

Introduction

This book revolves around a deceptively simple question: What do we mean when we say that something is an issue of civil rights? Americans use the term all the time. We have government agencies dedicated to protecting civil rights. We know the heroic struggle for racial equality of the 1960s as the civil rights movement. We're now supposedly in a post-civil rights era – even as we're constantly on the watch for new civil rights movements. We identify certain people as civil rights icons. We declare public officials good or bad on civil rights. All of this assumes “civil rights” includes certain things and not others. But look up the term in a dictionary or legal reference work and you'll find a mix of abstractions and stilted legalisms, none of which captures the depth and complexity of meaning that is conveyed with its invocation and none of which hints at historic and ongoing struggles over its contents.¹

In the United States today, the term civil rights is most commonly used to refer to protections against racial discrimination. This was the essential issue of the civil rights movement of the 1950s and 1960s. This is a central concern of civil rights laws and of most government and private organizations dedicated to civil rights. But consider how quickly complexities appear. Are those who oppose affirmative action because they believe racial preferences to be discriminatory making a civil rights claim? Many would say that such a claim repudiates basic civil rights principles. Is the recent Black Lives Matter campaign a new civil rights movement? Participants and supportive observers often describe it so, but its leaders insist it's not.²

While racial discrimination resides at the core of the public meaning of civil rights today, other forms of discrimination have come to be understood as raising civil rights concerns. Modern civil rights laws protect against discrimination based on sex, age, disability, and sexual orientation. The addition of each category has been the product of debate about what it means to be a civil right, and whether a newly claimed right properly belongs.

Even if we assume that the idea of civil rights centers on protections against group-based discrimination, it isn't clear that the category is limited to this issue. Is the right to bear arms a civil rights issue? The National Rifle Association, founded in 1871, refers to itself as “America's longest-standing civil rights organization,” a claim that

critics dismiss as ridiculous. (The National Association for the Advancement of Colored People, founded in 1909, counters that it is “the nation’s oldest, largest and most widely recognized grassroots-based civil rights organization.”) Some argue that gun violence, not gun rights, is the real civil rights issue. During his 1968 presidential campaign, Richard Nixon made his plea to the “silent majority” of Americans who felt that crime was spiraling out of control and protesters were going too far by declaring security of person and property “the first civil right of every American.” Nixon’s critics denounced his law-and-order agenda as a thinly veiled effort to undermine the real struggle for civil rights.³

Is abortion an issue of civil rights? Pro-life activists have long claimed that it is. In 2012 one Republican politician praised President Barack Obama as a person “who rightfully fights for civil rights” but then condemned him for failing to acknowledge “the civil rights of the unborn in this country.” The campaign to end abortion is the “civil rights movement of the 21st century,” proclaimed an antiabortion activist. Those on the other side of the abortion debate also embrace the civil right frame. A woman’s right to an abortion is “not a political question,” argued one pro-choice advocate, “it’s a civil rights issue.”⁴

But others insist that thinking of abortion in these terms mischaracterizes the issue. “Some issues – gay marriage and voting restrictions, for example – are straightforward, if still controversial, matters of civil rights,” notes a commentator. “But abortion is different. It requires unavoidable tradeoffs.” The assumption here is that civil rights issues are “straightforward.” We don’t compromise on civil rights. If you have a valid civil rights claim, you win. Abortion, on the other hand, demands trade-offs. One can have a valid claim of a right to an abortion but not be able to exercise that right because it must be balanced against other rights. In this evocation of civil rights, the distinguishing characteristic isn’t race or the rights of vulnerable minorities. It’s that they’re clear, that they’re not balanced against other rights. To have an issue recognized as a civil right is to elevate that issue above political debate and into the realm of consensus and principle.⁵

How do we make sense of all this? The term civil rights has such a familiar presence in discussions about American politics and law that we tend to use it reflexively and intuitively, but rarely do we stop to think about what exactly we mean by the term and why certain uses strike us as right or wrong. Dictionary definitions of the term would comfortably include all the uses previously cited – racial discrimination, gun rights, abortion rights (on both sides) – with little indication of why anyone would consider some usages inaccurate, misleading, even offensive.

To understand the meaning of civil rights – the meaning the label invokes when introduced in a conversation, declared at a protest rally, attached to a government agency, or placed on the cover of a book – history is our best resource. To make sense of the role the term plays in our world today, look to its past uses. Its present-day meaning is the accumulation of generations of debates about civil rights, of struggles over what it means to live in a nation dedicated to

protecting civil rights. Over the course of American history, civil rights has experienced moments of rebirth and transformation. Each generation of Americans has given the term new life. Yet the term has never fully shed its past lives. Its stages of development are the product of accretion of new meaning rather than the substitution of one meaning for another.⁶

My goal in this book is to reconstruct the history of the term civil rights in all its complexity. I don't dismiss or explain away paradox or contradiction, for supposed misuses of language can often be as revealing of its public meaning as widely accepted usages. I excavate the term as it was used and debated, redefined and redeployed. *Civil Rights in America* offers a history of civil rights that places the evolving, contested, and historically particularized understanding of this term at the center of inquiry. I explain how a phrase that initially rose to national prominence in the aftermath of the Civil War as a term of legal categorization, valued as much for what it excluded as for what it protected, morphed into something quite different in the twentieth century, becoming in the 1960s a label of identity for an inspired movement of social transformation. On a more general level, this book offers a case study of how the words and categories by which we understand our world become objects of contestation and points of leverage for social, political, and legal activity.

Exploring the history of how Americans have used this powerful and evocative term not only helps us understand the role it plays in American life today but it also helps us think about the role it may play in the future. Americans have been fighting over the meaning of civil rights since the 1860s. In recent years, however, the unfolding struggle over the term's meaning has taken a turn that threatens the unique contribution that civil rights, as a category of American life and law, has made over the course of its history. With what seems increasing frequency, people from across the ideological spectrum have been deploying civil rights as a synonym for their vision of what is just and true. It has become, for some at least, a term seemingly without limits. Such an approach, I argue, asks too much of civil rights. Throughout its history, civil rights has been a category of constraint. Its primary role has been to draw boundaries – not between right and wrong, justice and injustice, but between the subset of injustices that are particularly susceptible to and appropriate for government regulation and those that don't meet these requirements. To now use the term as a vessel into which people put their unbounded vision of what is right and necessary runs against its entire history.⁷

But equating civil rights with one's vision of social justice also asks too little from civil rights. As a term of limitation – as a category that captures only a part of a more capacious, aspirational vision of a more just and equal America – civil rights has been uniquely effective. *Civil Rights in America* tells the story of how across much of American history, people have used this category as a way to locate common ground among diverse interests and identities. It has been a tool of compromise and concession. Under the right circumstances, arguing about this flawed ideal of civil rights has reduced polarization and narrowed the chasms that divide Americans.

A NEW PERSPECTIVE ON CIVIL RIGHTS

This book is different from the countless books and articles that have been written on the history of civil rights. The standard approach for those writing about civil rights has been to assume some definition of the term – usually as a synonym for racial justice, often with a particular focus on the African American freedom struggle – and then to examine the history of this topic. The premise of this book, by contrast, is that there has never been a singular, unchanging definition of civil rights. Considered in historical perspective, it has always been contingent and contested.⁸

Put another way, the focal point of this book is the *term* civil rights rather than any particular *concept* of civil rights. I center my analysis on the invocation of the term itself, with a focus on moments when people are fighting over its meaning or using it in ways that challenge the prevailing usage of the day. This approach allows me to consider the evolution of the meaning of civil rights across time as new generations remake the term for their own purposes. What emerges is not a singular concept but a collection of concepts shifting across time, gaining salience, and falling into disuse as different people pursuing different goals lay claim to this remarkably generative and powerful two-word phrase.⁹

This is the first book to tell the history of the term civil rights across American history. Among the scholars who have given the most attention to the distinctive past meanings of civil rights are historians of the nineteenth century, when the definition of civil rights was a key point of dispute for the lawmakers, jurists, and citizens of the Reconstruction era. No one has traced this history forward in time, however. Those books that consider civil rights as a contested category in the twentieth and twenty-first centuries capture only selected episodes within its long history.¹⁰

The lack of attention given the historical development of the term civil rights is all the more striking when contrasted with the recent outpouring of scholarship on the evolution of two comparable legal categories: civil liberties and human rights. Legal historians have shown how in the first half of the twentieth century civil liberties evolved from rights claims intended to empower workers to its modern incarnation, centered on judicially enforced freedom from certain forms of government regulation, particularly regulation of speech. Historians have also crafted an important body of scholarship exploring the origins and global development of human rights. The history of civil rights merits comparable analysis.¹¹

SUMMARY OF THE BOOK

My history of civil rights begins with an account of how, in the years immediately following the Civil War, the United States government committed itself, at least in principle, to ensuring the “civil rights” of newly emancipated African Americans. As detailed in the first two chapters, the crux of the debate that took place in Congress and throughout the nation during Reconstruction was not whether this particular

category of rights should be protected but about what was in the category. It was about what was a civil right – and, as importantly, what was *not* a civil right. Understanding the terms of this debate requires the re-creation of the distinctive worldview that defined the legal and political terrain of the day, a worldview in which the right to make contracts, buy and sell property, and use the courts were understood as civil rights but where the right to vote and equal access to public accommodations and public schools generally were not. Black leaders and their white allies challenged this narrow conception of civil rights, justifying calls for increased federal protections for African Americans by invoking a broader definition of the term.

After Congress debated the meaning of civil rights in the 1860s and 1870s, the Supreme Court gave its views on the question in a series of rulings interpreting Reconstruction’s constitutional and legislative achievements. This is the focus of Chapter 2. When the Court held in 1883 that access to public accommodations was not a civil right and Congress therefore lacked the authority to regulate in this area, northern states responded by passing their own public accommodations laws – which they typically labeled civil rights laws. The *Plessy v. Ferguson* decision in 1896, in which the Court upheld the constitutionality of segregation policies that were a core feature of the South’s white supremacist Jim Crow regime, also featured a debate over the meaning of civil rights. While the Court’s majority held that seating arrangements on railroad cars involved mere social preferences and thus “whites-only” cars did not violate the Fourteenth Amendment, Justice John Marshall Harlan countered in his now famous dissent that nondiscriminatory access to railroad travel was indeed a civil right, protected by the Constitution.¹²

My portrait in the first two chapters of Reconstruction as the foundational period in the history of civil rights in the United States draws on a recent generation of historical scholarship that has examined the distinctive concept of civil rights in this period and emphasized the ways in which it differed from more recent understandings of civil rights. Placing civil rights in its historical context offers a better accounting of the achievements and failures of the constitutional revolution of Reconstruction. It also allows us to better appreciate how the vision of civil rights that emerged during the “second Reconstruction” in the middle decades of the twentieth century differed in fundamental ways from the civil rights vision at the heart of the first Reconstruction.¹³

Justice Harlan’s lone dissent in *Plessy* proved something of a swan song for the debate over civil rights that emerged during Reconstruction. In the following decades, the term was no longer an object of debate for jurists, politicians, and activists. For most of the first half of the twentieth century, when Americans spoke of civil rights they did so either in reference to state public accommodations laws or as an amorphous, generic label for fundamental or constitutional rights. What was and what was not a civil right was no longer a pressing question.

In the 1940s, the term civil rights burst back into the public spotlight. This is the subject of Chapter 3. The emergence of the modern understanding of civil rights – an understanding centered on legal protections against racial discrimination – was the product of a remarkable (and little known, even among scholars of this period) moment of confusion and fortuity. At the center of the story was a group of Cold War liberals who were looking for a label to describe a program for racial reform that was, as one official in the administration of President Harry S. Truman put it, “slightly fresh” and that would not be confused with “civil liberties” issues involving the rights of political dissidents. Because of the needs of a particular group of people at a particular moment in history, the “Negro Problem” became transformed into an issue of civil rights.¹⁴

Racial justice activists took advantage of the opportunity. They embraced this newly repackaged civil rights label, with its echoes of the Reconstruction-era past but updated to the needs of the mid-twentieth-century scene. Taking the newly resonant term and transforming it once again, activists elevated and energized civil rights into a rallying cry for a social movement. Civil rights became not just an agenda for legal change but a struggle to create a more racially just America. It became a cause. Civil rights also became a term of identity. The movement was made up of thousands of civil rights protesters; it was coordinated by civil rights organizers and supported by civil rights lawyers. (All these labels, like the label “civil rights movement,” were basically nonexistent before the late 1940s and only came into common currency in the 1960s.) Civil rights, born as a term of law and then reborn as a term of public policy, now became a term of social activism and identity.

Yet even as the label unified, inspired, and empowered this transformative social movement, it also risked limiting it. The 1960s, the high-water mark of what we now remember as the civil rights era, included a concerted campaign by proponents of racial justice to demonstrate the inadequacies of civil rights. In Chapter 4, I consider the growing chorus of African American leaders who sought to draw attention to what the movement was leaving out, challenging other activists and their allies to push a more far-reaching agenda of social, political, and legal reform. When articulating their visions of racial justice, Malcolm X, Bayard Rustin, Martin Luther King Jr., and others used civil rights as a foil. The term offered a way to critique the limits of civil rights and thereby to define and elevate more ambitious approaches to social and political change. Grassroots organizers worried that the civil rights approach was too legalistic, too dependent on lawyers and courts. An array of voices on the political left argued that while civil rights reforms might do the necessary work of uprooting discriminatory behavior, they failed to engage the larger economic and structural issues that entrenched patterns of racial inequality. These critics searched for new categories and new labels – for alternatives to civil rights – that would better capture the demands of social and racial justice. The real struggle, they argued, was not for just civil rights, it was for social rights and human rights, for black power and black liberation.

In Chapter 5, I consider another turn in the history of civil rights, this one taking place in the aftermath of the 1960s. One of the achievements of the civil rights movement was to make the label a valuable commodity, claimed by proponents of causes across the ideological spectrum. Beginning in the late 1960s, conservatives developed their own civil rights agenda. They urged narrow readings of existing civil rights laws and Warren Court-era civil rights rulings, and they also resisted the expansion of these laws to cover additional forms of discrimination. During Republican administrations, they used federal agencies charged with protecting civil rights as platforms to challenge affirmative action policies. In all these instances, conservatives insisted they were not rejecting civil rights, but were advancing a truer vision of civil rights, one drawn from the principles of the civil rights movement and grounded in a commitment to a “color-blind” Constitution. Liberal critics lashed back, accusing conservatives of misusing and co-opting the label. What conservatives offered was not civil rights at all, they argued, but rather a campaign to roll back the achievements of past civil rights battles.

The struggle to win over the civil rights label was not limited to the issue of policies about race. In Chapter 6, I turn to efforts of various groups to use the civil rights label to legitimate causes not directly involving race. Conservatives sought to define their own agenda – law-and-order campaigns, gun rights, deregulation, opposition to abortion, religious liberty – as efforts to advance “civil rights.” Liberals too sought to leverage the label to bolster their own causes. Social justice activists framed a line of antidiscrimination campaigns – on behalf of women, the disabled, the LGBTQ communities – as the “next civil rights movement.” Civil rights laws today typically protect against discrimination based on race, ethnicity, religion, sex, age, disability, and, increasingly, sexual orientation and gender identity. Even as the history of civil rights is filled with people insisting upon its limits, civil rights has proven to be a relatively open concept, its meaning expanding as different groups convince their fellow Americans that new rights claims belong under its protective umbrella.

THE CONSTRAINED TRADITION OF CIVIL RIGHTS

The ever-widening scope of what society accepts as “civil rights” demonstrates the power this category has in American discourse, particularly in the last half century, to guide the nation toward a better, more expansive understanding of human equality. Alongside the story of this open tradition of civil rights, I identify a different, less familiar strand of civil rights history, one in which the category’s unique value has been its resistance to certain claimants. People have drawn upon civil rights to recognize and legitimate some right claims while denying and delegitimizing others. I term this the *constrained tradition of civil rights*.

From Reconstruction through the black freedom battles of the 1960s through today, much of the force of the term civil rights has been its usefulness in

differentiating certain kinds of rights from others. People have used the category of civil rights to highlight underappreciated commonalities and forge new alliances. But they have also used the category as a tool for exclusion and differentiation. This book reveals a history of recurring arguments that some issues were *not* civil rights issues. Erecting and enforcing boundaries around civil rights was often the work of those seeking to limit egalitarian reforms. But this was not always the case. Asserting limits on the meaning of civil rights was also a powerful weapon for those who sought to advance the interests of vulnerable and disempowered minorities.

The reason civil rights first became legally consequential and publicly salient in Reconstruction was because those who advocated for increased legal protections for freedpeople needed a category to identify not only those fundamental rights that defined the conditions of freedom but also to identify those rights that did not meet this standard. The category of *civil* rights was valuable because there was a need to limit the concept of *rights*. For racial egalitarians, civil rights was a temporary stopping point on the path toward recognizing complete legal equality for African Americans; for others, it was a limiting principle that defined the boundaries of government responsibility to protect racial equality. Reconstruction era debates over civil rights were as much about what fell outside the category as what was inside it.

This theme of civil rights as a tool of constraint and exclusion carries through the subsequent history of civil rights. The resurrection of civil rights in the 1940s was in large part an effort to highlight a distinction between the way liberals approached issues of racial discrimination and the way they approached issues of personal liberty when balanced against national security concerns. Civil rights gained new significance in the 1960s when it was used as a foil for other, more radical rights claims. And in the decades since the civil rights movement, members of the “civil rights establishment” have policed the boundaries of what they deem legitimate versus illegitimate civil rights claims.

To highlight the exclusionary dynamic of the constrained civil rights tradition, I frame the first four chapters around a category of rights that were understood as *not* civil rights. These oppositional rights categories gave meaning and significance to the concept of civil rights. In Reconstruction, civil rights developed in opposition to political rights and social rights. In the 1940s, liberals differentiated civil rights from civil liberties; in the 1960s, social justice activists contrasted civil rights with human rights. And from the 1970s onward, civil rights stood in opposition to itself: conservatives and liberals advocated their own versions of civil rights, while denouncing opponents for exploiting the term. Over its history, the civil rights label has resounded in large part because it has served as a tool of constraint and exclusion.

THE PROMISE OF CIVIL RIGHTS

Although efforts to secure racial equality, particularly equality for African Americans, are at the heart of the history of civil rights, members of disadvantaged racial minority

groups have long expressed ambivalence toward the label. Readers may be surprised to find that for much of the history of civil rights that I tell in this book – the history, that is, of contestation over the label civil rights – the protagonists are not African Americans fighting for racial justice but white lawmakers and jurists. Even as black Americans demanded and fought for their rights, they generally avoided, resisted, and sometimes even attacked a term whose primary role throughout most of its history was to differentiate rights that government would protect from those it would not. Likewise, activists for the rights of other racial minorities and for women’s rights sometimes distanced themselves from the term. White male political and legal elites and more pragmatically oriented racial justice activists deployed the category of civil rights to make the case for protecting certain rights while excluding others. Civil rights has been a tool for carving up the terrain of possible rights claims, allowing civil rights claimants to extract a category of rights that are likely to resonate with substantial segments of American society and make the case that they are deserving of legal protection.

For this reason, civil rights historically has been more a term of law and institutions than a term of protest. It has not been a rallying cry for grassroots movements seeking to give voice to their needs and desires; it has rarely been a term of aspiration or defiance. It lacks the capacious potentialities of those terms that have served this role – terms such as freedom, liberty, justice, dignity, equality, human rights, or the simple “rights,” unadorned and unqualified. Generations of activists fighting for a more equal society have taken advantage of what civil rights offered them; they have called for legislation and court rulings that would advance civil rights, celebrated their achievement, demanded their enforcement. But they have done so while maintaining some distance from the term. Civil rights are essential, they have insisted, but they are also limited, a partial solution to problems that demand American society go beyond civil rights.

The young men and women who sat down at segregated lunch counters across the American South in 1960 spoke of their protest as an alternative to “civil rights.” Martin Luther King Jr. insisted that civil rights was never enough to achieve “genuine equality.” Malcolm X called upon black Americans to spend less time “barking up the civil-rights tree.” Among the most pointed critics of civil rights is the novelist and essayist Alice Walker. “The term ‘Civil Rights,’” she wrote, “could never adequately express black people’s revolutionary goals, because it could never adequately describe our longings and our dreams, or those of the non-black people who stood among us.” Of the “civil rights movement” label, Walker wrote, “I have never liked the term itself. It makes one think of bureaucrats rather than of sweaty faces, eyes bright and big for Freedom! marching feet. No; one thinks instead of metal filing cabinets and boring paperwork.” Why, she wonders, should we expect anything more from civil rights? The term itself “did not evolve out of black culture, but, rather, out of American law. As such, it is a term of limitation. . . . Even as it promises assurance of greater freedom it narrows the area in which people might expect to find them.”¹⁵

In recent years activists and scholars have pushed in a different direction, seeking to elevate the civil rights label into something new: an aspirational term of radical social transformation. They seek to make the term into a synonym for a progressive social justice agenda. The true meaning of civil rights is found in the words and actions of people outside the halls of power, they insist; its true meaning challenges existing structures of social and economic life, revealing a vision of a more egalitarian society.

This latest turn in the history of efforts to shape the meaning of civil rights may be seen as a step forward, a loosening of constraints, an elevation of the label to more ambitious and transformative heights. Yet the story I tell in this book suggests that something valuable may be lost when we try to release civil rights from its historic moorings. Across its past iterations, the civil rights label has had a distinctive power. While never the most inspirational of phrases, as a term of politics and law it played an essential role in making the United States a more equal and just society. From the 1860s through the 1960s, it signaled an effort to locate common ground and to unite disparate interests. It was a tool of pragmatic reform and compromise. It was an intermediary term, operating between the divisive specifics of particular policies and the abstract ideals to which most Americans profess their commitment. Terms of aspiration we have in abundance. Civil rights, historically, has been something different: a term that could translate aspiration into legal change. By recovering the history of the term civil rights, I also hope to make the case for the value of a conception of civil rights that is flawed, modest, and limited – but, under the right circumstances, transformative.