

e De facto
tion "Private"



A Legal Historian Committed to Contemporary Social Justice

WHEN RISA GOLUBOFF THOUGHT ABOUT WHAT TO DO AFTER graduating from college, she grew frustrated. Throughout her four years at Harvard University, she had spent her time in two related but different pursuits. As for academics, she studied American history and sociology—a combined major she created herself. She focused on labor history, social history, and the history of race relations in the United States. Outside the classroom, she participated in and sometimes led a host of public interest organizations. She perceived no real conflict between her academic interest in American history and her extracurricular commitment to social justice. Indeed, in preparation for writing her senior honors thesis on the civil rights movement on Johns Island, South Carolina, Goluboff spent a semester there both researching the movement and volunteering at a number of movement-initiated non-profit organizations.

*She perceived no real
conflict between her
academic interest in
American history and
her extracurricular
commitment to social
justice.*

It was disheartening, then, to think about choosing between academic pursuits and public interest work after college. But in preparing to apply either to graduate school in history or to law school, that was precisely the choice Goluboff felt she had to make. She decided to do both. After spending a year teaching sociology at the University of Cape Town as a Fulbright Scholar in South Africa, Goluboff returned home to pursue both a Ph.D. in history (at Princeton University) and a law degree (at Yale Law School).

Two graduate degrees, two federal clerkships, and five years of law teaching later, Goluboff has clearly found a way to unite her interests. As a legal historian at the University of Virginia School of Law, Goluboff is a scholar motivated by real-world concerns whose work, both in the classroom and in her writing, has real-world consequences. “Teaching law students about constitutional law and civil rights,” Goluboff says, “gives me an opportunity to shape their understanding not only of the law but also of the relationship between the law and larger political and social questions.” Her students, who uniformly rave about her teaching, agree. One has said that in her first-year Constitutional Law course, Goluboff “created a semester-long exploration of the Constitution that was so much more than just a class. It was a true discourse, an intellectual adventure, and a downright deep experience.”

Even more than her teaching, Goluboff’s scholarship reflects both her intellectual and her personal concerns with social justice. In a dissertation, a series of law review articles, and most recently her first book, *The Lost Promise of Civil Rights* (Harvard University Press, 2007), Goluboff has explored the meaning and possibilities of American civil rights law in the era before *Brown v. Board of Education*.

That wasn’t how the project started out. When Goluboff first began thinking about a dissertation topic, she went to the National Archives to look for a file of letters migrant farmworkers had written to the federal government in the 1930s. She had spent a summer in law school working with migrant farmworkers, and she had thought the history of such work and workers would make a promising dissertation topic. What she found

in the archives, however, was not what she expected. She found instead letters from the 1940s from African Americans to a newly created Civil Rights Section of the United States Department of Justice complaining about slavery and involuntary servitude.

The first paper to come out of that research won prizes from *Law & Social Inquiry* and the Law and Society Association. “‘Won’t You Please Help Me Get My Son Home?’: Peonage, Patronage, and Protest in the World War II Urban South,” 24 *Law & Soc. Inquiry* 777 (1999), stuck close to the archival material. Goluboff explored the rhetorical strategies southern African Americans used to convince the Civil Rights Section to prosecute the United States Sugar Corporation for holding their sons, brothers, nephews, cousins, and friends in a form of debt-based involuntary servitude called peonage. Tracing both the transformation of complaints from letters to telephone calls to in-person visits to local FBI offices and the language the complainants used to convince the federal government to act, Goluboff revealed a larger transformation: from a group of people who thought the government would only consider their interests if they were tied to more powerful patrons to a group increasingly confident in asserting their own rights to government protection.

The second article in the series followed what happened to those complaints once they arrived at the Department of Justice. In “The Thirteenth Amendment and the Lost Origins of Civil Rights,” 50 *Duke L.J.* 1609 (2001), Goluboff explored why the Civil Rights Section pursued involuntary servitude cases with such vigor in the 1940s and the doctrinal innovations they undertook. Placing the lawyers’ Thirteenth Amendment practice in larger historical context, Goluboff realized that civil rights in the era before *Brown* looked very different from the civil rights after it.

Although the progression of civil rights law may now seem, and is often depicted, as inevitable, during the fifteen years between the Supreme Court’s New Deal revolution in the late 1930s and its 1954 decision in *Brown*, the meaning of civil rights was up for grabs. The *Lochner* era had largely ended the Court’s protection of contract and property rights, but what kinds of individual rights the Court would begin to pro-

tect was uncertain. Indeed, contrary to current ideas about civil rights, labor and economic rights—the right to organize into unions and bargain collectively, as well as to minimal economic security—appeared the most likely rights for protection. In the Thirteenth Amendment practice of the Civil Rights Section, the lawyers combined racial claims with economic ones; they saw the Constitution not only through the lens of race but also through the lens of labor rights stemming from both the Reconstruction era and the New Deal. Goluboff thus discovered a form of pre-*Brown* civil rights quite distinct from what it became afterwards and remains today—mostly a negative restraint on racial classifications, shorn of concern for labor and positive economic rights.

Goluboff's implicit critique of the heroes of the conventional civil rights story—the lawyers of the National Association for the Advancement of Colored People (NAACP)—came to the fore in Goluboff's next two articles: “‘We Live’s in a Free House Such as It Is:’ Class and the Creation of Modern Civil Rights,” 151 *U. Pa. L. Rev.* 1977 (2003), and “‘Let Economic Equality Take Care of Itself:’ The NAACP, Labor Litigation, and the Making of Civil Rights in the 1940s,” 52 *UCLA L. Rev.* 1393 (2005). Like her first two articles, these again moved from the complaints of ordinary African Americans to the responses of the lawyers to whom they complained. Goluboff wrote “‘We Live’s in a Free House Such as It Is” for a symposium at the University of Pennsylvania on “Law and the Disappearance of Class in Twentieth-Century America.” Goluboff thus explicitly and self-consciously undertook to explore the class implications of modern civil rights by unearthing complaints African American agricultural workers had lodged with the NAACP in the pre-*Brown* era. Because scholars had largely followed the NAACP's lead in writing the history of civil rights, they largely ignored earlier economic challenges and the southern agricultural workers who made them.

Goluboff's article thus challenged the conventional historical narrative by showing how the complaints of African American agricultural workers addressed not only the racial but also the economic components of southern agriculture. Their complaints, which usually went

unanswered, asked the NAACP to redress both racial and economic discrimination. Goluboff concluded by briefly exploring the road not taken by the NAACP and by considering how pursuing combined claims of racial and economic discrimination might have led civil rights law in a different direction, one that would have challenged economic inequalities more so than the strategy the NAACP eventually embraced.

Following up on that article, “Let Economic Equality Take Care of Itself” delved more deeply into the NAACP’s approach to workers and labor-related litigation in the pre-*Brown* era. From its inception, the NAACP had not overly concerned itself with the problems of working-class African Americans. But in the 1940s, Goluboff discovered, with unions wielding considerable political power and the economy gearing up for World War II, the lawyers in the NAACP came to see employment discrimination as one of the two most important problems (along with voting rights) facing African Americans. Goluboff described how the NAACP’s new interest in black workers stemmed both from its perception that new legal tools were available to fight discrimination and from its interest in attracting a new constituency to the NAACP, namely industrial black workers who were increasingly moving north and earning higher salaries. As a result, the NAACP largely eschewed the kinds of agricultural cases Goluboff had described in her previous work—the kinds of cases the Department of Justice was taking—in favor of the cases of black industrial workers.

One of the major contributions of this article to the larger understanding of civil rights history is Goluboff’s depiction of the unsettled nature of the NAACP’s legal strategy in the decade and a half before *Brown*. She showed that not only did the Civil Rights Section of the Department of Justice practice a civil rights strategy very different from that in *Brown* and beyond, but so too did the NAACP. Where *Brown* targeted state-mandated segregation, took a principled stand against all segregation regardless of material equality, and used the equal protection clause of the Fourteenth Amendment as its constitutional basis, the NAACP’s labor cases in the 1940s targeted private as well as public actors, sought material equality even within the confines of segregation,

and used a revamped notion of the right to work derived from the Due Process Clause of the Fourteenth Amendment. The lawyers creatively mined legal doctrine in order to redress both the racial and the economic claims of the black industrial workers who sought their assistance. Having established that the approach the NAACP took to civil rights in *Brown* was neither timeless nor inevitable, Goluboff then went on to describe and explain the process by which the NAACP lawyers marginalized labor cases in favor of the direct attack on *Plessy v. Ferguson* in the education context that would ultimately lead to *Brown*. In her rendering, that case and that process entailed not only the familiar successes but also the loss of the creative and wide-ranging efforts against Jim Crow the NAACP had previously embraced.

In *The Lost Promise of Civil Rights*, Goluboff brought together all of these strands of her previous scholarship and broadened them out into a larger story about the shape and potential of civil rights law before *Brown*. Goluboff's innovations in the book were methodological, historical, and normative. Methodologically, Goluboff drew on the complaints with which she had begun her project in graduate school to highlight the idea of law as a dynamic process rather than a product simply of judicial decision-making. She emphasized the complaints of both agricultural and industrial workers in order to excavate the law-making process from an injury that a layperson perceives as legal in nature, to a complaint to a lawyer, to a lawyer's transformation of that complaint into a legally cognizable form, to a litigated case, and perhaps, only then, to a judicial opinion. Thus, she argues, it is impossible to understand *Brown* without also understanding the cases the NAACP chose not to take to the Supreme Court, without understanding the myriad complaints from African Americans that lawyers and judges filtered out of the litigation process.

Among Goluboff's historical innovations, three are most significant. First, Goluboff redefines a baseline assumption about Jim Crow. Where most historians have treated Jim Crow as a system of state-mandated segregation, Goluboff reveals it to encompass not only that component but also a system of private and publicly-supported economic exploitation.

For many southern whites, the abolition of slavery following the Civil War had spawned two related problems: a race problem and a labor problem. How, they asked themselves, would they prevent the newly freed African Americans from contaminating the white race and debasing white politics? And how would they find a replacement for the cheap labor black slaves had previously provided and on which the southern economy was largely based? The answer to both questions was the complex of laws and customs that arose in the late nineteenth century and eventually came to be called Jim Crow. Those laws and customs encompassed both the kinds of state-enforced formal discriminations we associate with Jim Crow today as well as myriad private and publicly-supported methods of racial subordination and economic exploitation. Defining Jim Crow as a product of both public and private power, and operating in the political, social, cultural, and economic sphere is a crucial contribution of the book.

Second, while most scholars have tended to view Jim Crow as largely a southern phenomenon, Goluboff gives it a national focus. Once one moves away from the cramped definition of Jim Crow as state-mandated segregation, it becomes clear that the South, though perhaps an extreme, was hardly an aberration. Goluboff thus explores the way both African American agricultural workers in the South and African American industrial workers across the nation experienced Jim Crow, and the complaints they lodged about it.

Finally, Goluboff reorients the history of civil rights away from *Brown* to the era before *Brown*. Until now, with a few exceptions, scholars have usually skipped directly from the New Deal Revolution of the late 1930s to *Brown* itself in describing the history of civil rights law. The 1940s is important only as a prelude to *Brown*. In the conventional story, just as the Supreme Court withdrew from closely scrutinizing economic regulation, it determined, as revealed in footnote four of *United States v. Carolene Products*, to closely scrutinize state racial classifications instead. But that timeline is misleading. In fact, neither judges nor scholars saw *Carolene Products* as an answer to the civil rights question until after *Brown* was decided, when it became a justification for the case. As Goluboff shows,

the 1940s were instead a period of openness and experimentation in civil rights. And they are crucial to understanding modern civil rights, because they illuminate the choices lawyers made on the way to where we are now.

These historical points are closely bound up with Goluboff's normative conclusions. Once one views Jim Crow as a system of both racial oppression and economic exploitation, the partialness of *Brown's* victory becomes apparent. And once one realizes the breadth of challenges to Jim Crow in the 1940s, the choices that *Brown* embodied become clear. *Brown* challenged state-mandated segregation, but it did nothing to challenge the public and private economic inequalities that were equality intrinsic to Jim Crow nationwide. It left aside much of the civil rights energy of the 1940s that had been directed toward other, equally important aspects of Jim Crow. With this in mind, racial inequalities in contemporary America are revealed not as happenstance but rather as remnants of Jim Crow that constitutional law has thus far been unable and unwilling to redress.

Which brings us back to Goluboff's commitment to social justice in the world she lives in today, as opposed to the lost world about which she writes. At the end of the day, it's her sense that perhaps this history might change the way people think about the current state of civil rights that keeps her in the archives, at the computer, and at the lectern. She continues to challenge the next generation to ponder not just what might have been, but what might still be. ❄

EXCERPTS

A New Deal for Civil Rights

(Introduction to Chapter 5, *The Lost Promise of Civil Rights*,
Risa Goluboff, Harvard University Press, 2007)

IN 1947, ROBERT CARR WROTE *Federal Protection of Civil Rights: Quest for a Sword*. A political science professor at Dartmouth and the executive secretary of President Harry Truman's 1946 Committee on Civil Rights, Carr hoped to publicize the work of the "unique and little-known agency" called the Civil Rights Section (CRS). Carr organized this first history of the section around a metaphor Supreme Court Justice Robert Jackson used in the 1944 peonage case of *Pollock v. Williams*. Jackson described two ways to protect those caught in involuntary servitude. "Congress," Jackson declared, "raised both a shield and a sword against forced labor because of debt." When victims of peonage found themselves imprisoned on charges of accepting advances under false pretenses, or breaking parole by leaving a particular job, they invoked the shield of federal law. They defended themselves "by requesting a federal court to invalidate the state action that is endangering [their] rights." When the federal government brought prosecutions against individual perpetrators of peonage, however, it raised a sword against them. It "[took] the initiative," Carr described, "in protecting helpless individuals by bringing criminal charges against persons who are encroaching upon their rights."

Adopting Jackson's metaphor, Carr concluded that in recent years the federal government, in the "tentative and experimental work" of the CRS, had taken up the sword not only in peonage cases but also in civil rights cases generally. "Government has traditionally been regarded as the villain in the civil rights drama," he wrote. "The government threat remains, but threats from other sources are extremely serious. They can

and should be met by government action.” Carr saw “the great achievement of the CRS” as making “[t]his new role of government [seem] to be inescapable.”

Carr’s choice to describe the CRS’s achievements through the lens of its peonage and involuntary servitude prosecutions is telling. As the section’s lawyers directed civil rights cases across the country from their perch in Washington, D.C., these Thirteenth Amendment violations made up the conceptual core of the section’s civil rights practice. Unlike the section’s other practice areas—lynching, police brutality, and voting rights cases—its Thirteenth Amendment cases uniquely responded to the combined racial and economic harms about which African American farmworkers complained. These cases built on New Deal protections for free labor and economic security and responded to wartime imperatives for racial justice. In pursuing involuntary servitude cases, the CRS lawyers aspired to a civil rights framework that assumed the government was responsible for eliminating some of the worst and most fundamental aspects of Jim Crow.

The section’s Thirteenth Amendment cases during and after World War II did not, however, comprise a single plan for a new civil rights doctrine. Rather, the CRS lawyers expanded the long-standing federal interest in peonage in three related but distinct directions. First, they reconceptualized Thirteenth Amendment violations from a narrow contractual understanding of peonage to a “federally-secured right to be free from bondage.” As Carr observed, this conceptual shift suggested that affirmative federal power could and should be used to protect not only New Deal economic security but also African Americans’ right to the “safety and security of the person”: the right to be free from bondage, lynching, and police brutality.

Second, the CRS expanded the Thirteenth Amendment from focusing on individual employment relationships to mandating the elimination of legal obstacles to African American free labor writ large. The CRS lawyers used the Thirteenth Amendment to deepen what had been the New Deal’s equivocal commitment to free labor within a unified national economy.

The National Labor Relations Act (NLRA) offered labor rights to industrial workers, but it largely accommodated the desire of southern whites to exclude many African Americans. So the CRS attacked the emigrant-agent, enticement, and other laws that restricted the mobility of black farmworkers. With these attacks, the CRS suggested that the Thirteenth Amendment should protect African Americans in the South from more than simply the chattel slavery it most centrally proscribed. The Thirteenth Amendment could guarantee free labor for those workers excluded from New Deal labor protections.

Finally, section lawyers expanded their understanding of the core economic problem of involuntary servitude. No longer were debt, violence, and legal coercion the sole indicia of unconstitutional servitude; extreme forms of economic coercion were also constitutionally problematic. Here, too, the CRS's use of the Thirteenth Amendment filled in the legislative gaps of the New Deal. Just as the NLRA had left many African Americans without labor rights, the New Deal's guarantees of economic security in the Fair Labor Standards Act (FLSA) and the Social Security Act (SSA) also excluded many African Americans. In attacking the poor conditions in which African American agricultural and domestic workers lived as problematic under the Thirteenth Amendment, the CRS lawyers indicated that such workers were entitled to a version of the economic rights to minimal living standards that FLSA and the SSA offered industrial workers.

Each expansion of the Thirteenth Amendment's protections built on a different strain of New Deal liberalism and represented a different promise for civil rights. Where the New Deal had emphasized labor and economic rights and assisted African Americans only partially and incidentally, these novel involuntary servitude prosecutions aimed to bring African Americans within the New Deal rights framework. Following changing trends within the involuntary servitude complaints of African Americans themselves, the CRS lawyers went about expanding the meaning of involuntary servitude—and the accompanying protection of the Thirteenth Amendment—in order to make the Constitution serviceable for African Americans in the post–New Deal era. ❧

Brown and the Lost Promise of Civil Rights

(*Civil Rights Stories*, Risa L. Goluboff and Myriam Gilles, eds., forthcoming Foundation Press, 2007)

BROWN BECAME THE ICONIC CIVIL RIGHTS CASE OF THE MODERN era. As legal scholars spent considerable effort analyzing, justifying, and systematizing the Court's decision, the image of Jim Crow it projected and the legal doctrine it embraced captured the collective legal imagination. Over the decade that followed *Brown*, subsequent cases, the rise of the civil rights movement, and legislative developments all contributed to this transformation of constitutional civil rights. To some extent, these developments reinvigorated particular aspects of pre-*Brown* civil rights. The pivotal civil rights protest of 1963 was called a March for Jobs and Freedom. The Johnson administration's War on Poverty tried to attack economic deprivation partly because it recognized the continuing connection between racial and economic inequality. And Title VII of the 1964 Civil Rights Act legislatively prohibited discrimination in the private labor market, in labor unions, and among state actors.

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

tive right to work that had been a hallmark of the pre-*Brown* years for the antidiscrimination paradigm that was a hallmark of the post-*Brown* era.

Moreover, these and other developments remained largely separate from constitutional law itself. Title VII was not constitutionally mandated. The *Civil Rights Cases* with their state action requirement remained good constitutional precedent. And attempts to translate legislative and social movement momentum for protection of the poor into constitutional guarantees ultimately failed. Within the realm of constitutionally protected civil rights, *Brown*'s equal protection clause, with its state action requirement and concern for formal rather than material equality, remained dominant.

As legal scholars increasingly converged on a general framework for making sense of the constitutional law of civil rights, then, that framework was predominantly the one *Brown* had set into motion in 1954. This is apparent in changes to succeeding editions of civil rights and constitutional law casebooks and treatises. Before and just after *Brown*, treatises and casebooks reflected considerable variety in both the subjects they included within the field of civil rights and the way they analyzed those subjects. Legal scholars treated "civil rights" as encompassing issues like involuntary servitude and labor rights as much as racial segregation; they saw rights as falling into categories like "the security of the person" as much as "discrimination;" and they described the vindication of civil rights as an affirmative responsibility of government as much as the responsibility of private litigants. By the 1960s, treatise and casebook authors eliminated sections on the security of the person; they condensed or eliminated discussions of involuntary servitude and the Thirteenth Amendment; and they eliminated chapters on freedom of labor altogether. Work-related civil rights were largely reduced to the question of job discrimination under the equal protection clause, akin to discrimination in other arenas.

As scholars winnowed out the varieties of pre-*Brown* civil rights, they converged on a race-based, privately-litigated, equal protection-oriented civil rights framework that *Brown* had inaugurated. Indeed, they

reconstructed a pedigree for *Brown* that made that framework seem more timeless than it really was. Rooting *Brown* in the 1938 case of *United States v. Carolene Products*, scholars suggested that courts had long before determined to treat race cases differently from those involving economic regulation. The canonization of *Carolene Products* doctrinally separated economics from race and justified judicial interference with the latter but not the former. It consequently interred any linkage civil rights lawyers had been able to make between the economic and formal legal aspects of Jim Crow in the pre-*Brown* era.

The link to *Carolene Products* made it all too easy to assume that before *Brown*, as afterwards, civil rights doctrine primarily addressed questions of racial classification. In fact, neither lawyers, judges, nor scholars had viewed *Carolene Products* as determining the contours of civil rights law before its vindication in *Brown*. It was not until the post-*Brown* years privileged a race-focused equal protection clause, and contrasted stringent judicial review of government actions affecting racial minorities with those affecting the economy, that race and labor truly diverged in constitutional law. It was not until then that constitutionally-grounded civil rights became squarely rights against the government, in contrast to both rights against private power and rights protected by the government. It was not until then that it became clear how partial the victory in *Brown* was and how much of Jim Crow remained intact in the face of the new civil rights *Brown* had helped construct. ❧

GOLUBOFF BIBLIOGRAPHY

BOOKS

The Lost Promise of Civil Rights (Harvard University Press, 2007)

BOOK CHAPTERS/MULTI-AUTHOR WORKS

“*Brown v. Board of Education* and The Lost Promise of Civil Rights,” *Civil Rights Stories* (Risa L. Goluboff and Myriam Gilles, eds., forthcoming Foundation Press, 2007)

Civil Rights Stories (Risa L. Goluboff and Myriam Gilles, eds., forthcoming Foundation Press, 2007)

“The Department of Justice and the Thirteenth Amendment,” in *The Promises of Liberty: Thirteenth Amendment Abolitionism* (Alexander Tsessis, ed., under contract with Columbia University Press)

“Peonage,” in *Encyclopedia of the Supreme Court of the United States* (David S. Tanenhaus, ed., forthcoming Macmillan, 2008)

“NAACP,” “Peonage,” “Workers’ Defense League,” in *Encyclopedia of U.S. Labor and Working-Class History* (Eric Arnesen, ed., forthcoming Routledge, 2007).

“The Unusual Journey of Vernon Lawhorn, Sam Austin, and the Green Brothers: Reverse Migration, Agricultural Work, and Rights Consciousness in World War II,” in *The Human Tradition in Labor History* (Eric Arnesen ed. 2003)

ARTICLES

“Race, Labor, and the Thirteenth Amendment in the 1940s Department of Justice,” 38 *Univ. of Toledo L. Rev.* 883 (2007)

“Deaths Greatly Exaggerated,” 24 *Law & Hist. Rev.* 201 (2006).

“Let Economic Equality Take Care of Itself”: The NAACP, Labor Litigation, and the Making of Civil Rights in the 1940s,” 52 *UCLA L. Rev.* 1393 (2005).

“We Live’s in a Free House Such as It Is’: Class and the Creation of Modern Civil Rights,” 151 *U. Pa. L. Rev.* 1977 (2003)

The Lost Promise of Civil Rights, Historically Speaking, vol. VII (forthcoming 2007)

“A Road Not Taken: The Thirteenth Amendment and the Lost Origins of Civil Rights,” 50 *Duke L. J.* 1609 (2001), reprinted in *Civil Rights Litigation and*

- Attorney Fees Annual Handbook* (Steven Saltzman ed. 2002)
- “‘Won’t You Please Help Me Get My Son Home?’: Peonage, Patronage, and Protest in the World War II Urban South,” 24 *Law & Soc. Inquiry* 777 (1999)
- “The Historian as Peace Broker in the Legal Academy’s Culture Wars: The Lessons of Sea Island Civil Rights for a Theory of Legal Instrumentalism,” 5 *Journal of Southern Legal History* 33 (1997)
- Book Note, “Reckoning with Race and Criminal Justice” (reviewing Jerome G. Miller, “Search and Destroy: African-American Males in the Criminal Justice System”), 106 *Yale L. J.* 2299 (1997)