The Court and Social Context in Civil Rights History
Mary L. Dudziak†

From Jim Crow to Civil Rights:
The Supreme Court and the Struggle for Racial Equality,

From Jim Crow to Civil Rights engages a theme that has been at the center of American constitutional theory since at least the 1930s: the role of judicial review in a democracy. The idea that judicial review is in tension with majoritarian politics was most famously developed by Alexander Bickel in The Least Dangerous Branch.¹ Bickel and other scholars in the late 1950s and 1960s wrote in the shadow of the Warren Court, and especially its decision in Brown v Board of Education.² Yet the interplay of judicial power and democratic politics had been firmly on the table prior to the Warren Court’s landmark rulings. In the aftermath of the Court’s 1937 “switch in time that saved nine,”³

† Judge Edward J. and Ruey L. Guirado Professor of Law and History, University of Southern California Law School. A.B. University of California, Berkeley; J.D. Yale Law School; Ph.D. Yale University. Thanks to Davison Douglas, Howard Gillman, and Dennis Hutchinson for helpful conversations, to David Newman for superb research assistance, to Sophia Lee for help with archival records, and especially to Michael Shapiro, a master critic.

¹ Alexander M. Bickel, The Least Dangerous Branch: The Supreme Court at the Bar of Politics 16 (Bobbs-Merrill 1962), introduced and explained the notion of “The Counter-Majoritarian Difficulty.” For an earlier treatment of judicial review and democracy, see James B. Thayer, The Origin and Scope of the American Doctrine of Constitutional Law, 7 Harv L Rev 129, 152 (1893), arguing that as “the judicial duty now in question touches the region of political administration,” the judicial branch “must not step into the shoes of the law-maker,” lest its validity be called into question. For a series of articles that examines the historical origins of the countermajoritarian difficulty, following the development of judicial supremacy, see generally Barry Friedman, The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy, 73 NYU L Rev 333 (1998); Barry Friedman, The History of the Countermajoritarian Difficulty, Part II: Reconstruction’s Political Court, 91 Georgetown L J 1 (2002); Barry Friedman, The History of the Countermajoritarian Difficulty, Part Three: The Lesson of Lochner, 76 NYU L Rev 1383 (2001).
³ The Court’s shift toward a more deferential posture in examining state and federal statutes, called the “switch in time that saved nine” because it is sometimes understood to have resulted from President Franklin Roosevelt’s proposal to increase the number of justices on the Supreme Court in order to obtain rulings more favorable to his New Deal policies, plays an important role in contemporary constitutional theory. See, for example, Bruce Ackerman, A Generation of Betrayal?, 65 Fordham L Rev 1519, 1531 (1997) (arguing that the Court’s shift “assure[d] that the Justices would now cooperate in elaborating the constitutional principles of New Deal Democracy”); Bruce Ackerman, Constitutional Politics/Constitutional Law, 99 Yale L

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the question of whether judicial review is in tension with or protective of democracy informed scholarly discourse3 and appeared in the popular press.5

From the moment the decision was handed down, Brown v Board of Education moved to the center of this debate. While most legal scholars embraced Brown’s outcome, some questioned whether the decision rested on a sound constitutional basis and expressed concerns about whether the ruling reflected the proper role for the courts.6

J 453, 490 (1989) (observing that the Court’s shift during the New Deal period “transformed not merely the structure of normal politics but the methods of constitutional change as well”).

More recently, however, scholars have questioned whether there really was a “switch in time.” See G. Edward White, The Constitution and the New Deal 165 (Harvard 2000) (developing new explanations for the “unusual magnitude of [constitutional] changes” of the early twentieth century as they “cannot be satisfactorily explained as a short-term judicial response to external political pressures generated by the New Deal”); Barry Cushman, Rethinking the New Deal Court: The Structure of a Constitutional Revolution 31 (Oxford 1998) (arguing that the notion that the pro–New Deal decisions of 1937 were “precipitated by the Court-packing plan is untenable”). But see William E. Leuchtenberg, The Supreme Court Reborn: The Constitutional Revolution in the Age of Roosevelt 161–62 (Oxford 1995) (characterizing the “Constitutional Revolution of 1937” as “the President’s one huge success in the Court fight—the legitimation of a vast expansion of the power of government in American life”). See generally Symposium, Moments of Change: Transformation in American Constitutionalism, 108 Yale L J 1917 (1999) (examining the impact of historical context on dramatic legal shifts).


5 See Bixby, 90 Yale L J at 753 (cited in note 4) (describing various instances, including a speech at Carnegie Hall and a radio address, in which prominent figures defended the Court’s independence as a crucial bulwark against victimization of minority groups); Trend Against Court Proposal Is Shown in Poll of Senators, NY Times 1, 15 (Feb 10, 1937) (describing various senators’ responses to the Court-packing plan, including that of Senator Harry S. Truman, who observed that “I am not in favor of packing any court to obtain any special set of decisions any more than I am in favor of jury-fixing”); Comments by Times Readers on the President’s Court Plans, NY Times 70 (Feb 14, 1937) (presenting a wide variety of readers’ opinions on the Court-packing plan, ranging from those describing it as a “work of destruction” to those exhorting that if “the Supreme Court has to be packed, then by all means let’s pack it”).

6 See, for example, Herbert Wechsler, Toward Neutral Principles of Constitutional Law, 73 Harv L. Rev 1, 22–23, 26–34 (1959) (expressing concern that the Brown decision did not rest on a neutral, generally applicable principle); Lino A. Graglia, Disaster by Decree: The Supreme Court Decisions on Race and the Schools 32 (Cornell 1976) (observing that “the Brown case was less a traditional law suit than a call for a social revolution, and in a healthy democracy social revolutions are made by elected representatives authorized to effectuate their political views and accountable for the results”); Raoul Berger, Government by Judiciary: The Transformation of the Fourteenth Amendment 133 (Harvard 1977) (discussing how, in order to remedy school segregation, the Court had to conclude that the political process “could not be trusted” and that “in consequence the Justices had to rewrite the Constitution”). See also Jack M. Balkin, Brown v. Board of Education: A Critical Introduction, in Jack M. Balkin, ed, What Brown v. Board of Education Should Have Said: The Nation’s Top Legal Experts Rewrite America’s Landmark Civil Rights Decision 3, 4 (NYU 2001) (observing that in the decade after Brown, “[e]ven many defenders of the result had little good to say about the opinion, arguing that its overruling of previ-
debate over Brown informed a generation of scholarship on American constitutional theory. Within this context, Bickel’s countermajoritarian analysis set the terms of debate for many years.

Richard Kluger’s magisterial history of the legal struggle that resulted in Brown did not set out to undermine Bickel, but the force of his narrative supported a counterargument: that judicial review aided democracy, for it was in the courts that a major achievement in civil rights, aiding democratization, was accomplished. Brown itself was twenty-one years old when Kluger brought his narrative power to bear on the story. In his hands, Brown was a sweeping story of heroism and enlightenment, resulting in nothing less than a “reconsecration of American ideals.” In this work and others, judges were the “unlikely heroes” of a needed revolution in American society.

Although these works did not speak directly to the countermajoritarian critique, the image of judges responding to compelling needs that the political branches either would not or could not address was a powerful rejoinder. Kluger’s title itself made the point: overcoming a long history of Jim Crow was a matter of Simple Justice. That the Court stepped in when Congress had not was not a difficulty in this narrative. Chief Justice Warren and his colleagues were integral to the story’s happy ending, which was Brown. Kluger became the exemplar of a consensus narrative that saw Brown as a product of American legal progress.

ous precedents was abrupt and unexplained and that its use of social science to demonstrate the harm that segregation imposed on black children was unconvincing”.

7 See, for example, John Hart Ely, Democracy and Distrust: A Theory of Judicial Review 32–33 (Harvard 1980) (arguing that judicial review in a democracy is legitimate as a corrective when the majoritarian political process fails); Mary L. Dudziak, The Politics of “The Least Dangerous Branch”: The Court, the Constitution, and Constitutional Politics Since 1945, in Jean-Christophe Agnew and Roy Rosenzweig, eds, A Companion to Post-1945 America 385 (Blackwell 2002).

8 For Kluger’s detailed narrative account celebrating the Brown decision, see Richard Kluger, Simple Justice: The History of Brown v. Board of Education and Black America’s Struggle for Equality (Knopf 1975). See also Robert Lowe, Richard Kluger’s Simple Justice After 29 Years, 44 Hist Educ Q 125, 130–32 (2004) (suggesting that Kluger’s sweeping narrative of “Black genius, Black struggle, and Black courage,” makes clear that, “Brown—despite its unfulfilled promise—should not be relegated to an archive shelf or reduced merely to a source of authority that both the left and right can claim to support policy agendas today”).

9 Kluger, Simple Justice at 896 (cited in note 8).

10 See generally Jack Bass, Unlikely Heroes (Alabama 1981) (describing the federal judges, chiefly those of the Fifth Circuit, who would implement Brown); Jack W. Peltason, Fifty-Eight Lonely Men: Southern Federal Judges and School Desegregation (Harcourt, Brace & World 1961) (providing a similar account of southern federal district and appellate judges enforcing, sometimes reluctantly, the Brown decision).

The next challenge in the debate about courts and rights came from the left. Two years after *Simple Justice* was published, Alan Freeman raised the question of whether the Supreme Court’s civil rights cases merely legitimized government action and hindered civil rights politics by causing activists to place undue reliance on courts. In 1991, political scientist Gerald Rosenberg published *The Hollow Hope*. Courts, he argued, had not operated as effective instruments of social change. Instead, by holding out the hope of social change, they diverted the movement’s attention from the political work that would ultimately be more effective. This critique seemed to destabilize the heroic vision of the courts in works like Kluger’s. It also undermined the countermajoritarian critique: if the courts didn’t do all that much, and if what they did was largely in keeping with majoritarian norms, then the courts were not so countermajoritarian after all.

Klarman enters the debate at this point. An early draft of his manuscript was titled “Neither Hero Nor Villain: The Supreme Court, Race, and the Constitution in the Twentieth Century,” and the metaphor of hero or villain remains a theme in the final text. Through this theme, Klarman seems to situate himself between Kluger and Rosenberg. The courts are not the hero of the story, generating needed social change, but neither are they the villain, deflecting the movement’s energies from political struggles more likely to be successful. Along the way, Klarman strikes a blow at the countermajoritarian thesis, for Klarman imagines a court without significant agency. The Court does not shape American society. Instead, the Court follows the flow of cultural mores, reflecting changes that have their source elsewhere.

Historical scholarship that has emerged in the years since Kluger set the bounds of the consensus story of *Brown* helps us explore the past social contexts that are so critical to Klarman’s conception of the Court’s actions, as well as the consequences of judicial action. Critical examination of social context and consequences can illuminate


13 Gerald N. Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* 70–71 (Chicago 1991) ("Before Congress and the executive branch acted, courts had virtually no direct effect on ending discrimination in the key fields of education, voting, transportation, accommodations and public places, and housing.").

whether this mirroring role of courts, rather than a more active, shaping role, best explains the impact of the Supreme Court in American civil rights history.

This Review will first discuss Klarman's contributions, paying particular attention to a central theme: his view of the relationship between law and society, or law and social context. Because social context plays an important causal role in Klarman's thesis, Part II will examine one aspect of social context particularly important to Klarman: the role of African-American migration. Part III will then revisit Brown's consequences, examining the international impact of Brown.

I. LAW AND SOCIAL CONTEXT

Each of Klarman's chapters focuses on key cases during different time periods. Chapters are divided into three sections: Context, Cases, and Consequences. Sections are then broken down by subject area. For example, the sections on cases and consequences in the chapter on the era of Plessy v Ferguson address the topics of segregation, disenfranchisement, jury service, and "separate but unequal." This organization can be frustrating at times, as Klarman sometimes discusses a given case at three places in a chapter. The structure, however, helps illuminate Klarman's objectives and methodology. He sees "context" as essential to understanding the cases. His principal interest is in measuring the impact, or "consequences," of each line of cases.

For the Plessy era, the context of post-Reconstruction race politics is endemic racism. This context affected the Court's action. Klarman argues that the Plessy-era cases reflected broader social and political attitudes at the time. Even had the rulings been to the contrary, little would have changed because "the oppression of blacks was largely the work of forces other than law" (p 10). The Supreme Court's opinion in Plessy is regularly criticized, but in Klarman's hands it appears as simply an expected product of its times. Segregation and disenfranchisement were such widely accepted practices that the Court could not have upended them. And since members of the Court are themselves a product of their times, the Court could not be expected to act in a way that was contrary to accepted mores. The Court is not the villain in Plessy, as it often seems to be in constitutional law classes. It is a product of its times.

In a chapter on the Progressive Era, Klarman sees the Court from 1908 to 1918 operating "in a racial context even more oppressive than that of the Plessy era" (p 62). Because context matters so much to

15 163 US 537 (1896).
Klarman’s thesis, he finds a number of Court decisions upholding rights of African-Americans to be paradoxical. This apparent tension provides an occasion for Klarman to qualify the context-drives-doctrine thesis: “where the law is relatively clear, the Court tends to follow it, even in an unsupportive context” (p 62). But clear law would take the Court only so far. “Whatever their disjunction from popular opinion, Progressive Era race decisions proved inconsequential” (p 62).

Here and elsewhere, an important contribution of Klarman’s book is his detailed and careful reconstructions of the Court’s deliberations in key cases. Klarman notes that, before World War II, the Court did invalidate some Jim Crow laws, for example the “grandfather” clauses designed to ensure that poor, rural whites would not suffer from the literacy tests used to exclude blacks from voting (p 70). However, Klarman’s explanation for these seeming victories for civil rights is that “[t]he issue was easy for justices committed to at least minimalist constitutionalism,” and that they “may have been consonant with dominant national opinion” (p 70–71). Klarman concedes that the same argument cannot be made of Buchanan v Warley, in which the Court struck down residential segregation ordinances requiring that property in white neighborhoods be sold only to whites and property in black neighborhoods be sold only to blacks (p 79). However, he contends that Buchanan “reflects the justices’ robust commitment to property rights more than any shift in racial proclivities” (p 80). In examining these cases, Klarman demonstrates with examples the bottom line that the Progressive Era did not yield substantial changes in the Court or in the rights of African-Americans. “Progressive Era rulings displayed no significant change in judicial racial attitudes. Nor did they produce significant changes in racial practices” (p 96).

An important aspect of the “context” from 1908 to 1918 was the domestic and international developments leading up to and through U.S. involvement in World War I. While the postwar context was an occasion for the internationalization of U.S. civil rights discourse,

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16 245 US 60 (1917).
Philip Klinkner and Rogers Smith argue that World War I did not produce meaningful civil rights reform.¹⁸ For Klarman, the war’s importance began after the armistice was signed. His chapter on “The Interwar Period” begins with the suggestion that “[e]xtralegal forces connected with World War I helped transform American race relations” (p 100). The relevant forces providing the context for postwar race cases were domestic. The most important was African-American migration from the South to the North. While progress was hampered by the Great Depression, many New Deal programs aided African-Americans, fueling a new involvement in electoral politics, at least in areas where African-Americans could vote. During the 1930s, “scientific” theories of racial inequality were discredited as Nazi eugenic practices came to light. For Klarman, positive Court decisions in the areas of criminal procedure, voting rights, housing, and education “reveal the justices’ emerging sensitivity to racial injustice” (p 152).

Still, there were profound limits to social change during these years. Migration provided new opportunities, but restrictive housing practices in the North forced African-Americans into segregated neighborhoods. The Court stepped in to redress egregious treatment of African-Americans in southern state courts. Klarman attributes these developments not to the “clear law” qualification of his thesis in the Progressive Era, but instead to the social context. “The nation and the justices took a dimmer view of lynching—and lynch law—after World War I” (p 122), and “as blacks made economic, political, cultural, and educational progress, barring them from jury service increasingly seemed anomalous to progressive white southerners” (p 127). Still, he sees these cases as having little impact. “[The interwar] reduction in lynchings was not attributable to the Court,” and southern courts could prevent blacks from sitting on criminal juries through other means (p 153). Similarly, he sees important cases on voting, housing, and education to have little impact. “Blacks were not going to vote, no matter how that debate was resolved. . . . The invalidation of residential segregation ordinances had little or no effect on segregated housing patterns. . . . The decision[s] affirmed the constitu[ency]ality of public school segregation” (p 159–60). While Klarman sees this as an

¹⁸ Philip A. Klinkner, with Rogers M. Smith, The Unsteady March: The Rise and Decline of Racial Equality in America 112–15 (Chicago 1999) (describing the factors “limiting the cause of racial equality in World War I,” including military discrimination, intelligence testing that purported to show “the mental deficiencies of blacks,” white Americans’ “profoundly reactionary mood,” widespread violence, and “the conservative stance taken by most black leaders during the war”).
era of progress, there would not be “[f]undamental [ ] change” in civil rights until “the cataclysmic intervention of World War II” (p 115).

So important was World War II to the struggle to overturn Jim Crow that Klarman devotes two chapters to it. The war “era” extends from 1940 to 1950, however, so Klarman’s consideration of war-related developments begins after the war in Europe has started, and after anti-Nazism has had a palpable impact on American law and politics. He also extends this “era” five years past the close of World War II, and well into the Cold War years. Herein lie some difficulties. The construction of a historical timeline is intricately tied to Klarman’s examination of his all-important “contexts.” The years 1940-45 and 1945-50 are generally thought of as having different “contexts.” Klarman conflates the crucial early Cold War years with World War II. During World War II, international affairs affected U.S. civil rights discourse, as Klarman recognizes, but the diplomatic effect was not nearly as deep as it would be after the war. The reason that the “Cold War imperative” was a Cold War imperative, not just a war imperative, was the radically altered context of global politics after World War II. The U.S. was no longer one nation among allies fighting the Axis. Europe was decimated by war, and the rebuilding nations of Western Europe needed massive American support. This created a void in international politics, just as fears about Soviet aggression heightened. The U.S. stepped into this void. This was a new role for the nation, which was now seen as the leader of the “free world.”

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19 See Bixby, 90 Yale L J at 753–59 (cited in note 4) (providing a rich analysis of the impact of rising antifascism on civil rights discourse before World War II).

20 On antitotalitarianism in civil rights discourse, see id; Richard A. Primus, The American Language of Rights 177 (Cambridge 1999) (arguing that the “American reaction against European totalitarianism became so powerful a force in the world of legal and political ideas that it sometimes surpassed, though without ever completely eclipsing, the influences of the ideas and experiences of older eras”); Margaret Raymond, Rejecting Totalitarianism: Translating the Guarantees of Constitutional Criminal Procedure, 76 NC L Rev 1193, 1196 (1998) (“Throughout the postwar period, judges invoked the specter of totalitarianism as part of the struggle to define the scope of constitutional limits on police authority.”). On the use of race in wartime anti-U.S. propaganda, see John W. Dower, War Without Mercy: Race and Power in the Pacific War 208 (Pantheon 1986) (observing that the “Japanese were well-informed about segregation and the lynching of blacks in the United States, for example, and the more blatantly racist statements of U.S. officials were invariably publicized”).

21 See Mary L. Dudziak, Desegregation as a Cold War Imperative, 41 Stan L Rev 61, 118 (1988) (detailing the distinctive impact of the Cold War in aligning the interests of white Americans, black Americans, and the federal government, given that widespread international awareness of U.S. race discrimination undermined the U.S. image abroad and undermined U.S. efforts to save the world for democracy).


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the Cold War, international scrutiny of U.S. race relations sharpened. Fearing a nuclear holocaust, Americans came to believe that peace rested squarely on U.S. Cold War leadership. The issue of race in the U.S. was a potential Achilles' heel. The Soviets took advantage, and by 1949 they used race in America as a principal propaganda theme. In this context, U.S. race relations became a major focus of concern for the U.S. State Department. Through this era, “domestic” law and politics played out on a world stage. From Klarman’s perspective, these different contexts may have affected the Court in similar ways, but an important difference arises when considering the consequences of the Court’s rulings. This issue will be discussed in Part III.

Klarman examines six different types of race-related cases from 1940 to 1950: voting, higher education, residential segregation, transportation, criminal procedure, and peonage. While many long-term trends affecting civil rights began before World War II, including urbanization, the Great Migration, industrialization, and the educational advancement of African-Americans, he argues that “[t]hough these long-term forces were important, World War II’s contribution to progressive racial change cannot be overstated” (p 174). For Klarman, war changed the social context, bringing about major changes in the racial attitudes of white Americans. This change in the social context in turn affected the Court. Relevant changes were economic, political, and cultural. First, World War II was described as a war to protect democracy and equal rights. In this context, U.S. racism and disenfranchisement seemed hypocritical. In addition, the horror of Hitler’s racial policies made many Americans question their own racial attitudes.

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24 See Michael S. Sherry, In the Shadow of War: The United States Since the 1930s 123–56 (Yale 1995) (tracing the rise of the notion that American militarization was a necessary bulwark against Soviet power); Paul S. Boyer, By the Bomb’s Early Light: American Thought and Culture at the Dawn of the Atomic Age 342–43 (Pantheon 1985) (chronicling the rise of the conviction that U.S. military, nuclear, and political supremacy was the best way to prevent a nuclear war).


26 See id at 48–56 (describing the U.S. State Department’s attempts to tell “its side of the story of race in America”); Thomas Borstelmann, The Cold War and the Color Line: American Race Relations in the Global Arena 122–23 (Harvard 2001) (describing the U.S. State Department’s various attempts to dispel the “worst assumptions about the state of race relations in the United States”).


28 See Peter Kellogg, Civil Rights Consciousness in the 1940s, 42 Historian 18, 30–36 (1979) (arguing that a pro-civil rights consciousness developed among liberals in the 1940s, but that during and after the war, the focus on distinguishing democracy from fascism and communism meant that the “concern was not with black people but with white people”).
Second, the war brought increased economic opportunities for African-Americans, helping to create an African-American middle class, which, Klarman argues, would become crucial to the civil rights movement in the following decade. Third, African-American migration to northern cities increased their political power, leading African-Americans to seek concessions from the federal government, particularly from northern politicians who needed their votes to stay in office. Fourth, as African-Americans returned home from the war, they refused to be treated as inferiors by southern whites, having been treated well by foreign civilians who saw them as equals to their white American counterparts. Fifth, the emerging Cold War with the Soviet Union forced Americans to confront the enormous gulf that existed between the democracy that Americans described to other nations and the democracy practiced at home. For Klarman, “[t]he importance of the Cold War imperative for racial change is hard to overstate” (p 183). Sixth, the expansion of the federal government through the New Deal and the war gave the government the ability to enforce civil rights laws, especially in southern states that relied heavily on federal funding. Lastly, the South itself underwent significant changes during this era. As urbanization, industrialization, and African-American and white education increased, white racial opinions (marginally) liberalized. National highways, airplanes, radio, and television broke down regional barriers, leading to a slow erosion of traditional regional mores. African-American voter registration increased, as did their economic power as the economy expanded. This erosion of southern white power and the traditional white supremacy led to violent reprisals (such as the blinding of veteran Isaac Woodard as he returned home, in uniform), but these “resistance efforts often backfired, unintentionally accelerating racial reform” (p 185).

According to Klarman, the conjunction of these factors eventually led to the beginning of major changes in the next two decades. Klarman concedes that not everything brought on by the war led to racial progress: McCarthyism and a surge of violence against African-Americans after the war retarded the progress of social change. Yet these forces were not able to stop what would soon become a full-fledged civil rights movement. “[T]he overall extralegal context was as favorably disposed as it had ever been toward advances in civil rights” (p 193).

Klarman’s view is that this changed context resulted in legal change. He sees the Court responding in this period by handing down rulings that were generally consistent with the changes in society. For
example, *Smith v Allwright* struck down the white primary in Texas. “Though the *Smith* opinion and the surviving conference notes do not explicitly refer to the war, the justices cannot have missed the contradiction between a war purportedly being fought for democratic ends and the pervasive disenfranchisement of southern blacks” (p 200). According to Klarman, the ruling did not help alter the social context, as popular opinion, particularly in the North, supported the outcome. Klarman sees key cases overturning segregation in graduate and professional schools in the same way. *Sweatt v Painter* and *McLaurin v Oklahoma State Regents for Higher Education* “represented clear changes in the law” (p 208), but they “are best explained in terms of social and political change” (p 209), such as the integration of baseball and the military, the presence of the first African-American law clerk for the Court, and the foreign policy arguments made in Justice Department amicus briefs.

Klarman then describes the social, political, and legal consequences of the Court’s decisions. He argues that the impact of rulings depended on the social context. If social context was receptive, a ruling would have an effect, as was the case with *Smith*. However, the result was different for *Shelley v Kramer* in 1948, which held that enforcement of racially restrictive real estate covenants violated the Constitution. According to Klarman, when the Court decided *Shelley*, whites throughout the country were not yet willing to open the streets of their communities to African-Americans. Giving African-Americans the ability to vote was one thing, letting them live next door quite another. As a result, the ruling “had essentially no impact on the amount of residential segregation” (p 262) because “[e]ven as whites became more supportive of civil rights after the war, they still generally favored residential segregation” (p 264). For Klarman, legal change is so dependent on social context that changes in the law were usually effective only when whites were willing to tolerate them (p 7).

Klarman devotes his final two chapters to school desegregation. Although he covers less historical ground in this part of the book, these chapters are Klarman’s strongest and most original. He argues

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32 334 US 1 (1948).
33 These chapters draw heavily on Klarman’s previously published articles, so the arguments will not be new to those familiar with his earlier work. See Michael J. Klarman, Brown, Racial Change, and the Civil Rights Movement, 80 Va L Rev 7, 85 (1994) (introducing his “backlash thesis” that “Brown was indirectly responsible for the landmark civil rights legislation of the mid-1960s by catalyzing southern resistance to racial change”); Michael J. Klarman, How Brown Changed Race Relations: The Backlash Thesis, 81 J Am Hist 81, 81–82 (1994) (arguing that
that the social context was not favorable for Brown. He suggests that, in the 1950s, few people expected that school segregation, particularly at lower educational levels, would be overturned by the Court. Klarman carefully dissects the views of Supreme Court justices as Brown came before the Court. One of the great contributions of this book is Klarman’s detailed analysis of evidence from the justices’ papers. Klarman finds that some of the justices were conflicted over the issue, while others had unambiguous positions. He sees each of them, however, as wrestling, in some form or another, with a tension between what the law said and what they thought the law should be. For Justices Frankfurter and Jackson, Klarman writes, “In Brown, the law—as understood by [them]—was reasonably clear: Segregation was constitutional” (p 308). They ultimately joined an opinion that went against their understanding of the law, and Klarman argues that this fact “suggests that they had very strong personal preferences to the contrary” (p 308). If social context drives law, why did these justices vote against prevailing mores? Klarman suggests that the elite were ahead of the rest of the country in racial attitudes. In this way, he builds social context into the story of Brown, even though the Court was not quite in step with the entire country. The elite was ahead, but the nation was moving along the same trajectory.

In this account, the “all deliberate speed” formulation of the second decision in Brown v Board of Education (“Brown II”) seems almost inevitable. Brown II was “a solid victory for white southerners” (p 318), and signaled that real desegregation would not occur for almost a decade in some parts of the South. After Brown II, the Court

“scholars may have exaggerated the extent to which the Supreme Court’s school desegregation ruling provided critical inspiration to the civil rights movement,” and that Brown’s most fundamental “indirect contribution to racial change” was “backlash against Brown”).

34 For other important works on the Court’s deliberations in Brown, see Mark Tushnet, with Katya Lezin, What Really Happened in Brown v Board of Education, 91 Colum L Rev 1867, 1869 (1991) (questioning the “standard version of what happened in Brown,” noting that “the personal contributions and interrelationships of [Justices] Vinson, Frankfurter, and Warren significantly affected the final outcome of Brown,” and focusing more intently on “the different ambivalences of Justices Jackson and Frankfurter over the question of what the Supreme Court could properly do about the issue of segregation by law”); Dennis J. Hutchinson, Unanimity and Desegregation: Decisionmaking in the Supreme Court, 1948–1958, 68 Georgetown L J 1, 3 (1979).

35 Klarman argues that cultural elitism is one of the stronger explanations for why the justices may have had such deep personal preferences against segregation at a time when the country was fairly divided. Since the judges were at a higher educational and socioeconomic status than most Americans, their views reflected a bias common to people of similar background. “Racial attitudes and practices were changing dramatically in postwar America. As members of the cultural elite, the justices were among the first to be influenced” (p 309). Thus, although school desegregation may have happened without Brown at some later point in history, the justices, faced with the issue in 1954, were willing to overturn a practice that a large percentage of the American population deemed constitutionally, and morally, acceptable.

36 349 US 294, 301 (1955).
backed away from cases that might provoke white southerners. However, the Court could not avoid these issues entirely, and it was forced to act when the governor of Arkansas blocked court-ordered desegregation in the Little Rock crisis. Klarman sees a pattern consistent with his context-drives-law thesis: “Aside from their condemnation of outright defiance in the Little Rock case, the justices withdrew almost entirely from the school desegregation arena for nearly a decade. When they reentered in 1963–1964, they were following, not leading, national opinion” (p 343).

Klarman’s final chapter is a lengthy discussion of the direct and indirect effects of Brown on many aspects of American life. In perhaps his most controversial argument, Klarman maintains that Brown did not foster meaningful civil rights reform or inspire the civil rights movement. Instead, “[o]nly the violence that resulted from Brown’s radicalization of southern politics enabled transformative racial change to occur as rapidly as it did” (p 442).

In his consideration of the consequences of Brown, Klarman first examines its direct legal effects in various regions of the country. In many western states, the ruling had little practical impact because desegregation had already occurred by the time Brown was decided. Many border states were already on their way to desegregation, and so the ruling simply accelerated the peaceful but slow transition already occurring. In the South, however, particularly the Deep South, the decision was met with strong resistance. Southern school boards did what they could to evade the law (p 350). Desegregation took place only when African-American parents could convince a federal judge to issue a court order mandating desegregation (p 351). Yet African-Americans sued school boards only infrequently because they feared physical retaliation by whites and because they could often not raise the necessary funds to finance litigation. In addition, “[p]ersonal

38 Klarman initially presented this point, known as the “backlash thesis,” in Klarman, 80 Va L Rev at 85 (cit in note 33). The scholarly reaction was extensive. See, for example, David Garrow, Hopelessly Hollow History: Revisionist Devaluing of Brown v. Board of Education, 80 Va L Rev 151, 154–55 (1994) (castigating Klarman for minimizing the importance of Brown, citing in particular “the profusion of firsthand evidence that testifies to just how strong an influence Brown had on Montgomery’s black activists”); Gerald Rosenberg, Brown is Dead! Long Live Brown!: The Endless Attempt to Canonize a Case, 80 Va L Rev 161, 162 (1994) (taking a different tack, stating that “Klarman’s attempt to find some beneficial effect from Brown is clever and plausible, but ultimately unpersuasive”); Mark Tushnet, The Significance of Brown v. Board of Education, 80 Va L Rev 173, 174 (1994) (expressing concern that “Klarman’s account suffers from a combination of the lawyer’s specific professional deformation and a determinist account of social change”). See also James T. Patterson, Brown v. Board of Education: A Civil Rights Milestone and Its Troubled Legacy xxii (Oxford 2001) (describing the scholarly reaction to Brown).
and political incentives not to press desegregation, together with a legal standard that conferred broad discretion, led most federal judges to countenance delay” (p 357). The result was paltry desegregation in the South. He concludes that Brown had minimal direct influence on actual desegregation. Instead, “[t]he 1964 Civil Rights Act, not Brown, was plainly the proximate cause of most school desegregation in the South” (p 363).

The case had various “indirect effects,” but changing southern attitudes was not one of them. “Brown changed the minds of few southern whites, who generally ridiculed the decision rather than being educated by it” (p 368). One indirect effect was some civil rights activism. “Southern blacks took other, mostly litigation-based action as well ‘to strike while the iron is hot’” (p 369), suing to desegregate buses, city parks, golf courses, and railroads. Still, “the evidence that Brown directly inspired [civil rights] protests is thin” (p 370). According to Klarman, “The outbreak of direct-action protest can be explained independently of Brown. Background political, economic, social, and ideological forces had created conditions that were ripe for racial protest” (p 374). However, despite this short-term setback, “over the long term, Brown may have encouraged direct action by raising hopes and expectations, which litigation then proved incapable of fulfilling. Alternative forms of protest arose to fill the gap” (p 381).41

Most central for Klarman, Brown inspired a white backlash (p 385). After Brown, southern whites no longer elected racial moderates (p 386). Instead, southern whites chose candidates who would disregard Brown and maintain segregation at all costs. “Political contests in southern states quickly assumed a common pattern: Candi-

39 To gauge Brown’s impact, Klarman relies on school attendance figures, though he notes that such data are imperfect. The number of African-Americans going to school with whites in southern states was markedly low; in some locales, only a handful of African-American students sat in the same classrooms as white students. For example, in Nashville in 1960, only 42 of the district’s 12,000 African-American students were sent to integrated schools; in North Carolina, only 40 of 300,000 African-American students attended integrated schools (p 360).

40 According to Klarman, among these background forces were the rising economic status of African-Americans in the South, better education for both African-Americans and whites, and greater restraints on white violence. Moreover, he argues that the Cold War and McCarthyism, as well as the decolonization of Africa, explain why the protests took off in the early 1960s as opposed to five years earlier (p 375–76). Klarman writes that the ruling, in the short term, may have even discouraged direct-action protest by encouraging litigation as the preferred means of fighting segregation (p 377).

41 See also Mark Tushnet, Making Civil Rights Law: Thurgood Marshall and the Supreme Court, 1936–1961 chs 19–20 (Oxford 1994) (observing that one reason that litigation had a limited impact was the pressure, legal and otherwise, brought by southerners and southern states to suppress the activities of the NAACP). When the NAACP was thus reduced in strength in the South, “blacks turned elsewhere for leadership” (p 384), often joining religious groups that planned to fight segregation through methods other than litigation.
dates tried to show that they were the most 'blatantly and uncompromisingly prepared to cling to segregation at all costs'" (p 390). This radicalization of southern politics in turn led to a sharp increase in violence. "The post-Brown racial fanaticism of southern politics produced a situation that was ripe for violence," much of which was "encouraged, directly or indirectly, by extremist politicians, whom voters rewarded for the irresponsible rhetoric that fomented atrocities" (p 441). As a result, in many areas in the South, race relations worsened and the political center shifted further to the right (p 392). The violence had a different impact on national politics, as a horrified nation watched the brutality on their television screens. Klarman concludes:

*Brown* was less directly responsible than is commonly supposed for the direct-action protests of the 1960s and more responsible for ensuring that these demonstrations were brutally suppressed by southern law enforcement officers. That violence, when communicated through television to national audiences, transformed racial opinion in the North, leading to the enactment of landmark civil rights legislation (p 364).

But at least two decades of civil rights scholarship would question Klarman's starting point. *Brown* is not thought of by civil rights scholars to be "directly responsible" for direct action. Instead, civil rights protests long preceded *Brown* and often grew out of what Charles Payne has called the "organizing traditions" of local communities. Earl Warren's *Brown* opinion did not put the fire hose in the hands of Bull Connor's firefighters. Horrific violence against African-American

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42 Klarman offers three reasons why *Brown* inspired such radicalization and violence when earlier events had not: the decision was harder for southern whites to ignore due in large part to the national attention it received; it represented federal interference in southern race relations, an interference which whites would not brook; and it embraced integration sooner than most whites were willing to tolerate (p 391).

insurgency had a long tradition before Brown. Insurgency had a long tradition before Brown. Civil rights demonstrators challenged white supremacy in the South, and they would have received the terrible blows struck against their predecessors with or without the Brown opinion. Yet the “backlash thesis” does fit the politics underlying the 1964 Civil Rights Act. The national revulsion to Birmingham and other scenes of violence led to broad national support for a civil rights bill. Interestingly, it is in the backlash thesis that Klarman finds an impact of law (Brown) on social context. The “social context” to which law (the Civil Rights Act) was responsive turns out to be constructed, in part, by the law (Brown) itself.

II. CONTEXT: DESEGREGATION AND THE DECLINE OF THE CITY

For Klarman, social context, not judicial action, drives social change. Courts track more fundamental changes in society. That is why the Court is neither hero nor villain in this rendering of civil rights history. Numerous factors shaped the twentieth century social context that Klarman regards as critical to the development of civil rights law: changes in transportation, communication, the structure of the workplace, the economy, the role of government in the lives of individuals, and countless other variables. Two changes that figure prominently in From Jim Crow to Civil Rights are the migration of African-Americans from the South to the North and West and the impact of wartime, particularly the Cold War, on American society. This Part will explore whether the broader context of African-American migration raises questions about Klarman’s thesis that social context drives law. I will argue for an alternative thesis, that causality is dialectic, not linear: that law and social context are mutually constitutive. Part III will explore whether the impact of the Cold War requires a rethinking of Brown’s “consequences.”

44 See, for example, Sally E. Hadden, Slave Patrols: Law and Violence in Virginia and the Carolinas (Harvard 2001) (examining public enforcement of the Virginia and Carolina slave systems from 1700 to 1865); Theodore Rosengarten, All God’s Dangers: The Life of Nate Shaw (Chicago 1974) (recounting the life of a black sharecropper who was involved with the Alabama Sharecropper Union and, as a result, faced various forms of persecution, including lengthy imprisonment); Black Rebellion: A Selection from Travellers and Outlaws (Arno 1969), reprinting portions of Thomas Wentworth Higginson, Travellers and Outlaws: Episodes in American History (Lee and Shepard 1889) (Higginson, an ardent abolitionist and commander of a freed slave company during the Civil War, originally published these five studies of slave revolts in the Atlantic Monthly during the 1850s and 1860s.); Herbert Aptheker, American Negro Slave Revolts (International 1963) (chronicling the history of slave revolts and reprisals from 1791 to 1860).

45 Klarman himself illustrates this point, describing the unequivocal response of southern whites to African-Americans attempting to exercise their rights during the interwar period. Among the most striking incidents were “[b]lack soldiers [who] were assaulted, forced to shed their uniforms, and sometimes lynched. In Orange County, Florida, thirty blacks were burned to death in 1920 because one black man had attempted to vote” (p 105).
that Klarman's focus on domestic consequences misses Brown's international impact: its role in reconstructing the global image of the United States.

The migration that Klarman rightly views as aiding midcentury civil rights reform also, paradoxically, created conditions that would undermine the implementation of Brown. Due to migration, by 1960 the majority of African-Americans lived in cities, mostly in the North.\textsuperscript{46} Thomas Sugrue has shown that some American cities were in decline after World War II despite the nation's economic growth.\textsuperscript{47} Economic growth was uneven. There were "significant regional variations and persistent inequality. . . . The steady loss of manufacturing jobs in northeastern and midwestern cities occurred at the same time that millions of African Americans migrated to the urban North."\textsuperscript{48} Sugrue argues that the "complex and pervasive racial discrimination that greeted black laborers in the land of hope ensured that they would suffer disproportionately the effects of deindustrialization and urban decline."\textsuperscript{49} Poverty was not new in the post–World War II years. However, the poor were now concentrated and segregated in America's inner cities. These poor populations were overwhelmingly persons of color.\textsuperscript{50} In other words, many African-Americans migrated to segregated urban ghettos in soon-to-be troubled cities. Their segregated neighborhoods would undermine the possibility of integration promised in Brown. In this way, desegregation collided with the decline of the city.

Residential segregation was not, however, simply one of many "background forces" outside the law (p 377). Law set the conditions that fostered segregated neighborhood patterns in the urban North.\textsuperscript{51} Justice William O. Douglas noted this in his concurring opinion in

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\textsuperscript{46} See Thomas J. Sugrue, \textit{The Origins of the Urban Crisis: Race and Inequality in Postwar Detroit} 7 (Princeton 1996) ("By 1960, a majority of America's African American population lived in cities, most of them north of the Mason-Dixon line," having been "driven from the rural South by disruptions in the agricultural economy and lured by the promise of freedom and opportunity denied to them in Jim Crow's last, desperate days.").
\textsuperscript{47} Id at 6–7 (noting the unevenness of the economic boom of the 1940s and 1950s that left many cities, such as Detroit, "rusting").
\textsuperscript{48} Id ("The fate of Northern industrial cities was fundamentally entangled with the troubled history of race in twentieth-century America.").
\textsuperscript{49} Id at 8 (internal quotation marks omitted) (observing that racial discrimination rendered the promise of prosperity in the North and Midwest "illusory").
\textsuperscript{50} Id at 4–5 (noting the various explanations for the "class and racial segregation" of northern cities, and suggesting that a complex web of interrelated factors drove cities like Detroit from their positions of "economic and political dominance").
\textsuperscript{51} See St. Clair Drake and Horace R. Clayton, \textit{Black Metropolis: A Study of Negro Life in a Northern City} 115–16 (Harcourt, Brace 1945) (detailing the role of racially restrictive real estate covenants, enforced by state courts, in maintaining segregation in the city of Chicago).
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Keyes v School District No 1, Denver, Colorado. Douglas argued that the distinction between de jure and de facto segregation should be abandoned because school segregation that results from residential segregation is still based on government action.

If a "neighborhood" or "geographical" unit has been created along racial lines by reason of the play of restrictive covenants that restrict certain areas to the elite, leaving the undesirables to move elsewhere, there is state action in the constitutional sense because the force of law is placed behind those covenants.

There is state action in the constitutional sense when public funds are dispersed by urban development agencies to build racial ghettos.

Scholars have described the legal barriers that contributed to the segregation of urban neighborhoods. Law encouraged the creation of ghettos through zoning, urban planning, highway construction, incorporation, and lack of funding for public housing. Residential segregation would foster segregated schools. As desegregation litigation moved from the South to the North and West, it encountered this troublesome social context.

It is fitting to view this process in Sugrue's context of Detroit, for it was in that city that desegregation and the decline of the city collided with particular force. The resulting ruling, Milliken v Bradley, sounded the death knell for urban desegregation. In Milliken, the Court faced a context of a nearly all-black inner city, surrounded by predominately white suburbs. This residential segregation was not an inevitable product of migration patterns, but was facilitated and exacerbated through legal tools, such as restrictive covenants, and through

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53 Id at 214–15.
54 Id at 216. Douglas saw this reasoning as a natural extension of the expansion of the definition of state action that began when the Court struck down white primaries in Smith v Allwright, 321 US 649.
57 See Hart v Community School Board of Brooklyn, New York School District No 21, 383 F Supp 699, 706 (ED NY 1974) (observing that the segregation of the school at issue "was brought about partly through the ghettoization of the core of Coney Island").
58 418 US 717 (1974). Sugrue, Origins of the Urban Crisis at 266 (cited in note 46), briefly mentions the Supreme Court’s Milliken decision, which was decided after the urban decline that is the focus of his study.
government action.\textsuperscript{59} Detroit's inner city schools had been intentionally racially segregated. The problem in the case was whether the remedy for segregation within the city could mandate integrating with the suburban schools, which was the only way to have meaningful racial balance. However, the Supreme Court ruled that the remedy for discrimination within the city must end at the city border.\textsuperscript{60} That left a nearly all-black school system without a means of achieving any significant desegregation.\textsuperscript{61} While many civil rights activists questioned whether integration was really the goal by the early 1970s,\textsuperscript{62} for proponents of racially balanced schools, \textit{Milliken} was a profound barrier.

Klarman's thesis would see urban conditions as the context within which courts operated. However, when we examine the legal structures underlying the creation of America's inner cities, the causal power of law looks more robust. Law and social context are not separate spheres, one acting upon the other. Instead, law and society are mutually constitutive.\textsuperscript{63} If we see law as playing an active role in shaping social context, then the Court appears in a new light, and it has new responsibility. Judicial action matters; it is not merely the natural


\textsuperscript{60} \textit{Milliken}, 418 US at 744–45 (holding that interdistrict remedies are permissible only when "a constitutional violation within one district [ ] produces a significant segregative effect in another district").


\textsuperscript{63} See Robert W. Gordon, \textit{Critical Legal Histories}, 36 Stan L Rev 57, 60 (1984) ("Though law and society are separate, they are related. And the big theoretical problem for writers who see the world this way is to work out the secret of that relationship"); Michael W. McCann, \textit{Rights at Work: Pay Equity Reform and the Politics of Legal Mobilization} 92–93 (Chicago 1994) (arguing that legal norms significantly shaped the terrain of struggle over wage equity).
and inevitable reaction of the courts to more powerful forces of social change.

III. CONSEQUENCE: DESEGREGATION AS DIPLOMACY

Klarman sees the context for Supreme Court cases as global, finding that World War II and the Cold War had important impacts on the Court. When he examines the consequences of Supreme Court cases, however, he operates within the standard terrain of American constitutional thought: his inquiry is bounded by American territory. For example, even though Klarman is attentive to the international dimensions of Brown's context, his understanding of its consequences is domesticated. In this respect, he misses an important impact of Brown, for Brown was a tool in the reconstruction of the U.S. global image, and it had an impact on U.S. Cold War diplomacy.

Brown's global context is evident in the foreign policy arguments made by the Justice Department in its amicus briefs in Brown and other cases, in commentary in the American press about the positive impact Brown would have on U.S. foreign affairs, and in the ubiquitous international media coverage of the ruling itself. But there is another sort of international history of Brown: Brown as a form of diplomacy. There is a diplomatic history of domestic American law.

The U.S. Constitution has played an important role in the construction of American national identity in world politics. During times of crisis, the United States has invoked the Constitution to assure other nations that all is right in America. During the Cold War, the Constitution served as a strategic asset. While the courts and the Constitution played a role in defining and legitimating the Cold War national security state at home, the Constitution also served another function during this period. It played an important role in U.S. efforts to project overseas an image of a nation that was just, one that had the moral standing to lead the free world. Arguments about the Constitution were projected overseas to aid U.S. foreign relations.

Brown v Board of Education played a particularly important role in the construction of the U.S. image overseas. As important as Brown was to domestic U.S. race politics, it played an international role as well, as the U.S. tried to shore up its image when it was battered by

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64 See, for example, Dennis v United States, 341 US 494, 516 (1951) (holding that the Smith Act, making it a crime to advocate overthrow of the United States government, does not "violate the First Amendment and other provisions of the Bill of Rights, or the First and Fifth Amendments because of indefiniteness"); Joint Anti-Fascist Refugee Committee v McGrath, 341 US 123, 139 (1951) (finding defamation where the attorney general declared petitioners' organizations "Communist"). See generally Ellen Schrecker, Many Are the Crimes: McCarthyism in America (Little, Brown 1998).
charges that it had violated the rights of its own citizens through racism, disenfranchisement, and segregation.

Addressing American racism was important because the U.S. described the Cold War in moral terms. President Harry S. Truman set the tone as the nation entered the Cold War. In an address to a joint session of Congress, he emphasized that “[a]t the present moment in world history nearly every nation must choose between alternative ways of life.” The choices were between a way of life “distinguished by free institutions, representative government, free elections, guarantees of individual liberty, freedom of speech and religion, and freedom from political oppression,” and a way of life that “relies upon terror and oppression, a controlled press and radio, fixed elections, and the suppression of personal freedoms.” In Cold War national security discourse, the U.S. and its adversaries were seen as opposites. Michael Hogan argues:

"[T]he national security ideology framed the Cold War discourse in a system of symbolic representation that defined America’s national identity by reference to the un-American “other,” usually the Soviet Union, Nazi Germany, or another totalitarian power. . . . The Soviets were equated with aggression and domination, while the Americans were equated with peace and cooperation."

In arguing for the moral superiority of its system of government, the U.S. opened itself to the charge of hypocrisy. The peoples of other nations were well aware of American racism." People of color at home

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65 Harry S. Truman, Special Message to the Congress on Greece and Turkey: The Truman Doctrine, in Public Papers of the Presidents of the United States: Harry S. Truman 1947 176, 178 (GPO 1963) (addressing a joint session of Congress to urge financial and economic support for Greece and Turkey, without which they would not survive as “free” nations).

66 Id.

67 Hogan, A Cross of Iron at 17 (cited in note 23). David Campbell, Writing Security: United States Foreign Policy and the Politics of Identity 9 (Minnesota revised ed 1998), expands on this theme:

[I]dentity is constituted in relation to difference. But neither is difference fixed by nature, given by God, or planned by intentional behavior. Difference is constituted in relation to identity. The problematic of identity/difference contains, therefore, no foundations that are prior to, or outside of, its operation. Whether we are talking of “the body” or “the state,” or of particular bodies and states, the identity of each is performatively constituted. Moreover, the constitution of identity is achieved through the inscription of boundaries that serve to demarcate an “inside” from an “outside,” a “self” from an “other,” a “domestic” from a “foreign.”

68 See Dudziak, 41 Stan L Rev at 73–93 (cited in note 21) (observing that lynchings, voting rights abuses, and school segregation in the U.S. were regular news stories overseas in the post–World War II years). By 1949, race in America was a principal Soviet propaganda theme. Even for U.S. allies, Soviet propaganda on American race discrimination could not be ignored. Europeans who might discount Soviet propaganda in other contexts were more receptive to anti-
and critics abroad argued that American democracy's true nature was captured in lynching, racially motivated violence, segregation, and discrimination. Since brutal racism was practiced in America, how could racism not be a feature of the American political system? How could the U.S. claim moral superiority in the Cold War when so many Americans were disenfranchised on account of race?

Brown played a crucial role in resolving this problem. In Cold War international relations, Brown illuminated the nature of American democracy and distinguished the nation from its Cold War adversaries. In the years before Brown, when segregation remained the law of the land in the South, some creativity was needed to tell a positive story about the state of the constitutional rights of African-Americans. Much effort was put into pamphlets and speaking tours that would highlight American racial progress through law. Brown itself was seen by American diplomats as the salve needed to redress the harm American racism had caused to U.S. foreign relations. It was used extensively in Voice of America programming and State Department planning. "You may imagine what good use we are making of the decision here in India," U.S. Ambassador to India George V. Allen wrote to NAACP Executive Secretary Walter White. The U.S. Information Service in India circulated a press release calling the decision "another milestone in the American Negro's steady progress toward full equality as a citizen." The ruling was expected to affect Cold War politics.

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69 The most well-developed example was a widely distributed pamphlet, The Negro in American Life, which turned the story of race in America into a story of the supremacy of the American form of government. The pamphlet presented the U.S. Constitution as playing an important role in American progress from slavery to freedom. It celebrated the great strides that had been taken in the area of constitutional rights, including the McLaurin and Sweatt cases. However, the pamphlet verged on, at the very least, overstatement, noting before Brown was decided that "since the war, in cases prosecuted by the NAACP, the Supreme Court has declared unenforceable by law leases which exclude Negroes from renting homes; it has ruled against segregation in public transportation and in public education." The Negro in American Life 13, available at the Yale University Library, Manuscripts and Archives, folder 503, box 112, series II, Chester Bowles Papers (emphasis added). See also Dudziak, Cold War Civil Rights at 53 (cited in note 25).

70 Letter from Walter F. White, Executive Secretary of the NAACP, to James W. Ivy, Managing Editor of The Crisis (June 4, 1954) (quoting letter from Allen to White, and going on to discuss the possibility of an article in The Crisis on national and international press coverage on Brown), available at the Library of Congress, NAACP Papers, Group II, General Office Files 1950-55, Box A619, Folder: Supreme Court, School Case, Foreign Press, June–Dec, 1954.

71 United States Information Service, India, Ban on School Segregation Another Milestone in Negro Progress (May 21, 1954), available at the Library of Congress, NAACP Papers, Group
As the West African Pilot put it, "Action speaks louder than words. That is why I believe that the US Supreme Court ruling against segregation of white and Negro pupils in State schools to be far more effective than all the propaganda against the iron curtain."  

As the author of the Brown opinion, Chief Justice Earl Warren was a particularly effective emissary for American democracy overseas. To foreign audiences, he seemed to embody the idea of American racial progress through constitutionalism. In August 1956, Warren traveled to India, ostensibly for the purpose of observing the Indian judicial system. As the New York Times put it, however, "[T]he trip is bound to have diplomatic significance far overshadowing Mr. Warren's education in Indian law." The trip came in the wake of unsuccessful efforts to get Dwight D. Eisenhower and Indian Prime Minister Jawaharlal Nehru together for talks on emerging difficulties in U.S.-Indian relations. In addition, Warren's trip was "calculated to counterbalance some of the effects" of Soviet Premier Nikolai A. Bulganin and Soviet Communist Party chief Nikita S. Khrushchev's "triumphant tour of the country" the previous year.

Someone needed to travel to India, but why Warren? The decision to send the Chief Justice was made by Secretary of State John Foster Dulles and President Eisenhower. According to the New York Times, Warren was "widely regarded in Washington as the best possible goodwill envoy, after the President himself, that this country could send to India." The reason Warren fit this role was that "[t]he Supreme Court decision on school desegregation is regarded abroad, particularly in the Asian-African world, as one of the milestones of modern United States achievement." Warren, "as chief of the court that rendered the unanimous decision, has been internationally identified with American libertarianism on racial matters." Because of that, Warren was perceived to be "an ideal envoy."  

While in India, Warren was introduced by the vice chancellor of the University of New Delhi as a man who had "shot into fame" for his role in the Brown decision. The vice chancellor's remarks were

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74 Id at 4.

75 Id.

76 Id. While Warren's trip was particularly prominent, other jurists also traveled overseas on U.S. government-sponsored trips. For example, while Warren was in India, the New York Times also reported that the chief justice of the Nebraska Supreme Court was on a tour of Africa. Nebraskan in Gold Coast, NY Times 17 (Aug 25, 1956).
"greeted with repeated and prolonged cheers." Warren met with Nehru, but it was not expected that they would speak about international relations. For this goodwill tour, embodying *Brown* and representing the U.S. Constitution were enough.  

Looking within U.S. borders, Klarman sees *Brown*’s "consequences" as quite limited. When we look outside the domestic sphere, however, we see a significant consequence: *Brown* aided U.S. foreign relations during the Cold War. It led other nations to believe that the U.S. government was behind civil rights reform. This strengthened the argument that American democracy fostered individual rights and equality, which bolstered the U.S. argument that democracy was better for all the world than the Soviet system. Klarman turns to the world for "context," but not for "consequences." For example, he quotes Justice Black’s opinion in *Chambers v Florida:* "[T]yrannical governments had immemorially utilized dictatorial criminal procedure and punishment to make scapegoats of the weak, or of the helpless political, religious or racial minorities." — a conclusion that suggests the Court was aware of the international context of American civil rights reform (p 228). While the impact of world events on Supreme Court justices during the 1940s and 1950s is hard to ignore, evidence of the impact of the Court’s major civil rights rulings on U.S. foreign affairs is even more clear.  

It may seem out of place to see as a consequence of *Brown* something arguably outside of what, on its face, the case was purportedly about. It is clear, however, that the beneficial foreign policy impact of *Brown* was something that the executive branch specifically sought to achieve in its involvement in the case. The case became an effective

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77 *Delhi Honors Warren*, NY Times 3 (Sept 1, 1956); A.M. Rosenthal, *New Delhi Greets Warren Warmly*, NY Times 12 (Aug 29, 1956). Race in the U.S. continued to be a foreign relations problem in later years, but the problem was easier to manage following the passage of the Civil Rights Act of 1964 and the Voting Rights Act of 1965. These landmark reforms made it easier to tell a positive story of American race relations. Federal statutes now proclaimed equality before the law. Even as difficulties in communities around the nation persisted, the civil rights statutes could be a symbol of the federal government’s commitment to equal rights. The text of a U.S. Information Agency pamphlet on these laws simply described statutes that had, in fact, been enacted. U.S. Information Agency, *For the Dignity of Man: America’s Civil Rights Program* (1965), available at the Library of Congress, Law Reading Room, call number: U.S. 8 Inform.

78 309 US 227 (1940) (holding that confessions were unconstitutionally obtained when they were elicited from four black codefendants with a week-long interrogation, sleep deprivation, and threats of lynching).

79 Id at 236.

80 See Brief for the United States as Amicus Curiae, *Brown v Board of Education*, No 8, *6–8 (S Ct filed Dec 2, 1952), online at http://curiae.law.yale.edu/pdf/347-483/022.pdf (visited Dec 5, 2004) (observing that domestic racial discrimination had a significant and increasingly negative impact on American foreign relations). See also President’s Committee on Civil Rights, *To Se-
tool in American diplomacy. While the plaintiffs did not set out to influence global politics, their Supreme Court victory had a significant impact on the U.S. image around the world.

The Court’s impact on the image of American democracy might seem ironic to critics who viewed Warren Court activism as undermining democratic politics. To those charged with managing U.S. Cold War foreign policy, however, the Court’s ruling in Brown both protected American democracy, by strengthening the nation’s role in an ideological battle with the Soviet Union, and also led to the possibility that more nations would aspire to democratic forms of governance. Far from constricting democracy, the Court, from this perspective, facilitated it.

CONCLUSION

In drawing his careful study to a close, Michael Klarman emphasizes the implications of his book for an understanding of the role of the Supreme Court in American society. “Court decisions do matter,” he suggests, “though often in unpredictable ways” (p 468). The impact of the Court is limited, however. Its rulings “cannot fundamentally transform a nation. The justices are too much products of their time and place to launch social revolutions” (p 468). The agency in this history does not rest in the hands of human actors. Instead, “deep background forces ensured that the United States would experience a racial reform movement regardless of what the Supreme Court did or did not do” (p 468).

Klarman’s perspective might surprise Warren Court critics. Lino Graglia argued in 1976 that the Brown decision had catapulted the Supreme Court into a powerful role in American governance. As a result of the case, he argued, “the Court increasingly became a tempting, willing, and seemingly omnipotent instrument for effecting fundamental social changes without obtaining the consent of the American people or their elected representatives.” More recently, Robert Bork noted critically that the Warren Court “produced one constitutional revolution after another.” Warren Court supporters, as well, have thought of the Court as revolutionary. Melvin Urofsky cele-

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cure These Rights 146 (GPO 1947) (stating that “our domestic civil rights shortcomings are a serious obstacle” to U.S. leadership “throughout the world”).


82 Robert H. Bork, Dismantling the Law, 21 New Criterion 72, 75 (Nov 2002).
brated Brown’s role in “set[ting] in motion a social, economic and constitutionl revolution.”

Revolutionary or not, some earlier supporters of Brown and the Warren Court’s rulings have raised further questions about the Court’s intervention in American racial justice. Most prominently, Derrick Bell suggested that the path of racial justice would have been more effectively furthered if the Court had not overturned Plessy v Ferguson, but instead had required real equality in racially separate schools.

In spite of its careful and detailed treatment of the subject, From Jim Crow to Civil Rights is unlikely to silence arguments about the courts’ role in landmark twentieth century civil rights cases. Ultimately the lasting impact of Klarman’s important book may be to keep civil rights, especially Brown v Board of Education, as a centerpiece in debates about the role of the courts.


84 See Derrick Bell, Bell, J., dissenting, in Balkin, ed, What Brown v. Board of Education Should Have Said at 199 (cited in note 6) (“By dismissing Plessy without dismantling it, the Court [in Brown] seems to predict if not underwrite eventual failure.”). See also Bell, Silent Covenants (cited in note 61) (arguing that Brown legitimated segregation by mandating no method for its extinction).