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From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality by Michael J. Klarman
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BOOK REVIEW

JIM CROW'S ENDURING LEGACY

Clayborne Carson*


Scholars writing about black-white relations in the United States typically offer either optimistic or pessimistic narratives. The former emphasize racial progress—the gradual realization of American egalitarian and democratic ideals, which is variously attributed to the heroic efforts of idealistic reformers, mass protest movements, foreign policy considerations, or the impersonal forces of modernization. American history, and especially African American history, is understood as a progression from slavery to freedom, from pervasive racial segregation and discrimination to landmark civil rights reforms and affirmative action policies. The pessimists in contrast call attention to the persistence of racial conflict, segregation, discrimination, and inequality. Although military force, civil rights legislation, and federal court decisions overcame slavery and the southern Jim Crow system, the pessimists point out that white Americans still exercise political dominance on most issues of racial salience, still generally have better educational and economic opportunities than do black Americans, and still often resist concerted efforts to reduce longstanding racial inequalities. Michael Klarman's From Jim Crow to Civil Rights is on the pessimistic side of the spectrum, offering a strong critique of the tendency of some civil rights advocates to rely too much on civil rights litigation while ignoring broader social issues.

During the twentieth century, Martin Luther King, Jr., became the prototypical racial optimist, while Malcolm X was usually assigned the role of his pessimistic antagonist. King's optimism was most famously expressed

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when he announced at the 1963 March on Washington that this nation would “one day . . . rise up and live out the true meaning of its creed: ‘We hold these truths to be self-evident, that all men are created equal.’”1 Malcolm X, for his part, was skeptical that such a day would ever come. He ridiculed the Washington “picnic” as a sell-out by King and other major civil rights leaders. But both men’s views evolved over time as King came to understand that Malcolm’s harsh rhetoric “came into being as a result of a society that gives so many Negroes the nagging sense of ‘nobody-ness.’”2 By the end of his life, King agreed with the 1968 prediction of the National Advisory Commission on Civil Disorders that the United States was “moving toward two societies, one black, one white—separate and unequal.”3

In the years since King’s assassination, the literature of the modern African American freedom struggle has expanded enormously, and optimistic scholars have outnumbered pessimists. It is not difficult for optimists to point to the substantial changes in race relations that have occurred during the past century. Lynching and other forms of racist violence no longer deter African Americans from exercising their civil rights. Segregation is no longer legally mandated or allowed in public schools, restaurants, hotels, and other places. Overt racial discrimination and explicit barriers to black suffrage are prohibited throughout the United States. Significant changes have also occurred in the racial attitudes of white Americans.

But pessimists could point to the persistence of white supremacy in the post-civil rights era. Even in the twenty-first century, black Americans continue to feel the impact of white political dominance, even if that dominance is exercised through dramatically increased incarceration rates rather than through lynch mobs and Jim Crow laws. During the four decades since the passage of the Voting Rights Act of 1965, the expansion of black suffrage has been offset by a major shift in the political and ideological allegiances of southern white voters from a New Deal-oriented Democratic Party to an increasingly conservative Republican Party. Black voters have generally continued to favor Democratic presidential candidates, but no such candidate since Lyndon Johnson has attracted the support of the majority of white voters. In the large sections of the South and West that are now dominated by the Republicans, candidates supported by black voters rarely prevail. Republican dominance in national politics has resulted in a shift away from Johnson’s Great Society policies. An ideological gulf now separates the majority of black voters from

the white majority regarding the role of government in responding to social needs.

Critical race theorists are among the dissenters who have argued that the indications of civil rights progress have obscured underlying continuities in the institutional foundations of white supremacy. These theorists question the notion that laws prohibiting individual acts of discrimination can reverse patterns of racial dominance that are subtle (sometimes the consequence of ostensibly egalitarian legal principles), institutionalized (therefore impersonal), and historically entrenched (therefore beyond the reach of normal legal remedies). Derrick A. Bell, Jr., a pioneer in the field, has suggested in his writings that civil rights litigation and legislation are unlikely to result in major enduring gains because white Americans will effectively resist any substantial threat to their dominance. More than two decades ago, Bell criticized school desegregation litigation, arguing that litigants “who fail to obtain judicial relief that reasonably promises to improve the education of black children serve poorly both their clients and their cause.” 4 Bell’s recent Silent Covenants: Brown v. Board of Education and the Unfulfilled Hopes for Racial Reform extends this critique by deprecating the gains that have been attributed to the past half-century of litigation to achieve school desegregation. 5

Michael J. Klarman pays little attention to the contributions of the critical race theorists, but his important study provides considerable ammunition for the racial pessimists. Rather than simply offering a critique of mainstream legal thought, he provides a wealth of historical evidence that will inform the ongoing debate concerning the relationship between civil rights law and contemporary American race relations. This thoroughly documented survey of civil rights litigation in the twentieth century is a stunning achievement, shedding new light on topics that have already drawn the attention of several generations of scholars. Like other scholars, Klarman focuses on the decades-long struggle of Thurgood Marshall and other NAACP lawyers to bring about the Supreme Court’s historic Brown v. Board of Education 6 decision, but he corrects the tendency of some scholars in the field to equate progress in black-white relations with changes in national civil rights law. Moreover, Klarman breaks new ground by broadening his inquiry to examine a wide range of race-relations rulings by the Supreme Court and to assess the indirect and unintended consequences of these rulings as well as the direct and intended ones. From Jim Crow to Civil Rights is a work of enormous ambition and


erudition. It is certain to have lasting influence on future scholarship in the fields of constitutional law and the history of American race relations.

Klarman first proposes to explain how the Supreme Court shifted from an acceptance of the separate-but-equal principle in its Plessy v. Ferguson decision to a rejection of that principle in its Brown decision. His answer to this question is hardly original—"judicial decision making involves a combination of legal and political factors" (p. 5)—but this conclusion is supported by careful examinations of dozens of Supreme Court rulings in the years from Plessy to Brown. Rejecting legal formalism, Klarman argues that the indeterminacy of constitutional law on questions of race encourages judges to resolve these questions in ways that conform to prevailing social mores and practices (p. 5). Rather than emphasizing the egalitarian values embedded in the American political tradition, Klarman recognizes that American egalitarianism has always been intertwined with pervasive racist oppression. As the historian Edmund Morgan insisted in American Slavery, American Freedom, the egalitarian and democratic principles that have been central to the history of the United States have been realized for white Americans through the subjection of African Americans and other nonwhite people. Thus, traditional American conceptions of equality and civil rights could never be isolated from the ongoing reality of white supremacy and black subjection.

An optimistic reading of civil rights litigation would stress the progression trend in Supreme Court decisions in the century and a half since Dred Scott v. Sandford, which held that African Americans were never intended to be among "the People" envisaged as citizens by the Constitution. Brown drew upon the subsequent Fourteenth Amendment to insist that African Americans were entitled to "the equal protection of the laws," but the Supreme Court majority in Dred Scott was correct, historically if not morally, in asserting that the Founders considered African Americans to be "a subordinate and inferior class of beings, who had been subjugated by the dominant race, and, whether emancipated or not, yet remained subject to their authority, and had no rights or privileges but such as those who held the power and the government might choose to grant them."

Brown was reasonable constitutional interpretation in light of the Fourteenth Amendment, but this ruling may have actually strayed further from the principle of original intent than did Dred Scott. As Klarman persuasively argues, "[t]o the justices who were most committed to traditional legal sources, such as text, original intent, precedent, and custom, Brown should have been an easy case—for sustaining school segregation" (p. 447). He surmises that only

7. 163 U.S. 537 (1896).
8. EDMUND MORGAN, AMERICAN SLAVERY, AMERICAN FREEDOM (1975).
9. 60 U.S. 393 (1857).
10. 347 U.S. at 495.
11. 60 U.S. at 404-05.
four of the nine Supreme Court Justices would have favored overturning *Plessy* when the NAACP’s school desegregation suits were first considered in 1952 (p. 300). The Fourteenth Amendment was by no means a clear basis for overturning school segregation, since, as Klarman points out, “the same Congress that wrote the Fourteenth Amendment and was responsible for its enforcement had segregated schools in the District of Columbia for nearly one hundred years, which implied that it considered segregation to be constitutional” (p. 294). Klarman suggests that the major factor causing the shift from a divided Court to the unanimous *Brown* ruling was the intrusion of political considerations into judicial decisionmaking. The Justices were aware of the changes in American race relations and in the position of the United States in world affairs that had resulted from World War II. They were also aware that a ruling by a divided court would encourage southern resistance to the decision (p. 302).

Klarman devotes careful attention to the dilemma of Justice Felix Frankfurter, who consistently rejected the notion of judges “reading their personal values into the Constitution” (p. 303) yet also “abhorred racial segregation” (p. 304). Even Frankfurter, however, recognized the significance of the changes that had occurred in American racial relations and attitudes in the postwar years. Furthermore, Klarman argues, the justices were part of a cultural elite that was even more likely than the majority of Americans to accept notions of racial equality (p. 309). He reports that of the Supreme Court clerks, only William Rehnquist “seems to have favored reaffirming *Plessy*” (p. 309). When the Justices finally agreed to overturn *Plessy*, they understood that their decision was not mandated by a strict construction of constitutional language, nor would it immediately transform American race relations. Frankfurter warned that a desegregation decision was “‘not a wand by which these transformations can be accomplished’” (p. 311).

To argue that even Supreme Court Justices pay attention to political and social realities should hardly surprise anyone familiar with contemporary scholarship in the field of constitutional law. The cautious process of implementing the *Brown* decision during the subsequent five decades provides ample evidence of legal realism in Court decisionmaking. It is perhaps more remarkable that breaks with precedent such as *Brown* quickly become precedents for a new generation of legal formalists. Klarman suggests that between the extremes of legal formalism and legal realism—and between strict constructionism and judicial activism—lies a middle position:

When the law is clear, judges will generally follow it, unless they have very strong personal preferences to the contrary. When the law is indeterminate, judges have little choice but to make decisions based on political factors. Moreover, different judges accord different weights to these two axes, and some judges may deem a particular factor in decision making to be legal, while others will regard the same factor as political. Thus, different judges, even when confronted with the same legal sources and holding the same

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personal preferences, might reach different legal interpretations because they prioritize the legal and political axes differently. (p. 5)

But Klarman's book would not be as important as it is if it simply left readers with this sensible synthesis of what has been said by other scholars on this contentious topic. In my view, his more important contribution to the civil rights literature is his assessment of the relationship between the Supreme Court's civil rights rulings and the continuing reality of racial inequality in America. On this question, Klarman has much to say that is original and enlightening. Examining not only Supreme Court decisions on school segregation but also decisions in many other areas of race relations, he asks, "How much did such Court decisions influence the larger world of race relations?" (p. 4). His answer to this question combines legal, political, and social history in ways that enrich each subdiscipline. Rather than separating civil rights litigation from other aspects of the African American freedom struggle, he recognizes their interrelationship. "This book analyzes litigation as a distinct method of social protest and evaluates its advantages and disadvantages," he writes (p. 7).

Klarman reminds readers of the dire situation of African Americans—and indeed that of nonwhites throughout the world—during the period when the Supreme Court issued its *Plessy* separate-but-equal ruling. During the 1890s the ritual of public lynching—sometimes attracting mobs containing thousands of whites—became an increasingly popular tool for instilling fear among African Americans. More than a thousand lynchings took place during the 1890s alone. Klarman quotes the pledge of South Carolina governor "Pitchfork" Ben Tillman to personally "lead a mob in lynching a negro who had committed an assault upon a white woman" (p. 11). In 1898, the brutal overthrow of the black-supported Republican city government of Wilmington, North Carolina, by armed whites signaled the general unwillingness of southern whites to allow black voters to exercise political power. The failure of President William McKinley to condemn the Wilmington violence was part of the North-South "sectional reconciliation" that encouraged southern politicians to proceed with efforts to disenfranchise nearly all black voters. In such a context, Klarman asserts, the *Plessy* decision could hardly have been otherwise. "Even had these justices been more racially egalitarian, their interventions would probably have been inefficacious," he writes (p. 59). Furthermore, "even enforceable Court decisions would have had relatively little effect on the lives of southern blacks. Most Jim Crow laws merely described white supremacy; they did not produce it" (p. 59). Thus, even before the Supreme Court signaled its willingness to accept black disenfranchisement in *Williams v. Mississippi*, white southerners had already taken large steps toward achieving that goal through the passage of new laws and through widespread violence against African Americans. "If the Court had invalidated the discriminatory

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12. 170 U.S. 213 (1898).
administration of literacy tests and ordered plaintiffs registered, the decision would have had little impact,” Klarman asserts. “Few southern blacks had the money to litigate voting rights cases, and in 1900 there was no NAACP or any similar organization to offer support. The willingness of whites to use violence to suppress black suffrage would have deterred most blacks from litigation” (p. 53).

Even with the emergence of the NAACP and its Legal Defense and Education Fund, the Supreme Court’s civil rights rulings did little to alter traditional patterns of racial oppression. While noting the NAACP’s pioneering legal victories, Klarman calls attention to factors such as the intensity of opponents’ resistance, the capacity of the beneficiaries of Court decisions to capitalize on them, the ease with which particular rulings are evaded, the availability of sanctions against those who violate rights, the relative attractiveness of particular rights-holders, and the availability of lawyers to press claims. (p. 7)

Given that southern white resistance was less fervent in areas such as voting than in desegregation of public schools and other facilities, the Supreme Court’s Smith v. Allwright13 decision had some impact on the southern white primary system, but even this breakthrough “could not thwart the obstacles to black voting in the rural Deep South. Only the imposition of federal force could secure political equality for most southern blacks. That intervention was largely a consequence of the southern black protest movement” (p. 253). In general, enforceable Supreme Court decisions on behalf of civil rights required the kind of progress in race relations that the decisions were intended to secure. Klarman advises:

Litigation is unlikely to help those most desperately in need. We have already seen that the justices, reflecting broader social mores, are unlikely to side with litigants who lack significant social standing. Even once litigants secure Court victories, they must have a certain amount of power in order to enforce them. . . . Litigation requires lawyers, economic resources, and some security from physical danger. (p. 463)

The Brown decision serves as the principal test of Klarman’s overall thesis because that decision has often been seen as shaping the changes that occurred afterward in American race relations. He concedes that Brown inspired much of the civil rights activism of the following decade (p. 381), but this fact reinforces his point that it was that activism rather than the decision that brought about most of the changes. Moreover, Brown had the unintended consequence of radicalizing the southern white opposition to civil rights reform. “By encouraging extremism, Brown increased the likelihood that once direct action protest developed, it would incite a violent response,” Klarman observes (p. 385). The modest amount of public school desegregation that took place in the decade after Brown might well have occurred in any case: “Brown

immediately desegregated schools in border-state cities, but it was almost completely nullified for a decade in the Deep South” (p. 454). As late as 1964, more than ninety-eight percent of all southern black students still attended segregated schools (p. 362). Even four decades later, most black students throughout the nation still attend predominantly black schools.  

If it is true, as Klarman contends, that “the efficacy of Court decisions depends on many social and political factors” (p. 462), then what should be the relationship between civil rights litigation and other tactics used to alter these factors? Although his book abstains from the activist stance of some critical race theorists, Klarman offers some broad suggestions that should be helpful in determining the strengths and limitations of alternative strategies for transforming American race relations. “Constitutional litigation can only redress those problems that are grounded in law,” Klarman concludes (p. 461). “Because white supremacy depended less on law than on entrenched social mores, economic power, ideology, and physical violence, the amount of racial change that litigation could produce was inevitably limited” (p. 461). Rather than assuming that civil rights litigation can alter entrenched patterns of racial oppression, he suggests that a broader range of tactics is necessary. “Sit-ins, Freedom Rides, and street demonstrations fostered black agency much better than did litigation, which encouraged blacks to place faith in elite black lawyers and white judges rather than in themselves,” he writes (p. 467).

Because his book is not a general discussion of the modern African American freedom struggle, Klarman can only offer hints of a broader approach to social change that might prove more effective than reliance on litigation. Certainly, the major civil rights reforms of the mid-1960s were more the result of mass protests than litigation, but these protests and the urban black insurgencies that followed were difficult to sustain and produced a national white backlash that was even more enduring than was the southern Massive Resistance movement of the 1950s. Readers of Klarman’s book therefore will find little cause for optimism that efforts to overcome racial inequity and oppression in the United States can ever proceed rapidly, given the deep historical roots of white supremacy.