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# The Civil Rights-Civil Liberties Divide

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## THE CIVIL RIGHTS-CIVIL LIBERTIES DIVIDE

Christopher W. Schmidt\*

### ABSTRACT

*Contemporary legal discourse differentiates “civil rights” from “civil liberties.” The former are generally understood as protections against discriminatory treatment, the latter as freedom from oppressive government authority. This Essay explains how this differentiation arose and considers its consequences.*

*Although there is a certain inherent logic to the civil rights-civil liberties divide, it in fact is the product of the unique circumstances of a particular moment in history. In the early years of the Cold War, liberal anticommunists sought to distinguish their incipient interest in the cause of racial equality from their belief that national security required limitations on the speech and due process rights of suspected subversives. Toward this end, they took two terms that had generally been used interchangeably and they created the civil rights-civil liberties distinction. Civil rights would forever after be attached to the struggle for racial equality and subsequent campaigns against other forms of public and private discrimination. Civil liberties would be attached to claims of individual freedom against generally applicable government regulatory power.*

*The civil rights-civil liberties divide was contested from the beginning, however. In the late 1940s and early 1950s, the radical left condemned the divide as a tool for politically powerful liberal anticommunists to separate themselves from the declining fortunes of their former New Deal allies. In the 1960s, a new generation of critics of the divide made the case that the battles against discrimination and government oppression were indivisible. Some advocated a new label, “human rights,” which would subsume the categories of civil rights and civil liberties, while also recognizing social welfare rights. Despite these revisionist efforts, the civil rights-civil liberties divide survives, still contested, but also reinforced as each new generation puts it to new uses. This Essay not only reconstructs the largely forgotten history of the origins of the civil rights-civil liberties divide, it also identifies the ways in which labeling and categorizing the legal landscape can advance or impede legal change.*

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# THE CIVIL RIGHTS-CIVIL LIBERTIES DIVIDE

## INTRODUCTION

The terms “civil rights” and “civil liberties” are generally understood as referencing distinct areas of law. Civil rights claims challenge the unequal treatment of different groups. The civil rights canon revolves around the Equal Protection Clause of the Fourteenth Amendment, supplemented by an array of local, state, and federal civil rights laws, which today protect against state and many forms of private discrimination based on race, sex, disability, and sexual orientation.<sup>1</sup>

To speak of civil liberties in contemporary legal discourse raises quite different concerns.<sup>2</sup> While civil rights policy often calls for government regulation of private relations, civil libertarianism is premised on a skepticism toward government interference in the private sphere. Autonomy rather than equality is the guiding principle of civil liberties. The civil liberties canon revolves around the limitations on government power outlined in the Bill of Rights, starting with the foremost of all civil liberties principles, the First Amendment’s protection of freedom of speech.<sup>3</sup>

Although there is a certain inherent logic to the distinction between these two terms, the civil rights-civil liberties divide is actually the product of the unique constellation of circumstances that arose at a particular moment in history. In this Essay I explain how, in the years following World War II, the civil rights-civil liberties divide took shape, how subsequent generations have contested the distinction, and why despite these challenges it has retained its viability in modern legal discourse. I also consider the impact of this particular exercise in legal categorization. The terms and categories by which we understand our legal world matter. The birth of the civil rights-civil liberties divide and subsequent debates over its value and meaning well illustrate this point. The divide has served some legal claims better than others.

The origins of the modern distinction between civil rights and civil liberties can be traced to the late 1940s, when liberal anticommunists sought to distinguish their incipient interest in the cause of racial equality from their belief that national security demanded limitations on the speech and due process rights of suspected subversives. In the early years of the Cold War, it

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<sup>1</sup> See, e.g., Jack Greenberg, *Civil Rights*, in ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION 273-81 (Leonard Levy et al. eds., 1986); *civil right*, in BLACK’S LAW DICTIONARY 240 (Bryan A. Garner ed., 7th ed. 1999) [hereinafter BLACK’S]; John E. Semonche, *Civil Rights and Civil Liberties* in THE OXFORD COMPANION TO AMERICAN LAW 110 (Kermit L. Hall at al. eds., 2002).

<sup>2</sup> See generally, Norman Dorsen, *Civil Liberties*, in ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION 263-70 (Leonard Levy et al. eds., 1986); *civil liberty*, in BLACK’S, *supra* note 1, at 239.

<sup>3</sup> For similar summaries of the distinction between civil rights and civil liberties, see Semonche, *supra* note 1. Thomas C. Grey, *Civil Rights vs. Civil Liberties: The Case of Discriminatory Verbal Harassment*, 63 J. HIGHER EDUC. 485, 485 (1992); Ronald Goldfarb & Stephen Kurzman, *Civil Rights v. Civil Liberties: The Jury Trial Issue*, 12 UCLA L. REV. 486, 486 (1965); “*Civil Rights*” vs. “*Civil Liberties*,” Findlaw, <http://public.findlaw.com/civil-rights/civil-rights-basics/civil-rights-vs-liberties.html>.

Of course, the civil rights-civil liberty distinction is not always so clear in practice, a fact reflected in BLACK’S’S recognition that a civil liberty is “[a]lso termed a civil right,” and the inclusion of “civil liberty” as an alternative definition for civil right. BLACK’S, *supra* note 1, at 239-40.

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became increasingly important for liberal anticommunists to separate the “race issue” from the domestic “Communist issue.” One of the results was the creation of the civil rights-civil liberties divide. Liberal anticommunists took two terms that had generally been used interchangeably and with little self-conscious effort to define what they meant, and they crafted and promoted the civil rights-civil liberties distinction. From this point on, civil rights would be attached to the struggle for racial equality and subsequent campaigns against public and private discrimination of various kinds. The women’s movement, the movement for disability rights, the gay rights movement have all been generally recognized as advancing civil rights claims. In contrast, civil liberties since the early Cold War generally has been attached to claims of individual freedom against generally applicable government regulatory power.

The civil rights-civil liberties divide was contested from the beginning, however. In the late 1940s and early 1950s, the radical left recognized the divide as a tool for politically powerful liberal anticommunists to separate themselves from the declining fortunes of their former New Deal allies. By the late 1960s a new generation of critics of the divide made the case for the indivisibility of the battles against discrimination and government oppression, often insisting on the need for a new label, “human rights,” that would subsume the categories of civil rights and civil liberties while adding a recognition of social welfare rights.

Yet the civil rights-civil liberties divide remains a basic organizing principle for modern American law. Its continued vitality in the face of these persistent challenges can be attributed to several factors. The animating principles behind paradigmatic civil liberties claims and civil rights claims do have distinctive characteristics. Various rights-oriented organizations and agencies have developed around one category or the other, thus giving a kind of organizational path dependency to the categories. And, perhaps most significantly, the divide retains continued utility in structuring legal contestation. The civil rights-civil liberties divide has featured prominently, for instance, in debates over hate speech regulation, in the framing of the legal claims of the gay rights movement, and in recent libertarian efforts to elevate the role of civil liberties in the history of the civil rights movement. In each of these instances, we see the *work* the divide does for various legal battles.

This Essay presents the history of the civil rights-civil liberties divide in four parts. Part One looks to the period before the divide. Here I examine efforts to categorize rights claims from the Reconstruction Era through the New Deal. The terms “civil rights” and “civil liberties” were commonly used during these years, but without their modern, differentiated implications. Part Two explains the development of the civil rights-civil liberties divide in the 1940s and 1950s, when liberal anticommunists relied on the category distinction as a way to justify and explain their political agenda. In Part Three I examine various challenges to the divide in the 1950s and 1960s. Then, in Part Four, I consider why, in the face of these critiques, the divide has persisted. This Part includes a discussion of some more recent legal debates in which the divide has played a role. I conclude with an assessment of the costs and benefits of the civil rights-civil liberties divide. The history of the divide shows the need to attend to the ways in which the exercise of labeling and categorization the landscape of legal rights can advance as well as retard the cause of legal reform.

## I. CIVIL RIGHTS AND CIVIL LIBERTIES BEFORE THE DIVIDE

In this Part I consider the history of debates over the meaning of “civil rights” and “civil liberties” in the period between Reconstruction, when the Thirty-Ninth Congress basically created civil rights in its modern sense, though the middle of the twentieth century, just as the civil rights-civil liberties divide was taking shape.

### A. Reconstruction & the Birth of Civil Rights

The earliest effort in the United States to define something approaching our modern, discrimination-focused understanding of civil rights came immediately following the Civil War, as the newly unified nation faced the challenge of defining a place for four million newly freed slaves.<sup>4</sup> In response to the South’s repressive Black Codes, the Thirty-Ninth Congress passed the Civil Rights Act of 1866,<sup>5</sup> the first of a series of federal laws designed to protect the recently freed slaves. Its provisions provided the foundation of what would become the Fourteenth Amendment.<sup>6</sup> The law prohibited “discrimination in civil rights or immunities,” which the text of the statute enumerated as including: the right to contract; to go to court; to own and sell property; and “to full and equal benefit of all laws and proceedings for the security of person and property.”<sup>7</sup> The debate over the passage of this statute included much discussion, largely inconclusive, about the meaning of the term “civil rights.” The subsequent congressional debate over the framing of the Fourteenth Amendment (intended in large part to place the statutory protections of the Civil Rights Act of 1866 on firmer constitutional footing) largely reprised the terms of the earlier debate, including the discussions about the meaning of “civil rights.” In the end, the primary author of the initial text of the Fourteenth Amendment, Senator John A. Bingham, chose to exclude the contentious term “civil rights” from the text of the amendment.<sup>8</sup>

When the Thirty-Ninth Congress turned to the problems of defining and categorizing rights, the central issue was not differentiating “civil rights” from “civil liberties,” as the two terms were used interchangeably.<sup>9</sup> Rather, the key lines of distinction were between three categories of rights: civil rights (sometimes referred to as civil liberties), social rights, and political rights.<sup>10</sup> Advocates of the Civil Rights Act of 1866 countered criticism that its anti-

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<sup>4</sup> See GEORGE RUTHERGLEN, *CIVIL RIGHTS IN THE SHADOW OF SLAVERY: THE CONSTITUTION, COMMON LAW, AND THE CIVIL RIGHTS ACT OF 1866*, 42 (2013) (describing the passage of the 1866 Civil Rights Act as redefining “civil rights” to mean “those rights sufficiently fundamental to be protected from discrimination on the basis of race”).

<sup>5</sup> Civil Rights Act of 1866, 14 Stat. 27.

<sup>6</sup> See generally RUTHERGLEN, *supra* note 4, at 70-80.

<sup>7</sup> 14 Stat. 27.

<sup>8</sup> RUTHERGLEN, *supra* note 4, at 74; Alexander M. Bickel, *The Original Understanding and the Segregation Decisions*, 69 HARV. L. REV. 1, 25-26 (1955).

<sup>9</sup> See, e.g., Cong. Globe, 39th Cong., 1st Sess. 474 (Jan. 29, 1866) (Senator Trumbull describing the purpose of the Civil Rights Act as protecting “civil liberty”); see also RUTHERGLEN, *supra* note 4, at 41-46.

<sup>10</sup> On the nineteenth-century division of what we today consider varieties of civil rights into this tripartite division, see HAROLD M. HYMAN & WILLIAM M. WIECEK, *EQUAL JUSTICE UNDER LAW: CONSTITUTION DEVELOPMENT, 1835-1875*, at 394-97 (1982); Rebecca J. Scott, *Public Rights, Social Equality, and the Conceptual Roots of the Plessy Challenge*, 106 MICH. L. REV. 777, 788-89 (2008); Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947, 1016-36 (1995).

discrimination measures went too far by emphasizing the limits of the “civil rights” that it protected. The Act prohibited racial discrimination with regard to the right to make contracts, own property, and to go to court, but, according to its defenders, it did not affect political rights, such as the right to vote or run for office; not did it affect “social rights,” which implicated an amorphous conception of social interactions that ran the gamut from private social clubs to privately operated public accommodations (taverns, theaters, and the like) to public schools.

The framers of the Fourteenth Amendment emphasized much the same distinctions between civil rights (the primary target of the Amendment), social rights, and political rights. Hence the need for an additional constitutional amendment, the Fifteenth, to protect the right to vote. And hence the need for additional congressional action, the Civil Rights Act of 1875, to protect against racial discrimination in public accommodations (an early version of the 1875 Act also included protections against discrimination in schooling). The carving up of society into separate spheres—civil, social, and political—was central to the emerging logic of Jim Crow. It featured prominently, for instance, in the reasoning of the Supreme Court in *The Civil Rights Cases*,<sup>11</sup> which struck down much of the Civil Rights Act of 1875 as beyond the reach of the Fourteenth Amendment, and *Plessy v. Ferguson* (1896),<sup>12</sup> which upheld racial segregation in railroad cars as merely a restriction of a social right, not an infringement of a protected civil right.

Differentiating the category of civil rights from other categories of rights was thus at the heart of the civil rights project from the beginning. What would change in the twentieth century was the nature of the categories. The sharp lines between civil, social, and political rights would become blurred and ultimately untenable, as the twentieth century black freedom movement successfully challenged racial discrimination in all these spheres. By the middle of the twentieth century, the term civil rights had subsumed and largely effaced these categories. But as racial justice activists in the twentieth century remade the category of civil rights, conflating what had previously been differentiated, other activists were engaged in their own efforts to advance their causes by capturing and redefining the meaning of civil rights and civil liberties.

## **B. Civil Rights, Civil Liberties, and the Labor Movement in the New Deal Era**

In the period from the beginning of the twentieth century to the onset of the Cold War, there was little reason to distinguish between civil right and civil liberties. The various rights-based causes of the period were so intertwined, their central legal claims so eclectic and diffuse, that the development of such category distinctions would not have made sense, or at least would not have been particularly useful.

The most significant social reform movement of the opening decades of the twentieth century was the labor movement. Its leaders often described their cause as the advancement of civil rights or civil liberties—the two labels were still used largely interchangeably in this period.<sup>13</sup> During the same period, another reform movement was also taking shape, this one far less prominent and politically powerful than the workers’ movement, but one that would prove deeply consequential for twentieth century law. This movement sought to protect free speech

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<sup>11</sup> 109 U.S. 3, 22 (1883); *id.* at 59-60 (Harlan, J., dissenting).

<sup>12</sup> 163 U.S. 537, 544 (1896); *id.* at 561 (Harlan, J., dissenting).

<sup>13</sup> RISA GOLUBOFF, *THE LOST PROMISE OF CIVIL RIGHTS* 23-25, 280 nn. 16-21 (2007).

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rights against government regulation.<sup>14</sup> Like the labor movement, the early free speech movement used the labels civil rights and civil liberties interchangeably and indiscriminately to describe their work. Yet the free speech movement of the early twentieth century was not primarily moved by some abstract commitment to the free flow of speech, regardless of its content, regardless of whose interests were advanced by that speech. This sort of content-neutral free speech commitment (which is the operating principle of modern First Amendment doctrine) developed in the 1920s and 1930s.<sup>15</sup> The free speech movement in its earliest incarnation was primarily concerned with advancing the cause of workers' rights.<sup>16</sup> To further complicate matters, the movement for racial justice in the 1930s and 1940s was inextricably linked with the labor movement.<sup>17</sup>

Consider the following: In 1920, when Roger Baldwin reorganized the National Civil Liberties Bureau, a group formed in response to government efforts to suppress speech during World War I, he considered naming the new organization the National Civil Rights Union before settling on the American Civil Liberties Union.<sup>18</sup> The early ACLU was primarily concerned with protecting and promoting the rights of workers to organize.<sup>19</sup> In the 1930s Senator Robert LaFollette created and chaired the Civil Liberties Committee, a congressional committee dedicated to the protection of labor rights.<sup>20</sup> In 1939 the Justice Department formed a new department named the Civil Liberties Unit.<sup>21</sup> Initially, its primary concern, as with La Follette's committee, was protecting the rights of workers to organize and protest.<sup>22</sup> In 1941, when Victor Rothen took charge of the Civil Liberties Unit, he decided to change its name. He was concerned that his group was getting confused with the ACLU; he also felt that the title was risking sounding too radical.<sup>23</sup> So he renamed it the Civil Rights Section.<sup>24</sup> (This idea that "civil

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<sup>14</sup> See, e.g., DAVID RABBAN, *FREE SPEECH IN ITS FORGOTTEN YEARS, 1870-1920* (1999).

<sup>15</sup> Laura Weinrib, *The Sex Side of Civil Liberties: United States v. Dennett and the Changing Face of Free Speech*, 30 L. & HIST. REV. 325 (2012); Laura Weinrib, *From Public Interest to Private Rights: Free Speech, Liberal Individualism, and the Making of Modern Tort Law*, 34 L. & SOC. INQUIRY 187 (2009).

<sup>16</sup> *Id.*

<sup>17</sup> See, e.g., GOLUBOFF, *supra* note 13; Kenneth W. Mack, *Rethinking Civil Rights Lawyering and Politics in the Era Before Brown*, 115 YALE L.J. 256 (2005).

<sup>18</sup> SAMUEL WALKER, *IN DEFENSE OF AMERICAN LIBERTIES: A HISTORY OF THE ACLU* 47 (2d. ed 1999).

<sup>19</sup> See Weinrib, *supra* note 15.

<sup>20</sup> Risa L. Goluboff, *The Thirteenth Amendment and the Lost Origins of Civil Rights*, 50 DUKE L. J. 1609, 1617-18 (2001); Report of the Senate Committee on Education and Labor, 74th Cong., 1st Sess., *Violations of Free Speech and the Rights of Labor*. The LaFollette Committee was established "to investigate violations of right of free speech and assembly and interference with right of labor to organize and bargain collectively." S. Res. 266, 74th Cong., 2d Sess., June 6, 1936, *quoted in* ROBERT K. CARR, *FEDERAL PROTECTION OF CIVIL RIGHTS: QUEST FOR A SWORD* 28 n. 39 (1947).

<sup>21</sup> CARR, *supra* note 20, at 24 n. 35 (citing Order of the Attorney General, No. 3204, Feb. 3, 1939); Henry A. Schweinhaut, *The Civil Liberties Section of the Department of Justice*, 1 BILL RTS. REV. 206 (1941).

<sup>22</sup> At the time of the formation of the Civil Liberties Unit, the most significant recent Justice Department prosecutions relating to what was understood to be "civil liberties" involved Kentucky coal miners and the CIO in New Jersey. Schweinhaut, *supra* note 21, at 206. The complaints received by the newly formed unit encompassed a variety of issues, from labor rights to free speech to criminal justice violations to repression of African Americans by the Ku Klux Klan. *Id.* at 206-07. See also Goluboff, *Thirteenth Amendment*, *supra* note 20, at 1616-17.

<sup>23</sup> CARR, *supra* note 20, at 24 n. 35.

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rights” had a less subversive connotation than “civil liberties” would be a recurrent theme in the coming years.) Typical of the slippage between labels was an article published in the inaugural edition of the *Bill of Rights Review* in 1940 titled “Civil Liberties—A Field of Law.”<sup>25</sup> Its first sentence described the emergence of a “distinct field of law—that of civil rights . . . .”<sup>26</sup>

All of this is to say that the most prominent rights movements of the early twentieth century fail to fit neatly into modern legal categories, with campaigns for free speech interlocking with campaigns for labor rights and with all of these efforts—as well as the movement for racial justice—flying under the banners of civil rights as well as civil liberties. Prior to the 1940s, the terms civil liberties and civil rights were used interchangeably and with little precision in American legal and political discourse.

## II. THE COLD WAR AND THE CREATION OF THE CIVIL RIGHTS-CIVIL LIBERTIES DIVIDE

With the rise of anticommunism as a major issue in the years following World War II, the civil rights-civil liberties distinction took form. During this period, an influential group of Cold War liberals sought to distinguish their growing interest in protecting African American civil rights from their willingness to consider certain limitations on civil liberties to protect the nation from communism. Even for those who lamented the weakening of protections for political dissent, the distinction offered useful labels to criticize these developments. The civil rights-civil liberties divide, in short, provided a language to describe the politics of early Cold War America.

### A. Domestic Politics of the Early Cold War Years

In the years following World War II, rising tensions between the United States and the Soviet Union, and the resulting anticommunist fervor within the United States, led certain minority group interests to be strengthened and others to be severely curtailed. The campaign against racial discrimination gained significant momentum in the early years of the Cold War. World War II marked a critical turning point in the emergence of the modern movement for African American equality, a result of wartime rhetoric attacking fascism and promoting American freedom, the service of large numbers of African Americans in the armed forces, and the migration of thousands of African Americans to the urban North, where they formed powerful voting blocs that demanded the attention of local, state, and federal government representatives.<sup>27</sup> With the end of World War II and the subsequent emergence of the Cold War, the problem of racial discrimination became a foreign policy liability.<sup>28</sup> The Soviet Union

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<sup>24</sup> *Id.* The name change foreshadowed a change in the section’s mission. Over the course of the 1940s, the agenda of the Civil Rights Section shifted from labor rights toward a focus on racial discrimination. *Id.*

<sup>25</sup> *Civil Liberties—A Field of Law*, 1 BILL RTS. REV. 7, 7 (1940).

<sup>26</sup> *Id.* Almost all the articles published during the short life of the *Bill of Rights Journal* (it stopped publication in 1942) dealt with what we would today consider civil liberties issues.

<sup>27</sup> See MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 173-96 (2004).

<sup>28</sup> See, e.g., MARY L. DUDZIAK, COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY (2000).

eagerly highlighted examples racial discrimination in the United States in their efforts to bring nations of Africa and Asia under its influence. The supposed leader of the Free World hardly acted the part when it came to protecting the freedoms of its racial minorities, and the Soviet propaganda machine only had to publicize news events from the United States to make this point obvious to the rest of the world. As Cornell professor Robert Cushman wrote in 1948 in a *New York Times Magazine* article, “It is unpleasant to have the Russians publicize our continued lynchings, our Jim Crow statutes and customs, our anti-Semitic discrimination, and our witchhunts; but is it undeserved? Some of the flung mud sticks.”<sup>29</sup> From the late 1940s onward, this cold war imperative proved a powerful national security rationale for increased federal intervention into dismantling the worst excesses of Jim Crow.

For other minority groups, however, the onset of the Cold War was severely damaging. Domestic anticommunism decimated the already declining numbers on the far left end of the American political spectrum.<sup>30</sup> Radicals of all stripes found themselves vulnerable to accusations of being sympathetic to Communism, of being subversive to the American order, of being disloyal. Members of leftist groups (or even those suspected of being “fellow travelers”) were ostracized from mainstream society; many were even prosecuted for disloyalty.<sup>31</sup> Liberals regularly expressed concern when loyalty programs and prosecution of suspected subversives infringed upon free speech and due process rights. But these expressions of concern were often muted and qualified. Many liberals truly felt that the threat of communism, at home and abroad, necessitated a reconsideration of the balance of individual rights and national security. With anti-communism dominating domestic politics in the late 1940s and early 1950s, the political risks of staking out a strong stand on behalf of the civil liberties of Communists often discouraged public officials who might have had reservations about loyalty programs and prosecutions from speaking out on behalf of civil liberties.

Writing in 1952, Robert M. Hutchins noted the “great progress [that] has been made” to advance “the rights of the Negro,” while lamenting that on the question of “the freedom to differ and to espouse unpopular causes, we seem to be losing ground.”<sup>32</sup>

## **B. Racial Equality and Free Speech Before the Civil Rights Movement**

The new generation of civil rights activists who gained influence in the 1940s were not necessarily committed advocates of free expression—what today we would label civil libertarians. The assumption behind the nascent civil rights-civil liberties divide was that the cause of racial justice could be advanced without necessarily aligning the cause with efforts to enforce protections for protest and expression. This was not a new move for racial justice advocates of the period, who had often emphasized that unrestricted free speech could be counterproductive to their cause. Well before the hate-speech codes of recent years, civil rights activists and their supporters looked to some forms of speech repression as a weapon against

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<sup>29</sup> Robert E. Cushman, *Our Civil Rights Become a World Issue*, N.Y. TIMES MAGAZINE, Jan. 11, 1948, at 12.

<sup>30</sup> See, e.g., ELLEN SCHRECKER, *MANY ARE THE CRIMES: MCCARTHYISM IN AMERICA* (1998).

<sup>31</sup> *Id.*

<sup>32</sup> Robert M. Hutchins, *Foreword*, in *POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES* iv (Thomas I. Emerson & David Haber eds., 1952).

racial oppression.<sup>33</sup> They advocated measures to drive racist speech from the public sphere through what was then described as prohibitions of “group libel.” In a 1942 law review article calling for expanding regulation of group libel, David Riesman identified “the existence of a mobile public opinion as the controlling force in politics, and the systematic manipulation of that opinion by the use of calculated falsehood and vilification” as a disturbing new trend.<sup>34</sup> In 1949, the *Chicago Defender*, one of the nation’s leading African American newspapers, called on the federal government to prevent a particularly virulent white supremacist pamphlet from entering the mail;<sup>35</sup> Adam Clayton Powell argued that federal sedition law should be used against segregationist opponents of school desegregation;<sup>36</sup> racial justice activists sought to have racist teachers fired from New York public schools.<sup>37</sup> During the 1940s, various critics of racial, ethnic, and religious discrimination saw speech repression as a necessary component of anti-discrimination policy. In 1952, the Supreme Court upheld an Illinois group libel statute, finding that libelous speech was not protected under the First Amendment.<sup>38</sup>

During the height of the anticommunist fervor of the early Cold War, for reasons both strategic and ideological, some racial justice activists viewed suppression of certain forms of dissent as conducive to their cause. Mary McLeod Bethune wrote an article in 1950 titled “The Privileges of a Democracy Are Not Without Common Sense” in which she declared that “[n]either rabble-rousing nor totalitarian whip-cracking is evidence of democracy.”<sup>39</sup> The NAACP expelled Communists from their organization in 1950,<sup>40</sup> and its leaders generally supported government loyalty measures.<sup>41</sup> Thurgood Marshall resigned from the National Lawyers Guild after the left-leaning organization criticized Judge Harold Medina for his handling of a 1949 sedition trial of communists.<sup>42</sup>

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<sup>33</sup> Looking back on this period from the vantage point of the 1960s, Harry Kalven noted: “It is strange how rapidly things change. Just a little more than a decade ago we were all concerned with devising controls for the libeling of groups. The war and the rise of fascism had made us suddenly sensitive to the evils of systematic defamation of minority groups, sensitive to the new and unexpected power of malevolent propaganda.” HARRY KALVEN, JR., *THE NEGRO AND THE FIRST AMENDMENT* 7 (1965).

<sup>34</sup> David Riesman, *Democracy and Defamation: Control of Group Libel*, 42 COLUM. L. REV. 727, 728 (1942).

<sup>35</sup> *Black Blood Black, but Negro Is Red Says New Race Hate Book*, CHICAGO DEFENDER, June 11, 1949, at 13.

<sup>36</sup> MARTHA BIONDI, *TO STAND AND FIGHT: THE STRUGGLE FOR CIVIL RIGHTS IN POSTWAR NEW YORK CITY* 138-39 (2003).

<sup>37</sup> *Id.* at 244-46.

<sup>38</sup> *Beauharnais v. Illinois*, 343 U. S. 250, 266 (1952).

<sup>39</sup> Mary McLeod Bethune, *The Privileges of a Democracy Are Not Without Common Sense*, CHICAGO DEFENDER, Apr. 22, 1950, at 6.

<sup>40</sup> *See, e.g., NAACP Pledges Crackdown On Communism At Confab*, CHI. DEFENDER, July 1, 1950, at 1, 2.

<sup>41</sup> *See, e.g.,* George Streator, *NAACP Condemns Communist Tinge*, N.Y. TIMES, Mar. 10, 1949; Walter White, *The Negro and the Communists*, 57 CRISIS 502 (1950); ROY WILKINS WITH TOM MATHEWS, *STANDING FAST: THE AUTOBIOGRAPHY OF ROY WILKINS* 205-06 (1982).

<sup>42</sup> MARK V. TUSHNET, *MAKING CIVIL RIGHTS LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1936-1961*, 44-45 (1994); JUAN WILLIAMS, *THURGOOD MARSHALL: AMERICAN REVOLUTIONARY* 168-69 (1998).

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The emergence of the early stages of the civil rights movement in the 1940s transformed the landscape of rights-based activism. In contrast to the labor movement of the 1930s, supporters of the cause of racial equality in the 1940s saw little advantage in aggressively promoting the need to protect uninhibited free expression. To be sure, white supremacy in the United States included the repression of speech of African Americans, through formal and informal methods. But at the time there was nothing approaching an organized mass movement for racial equality that could be unleashed by removing restrictions on protest activities. What was needed, racial liberals assumed, was to create more public support for the cause of dismantling Jim Crow. This public relations goal would be aided by detaching the attack on Jim Crow from leftist politics, which by the late 1940s, with the rise of anticommunism, were in increasing disrepute.

### C. The President's Committee on Civil Rights

Perhaps no official action did more to solidify “civil rights” as specifically involving problems of discrimination, particularly racial discrimination, than President Truman’s creation of a special commission in 1946 charged with investigating the nation’s race problem. The President’s Committee on Civil Rights (PCCR) would publish a highly influential report in 1947, titled *To Secure These Rights*,<sup>43</sup> which went a long way toward establishing the liberal agenda for civil rights reform in the coming years. The report also drew a sharp distinction between government policy designed to address racial discrimination and the need to protect against government infringement of free expression and basic due process rights.

Initially, however, as members of the commission and staffers sought to establish the PCCR’s agenda, there was a good deal of uncertainty about the purview of the committee and about the best way to describe its agenda. Truman’s executive order creating the PCCR showed no sense of a distinction between the terms civil rights and civil liberties. It described the breakdown of government protections for minorities following World War II as a question of “civil liberties,” the preservation of which “is a duty to every Government—state, Federal, local.” It then shifted to discuss the need for improved “civil rights” legislation, referencing the title of the committee—the President’s Committee on *Civil Rights*—and concluding with the committee’s charge to report on the means by which the nation could improve “the protection of the civil rights of the people of the United States.”<sup>44</sup> Philleo Nash, a special assistant to Truman, explained that the administration officials who planned out the PCCR used “civil rights” in the title of the commission since it was “a term that was slightly fresh” and it “was not used for this function [i.e., racial equality] at that time.”<sup>45</sup>

Soon after Truman announced the creation of the committee, its members turned to the Civil Rights Section of the Justice Department for guidance on what exactly a committee dedicated to civil rights would do. Lawyers in the Civil Rights Section responded with a report to the PCCR that shed remarkably little light on the situation. Civil rights “is not a technical legal term,” they explained, “but a phrase of popular currency applied somewhat indiscriminately

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<sup>43</sup> PRESIDENT’S COMMITTEE ON CIVIL RIGHTS, *TO SECURE THESE RIGHTS* (1947).

<sup>44</sup> Executive Order 9808, reprinted in *id.*, at viii.

<sup>45</sup> Philleo Nash Oral History, Feb. 21, 1967, 626-27, Truman Library, Independence, Missouri.

to a miscellaneous group of rights, interests and situations.”<sup>46</sup> In short, an agency named the Civil Rights Section was explaining to a special commission called the President’s Committee on Civil Rights that they did not really know the meaning of the term civil rights.

But as the PCCR went about its work of collecting information, analyzing the state of minority rights, and proposing an agenda for reform, its members found the Justice Department’s catch-all definition of civil rights too diffuse for their purposes. They sought to draw distinctions between different categories of rights. The placement of these lines—out of which emerged the modern distinction between civil rights and civil liberties—was very much the product of the politics of the Cold War.

It was in the distinctive political atmosphere of the early Cold War, with the relative strength of the cause of racial equality and the cause of political dissent heading in opposite directions, that Truman’s civil rights committee operated. The resulting report, released in 1947, clearly reflected the changing dynamics of the American political scene. It offered quite bold proposals for federal government intervention on the race question—indeed, much of what the report called for would eventually be realized in the landmark civil rights legislation of the 1960s. Yet it largely bypassed the other minority rights issue of the day: the rights of political dissenters. The fact that the seminal official statement of civil rights of the time could spend practically all of its time on the problem of racial discrimination (it included just a six page statement on the “Right to Freedom of Conscience and Expression”<sup>47</sup>) indicated a definite shift in the kinds of issues that would be associated with the category of “civil rights” going forward.

#### **D. Civil Rights, Civil Liberties, and the Case for Government**

One of the central challenges for the PCCR was to make the case for federal intervention to protect civil rights. The civil rights-civil liberties distinction helped address this challenge. It allowed civil rights proponents to more easily promote the benefits of an active central government. Advocates of civil liberties who were fighting for the rights of political dissidents tended to view the power of the government as the most significant threat to freedom. Their primary goal was to push government back, to protect their activities from government interference. In contrast, advocates of civil rights viewed that very same interventionist power of the government as necessary for promoting freedom. Civil rights would require an acceptance of the need for some measure of “social engineering” and an acceptance of the need for the careful application of governmental power in the promotion of personal liberty, an approach that was in tension with the negative-liberty orientation of civil libertarians.<sup>48</sup>

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<sup>46</sup> Civil Rights Section of the Department of Justice, Federal Criminal Jurisdiction Over Violations of Civil Rights, Memorandum to the President’s Committee on Civil Rights, Jan. 15, 1947, reproduced in DOCUMENTARY HISTORY OF THE TRUMAN PRESIDENCY, VOL. 11, THE TRUMAN ADMINISTRATION’S CIVIL RIGHTS PROGRAM: THE REPORT OF THE COMMITTEE ON CIVIL RIGHTS AND PRESIDENT TRUMAN’S MESSAGE TO CONGRESS OF FEBRUARY 2, 1948 235 (Dennis Merrill ed., 1996) [hereinafter DOCUMENTARY HISTORY].

<sup>47</sup> PCCR Report, *supra* note 43, at 47-53.

<sup>48</sup> Consider, for example, NAACP attorney Thurgood Marshall’s statement before the PCCR: “Whatever reservations one may have concerning a strong central government, our complex social and economic structure makes such a government not only necessary but inevitable. . . . [P]ossibly more than any group

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In a 1947 study of the work of the Civil Rights Section, political scientist Robert K. Carr demonstrated the value of this new “civil rights” mindset through his differentiation of what he called the “shield approach” and the “sword approach” to protecting individual rights.<sup>49</sup> From the perspective of the shield approach, “[i]nterference with private rights by public agencies is the great historic threat to civil liberty, and the chief method of meeting this threat has long been to invoke the constitutional bill of rights.... Government was the enemy of freedom. Accordingly, it was against government, and government alone, that the Bill of Rights was directed.”<sup>50</sup> But, Carr argued, “[t]he use of a defensive weapon is not enough. A sword must be wielded and aggressive battle waged to safeguard our fundamental rights. In this battle to preserve civil rights, the role of government inevitably changes from oppressor to protector.”<sup>51</sup>

The ease with which postwar liberals were able to move back and forth between advocating the need to limit civil liberties alongside the need to expand civil rights is illustrated by a speech Attorney General (and future Supreme Court justice) Tom Clark gave in 1946. The speech, entitled “Civil Rights,” began by discussing the problem of racial discrimination and the challenges the Justice Department faced in effectively dealing with this problem. But Clark quickly shifted into an attack on radicalism: “We know that there is a national and international conspiracy to divide our people, to discredit our institutions, and to bring about disrespect for our government.” By the end of the speech he concluded, “I do not believe in purges because they bespeak the dark and hideous deeds of communism and fascism, but I do believe that our bar associations, with a strong hand, should take those too brilliant brothers of ours to the legal woodshed for a definite and well-deserved admonition.”<sup>52</sup> He has traveled a remarkable road here. Both civil rights and civil liberties concepts mixed in the minds of the postwar liberals, but not in the way this is typically assumed. In the context of the times, a pro-civil rights argument could easily morph into an argument for limiting civil liberties. Once on the Supreme Court, Clark established himself as generally supportive of civil rights claims while remaining skeptical toward broad civil liberties claims.<sup>53</sup> Indeed, most of Truman’s appointments to the Court walked the same path when it came to civil rights and civil liberties.<sup>54</sup>

President Truman himself exemplified this position. He was an aggressive Cold Warrior who supported significant limitations on civil liberties in the name of national security, but he also spoke out powerfully against racial discrimination. His words before the 1947 convention of the National Association for the Advancement of Colored People (NAACP) captured the approach of this new generation of Cold War liberals—and the emerging reliance on the civil rights-civil liberties distinction. “We cannot be content with a civil liberties program which

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in American life, the Negro fervently believes in the rightness and the correctness of these principles.” Statement of Thurgood Marshall Before President’s Committee on Civil Rights, Apr. 17, 1947, Records of the President’s Committee on Civil Rights, Box 9, Truman Library.

<sup>49</sup> CARR, *supra* note 20.

<sup>50</sup> *Id.* at 6.

<sup>51</sup> *Id.* at 14.

<sup>52</sup> Tom C. Clark, *Civil Rights*, Address to Chicago Bar Association, Chicago, June 21, 1946, *reprinted in* DOCUMENTARY HISTORY, *supra* note 46, at 89, 90.

<sup>53</sup> KLARMAN, *supra* note 27, at 194-96

<sup>54</sup> *Id.*

emphasizes only the need of protection of the people *against* the possibility of tyranny by the Government,” the president explained. “The extension of civil rights today means not protection of the people *against* the government, but protection of the people *by* the government. We must make the federal government a friendly, vigilant defender of the rights and equalities of all Americans.”<sup>55</sup>

In this way, Cold War liberalism pushed aside the strong civil libertarian position that saw the expansion of federal government power as an inherent threat to basic freedoms. Over the course of the 1950s, liberals regularly distinguished claims against government interference with personal liberty from demands for government intervention to protect against discriminatory treatment.

### E. The Influence of the PCCR Report

The PCCR’s highly publicized final report, titled *To Secure These Rights* and released on October 29, 1947, implicitly relied upon the existence of a civil rights-civil liberties divide that would characterize the liberal agenda in the coming years. Although the report never clearly defined “civil rights”—it noted that the term “has with great wisdom been used flexibly in American history”<sup>56</sup>—its predominant focus on the rights of African Americans made clear what the PCCR meant by the term. The focus of the report significantly pushed forward the process of confining the term “civil rights” to the issue of African American equality, with a particular focus on anti-discrimination policy—and in doing so, implicitly limiting issues of dissent and free speech to the category of “civil liberties.”

Following the publication of the report, the term “civil rights” began to be used with increasing frequency to represent the issue that had previously been described as the “Negro question” or the “race question.” On February 2, 1948, Truman gave a special address to Congress on “civil rights,” in which he made a case for implementing the recommendations of the PCCR.<sup>57</sup> Truman called on Congress to enact an array of laws designed to address racial discrimination. These included the strengthening of Reconstruction Era federal civil rights laws, federal protection against lynching, increased protection of the right to vote, the creation of a Fair Employment Practices Commission, and the prohibition of discrimination in interstate transportation.<sup>58</sup> He also called for the creation of “a permanent Commission on Civil Rights, a Joint Congressional Committee on Civil Rights, and a Civil Rights Division in the Department of Justice.”<sup>59</sup> Collectively, these proposals became known as Truman’s “civil rights program.”<sup>60</sup>

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<sup>55</sup> Harry S. Truman, *Address Before the National Association for the Advancement of Colored People*, June 29, 1947, PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: HARRY S. TRUMAN, 1947 311.

<sup>56</sup> PRESIDENT’S COMMITTEE ON CIVIL RIGHTS, *TO SECURE THESE RIGHTS* x (1947). The report does offer a brief summary on the “Right to Freedom of Conscience and Expression,” *id.* at 47-53, but prefaces this section with a disclaimer that the committee did not do much research on this topic due, in part, to “the conviction that this right is relatively secure.” *Id.* at 47.

<sup>57</sup> Harry S. Truman, *Special Message to the Congress on Civil Rights*, Feb. 2, 1948, PUBLIC PAPERS OF THE PRESIDENT, available at <http://www.presidency.ucsb.edu/ws/index.php?pid=13006>.

<sup>58</sup> *Id.*

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

<sup>60</sup> See, e.g., The President’s News Conference, Feb. 5, 1948, <http://www.presidency.ucsb.edu/ws/index.php?pid=13017>; Editorial, *Civil Rights Message*, Wash. Post,

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Truman's efforts to convince his party to embrace his civil rights program led in 1948 to the first use of the term *civil rights movement*.<sup>61</sup> After 1948, the term became commonplace to describe the fight for racial equality.

In political and legal discourse, the "Negro question" now had a new label, one that gave the issue a more generalizable connotation and one that more thoroughly grounded the issue as one that demanded legal and constitutional action.<sup>62</sup> Beginning in 1948, the NAACP joined the American Jewish Congress to publish an annual report titled *Civil Rights in the United States: A Balance Sheet of Group Relations*.<sup>63</sup> When, in 1950, the heads of the several civil rights organizations came together to form a coalition designed to pressure Congress to take up Truman's call for national civil rights legislation, they named themselves the Leadership Conference on Civil Rights.

The influence of the PCCR report was clearly evident in Arthur M. Schlesinger, Jr.'s 1949 manifesto of Cold War liberalism, *The Vital Center*,<sup>64</sup> which was the most explicit articulation up to this point of the civil rights-civil liberties divide. "The distinction between the two areas is worth understanding," Schlesinger explained. "'Civil rights' refers to issues of racial and religious discrimination. The federal civil rights acts after the Civil War defined the field, and the report of the President's Committee on Civil Rights has given eloquent statement of our present achievements and obligations." In contrast, "civil liberties . . . refers primarily to the freedoms of conscience and expression." He went on to assert his unstinting support for civil rights, terming "the sin of racial pride" as "the most basic challenge to the American conscience," and concluding that "it is fatal not to maintain an unrelenting attack on all forms of racial discrimination."<sup>65</sup> At this point, Schlesinger turned his attention to the matter of civil liberties, which he argued would require "a considered redefinition in terms of the threats to free

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Feb. 4, 1948, at 14; C.P. Trussell, *South Threatens Anti-Truman Drive Over Civil Rights*, N.Y. TIMES, Feb. 4, 1948, at 1.

<sup>61</sup> *Urges Ballot Use In Dixie*, CHI. DEFENDER, Feb. 28, 1948, at 5 (referring to opposition to Truman's program as "[l]eaders in the anti-civil rights movement"); *Since Seneca Falls*, WASH. POST, July 22, 1948, at 10 (looking back on the 100-year anniversary of the Seneca Falls Conference, describing the Democratic Party in 1948 as having "taken its stand for the new civil rights movement"). A search of Proquest Historical Newspapers database produced only a single use of the phrase "civil rights movement" prior to 1948. *Colored Leagues in Ohio*, SUN, Feb. 27, 1884, at 1 ("[A] gigantic civil rights movement has been started among the colored people in Ohio, and already over 200 'equal rights leagues' have been organized.").

<sup>62</sup> This development, what might be understood as the *legalization* of the race question, was related to the relative decline of the *laissez faire* attitude toward race relations that dominated the Jim Crow era. One of the central contributions of racial justice advocates of the 1940s was to challenge the assumption that racial prejudice could not be uprooted by law. See Christopher W. Schmidt, *"Freedom Comes Only from the Law": The Debate over Law's Capacity and the Making of Brown v. Board of Education*, 2008 UTAH L. REV. 1493.

<sup>63</sup> NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE & THE AMERICAN JEWISH CONGRESS, *CIVIL RIGHTS IN THE UNITED STATES: A BALANCE SHEET OF GROUP RELATIONS* (1948-1953).

<sup>64</sup> ARTHUR M. SCHLESINGER, JR., *THE VITAL CENTER: THE POLITICS OF FREEDOM* (1949).

<sup>65</sup> *Id.* at 189-91.

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society presented by fascism and Communism.” While far from an endorsement of the witch-hunts led by the House Un-American Activities Committee and, in the coming years, by Senator Joseph McCarthy, Schlesinger offered a standard liberal anticommunist argument for reconsidering how far civil liberty protections should be extended during a time of crisis.<sup>66</sup>

In a major 1953 law review article on civil rights policy, Will Maslow and Joseph B. Robison cited Schlesinger’s distinction in drawing a similar line between civil rights (“those rights commonly denied because of race, color, religion, national origin, or ancestry”) and civil liberties (“rights protected by the Constitution and particularly the first ten amendments”).<sup>67</sup> The lawyers for the NAACP felt the new categories useful in trying to discern a pattern in the Supreme Court’s rulings. “Although the Supreme Court record in the field of civil liberties of late has not been good,” attorney Robert Carter wrote to NAACP executive secretary Walter White in 1951, “we certainly have no cause to complain about their handling of civil rights cases involving the question of racial discrimination.”<sup>68</sup> By 1952, if there were any lingering confusion, the voice piece of the American mainstream, *Life* magazine, put the development of the past five years or so into the simplest terms. “Civil rights means Negro rights,” its editors declared.<sup>69</sup>

By the early 1950s, the language by which Americans would describe and categorize the landscape of rights claims was set. When in 1957 Congress passed legislation designed to protect voting rights, it was titled “An Act [t]o provide means of further protecting and securing the civil rights of persons within the jurisdiction of the United States.”<sup>70</sup> The first section of the 1957 Act followed through on the proposal of Truman’s PCCR and created a “Civil Rights Commission.” Its mandate was to investigate the denial of voting rights “by reason of . . . color, race, religion or national origin,” and to “[s]tudy and collect information concerning legal developments constituting a denial of equal protection of the laws under the Constitution.”<sup>71</sup> Subsequent congressional legislation—in 1960, 1964, 1965, 1968—were all labeled civil rights acts. The movement had its name.

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<sup>66</sup> *Id.* at 191-218. See also, Arthur M. Schlesinger, Jr., *What Is Loyalty? A Difficult Question*, N.Y. TIMES MAGAZINE, Nov. 2, 1947, at 7, 48-51.

<sup>67</sup> Will Maslow and Joseph B. Robison, *Civil Rights Legislation and the Fight for Equality, 1862-1952*, 20 U. CHI. L. R. 362 n.1 (1953). See also MILTON R. KONVITZ, *THE CONSTITUTION AND CIVIL RIGHTS* vii (1947) (differentiating between political rights (“such as the right to vote”), civil liberties (“such as those mentioned in the Bill of Rights), and civil rights (“the rights of persons to employment, and to accommodation in hotels, restaurants, common carriers, and other places of public accommodation and resort”)).

<sup>68</sup> JACK GREENBERG, *CRUSADERS IN THE COURTS: HOW A DEDICATED BAND OF LAWYERS FOUGHT FOR THE CIVIL RIGHTS REVOLUTION* 105 (1994); see also Loren P. Beth, *The Case for Judicial Protection of Civil Liberties*, 17 J. POLITICS 100, 101 (1955) (noting that “the Supreme Court has in recent years turned in what many libertarians believe to be a backward direction”).

<sup>69</sup> *White Supremacy*, LIFE, Aug. 4, 1952, at 30.

<sup>70</sup> The Civil Rights Act of 1957, Pub. L. 85–315, 71 Stat. 634.

<sup>71</sup> *Id.*, Part I, §104(1)-(2). In a pamphlet the Commission issued, it further explained its mission as “the study of the application of the Fourteenth Amendment” in order to “pave[] the way for future laws and governmental action in the broad field of civil rights.” Pamphlet, *The Commission on Civil Rights* (1958) [E. Frederic Morrow Records, Box 9, Civil Rights Bill], available at [http://eisenhower.archives.gov/research/online\\_documents/civil\\_rights\\_act.html](http://eisenhower.archives.gov/research/online_documents/civil_rights_act.html).

### III. CHALLENGING THE CIVIL RIGHTS-CIVIL LIBERTIES DIVIDE

#### A. Early Challenges

The distinction between civil rights and civil liberties did not go unchallenged during this formative period in the early years of the Cold War. Skepticism toward the idea that civil rights could be advanced without attention to civil liberties could be found among those who were sympathetic to the cause of racial equality. Some were concerned that the movement was too committed to federal power. This civil libertarian critique of federal civil rights policy was evident in the surprising testimony of Charles Hamilton Houston, a leading figure in the NAACP's litigation campaign, before the PCCR. "It may sound a little strange," Houston told the Committee, "but, basically, I am a states rights man as distinguished from a federal rights man, because I can conceive of the Federal Government being a juggernaut which can roll over minority rights, as well as protect them, and the present performance of the Federal Government in the witch hunt against Communists, and its fight against labor, gives me no belief that the Federal Government either is the repository of all wisdom or should be entrusted with all the police power of the United States of America."<sup>72</sup> Much the same point was featured in an assessment of *To Secure These Rights* published in the *Harvard Law Review*, which criticized the PCCR report for its virtually unqualified enthusiasm for federal power. "[T]his emphasis has ... resulted in the virtual ignoring of those threats to civil liberty which prompted the original adoption of the first ten Amendments. ... [C]ivil rights [i.e., civil liberties] are constantly imperiled, as much today as in any previous time, by certain suggested or actual uses of the processes of government."<sup>73</sup>

The further left one was on the political spectrum, the more one had to lose from the emergence of the civil rights-civil liberties divide, since it had the effect of detaching a liberal cause that was steadily growing in support (civil rights for African Americans) from one that was under fire (civil liberties for leftists). In 1950 editors of the *Nation* lamented, "Within the past three years a distinction has developed between 'civil rights' and 'civil liberties' that clearly reflects a tendency to reject the moral commitment to preserve our freedom which is part of the American heritage." The editors then asked the key question: "What if the price which government demands for the affirmative protection of civil rights is acquiescence in the curtailment of civil liberties?"<sup>74</sup> Carey McWilliams, a *Nation* contributor and an activist committed to combating both anticommunism and racial discrimination, wrote a book in 1950 in which he accused liberals of attempting to divert attention from the problem of economic rights and basic civil liberties by their newfound interest in civil rights.<sup>75</sup> Although these voices of dissent would strengthen as the excesses of the anticommunist crusade continued to pile up and

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<sup>72</sup> Transcript of meeting of the PCCR, Charles H. Houston testifying, May 15, 1947, White House File, Truman Library, Box 201.

<sup>73</sup> Thomas H. Eliot, Book Review, 61 HARV. L. REV. 899, 899 (1948) (book review of *TO SECURE THESE RIGHTS*, *supra* note 43; *CARR*, *supra* note 20;).

<sup>74</sup> *Rights and Liberties*, NATION, July 22, 1950, at 71-72.

<sup>75</sup> CAREY MCWILLIAMS, *THE WITCH HUNT: THE REVIVAL OF HERESY* (1950). See also Carey McWilliams, *The Witch Hunt and Civil Rights*, NATION, June 28, 1952, at 651-53.

liberal opinion was mobilized, albeit tentatively and gradually, on behalf of civil liberties, it would not be until McCarthyism died down in the late 1950s that one could fairly say that civil liberties joined civil rights as central pillars of mainstream liberal opinion.<sup>76</sup>

## **B. The Civil Rights Movement and the Emergence of the Civil Rights-Civil Liberties Alliance**

By the late 1950s, the conditions that had encouraged the development of the civil rights-civil liberties divide were receding. Anticommunism, although still a powerful factor on the American political scene, no longer dominated political discourse in the way it did in the McCarthy Era. The lines of attack in the black freedom struggle changed in the aftermath of *Brown v. Board of Education* in ways that made civil liberties, particularly First Amendment rights, function as directly supportive of civil rights. These developments challenged the line between civil rights and civil liberties that had been so integral to the work of liberal anticommunists in the early years of the Cold War. By the mid-1960s, a new generation of liberals challenged the entire concept of a distinction between civil rights and civil liberties. The distinction, they argued, risked limiting future progress for the liberal agenda.

### 1. The Supreme Court Challenges the Divide

The clearest indication of the emergence of a new civil rights-civil liberties alliance came in a series of landmark Supreme Court rulings in the late 1950s and 1960s. The Court expanded the protections of the First Amendment in order to protect peaceful, lawful civil rights activity from southern states intent on running the civil rights movement out of business. Following *Brown v. Board of Education*, Alabama tried to kill off the NAACP by requiring the organization to hand over its membership lists, a move that would have left members vulnerable to firing, intimidation, or worse. In *NAACP v. Alabama*,<sup>77</sup> the Court unanimously ruled that the First Amendment protected an implied “right to association” that would be violated if organizations could not protect the identities of their members. The state interest in obtaining the membership lists in this case was not sufficient to overcome the First Amendment rights of the NAACP members.<sup>78</sup>

In another attempt to interfere with the NAACP’s civil rights activities, Virginia prosecuted NAACP lawyers for violating state ethics laws. The NAACP’s public interest litigation, most notably its school desegregation suits, required its lawyers to mobilize support in local communities and to exercise significant control over the course of litigation, practices that

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<sup>76</sup> The growing acceptance of civil liberties claims in the wake of McCarthyism can be seen particularly clearly in the work of the Supreme Court. Although in the early 1950s the Court had little trouble approving of the constitutionality of the anti-communist measures, *see, e.g.*, *American Communication Ass’n v. Douds*, 339 U.S. 382 (1950); *Dennis v. United States*, 341 U.S. 494 (1951), by the late 1950s the Court was taking the civil liberties claims of dissidents more seriously, *see, e.g.*, *Yates v. United States*, 354 U.S. 298 (1957); *Watkins v. United States*, 354 U.S. 178 (1957).

<sup>77</sup> 357 U.S. 449 (1958).

<sup>78</sup> *See also* *Shelton v. Tucker*, 364 U.S. 479 (1960) (voiding Arkansas requirement that all teachers submit an annual list of all organizations the teacher belonged to or contributed to); *Bates v. Little Rock*, 361 U.S. 516 (1960) (holding that Little Rock could not require the local NAACP branch secretary to turn over the branch’s membership list); *Gibson v. Florida Legislative Investigating Comm.*, 372 U.S. 539 (1963) (holding that Florida could not compel disclosure of NAACP membership lists under pretense of a legislative investigation into suspected subversive activities).

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Virginia claimed failed to follow proper legal practices. The Court again stood behind the civil rights organization, ruling in *NAACP v. Button*<sup>79</sup> that public interest litigation was a form of political expression protected under the First Amendment. Justice Brennan explained that for groups such as African Americans who are unable to have themselves heard at the ballot box, “litigation may well be the only practicable avenue open to a minority to petition for redress of grievances.”<sup>80</sup> He also referenced the obvious fact that Virginia’s motivation behind prosecuting the NAACP was the “intense resentment and opposition” of white Virginians to the NAACP’s civil rights activity.<sup>81</sup>

Yet another demonstration of the newfound civil rights-civil liberties alliance came in the landmark 1964 case of *New York Times v. Sullivan*.<sup>82</sup> This case emerged from the efforts of pro-segregationist forces in Alabama to use state libel law to strike out at civil rights activists and the northern press. As the student lunch counter sit-in movement spread across the South, allies of Martin Luther King, who was being prosecuted in Alabama on charges of tax evasion and perjury, ran a full-page fundraising advertisement in the *New York Times*, in hopes of getting donations to cover King’s considerable legal expenses. The advertisement, which condemned Alabama law enforcement’s treatment of both student protesters and King, contained several factual inaccuracies. Several Montgomery elected officials, including L.B. Sullivan, the city commissioner in charge of the police, sued the *Times* and four black Alabama ministers who had been listed as endorsing the advertisement for libel. Sullivan won a \$500,000 jury verdict against the newspaper, which the Alabama Supreme Court upheld.<sup>83</sup> The Supreme Court, in another opinion by Justice Brennan, held that in light of “the profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open,” the verdict infringed on the newspaper’s First Amendment rights. In order for a public official to sue for libel, the statements at issue must be made with “actual malice,” a high standard that largely immunized newspapers from being held liable for inadvertent factual inaccuracies that portrayed public officials in a negative light. It was obvious to all that while the doctrinal significance of this decision was in the area of the First Amendment, the motivation for the ruling was, as one commentator put it, the “sociological reality” of the black freedom struggle.<sup>84</sup>

Some justices also considered drawing on the First Amendment to protect civil rights protesters engaged in acts of civil disobedience. These cases proved far more difficult and divisive for the Court than the NAACP cases or *New York Times v. Sullivan*. The first case, involving the lunch-counter sit-ins that spread across the South in the spring of 1960, reached the Supreme Court in 1961. In *Garner v. Louisiana*<sup>85</sup> the Court struck down the breach-of-peace convictions on factual grounds, namely that the protesters did nothing to actually disturb the peace. Justice John Marshall Harlan, in concurrence, saw deeper constitutional values implicated, however. He suggested that the prosecutions of the sit-in protesters might raise a

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<sup>79</sup> 371 U.S. 415 (1963).

<sup>80</sup> *Id.* at 430.

<sup>81</sup> *Id.* at 425.

<sup>82</sup> 376 U.S. 269 (1964).

<sup>83</sup> *New York Times v. Sullivan*, 273 Ala. 656 (1962).

<sup>84</sup> Harry Kalven, Jr., *The New York Times Case: A Note on “The Central Meaning of the First Amendment”*, 1964 SUP CT. REV. 191, 193 (1964).

<sup>85</sup> 368 U.S. 157 (1961).

viable First Amendment claim, going so far as to analogize the protesters' actions to "a public oration from a soapbox."<sup>86</sup> Harlan insisted there were limits to the state's use of a "general and all-inclusive breach of the peace prohibition" when it had the effect of restricting speech.<sup>87</sup>

The Court was more willing to find civil rights protest protected under the First Amendment in cases where the protest took place on public property. In *Edwards v. South Carolina*,<sup>88</sup> Justice Stewart found a demonstration held on the grounds of the state house as an exercise of First Amendment rights "in their most pristine and classic form."<sup>89</sup> In *Cox v. Louisiana*,<sup>90</sup> the Court held that peaceful protesters who refused to leave jailhouse property when officials ordered them to were protected from prosecution under the First Amendment; and in *Brown v. Louisiana*,<sup>91</sup> the Court held that a public library sit-in was a form of expression protected under the First Amendment.

Thus we can see that the Justices generally understood the First Amendment and the Equal Protection Clause as mutually supportive partners in the project of supporting and advancing the cause of the civil rights movement. The Court advanced the cause of racial equality not only through its civil rights decisions, but also through civil liberties decisions. Indeed, some believed that in these cases the two categories overlapped so much that the distinction seemed to disappear.

## 2. A Civil Libertarian Interprets the Civil Rights Movement

The civil rights-civil liberties alliance reflected in the Court's rulings in the late 1950s through the mid-1960s, gained an influential endorsement from the legal academy in the spring of 1964 when Harry Kalven, the leading First Amendment scholar of the day, gave a series of lectures in which he emphasized the ways in which the Court's promotion of free speech served the cause of the civil rights movement.<sup>92</sup> Kalven acknowledged that his claim highlighted the intersection of "civil rights" and "civil liberties," although, in line with the growing concern with the descriptive accuracy and normative implications of the civil rights-civil liberties divide, he indicated some discomfort with the terminology, which he referred to as "two popular labels of the day."<sup>93</sup> Regardless of the labels chosen to describe this development, he felt it was reason for celebration. The tone of his lectures was hopeful, even triumphant. "The story [of the civil rights movement and the First Amendment] is, I think, a happy and encouraging one," he wrote.<sup>94</sup> Although the civil disobedience tactics embraced by movement activists risked pushing their actions beyond the protection of the First Amendment, the "extraordinary tact and sure instinct" of the protesters, Kalven argued, had ensured that these actions could be properly regarded as "primarily a massive petition for the redress of grievances, a form of political action, in the

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<sup>86</sup> *Id.* at 201.

<sup>87</sup> 368 U.S. at 203.

<sup>88</sup> 372 U.S. 229 (1963).

<sup>89</sup> *Id.* at 235.

<sup>90</sup> 379 U.S. 536 (1965).

<sup>91</sup> 383 U.S. 131 (1966).

<sup>92</sup> The lectures were published the following year. KALVEN, *supra* note 33.

<sup>93</sup> *Id.* at 4.

<sup>94</sup> KALVEN, *supra* note 33, at viii.

courts and in the streets. And a gallant and sensitive United States Supreme Court has responded.”<sup>95</sup>

In praising the ways in which the black freedom struggle bolstered free speech principles, Kalven noted “an intriguing sociological puzzle”: that the black freedom struggle—unlike campaigns against anti-Semitism, for example—had generally eschewed the use of group-libel law (the mid-twentieth-century version of modern hate speech regulation) to advance its cause.<sup>96</sup> Regardless of the reason for this (Kalven hypothesized that it is related to blunt harshness of white supremacy in America), it allowed Kalven to press ahead with his basic thesis, namely that the civil rights movement epitomized the synthesis of free expression and antidiscrimination efforts. Not only was the civil rights movement achieving unprecedented gains for African Americans, it was also elevating the First Amendment to newfound heights. In its effort to protect the black freedom struggle, the Court, in cases such as *Button* and *Sullivan*, was embracing new speech-protective doctrines, which would ultimately serve to benefit the entire society. “[T]he Negro,” Kalven declared, was “winning back for us the freedoms the Communists seemed to have lost for us.”<sup>97</sup> There was no divide between civil rights and civil liberties. In Kalven’s optimistic assessment, the two were mutually reinforcing.

### 3. The Birth of the *Harvard Civil Rights-Civil Liberties Law Review*

In 1966, in the midst of this optimistic atmosphere in which civil rights and civil liberties seemed to be working in easy alliance in service of the liberal agenda, students at Harvard Law School published the first volume of the *Harvard Civil Rights-Civil Liberties Law Review (CR-CL)*. The inaugural issue explained the editors’ rationale for integrating the two concerns of civil rights and civil liberties into a single journal dedicated to progressive legal reform. “The line of demarcation between the fields of civil liberties and civil rights, blurry enough in theory, has proven nearly unworkable in practice,” they wrote.<sup>98</sup>

Prior to the formation of *CR-CL*, Harvard Law School had separate student organizations dedicated to civil liberties and to civil rights. The students who began the Civil Liberties Bureau in 1960 modeled the organization on the ACLU.<sup>99</sup> The group was dedicated to providing research support for litigants and reform groups working to advance the principles of the Bill of Rights.<sup>100</sup> Its framers followed the principled neutrality model of the ACLU; they even claimed they would work for the segregationist White Citizens Councils if they felt their constitutional rights were being violated.<sup>101</sup> As the law school newspaper explained, “Members will be asked, not if they are for a cause or against it, but what legal rights are involved and should be recognized.”<sup>102</sup>

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<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at 10-11.

<sup>97</sup> *Id.* at 6. See also Kalven, *supra* note 84, at 192-93.

<sup>98</sup> *Preface*, 1 HARV. C.R.-C.L. L. REV. iii. (1966).

<sup>99</sup> *Civil Liberties Researchers Organize*, HARVARD LAW RECORD, Oct. 13, 1960, at 5.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

Three years later, Harvard law students formed a separate organization dedicated to civil rights.<sup>103</sup> Members of the Civil Rights Group focused on ways in which the law could be actively used to protect and empower the weakest members of society. Their overriding concern was the struggle for black equality.<sup>104</sup>

The division of labor between the two groups was never clearly demarcated, however, and by 1966 they found their work overlapping so much that it seemed logical to unite their causes when forming the new journal. Those responsible for the merger offered several explanations for what had happened. The student editors emphasized the practical pressures for combining, as “the ties between the organizations have over the years become increasingly intimate.”<sup>105</sup> The journal’s adviser, Professor Mark DeWolfe Howe, found a meaning in the new group that went well beyond a mere marriage of convenience.

Recent times have reminded us . . . that aspiration, like history, is a seamless web—that when we talk of civil liberties we are discussing civil rights, that when we deal effectively with civil rights we must deal courageously with economic misery, that when we take military action with respect to the world around us the achievements that we have sought at home are likely to be postponed. . . . This periodical is launched with the confidence of its sponsors and editors that the legal profession sorely needs a journal that will be devoted to the alert examination, the critical consideration, and the constructive proposal of efforts to make law an effective instrument for advancing the personal freedoms and the human dignities of the American people.<sup>106</sup>

Such sentiment had become commonplace by the mid-1960s. This faith in an unproblematic—perhaps even inevitable—alliance of civil rights and civil liberties in the cause of progressive politics was an understandable outgrowth of the experience of the civil rights movement. For a brief period of history the two approaches to defending minority interests against majority oppression came into a powerful and fortuitous alignment. The students who formed *CR-CL* were a part of this historical period in which there was little question that the struggle for social justice, for the advancement of the “personal freedoms and human dignities” of which Howe wrote, was served by aggressive advocacy of both civil rights and civil liberties.

### C. Civil Rights vs. Human Rights

By the mid-1960s, civil rights activists, inspired by their accomplishments and frustrated by the persistence of racial inequality in the face of these accomplishments, were framing the movement’s goals in increasingly ambitious terms. One element of this growing ambition was the conflation of the concepts of civil rights and civil liberties, a product of the heady intersection of a nation-changing social movement and a Supreme Court that transformed both civil rights and civil liberties doctrines in order to support the cause of racial equality. Another element of this growing ambition was the turn to a more openly radical agenda among civil rights activist. As the 1960s progressed, leading civil rights advocates picked up what had been a

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<sup>103</sup> Donald W. Kramer, *Rights Groups Form*, HARVARD LAW RECORD, Oct. 17, 1963, at 1, 9.

<sup>104</sup> Michael Hampden, *Student Groups Work for Rights, Liberties*, HARVARD LAW RECORD, Nov. 12, 1964, at 8.

<sup>105</sup> *Preface*, *supra* note 98, at iii.

<sup>106</sup> Mark DeWolfe Howe, *Foreword*, 1 HARV. C.R.-C.L. L. REV. 1 (1966).

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minor cord in the civil rights community and brought it to the forefront of the cause, emphasizing that ending racial discrimination (or, for that matter, defending civil liberties) was not an end in itself, but was a means to the more fundamental goal of social justice and economic opportunity—a goal that advocates often framed in transnational terms. This turn strained the confines of the category of “civil rights,” which racial liberals of the 1940s and 1950s had effectively stripped of its social democratic and labor-oriented implications.<sup>107</sup> In attempting to capture the social and economic focus of the civil rights movement agenda in the second half of the 1960s, activists turned to a new category, “human rights.” In this setting, civil rights assumed a new role. It became a more conservative, moderate, and inadequate foil to “human rights,” a term with a long, if somewhat under-defined, historical pedigree,<sup>108</sup> which achieved newfound currency in the postwar years.<sup>109</sup> Progressive activists turned to “human rights” to reference a range of agendas, from a national labor-civil rights alliance to an idealistic, even utopian, campaign for justice and equality on an international scale.

The most pressing category distinction in the realm of legal rights of the late 1960s, then, was between civil rights and human rights. For more and more people on the political left, civil rights did not go far enough—ridding the country of racial discrimination would not address entrenched structural economic inequalities. Civil rights was best understood as a sub-category within the broader category of human rights, which included not only civil rights and civil liberties, but also, most importantly, social welfare rights.

Bayard Rustin, in his classic 1965 assessment of the civil rights movement, published in *Commentary* under the title “From Protest to Politics,”<sup>110</sup> questioned the continued utility of the concept of civil rights. “At issue, after all, is not *civil rights*, strictly speaking, but social and economic conditions,” he explained.<sup>111</sup> The best way to achieve economic justice was not through the protest tactics that had proven so successful in the battle against racial discrimination, but through gaining political power. Rustin even suggested that the civil rights movement was “perhaps misnamed,” since the term civil rights was too limited to encompass what was really at stake.<sup>112</sup>

By the late 1960s, civil rights activists increasingly began to describe their work as involving the recognition and protection of “human rights.” “It is not a constitutional right that men have jobs,” Martin Luther King Jr. once noted, “but it is a human right.”<sup>113</sup> In 1967, members of the Student Nonviolence Coordinating Committee (SNCC) declared themselves a “human rights organization.”<sup>114</sup> “The cause is not 'civil rights' but human rights, as Malcolm X

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<sup>107</sup> See GOLUBOFF, *supra* note 13.

<sup>108</sup> See, e.g., LYNN HUNT, *INVENTING HUMAN RIGHTS: A HISTORY* (2008).

<sup>109</sup> See SAMUEL MOYN, *THE LAST UTOPIA: HUMAN RIGHTS IN HISTORY* (2012).

<sup>110</sup> Bayard Rustin, *From Protest to Politics: The Future of the Civil Rights Movement*, 39 *COMMENTARY* 25 (1965).

<sup>111</sup> *Id.* at 26.

<sup>112</sup> *Id.*

<sup>113</sup> THOMAS F. JACKSON, *FROM CIVIL RIGHTS TO HUMAN RIGHTS: MARTIN LUTHER KING, JR., AND THE STRUGGLE FOR ECONOMIC JUSTICE* 5 (2007).

<sup>114</sup> Francesca Polletta, *The Structural Context of Novel Rights Claims: Southern Civil Rights Organizing, 1961-1966*, 34 *L. & SOC'Y REV.* 367, 400 (2000).

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said,” a SNCC worker wrote in late 1965.<sup>115</sup> “There is an international struggle in which our American struggle is only a small part.”<sup>116</sup>

During this same period, a growing contingent of legal academics was exploring the possibility of a constitutional right to certain minimum social welfare benefits, a concept they too took to describing as “human rights.” Archibald Cox, who had served as Solicitor General between 1961 and 1965 before returning to teaching at Harvard Law School, titled his 1966 *Harvard Law Review Foreword* “Constitutional Adjudication and the Promotion of Human Rights.”<sup>117</sup> Cox charted the explosion of equality-based claims in a variety of areas—race, access to the vote, criminal procedure—which he consolidated under the umbrella label of “human rights.”<sup>118</sup> The Supreme Court’s human rights agenda demonstrated an increased willingness to “impose affirmative obligations upon the state.”<sup>119</sup> “Today, the political theory which acknowledges the duty of government to provide jobs, social security, medical care, and housing extends to the field of human rights and imposes an obligation to promote liberty, equality, and dignity.”<sup>120</sup> Such an ambitious and novel constitutional agenda, reaching well beyond the civil rights and civil liberties achievements of the past, demanded a new label, one that could transcend the civil rights-civil liberties divide and encompass the positive rights agenda that some liberals believed was within reach. This was the work of “human rights.”

While efforts to transform the civil rights movement into a broader, more ambitious human rights movement failed to gain significant traction as a matter of domestic policy or constitutional doctrine in the United States,<sup>121</sup> beginning in the 1970s a vibrant international human rights movement developed. The Universal Declaration of Human Rights of 1948, which eventually came to be one of the seminal statements of the modern human rights movement,<sup>122</sup> included a sweeping list of rights. There was no effort to divide these rights into the categorizations that were becoming increasingly important to liberal reformers in the United States in the early Cold War years. The Declaration included not only basic civil liberties protections (freedom of speech and religion, protection against cruel punishment) alongside the right to equal treatment of the law, but also certain social welfare rights (right to work, right to an education). This document reflected the sweeping nature of rights ideology around which non-governmental organizations mobilized the international human rights movement.<sup>123</sup> The modern international human rights movement benefited from a big-tent approach, one that allowed for

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<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> Archibald Cox, *The Supreme Court—1965 Term: Foreword: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91 (1966).

<sup>118</sup> *Id.* at 91-93.

<sup>119</sup> *Id.* at 93.

<sup>120</sup> *Id.*

<sup>121</sup> *See, e.g.,* *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973); *Dandridge v. Williams*, 397 U.S. 471 (1970).

<sup>122</sup> *See* MARY ANN GLENDON, *A WORLD MADE NEW: ELEANOR ROOSEVELT AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS* (2001); J. H. Burgers, *The Road to San Francisco: The Revival of the Human Rights Idea in the Twentieth Century*, 14 HUMAN RTS. Q. 447 (1992).

<sup>123</sup> *See, e.g.,* PAUL GORDON LAUREN, *THE EVOLUTION OF INTERNATIONAL HUMAN RIGHTS: VISIONS SEEN* (1998); Kenneth Cmiel, *The Recent History of Human Rights*, 109 AM. HIST. REV. 117 (2006); Kenneth Cmiel, *The Emergence of Human Rights Politics in the United States*, J. AM. HIST. 1231 (1999).

many different actors with different agendas to rally around the same amorphously defined label of “human rights.”<sup>124</sup> If the primary work of the original civil rights-civil liberties distinction was to divide, to carve off a swath of loyal but risky supporters of the cause of racial equality in order to legitimate that cause, the primary work of the label of human rights was to bring together a diverse global community.

#### IV. MAINTAINING THE CIVIL RIGHTS-CIVIL LIBERTIES DIVIDE

##### A. The Durability of the Civil Rights-Civil Liberties Divide

The history of the civil rights-civil liberties divide raises the following question: Why has the distinction been so durable, even when the conditions for its emergence are long past? Several explanations present themselves. One is that the labels indeed reflect certain basic realities about the American legal tradition. Civil rights and civil liberties have different legal and constitutional bases—different textual origins, different lines of precedent, different government institutions that tend to support (or threaten) those rights. Modern civil rights practice relies predominantly on statutory frameworks; civil liberties claims still generally rest on constitutional grounds.

Additionally, there is an important functional distinction between civil rights and civil liberties in terms of what their proponents ask of the government. Put simply, advocates of civil rights typically ask the government to do more: to implement more aggressive antidiscrimination regulations, to extend the equal protection norm, through legislative or judicial or administrative action, to new areas of society and to new groups. Civil libertarians generally believe that government power and individual freedom operate as a zero-sum game. Their basic demand is often that the government to do less. There is therefore a certain legal and functional logic to the civil rights-civil liberties distinction, which has allowed it to live on, even when the largely political circumstances of its birth no longer hold.<sup>125</sup>

The longevity of the civil rights-civil liberty divide can also be explained by reference to organizational dynamics. Civil rights activists and civil libertarians have largely developed separate organizational structures. While in the majority of instances these organizations find themselves fighting different battles or joining on the same side of a particular issue, there are instances in which this is not the case, instances in which their organizations end up on opposing

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<sup>124</sup> See generally MOYN, *supra* note 109.

<sup>125</sup> Thomas Grey provides an excellent discussion of what he terms “the two main structural features of the clash between the civil-liberties and civil-rights perspectives.” Grey, *supra* note 3, at 486. (1) “The civil-liberties mentality . . . tends to limit the kinds of harms that can justify abridgment of that freedom to traditionally recognized infringements of tangible interests in property and bodily security. . . . By contrast, the civil-rights approach, with its roots in anti-discrimination law and social policy, is centrally concerned with injuries of stigma and humiliation to those who are the victims of discrimination.” *Id.* (2) “The active state is traditionally conceived as the sole or dominant threat to civil liberties. . . . [But] [u]nder the civil rights perspective, defense of basic human rights is by no means simply a matter of limiting state power. Government may deny equal protection by omission as well as by action.” *Id.* at 486-87. Cf. Richard B. Wilson, *The Merging Concepts of Liberty and Equality*, 12 WASH. & LEE L. REV. 183, 183 (1955) (“Liberty and equality have frequently been considered antithetic. Liberty has been viewed as protecting the unfettered expression of individuality in all its forms, equality as a set of limitations on human action.”).

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sides of an issue. In the 1930s and 1940s, the ACLU gradually abandoned its affiliation with the labor movement and leftist causes, a response to the necessities of surviving in the face of Cold War politics, along with the growing prominence of groups such as the NAACP specifically dedicated to fighting on behalf of oppressed groups.<sup>126</sup> During this period, the ACLU's national office became increasingly dedicated to a stance of principled neutrality, focusing on protecting a legal principle more than specific causes.<sup>127</sup> So, for example, the ACLU criticized the Civil Rights Act of 1960 because it did not guarantee southern election officials accused of discrimination to confront their accuser during the hearing before the Civil Rights Commission.<sup>128</sup> More recently, the ACLU has broken with civil rights groups over hate speech codes (a topic discussed further below).

In sum, ingrained ideological tensions between the civil rights and civil liberties, the development of separate legal traditions, and the largely distinct organizational apparatus that has developed help to explain the resilience of the civil rights-civil liberties divide through the second half of the twentieth century and into the twenty-first century.

In addition to these factors, we also need to recognize the *work* that the divide does in modern American law. Just as the liberal anticommunists of the early Cold War put the divide to work for their own purposes, subsequent generations of Americans have found tangible benefits in amplifying the distinction between the two categories of rights claims. The civil rights-civil liberties divide has always served as a vehicle to advance certain substantive claims. It has always been a way to structure debates about which kinds of rights should be favored and which ones should be limited. This trend repeated itself many times over the course of the history of the divide, and it remains relevant today.

For instance, opponents to the breakthrough federal civil rights laws of the late 1950s through the 1970s often framed their critique as a defense of civil liberties against civil rights. In his autobiography, Sam Ervin, the longtime U.S. Senator from North Carolina, wrote, "There is an unbridgeable gap between civil liberties and civil rights. Civil liberties belong to Americans of all races, classes, and conditions. Civil rights are special privileges enacted by Congress, or created by executive regulations, or manufactured by activist Supreme Court Justices for the supposed benefit of members of minority races on the basis of their race."<sup>129</sup> Critics of the civil rights movement framed this claim as a tension between equality and liberty, with the latter proclaimed as the more fundamental value.<sup>130</sup> They joined forces with ideological libertarians to attack efforts to promote racial equality through increased government regulation because of the supposed costs these regulations imposed on individual freedom.<sup>131</sup>

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<sup>126</sup> See Weinrib, *supra* note 15.

<sup>127</sup> Note, *Private Attorneys-General: Group Action in the Fight for Civil Liberties*, 58 YALE L.J. 574, 579 (1949) (noting that the ACLU's role as defender of "oppressed groups" has diminished in recent years because these groups have been organizing on their own).

<sup>128</sup> WALKER, *supra* note 18, at 240.

<sup>129</sup> SAM ERVIN, PRESERVING THE CONSTITUTION: THE AUTOBIOGRAPHY OF SAM ERVIN 163-64 (1984).

<sup>130</sup> See, e.g., R. Carter Pittman, *The "Blessings of Liberty" vs. The "Blight of Equality"*, 42 N.C. L. REV. 86 (1963); R. Carter Pittman, *Equality Versus Liberty: The Eternal Conflict*, 46 A.B.A. J. 873 (1960).

<sup>131</sup> See, e.g., Alfred Avins, *Freedom of Choice in Personal Service Occupations: Thirteenth Amendment Limitations on Antidiscrimination Legislation*, 49 CORNELL L. Q. 228 (1964);

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A more recent episode in the still-unfolding history of the civil rights-civil liberties divide can be found in the debate over the regulation of hate speech and pornography, a debate fought out with particular urgency in the 1980s and 1990s and one that has periodically flared up since then. In an assessment of campus speech codes written in 1992, Thomas C. Grey started by identifying the assumption of a civil rights-civil liberties alliance that was a legacy of the 1960s, noting that “American liberals believe that both civil liberties and civil rights are harmonious aspects of a basic commitment to human rights.”<sup>132</sup> The debate over hate speech had the effect of challenging this assumption, however, and “recently these two clusters of values have seemed increasingly to conflict ...”<sup>133</sup> Critical race theorist Richard Delgado suggested that the hate speech debates demonstrate that civil rights and civil liberties might best be described as having a “dysfunctional” relationship.<sup>134</sup> Delgado and other supporters of hate speech restrictions argued that the proper approach was to prioritize civil rights over civil liberties—an abstract principle of free expression must not prevent measures designed to protect oppressed groups.<sup>135</sup> When the cause of racial equality comes into conflict with personal liberty and autonomy, defenders of hate speech regulation argue, equality simply must triumph over liberty.<sup>136</sup> Here, the civil rights-civil liberties distinction allows for a relatively clear, concise exercise in ranking the substantive value of conflicting rights.

Critics of speech codes have also framed their critique in terms of the civil rights-civil liberties divide. In this conflict, they argue, civil liberties must be recognized as the more fundamental value<sup>137</sup> The courts have generally agreed with this position and have consistently

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Robert Bork, *Civil Rights—A Challenge*, NEW REPUBLIC, Aug. 31, 1963, at 21; *see generally* Christopher W. Schmidt, *Defending the Right to Discriminate: The Libertarian Challenge to the Civil Rights Movement*, in SIGNPOSTS: NEW DIRECTIONS IN SOUTHERN LEGAL HISTORY (Sally Hadden & Patricia Minter eds., 2013).

<sup>132</sup> Grey, *supra* note 3, at 485.

<sup>133</sup> *Id.*

<sup>134</sup> Richard Delgado, *About Your Masthead: A Preliminary Inquiry into the Compatibility of Civil Rights and Civil Liberties*, 39 HARV. C.R.-C.L. L. REV. 1, 2 (2004). Delgado writes that “efforts at reconciliation [between civil rights and civil liberties] are unsuccessful because they dodge hard cases, minimize conflicts that are real, or define the area of disagreement in a manner that allows only one answer.” *Id.* at 4.

<sup>135</sup> *See, e.g.*, Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim’s Story* 87 Mich. L. Rev. 2320 (1989); Charles R. Lawrence, III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431; Frank I. Michelman, *Universities, Racist Speech, and Democracy in America: An Essay for the ACLU*, 27 HARV. C.R.-C.L. L. REV. 339 (1992).

<sup>136</sup> An alternative approach to defending the constitutionality of speech codes is to downplay the supposed tension between civil rights and civil liberties. *See* Charles R. Calleros, *Reconciliation of Civil Rights and Civil Liberties After R.A.V. v. City of St. Paul: Free Speech, Antiharassment Policies, Multicultural Education, and Political Correctness at Arizona State University*, 1992 UTAH L. REV. 1205.

<sup>137</sup> *See, e.g.*, DAVID E. BERNSTEIN, YOU CAN’T SAY THAT! THE GROWING THREAT TO CIVIL LIBERTIES FROM ANTIDISCRIMINATION LAWS (2003); David E. Bernstein, *Anti-Discrimination Laws and the First Amendment*, 66 MO. L. REV. 83 (2001).

struck down efforts to regulate pornography and hate speech as a violation of the First Amendment.<sup>138</sup>

A related development has been a recent revisionist effort among libertarian legal scholars to elevate the role of civil liberties in the history of racial progress in twentieth-century American. David Bernstein's work in particular has pressed this point.<sup>139</sup> Bernstein argues that *Lochner*-style jurisprudence "supported not only what is now called economic liberty, but civil rights and civil liberties as well."<sup>140</sup> Indeed, *Lochner*'s defenders "failed to distinguish among these categories."<sup>141</sup> "It is possible to imagine," he writes, "that but for the interruption of the Great Depression and the New Deal, entirely different forms of civil rights protections would have arisen—a laissez-faire combination of equal protection of the law, liberty of contract, and freedom of association, instead of the more statist combination of interest group liberalism, the welfare state, and government enforcement of nondiscrimination norms against private parties."<sup>142</sup> Bernstein and others have called for a reinvigoration of this "laissez-faire version of civil rights"<sup>143</sup>—or, put another way, a civil liberties approach to advancing the civil rights goal of combatting discrimination.<sup>144</sup>

In these debates over the reach of the civil rights agenda, the civil rights-civil liberties divide retains its relevance because it continues to help explain legal and political developments. It provides a language by which to oppose and praise and reconcile many of the legal developments of our era

## **B. Gay Rights and the Civil Rights-Civil Liberties Divide**

The movement for gay rights also has had to negotiate the civil rights-civil liberties divide. Indeed, in certain ways, the gay rights movement seems to be closely tracking the black freedom struggle's history with the divide. The divide was most pronounced in the early stages of each movement. Just as the civil rights activists in the Cold War years feared the ways in which civil liberties claims could undermine their agenda, the early stages of the gay rights movement found its interests undermined by civil liberties claims. In *Boy Scouts of American v. Dale* (2000),<sup>145</sup> the Supreme Court struck down a regulation intended to protect against sexual orientation discrimination based on a civil libertarian challenge—a claimed right to free

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<sup>138</sup> See, e.g., *R.A.V. v. St. Paul*, 505 U.S. 377 (1992) (striking down cross-burning statute); *American Booksellers Ass'n, Inc. v. Hudnut*, 771 F.2d 323 (7th Cir. 1985); but see *Virginia v. Black*, 538 U.S. 343 (2003) (cross burning with intent to intimidate not protected by the First Amendment).

<sup>139</sup> See especially DAVID E. BERNSTEIN, *REHABILITATING LOCHNER: DEFENDING INDIVIDUAL RIGHTS AGAINST PROGRESSIVE REFORM* 78-86 (2011).

<sup>140</sup> David E. Bernstein, *Philip Sober Controlling Philip Drunk: Buchanan v. Warley in Historical Perspective*, 51 VAND. L. REV. 797, 873 (1998).

<sup>141</sup> *Id.*

<sup>142</sup> David E. Bernstein, *Roots of the Underclass: The Decline of Laissez-Faire Jurisprudence and the Rise of Racist Labor Legislation*, 43 AM. U. L. REV. 85, 135 (1993).

<sup>143</sup> *Id.*

<sup>144</sup> For a critique of this claim, see Brent M. Rubin, *Buchanan v. Warley and the Limits of Substantive Due Process as Antidiscrimination Law*, 92 TEX. L. REV. 477 (2013).

<sup>145</sup> 530 U.S. 640 (2000).

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association on the part of the Boy Scouts.<sup>146</sup> This has proven a relatively minor setback when viewed from the perspective of the overall success of the gay rights movement. Its recent successes have demonstrated the ways in which a fully mobilized social movement can transcend the civil rights-civil liberties divide. Like the black freedom movement of the 1960s, the gay rights movement of the past decade has achieved significant breakthroughs by capitalizing on both sides of the divide. The movement has seen some of its most significant gains, in both legal and political contexts, because it has been able to frame itself as not only a question of civil rights (i.e., a question of equality and discrimination), but also as a question of civil liberties—that is, as a matter of protecting individual liberty, privacy, and expression. One of the more influential groups pushing for gay rights today is the Log Cabin Republicans, a group that, according to its mission statement, locates its commitment to equal rights for gay Americans within its larger commitment to “the principles of limited government, individual liberty, individual responsibility, free markets and a strong national defense.”<sup>147</sup> In the leading Supreme Court case of *Lawrence v. Texas*, Justice Kennedy bypassed an equal protection analysis to offer a ringing libertarian defense of privacy and personal liberty. In 2010 a federal district court in California struck down the military’s “Don’t Ask, Don’t Tell” policy as a violation of the First Amendment.<sup>148</sup>

Conservative supporters frame gay rights primarily as a civil libertarian cause; liberals tend to give the issue a more egalitarian emphasis. Gay rights today, like the black freedom struggle of the 1960s, offers the opportunity for a new civil rights-civil liberties alliance. Like the black freedom struggle of the 1960s, we are witnessing in the gay rights movement an extraordinary convergence of divergent clusters of values, grounded in various parts of the Constitution, all working toward a common goal. And if the past is any guide to the future, this convergence too will be a moment whose time will pass. Once the gay rights movement has run its course, the civil rights-civil liberties divide will reassert itself. The expansion of gay rights will be contained in the face of competing rights claims.

## CONCLUSION

In a recent article on the history of human rights, Kenneth Cmiel called for more attention to the “ways that rights have been clustered together over time,” including the “political ramifications” of these groupings.<sup>149</sup> This examination of the civil rights-civil liberties divide has sought to do just this.

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<sup>146</sup> See generally ANDREW KOPPELMAN WITH TOBIAS BARRINGTON WOLFF, *A RIGHT TO DISCRIMINATE? HOW THE CASE OF BOY SCOUTS OF AMERICA V. JAMES DALE WARPED THE LAW OF FREE ASSOCIATION* (2009).

<sup>147</sup> Mission Statement, Log Cabin Republicans, <http://online.logcabin.org/about/mission.html>. The mission statement explains: “The core of the political philosophy known as conservatism is unbounded faith in liberty. This is driven by two beliefs: the power of the individual to self-direct his/her life and the proper role of government to protect and expand liberty, not to limit it. These dual beliefs validate gay and lesbian equality as sound conservative politics.” *Id.*

<sup>148</sup> *Log Cabin Republicans v. United States*, 716 F.Supp.2d 884 (C.D. Cal. 2010).

<sup>149</sup> Cmiel, *supra* note 123.

## *CIVIL RIGHTS-CIVIL LIBERTIES DIVIDE*

In the late 1940s, the gathering of certain rights around the labels of civil rights and civil liberties was a response to the demands of the domestic politics of the Cold War. Liberal anticommunists sought a language of rights that could capture their potentially contradictory message of calling for an expanded federal commitment to the protection of equality rights for African Americans while accepting, in the name of national security, certain limitations on certain individual freedoms. The civil rights-civil liberties divide provided this language. The divide had its costs, first raised by certain isolated voices in the 1940s and 1950s, then, in the 1960s, by a concerted reform movement. Efforts in the 1960s to dissolve the civil rights-civil liberties divide largely failed, however. The distinction continues to be a basic organizing principle of American law.

Excavating the history of the civil rights-civil liberties divide allows us to better understand its continued significance today. The creation and maintenance of the civil rights-civil liberties divide has provided a language and conceptual apparatus for valuing certain rights ahead of others. This is the under-recognized politics of the civil rights-civil liberties divide. Its liberal anticommunist creators used it to advance their political agenda in the early Cold War. Other political visions motivated subsequent efforts to challenge and to maintain the divide. The divide persists because of the value different groups have found in the work it has done over the years—work it continues to do today. A better understanding of the history of the civil rights-civil liberties divide reminds us of the importance of the labels by which we understand our legal world.