U.S. property may be especially important. Some legal historians go so far as to describe it as the basis of American civil society[67] and "the guardian of every other right."[68] And all agree that in constitutional law property has a special place. It alone stands as the equal of liberty and life in the Constitution—something not to be taken, at least not without expensive, time-consuming procedures.[69] It also had a special place in Cold War political rhetoric: as a symbol of a free market and a free society, private property differentiated Americans from their enemies. In sum, the boundaries of property mattered.

Some scholars have suggested that Fedya Nestor's disloyalty was more important to the Court than the property issue and that the case's outcome was simply "Court rationalization of the persecution of a communist who had been deported in 1956 but who had the audacity to demand his social security money."[70] The several dissenters in the case alleged the same. Had the Court merely wanted to rationalize Nestor's persecution, however, there were ways to do so that would not have simultaneously affected the interests of millions of American workers and their families. For example, the Court might have acknowledged a theoretical property interest in Social

66. Richard Adelstein, "The Origins of Property and the Powers of Government," in Mercuro and Samuels, *The Fundamental Interrelationships between Government and Property,* 25–35, 25.

67. As David Abraham puts it, "American law started from and remains strongly wedded to the right of property." American national identity centers on the idea of liberty, but that liberty is "formal, negative, expressed in contract, and dependent on possession of property." Whereas other countries may tie rights to principles like citizenship, Americans tie everything from speech to reproductive freedom to the notion of property. "The law, it seems, only listens to talk it can understand. More than anything, it understands property." David Abraham, "Liberty without Equality: The Property-Rights Connection in a 'Negative Citizenship' Regime," *Law and Social Inquiry* 21 (1996): 1–64.

68. James Ely, for example, argues that from the colonial era to the present, property rights and other personal rights have been closely connected, even as their place in constitutional law has changed. James W. Ely, Jr., *The Guardian of Every Other Right* (New York: Oxford University Press, 1992).

69. U.S. Const. Amend. V. Beyond the due process clause and the "takings clause" of the Fifth Amendment, property finds protection in the First Amendment (protecting a person's use of property in her expressive activities), the Third Amendment (restricting the government's authority to quarter soldiers in private homes), the Fourth Amendment (barring unreasonable searches and seizures of a person's home, papers, and effects), the Eighth Amendment (prohibiting excessive fines), and the Fourteenth Amendment (supporting some egalitarian claims to the resources people need to survive). C. Edwin Baker, "Disaggregating the Concept of Property in Constitutional Law," in Mercuro and Samuels, *The Fundamental Interrelationships between Government and Property,* 47–62, 49.

70. Abraham, "Liberty without Equality," 24 n 79.

Security benefits, but held that Nestor's right had not "vested" at the time Congress changed the law regarding communist deportees. There are other reasons as well to question the "Court rationalization" theory. While the sparse notes in the files of Justices Black and Douglas, both dissenters in the case, shed little light on the issue, Howard Lesnick, a clerk to Justice Harlan during the 1959–60 term, recalls that members of the Court were most concerned about Judge Tamm's unorthodox use of the term "property" and the apparent judicial intrusion on the legislative function.[71] This seems right. In 1960, when the justices heard *Flemming v. Nestor,*[72] anticommunist sentiments were not gone—indeed, the politics of anticommunism were thriving—but the climate of fear associated with Senator McCarthy had lifted. And although most of the justices had taken a conservative stance on loyalty and security issues during the early Cold War period,[73] by 1956 the Court had welcomed one of its most liberal members ever (William

71. "Case File: No. 54 Oct. term, 1959 *Flemming v. Nestor,*" Box 341, Papers of Hugo L. Black, Library of Congress, Washington, D.C.; "Folder No. 54—*Flemming v. Nestor,*" Box 1223, Papers of William O. Douglas, Library of Congress, Washington, D.C.; Howard Lesnick, conversation with author, January 6, 2007.

72. In 1960 Earl Warren was chief justice but most legal scholars argue that the "Warren Court" had not yet begun. (They cite the starting date as 1962, when the conservative Charles Whittaker retired and the most articulate proponent of judicial restraint, Felix Frankfurter, resigned, replaced by Byron White and Arthur Goldberg.) The main divide on the Court in 1960 was between those like Justice Harlan, who believed that the Court could rationalize Congress's actions for just about anything, thereby keeping laws in harmony with the Constitution, and people like Justice Black, who believed that devising benign, rational justifications for Congress's actions was wrong when Congress never had such justifications in mind. Mark Tushnet, "The Warren Court as History: An Interpretation," in *The Warren Court in Historical and Political Perspective,* ed. Mark Tushnet (Charlottesville: University Press of Virginia, 1993), 1–36.

73. "For most of the brethren, it was simple fact that the Communist 'menace' had to be curtailed, and, during the first half of the 1950s, the Supreme Court majority of Vinson, Jackson, Frankfurter, Clark, Minton, Burton, and Reed managed to find for the governmental interest in subverting freedom of speech, press, and/or association." Howard Ball and Phillip J. Cooper, *Of Power and Right: Hugo Black, William O. Douglas, and America's Constitutional Revolution* (New York: Oxford University Press, 1992), 147. The most "notorious example" of the Court giving in to repressive anticommunism, according to Morton Horwitz, was *Dennis v. United States,* 341 U.S. 494 (1951), in which the Court upheld eleven Smith Act convictions and eviscerated constitutional protections on free speech. Horwitz, *The Warren Court,* 57–59. Some decisions from this period are arguably better explained by certain justices' predisposition to judicial restraint in cases implicating national security, but the most important point is that between 1950 and 1956 the Court as a collective "gave free rein to executive, legislative, and popular determination to destroy the domestic arm of the international Communist movement" by "accepting a generic 'proof' of Communism's seditions nature" whereas after that period it was less willing. William M. Wiececk, "The Legal Foundations of Domestic Anticommunism: The Background of *Dennis v. United States,*" *The Supreme Court Review* (2001): 375–434, 434.

J. Brennan).[74] The 1956–1957 term became famous for limiting political persecution.[75] Thus, a case that once fit with classic McCarthy-era controversies was by 1960 about guarding the boundaries of property, preventing leftist lawyers from carving out new rights, and respecting Congress as it grappled with the complexities of running a welfare state.[76]

The decision in *Flemming v. Nestor* was five to four in favor of HEW (Flemming), with Justice John Marshall Harlan writing for the majority. He began with an explanation of Social Security's design. "Payments under the [Social Security] Act are based upon the wage earner's record of earnings in employment"; "[t]he program is financed through a payroll tax levied on employees in covered employment." But, he continued, "eligibility for benefits, and the amount of such benefits, do not in any true sense depend on contribution to the program through the payment of taxes." Each contributor's payroll taxes go into the Treasury as "internal-revenue collections" and from there into the program's "Trust Fund." Nothing akin to individual bank accounts exists. In other words Social Security was not like commercial insurance, where one's benefits were entirely dependent on contractual premium payments, nor could the "noncontractual interest" of a covered employee be analogized to that of the holder of an annuity. The annuity holder has a firm entitlement; the covered employee something less.[77]

74. Brennan's confirmation is further evidence that McCarthyism was waning. Senator McCarthy pursued Brennan with his usual tactics during Brennan's confirmation hearings, but only McCarthy himself voted against confirmation.

75. Usually the Court avoided deciding cases on constitutional grounds (perhaps because of backlash over *Brown*), but by 1956 it was frequently overturning persecutions of alleged subversives on technical or procedural grounds. See, e.g., *Schware,* 353 U.S. 232 (1957) (holding that the New Mexico board of bar examiners denied Schware the right to practice law without due process when it found his past membership in the Communist Party and his use of aliases to raise "substantial doubts" about his moral character); *Speiser v. Randall,* 357 U.S. 513 (1958) (holding that California had used unconstitutional procedures to enforce a law making "nonadvocacy of overthrow of government by unlawful means" a condition precedent to a tax exemption); *Vitarelli v. Seaton,* 359 U.S. 535 (1959) (holding that the procedures that the secretary of the interior followed in dismissing a government employee fell short of the requirements of due process). For a discussion of "the avoidance canon" of the early Warren Court, see Philip P. Frickey, "Getting from Joe to Gene (McCarthy): The Avoidance Canon, Legal Process Theory, and Narrowing Statutory Interpretation in the Early Warren Court," *California Law Review* 93 (March 2005): 397–464.

76. Horwitz notes that between 1959 and 1962 the Court "seemed to flee from its earlier anti-McCarthy initiatives," but he rejects the idea that the Court acted out of fear of communist subversion or antipathy towards political radicals. Horwitz attributes the apparent retrenchment to the Jenner-Butler Bill, an anti-Court measure that Congress considered after the Court overrode Congressional committees and decrees on "Red Monday." Horwitz, *The Warren Court,* 64–65. See also Walter F. Murphy, *Congress and the Court* (Chicago: The University of Chicago Press, 1962); C. Herman Pritchett, *Congress Versus the Supreme Court, 1957–1960* (Minneapolis: University of Minnesota Press, 1961).

77. *Flemming v. Nestor,* 363 U.S. 603, 608–10 (1960) (emphasis added).

Justice Harlan next discussed why it would be wrong to characterize a person's accrued Social Security benefits as a "property right," a title that other Cold War cases had forced into ambiguity. (For example, in *Greene v. McElroy,* a case involving revocation of a government contractor's employee's security clearance, a majority of the Court agreed that the "liberty" and "property" concepts of the Fifth Amendment encompassed "the right to hold specific private employment and to follow a chosen profession free from unreasonable government interference").[78] Congress designed Social Security, Harlan explained, "to function into the indefinite future," enduring inevitable fluctuations in economic and social conditions. To fulfill this goal Congress needed "flexibility and boldness in adjustment," including the ability to narrow or even repeal provisions that promised certain benefits. If the Court were to agree with Judge Tamm that accrued Social Security benefits were "property," a host of procedural protections would apply and Congress would lose its flexibility. The Constitution also prohibits the government from taking private property for public purposes without just compensation, meaning Congress might have to offer pay-outs to covered beneficiaries every time it lowered or restricted benefit levels, wreaking havoc on the national budget.[79]

Justice Harlan insisted that the Court's holding was fair. Nestor's benefits were not "property," but that did not mean the government could freely revoke them. In evaluating Congressional actions not involving a fundamental interest like liberty or property, the Court would still overturn laws that "manifest[ed] a patently arbitrary classification, utterly lacking in rational justification." Not surprisingly, however, Justice Harlan found "[s]uch is not the case here." When Congress terminated the benefits that accrued to people like Nestor, deported for Communist Party affiliation, Harlan reasoned, it might have been simply limiting benefits to people residing in the United States, perhaps because residents would be more likely than non-residents to invest their money in the U.S. economy. Then, having conjured a possible rational explanation, Harlan concluded that the Court "need go no further." The Act depriving Nestor of his benefits was constitutional; Nestor had received all the protection the law mandated.[80]

78. 360 U.S. 474, 492 (1959). See also *Schware,* 353 U.S. 232 (1957) (holding that the opportunity to qualify to practice law is protected by constitutional due process provisions); *Peters v. Hobby,* 349 U.S. 331, 352 (1955) (arguing that "the reputation of men and their right to work" must be safeguarded by rigorous procedures since these are "things more precious than property itself") (Douglas, J., concurring).

79. *Flemming v. Nestor,* 363 U.S. 603, 608–10 (1960).

80. Ibid. Justice Harlan devoted the rest of the decision to dismissing Nestor's Sixth Amendment claim (that deprivation of benefits punished people like Nestor in an unconstitutional manner). To strike down a Congressional enactment of this kind on Sixth Amendment

Justice Hugo Black vigorously disagreed.[81] Black and Harlan, though friends, came from different worlds and often found themselves on opposite sides of legal debates. Harlan was a Princeton graduate and Rhodes Scholar who seemed groomed for political greatness. His forbears included a governor, a congressman, and a Supreme Court justice (his namesake). Black, by contrast, came from an evangelical Baptist family in poor, isolated Clay County, Alabama. His training in law came not from Oxford or the "Eastern establishment," but from the University of Alabama and his years as a small-time practitioner, police court judge, and county prosecutor. With little money and no family connections, Black entered national politics (he won a Senate seat in 1926) by combining his brand of southern populism with a short-lived membership in the powerful Ku Klux Klan.[82]

Once in the Senate Hugo Black was a tenacious foe of corruption, an advocate for the common man (the consumer, the farmer, the factory worker), and a reliable supporter of New Deal legislation, including the Social Security Act of 1935.[83] In fact, his personal papers are filled with correspondence from constituents about the Act—how it worked; whether they or their family members could benefit. Sincere letter writers detailed their personal situations and asked for their senator's opinion.[84] Black likely told them the same thing that New Deal designers and administrators said: Social Security was insurance for the working man, earned by the individual and merely administered by the federal government.

Perhaps in answering he consulted one of the clippings he saved, from the *Tuscumbia Times*. "The Truth About Old Age Benefits" discussed a hypothetical man, Jim Brown, who was nearly sixty and had a job in a mill. When old age overtakes Jim, the article explained, "the postman will bring him a Government check, every month, covering the amount of old-age benefits to which he is entitled" based on his wage record. And Jim "will have only himself to thank for this provision for his old age"—

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grounds Nestor would need "unmistakable evidence of punitive intent," Harlan explained, and this evidence simply did not exist. Ibid., 619.

81. Ibid., 626. Justices Douglas, Brennan, and Warren also dissented. Douglas focused on the idea that the 1954 law under which the government terminated Nestor's benefits was a classic bill of attainder, "a legislative act which inflicts punishment without judicial trial." Ibid., 629 (Douglas, J., dissenting). Brennan's dissent, which Douglas and Warren joined, added that the 1954 Act violated the constitutional prohibition against ex post facto laws. Ibid., 634–40 (Brennan, J., dissenting).

82. Ball and Cooper, *Of Power and Right.*

83. President Franklin D. Roosevelt considered Black reliable enough to make him his first appointment to the Supreme Court in 1937, even though Black was not a White House insider.

84. "Senatorial File, Constituent Correspondence, Social Security 1936–1937," Box 133, Papers of Hugo L. Black, Library of Congress, Washington, D.C.

because he earned it.[85] Twenty-five years later the majority in *Flemming v. Nestor* wanted to take Jim's right away, Black believed. With "nice words" and slick reasoning the majority told contributors "that despite their own and their employers' payments the Government . . . is merely giving them something for nothing and can stop doing so when it pleases." This, Justice Black wrote in dissent, was "a complete misunderstanding of the purpose Congress and the country had in passing that law."[86]

To support his understanding of Congress's purpose Justice Black cited Senator Walter F. George (D-Georgia), chairman of the Finance Committee in 1935 and presumably a representative of "congressional intent." As Congress debated Social Security, Senator George emphasized the program's compatibility with "the American concept that free men want to earn their security and not ask for doles—that what is due as a matter of earned right is far better than a gratuity." In another passage Senator George stated: "Social Security is not a handout; it is not charity; it is not relief. It is an earned right based upon the contributions and earnings of the individual. As an earned right, the individual is eligible to receive his benefit in dignity and self-respect."[87]

The majority not only overlooked ignored legislative history, Black continued, it overlooked binding legal precedents. Consider the 1934 case *Lynch v. United States,* which involved beneficiaries of War Risk Insurance, a WWI-era federal program that Congress subsequently repealed. The beneficiaries claimed that the repeal deprived them of property without due process of law, and the Court agreed. "[W]ar risk policies, being contracts, are property and create vested rights"; taking such property without just compensation violated the Fifth Amendment.[88] Black complained that the *Nestor* majority conveniently "puts the Lynch case aside."[89]

Last, Black invoked the very real expectations that Social Security created. "People who pay premiums for insurance usually think they are paying for insurance," Justice Black wrote. They pay for security, not for the "flexibility and boldness" that the majority cited. Congress could deny coverage to new people or refuse to increase its obligations to existing beneficiaries, "[b]ut that is quite different from disappointing the just expectations of the contributors to the fund which the Government has compelled them and

85. "Senatorial File, Clipping File, Social Security," Box 111, ibid.

86. *Flemming v. Nestor,* 363 U.S. 603, 623 (1960) (Black, J., dissenting).

87. Ibid. Essentially, he was making the same argument as Judge Tamm. This agreement between Black, a famous protector of civil liberties, and Tamm, a man who once helped Hoover wiretap unsuspecting citizens, suggests the complicated cross-currents generated by the nexus of the Cold War and the welfare state.

88. *Lynch v. United States,* 272 U.S. 571, 577 (1934).

89. *Flemming v. Nestor,* 363 U.S. 603, 622 (1960) (Black, J., dissenting).

their employers to pay its Treasury."[90] Justice Black denigrated the standard of review that the majority applied to such a flagrant act of dispossession. It amounted to no review at all.[91]

The End of Insurance and the Making of "New Property"

When the Supreme Court handed down its decision in *Flemming v. Nestor* the public appeared unconcerned. Although the Court had not framed its decision in terms of loyalty, journalists characterized the case as just another one involving a "Red," not applicable to loyal Americans[92] (a lacuna in coverage that at least one historian of Social Security finds shocking).[93] Some legal scholars took note, as they did with all cases handed down by the nation's highest court, but their tone was detached and academic; most did not recognize or sympathize with the decision's meaning for Social Security contributors.[94] The lone exception, it appears, was blind activist and professor Jacobus tenBroek, who in a speech to the San Diego Urban League characterized *Nestor* as part of an attack on the original meaning of Social Security and an example of the dangerous penetration of criminal law into social welfare programs.[95] TenBroek was right to emphasize

90. Ibid., 624.

91. Though Justice Douglas did not join Black's dissent, he shared many of Black's concerns. Douglas characterized a person's accrued social benefits as "part of his property benefits." He, too, cited Senator George's characterization of Social Security as "an earned right." Ibid., 630–31 (Douglas, J., dissenting).

92. The entry in the *New York Time*'s Supreme Court round-up was as follows: "Upheld, 5 to 4, the constitutionality of a Congressional statute depriving certain deported aliens of Social Security benefits that they would otherwise have been entitled to." "Supreme Court Actions," *New York Times,* June 21, 1960. A more extensive piece noted the Court's rejection of the idea of "accrued property rights" in Social Security, but focused on Nestor's unique factual circumstances. "High Court Rejects Pension Plea by Man Deported as Former Red," *New York Times,* June 21, 1960.

93. See note 4 above.

94. Among full-length law review articles on the case, I found only one that focused on the Court's refusal to recognize accrued benefits as property rights: James P. Lewis, "The Property Interest in Social Security Benefits," *Maryland Law Review* 21 (1961): 331–44. The several other articles focused on different aspects. See, e.g., "Retroactivity and First Amendment Rights," *University of Pennsylvania Law Review* 110 (1961–1962): 394–435 and "Bill of Attainder and the Supreme Court in 1960—*Flemming v. Nestor,*" *Washington University Law Quarterly* (1961): 402–24.

95. Jacobus tenBroek, "Social Security: Today's Challenge in Public Welfare," *Vital Speeches of the Day* 27 (1961): 411–15. For greater discussion of tenBroek's role in shaping and critiquing the American welfare state, see Felicia Kornbluh, "A Disabled State: How Blind Activists Created Modern Social Welfare Policy" (paper presented at the annual meeting of the American Society for Legal History, Baltimore, Md., November 17, 2006).

Nestor's importance. The case addressed one of the biggest unresolved questions of the American welfare state: the nature of its payouts.

This was indeed an open question. Politicians had their own ways of explaining the program to their constituents, while private insurers—the SSA's main competitors—frantically broadcast a different message.[96] And within the federal government (never a policymaking monolith to begin with), different individuals, agencies, and branches of government had distinct interpretations of this crucial piece of the welfare state. Officials in the Social Security Administration, for example, were disturbed by *Nestor.* The director of the Bureau of Old-Age and Survivors Insurance, Victor Christgau, called *Nestor*'s portrayal of Social Security "quite unfortunate" and criticized Justice Department lawyers for telling the Court that old-age, survivors, and disability insurance was something other than "insurance." The positions of HEW and the SSA were "quite to the contrary," he emphasized.[97] *Nestor* essentially forced that disagreement into the open and required the Court to resolve it.[98] Today, despite Christgau's grumblings, the SSA uses *Nestor* to show that benefits are "an earned right" only in

96. The National Association of Insurance Commissioners (NAIC) and the National Association of Life Underwriters (NALU) had long tried to convince the public that Social Security was no substitute for real insurance. In fact, the *Nestor* opinion perfectly reinforced a recent NALU resolution to oppose use of insurance terminology in the Social Security Act. Carlyle Dunaway, general counsel to the NALU, noted that "the decision [*Nestor*] could prove extremely helpful to NALU in its current campaign to persuade Congress to delete all insurance terminology from the Social Security Act and to insert in the Act a forthright declaration that the Social Security program is not, and is not to be represented as, an insurance program." Statement of Carlyle M. Dunaway, *National Association News* 55 (1960): 70, quoted in Lewis, "The Property Interest in Social Security Benefits," 343 n 63. See also Attarian, *Social Security,* 221 (describing the use that Ray Peterson, vice president and associate actuary of the Equitable Life Assurance Society, made of the decision and the government's briefs); Robert J. Myers, memorandum ("Further Thoughts on Quotations Relative to Nature of OASDI under Brief of Nestor Case"), January 12, 1960, box 2, Bureau of Old-Age and Survivors Insurance—Correspondence of Director Victor Christgau, 1954–1963, Social Security Administration Archives, National Archives, College Park, Md. (observing that the NALU had started using language from *Nestor* as "proof" that the program is not "insurance").

97. Victor Christgau to W. L. Mitchell, October 19, 1960, box 218, folder 011.11, Social Security Administration Archives, National Archives, College Park, Md. Christgau's memo made its way to HEW's general counsel, who sent back a terse response and dismissed the charge that Social Security had suffered. Parke M. Banta to W. L. Mitchell, December 5, 1960, box 216, folder 011.11, General Correspondence, 1960–1964, Records of the Office of the Commissioner—Commissioner's Correspondence, Social Security Administration Archives, National Archives, College Park, Md. This conversation may be part of a larger story about the internal politics of the New Deal agencies. Christgau's positions in the Agricultural Adjustment Administration and Works Progress Administration in the 1930s may have affected his stance on the nature of Social Security in 1960. I thank Dan Ernst for this suggestion.

98. Lower courts had come to similar conclusions about the nature of Social Security

the "moral and political sense," not the "legal, contractual sense"; Social Security is not a "handout" but neither is it "a matter of right." *Nestor* definitively settled the issue.[99]

If *Flemming v. Nestor* rejected one idea (that a person could have a traditional property- or contract-based right to Social Security benefits), it opened up space for another. *Nestor* attracted the attention of Yale professor Charles Reich, who made the case the centerpiece of his 1964 article "The New Property."[100] In this classic artifact of legal liberalism, Reich articulated a vision of individual liberty and government largess that aimed to push the welfare state under the protective umbrella of the Constitution and prevent McCarthy-style persecution from happening again.

Often historians and legal scholars do not associate "The New Property" with the issues of the 1950s because it had such a great impact in the late 1960s and 1970s, and because shortly after "The New Property" Reich started working on *The Greening of America,* his famous encomium to the consciousness of youth.[101] The article thus seems enmeshed in the social, political, and cultural upheaval of the sixties. It is also true that "The New Property" was not aimed at McCarthyism; if anything, it was aimed at establishing welfare rights. But as Robert Rabin astutely observed, "The New Property" is "firmly grounded in the political and cultural trauma of the

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(that Congress was free to change it without compensating affected beneficiaries) but "[t]he *Nestor* decision indicates that the pattern of recurrent amendments which have characterized the history of the Social Security Act since 1939 can withstand challenge in the highest court." Lewis, "The Property Interest in Social Security Benefits," 343.

99. Congress has changed eligibility rules "many times over the years," the SSA now explains. "The rules can be made more generous, or they can be made more restrictive. Benefits which are granted at one time can be withdrawn . . . ." Social Security Administration, "Supreme Court Case: Flemming v. Nestor," http://www.ssa.gov/history/nestor.html (25 April 2006). See also Attarian, *Social Security,* 219 ("So the highest court in the land had settled it: there is no accrued, vested property right to Social Security benefits. Social Security has no contract for benefits. And there is no sound analogy between Social Security and private insurance or annuities").

100. *Flemming v. Nestor* was not the only motivation for "The New Property." It was part of a series of cases in which authorities used control over privileges and benefits to punish non-conforming individuals. Furthermore, as Martha Davis and Felicia Kornbluh note, many of these cases came to Reich's attention only after Justine Wise Polier, a New York family court judge and the mother of a boyhood friend, asked Reich to look into the legality of "midnight raids" on welfare recipients. Martha Davis, *Brutal Need: Lawyers and the Welfare Rights Movement, 1960–1973* (New Haven: Yale University Press, 1993), 84; Felicia Kornbluh, *The Battle over Welfare Rights: Poverty and Politics in Modern America* (Philadelphia: University of Pennsylvania Press, 2007). Last, there is a more mundane explanation for the article and its timing: Reich was assigned to teach an introductory course on Property, a subject of which he knew "virtually nothing." When he read the Framers' discussions of property and government, he saw his contemporary concerns in a new light. Charles Reich, e-mail message to author, October 19, 2006.

101. Charles Reich, *The Greening of America* (New York: Random House, 1970).

Fifties."[102] More specifically, it is grounded in Reich's observations about how a powerful state, strengthened by its authority over New Deal social welfare programs, could enforce political and ideological conformity.

From the late-1940s to the mid-1950s, according to Ellen Schrecker, "Americans at every level of society genuinely believed that Communism endangered the nation." There were enough instances of supposed subversion, espionage, and sabotage to convince many people that communists were trying to undermine the American government and way of life.[103] People scrambled to protect the country, as well as their own reputations and institutions. The federal government implemented loyalty tests for employment, pursuant to executive order, but many private employers followed voluntarily. (Security-related industries adopted particularly stringent loyalty-security criteria, as did industries like law, education, communication, and entertainment).[104] State and local governments did their part by conditioning the use of public spaces and resources on loyalty, monitoring everything from fishing privileges to drivers' licenses. Meanwhile, after several decades of steady public sector growth in which many families grew dependent on government employment,[105] officials enthusiastically rooted out subversive employees, often with flimsy evidence and Kafkaesque procedures.[106]

102. Robert L. Rabin, "The Administrative State and Its Excesses: Reflections on 'The New Property,'" *University of San Francisco Law Review* 24 (1990): 275.

103. Schrecker, *Many Are the Crimes,* 154. See also Tom Engelhardt, *The End of Victory Culture: Cold War America and the Disillusioning of a Generation* (New York: Basic Books, 1995) (discussing Americans' preoccupation with the "enemy within" and the merging of "national security and insecurity" in American culture during the 1950s).

104. The best source on employment tests remains Ralph S. Brown, Jr., *Loyalty and Security: Employment Tests in the United States* (New Haven: Yale University Press, 1958). At the time of publication, Brown estimated that half of professional workers in the U.S. were "exposed to some kind of oath, inquiry, supervision, or surveillance" designed to test their loyalty. Surveying the total labor force (including public employees) Brown concluded that "at least one person out of five, as a condition of his current employment, has taken a test, or completed a loyalty statement, or achieved official security clearance, or survived some unidentified private scrutiny." Ibid., 176.

105. In 1950 governmental occupations included 13.3 percent of the nation's non-agricultural employees. This percentage steadily grew, reaching 15.4 percent by 1950 and 19.1 percent by 1975. Susan B. Carter et al., eds., *Historical Statistics of the United States, Millennial Edition Online* (Cambridge: Cambridge University Press, 2007), http://hsus.cambridge.org/HSUSWeb (16 January 2007).

106. Schrecker reports that by the end of the Truman administration there were 518 loyalty dismissals and 2,636 resignations. The figures from the Eisenhower administration, when 1,456 federal employees were fired, were not disaggregated. Schrecker estimates a low number of loyalty dismissals, but also notes evidence that "ten times as many people with security problems in their files resigned as were fired." Schrecker, *Many Are the Crimes,* 298. The government also flushed out employees that appeared vulnerable to coercion by the enemy, such as homosexuals. David K. Johnson, *The Lavender Scare: The Cold War*

Charles Reich, who during his years in Washington, D.C. sometimes went over to the Capitol "to watch Senator McCarthy and experience first-hand the atmosphere of fear and conformity which had taken over much of our government," had several connections to victims of anticommunist zeal.[107] One was Dr. Edward K. Barsky. An executive board member of the apparently suspicious Joint Anti-Fascist Refugee Committee, Barsky received a subpoena from the House Committee on Un-American Activities in April 1946. Barsky and seventeen fellow board members were cited for contempt when they refused to surrender the organization's records. Barsky paid a $500 fine and served a six-month sentence, but his ordeal was far from over. For his "crime" the State of New York suspended (and threatened to revoke) his license to practice medicine. Barsky sued, arguing that New York "deprive[d] him of property in his license and his established practice, without due process of law."[108] Barsky's case made it all the way to the Supreme Court, where Justice Black and his young law clerk, Reich, took great interest.

Reich had been thinking about the anticommunist manipulation of government-issued licenses, government jobs, and government services for several years. In 1951 Reich helped a fellow editor on the *Yale Law Journal* conceptualize a Note on passport denial, at the time a favorite State Department "weapon in the anti-communist crusade."[109] On a more personal level, Reich feared he would be denied membership to the New York bar in 1952 because of his past associations. One of Reich's mentors at Yale, Thomas Emerson, had earned the nickname "Tommy the Commie"[110] for his political work and Reich remembered "many rumors that the Com-

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Persecution of Gays and Lesbians in the Federal Government (Chicago: University of Chicago Press, 2004).

107. Charles Reich, *The Sorcerer of Bolinas Reef* (New York: Random House, 1976), 5–6.

108. *Barsky,* 347 U.S. 442, 451 (1954).

109. "What the State Department was saying came down to this: you are free to exercise your constitutional rights, but we can deny you a passport for doing so; the Constitution only protects you from criminal punishment, not other kinds of sanctions and deprivations." Charles Reich, "The New Property after 25 Years," *University of San Francisco Law Review* 24 (1990): 232; Comment, "Passport Refusal for Political Reasons: Constitutional Issues and Judicial Review," *Yale Law Journal* 61 (1952): 171–203. See also Stanley Kutler, "Government by Discretion: The Queendom of Passports," in *The American Inquisition: Justice and Injustice in the Cold War* (New York: Hill and Wang, 1982).

110. Thomas I. Emerson was among the leading civil liberties scholars of his generation. He was also active in politics. He ran for governor on the Wallace Progressive Party ticket in 1948, and during the McCarthy era he belonged to the National Committee to Abolish the House Committee on Un-American Activities and the National Lawyers Guild. For a complete list of writings by and about Emerson, see "Writings of Thomas Irwin Emerson," *Yale Law Journal* 101 (1991): 327–30.

mittee [on Character and Fitness] would reject anyone thought to harbor left-wing tendencies."[111] Meanwhile, as a Supreme Court clerk, Reich daily "read briefs and listened to arguments involving people who had been persecuted, exiled, or destroyed by their own government."[112] Ultimately neither the government nor the bar association questioned Reich's loyalty, but he lived with the knowledge that an arbitrary official action could take something precious from him. This may explain why Reich spent so "many hours and days discussing and debating" Barsky's appeal in Justice Black's chambers, even though a clear majority of the Court found the state's action unobjectionable.[113] The case would come back to Reich in the early 1960s as he considered the holding in *Flemming v. Nestor.*

In 1960, when the Supreme Court issued its decision in *Nestor,* anticommunists seemed unaware of their victory. Meanwhile, both Fedya Nestor and his wife Barbara were far removed from the proceedings. Yet *Nestor* stood out, at least to Reich, because it epitomized what was particularly dangerous about this Red Scare. Anticommunists were not simply raiding union offices or jailing alleged radicals; they were throwing the full force of the welfare state behind their efforts.[114] They had gone beyond demanding loyalty oaths for high-security government jobs to demanding such oaths for almost all publicly administered goods, from professional licenses to

111. Reich, "The New Property after 25 Years," 234. Reich would have been vulnerable to this charge: he supported Henry Wallace for President in 1948 and was a friend of prominent leftists like I. F. Stone and Leonard Boudin. According to Reich, he did not support communism "in any form," but he opposed the Cold War, the Truman loyalty program, the anticommunist oath for labor leaders in the Taft-Hartley Act, "and all manner of procorporate anti-leftism." Charles Reich, e-mail message to author, October 19, 2006.

112. Reich, *The Sorcerer of Bolinas Reef,* 6.

113. Ibid., 234; *Barsky,* 347 U.S. 442 (1954) (upholding the statute and the procedures that the New York Board of Regents used to suspend Barsky's license). Justice Black, joined by Justice Douglas, dissented. Reich credits the following statement from their dissent to his own influence: "The right to practice [medicine] is . . . a very precious part of the liberty of an individual physician or surgeon. *It may mean more than any property.* Such a right is protected from arbitrary infringement by our Constitution, which forbids any state to deprive a person of liberty or property without due process of law." Ibid., 459 (Black, J., dissenting) (emphasis added); Reich, "The New Property after 25 Years," 235.

114. Here I use "welfare state" to refer to its most "visible" components, programs like Social Security, unemployment insurance, and Aid to Families with Dependent Children. Scholars now recognize that there are important, less visible pieces of the American welfare state such as the tax code and private employer pensions. See, e.g., Jacob Hacker, *The Divided Welfare State: The Battle over Public and Private Social Benefits in the United States* (Cambridge, Eng.: Cambridge University Press, 2002); Christopher Howard, *The Hidden Welfare State: Tax Expenditures and Social Policy in the United States* (Princeton: Princeton University Press, 1997); Michael B. Katz, *The Price of Citizenship: Redefining the American Welfare State* (New York: Henry Holt, 2001); Jennifer Klein, *For All These Rights: Business, Labor, and the Shaping of America's Public-Private Welfare State* (Princeton: Princeton University Press, 2003).

housing.[115] And now they were imposing political conditions on a mandatory retirement savings program, a program grounded firmly in the language of entitlement (and thus supposedly above politics). Yes, the spirit of McCarthyism seemed to be flagging, and *Nestor*'s facts seemed too unique to stir fear in most Americans, but the case was an egregious example of a pattern of government conduct that had no discernible limit. The American welfare state had created expectations among its constituents—more and more every year, Reich observed—yet few protections existed to prevent legislators and administrators from exploiting these expectations should some future need to enforce loyalty or conformity arise.[116] Laws in the early 1960s that subjected welfare mothers to "midnight searches" (for men in their beds and men's clothing in their closets) were one worrisome indication of the government's latent power. The holding in *Flemming v. Nestor* was another.[117]

The term "welfare state" entered the American lexicon in the late 1940s, when opponents of Truman's "Fair Deal" attempted to portray the program as a corruptor of American individualism and a communist plot. The term was an epithet to some, while to others it had positive connotations. In general, the existence of a "welfare state" in America was far from accepted.[118] By the late 1950s, however, scholars had recognized that the

115. See note 12 above.

116. "By 1964, after the loyalty investigations of the 1950s, it was all too apparent that unprotected new forms of wealth afforded a ready device for using economic retaliation as an extra-constitutional means of punishment." Charles Reich, "Property Law and the New Economic Order: A Betrayal of Middle Americans and the Poor," *Chicago-Kent Law Review* 71 (1996): 820.

117. Charles Reich, "Midnight Welfare Searches and the Social Security Act," *Yale Law Journal* 72 (1963): 1347–60. Other arbitrary exercises of official power bothered Reich, too, like the series of cases involving bar admission. One of Reich's colleagues at Yale Law School, Clyde Summers, was denied bar membership for being a conscientious objector to World War II. Another well-known legal academic, George Anastaplo, spent over five years litigating the Illinois bar's refusal to admit him after he would not answer questions about CP affiliations. Charles Reich, e-mail message to author, October 19, 2006. See *In re Clyde Wilson Summers,* 323 U.S. 705 (1944); *In re Anastaplo,* 366 U.S. 82 (1961).

118. On the dangers of the "welfare state," see Sheldon Glueck, ed., *The Welfare State and the National Welfare: A Symposium on Some of the Threatening Tendencies of Our Times* (Cambridge, Mass.: Addison-Wesley Press, 1952) (including commentaries by Bernard Baruch, Harry F. Byrd, John Foster Dulles, Dwight D. Eisenhower, Herbert Hoover, and Roscoe Pound); Jules Abels, *The Welfare State: A Mortgage on America's Future* (New York: Duell, Sloan and Pearce, 1951); Marc Moreland, "The Welfare State: Embattled Concept," *Phylon* 11 (1950): 164–70 (attempting to explain why "the mere notion of the welfare state" had become "an anathema, an abomination" to the dominant political and business interests). On the promise of a "welfare state," see, e.g., William O. Douglas, "The Human Welfare State," *University of Pennsylvania Law Review* 97 (April 1949): 597–607. For an excellent collection of magazine articles and speeches discussing the existence, nature, strengths, and

United States had a "welfare state" system of social welfare provision (or, as one law professor put it, a "welfare state standard" regarding poverty).[119] They also realized that whether good or bad, this increasingly extensive and complex system challenged traditional American values, customs, and legal concepts.[120] Reich's "The New Property" married these concerns about the nature of the welfare state with the civil liberties questions raised by McCarthyism.

"The New Property" catalogued the many ways in which "the valuables dispensed by government" were "steadily taking the place of traditional forms of wealth" and leaving Americans more dependent, often invol-

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weaknesses of a "welfare state" in America, see Herbert J. Marx, Jr., ed., *The Welfare State* (New York: The H. W. Wilson Company, 1950). For a sampling of newspaper coverage, see, e.g., "Truman's 'Welfare State,'" *New York Times,* January 9, 1949 ("Mr. Truman's other policies represent—let us face this fact squarely—the growth of the 'welfare state' in America"); Henry Steele Commager, "Appraisal of the Welfare State," *New York Times,* May 15, 1949 (explaining the term "welfare state" and its differences from socialism); "Byrnes Hits Trend to 'Welfare State,'" *New York Times,* June 19, 1949 (quoting former Secretary of State James F. Byrnes attacking Truman's new programs for "point[ing] inevitably to a welfare state"); Lucy Freeman, "Dewey Lists Gains in State Welfare," *New York Times,* November 16, 1949 (quoting New York Governor Dewey on the "rising war of words over the phrase 'welfare state'").

119. Writing in 1962, Yale law professor Calvin Woodward described "widespread acceptance of the welfare state standard," the notion that "poverty is an 'economic' phenomenon that can, must, and should be abolished" and that "the state is the sole social institution capable of dealing with the economic forces which give rise to that phenomenon." Calvin Woodward, "Reality and Social Reform: The Transition from Laissez-Faire to the Welfare State," *Yale Law Journal* 72 (1962–1963): 288. See also Harry W. Jones, "The Rule of Law and the Welfare State," *Columbia Law Review* 58 (February 1958): 143–56 (noting that America had developed what Europeans called a "welfare state," marked by a "vast increase in the range and detail of government regulation of privately owned economic enterprise," "the direct furnishing of services by government to individual members of the national community," and "increasing government ownership and operation of industries and businesses"); Jacobus tenBroek and Richard B. Wilson, "Public Assistance and Social Insurance—A Normative Evaluation," *U.C.L.A. Law Review* 1 (April 1954): 238 ("[t]aking it as settled that public welfare on the present scale of magnitude or a greater one is a fixed and permanent part of our national policy . . . ").

120. See, e.g., tenBroek and Wilson, "Public Assistance and Social Insurance," 239 (asking how the welfare state "fit[s] into our democratic system of government," as well as whether it is "in harmony with American political and constitutional ideals," "consistent with sound economic principles," and "compatible with existing knowledge of the nature of man"); Jones, "The Rule of Law and the Welfare State," 143 (asking "How, if at all, can the values associated with the rule of law be achieved in today's welfare state?"); Alanson W. Willcox, "Patterns of Social Legislation: Reflections on the Welfare State," *Journal of Public Law* 8 (1957): 8 (balancing the economic value of the welfare state against charges that it causes "a net loss of freedom, and damage to the American character"); Elmer F. Wollenberg, "Vested Rights in Social-Security Benefits," *Oregon Law Review* 37 (1957–1958): 300 (worrying that judges or legislators would "transplant" inappropriate property- and contract-based legal concepts to the government social insurance program).

untarily, on the government. Income and benefits, jobs and occupational licenses, public resources and services—our wealth is increasingly in the form of these intangible goods, Reich told his readers, yet these goods are ours only by the grace of the government.[121] And the government, according to Reich, had misused its power in the past. He needed only gesture to the case law of the 1950s: *Barsky v. Board of Regents,*[122] *Homer v. Richmond,*[123] *Borrow v. Federal Communications Commission*[124]—and, of course, *Nestor,* the decision from the end of the McCarthy era that Reich considered "the most important of all judicial decisions concerning government largess."[125] "The implications of *Flemming v. Nestor* are profound," wrote Reich:

> No form of government largess is more personal or individual than an old age pension. No form is more clearly earned by the recipient, who, together with his employer, contributes to the Social Security fund during the years of his employment. No form is more obviously a compulsory substitute for private property; the tax on wage earner and employer might readily have gone to higher pay and higher private savings instead. No form is more relied on, and more often thought of as property. No form is more vital to the independence and dignity of the individual.

The fact that the government could take this "property" away suggested a feudal order, Reich said, in which "[w]ealth is not 'owned,' or 'vested' in the holders" but rather "held conditionally" and subject to "the fulfillment of obligations imposed by the state."[126] This "new feudalism" should disturb all Americans, he argued, because it eroded the essence of American national character: individualism and independence.[127] The Social Security pension system, for example, ostensibly "assur[ed] old people a stable,

121. Reich, "The New Property," 768. See also Jones, "The Rule of Law and the Welfare State,"155 ("Now the welfare state brings its staggering volume of additional grist to the mills of justice: new rights in vast number and infinitely more widely dispersed among the citizenship than the old rights ever were. In the scale of legal valuation, these new and more widely asserted rights are . . . certainly as dear to their possessors as contract and property rights are to those who possess them").

122. 347 U.S. 442 (1954) (upholding New York's suspension of a surgeon's medical license after he was convicted of contempt of Congress).

123. 292 F.2d 719 (D.C. Cir. 1961) (upholding the Coast Guard's denial of an operator's license to an applicant who refused to answer questions about membership in subversive organizations).

124. 285 F.2d 666 (D.C. Cir. 1960) (holding that the Federal Communications Commission could legally refuse to renew a radio operator's license for refusing to answer questions about CP membership).

125. Reich, "The New Property," 768.

126. Ibid., 769.

127. "If the day comes when most private ownership is supplanted by government largess, how then will governmental power over individuals be contained? What will dependence do to the American character? . . . Without the security of the person which individual wealth provides and which largess fails to provide, what, indeed, will we become?" Ibid., 770–71.

dignified, and independent basis of retirement," consonant with American social values. Yet in *Nestor* "Congress and the Supreme Court jeopardized all these values to serve a public policy both trivial and vindictive—the punishment of a few persons for Communist Party membership now long past."[128] A "feudal philosophy of largess and tenure may well be characteristic of collective societies," like Nazi Germany or Soviet Russia, but it was not the American way.[129]

Reich proposed a deceptively simple solution. The institution of private property had long protected the individual against both the power of the state and the "ruthless pressures" of collective society, Reich argued, combining a Lockean understanding of property with his own dash of anticommunism.[130] In light of changing circumstances Americans needed to "create a new property" to perform this function. They needed a definition of property that encompassed diverse forms of government largess and endowed them with the procedural protections surrounding traditional forms of property, like hearings before fair tribunals, judicial review, and the opportunity to cross-examine evidence. As with traditional forms of property, "[t]he presumption should be that the professional man will keep his license, and the welfare recipient his pension," Reich explained. And "[i]f revocation is necessary, not by reason of the fault of the individual holder, but by reason of overriding demands of public policy, perhaps payment of just compensation would be appropriate," just as it would be if the government took a man's land.[131] This would ensure that all citizens had the necessary modicum of property to be independent, upright citizens, capable of participating in the polity.[132] In essence, it was a solution to

128. Ibid., 775.

129. The invocation of communism and fascism as two poles, equally distant from freedom and American values, illustrates how Reich deployed classic anticommunist liberal ideas and the anti-extremist language of the early sixties in the service of greater protections for the clients of the welfare state. On the shifting ideology of anticommunism, see Richard Gid Powers, *Not without Honor: The History of American Anticommunism* (New York: The Free Press, 1995).

130. Unlike Locke, however, Reich believed that "Property is not a natural right but a deliberate construction by society"; all property comes from the state. Reich, "The New Property," 771.

131. Ibid., 785–87.

132. "The New Property" articulates a variant of the idea that "[p]roperty protects all other rights, because property enables citizens to be independent and hence capable of self-government." It invokes an older republican tradition in which property, especially agricultural property, gives the citizen a "safe haven" that "enables him to form independent judgments and to debate and defend his views with courage and vigor in the political forum." Since the republican property owner is "dependent on no one," he is "fit to exercise the franchise and generally take part in the polity." Carol Rose, "Property as 'The Guardian of Every Other Right,'" in *Property Law on the Threshold of the 21st Century,* ed. G. E. van Maanen and A. van der Walt (Antwerp: MAKLU Uitgevers Antwerpen—Apeldoorn, 1996), 487–93, 488.

what Justice Douglas in 1949 called "the foremost problem of society": "to cultivate and preserve incentive and independence for the individual and security for the masses of the people."[133] It was also a brilliant sleight of hand. As Gregory Alexander explains, Reich's theory not only justified legal recognition of the individual property interest in entitlements like Nestor's Social Security benefits, which "are easily squared with the classical liberal theory of the legitimate means of acquiring property rights," but also the property interest in "the true welfare benefit."[134]

Reich's argument proved to be one of the most influential of the late twentieth century. On the twenty-fifth anniversary of "The New Property," the editors of the *University of San Francisco Law Review* found hundreds of journal pieces and at least fifty important cases that relied on "The New Property."[135] The most consequential was *Goldberg v. Kelly* (1970), the case in which, to use the words of one critic, Justice Brennan attempted to transform Reich's "academic and philosophical insights about the nature of property into the imperative language of constitutional law."[136] In *Goldberg,* the Supreme Court not only mandated an evidentiary hearing before the termination of welfare benefits (a hefty procedural protection), Brennan suggested that welfare entitlements may now be "more like 'property' than a 'gratuity.'" "Much of the existing wealth in this country takes the form of rights that do not fall within traditional common-law concepts of property," Brennan explained, but this wealth needs property's traditional protections.[137]

Ironically, Justice Black vehemently dissented, signaling that his protégé had carried the notion of property too far, that the leftist deportee Fedya Nestor really was more deserving than the welfare recipient John Kelly. "It somewhat strains credulity," Black wrote, "to say that the government's promise of charity to an individual is property belonging to that individual when the government denies that the individual is honestly entitled to receive such a payment." He accused the majority of interpreting the Due Process Clause to "forbid [] any conduct that a majority of the Court believes 'unfair,' 'indecent,' or 'shocking to their consciences,'" an interpretation that could easily allow the clause to "swallow up all other parts of the Constitution." He also predicted that the effect of the decision would be just the opposite of what Reich intended: "that the government

133. Douglas, "The Human Welfare State," 597.

134. Gregory S. Alexander, *Commodity and Propriety: Competing Visions of Property in American Legal Thought, 1776–1970* (Chicago: University of Chicago Press, 1997), 371.

135. Reich, "The New Property after 25 Years," app., 242–71. In 1991, the *Yale Law Journal* found "The New Property" to be its most cited article to date. Fred R. Shapiro, "The Most-Cited Articles from *The Yale Law Journal,*" *Yale Law Journal* 100 (1994): 1449–1515.

136. Epstein, "No New Property," 748.

137. *Kelly,* 397 U.S. 254 (1969).

will not put a claimant on the rolls initially until it has made an exhaustive investigation to determine his eligibility"; people in desperate need would be disserved.[138]

Black's gauge of bureaucratic behavior proved prescient, but in the short term *Goldberg* was a major victory for the diffuse "poor people's movement" of public housing tenants, welfare mothers, legal services lawyers, and civil rights activists. It raised their hopes of constitutionalizing a more just, humane social order and gave them a weapon to use in their ground-level battles for welfare rights.[139] *Goldberg* also appeared to catalyze a "due process explosion" in which the Court "carried the hearing requirement from one new area of government action to another."[140] The decision produced "considerable progeny in the Supreme Court and a much larger brood in the lower courts": under its framework, the Court mandated that hearings precede the suspension of driver's licenses, the repossession of chattels, the revocation of parole or probation, and even a student's ten-day suspension from school.[141] By 1975, Judge Friendly famously wondered "whether government can do anything to a citizen without affording him 'some kind of hearing.'"[142]

The answer, it turned out, was "yes." By the following year, the Supreme Court held in *Mathews v. Eldridge* that the federal government did not have to provide an evidentiary hearing before terminating a person's Social Security disability benefits. This decision also inaugurated a "balancing test" for due process cases, in which the Court weighed the so-called "private interest" against "the Government's interest," including the fiscal and administrative burdens that greater procedural protections would entail.[143] Although this approach continued to acknowledge the valuable interests that the welfare state created, it took the magic out of the word "property." Whether a government benefit was "property" or not became curiously irrelevant.

In the end, then, "The New Property" did not lead to a revolution in constitutional law, nor did it result in greater security for most clients of the nation's social welfare programs. Reich himself eventually acknowl-

138. Ibid., 271–79 (Black, J., dissenting).

139. Davis, *Brutal Need*; Annelise Orleck, *Storming Caesar's Palace: How Black Mothers Fought Their Own War on Poverty* (Boston: Beacon Press, 2005), 133–34.

140. Henry J. Friendly, "Some Kind of Hearing," *University of Pennsylvania Law Review* (1975): 1268.

141. Ibid., 1273–75 (citing *Bell v. Burson,* 402 U.S. 535 [1971]); *Fuentes v. Shevin,* 407 U.S. 67 (1972); *Morrissey v. Brewer,* 408 U.S. 471 (1972); *Gagnon v. Scarpelli,* 411 U.S. 778 (1973); *Perry v. Sinderman,* 411 U.S. 593 (1972); *Board of Regents v. Roth,* 408 U.S. 564 (1974); *Goss v. Lopez,* 419 U.S. 565 (1975).

142. *Goss v. Lopez,* 419 U.S. 565 (1975), 1275.

143. 424 U.S. 319, 334–34.

edged that "the moderate, due process, cost-benefit approach" of "The New Property" "must surely be deemed a failure" because "it does not work."[144] Yet in at least one way it succeeded beyond Reich's expectations: drawing on cases like *Nestor,* "The New Property" called attention to the tensions inherent in a state that guaranteed both social security and domestic security; it vividly illustrated the connections between the nation's most progressive impulses and its darkest. These are observations that haunted other intellectuals of the post-war period and that haunt us still today.

Conclusion

Fedya Nestor's stepdaughter, Dorothy Healey, was the last person in her family to see Fedya alive. In June 1961 Dorothy went with six other American communist leaders to Eastern Europe, where she found Fedya "a sadly disillusioned man." "He had set off with such eagerness," she remembered, but life in Bulgaria was not what he expected.[145] A high school sweetheart put him up for a time, but eventually threw him out. The Bulgarian government had no use for his perpetual motion machine or his political ideas. According to Barbara, Fedya wrote to her begging to return to the U.S., but she could do nothing for him.[146] His life seems to have ended in loneliness and disappointment.

Fedya Nestor's encounter with the legal system, at least, demands remembering. The case not only set a vital precedent for all contributors to the Social Security program, it captured a complex moment in American history. The nation was at once grappling with political and ideological threats, adjusting to the changes wrought by World War II, and puzzling out the meaning of its welfare state, all while attempting to preserve the integrity of sacred concepts like "liberty" and "property." Nestor's case also anticipates some of the major disputes and concerns of the 1960s. As the war on domestic communism transitioned to a war on poverty and a war in Vietnam, *Nestor*'s questions about the nature of government largess, the scope of government responsibility, and the exercise of government power became even more pressing.

Most important, *Flemming v. Nestor* should prompt scholars to think

144. Charles Reich, "Beyond the New Property: An Ecological View of Due Process," *Brooklyn Law Review* 56 (Fall 1990): 733. Reich claims that, "judged by the experience of twenty years," the best way to realize his goal from "The New Property" would be to "give economic security the status of a constitutional right which must be honored ahead of the other goals of society." Ibid.

145. Healey and Isserman, *Dorothy Healey Remembers,* 182.

146. Nestor, interview, December 27, 1974, interview 06d segment 3 segkey: a1606.

about the history of social welfare policy in new ways and to reevaluate periods that appear quiescent.[147] The case and its trajectory highlight the crooked path by which the American welfare state has developed (a path that traveled through the courts), the toll the welfare state has taken on competing interests like civil liberties, and the unusual combination of "insiders" and "outsiders," the powerful and the powerless, that shaped its story. Often historians of the American welfare state turn to legislative debates, cabinet discussions, and boardroom meetings to understand the unique structure of American social welfare provision, overlooking the role of the courts and their diverse array of litigants. But as Susan Sterett has written in her work on public pension cases, the accessibility of the American court system ensured that "it was not only social workers and social insurance advocates and their legislative opponents who shaped policy," but also the range of Americans that took their complaints to court—people like railroad executives, "cranky taxpayers," and county commissioners. In this way, the law functioned "not only as a structure but as a site of contest": "[l]itigation in specific cases contested the meanings that common-law categories contained for public payments."[148] Cases like *Flemming v. Nestor* should urge historians to extend Sterett's analysis beyond public pensions to public support of all kinds, beyond the New Deal era to subsequent decades of welfare state development and retrenchment, and beyond "cranky taxpayers" to welfare mothers, disbarred lawyers, "subversive" government employees, and evicted public housing tenants. Through their seemingly personal disputes—which often occurred right under the noses of crucial policymakers, administrators, and activists—litigants negotiated the boundaries, meaning, and power of the American welfare state.

147. Many scholars characterize the years between the New Deal and the Great Society as a period of "benign neglect" in the history of welfare state development. It's time to reconsider that evaluation.

148. Susan Sterett, *Public Pensions: Gender and Civic Service in the States, 1850–1937* (Ithaca: Cornell University Press, 2003), 10.

The Administrative State, Front and Center: Studying Law and Administration in Postwar America

REUEL E. SCHILLER

I. Blinded by *Brown*

More than any other case from the postwar period, *Brown v. Board of Education* has captured the attention of historians and the public alike. The case itself, and the NAACP's campaign that led to it, have been the subject of books and articles beyond counting.[1] In many history textbooks it is the only court case mentioned between the end of World War II and the early 1960s.[2] It is one of a handful of cases that is recognized by the

1. A search of the system-wide catalog of the libraries of the University of California reveals eighty-one entries for books with "*Brown v. Board of Education*" in the title. Only eleven contain the words "Roe" and "Wade"; seven contain the words "Plessy" and "Ferguson"; and seven contain "Marbury" and "Madison." Only the words "Dred Scott" come close to *Brown*, generating seventy-seven entries. The Library of Congress subject heading "Topeka (Kan) Board of Ed—Trials, Litigation, etc" has forty-three entries, including twelve under the subheading "juvenile literature."

2. See Daniel J. Boorstin and Brooks Mather Kelley, *A History of the United States* (Needham, Mass.: Prentice Hall, 1996), 705–71 (*Brown* is the only judicial decision mentioned in the section entitled "Postwar Problems, 1945–1960"); Paul Boyer, *Boyer's American Nation* (Boston: Houghton Mifflin, 2001) (chaps. on the "Cold War" and on "Society after World War II" mention *Brown* and *Sweat v. Painter,* but no other cases); Andrew Cayton, Elisabeth Israels Perry, and Allan M. Winkler, *America: Pathways to the Present* (Needham, Mass.:

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public at large and is surely the only Supreme Court case that has its own National Historic Site.[3]

The intense focus on this single case is not without reason. While recent years have seen a debate about the importance of *Brown* in actually promoting desegregation,[4] no one doubts that it is a potent symbol of the major elements of postwar liberalism. The case demonstrated the increasing commitment of national institutions to pluralism and racial egalitarianism. It presaged the Warren Court's reconceptualization of the Supreme Court's role as the protector of certain kinds of civil rights and civil liberties. It was also a potent bellwether for the increasing importance of federal institu-

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Prentice Hall, 1995) (*Brown* is only Supreme Court decision from the 1950s that is mentioned); Gary Nash, *American Odyssey: The United States in the Twentieth Century* (New York: Glencoe/McGraw-Hill, 1999) (*Brown* is the only judicial decision from the 1950s that is mentioned, although the book does discuss the trial of the Hollywood Ten). These textbooks are four of the six most popular high school American history textbooks according to the American Textbook Council. www.historytextbooks.org/adoptions.htm. College textbooks are not appreciably better. Alan Brinkley's *The Unfinished Nation* mentions no cases other than *Brown* in its chapters on the postwar period. See Alan Brinkley, *The Unfinished Nation: A Concise History of the United States,* 3rd ed. (New York: McGraw-Hill, 2001), 844–913. Another leading college text, *America, Past and Present,* mentions *Yates v. United States,* but otherwise focuses solely on *Brown.* Robert A. Divine, T. H. Breen, George Fredrickson, R. Hal Williams, *America, Past and Present,* 3rd ed. (New York: HarperCollins, 1991), 881. As Mary Dudziak has noted, even legal history texts, which obviously discuss more than just *Brown* in their sections in the postwar period, have the unfortunate tendency to segregate the race cases and the anticommunism cases from one another. Mary L. Dudziak, "*Brown* as a Cold War Case," *Journal of American History* 91 (2004): 32. As both Lee and Tani's articles indicate, these cases need to be woven together as part of the narrative of postwar legal history.

3. http://www.nps.gov/brvb/. The courthouse in Saint Louis where the trials in the *Dred Scott* case were held is also a National Historic Site. However, this site is not devoted exclusively to *Dred Scott.* It instead memorializes the many links that the courthouse has to slavery, including the slave auctions that occurred there and its relationship to the Underground Railroad. It also has exhibitions on Virginia Minor's 1870 challenge to women's disfranchisement, nineteenth-century law in general, and the architecture of historic courthouses. http://www.nps.gov/jeff/planyourvisit/och.htm.

4. Michael Klarman and Gerald Rosenberg are the two leading *Brown* skeptics. See Gerald Rosenberg, *The Hollow Hope* (Chicago: University of Chicago Press, 1991), 42–71; Michael Klarman, "*Brown,* Racial Change, and the Civil Rights Movement," *Virginia Law Review* 80 (1994): 7; Michael Klarman, "How *Brown* Changed Race Relations: The Backlash Thesis," *Journal of American History* 81 (1994): 81; Michael Klarman, *From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality* (Oxford: Oxford University Press, 2005), 344–442. For some impassioned defenses of *Brown,* see David J. Garrow, "Hopelessly Hollow History: Revisionist Devaluing of *Brown v. Board of Education,*" *Virginia Law Review* 80 (1994): 151; Mark Tushnet, "The Significance of *Brown v. Board of Education,*" ibid., 173; and Paul Finkelman, "Civil Rights in Historical Context: In Defense of *Brown,*" *Harvard Law Review* 118 (2005): 973.

tions in public policy creation. Finally, *Brown* established a model for what has been called "structural reform litigation" in which interest groups use litigation campaigns to affect public policy by bringing executive and, to a lesser extent, legislative institutions under on-going judicial control.[5]

Nevertheless, *Brown's* dominance of the narrative of postwar legal history has come with a cost. Just as objects placed next to a blazing light may be difficult to see, *Brown's* notoriety has distracted legal historians from other significant legal-historical events of the postwar period. While there have been wonderful works of legal history about certain postwar subjects,[6] legal historians have been largely AWOL as political, cultural, and social historians have deepened the narrative of postwar American history. Surely the rise of consumer culture, the growth of suburbanization, and the resurgence of domesticity, to name just three subjects successfully incorporated into the narrative of postwar history, have legal components that are worth investigating.[7]

5. The germinal works discussing the rise of structural reform litigation are Abram Chayes, "The Role of the Judge in Public Law Litigation," *Harvard Law Review* 89 (1976): 1281 and Owen Fiss, *The Civil Rights Injunction* (Bloomington: Indiana University Press, 1978). A contemporary, less sanguine, view of structural reform litigation is Ross Sandler and David Schoenbrod, *Democracy by Decree: What Happens When Courts Run Government* (New Haven: Yale University Press, 2003).

6. Two areas that have received scholarly attention are anticommunism and legal thought. On anticommunism see Michal R. Belknap, *Cold War Political Justice: The Smith Act, the Communist Party, and American Civil Liberties* (Westport, Conn.: Greenwood Press, 1977); Stanley I. Kutler, *The American Inquisition: Justice and Injustice in the Cold War* (New York: Hill and Wang, 1982); and Arthur J. Sabin, *In Calmer Times: The Supreme Court and Red Monday* (Philadelphia: University of Pennsylvania Press, 1999). On postwar legal thought see G. Edward White, *Patterns of American Legal Thought* (Indianapolis: Bobbs-Merrill, 1978), 136–62; Laura Kalman, *Legal Realism at Yale, 1927–1960* (1986), 145–231; Neil Duxbury, *Patterns of American Jurisprudence* (Oxford: Oxford University Press, 1995), 206–99; Laura Kalman, *The Strange Career of Legal Liberalism* (New Haven: Yale University Press, 1996), 22–42; and William N. Eskridge, Jr. and Philip P. Frickey, "The Making of Legal Process," *Harvard Law Review* 107 (1994): 2031. Of course, more synthetic surveys of twentieth-century legal history have sections on postwar developments. See Morton Horwitz, *The Transformation of American Law, 1870–1960: The Crisis of Legal Orthodoxy* (New York: Oxford University Press, 1992); William E. Nelson, *The Legalist Reformation: Law, Politics, and Ideology in New York, 1920–1980* (Chapel Hill: University of North Carolina Press, 2001); and Lawrence M. Friedman, *American Law in the Twentieth Century* (New Haven: Yale University Press, 2002). Friedman has a particularly useful bibliography.

7. On these subjects see Kenneth T. Jackson, *The Crabgrass Frontier: The Suburbanization of the United States* (New York: Oxford University Press, 1985); Elaine Tyler May, *Homeward Bound: American Families in the Cold War Era* (New York: Basic Books, 1988); Lizabeth Cohen, *A Consumer's Republic: The Politics of Mass Consumption in Postwar America* (New York: Knopf, 2003); and Meg Jacobs, *Pocketbook Politics: Economic Citizenship in Twentieth-Century America* (Princeton: Princeton University Press, 2004).

The largest lacuna (or at least the one that bothers me the most) is the absence of any sustained legal history of the administrative state. This historiographic hole is particularly perplexing. No one would disagree that the growth of the administrative state (including the welfare state) is one of the key elements of postwar liberalism. Yet its legal dimensions are profoundly understudied. In the last several decades political historians have fruitfully turned their attention to the administrative state,[8] yet legal historians have not followed.[9] Elsewhere I have called political historians to task for ignoring the role of courts in the administrative state.[10] But the fault is ours as well. Legal historians have not generated a legal history of the postwar period that includes the interaction of courts and agencies.

Indeed, *Brown* may have led us astray. The story of *Brown*—litigators using the federal courts to bludgeon recalcitrant state actors into creating specific policies—is simply not the manner in which most public policy was made during the postwar period. Courts were not alone in the driver seat. They may not even have been in the front of the car. In the years following World War II administrative agencies created increasing amounts of law. Postwar legal history must begin to reflect this. The fact

8. For the basic bibliographical references to the so-called "state-building" or "American Political Development" literature, see Reuel E. Schiller, "Enlarging the Administrative Polity: Administration and the Changing Definition of Pluralism, 1945–1970," *Vanderbilt Law Review* 53 (2000): 1389, 1393–96. For monographs from this literature that focus on the postwar period in particular, see Brian Balogh, *Chain Reaction: Expert Debate and Public Participation in American Commercial Nuclear Power, 1945–1975* (Cambridge: Cambridge University Press, 1991); Julian Zelizer, *Taxing America: Wilbur D. Mills, Congress, and the State, 1945–1975* (Cambridge: Cambridge University Press, 1998); Jennifer Klein, *For All These Rights: Business, Labor, and the Shaping of America's Public-Private Welfare State* (Princeton: Princeton University Press, 2003); Merl E. Reed, *Seedtime for the Modern Civil Rights Movement: The President's Committee on Fair Employment Practice, 1941–1946* (Baton Rouge: Louisiana State University Press, 1991); Meg Jacobs "'How About Some Meat?': The Office of Price Administration, Consumption Politics, and State Building from the Bottom Up, 1941–1946," *Journal of American History* 84 (1997): 910–41; as well as several excellent essays in parts one and two of *The Politics of Social Policy in the United States,* ed. Margaret Weir, Ann Shola Orloff, and Theda Skocpol (Princeton: Princeton University Press, 1988).

9. For three legal historians who have truly given the administrative state its due, see Lucy E. Salyer, *Laws Harsh as Tigers: Chinese Immigrants and the Shaping of Modern Immigration Law* (Chapel Hill: University of North Carolina Press, 1995); William J. Novak, *The People's Welfare: Law and Regulation in Nineteenth-Century America* (Chapel Hill: University of North Carolina Press, 1996); and Barbara Young Welke, *Recasting American Liberty: Gender, Race, Law, and the Railroad Revolution, 1865–1920* (Cambridge: Cambridge University Press, 2001). Of course, none of these books address the postwar period.

10. Reuel E. Schiller, "'Saint George and the Dragon': Courts and the Administrative State in Twentieth-Century America," *Journal of Policy History* 17 (2005): 110.

that both Sophia Lee and Karen Tani's wonderful articles do so is a cause for optimism.

Both articles place the administrative state front and center in the legal history of postwar America. They do so in different ways, each of which suggests a fruitful path for legal historians who wish to explore the interaction between administration and law in the years following the Second World War. To simplify: Lee demonstrates that agencies were a completely independent locus of law creation, even at a constitutional level; Tani shows how studying the interaction between courts and agencies is crucial to understanding policy development during the postwar period. Using these articles as a springboard, in the next two sections I will suggest some directions for legal historians to take as they pursue either approach to this subject.

II. The Untold Administrative Dimension of Legal Liberalism

Lee's narrative is compelling proof of the importance of studying administrative institutions as law-makers. By showing how the NAACP used the NLRB in its battle for fair employment practices, she not only throws light on a heretofore unstudied element of the NAACP's campaign for racial equality. She also shows how, in the years following the Second World War, agencies became a locus of law creation—a locus that cries out for further examination by legal historians.

For example, Lee's description of the litigation campaign to outlaw racial discrimination by unions under the NLRA was only one of several doctrinal innovations that civil rights litigators pressed on the Board. Two years prior to *Hughes Tool,* the Board declared that it would set aside elections in which employers used racially inflammatory rhetoric.[11] In 1964, the year it decided *Hughes Tool,* the Board held that concerted activities aimed at promoting non-discriminatory employment practices were protected by the Act.[12] In 1969, the NAACP and other civil rights organizations argued before the Board that it should allow unionized African-American workers to bargain separately with their employer if they believed that their union was not representing their interests.[13] While the Board rejected that argument, the D.C. Circuit did not.[14] Indeed, that same year the D.C. Circuit

11. *Sewell Manufacturing,* 138 NLRB 66 (1962).

12. *Tanner Motor Livery,* 148 NLRB 1402 (1964).

13. See Reuel E. Schiller,"The Emporium Capwell Case: Race, Labor Law, and the Crisis of Postwar Liberalism," *Berkeley Journal of Employment and Labor Law* 25 (2004): 129, 145–49.

14. *Emporium Capwell,* 192 NLRB 173 (1971), reversed and remanded sub nom *Western Addition Community Organization v. NLRB,* 485 F.2d 917 (D.C.Cir. 1973).

instructed the Board to find that racial discrimination by an employer was, in and of itself, a violation of the NLRA.[15]

As with *Hughes Tool,* none of these innovations had much lasting impact. Some were rejected by higher courts,[16] while others, like *Hughes Tool,* simply faded away.[17] But the fate of these doctrines is not what was significant about them, historically speaking. Their significance lies in the fact that they demonstrate how aggressively civil rights litigators used administrative agencies to further their goals.

Indeed, there exists an essentially unchronicled legal history of the interaction between the Civil Rights Movement and the administrative state.[18] The "unremitting struggle" that civil rights activists demanded required as much legal action before agencies as it did before courts.[19] The short-lived Fair Employment Practice Committee and the Equal Employment Opportunity Commission were obvious places for the NAACP and other groups to focus their attention, but people within the Civil Rights Movement hardly limited themselves to agencies that were designed to address their concerns. To do so would have been to profoundly restrict their opportunities to shape policy through the administrative state. Instead, lawyers in the Civil Rights Movement used agencies that were not designed to address issues of racial equality.

For example, the Interstate Commerce Commission was less than two months old when, in May of 1887, William H. Councill filed a complaint against the Western and Atlantic Railroad Company after being violently expelled from an all-white, first-class car as he traveled, with a first-class ticket, from Chattanooga to Atlanta.[20] In Councill's case, as well as in two others that were brought in the next two years, the Commission held that the railroad companies violated the Interstate Commerce Act by failing to provide African-American passengers with accommodations equal to

15. *United Packing House, Food, and Allied Workers v. NLRB,* 416 F.2d 1126 (D.C. Cir. 1969).

16. *Emporium Capwell v. Western Addition Community Organization,* 415 U.S. 913 (1975); *NLRB v. Tanner Motor Livery,* 419 F.2d 216 (9th Cir. 1969).

17. *Sewell* is still good law. See *KI (USA) Corp,* 309 NLRB 1063 (1992); *Zartic, Inc.,* 315 NLRB 495 (1994). *United Packing House,* on the other hand, has been narrowed by the Board. *Jubilee Manufacturing,* 202 NLRB 272 (1973). Consequently, racial discrimination rarely serves as the basis for a section 8(a)(3) claim. *J. S. Alberici Construction Co.,* 231 NLRB 1030 (1977); *Dispatch Printing Co.,* 306 NLRB 9 (1992).

18. A notable exception to this is Welke, *Recasting American Liberty,* particularly chap. 9.

19. This phrase was William Henry Hastie Jr.'s. See Genna Rae McNeil, *Groundwork: Charles Hamilton Houston and the Struggle for Civil Rights* (Philadelphia: University of Pennsylvania Press, 1983), 211.

20. Charles A. Lofgren, *The Plessy Case: A Legal-Historical Interpretation* (New York: Oxford University Press, 1987), 142.

those of whites.[21] Thus, the ICC created the doctrine of separate but equal almost a decade before *Plessy v. Ferguson* was decided.

In the 1880s, this was seen as something of a triumph, since most railroads provided no first-class accommodations for blacks.[22] By the end of World War II, the goals of the litigants had changed substantially, particularly as the ICC backed away from requiring even segregated equality. Their choice of forums did not change, however. The NAACP continued litigating before the ICC, ultimately securing in 1950 a decision by the Supreme Court that the Interstate Commerce Act prohibited segregated railroad cars.[23] It also used the ICC as a forum for attacking segregated bus facilities in the context of the Freedom Rides in 1961.[24] The 1960s also saw cases brought before the Civil Aeronautics Board to desegregated southern airports and prohibit racial discrimination in air transportation.[25]

Similarly, during the 1960s, civil rights organizations used the Federal Communication Commission (FCC) as a forum for advancing their agenda of racial egalitarianism. During 1964, organizations participating in Freedom Summer in Mississippi petitioned the FCC, requesting that the agency not renew the licenses of white-owned radio and television stations that refused to carry black-oriented programming or that broadcast biased information about civil rights activities.[26] As a result, by early 1970s, the FCC was adjudicating dozens of petitions from African-American listeners demanding that local programming reflect the interests of all elements of the community. Indeed, even by the mid-1960s, the simple threat of such petitions forced southern media outlets to begin, albeit tentatively, to cover civil rights activities.[27]

21. Welke, *Recasting American Liberty,* 344–48; Lofgren, *Plessy Case,* 142–44; Catherine A. Barnes, *Journey from Jim Crow: The Desegregation of Southern Transit* (New York: Columbia University Press, 1983), 6–7.

22. Note that this was all that Councill and the other early litigants were asking for. Lofgren, *Plessy Case,* 142–43; Welke, *Recasting American Liberty,* 344–45.

23. *Henderson v. United States,* 339 U.S. 816 (1950). Barnes, *Journey from Jim Crow,* 74–76.

24. Barnes, *Journey from Jim Crow,* 168–75.

25. Ibid., 172; *Fitzgerald v. Pan American World Airways,* 132 F. Supp. 798 (S.D.N.Y. 1955).

26. For a tantalizing, but brief, description of these events see Brian Ward, *Radio and the Struggle for Civil Rights in the South* (Gainsville: University Press of Florida, 2004), 274–77. Also see Kay Mills, *Changing Channels: The Case That Transformed Television* (Jackson: University Press of Mississippi, 2004). The FCC was exceptionally resistant to considering such petitions until it was twice rebuked by the D.C. Circuit for its intransigence. *Office of Communications of the United Church of Christ v. FCC,* 359 F.2d 994 (D.C.Cir. 1966); *Office of Communications of the United Church of Christ v. FCC,* 425 F.2d 543 (D.C.Cir. 1969).

27. Ward, *Radio and the Struggle for Civil Rights,* 277.

All of these instances of administrative law-making involved the civil rights of African-Americans. However, the growth of the administrative state during the postwar period provides a plethora of opportunities to study, as Lee did for the NLRB, the way in which individuals and interest groups generated policy as they litigated before agencies on a host of subject matters. As Tani demonstrates, anticommunism is an obvious locus for such studies. The Subversive Activities Control Board, the Attorney General's list, and countless state equivalents, have already generated some legal-historical scholarship, but nowhere near enough.[28] Similarly, despite an explosion of historical work about the development of the American welfare state, legal historians have just begun to explore its legal and doctrinal elements.[29] And what about the administrative entities associated with the other elements of postwar social change: the federal, state, and local entities that shepherded millions of Americans from the cities into the suburbs; or agencies that helped to generate consumer culture through loans and subsidies? Or, what about the actions of less "sexy" agencies, like the Atomic Energy Commission, the Federal Power Commission, and the Food and Drug Administration, each of which transformed the way they regulated profoundly important areas of the economy in the late 1950s and the early 1960s?[30]

Finally, this focus on the legal aspects of agency actions must reflect one of Lee's key points: agencies can be constitutional actors. *Marbury v. Madison* to the contrary, the growth of the administrative state has, on occasion, created a demimonde of constitutional interpretation in which agencies, not courts, are the primary actors. Consider freedom of expression: During the first third of the twentieth century, judicial deference to administrative action limiting free speech was routine.[31] Even as the judiciary asserted itself as the primary guardian of this right, agencies strongly and successfully asserted their own power to interpret the First Amendment. In the 1930s and 1940s, the NLRB engaged in a struggle with the judiciary over its power to restrict the speech of employers in the context

28. See note 6, above. Ellen Schrecker's *Many are the Crimes: McCarthyism in America* (Boston: Little, Brown, 1998), the definitive narrative history of McCarthyism, discusses many legal issues.

29. In addition to Tani's piece in this Forum, see Felicia Kornbluh, *The Battle for Welfare Rights: Politics and Poverty in Modern America* (Philadelphia: University of Pennsylvania Press, 2007), particularly chap. 3, and Martha F. Davis, *Brutal Need: Lawyers and the Welfare Rights Movement, 1960–1973* (New Haven: Yale University Press, 1993).

30. Reuel E. Schiller, "Rulemaking's Promise: Administrative Law and Legal Culture in the 1960s and 1970s," *Administrative Law Review* 53 (2001): 1139, 1147–49.

31. Reuel E. Schiller, "Free Speech and Expertise: Administrative Censorship and the Birth of the Modern First Amendment," *Virginia Law Review* 86 (2000): 1, 21–51.

of union representation elections. Even after the Supreme Court explicitly prohibited the Board from doing so in 1941, the agency continued until Congress and new appointees reined it in.[32]

Similarly, for most of the twentieth century the FCC (and its predecessor, the Federal Radio Commission) acted in a constitutional capacity by strictly regulating the content to radio and television broadcasts.[33] In the 1920s and 1930s, the agency would revoke licenses of stations that broadcast "distasteful" or even "uninteresting" content.[34] Stations that broadcast political opinions contrary to those of the Roosevelt Administration also found themselves in hot water.[35] In 1940, the FCC simply prohibited editorializing.[36] During the postwar period, the agency overturned its ban on editorializing and instituted the "fairness doctrine" that required stations to broadcast "all sides of controversial public issues."[37] It also denied licenses to stations if their broadcasting did not "sufficiently represent local interests."[38] Each of these actions was taken without any judicial interference. Indeed, when, in 1987, the FCC abolished the fairness doctrine and committed itself to a libertarian (or market driven) conception of free speech, it did so completely on its own, without any prompting from courts.[39] Whether restricting expression or not, the agency, not the courts, was the constitutional decision-maker.

Lacking knowledge (or a fecund imagination), I won't hazard a guess at what other agencies have engaged in such behaviors (perhaps local land-use agencies with respect to takings, or the SEC with respect to free speech when it preapproves prospectuses). Instead, let me simply amplify Lee's point: courts do not have a monopoly on constitutional interpretation. In certain instances, they don't even have the last word. Accordingly, the rapid growth of the administrative state during the New Deal and the postwar period gives legal historians an ample opportunity to tell the story of twentieth-century extra-judicial constitutionalism.

32. Harry A. Millis and Emily Clark Brown, *From the Wagner Act to Taft-Hartley: A Study of National Labor Policy and Labor Relations* (Chicago: University of Chicago Press, 1950), 174–78; Reuel E. Schiller, "The Era of Deference: Courts, Expertise and the Emergence of New Deal Administrative Law,"*Michigan Law Review* 106 (2007): 399, 436–38.

33. Schiller, "Free Speech and Expertise," 43–41, 96–101.

34. Ibid., 45–46.

35. Ibid., 49.

36. Ibid., 50.

37. Ibid.

38. Ibid., 98.

39. Indeed, in the late 1960s, at the height of the Supreme Court's commitment to libertarian free speech, the Court reaffirmed the FCC's power to restrict and direct the expression of its licensees. *Red Lion Broadcasting v. FCC,* 395 U.S. 367 (1969). For the FCC's abandonment of the fairness doctrine see *Syracuse Peace Council,* 2 F.C.C.R. 5043 (1987).

III. Courts v. Agencies: The Contradictions within Legal Liberalism

Karen Tani's narrative sits at the exceptionally fertile intersection of the study of anticommunism, the development of the welfare state, and the rise of rights-based legal thought. While covering a similar period and touching on some similar issues as Lee's piece, Tani's article has a different institutional focus. She is interested in the interaction of courts and the administrative state. While courts left Lee's actors alone, allowing the NLRB to craft the *Hughes Tool* doctrine with essentially no judicial supervision, Tani writes about a doctrinal development—the luxuriation of procedural due process—that pit agencies and courts against each other. Reich's notion of the New Property, she demonstrates, was an explicit reaction to administrative overreaching. It was created, quite consciously, as a tool to allow courts to control the administrative process. This story is an example of another facet of the legal history of the administrative state that has been profoundly understudied: the relationship between courts and agencies and how that relationship changed over time. If, as I have argued, legal historians need to focus more attention on agencies as a locus of policy-creation, then we also need to understand the relationship between courts and agencies. How do changes in the way the two institutions interact shape the nature of the policy they create?

The effect of *Goldberg v. Kelly* on the welfare state is a potent example of this phenomena. Tani does a wonderful job of describing the connections among anticommunism, the growth of the welfare state, and judicial behavior by tracing the emergence of the idea of the New Property from Barbara Nestor's Social Security claim through Reich's encounter with anticommunism to the Supreme Court's decision in *Goldberg.* In doing so, she demonstrates how the very presence of the welfare state became an impetus for more judicial control over the administrative process. Not surprisingly, this control had a profound effect on the institutions of the welfare state. After all, *Goldberg* required social service agencies to add procedural mechanisms. Thus, Tani's narrative can be continued forward in a manner that shows how the welfare state responded to the Court's requirements. Faced with limited resources, agency officials mechanized and bureaucratized the process of applying for government benefits: decisions were made less subjective; procedural rules were enforced strictly; discretion was taken away from agency personnel.[40]

Because *Goldberg v. Kelly* transformed due process law, it would be surprising if it had not had a profound effect on agency behavior and the

40. Jerry L. Mashaw, *Due Process in the Administrative State* (New Haven: Yale University Press, 1985), 33–34.

development of the administrative state. Many agency-court interactions, however, take place on a much more modest scale. Yet exploring these interactions is nonetheless crucial to understanding the development of the administrative state. When faced with vague policy pronouncements from a legislature, courts and agencies frequently collaborate to flesh out the procedural and substantive dimensions of these mandates. Legal historians must turn their attention to this collaborative process. Consider, for example, the development of one of the main components of the modern welfare state: federal disability compensation law.[41]

Workers who have paid Social Security taxes or who have been injured while employed in certain risky professions are entitled to receive federal benefits if they become disabled. Officials at the Social Security Administration adjudicate thousands of such claims each year. Not surprisingly the agency has, over the years, developed procedural mechanisms for hearing these claims. For example, to streamline the process, the agency created "medical-vocational" guidelines that determine whether a disability exists, thereby eliminating the need to have vocational experts testify at every hearing. Similarly, the agency created a particular burden of proof (called the "true doubt rule"), designed to facilitate the payment of claims in close cases. Each of these procedural innovations was reviewed by federal circuit courts and, ultimately, by the Supreme Court. The medical-vocational guidelines were, in most circumstances, allowed, while the true doubt rule was not.

On their face these cases don't seem to represent the most fascinating corner of the legal history of the administrative state. Yet considering the importance of Social Security to the modern welfare state,[42] the doctrinal machinations surrounding its administration should be of interest to legal historians. The development of both the true doubt rule and the medical-vocational guidelines illustrate the importance of examining the dialogue that occurs between agencies and courts as they generate public policy.

41. These examples stem from two Supreme Court cases *Heckler v. Campbell,* 461 U.S. 458 (1983) and *Director, Office of Workers' Compensation Programs v. Greenwich Collieries,* 512 U.S. 267 (1994).

42. In a single year the Social Security Administration hears more claims than the federal courts hear on all subjects within their jurisdiction. (In 2005, 652,011 cases were commenced before the Social Security Administration. That same year 253,273 civil cases and 92,226 criminal cases were filed in federal district court. Federal courts of appeals heard another 68,473 appeals. Social Security Administration, Annual Statistical Supplement, 2006, Table 2.F9; Administrative Office of the United States Courts, Judicial Business of the United States Courts, [2006], pp. 102, 165, 214.) In 2005, almost fifty million people received old age benefits and seven and a half million people received disability benefits from the Social Security Administration. The value of these benefits was over $520 billion. SSA, Annual Statistical Supplement, 2006, p. 2.

Each rule was created by the agency based on its expert opinion of how best to administer the disability program. Courts brought different interests to the table: ones based on more "legal" concerns such as canons of statutory construction and the requirements of due process. A complete legal history of the administrative state requires historians to understand these interests and, most importantly, to see how they change over time. Only by doing this can we generate an accurate picture of how law was created in the twentieth century.

Consider, for example, judicial attitudes towards administrative expertise during the postwar period. The more a court believed in an agency's expertise, the less invasive that court would be in reviewing administrative action. The more suspicious of expertise a court was, the more it would force agencies to comport their actions to its own notions of what public policy should be. These notions might be informed by a judge's philosophical predisposition, by his crass political preferences, or by institutional interests that are autonomous from politics (the desire to promote legal formalism or institutional prestige, for example). Regardless of their motivation, as courts put less faith in expertise, they become more powerful actors in the administrative process.

As it happens, the postwar period was a time when the judiciary became increasingly suspicious of the idea of expertise. Encounters with the administrative manifestations of fascism and Stalinism during the 1940s soured many Americans on efficient, expertise-driven notions of government.[43] Tani beautifully illustrates how domestic anticommunism had the same effect. Liberals like Reich and Brennan embraced the notion of the New Property as a bulwark against an administrative state of which they had become increasingly distrustful—an administrative state that implemented the political dictates of McCarthyism rather than the New Deal.

Indeed, this is the key irony that Tani's article illustrates. Postwar liberalism was built on a foundation of both increasing statism (a product of the New Deal) and increasing rights consciousness (a product of America's fight against totalitarianism abroad and racial discrimination at home). Yet these two elements were potentially antagonistic. Tani demonstrates that the rise of the administrative state stimulated a type of rights consciousness that was inimical to agency freedom of action. Harlan understood this in *Flemming v. Nestor* and sided with the agency. Brennan understood it as

43. Reuel E. Schiller, "Reining-in the Administrative State: World War II and the Decline of Expert Administration," in *Total War and the Law: The American Home Front in World War II,* ed. Daniel Ernst and Victor Jew (Westport, Conn.: Praeger, 2002), 185–206; Horwitz, *The Transformation of American Law,* 213–46; Edward Purcell, *The Crisis of Democratic Theory: Scientific Naturalism and the Problem of Value* (Lexington: University Press of Kentucky, 1973), 115–78.

well and, in *Goldberg v. Kelly,* he chose to side with the individual. As legal historians study the postwar administrative state in greater detail, they will see this conflict writ large as agencies and courts interacted, some times cooperatively, sometimes antagonistically, to create law.

The notion of writing about administrative law or the administrative state can be a daunting one. Does anybody really have the attention span to write a legal history of the true doubt rule? Does any one have the attention span to read such a history? The complex administrative state that emerged after World War II has generated doctrinal administrivia that may be important but is certainly not thrilling. Yet the thrill is in the context. Lee and Tani's essays place the legal history of the administrative state in the context of the Civil Rights Movement and anticommunism, of grass-roots politics and postwar legal thought. These contexts are only the beginning. All the manifestations of the anxious prosperity of the 1950s—anticommunism, domesticity, civil rights, suburbanization, Beat culture, consumer culture, behavioralism, and the military industrial complex, to name just a few—affected and were affected by administrative laws and regulations.[44] If legal historians are to strive for a deeper, richer narrative of postwar legal history we must begin to draw these connections.

44. Don't believe me about Beat culture? That's just because nobody, to my knowledge, has examined how licensing regimes (which frequently included restrictions on speech and conduct) in places like San Francisco and New York allowed certain subcultures to flourish. Similarly, how many Beat-era writers benefited, like Norman Mailer and Lawrence Ferlinghetti, from the G.I. Bill? See Edward Humes, *Over Here: How the G.I. Bill Transformed the American Dream* (Orlando: Harcourt, 2006), 154–86. Indeed, there is great potential in studying the legal facets of the connection between art and the administrative state. See Donna M. Binkiewicz, *Federalizing the Muse: United States Arts Policy and the National Endowment for the Arts, 1965–1980* (Chapel Hill: University of North Carolina Press, 2006); Richard McKinzie, *The New Deal for Artists* (Princeton: Princeton University Press, 1973); and Monte Penkower, *The Federal Writers' Project: A Study in Government Patronage of the Arts* (Urbana: University of Illinois Press, 1977).