Michigan Law Review

Volume 103 | Issue 6

2005

Does the Supreme Court Matter? Civil Rights and the Inherent Politicization of Constitutional Law

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DOES THE SUPREME COURT MATTER? CIVIL RIGHTS AND THE INHERENT POLITICIZATION OF CONSTITUTIONAL LAW

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FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY. By *Michael J. Klarman.* New York: Oxford University Press. 2004. Pp. xii, 655. $35.

I. BACKGROUND

More than a decade ago, in a colloquium sponsored by the *Virginia Law Review*,[1] scholars of the civil rights movement launched a fierce assault on Michael J. Klarman's[2] interpretation of the significance of the Supreme Court's famous school desegregation ruling in *Brown v. Board of Education*.[3] Klarman's "backlash thesis," initially set forth in a series of law review and history journal articles and now serving as the centerpiece of his new book, revolves around two central claims. First, he argues that the advancements toward racial equality generally attributed to *Brown* were instead the inevitable products of long-term political, social, and economic transformations that "would have undermined Jim Crow regardless of Supreme Court intervention."[4] Second, he credits *Brown* with a role in this historical process only through a chain of indirect causation: the Supreme Court decision galvanized massive resistance and racial violence in the South, which civil rights activists capitalized upon by engineering televised confrontations that mobilized public opinion across the nation, which created the climate for the passage of the federal civil rights and voting rights legislation of the mid-1960s, which directly and

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1. Colloquium, *Twentieth-Century Constitutional History*, 80 VA. L. REV. 1 (1994).

2. James Monroe Professor of Law and Professor of History, University of Virginia.

3. 347 U.S. 483 (1954).

4. Michael J. Klarman, Brown, *Racial Change, and the Civil Rights Movement*, 80 VA. L. REV. 7, 10 (1994).

profoundly transformed southern race relations.[5] Although the contours of this general story are part of the standard historical narrative, firmly grounded in the secondary source literature and taught in almost every university classroom, Klarman's specific charge that civil rights scholars have greatly exaggerated the importance of *Brown* set off a bit of a firestorm. The first wave, which accompanied the 1994 *Virginia Law Review* article, included not only the expected differences of historiographical analysis but also criticism of a surprisingly personal nature.

The response by David J. Garrow, titled *Hopelessly Hollow History*, ascribed Klarman's views on *Brown* to the "professorial urge for interpretive novelty," which often produces useful advancements but in some unfortunate cases results in "revisionist interpretations whose rhetorical excesses are quickly revealed for what they are when old, but indisputable historical evidence, is inconveniently brought back to the pictorial foreground."[6] Garrow highlighted Klarman's failure to acknowledge the "*direct* influence of *Brown* on the instigation of the 1955 Montgomery [bus] boycott," a causal analysis that emphasizes the crucial inspiration for southern black activists who finally had the moral authority and legal force of the Supreme Court on their side.[7] While conceding Klarman's point that *Brown* resulted in little school desegregation during the decade after 1954, Garrow blamed the Court itself for emboldening resistance to its decree through the infamous "all deliberate speed" implementation guidelines known as *Brown II*.[8] Under this scenario, primary fault for the limited reach of *Brown* rested in the justices' constrained vision of enforcement rather than in their premature placement of desegregation on the nation's political agenda. In the final sentence of his rejoinder, Garrow dismissed Klarman's entire project with undisguised condescension for the law professor treading on historians' turf: "[C]ommentators would be well-advised to keep their professional desire for interpretive novelty in check, for rhetorically excessive overstatements and oversimplifications oftentimes do turn

5. *Id.*; *see also* Michael J. Klarman, *How* Brown *Changed Race Relations: The Backlash Thesis*, 81 J. AM. HIST. 81 (1994).

6. David J. Garrow, *Hopelessly Hollow History: Revisionist Devaluing of* Brown v. Board of Education, 80 VA. L. REV. 151, 151 (1994). Garrow is the author of a respected biography of Martin Luther King, Jr., and a massive history of *Roe v. Wade*, among other works. *See* DAVID J. GARROW, BEARING THE CROSS: MARTIN LUTHER KING, JR., AND THE SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE (1986); DAVID J. GARROW, LIBERTY AND SEXUALITY: THE RIGHT TO PRIVACY AND THE MAKING OF *ROE. V. WADE* (1994).

7. Garrow, *supra* note 6, at 152.

8. Brown v. Bd. of Educ., 349 U.S. 294 (1955) [hereinafter *Brown II*]; Garrow, *supra* note 6, at 158-59.

out to be hopelessly hollow once a fuller understanding of the historical record is brought to bear."[9]

Mark Tushnet's critique, published in the same issue of the *Virginia Law Review*, offered a different variation of Garrow's indictment of careerist zealotry:

> Lawyers are notorious for producing law-office history, the result of the professional deformation in which judgment must be awarded to one or the other side. Law-office history reduces complexity and contradiction [tropes favored by academic historians] to simplicity and provides a story in which all evidence points to a single conclusion.[10]

Tushnet contended that Klarman's backlash thesis underplayed the historical magnitude of *Brown* when understood as a Supreme Court proclamation of a "fundamental principle of constitutional law" — that government policies designed to discriminate against black citizens are illegitimate — a proposition with momentous consequences that have extended far beyond the particular arena of southern school desegregation.[11] Turning to the details, Tushnet also charged that Klarman's inevitability framework represented "a largely determinist account of the transformation of race relations" and that the emphasis on the chain reaction of white violence in the South and white public opinion in the North "com[es] close to eliminating African Americans as historical agents."[12] He concluded with the announcement that "[t]o the extent that Professor Klarman appears to believe that he has established the unimportance of *Brown* [as a declaration of constitutional principle] . . . and to believe that he has deepened our understanding of the limits of judicial power, he is mistaken."[13]

Klarman's rebuttal, subtitled *Facts and Political Correctness*, struck back in kind. He began with the observation that "*Brown v. Board of Education* is today so politically sacrosanct that one cannot dispassionately discuss the decision's soundness as a matter of constitutional theory."[14] Although both Garrow and Tushnet had

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9. Garrow, *supra* note 6, at 160.

10. Mark Tushnet, *The Significance of* Brown v. Board of Education, 80 VA. L. REV. 173, 173 (1994). Tushnet is the author of a number of books about the history of civil rights litigation and jurisprudence. *See* MARK V. TUSHNET, THE NAACP'S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925-1950 (1987) [hereinafter TUSHNET, NAACP'S LEGAL STRATEGY]; *see also* MARK V. TUSHNET, MAKING CIVIL RIGHTS LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1936-1961 (1994).

11. Tushnet, *supra* note 10, at 176.

12. *Id.* at 174, 179.

13. *Id.* at 184.

14. Michael J. Klarman, Brown v. Board of Education*: Facts and Political Correctness*, 80 VA. L. REV. 185, 185 (1994) (citations omitted).

engaged Klarman almost exclusively on the immediate issues of historical causation and the evidentiary basis for these claims, his response quickly made it clear that a broader debate about the proper "limits of judicial power" undergirded his inquiry into the impact of *Brown*.[15] The "political correctness" that circumscribed this academic discussion "can only be lamented," Klarman continued, "as *Brown* was not an unambiguously correct decision either for the justices or the American public in 1954, and to formulate constitutional theories on the basis of ahistorical judgments is at the very least unconstructive, and possibly quite insidious."[16] Klarman then proceeded to marshal countervailing evidence against Garrow's claim that *Brown* directly inspired the civil rights demonstrations that followed, and he characterized Tushnet's accusation that the backlash thesis denied historical agency to black southerners as "not only inaccurate, but offensive."[17] But Klarman emphasized that his critics were battling him only on a secondary front, because "[t]he cultural or symbolic account of *Brown*'s significance has become . . . something of a fallback position for those committed to preserving *Brown*'s status as a judicial icon while unable to identify concrete ways in which the decision mattered."[18]

This debate, which has been reinvigorated with the publication of Klarman's lengthy and impressive book examining the Supreme Court and racial discrimination from *Plessy* to *Brown*, is deeply contentious in large part because its participants are starting from such different vantage points.[19] To oversimplify only slightly, most historians who specialize in the fields of civil rights and African-American, southern, and urban studies do indeed consider *Brown* to be "unambiguously correct" and are not that bothered by law school anxieties about its "soundness as a matter of constitutional theory."[20] (The most salient criticisms of *Brown* leveled by academic historians emanate from the left end of the spectrum, from scholars who question the assimilationist philosophy of the liberal integrationist agenda).[21]

15. Tushnet, *supra* note 10, at 184.

16. Klarman, *supra* note 14, at 185.

17. *Id.* at 198.

18. *Id.* at 186.

19. In a special issue sponsored by *The Nation* and dedicated to the fiftieth anniversary of *Brown*, Klarman's interpretation of the relative insignificance of the 1954 decision placed him decidedly in the minority among the civil rights scholars who contributed, although almost every participant in the forum emphasized the nation's failure to achieve racial equality in public education. Eric Foner & Randall Kennedy, Brown *at 50*, NATION, May 3, 2004, at 15.

20. Klarman, *supra* note 14, at 185.

21. *See* DARYL MICHAEL SCOTT, CONTEMPT AND PITY: SOCIAL POLICY AND THE IMAGE OF THE DAMAGED BLACK PSYCHE, 1880-1996 (1997). Historians of the "post-integrationist" school also have been influenced by the critique of *Brown* associated with

Historians generally measure Supreme Court decisions on a scale of whether they advance or harm the struggle for social justice and racial equality — meaning that there is an effective consensus within the profession that *Dred Scott*, *Plessy*, and *Korematsu* were wrongly decided, and a widely shared belief that the most important lesson of *Brown* is how far the nation still has to go to live up to its promises.[22] Many historians reflexively believe that judicial activism is necessary to achieve liberal policy outcomes, a stance undoubtedly shaped by the overall thrust of the Supreme Court decisions of the Warren era, and they tend to be suspicious that theories of constitutional law designed to limit judges from issuing countermajoritarian rulings are animated by original-intent conservatism or some other undertaking associated with the political right. In short, academic historians who specialize in modern American society and politics effectively have embraced a results-oriented rather than a process-oriented standard for evaluating constitutional law, including a firm belief that judges should expand and defend the rights of oppressed minorities and that countermajoritarian decisions are often an essential component of this mission.[23]

Klarman has been a vocal proponent of political process theory, an approach to constitutional law that seeks to reconcile judicial review with democracy "by demonstrating that judicial review consists of something other than judges simply replacing legislative policy judgments with their own."[24] The "countermajoritarian problem," in Klarman's view, can be resolved only through a constitutional theory that limits judicial activism to those situations in which the outcome of such intervention can be demonstrated to be more democratic than

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Derrick A. Bell. *See* DERRICK A. BELL, FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM (1992); *see also* DERRICK A. BELL, SILENT COVENANTS: *BROWN V. BOARD OF EDUCATION* AND THE UNFULFILLED HOPES FOR RACIAL REFORM (2004).

22. *See, e.g.*, Forum, *Beyond Black, White, and* Brown, NATION, May 3, 2004, at 17-24. In recent years, a growing number of historians have moved beyond the widespread interpretation of *Brown* as an unfulfilled promise in order to emphasize the inherent limitations of the school desegregation decision as an expression of a particular strain of postwar liberalism. From this view, *Brown* symbolizes a larger liberal project (understood in contemporary terms as the "American Dilemma") that misdiagnosed the structural foundations of white supremacy in its emphasis on eradicating individual racism and obscured the national and multiracial scope of systematic discrimination against minorities in its concentration on the regional and biracial context of Jim Crow. *See also* Kevin Gaines, *Round Table:* Brown v. Board of Education*, Fifty Years After: Whose Integration Was It?* 91 J. AM. HIST. 19 (2004).

23. For a synthetic history that is representative of this results-oriented approach, see ERIC FONER, THE STORY OF AMERICAN FREEDOM (1998).

24. Michael J. Klarman, *The Puzzling Resistance to Political Process Theory*, 77 VA. L. REV. 747, 768 (1991).

the legislative choices of elected representatives.[25] In the early 1990s, Klarman carved out an exception that justified *Brown* within the political process framework, based on the argument that the nearly universal disfranchisement of black southerners characterized Jim Crow as an undemocratic system and the counterfactual (and qualified) hypothesis that "effective enforcement of black voting rights possibly would have rendered *Brown* unnecessary."[26] He concluded:

> to the extent that *Brown* does not rest on southern black disfranchisement, it cannot be justified under political process theory .... It is time we abandon the premise that *Brown* must have been correct when decided (leaving aside the widespread disfranchisement of southern blacks) ... simply because in today's world the result is so morally unimpeachable.[27]

To complicate the issue further, the other participant in the 1994 *Virginia Law Review* colloquium, Gerald N. Rosenberg, rebuked the backlash thesis as a product of tortured reasoning that greatly exaggerated the actual effect of *Brown* (the opposite charge of the other critics), driven by Klarman's complicity in the mission to preserve the decision's iconic status as a "symbol of the use of courts to produce significant social reform," which "provides legitimacy and a sense of purpose to liberal-leaning legal academics."[28]

And now, appearing on the fiftieth anniversary of *Brown*, Michael Klarman's ambitious first book asks legal scholars and especially civil rights historians to reconsider the question of how much the Supreme Court really matters in American politics and society. Despite the overheated rhetoric from some civil rights specialists in response to Klarman's initial presentation of the backlash thesis, historians can learn a lot from his analysis of various Supreme Court cases and his warning against placing excessive faith in the judicial branch as a vanguard of social change. The counterfactual and overly speculative nature of the book's central thesis, however, probably will not convince many partisans to abandon their celebration of the 1954 decision as a landmark in the struggle for racial equality. Klarman also details at great length the broader historical developments that shaped the trajectory of civil rights case law, a narrative that is comprehensive and compelling but drawn primarily from the secondary source

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25. *Id.*; *see also* Michael J. Klarman, *Constitutional Fact/Constitutional Fiction: A Critique of Bruce Ackerman's Theory of Constitutional Moments*, 44 STAN. L. REV. 759 (1992).

26. Klarman, *supra* note 24, at 807.

27. *Id.* at 815, 819.

28. Gerald N. Rosenberg, Brown *Is Dead! Long Live* Brown*! The Endless Attempt To Canonize a Case*, 80 VA. L. REV. 161, 171 (1994). Rosenberg is also the author of the book THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (1991).

literature, and these sections may be of greater interest to legal scholars seeking to understand the context surrounding judicial decisions than to historians who may already be familiar with the events. This hybrid book simultaneously presents a historical inquiry into the effects of *Brown* alongside a theoretical analysis of the political and social forces that govern judicial decisionmaking. Klarman is almost certainly right that historians have overstated the power and the inclination of the judicial branch to lead the nation toward greater social justice, but he also remains vulnerable to the admonition that history practiced by constitutional lawyers can flatten into a teleological narrative "in which all evidence points to a single conclusion."[29] *From Jim Crow to Civil Rights* offers a plausible though debatable account of the direct and indirect consequences of *Brown* during the decade after 1954, but the book's most notable weakness is the failure to interrogate with any rigor the principal claim that the 1964 Civil Rights Act and not the federal courts played the definitive role in dismantling Jim Crow in the public schools of the South during the decade that followed.

II. THE *PLESSY* ERA

Although the relationship between *Brown* and racial change represents the book's overarching theme, Klarman does not turn to the 1954 decision until page 290 of the volume. The first third of *From Jim Crow to Civil Rights* surveys the Court's most significant civil rights rulings during the *Plessy* era of legal segregation; the middle section portrays World War II as the genuine watershed for black-white race relations; and the final third explores the context of *Brown* and the political backlash against school desegregation in the South. Klarman begins by contrasting the regressive racial climate of the late 1890s with the progressive currents of the mid-1950s, and the introduction sets forth a three-part agenda for the chapters that follow: to recount the forces that underlaid the substantial racial advancements that took place during this half-century; to investigate the dynamics that produced key judicial rulings, including *Plessy* and *Brown*; and to measure the extent to which the Supreme Court shaped the broader political and social milieu of racial discrimination and civil rights (p. 4). Klarman explains that the judicial decisionmaking process operates simultaneously along a political and a legal axis, although "because constitutional law is generally quite indeterminate, constitutional interpretation almost inevitably reflects the broader social and political context of the times" (p. 5). Such a perspective on

29. Tushnet, *supra* note 10, at 173.

constitutional history suggests that "justices are unlikely to be either heroes or villains . . . [because] they rarely hold views that deviate far from dominant public opinion" (p. 6). This assessment means that the Supreme Court essentially moved with the flow of national sentiment when it invalidated de jure segregation in *Brown*, and also that the justices merely sanctioned mainstream legal and political trends when they originally sustained Jim Crow six decades earlier in *Plessy*, which is where the story begins.

In the first chapter, Klarman presents a solid case that *Plessy v. Ferguson*, widely viewed today as one of the Supreme Court's most indefensible decisions, actually represented a reasonable outcome in the political context of the time and indeed was never even a close call.[30] He argues that the civil rights decisions of the *Plessy* Court (1895-1910) "reflected, far more than they created, the regressive racial climate of the era" (p. 9). During the last two decades of the nineteenth century, the end of Reconstruction accompanied a wave of lynchings and political violence targeting black voters in the South, northern public opinion and Republican party policy shifted decisively against federal intervention to protect civil rights, the third-party Populist movement's brief flirtation with biracial alliances galvanized powerful Democratic appeals to racial unity, and imperialist adventures abroad fostered a desire for sectional reconciliation grounded in a transregional public culture of white supremacy (pp. 10-15). As an antidote to pervasive racial violence, and in an effort to stabilize the forces unleashed by industrialization and urbanization, many leading figures in the South and the North viewed segregation and disfranchisement as progressive methods of managing race relations. For a number of historians, the "New South" project of economic modernization through racial peace and stability holds the key to understanding the advent of the Jim Crow system.[31] Klarman recognizes the links between Progressive reform and racial segregation and disfranchisement but does not make this explanation as central to his analysis as the aforementioned political factors.[32] He

30. 163 U.S. 537 (1896).

31. *See, e.g.*, EDWARD L. AYERS, THE PROMISE OF THE NEW SOUTH: LIFE AFTER RECONSTRUCTION (1992); PAUL M. GASTON, THE NEW SOUTH CREED: A STUDY IN SOUTHERN MYTHMAKING (1970); GLENDA ELIZABETH GILMORE, GENDER AND JIM CROW: WOMEN AND THE POLITICS OF WHITE SUPREMACY IN NORTH CAROLINA, 1896-1920 (1996).

32. Pp. 21-22, 38. Progressive reformers in both the South and the North believed that segregation and disfranchisement provided forward-looking resolutions to interracial violence, a modernized version of scientifically managed race relations. Although Klarman cites the relevant historical literature on this point, the Progressive version of the origins of segregation moves somewhat at cross-purposes with his broader argument that the steady deterioration of race relations and the regressive racial climate of the late 1800s culminated in the political and judicial transitions of the *Plessy* era. *See generally id.*

also contends, in a strained effort at disaggregation that serves to minimize the legal foundations of Jim Crow, that the *Plessy* Court's legitimation of the emerging framework of de jure segregation and racially motivated disfranchisement did not make much difference because "the oppression of blacks was largely the work of forces other than law" (p. 10).

The major civil rights decisions issued by the *Plessy* Court involved state-mandated segregation in transportation along with challenges to ostensibly race-neutral public policies governing voting and jury service clearly designed to further discrimination in their application. Klarman argues that the Republican architects of the Fourteenth Amendment might have believed they were banning segregation on railroads but almost certainly did not intend to invalidate segregation in public education (pp. 18-27). Although the Supreme Court during this period never ruled directly on laws requiring school segregation, the 1896 decision in *Plessy* upheld a Louisiana railroad statute that mandated separate and equivalent facilities for black and white passengers. The majority opinion distinguished between political and social equality (p. 21), with only the former protected by the Fourteenth Amendment, a verdict Klarman attributes to judicial validation of the fact that racial segregation "simply mirrored the preferences of most white Americans" (p. 22). He also points out that *Plessy* (contrary to popular mythology) "did *not* hold that the Constitution required racially separate facilities to be equal" and that in subsequent rulings the justices made it clear that black public schools and other segregated accommodations need only meet a minimum standard of reasonableness rather than a strict standard of equality (p. 46). Then, in the first of many counterfactual scenarios employed throughout the book to emphasize the limited effect of Supreme Court decisions, Klarman concludes that the federal government would not and could not have enforced an alternative judicial decision that invalidated segregation in the South (pp. 47-52). Not that it would have mattered, however, because "there is no direct evidence that *Plessy* led to an expansion of segregation" (p. 48) and "more favorable Court rulings, even if enforceable, would not have appreciably alleviated the oppression of southern blacks" (p. 60).

Does constitutional law then matter much at all? It is hard not to conclude, given the bold and sweeping nature of these assertions and the ambiguity and complexity of the evidence at hand, that Klarman has constructed a teleological model of historical change in which political and social forces always determine the outcome of judicial processes but the cause-and-effect relationship almost never moves appreciably in the opposite direction. The problem with this framework is not only that the legal culture of white supremacy represented one of the central pillars of the Jim Crow system that

governed the South from the 1890s until the 1960s, and therefore that both civil rights activists and defenders of racial segregation focused on the public spaces under authority of the law as the critical sphere of confrontation during the postwar struggle for racial equality.[33] The problem is also that, even during the *Plessy* era, the Supreme Court's refusal to investigate the extralegal (e.g. "subconstitutional") subterfuges employed to discriminate against blacks actively fortified the emerging political culture of white supremacy in ways that challenge Klarman's model of judicial minimalism. In the area of voter disfranchisement, southern legislatures operated within the technical confines of the Fifteenth Amendment, adopting suffrage restrictions such as literacy tests that vested substantial administrative discretion in local officials, obvious subterfuges designed to discriminate in practice despite their statutory race neutrality. In *Williams v. Mississippi*, the Court declined — despite sufficient precedent — to scrutinize either the legislative motive or the state action that undergirded the disfranchisement of black citizens (pp. 28-39).[34] In the area of jury service, the Court likewise articulated a legal principle of racial nondiscrimination but "essentially invited nullification" (p. 55) by refusing to investigate the administrative discretion that achieved the systematic exclusion of blacks (pp. 39-43, 55-57).

Klarman largely substantiates his claim that the *Plessy* Court's civil rights decisions represented "plausible interpretations of conventional legal sources" and accurate reflections of white public opinion, and therefore the corollary that "these rulings were not blatant nullifications of post-Civil War constitutional amendments designed to secure racial equality" (p. 9). But this does not necessarily confirm his broader thesis about the minimal effect of the *Plessy*-era decisions on the path of history. Klarman's belief in judicial minimalism downplays the import of having the institution of the Supreme Court — and not just southern vigilantes or political demagogues or even Progressive-era reformers — extend the federal government's stamp of constitutional approval to a formal legal system that operated on the basis of the systematic racial subordination of African Americans.

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33. Klarman briefly remarks that "[e]ven if *Plessy* did not inspire the expansion of segregation, it may have provided legitimacy to the practice and thus delayed its eventual demise." P. 48. Most historians of the Jim Crow period and the civil rights movement would dispense with the speculative verb choice and then consider this statement of possibility to be demonstrably true. Leaving aside the debate about the immediate influence of *Plessy*, Klarman's thesis of the minimal impact of Supreme Court decisions on society and politics fails adequately to explore the issue of whether precedents such as *Plessy* imposed substantial constraints on the struggle for racial equality several decades down the road, projecting the constitutional law of one era into a substantially altered historical context. The judicial reasoning in *Plessy* certainly shaped and constricted the litigation strategies of the NAACP. *See* TUSHNET, NAACP'S LEGAL STRATEGY, *supra* note 10.

34. 170 U.S. 213 (1898).

"Jim Crow legislation was generally more symbolic than functional," according to Klarman, because "[w]hite supremacy depended less on law than on entrenched social mores, backed by economic power and the threat and reality of violence" (p. 82). But surely it is not simply a coincidence that a relatively stable racial order marked the four decades between the turn of the twentieth century and the beginning of World War II, the same era during which the *Plessy* Court's validation of legal segregation and black disfranchisement remained operative. Nor is it incidental that substantial black activism and corresponding white violence marked the fluid and unsettled racial climate that existed during the decades before the Supreme Court's endorsement of segregation and disfranchisement in the late 1890s, and also during the period after the federal judiciary began to chip away at both policies beginning in the 1940s.[35]

The Supreme Court's overt willingness to tolerate state-action subterfuges that enforced anti-black discrimination through race-neutral facades also helped to shape the legal underpinnings of racial inequality and provided a segregationist road map for southern (and northern) policymakers throughout the twentieth century. Between 1910 and 1920, the Court issued a series of rulings that invalidated forced peonage laws, grandfather clauses, separate-and-unequal luxury accommodations in railroad cars, and city ordinances mandating residential segregation.[36] These cases, which Klarman aptly characterizes as "concerned more with form than substance," were therefore "easy to circumvent" as long as legislatures continued to pay lip service to constitutional principles (p. 62). For example, beginning in the 1920s the NAACP mounted an aggressive assault on residential segregation, which emerged as a decidedly national phenomenon as a result of urbanization in the South and the First Great Migration of blacks to the North. But the federal courts upheld restrictive racial covenants under the doctrine of private property rights until the late 1940s, and they have never seriously challenged "racially motivated but facially neutral zoning" (p. 92) and other public policies that offer ample evidence of state action.[37] In the area of criminal law, the

35. Stability and fluidity are relative concepts, and I do not mean to suggest a calcified racial order between 1900 and 1940. For two differing interpretations of this period, see NEIL R. MCMILLEN, DARK JOURNEY: BLACK MISSISSIPPIANS IN THE AGE OF JIM CROW (1989); J. DOUGLAS SMITH, MANAGING WHITE SUPREMACY: RACE, POLITICS, AND CITIZENSHIP IN JIM CROW VIRGINIA (2002).

36. Pp. 61-97. The only one of these decisions that might seem to be a substantive step forward, the invalidation of a Louisville residential segregation ordinance, pivoted on a defense of property rights more than racial equality and did not noticeably alter housing patterns. *See* p. 82; Buchanan v. Warley, 245 U.S. 60 (1917).

37. Pp. 142-46. Historians and social scientists have emphasized the centrality of state action through public policies that established and reinforced patterns of residential segregation. *See* KENNETH T. JACKSON, CRABGRASS FRONTIER: THE SUBURBANIZATION

Supreme Court expanded the scope of due process during the interwar period to rescue black victims of grossly unjust trials, but these individual (rather than class-action) cases did almost nothing to remedy the structural racism that pervaded the southern legal system (pp. 117-35, 152-58). During the New Deal era, the justices did signal a greater willingness to consider the state action dilemma in cases involving the all-white primary in Texas and the failure of Missouri to provide a substantively equal law school for a black applicant in the *Gaines* litigation brought by the NAACP.[38] The civil rights group ensured that voting discrimination and substantive equality in public education would remain on the judicial agenda during and after World War II, the turning point in Klarman's story.

III. THE WATERSHED

World War II serves as the watershed in Klarman's account of the transformation of race relations in twentieth-century United States history (pp. 173-96). Broader political and ideological trends directly shaped the increased judicial activism of the Supreme Court, because "[n]ot until World War II catalyzed fundamental shifts in U.S. racial attitudes and practices did the justices begin transforming the constitutional jurisprudence of race" (p. 152). The Second Great Migration of black southerners to the urban North altered the calculus of national politics and placed racial equality on the agenda of postwar liberalism. Fighting a war against fascism inspired growing numbers of African-American citizens to mobilize for democracy at home and also encouraged many white Americans to reconsider ideologies of white supremacy and black inferiority. Massive federal spending programs, stretching from the New Deal through the Cold War, launched an economic revolution in the South that underlaid long-term demographic and political changes. The Soviet Union publicized southern lynchings and northern race riots as evidence of American hypocrisy, creating a "Cold War imperative for racial change" (p. 183) that Klarman presents as probably the most significant factor in transforming elite opinion and civil rights jurisprudence. Franklin Roosevelt and Harry Truman also completely reconfigured the makeup of the conservative Court of the early New Deal period, and the new justices began to move aggressively into areas of civil rights

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OF THE UNITED STATES (1985); *see also* DOUGLAS S. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS (1993). Klarman approaches this debate more from the perspective of constitutional theory, with the observation that one's stance on the presence or absence of state action in many areas of racial inequality is largely a product of personal political values. *See* pp. 138-39.

38. Pp. 100-16, 135-42, 146-52, 160-70; Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337 (1938).

and civil liberties.[39] Klarman observes that because of the rapid shift in public opinion that resulted from the dynamics of World War II and the Cold War rationale for black equality, "the justices seemed willing to vindicate nearly any claim for progressive racial reform, even if doing so required considerable legal creativity" (p. 173).

In *Smith v. Allwright*, eight of the justices invalidated the all-white primary in Texas under an expansive interpretation of state-action theory, in the process overruling a unanimous Supreme Court precedent that had reached the opposite conclusion only nine years earlier (pp. 197-204).[40] Klarman argues that several justices "subordinated their understanding of law to politics" (p. 204), and he further asserts that "to focus on judicial turnover as the explanation for *Smith* is to miss the fundamental importance of World War II."[41] This particular Court decision produced immediate and substantial repercussions in southern politics, primarily in the major cities where the percentage of black adults registered to vote increased dramatically (pp. 236-53). Six years later, in response to the NAACP stratagem of using the *Gaines* precedent to challenge the absence of substantive equality in higher education, the Court "functionally overruled *Plessy*" in a pair of cases from Texas and Oklahoma (p. 205). *Sweatt v. Painter* unanimously ordered the admission of a black plaintiff to the University of Texas Law School, under the reasoning that a segregated alternative provided by the state lacked the tangible and intangible qualities necessary for an equal education.[42] "Had separate but equal always meant this," Klarman comments, "the South could not have constructed a social system around it" (p. 208). On the same day in 1950, the *McLaurin* ruling forbade the University of Oklahoma from segregating a black graduate student within its facilities.[43] A majority of states in the border and upper South slowly began to comply with the higher education decisions, but political

39. Klarman cites the role of political process theory in the expansion of constitutional jurisprudence that accelerated in the 1940s, and he also contends that the emergence of the Cold War rationale for racial egalitarianism offers a better explanation than the altered makeup of the Supreme Court for the liberal opinions of the postwar era. *See* pp. 193-96; *see also* Klarman, *supra* note 24.

40. 321 U.S. 649 (1944).

41. P. 200. Lacking direct evidence from internal Court deliberations, Klarman speculates that the justices "must have been tempted" to move closer to democracy at home during a war fought under expanding that ideology abroad, which "probably influenced judicial thinking about the white primary." *Id.* Klarman is probably correct in this assessment, but some scholars may be unconvinced by the either-or need to disaggregate the effect of judicial turnover from the transformative impact of the war, an impulse driven more by the desire to support a specific theory of the development of constitutional law than to portray the multiplicity of causal factors behind most historical events.

42. 339 U.S. 629 (1950).

43. McLaurin v. Okla. State Regents for Higher Educ., 339 U.S. 637 (1950).

resistance effectively nullified the rulings in the Deep South, a subregion that also continued to oppress black voters in extralegal defiance of *Smith* (pp. 204-11, 253-61). Klarman concludes that the voting rights and higher education cases are "best explained in terms of social and political change," including not only the decisionmaking process of the justices but also the evolution of white racial attitudes in the more moderate areas of the urban and upper South where enforcement of these rulings actually happened (p. 209).

As Klarman's primary causal explanation for constitutional jurisprudence, "public opinion" is an undoubtedly important but also fairly elastic framework of analysis. Consider the Supreme Court's precedent-breaking ruling in *Shelley v. Kraemer*, which outlawed judicial enforcement of racially restrictive covenants as a violation of the equal protection clause of the Fourteenth Amendment (pp. 212-17).[44] For several decades, the federal courts repeatedly had found racial covenants to be constitutional as a form of private discrimination beyond the scope of state action. "Rarely have the justices changed their minds about an issue so swiftly and unanimously," Klarman observes, "but then, rarely has public opinion on any issue changed as rapidly as public opinion on race did in the postwar years" (p. 215). But what if *Shelley* had gone the other way, or more likely, if the Court had continued to decline to review challenges to the well-established precedent? Ample evidence exists from the postwar period to demonstrate that, as Klarman also observes, "most northern whites opposed integrating their own neighborhoods, [although] they increasingly favored suppressing the more extreme aspects of southern Jim Crow" (p. 193). In other words, the same climate-of-public-opinion thesis employed to explain *Shelley* could just as easily have explained the opposite result. At any rate, the Supreme Court did not extend the state-action theory in *Shelley* to cover other public policies that entrenched residential segregation in America's metropolitan regions during the postwar decades, including the racially discriminatory effects of municipal zoning and planning policies combined with federal mortgage programs, urban renewal, and highway construction.[45] Klarman's flexible model attributes this to judicial disinclination to "contravene dominant public opinion on housing segregation" (p. 264), but it is also crucial to understand a point not emphasized in this book: that in the metropolitan regions, these state-sponsored patterns of residential segregation would shape

44. 334 U.S. 1 (1948).

45. Pp. 261-74; *see also* JACKSON, *supra* note 37.

the responses of southern (and eventually northern) whites to the school desegregation mandate set forth in *Brown*.[46]

Klarman's account of the internal deliberations among the justices as they contemplated the *Brown* decision is fascinating. More than one-third of the states still mandated school segregation in the early 1950s, and the five cases combined into *Brown* included two from the rural South, two from cities in the border region, and one from the District of Columbia (pp. 292-312). Evidence from the private papers of several justices reveals that a majority "were deeply conflicted" over the case, which the swing faction viewed as a conflict between constitutional law and personal political values (p. 293). Klarman believes that the ruling could have gone either way, but in the end the Court achieved unanimity in the resolution to overturn *Plessy*, following Chief Justice Earl Warren's argument that "we must act but we should do it in a tolerant way" (p. 302). Although *Brown*'s repudiation of statutory school segregation moved the Supreme Court into a leading role in the movement for racial equality, especially compared to the inaction of the political branches of the federal government, Klarman fits the decision into his public opinion framework by noting that white sentiment nationwide roughly divided in half. "*Brown* is not an example of the Court's resistance to majoritarian sentiment," he concludes, "but rather of its conversion of an emerging national consensus into a constitutional command" (p. 310). The 1955 implementation order in *Brown II* provides support for his thesis that the decision did not move very far beyond national public opinion, as the Supreme Court "chose vagueness and gradualism" instead of the NAACP's request for immediate compliance with firm guidelines (p. 313). The justices worried that an unenforceable order would weaken the public authority of the Supreme Court, and the policy of gradualism also mirrored the preferences of white southern moderates and many northern liberals. Decentralized desegregation enforcement on a timetable of "all deliberate speed" appeared to be a pragmatic compromise between constitutional rights and political realities (pp. 312-20).

Brown II invites historians to engage in a different version of Klarman's counterfactual hypothesis that the racial liberalization unleashed by World War II would have undermined Jim Crow even without the intervention of the Supreme Court.[47] Students of the civil

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46. I have argued elsewhere that constitutional law (and political discourse) established a false dichotomy between de jure and de facto segregation during the post-1945 era, in the interlinked areas of housing and education, because a history of state-sponsored policies of residential segregation shaped spatial landscapes and "neighborhood schools" assignment plans in the metropolitan regions of the South and the North. *See* MATTHEW D. LASSITER, THE SILENT MAJORITY: SUBURBAN POLITICS IN THE SUNBELT SOUTH (2005).

47. *See* pp. 344-442; *see also* Klarman, *supra* notes 4-5.

rights movement have highlighted the period of relative calm that followed the initial *Brown* ruling, especially in the residentially segregated metropolitan areas and in the states of the upper and outer South that contained smaller percentages of black residents.[48] Massive resistance to school desegregation fully emerged as a regional political movement only in the aftermath of *Brown II*, and some scholars have concluded that the lesson of "all deliberate speed" is that court-ordered desegregation must be implemented rapidly and comprehensively instead of incrementally to be successful.[49] Klarman observes that the implementation decree "invited delay by recalcitrant school boards and district judges and provided inadequate political cover for those who were willing to comply in good faith" (p. 317). But then he asks rhetorically if the Court's "miscalculation matter[ed] much? Probably not" (p. 320). Moving beyond the speculative, Klarman demonstrates that the *Brown II* warning that popular opposition would not be permitted to delay the enforcement of constitutional law represented little more than a *pro forma* declaration that the justices themselves "did not take seriously" (p. 318). Historians have tended to critique the gradualist and tokenist desegregation plans supported by white southern moderates as obvious subterfuges that subverted the original spirit of *Brown*, but Klarman provides a convincing reminder that the Supreme Court declined to review minimalist formulas approved by district judges and explicitly affirmed allegedly race-neutral pupil placement laws designed to maintain as much segregation as possible by vesting discretion in local officials (pp. 321-43).

During the first decade after *Brown*, the amount of school desegregation accomplished under the "all deliberate speed" regime turned out to be extremely limited. The Supreme Court decision did accelerate desegregation in the border states, although "freedom-of-choice" assignment plans and "neighborhood schools" policies that reflected residential segregation combined to keep most black students in single-race schools (pp. 344-48). In the eleven states that formed the heart of the South, *Brown* triggered a political showdown between white moderates in the metropolitan regions who supported legal compliance and uncompromising segregationists from the rural countryside who demanded massive resistance. Legislatures in the Deep South, along with their counterparts in Virginia and Arkansas, enacted massive resistance programs that revolved around the

48. *See, e.g.*, WILLIAM H. CHAFE, CIVILITIES AND CIVIL RIGHTS: GREENSBORO, NORTH CAROLINA, AND THE BLACK STRUGGLE FOR FREEDOM (1980).

49. The most forceful argument that successful court-ordered desegregation depends upon sweeping change instead of incrementalism can be found in JENNIFER L. HOCHSCHILD, THE NEW AMERICAN DILEMMA: LIBERAL DEMOCRACY AND SCHOOL DESEGREGATION (1984).

abandonment of public education in response to any degree of court-ordered desegregation. President Eisenhower maintained a position of neutrality on *Brown* until 1957, when mob violence and blatant political nullification of a judicial mandate forced him to send federal troops to escort black students to a white school in Little Rock. Moderate leaders in the cities and suburbs tended to favor minimal desegregation rather than outright defiance, but the systematic malapportionment of state legislatures empowered rural counties over metropolitan regions, and public opinion did not shift markedly toward compliance until after segregationist politicians closed public schools in Virginia and Arkansas.[50] Except for *Cooper v. Aaron*, which refused to tolerate violence as a rationale for postponement in Little Rock, the Supreme Court stayed above the school desegregation fray during the decade after *Brown* (pp. 324-34).[51] Moderation ultimately replaced massive resistance across the region, but under policies of gradualism and tokenism only one percent of southern black students attended desegregated schools in 1964 (p. 362). Klarman observes that "[t]he federal judiciary, acting without any congressional or much presidential backing, had proved powerless to accomplish more" (pp. 362-63).

IV. FEDERAL COURTS AND SOCIAL CHANGE

The final chapter of *From Jim Crow to Civil Rights*, nearly one hundred pages in length, provides a detailed narrative of Klarman's backlash thesis that *Brown* played a significant role in the racial transformation of the South only through an indirect and ironic causal chain that ultimately led to the Civil Rights Act of 1964 (pp. 344-442). If *Brown* accomplished only a limited amount of actual desegregation during its first decade, the ruling played a direct role in the radicalization of southern politics by making race the dominant theme for a generation, especially in the most resistant Deep South states targeted by the direct-action wing of the civil rights movement. Klarman offers a two-part argument about the relationship between the Supreme Court and the civil rights movement: "Brown was less directly responsible than is commonly supposed for the direct-action protests of the 1960s and more responsible for ensuring that those

50. Pp. 385-421. If the Supreme Court had jettisoned the "political questions" doctrine and invalidated legislative malapportionment before *Brown*, instead of waiting until the reapportionment cases of the early 1960s, moderates would have enjoyed a much stronger position vis-à-vis massive resisters in southern politics, and "massive resistance might have played out rather differently." P. 415. For an extended version of this thesis, see LASSITER, *supra* note 46.

51. 358 U.S. 1 (1958).

demonstrations were brutally suppressed by southern law enforcement officers" (p. 364). He concedes almost no ground to the scholars[52] who have previously criticized the backlash thesis for failing to connect the dots between *Brown* and civil rights protests such as the Montgomery bus boycott. Instead Klarman argues that the evidence for drawing such a direct connection is weak and inconclusive, and at any rate "[d]eep background forces set the stage for mass racial protest. *Brown* was not the spark that ignited it" (p. 377). *Brown* mattered most, according to Klarman's formula, in the political arena of the Deep South, where the backlash against the Supreme Court empowered racial demagogues who were willing to employ violence against black demonstrators, even after it became apparent that televised confrontations played directly into the tactical goals of the civil rights movement.[53]

The grassroots protests of civil rights activists forced a reluctant federal government to dismantle the legal underpinnings of Jim Crow. Klarman concludes that the moral example of the nonviolent civil rights movement, more than the abstract guarantees of racial nondiscrimination announced by *Brown*, convinced most white Americans to accept the principle of legal equality. The violent crackdowns against civil rights marchers in Birmingham (1963) and Selma (1965), which played out on the television news programs, "transformed racial opinion in the North" (p. 364) and "ultimately rallied national opinion behind the enforcement of *Brown* and the enactment of civil rights legislation" (p. 385). Congress passed the Civil Rights Act of 1964, which outlawed segregation in public accommodations, granted the Justice Department authority to file school desegregation lawsuits against local jurisdictions, and authorized the termination of federal funds for noncompliant districts.[54] One year later, Congress passed the Voting Rights Act of 1965, which provided for federal enforcement of the Fifteenth Amendment and helped to produce a sea change in southern politics.[55] Within a decade, southern states led the nation in the number of black office holders, and the region contained a higher percentage of black students attending desegregated public schools than any other part of

52. *See, e.g.*, Garrow, *supra* note 6.

53. Klarman asks: "Would the same violence have confronted civil rights demonstrators without *Brown*?" He answers that "[o]ne cannot know for certain. . . . How southern whites in this counterfactual universe would have responded if and when black street demonstrations erupted is impossible to tell." P. 442. At some point, readers may begin to wonder if the combination of speculative conclusions and counterfactual scenarios is subject to the law of diminishing returns.

54. Civil Rights Act of 1964, 42 U.S.C. § 2000(a)-(e)(5) (2000).

55. Voting Rights Act of 1965, 42 U.S.C. § 1973 (2000).

the country.[56] Klarman concludes that "[t]he 1964 Civil Rights Act, not *Brown*, was plainly the proximate cause of most school desegregation in the South" (p. 363). When the Supreme Court returned to desegregation jurisprudence in the mid-1960s, the justices "were following, not leading, national opinion. The civil rights movement had overtaken the school desegregation process, and the political branches of the national government were now playing the vanguard role" (p. 343).

The book ends here but the story does not. The most glaring, and most puzzling, omission in *From Jim Crow to Civil Rights* is its failure to examine in almost any depth the actual impact of the 1964 Civil Rights Act, especially vis-à-vis the substantial involvement of the judicial branch in the process of school desegregation during the second decade after *Brown*.[57] Executive branch enforcement of the Civil Rights Act originally targeted the noncompliant rural districts that maintained complete segregation, and federal policy initially required only that localities implement the minimalist "freedom-of-choice" formulas already approved by the courts. The Johnson administration began to demand more substantive integration procedures in the late 1960s, but executive branch oversight played a relatively minor role in the population centers of the urban South, where most districts instead operated under judicial supervision because of ongoing NAACP litigation.[58] Then the Supreme Court transformed desegregation case law in *Green v. New Kent County*, which dismantled the "all deliberate speed" regime and charged school districts with "the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch."[59] Under these expansive guidelines, rooted in the soaring text if not the original intent of *Brown*, the NAACP convinced several district courts to order busing to overcome state-sponsored patterns of residential

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56. *See* QUIET REVOLUTION IN THE SOUTH: THE IMPACT OF THE VOTING RIGHTS ACT, 1965-1990 (Chandler Davidson & Bernard Grofman eds., 1994); *see also* GARY ORFIELD & FRANKLIN MONFORT, NAT'L SCH. BDS. ASSOC., STATUS OF SCHOOL DESEGREGATION: THE NEXT GENERATION (1992).

57. Klarman dedicates only a few pages to the process of school desegregation after 1964. Pp. 341-43, 362-63. For a more balanced account of the role of executive branch agencies and federal courts in the enforcement of *Brown* between the mid-1960s and the mid-1970s, see JAMES T. PATTERSON, *BROWN V. BOARD OF EDUCATION*: A CIVIL RIGHTS MILESTONE AND ITS TROUBLED LEGACY (2001).

58. *See* GARY ORFIELD, THE RECONSTRUCTION OF SOUTHERN EDUCATION: THE SCHOOLS AND THE 1964 CIVIL RIGHTS ACT (1969); *see also* J. HARVIE WILKINSON III, FROM *BROWN* TO *BAKKE*: THE SUPREME COURT AND SCHOOL INTEGRATION, 1954-1978 (1979).

59. 391 U.S. 430, 437-38 (1968).

segregation in urban schools, a novel and far-reaching extension of state-action doctrine. District Judge James B. McMillan pioneered the two-way busing of black and white students to integrate "neighborhood schools" in a landmark 1969 decision that galvanized enormous white resistance but was ultimately affirmed by the Supreme Court in *Swann v. Charlotte-Mecklenburg*.[60]

This combination of NAACP litigation and federal court rulings — not the direct consequences of the Civil Rights Act and certainly not a monolithic expression of "northern public opinion" — played the crucial role in producing the dramatic surge in school desegregation that transformed southern public education in the early 1970s.[61] The ratio of southern black students attending desegregated schools increased to about one-sixth in 1967 and to one-third in 1969 before skyrocketing to more than three-fourths by 1973 (although only about two-thirds of this group attended majority-white schools).[62] Executive branch enforcement deserves a substantial portion of the credit for the acceleration of desegregation during the half-decade after the 1964 Civil Rights Act, but only the emergence of court-ordered busing can explain the mushroom effect that followed the Supreme Court's approval of the expansive remedy in *Swann*. In fact, opponents of busing often cited the text of the Civil Rights Act, in which Congress (at the insistence of northern members) specified that "nothing herein shall empower any official or court of the United States to issue any order seeking to achieve a racial balance in any school by requiring the transportation of pupils or students from one school to another or one school district to another."[63] The escalation of southern school desegregation between 1969 and 1973 also occurred despite the Nixon White House's direct orders to executive branch enforcement officials to avoid busing and to hold integration to the minimum required by

60. 300 F. Supp. 1358 (1969); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971). For the broader story behind the political backlash against court-ordered busing, including the Charlotte litigation, see LASSITER, *supra* note 46.

61. Contrary to the political mythology that court-ordered busing failed completely as public policy, comprehensive plans produced substantial integration in a number of urban school systems in the South during the early 1970s. The key variable for successful implementation involved the prior consolidation of city school systems with surrounding counties, which reduced the problem of "white flight" to the suburbs through the establishment of countywide districts and allowed busing programs to overcome metropolitan patterns of residential segregation. *See* GARY ORFIELD & FRANKLIN MONFORT, NAT'L SCH. BDS. ASSOC., RACIAL CHANGE AND DESEGREGATION IN LARGE SCHOOL DISTRICTS (1988).

62. P. 363. The figures Klarman cites are somewhat inflated because they include black students in predominantly black schools with only a few white students, but the general trajectory of acceleration is accurate. For comparison, nineteen percent of southern black students attended majority-white schools in 1968, and forty-five percent did by 1972. *See* ORFIELD & MONFORT, *supra* note 56, at 14.

63. Civil Rights Act of 1964, 42 U.S.C. § 2000(a)-(e)(5) (2000).

law.[64] In the face of concerted political backlash, the federal judges who advanced the busing jurisprudence grounded their authority primarily in the long shadow of *Brown*'s pronouncement of the constitutional principle that "[s]eparate educational facilities are inherently unequal," combined with an unprecedented willingness to investigate the de jure roots of allegedly de facto segregation resulting from housing patterns and neighborhood schools.[65]

The pivotal role of court-ordered busing in many southern cities challenges Klarman's model of judicial minimalism and requires revision — but not abandonment — of his thesis that Supreme Court decisions never venture far beyond mainstream public opinion. In 1973, in *Keyes v. Denver*, the Court found a large city outside of the South guilty of de jure methods of racial discrimination in the maintenance of segregated neighborhood schools, and the national backlash against busing intensified as civil rights jurisprudence moved northward and westward.[66] A year later, in *Milliken v. Bradley*, the justices overturned a district court plan to consolidate the city and suburban school districts of metropolitan Detroit in order to implement comprehensive two-way busing throughout the region.[67] The specter of public opinion, and the inherent politicization of constitutional law, plainly shaped the outcome of *Milliken*, not least because Richard Nixon had recently appointed four of the justices in the five-member majority that delivered the NAACP's first landmark defeat in school desegregation case law.[68] While *Swann* presents a difficult case, *Milliken* fits more smoothly into Klarman's analytical framework, which offers little comfort to those who believe that the Supreme Court should act as an engine of social change. In the conclusion, he observes that "the justices reflect dominant public opinion too much for them to protect truly oppressed groups" (p. 449). Instead, the "courts are likely to protect only those minorities that are favorably regarded by majority opinion. . . . [N]ot a single Court decision involving race clearly contravened national public opinion" during the era between *Plessy* and *Brown* (p. 450).

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64. *See* GARY ORFIELD, MUST WE BUS? SEGREGATION AND NATIONAL POLICY (1978).

65. Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954).

66. 413 U.S. 189 (1973); *see also* ORFIELD, *supra* note 64.

67. 418 U.S. 717 (1974).

68. Klarman does not mention *Keyes* or *Milliken*, and the book contains only a fleeting reference to *Swann*. Pp. 341-42. Although the book is focused primarily on the Jim Crow regime in the South, only in the final two chapters about *Brown* does the northern context disappear altogether, except for the monolithic role played by northern public opinion in establishing the civil rights legislation of the mid-1960s.

At the beginning of the book, Klarman assures readers that the narrative to follow "makes no claim about how judges *should* decide cases. This is not a work of normative constitutional theory" (p. 5). Perhaps this caveat is true, but the evidence and the arguments marshaled throughout this examination of seventy years of American history consistently point in the same direction: legislative actions matter far more than federal court decisions; the ability of judges to implement social change is quite limited; long-term historical processes shape the evolution of constitutional law far more than vice versa. Near the end, Klarman asks "[w]hat lessons shall we draw from this study about the consequences of Court rulings?" (p. 454). Citing the persistent discrimination against blacks through allegedly color-blind laws and public policies, he points out that "[c]onstitutional interpretation that is limited to form and is unwilling to delve into substance is vulnerable to nullification by determined resistance" (p. 457). Instead of providing positive guarantees of substantive equality, "constitutional rights are generally limited to negative constraints on government" (p. 461). In broader perspective, Klarman warns that more recent judicial activism in areas such as abortion and gay rights, where public opinion is deeply divided and constitutional law is unclear, has galvanized fierce political backlashes reminiscent of the rise of massive resistance to *Brown* (p. 464-66). But since backlashes against the expansion of constitutional rights can also generate counter-backlashes, as well as embolden rights-based movements to push for legislative as well as judicial protection, history remains an unpredictable guide to the future. Still, Klarman cautions that social movements miscalculate when they elevate litigation over alternative strategies, including direct-action protests and legislative victories, because of the "limited capacity of lawsuits alone to produce social change" (p. 467). "Court decisions do matter," Klarman concludes in this formidable and controversial book, "[b]ut they cannot fundamentally transform a nation" (p. 468).