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

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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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Law and History Review Summer 2008, Vol. 26, No. 2
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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*) http://www.jstor.org/view/00218723/di952434/95p0006c/0 (June 2, 2007). 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, http://www.historycooperative.org/journals/jah/91.4/hall.html (June 2, 2007); 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, http://www.historycooperative.org/journals/jah/91.1/sugrue.html (June 2, 2007). 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: University of North Carolina Press, 1996). However, the New Deal marked a sea-change in

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]

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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, http://www.jstor.org/view/00218723/di975306/97p0517l/0 (June 2, 2007). 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, http://www.historycooperative.org/journals/jah/93.1/mack.html (June 2, 2007). 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, http://muse.jhu.edu/journals/journal_of_policy_history/v018/18.4thurber.html (June 2, 2007).

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.