

BELONGING AND EMPOWERMENT: A NEW “CIVIL RIGHTS” PARADIGM BASED ON LESSONS OF THE PAST

THE LOST PROMISE OF CIVIL RIGHTS. By Risa L. Goluboff.¹ Harvard University Press. 2007. Pp. viii + 376. \$35.00.

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I. INTRODUCTION

When I was a legal services lawyer on the South Side of Chicago, my colleagues engaged in an ongoing debate over whether race discrimination cases fit within our mandate to practice “poverty law.” On the one hand, race discrimination was a barrier to the ability of some of our clients to find good jobs and work their way out of poverty. On the other hand, race discrimination cases did not directly redress the poverty of our clients. Clients “lucky” enough to have a job where they experienced discrimination arguably needed our help less than those who depended on public benefits. Our thinking reflected the Court’s interpretation of the equal protection clause which disaggregates the relationship between race and class. The Supreme Court’s equal protection jurisprudence did little to help my African American clients on the South Side of Chicago. Even though the primary problem of our clients was poverty, race discrimination provided the only framework of anti-discrimination law to meet their needs. The Supreme Court long ago found that economic classifications do not trigger “heightened scrutiny” for equal protection analysis³—only race-based classifications get heightened

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3. See *Dandridge v. Williams*, 397 U.S. 471 (1970).

scrutiny. Moreover, many statutes protect against race discrimination, but virtually none protect against discrimination on the basis of poverty.⁴ Yet it was rarely possible for us to show that our client's legal troubles were caused by intentional race discrimination.⁵ Our poor, Black clients needed a new formulation of their rights, which would take into account the confluence of race and class that limited their ability to improve their lives, and create positive measures to remedy it.

Despite the advances that African Americans have made in our country as a result of the Civil Rights movement of the 1960s, poverty stubbornly persists in communities of color throughout our country. More than 50 years after *Brown v. Board of Education*⁶ and 40 years after the 1964 Civil Rights Act,⁷ people of color are still lagging behind whites in virtually every indicator of economic success.⁸ Yet our race discrimination law is simply unable to address that frustrating phenomenon. In *Brown*, the Court established a paradigm by holding that racial segregation violates the equal protection clause of the Fourteenth Amendment. As a result of *Brown* and its progeny, a person has the right to be free from arbitrary and discriminatory treatment based on prejudice against that person's immutable characteristics. However, the *Brown* paradigm fails to account for the inter-relationship of race and class in the subordination of people of color in our society. At the dawn of the twenty-first century, we need a new way of thinking about civil rights. We

4. For example, the regulations governing federal Section 8 housing subsidy vouchers prohibit discrimination on the basis of "race, color, religion, sex, national origin, familial status or disability" but not level of income. 24 C.F.R. 982.304 (2008). Instead, the regulations put the burden on the tenant to locate a "willing" landlord. 24 C.F.R. 982.302 (2008). When I practiced law in Chicago, my clients with Section 8 certificates often had difficulty locating a landlord willing to rent to them and accept their certificate.

5. It is arguable that societal race discrimination, and even indirect intentional discrimination by the government, caused our clients' predicament. See NICHOLAS LEMANN, *THE PROMISED LAND: THE GREAT BLACK MIGRATION AND HOW IT CHANGED AMERICA* 89-95 (1991). However, the Court has repeatedly held that general allegations of societal discrimination, without more, do not establish a violation of the Equal Protection Clause. See, e.g., *Washington v. Davis*, 426 U.S. 229 (1976). In addition, the Court has held that remedying general societal race discrimination does not justify affirmative action programs that classify on the basis of race. See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

6. *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

7. Civil Rights Act of 1964, Pub. L. 88-352, July 2, 1964, 78 Stat. 241, codified at 42 U.S.C. § 2000 et seq. (1994).

8. For example, in 2004, Black households had a median income of \$30,134, while overall median income was \$44,389. http://www.census.gov/Press-Release/www/releases/archives/income_wealth/005647.html.

need to move beyond the paradigm of equal treatment and towards a paradigm of more substantive equality rooted in the principle of anti-subordination.

Instead of formal equality, a good starting point for re-thinking civil rights is the concept of "belonging."⁹ Rights of belonging are those rights that promote an inclusive vision of who belongs to the national community of the United States and that facilitate equal membership in that community.¹⁰ Rights of belonging include economic rights because in order to fully belong in our society, people need more than simply the freedom from intentionally discriminatory treatment. They also need economic empowerment.¹¹ Risa Goluboff's recent book, *The Lost Promise of Civil Rights*, gives us a glimpse of what civil rights law would look like without the disaggregation of race and class, and provides a great background for understanding rights of belonging. In the book, Goluboff describes another tradition of civil rights from our history, based not in the equal protection clause of the Fourteenth Amendment but instead in the Thirteenth Amendment's promise of economic empowerment. Goluboff's lessons from the past can help us to re-envision civil rights law for the future by providing a basis for a fuller understanding of rights of belonging.

In *The Lost Promise*, Goluboff provides three valuable contributions for anyone who teaches, studies, or has any interest in constitutional law and anti-discrimination law. First, she helps us to understand how the meaning of civil rights developed into what we understand today as civil rights, and details an alternative approach that was abandoned by the attorneys who litigated early civil rights cases. Thus, her second contribution is that she reminds us that the current paradigm is not the only way to think about equality law. Finally, and most importantly, she provides an eye-opening framework for re-thinking equality law to address more effectively the problems in our society today. In that framework, economic rights are paramount because the subordination of people of color in our society has never been just

9. See REBECCA E. ZIETLOW, ENFORCING EQUALITY CONGRESS, THE CONSTITUTION, AND THE PROTECTION OF INDIVIDUAL RIGHTS 6-7 (2006).

10. The concept of "belonging" has its roots in the Reconstruction Era theory of citizenship rights and is inspired by the work of Professor Kenneth Karst. See e.g., KENNETH KARST, BELONGING TO AMERICA: EQUAL CITIZENSHIP AND THE CONSTITUTION (1989); ZIETLOW, *supra* note 9, at 6-7.

11. Civil rights leader Martin Luther King recognized the importance of economic rights to in our society, and spent the last years of his life campaigning for those rights.

about race. Rather, racism has been used as a means to further the economic exploitation of workers.

The Lost Promise has already received recognition as a ground-breaking work of legal history.¹² Goluboff's innovative work goes beyond other historical works on the civil rights movement because she not only explores the connection between the labor movement of the early twentieth century and the civil rights movement of the later twentieth century, but also examines the doctrinal connections between the two movements.¹³ Her detailed description of the development of constitutional doctrine warrants the same recognition by constitutional scholars and theorists. For too long, constitutional theorists have also disaggregated the relationship of race and class when theorizing constitutional principles of equality. Informed by Goluboff's work, the theory of rights of belonging synthesizes racial equality and economic rights in order to effectively combat the subordination of all workers in our society.

II. THE *BROWN* PARADIGM AND THE EQUAL PROTECTION CLAUSE

The equal protection clause is triggered when laws divide people into categories and treat categories of people differently. As any student of constitutional law knows, the Court first identified racial classifications as those that might warrant heightened scrutiny in Justice Stone's footnote four of *U.S. v. Carolene Products*¹⁴ and reaffirmed that commitment in the case of *Korematsu v. U.S.*¹⁵ In *Brown*, the Court overturned the 1896 case of *Plessy v. Ferguson*¹⁶ and held that contrary to its ruling in *Plessy*, "separate" could never be "equal."¹⁷ Since *Brown*, the Court has applied strict scrutiny to race-based classifications, striking down

12. For example, the book recently received the 2008 Willard Hurst award given by the Law and Society Association for the best legal history book written in 2007.

13. By comparison, in her book, *TO STAND AND TO FIGHT: THE STRUGGLE FOR CIVIL RIGHTS IN POSTWAR NEW YORK CITY* (2003), historian Martha Biondi explains how the northern civil rights movement grew out of the labor movement, but she does not discuss the legal theories employed by lawyers who worked with the movement. In his book, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY* (2004), legal historian Michael Klarman examines the development of race discrimination law throughout the first half of twentieth century, but he does not discuss the labor movement.

14. *U.S. v. Carolene Products*, 304 U.S. 144, 152 n.4 (1938).

15. *Korematsu v. U.S.*, 323 U.S. 214 (1944).

16. *Plessy v. Ferguson*, 163 U.S. 537 (1896).

17. *Brown*, 347 U.S. at 495.

virtually every such classification, including laws requiring segregation in all government facilities¹⁸ and those outlawing interracial marriage.¹⁹ Thanks to the *Brown* paradigm, African Americans enjoy a constitutional right against government discrimination on the basis of race. By ending our racial caste system, *Brown* and its political companion, the 1964 Civil Rights Act, affirmed a fundamental human right.

The *Brown* paradigm has its weaknesses, however. The Court has severely limited the scope of the equal protection clause by holding that it does not apply to private actors²⁰ and requiring a showing of discriminatory intent to trigger heightened scrutiny.²¹ These holdings have greatly limited the potential of the equal protection clause to combat race discrimination. Moreover, as Equal Protection law has developed, it has developed doctrinal weaknesses. The concept of equal protection requires the comparison of identical groups of people. To oversimplify, only “likes” need be treated “alike.” Determining whether groups of people are alike or different can cause uncertainty.

This uncertainty is most apparent in the Court’s treatment of the two principle “suspect classifications” that it has identified, those based on race and those on gender. When the law categorizes on the basis of race, treating the white majority differently from racial minorities, courts must consider whether whites and members of minority groups are alike. On the one hand, people are people, and the law correctly assumes that there are few if any inherent differences based on the color of one’s skin.²² Race is a social construct, not a biological difference.²³ However, centuries of racial discrimination and racial subordination have left their mark on our society, and on people of color in our society. Although there are few if any biological differences between Blacks and whites, it is hard to say that Blacks and whites are really equal in terms of the opportunities

18. See, e.g., *Mayor of Baltimore v. Dawson*, 350 U.S. 877 (1955) (addressing beaches); *Gayle v. Browder*, 352 U.S. 903 (1956) (addressing buses); *Holmes v. Atlanta*, 350 U.S. 879 (1955) (addressing golf courses); *New Orleans City Park Improvement Ass’n v. Detiege*, 358 U.S. 54 (1958) (addressing parks); See also KENNETH L. KARST, *BELONGING TO AMERICA: EQUAL CITIZENSHIP AND THE CONSTITUTION* 80 (1989).

19. *Loving v. Virginia*, 388 U.S. 1 (1967).

20. *The Civil Rights Cases*, 109 U.S. 3 (1883).

21. *Washington v. Davis*, 426 U.S. 229 (1976).

22. See William M. Richman, *Genetic Residues of Ancient Migrations: An End to Biological Essentialism and the Reification of Race*, 68 U. PITT. L. REV. 387 (2006).

23. See IAN HANEY-LÓPEZ, *WHITE BY LAW* (1996).

that they face, even in the twenty-first century. Given that there is significant evidence that whites and Blacks are not equal in terms of opportunities and resources, are they really alike? Or, is a person's race sufficiently predictive of one's economic and social success that people of color and whites really are not alike, and differential treatment is justified, at least when that treatment is geared towards improving the opportunities and resources of people of color?

Currently, the Court has adopted the stance that whites and racial minorities are sufficiently alike that virtually any differential treatment violates the principles of equality. As Justice Scalia announced in his concurrence to *Adarand*, "In the eyes of our government, we are just one race here. It is American . . ." ²⁴ Because this view fails to account for the historic subordination of people of color in our society, the race blind approach to race based categories hampers the ability of racial minorities to obtain equality. The United States Supreme Court has applied this approach to strike down affirmative action measures intended to benefit racial minorities. ²⁵ Thus, the current Supreme Court's approach significantly hampers the attempts of people of color to use the political process to obtain substantive equality.

Treating "likes" alike and different people differently is also problematic in the area of gender discrimination law. While men and women are equal in abilities in many contexts, there are biological differences between men and women that simply do not fit into the "equal treatment" paradigm. The Supreme Court has been inconsistent when determining which differences are "real" and which are outdated stereotypes. For example, the Court has found that pregnancy is not a gender related condition justifying differential treatment, ²⁶ but the capacity to get pregnant is such a condition. ²⁷ Not surprisingly, the equal treatment paradigm has brought about limited economic progress for women. The "gender gap" between wages earned by men and women for comparable work persists, and is virtually identical to that in the early 1970s, when the Court first recognized gender as a protected class. ²⁸ Thus, gender discrimination law is also an ineffective solution for the inequality experienced by women of color.

24. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 239 (1995).

25. *See, e.g., City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); *Gratz v. Bollinger*, 539 U.S. 244 (2003).

26. *Geduldig v. Aiello*, 417 U.S. 484 (1974).

27. *Michael M. v. Superior Ct. of Sonoma Cty.*, 450 U.S. 464 (1981).

28. <http://usgovinfo.about.com/od/censusandstatistics/a/paygapgrows.htm>. Moreover,

One solution that scholars have offered to the sameness-difference dilemma is to replace the equal treatment model with an "anti-subordination" model.²⁹ Under the anti-subordination approach, courts would evaluate categories differentiating people, not based on whether or not they treat people equally, but on whether the category empowers or subordinates a group of people that have historically been subordinated by the law.³⁰ In the context of race, courts would strike down laws that subordinate people of color and uphold laws that empower them. In the context of gender, courts would strike down laws that subordinate women and uphold laws that empower them.³¹ Like the equal treatment model, the anti-subordination model has roots in the *Brown* decision.³² In *Brown*, the Court emphasized the subordinating impact of racial segregation on African American children.³³ "Separate but equal" could never be truly equal in public education because race-based categories had been used to

there is ample evidence that the equal treatment model has hurt women economically. A number of scholars have noted that at least in the context of family law, gender neutrality has a harmful impact on women. See, e.g., MARTHA ALBERTSON FINEMAN, *THE ILLUSION OF EQUALITY: THE RHETORIC AND REALITY OF DIVORCE REFORM 180-85* (1991); David L. Chambers, *Rethinking the Substantive Rules for Custody Disputes in Divorce*, 83 MICH. L. REV. 477 (1985). Lower courts have held that sex-custody presumptions are unconstitutional, and they have widely been replaced by the gender neutral "best interests of the child" test. See Katherine T. Bartlett, *Preference, Presumption, Pre-disposition, and Common Sense: From Traditional Custody Doctrines to the American Law Institute's Family Dissolution Project*, 36 FAM. L. Q. 11, 11-17 (2002). As a result, women often bargain for custody, accepting lesser economic compensation in exchange for their husbands' agreement not to contest custody. FINEMAN, *supra* at 180-85. Even though a significantly higher percentage of married women with children work outside the home than did so forty years ago, women continue to suffer economically after divorce. Divorced mothers overwhelmingly experience a decrease in income while their ex-husbands tend to experience an increase in income, after their divorce. See Suzanne M. Bianchi et al., *The Gender Gap in the Economic Well-Being of Non-resident Fathers and Custodial Mothers*, 36 DEMOGRAPHY 195, 197 (May 1999).

29. See CATHARINE MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* (1989); Ruth Colker, *Anti-Subordination Above All: Sex, Race and Equal Protection*, 61 N.Y.U. L. REV. 1003 (1986); Victor C. Romero, *Are Filipinas Asian or Latinas? Reclaiming the Anti-Subordination Objective of Equal Protection After Grutter and Gratz*, 7 U. PA. J. CONST. L. 765 (2005).

30. Colker, *supra* note 29, at 1008.

31. Justice Ginsburg hinted at such an approach to gender based classifications in *U.S. v. Virginia*, 518 U.S. 515, 555 (1996). See Denise C. Morgan, *Anti-Subordination Analysis After United States v. Virginia: Evaluating the Constitutionality of K-12 Single Sex Public Schools*, 1999 U. CHI. LEGAL. F. 381.

32. See Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles Over Brown*, 117 HARV. L. REV. 1470 (2004).

33. *Brown v. Board of Educ.*, 347 U.S. 483, 494 (1954) (Stating, "To separate (Black children) from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.").

subordinate African Americans.³⁴ This reasoning suggests that racial segregation was unconstitutional, not because it treated Blacks and whites differently, but because its purpose was to subordinate African Americans.

The anti-subordination model is appealing because it goes beyond a formalist approach to equality and attempts to get at the root cause of inequality by focusing on the effect of legal categories. The problem with the anti-subordination approach is that it has a somewhat awkward fit with the equal protection clause and with the American ideal of equality. To many, the anti-subordination approach is not equal because it requires “special” treatment. In its affirmative action jurisprudence, the Supreme Court has rejected this model in race discrimination law precisely because of this asymmetry.

The Court’s rejection of the anti-subordination model reflects another weakness of that model—its subjectivity. Anti-subordination fits awkwardly into equal protection law, which values neutral principles like facial equality. The anti-subordination model requires judges to make value judgments about whether a category is subordinating or not. Reasonable people can and often do differ about whether a race or gender based category is subordinating. For example, while proponents of affirmative action measures to remedy race discrimination argue that such measures are needed to undo race-based subordination, opponents of affirmative action argue that any race based classifications further a system of racial inferiority.³⁵ Feminists often differ over whether gender based classifications are justified as anti-subordination measures, or whether they simply perpetuate outdated stereotypes about women’s interests and capabilities. For example, prominent feminists have taken opposing positions over the constitutionality of public single sex education and the questions of whether employers may provide health benefits for maternity leave when they do not provide benefits for the comparable health concerns of men.³⁶ These de-

34. *Id.* at 495.

35. Justice Clarence Thomas is one of the best known, and most influential, people to make such an argument; see, e.g., *Grutter v. Bollinger*, 539 U.S. 206, 350 (2003) (Thomas, J., dissenting).

36. See Wendy W. Williams, *The Equality Crisis: Some Reflections on Culture, Courts, and Feminism*, 7 *WOMEN’S RTS. L. REP.* 175, 191, 195–96 (1982). The debate itself exposes the problem of equal protection and gender. Is there really any condition experienced by men that is comparable to pregnancy? There is a strong argument that no such condition exists.

bates, often heated, expose more problems inherent in applying the *Brown* paradigm.

However, perhaps the worst flaw of the *Brown* paradigm is that its failure to address the intersection of race and class belies the continued correlation between race and class in our society. The neighborhood in which I practiced law, once known as "Bronzeville,"³⁷ aptly illustrates the historical intersection between race and class. During the middle of the twentieth century the area was a thriving community full of jazz clubs, theaters and other cultural centers, home of celebrities like Joe Louis and Mahalia Jackson.³⁸ Wealthy Blacks lived in the crowded neighborhood of Bronzeville because segregation prevented them from moving to more upscale neighborhoods.³⁹ After the success of the civil rights movement, those folks could and did move to the suburbs and other tonier locations. While I was practicing law there in the early 1990s, the former Bronzeville was still virtually 100% African American, but it had become one of the poorest neighborhoods in the country.⁴⁰ Residents of Bronzeville were unable to leave the neighborhood, not because of race discrimination per se, but because they could not afford to move.⁴¹

Now I live in Toledo, Ohio, the location of the Auto-Lite strike of 1934, a momentous event in labor history which served as a catalyst for congressional passage of the National Labor Relations Act, establishing a statutory right to join a union and engage in collective bargaining.⁴² In Toledo today, numerous workers of all races have lost their well-paying, union-protected factory jobs with health benefits and must instead work in low paying service sector jobs without any job security or health in-

37. Recently, gentrification has reached the northern edge of Bronzeville and real estate developers have revived the term. See David Roeder, *Bronzeville 'land grab'; Residents say they just want area to 'maintain its mixed-income character.'* CHICAGO SUN-TIMES, May 8, 2008, at 43.

38. See ALAN EHRENHALT, *THE LOST CITY: DISCOVERING THE FORGOTTEN VIRTUES OF COMMUNITY IN THE CHICAGO OF THE 1950S* at 153-54 (1995); LEMANN, *supra* note 5, at 64.

39. LEMANN, *supra* note 5, at 64.

40. EHRENHALT, *supra* note 38, at 261-62.

41. In recent years, the South Loop development has spread to the northern edge of "Bronzeville" and development has revived the economy of the neighborhood. However, my former clients now face another dilemma—being driven out of the neighborhood by higher real estate prices. See Roeder, *supra* note 37.

42. See Rebecca E. Zietlow & James Gray Pope, *The Auto-Lite Strike and the Fight Against "Wage Slavery,"* 38 U. TOL. L. REV. 839 (2007).

surance. The *Brown* paradigm does nothing to help those workers either, including those who are people of color.

There have been attempts by lawyers and political actors to combat both racial and economic subordination since the 1930s. The most important such attempt was Title VII of the Civil Rights Act of 1964, which outlawed race and gender discrimination in employment.⁴³ Labor leaders and civil rights leaders joined together to fight for that protection, and their alliance was crucial to the measure's success.⁴⁴ Title VII was intended not only to end race and gender discrimination, but also to empower people of color economically by removing race and gender based barriers to their economic success.

The Warren Court also occasionally recognized the link between race and poverty. For example, in *Harper v. Virginia*, the Court outlawed the use of poll taxes in state elections, in an opinion that implicitly recognized the fact that those taxes had historically been used, not only to discriminate on the basis of wealth, but also (and more often) to deny the franchise to African American voters.⁴⁵ Similarly, in *King v. Smith*, the Court struck down an Alabama law which prohibited welfare recipients from "co-habiting" with a male companion because it was inconsistent with federal regulations governing Aid to Families with Dependent Children.⁴⁶ The Court held that local welfare administrators were required to follow federal regulations.⁴⁷ Limiting the discretion of local caseworkers was not just a matter of economic justice, but also of racial justice. Not coincidentally, the case originated in Alabama, where white welfare administrators had been using the "spouse in the house" visits to harass African American women receiving welfare benefits.⁴⁸ The Court's *King* opinion implicitly recognized the fact that many people in southern states deeply resented the fact that African American women were eligible for welfare. The availability of welfare had an inflationary impact on the wages of low skill workers because it provided an alternative to agricultural and domestic work.

43. Civil Rights Act of 1964, Pub. L. 88-352, July 2, 1964, 78 Stat. 241, codified at 42 U.S.C. § 2000 et seq. (1994).

44. See ZIETLOW, *supra* note 9, at 118.

45. *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663 (1966). The 24th Amendment to the U.S. Constitution prohibits states from leveling poll taxes in federal elections. U.S. CONST. Amend. XXIV.

46. *King v. Smith*, 392 U.S. 309 (1968).

47. *Id.*

48. See MARTHA F. DAVIS, *BRUTAL NEED: LAWYERS AND THE WELFARE RIGHTS MOVEMENT* (1993).

Thus, the availability of welfare undermined the system of economic subordination that Goluboff describes so eloquently in her book.

Since then, however, racial and economic subordination have been disaggregated in our anti-discrimination law. For example, poverty lawyers attempted to follow the *Brown* model and convince the Court that poverty was a suspect class warranting heightened scrutiny. They were unsuccessful, and in *Dandridge v. Williams* the Court stated emphatically that *all* economic classifications are subject to deferential rational basis review, even if they harm poor people.⁴⁹ The *Dandridge* Court did not even consider the correlation between race and poverty in our society. The *Dandridge* opinion enables discrimination on the basis of wealth to serve as a proxy for race discrimination. For example, in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, the Court found that the decision of the virtually all-white Village of Arlington Heights to require single family housing and reject a zoning variance for builders of low income housing was permissible because it was constitutionally permissible for the Village to maintain its single family middle class identity.⁵⁰ The Court found that the history of racial segregation in Arlington Heights was irrelevant because there was no evidence that the decision being challenged was based on race discrimination.⁵¹

Ironically, the low level of scrutiny for economic based classifications makes possible one of the few legal measures available for the empowerment of African Americans. While the Court has repeatedly struck down race based affirmative action measures, it has also repeatedly noted that affirmative action measures for economically disadvantaged students are constitutionally permissible.⁵² Because students of color are statistically so much more likely than white students to be economically disadvantaged, such programs should disproportionately benefit those students. Thus, economic affirmative action has become a safe way for universities to attempt to diversify their student bodies. The Supreme Court has also spoken approvingly of diversity measures such as the Florida 10% program, which guar-

49. *Dandridge v. Williams*, 397 U.S. 471 (1970).

50. *Village of Arlington Heights v. Metro. Housing Develop. Corp.*, 429 U.S. 252 (1977).

51. *Id.*

52. *See, e.g., Gratz v. Bollinger*, 539 U.S. 244, 297 (2003).

antees the top 10% of every graduating high school class a spot in a state university.⁵³

Court approval of these remedies is ironic. The irony of the first measure is that its very success at achieving racial diversity depends on the failure of African Americans to achieve economic success. The irony of the second measure is that its success depends on the continued racial segregation of Florida high schools. A country whose economic success has depended on centuries of unpaid and underpaid work of African American workers should be able to better provide for the sons and daughters of those workers.

III. THE LOST PROMISE

In *The Lost Promise*, Risa Goluboff shows that the disgregation of race and class was not inevitable in our civil rights law. From the founding of the NAACP in 1909 and the Civil Rights Section of the Department of Justice ("CRS") in 1939 through the Supreme Court's decision in *Brown*,⁵⁴ Goluboff details the development of civil rights law during the early years of civil rights practice, and describes another way of thinking about civil rights, lost until now, that integrates race and class in a dynamic fashion. Goluboff reminds us that throughout our nation's history, African Americans have suffered not only from racial subordination, but also economic subordination. While slavery is the most obvious example of exploitation of labor facilitated by racial subordination, Goluboff describes in great detail the extent to which such exploitation continued under the Jim Crow system that dominated the south for nearly a century after the Civil War ended.

Goluboff paints a vivid picture of the lives of these workers based primarily on letters of complaint that they wrote to NAACP and CRS lawyers in the 1930s and 1940s. Those poignant letters reveal how in the south, racial segregation facilitated the economic subordination of southern Black workers and made it possible for rural employers to treat their workers as virtual slaves (pp. 52–80). When those workers moved north for a better life, they encountered less brutal but equally pervasive segregation that also limited their economic opportunities (pp.

53. See *Gratz*, 539 U.S. at 297 (2003) (suggesting the Florida 10% plan as an alternative means of obtaining racial diversity).

54. 347 U.S. 483 (1954).

81–110). Thus, both northern and southern African American workers described the ways in which race discrimination and racial subordination limited their economic opportunities. However, the primary concern of those workers was not race discrimination, but lack of economic opportunity (pp. 80, 85).

In the rural south, the Jim Crow system treated Blacks as second class citizens in every facet of their life, and kept their labor cheap by law and brutal force. Black sharecroppers lived in a “world of white economic domination and black economic dependence” (p. 80), a world which many found impossible to leave behind. Meanwhile, in the industrial north, “For some African American workers, then, economic opportunity meant the end of segregation. For others, it meant a willingness to accept segregation (at least in the short term) in exchange for economic survival and advancement” (p. 160). Thus, lawyers presented with these workers’ complaints had to try to find a legal strategy to remedy both economic disempowerment and race discrimination (p. 13).

Under the *Brown* paradigm, it is axiomatic that the most promising strategy to address the problems of African American workers is to sue their employers for race discrimination. However, in the 1930s, the predominance of race over economic injury was far from obvious. Not only was *Plessy* still the law of the land, but as Goluboff explains, in the 1930s individual rights claims were most often framed not as race based civil rights, but as class based economic rights. Until the mid-1930s, the Court had found an individual “right to contract” in cases such as *Lochner v. New York*⁵⁵ (p. 25). As a result of the New Deal, the Court abandoned *Lochner*, but many contemporary scholars and practitioners believed that other economic rights would take the place of the right to contract (p. 26). Unions were politically powerful, as was their claim that the right to organize was a fundamental right. Thus, “the most likely replacement for the individual contract rights the Supreme Court had previously protected seemed to be new collective labor and economic rights” (p. 17).

As the lawyers in the Civil Rights Section of the Department of Justice began to theorize a way to attack the oppressive system of Jim Crow, their paradigm was the economic and labor rights that had been central to the New Deal program of Presi-

55. 198 U.S. 45 (1905).

dent Franklin Roosevelt and his political allies (pp. 27–29). Those lawyers developed a litigation strategy directly attacking the economic exploitation of southern Black workers. While the New Deal had largely excluded Black workers by excluding agricultural and domestic workers from its protections, the CRS lawyers added an element of race equality to workers rights and attempted to extend those protections to those workers (p. 172). Thus, they started from the framework of economic rights and used those rights creatively to further the case of racial equality.

While *Brown* was based on the equal protection clause of the Fourteenth Amendment, the CRS lawyers relied instead on the Thirteenth Amendment and Reconstruction Era anti-peonage statutes based on Congress' power to enforce the Thirteenth Amendment (p. 114). The Thirteenth Amendment, which outlaws slavery and involuntary servitude, was a natural source for the CRS attorneys, who invoked the spirit of Reconstruction as they sought to expand the meaning of that Amendment and the Reconstruction era civil rights statutes based on Congress' power to enforce it (p. 135). Members of the Reconstruction Congress understood the connection between racial subordination and economic oppression and they intended the Thirteenth Amendment to serve as a tool for the empowerment, not just for former slaves, but also for workers in general (p. 18).⁵⁶ Abolitionists such as James Wilson emphasized the depressing effect that slavery had on the wages of free workers, and the conditions in which they worked. They argued that the abolition of slavery would help all workers, white or Black, because "free labor was not just the absence of slavery and its vestiges; it was the guarantee of an affirmative state of labor autonomy."⁵⁷

After Reconstruction, members of the nascent American labor movement nurtured this broad construction of the Thirteenth Amendment.⁵⁸ Labor leaders came to believe that working without the right to organize in a union was akin to slavery. They argued that workers had a constitutional right to organize, embodied in the First and Thirteenth Amendments.⁵⁹ Through

56. See also Lea VanderVelde, *The Labor Vision of the Thirteenth Amendment*, 138 U. PA. L. REV. 437, 438 (1989).

57. *Id.* at 438.

58. See James Gray Pope, *Labor's Constitution of Freedom*, 106 YALE L.J. 941 (1997).

59. See James Gray Pope, *The Thirteenth Amendment versus the Commerce Clause: Labor and the Shaping of American Constitutional Law, 1921-1957*, 102 COLUM. L. REV. 1 (2002).

the late 1930s, union leaders invoked the Thirteenth Amendment and the fight against wage slavery as they lobbied for the National Labor Relations Act and other protective labor legislation.⁶⁰ Members of the New Deal Congress were influenced by this campaign. Members of Congress also invoked the Thirteenth Amendment and the fight against wage slavery as they spoke in favor of the NLRA during congressional debates.⁶¹ Upholding the NLRA in *NLRB v. Jones & Laughlin*, the Supreme Court referred to the right to organize as a fundamental right.⁶²

The CRS attorneys reflected the influence of this political context as they embarked on their campaign to help African American workers. The CRS was founded by Attorney General Frank Murphy, the pro-labor former governor of Michigan (p. 111). Attorney General Francis Biddle, who had previously served as chair of the National Labor Relations Board, led the CRS during its most formative years of 1941-1945 (p. 125). Thus, the CRS had a strong pro-labor bent and championed workers' rights. The workers whom they represented were primarily agricultural and domestic workers who did not enjoy a right to organize into a union because they had been excluded from NLRA coverage (pp. 126-27). The CRS relied on the Thirteenth Amendment's prohibition of involuntary servitude and anti-peonage statutes to litigate against unscrupulous farmers who abused their sharecroppers and tenant farmers (pp. 136-40, 142-43). Eventually, the CRS also represented domestic workers who were virtually confined to the homes of their employers (pp. 162-64).

The CRS attorneys' ultimate goal was also significantly different from that of the *Brown* paradigm. In *Brown*, the Court ruled against state discrimination and established the negative right of freedom from discrimination (p. 218). In contrast, the CRS attorneys sought to establish affirmative duties on the part of the government. They hoped to create a constitutional right to work for fair wages and under decent conditions (pp. 151-52). CRS lawyers argued that the United States government had an affirmative obligation to provide this right, which they described as "the full and equal benefit of all laws and proceedings for the security of person and property" (p. 152).

60. See ZIETLOW, *supra* note 9, at 65-70.

61. *Id.* at 75-80.

62. *NLRB v. Jones & Laughlin Steel Co.*, 301 U.S. 1, 33 (1937).

The story of the CRS attorneys is only one of two narratives in *The Lost Promise*. Goluboff also describes the legal strategy of the NAACP legal department during the same time period. Leaders of the NAACP had early on determined that their mission would focus on racial, not economic, equality (p. 176). In the 1940s, NAACP lawyers led by Thurgood Marshall took on the cause of industrial workers suffering from the racial discrimination of both employers and unions (p. 180). Because there were few anti-discrimination statutes, the NAACP lawyers tried to whittle away at the state action requirement of the Equal Protection Clause (p. 200). The NAACP lawyers also attempted to establish a right to work free of race discrimination, a theory that relied on *Lochner* Era state court precedents upholding a substantive right “to pursue one’s calling” (pp. 206–08). These theories enjoyed some success in lower courts (p. 212). However, by the mid-1940s, the NAACP lawyers began to move away from their workers’ rights cases and focus predominantly on education as a vehicle to overturn *Plessy v. Fergusson* (p. 218).⁶³ Their efforts culminated in the 1954 victory in *Brown* (p. 240).

Thus, the NAACP attorneys veered away from economic justice as one of their goals, and eventually wholeheartedly adopted the more middle class concern about racial segregation as the Legal Defense Fund established a separate identity from the main organization (p. 13). As Goluboff points out, the LDF lawyers faced opposition from many sides, including Republicans, southern Democrats, and anti-Communists (p. 217). Goluboff explains that those attorneys took the road that they believed would be the most effective, and the most politically palatable at the time. Nonetheless, it is clear that Goluboff sees this decision as a betrayal of the workers whom the NAACP attorneys represented during the pro-labor days of the 1940s. Ironically, one of the reasons why the LDF reduced its labor strategy was because the NAACP sought to form more alliances with unions as a liberal front during the anti-Communist

63. Sophia Z. Lee disagrees with Goluboff on this point. See Sophia Z. Lee, *Hotspots in a Cold War: The NAACP's Postwar Workplace Constitutionalism, 1948-1964*, 26 LAW & HIST. REV. 327 (2008). Lee points out that even while Thurgood Marshall focused on the campaign to end *Plessy*, local branch lawyers continued to argue that unions were state actors before administrative agencies. *Id.* at 332. In 1964, those lawyers achieved a major victory in the form of an NLRB ruling holding that the NLRB could not certify a union that discriminated on the basis of race. The NLRB relied on *Shelley v. Kramer*, 334 U.S. 1 (1948), to hold that the Board’s certification met the state action requirement of the Equal Protection Clause. *Lee*, at 336 (citing Hughes Tool, 147 NLRB 1573 (1964)).

McCarthy Era, and thus stopped suing unions for race discrimination (pp. 217–37). Nonetheless, it is clear that Goluboff sees this 1950 decision as a turning point away from an approach to civil rights that would have more directly helped African American workers, the primary reason why the “promise” was “lost.”

Goluboff provides less information about the evolution of the CRS legal strategy, probably because it mostly occurred after the time period covered by the book. I would love to know more about the decline of the anti-peonage strategy. Also omitted from Goluboff’s story is the alliance of labor with the civil rights movement in the early 1960s, and their joint success in the 1964 Civil Rights Act. Nonetheless, it is apparent that political forces influenced the turn of the CRS lawyers away from economic empowerment and towards anti-segregation, just as it had with their LDF colleagues. Those forces included the anti-Communism of the McCarthy era, which threatened those daring enough to espouse class-consciousness, and the rise of the civil rights movement, which emphasized racial segregation over overtly economic issues (pp. 256–58).

Goluboff ends her book by evaluating the impact of *Brown* on contemporary legal thought. It really is difficult to exaggerate the impact of *Brown* on current constitutional doctrine and equality law. As Goluboff explains, *Brown* established “the legal and intellectual framework that continues to dominate how lawyers and laypeople alike think about civil rights.” (p. 240). In that framework, the prototypical plaintiff is not the worker seeking economic rights, but the child seeking to combat the social stigma of racial segregation. “Enshrined in constitutional law, then, was *Brown*’s image of a Jim Crow that had as its central harm the psychological injury of inferiority.” (p. 244). According to Goluboff, the gravitational pull of *Brown* eventually ended civil rights lawyers’ experimentation with economic-based civil rights. As she explains, the image of Jim Crow in the *Brown* opinion “divorced the seventy-five-year-old caste system from its economic roots, or its material inequalities, from the farm workers who complained about immobility and the industrial workers who complained about their inability to make a living.” (p. 251). As a result, “the new civil rights would prove fundamentally unable to redress the economic hierarchies of Jim Crow America.” (p. 244).

IV. RIGHTS OF BELONGING AND ECONOMIC EMPOWERMENT

In the twenty-first century, it is apparent that facial equality alone is not sufficient to remedy the centuries of economic and race-based subordination of people of color in our society. In order to truly belong, outsiders need not just permission to belong, but also a means of belonging. *The Lost Promise* gives us a good foundation for imagining the content of those rights of belonging. The book also reminds us that rights of belonging have more than one doctrinal basis. Because of its promise of both racial equality and economic empowerment, the Thirteenth Amendment is a crucial source of rights of belonging. Finally, because rights of belonging are positive rights, they must come primarily from positive law. In the twenty-first century, we should expect legislatures, not the courts, to play the leading role in establishing and protecting rights of belonging.

The Lost Promise teaches us three lessons about rights of belonging. First, those rights must include economic rights as well as anti-discrimination norms. Second, those rights come not just from the Fourteenth Amendment, which has been so limited by the Supreme Court, but also from the as yet untapped potential of the Thirteenth Amendment, which establishes both the right to racial equality and the end of the economic subordination of workers. Finally, as positive rights, rights of belonging are best suited to enforcement not by the federal courts, but by the political branches. Thus, the conceptualization of rights of belonging must occur not within the confines of federal litigation, but instead as the result of a robust political debate.

First, in order to truly facilitate the belonging of outsiders in our society, rights of belonging include economic rights as well as anti-discrimination rights. This is not a new insight. Dr. Martin Luther King, Jr., took his last fateful trip to Memphis in support of sanitation workers who were on strike in order to achieve the right to form a union and to earn a living wage. The slogan on the signs that those workers carried, "I am a man," reflected their belief that they were fighting not just for economic rights but for dignity and respect. The sanitation workers in Memphis understood that in order to belong to their community as equal citizens, they needed the economic empowerment that a right to join a union would bring to them.

Goluboff reminds us that the right to join a union was once considered a fundamental human right, the most important of all

“civil rights,” not just by labor leaders, but also by the general public. In the decades leading up to the passage of the National Labor Relations Act, workers fought, suffered, and even died for the right to form unions.⁶⁴ The right to organize into a union is a fundamental right of belonging. It facilitates not only the economic empowerment of workers, but also their political empowerment.

However, unions were a mixed blessing for African Americans during the 1940s and 1950s. Some unions welcomed Blacks with open arms and launched the careers of civil rights leaders such as A. Philip Randolph.⁶⁵ Other unions discriminated against African Americans (pp. 96–100). Many unions were segregated, and union leaders often did their best to keep African Americans away from the better skilled, better paying jobs (p. 95). Even when they were allowed to be members, Blacks often lacked meaningful representation in their unions. This situation often put Black workers in the uncomfortable position of opposing unions, suing them for race discrimination, where such a remedy was available.⁶⁶ As a remedy, the NLRB and some state courts ordered employers to reinstate Black workers even if they could not be union members (p. 212).

Over time, relationships between unions and people of color have improved. By the late 1940s, the NAACP had allied itself with unions and stopped litigating labor cases, including discrimination cases against unions (p. 222). During the next decade the NAACP and leading unions cemented their alliances. UAW leader Walter Reuther helped to lead the fight for the 1964 Civil Rights Act, and union support was essential to its passage.⁶⁷ In the early twenty-first century, some of the most vibrant unions, such as UNITE, have large minority memberships.⁶⁸ Union membership also continues to be one of the most important sources of empowerment for low-income people, including jani-

64. See, e.g., Zietlow & Pope, *The Auto-Lite Strike*, *supra* note 42.

65. See Martha Biondi, *TO STAND AND FIGHT: THE STRUGGLE FOR CIVIL RIGHTS IN POSTWAR NEW YORK CITY* 17 (2003).

66. Federal agencies were prohibited from discriminating on the basis of race, though some openly discriminated. In 1935, the NAACP supported an amendment to the NLRA that would have prohibited unions from discriminating on the basis of race, but the amendment failed. In its suits against unions, the NAACP relied upon state laws including the New York Fair Employment Practices Act, and the federal Railway Laborers Act (p. 195).

67. See Rebecca Zietlow, *To Secure These Rights: Congress, Courts and the 1964 Civil Rights Act*, 57 RUTGERS L. REV. 945 (2005).

68. <http://www.unitehere.org/presscenter/factsheet.php>.

tors and service employees. Union membership has declined dramatically since its height in the mid-1950s,⁶⁹ due in large part to Supreme Court rulings narrowly interpreting the National Labor Relations Act.⁷⁰ The NLRA should be amended to strengthen its protections for the workers' right to organize.

To determine what other economic rights are rights of belonging, a good starting place is the era that Goluboff describes in her book. At the beginning of his fourth term as president, Franklin Roosevelt proposed a "Second Bill of Rights," which included the right to a job at an adequate wage, decent housing, medical care, and education (p. 35). Roosevelt's Bill of Rights would have established an affirmative obligation on the part of the government to provide for its citizens. As Roosevelt's successor, President Harry Truman explained in a 1947 speech at the Lincoln Memorial, "The extension of civil rights today means not protection of the people *against* the Government, but protection of the people *by* the Government" (p. 141).⁷¹ Initially, Roosevelt's proposal was well received. The elite American Law Institute convened an international committee to write up "the essential statement of human rights" which "emphasized that economic rights were a necessary part of any modern state," and the United Nations, which was formed in 1945, adopted similar guarantees (p. 141). Congress considered a Full Employment Bill in 1945, which would have created a right of "all Americans" to "useful, remunerative, regular, and fulltime employment" and obliged the federal government to vindicate that right (p. 141).

After World War II ended, the political tide turned to the right, anti-Communism flourished, and the Full Employment Act failed (p. 39). However, Roosevelt's initiative still serves as a foundation for other economic rights of belonging. While it is difficult to imagine the government guaranteeing a right to employment or housing, polls show that a majority of Americans already believe that education and access to health care are fundamental rights. Because education and health care are so essential to economic advancement, and even survival, they fit within

69. In 2007, 12.1 percent of employed wage and salary workers were members of unions. In 1983, the number was 20.1 percent. See U.S. Department of Labor, Bureau of Labor Statistics Press Release, USDL 08-0092, January 25, 2008, <http://www.bls.gov/news.release/pdf/union2.pdf>.

70. See James Gray Pope, *How Workers Lost the Right to Strike, and Other Tales*, 103 MICH. L. REV. 518 (2004).

71. For an in-depth discussion of the CRS vision of the role of government in protecting civil rights under Truman, see ROBERT K. CARR, *FEDERAL PROTECTION OF CIVIL RIGHTS: QUEST FOR A SWORD* (1947).

the rubric of twenty-first century rights of belonging. Like Roosevelt's Second Bill of Rights, these rights would create a positive obligation by the government.⁷²

The Lost Promise also reminds us that there is more than one doctrinal basis for civil rights. Under the *Brown* paradigm, the equal protection clause dominated anti-discrimination law in the second half of the twentieth century. Apart from the years of the CRS, and despite its wide-ranging promise, the Thirteenth Amendment has been an under-enforced and under-appreciated constitutional provision. Recently, however, there has been a surge of scholarly interest in that amendment.⁷³ Members of Congress also have revived the Thirteenth Amendment enforcement power by enacting the Trafficking Victims Protection Act of 2000⁷⁴ and relying on it as a foundation of a proposed Hate Crimes Act.⁷⁵ Despite its recent rulings narrowly construing the Fourteenth Amendment enforcement power, the United States Supreme Court continues to construe the Thirteenth Amendment enforcement power broadly.⁷⁶ The twenty-first century may well be the century of the Thirteenth Amendment. For those who wish to address the intersection of race and class in our society, it is the fountainhead of constitutional law.

The Thirteenth Amendment has several advantages over the Fourteenth as a source of civil rights remedies. First, unlike the Fourteenth Amendment, the Thirteenth Amendment's scope is not limited to state action. On its face, the Thirteenth Amendment applies to private action, and the Court has inter-

72. Therefore, for reasons explained below, they are best suited for enforcement by Congress, not the federal courts.

73. See, e.g., ALEXANDER TESIS, *THE THIRTEENTH AMENDMENT AND AMERICAN FREEDOM: A LEGAL HISTORY* (2004); Pope, *Thirteenth Amendment versus the Commerce Clause*, *supra* note 59.

74. See Peonage, Slavery and Trafficking in Persons Act, 18 U.S.C. §1581 (June 25, 1948, c. 645, 62 Stat. 772; Sept. 13, 1994, Pub. L. 103-322, Title XXXIII, §33016(1)(K), 108 Stat. 2147; Sept. 30, 1996, Pub. L. 104-208, Div. C, Title II, §218(a), 110 Stat. 3009-573; Oct. 28, 2000, Pub. L. 106-386, Div. A, §112(a)(1), 114 Stat. 1486).

75. Local Law Enforcement Hate Crimes Prevention Act of 2007, H.R. 1592. The Act passed the House of Representatives and was referred to the Senate Committee on May 7, 2007. H.R. 110-113. Senator Edward Kennedy introduced a similar provision on the Senate side, S. 1105, the Matthew Shepard Local Law Enforcement Hate Crimes Prevention Act of 2007, S. 4445-4447.

76. The most recent example is a case this term in which the Supreme Court held that Section 1981, a provision of the 1866 Civil Rights Act prohibiting race discrimination in contracts based on the Thirteenth Amendment enforcement power, authorized a remedy for retaliatory actions on the part of employers. See *CBOCS, Inc. v. Humphries*, 128 S. Ct. 1951 (2008).

preted it that way on numerous occasions.⁷⁷ Second, the Thirteenth Amendment prohibits any badges or incidents of slavery based on race, so it is an excellent source of anti-race-discrimination law. Third, the Amendment is also a potent source of workers' rights, because it provides protection against the economic exploitation of workers. Thus, the Thirteenth Amendment provides a source of anti-subordination law without triggering the awkward equality/difference dilemma posed by the equal protection clause.

Finally, *The Lost Promise* highlights the key role that the political branches play in defining and enforcing rights of belonging. Under the *Brown* paradigm, courts do the work of creating civil rights, protecting minorities against the discrimination of the majority.⁷⁸ *The Lost Promise* reminds us how important it is for supporters of civil rights to engage the political process as well. President Roosevelt created the CRS and the CRS enjoyed strong support from his Attorneys General, Murphy and Biddle. Roosevelt's successor, President Harry Truman, also strongly supported its efforts (pp. 38–40). CRS lawyers pursued a litigation strategy that was complementary to the efforts of members of Congress to expand the rights of workers. At the request of the CRS, Congress amended the Anti-Peonage Act in 1948 to strengthen its provisions and expand the meaning of involuntary servitude (p. 150). The CRS and the NAACP both lobbied regularly for federal legislation expanding civil rights. In the twenty-first century, re-imagining civil rights as rights of belonging must happen within the political process, not the confines of the U.S. courts.

IV. CONCLUSION

Risa Goluboff's *The Lost Promise of Civil Rights* teaches us a great deal about the roots of our modern civil rights tradition. Goluboff tells us what lawyers thought during those formative years, and she details the decisions they made that shaped the civil rights paradigm today. But most importantly, in *The Lost Promise*, Goluboff gives us a sense of where to go tomorrow. This provocative book was intended to open our eyes and make

77. See, e.g., *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968); *Runyon v. McCrary*, 427 U.S. 160, 172 (1976); *Patterson v. McClean Credit Union*, 491 U.S. 164 (1989).

78. See Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolutions*, 82 VA. L. REV. 1 (1996).

us question the paradigm that shapes the way that civil rights lawyers practice and the way that constitutional law scholars think about equality rights. Goluboff has triggered a crucial conversation about the future of civil rights, and a foundation for re-envisioning those rights as rights of belonging. Let us hope that the conversation continues.