

BOOK REVIEW

“HAPPY” BIRTHDAY, *BROWN V. BOARD OF EDUCATION*? *BROWN*’S FIFTIETH ANNIVERSARY AND THE NEW CRITICS OF SUPREME COURT MUSCULARITY

*David J. Garrow**

From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality. By Michael J. Klarman. New York: Oxford University Press, 2004.

INTRODUCTION

TEN years ago Professor Michael J. Klarman published an article entitled “*Brown*, Racial Change, and the Civil Rights Movement” in the *Virginia Law Review*.¹ Portions of Professor Klarman’s argument were so notable that another discipline’s most widely read scholarly publication, the *Journal of American History* (“*JAH*”), printed a briefer version of Klarman’s interpretation just four months later.²

Professor Klarman’s *Virginia Law Review* article was accompanied by critical commentaries by this writer,³ Professor Gerald N. Rosenberg,⁴ and Professor Mark Tushnet,⁵ and a reply by Professor

* Presidential Distinguished Professor, Emory University School of Law. B.A. Wesleyan University, M.A., Ph.D., Duke University.

¹ Michael J. Klarman, *Brown*, Racial Change, and the Civil Rights Movement, 80 Va. L. Rev. 7 (1994) [hereinafter Klarman, Racial Change].

² Michael J. Klarman, How *Brown* Changed Race Relations: The Backlash Thesis, 81 J. Am. Hist. 81 (1994) [hereinafter Klarman, Backlash].

³ David J. Garrow, Hopelessly Hollow History: Revisionist Devaluing of *Brown v. Board of Education*, 80 Va. L. Rev. 151 (1994).

⁴ Gerald N. Rosenberg, *Brown* Is Dead! Long Live *Brown*!: The Endless Attempt to Canonize a Case, 80 Va. L. Rev. 161 (1994).

⁵ Mark Tushnet, The Significance of *Brown v. Board of Education*, 80 Va. L. Rev. 173 (1994).

Klarman.⁶ While all of the commentaries voiced strong criticisms of Professor Klarman's conclusions, Professor Rosenberg was the most supportive, and Professor Tushnet was the most disparaging.

The intensity of those 1994 criticisms stemmed from the extent to which Klarman's argument disparaged the historical influence, and thus arguably the historical importance, of *Brown v. Board of Education*.⁷ The widespread historical consensus was that *Brown*, through the arguments of Brown's attorneys and the decision of the United States Supreme Court, had initiated a transformative new era in the African-American freedom struggle. Klarman, in contrast, asserted that "racial change in America was inevitable owing to a variety of deep-seated social, political, and economic forces."⁸ If, "in the long term," as Klarman contended, "transformative racial change was bound to come to the United States regardless of *Brown*,"⁹ then the historical contributions of the *Brown* attorneys and the justices who vindicated their claims were not essential elements to the African-American freedom struggle. Several generations of Americans might have memorialized the roles of Thurgood Marshall and Chief Justice Earl Warren, but to Klarman such memorializations signified nothing more than highly misleading mythmaking.

But Klarman's historical diminution of *Brown* was far from the most controversial part of his analysis. Even more unusually, he claimed *Brown* "did *not*" provide "critical inspiration for the modern civil rights movement," since "evidence that *Brown* inspired the 1960s civil rights movement is considerably less persuasive than the conventional wisdom would have us believe."¹⁰ Klarman conceded that "it would be mistaken to deny *Brown*'s inspirational impact on American blacks,"¹¹ and in his subsequent *JAH* article, he willingly admitted that "many participants in the civil rights demonstrations of the 1950s and 1960s emphasize[d] *Brown*'s in-

⁶ Michael J. Klarman, *Brown v. Board of Education: Facts and Political Correctness*, 80 Va. L. Rev. 185 (1994) [hereinafter Klarman, *Political Correctness*].

⁷ 347 U.S. 483 (1954).

⁸ Klarman, *Racial Change*, supra note 1, at 10.

⁹ Klarman, *Political Correctness*, supra note 6, at 199.

¹⁰ Klarman, *Racial Change*, supra note 1, at 84.

¹¹ *Id.* at 80.

2004] “Happy Birthday” *Brown v. Board of Education?* 695

spirational effect.”¹² Nonetheless, the thrust of his argument again appeared to minimize the causal significance of *Brown*.

Klarman had yet a third major element in his analysis, one that restored *Brown*'s import, albeit it in a decidedly indirect and highly ironic fashion. In his view, “significant civil rights advances were taking place in the South in the pre-*Brown* years without inciting a violent response” from local white southerners.¹³ When the Supreme Court spoke, however, *Brown* not only “prompted greater resistance than did these earlier incipient civil rights initiatives,”¹⁴ it also “created a political climate conducive to the brutal suppression of civil rights demonstrations.”¹⁵ Because *Brown* emanated from a federal branch, was unambiguous, and concerned grade school education, it “elicited greater violence and intransigence than the indigenous civil rights advances” that had preceded it.¹⁶

Klarman summarized his view of *Brown* most succinctly in his *JAH* article: “While the civil rights movement did not require *Brown* as a catalyst, the massive resistance movement did.”¹⁷ Greatly intensified white opposition to black advancement produced the horrific scenes of official violence in cities like Birmingham in 1963 and Selma in 1965 that helped spur congressional passage of the landmark Civil Rights Act of 1964 and the Voting Rights Act of 1965. The famous Supreme Court decision *did* play an indirectly influential role in advancing civil rights, but only by generating white anger, not by directly benefiting or mobilizing African-Americans. “[P]olitical, economic, social, demographic, and ideological forces, many of which coalesced during World War II, laid the groundwork for the civil rights movement,” rather than the Supreme Court, Klarman wrote in *JAH*.¹⁸ “*Brown* played a relatively small role.”¹⁹

Subsequent to his two early 1994 articles, Professor Klarman made his disagreements with the consensus historiography even

¹² Klarman, *Backlash*, supra note 2, at 85.

¹³ Klarman, *Political Correctness*, supra note 6, at 196.

¹⁴ *Id.*

¹⁵ Klarman, *Racial Change*, supra note 1, at 11.

¹⁶ Klarman, *Political Correctness*, supra note 6, at 197.

¹⁷ Klarman, *Backlash*, supra note 2, at 91.

¹⁸ *Id.*

¹⁹ *Id.*

more stark in a December 1994 review²⁰ of a book by Professor Tushnet.²¹ Writing with increased sharpness, Klarman maintained that “the myth that the Supreme Court, with an important assist from the NAACP, was largely responsible for the creation of the modern civil rights movement . . . simply is not true.”²² Acknowledging that *Brown* “is widely regarded as the most important Supreme Court ruling of the twentieth century,” Klarman nonetheless reiterated that “[i]t is unclear how instrumental *Brown* was in fostering the civil rights movement.”²³ Professor Tushnet’s book, Klarman complained, “inflate[d] the relative contributions of Thurgood Marshall, the NAACP, and the Supreme Court to this nation’s racial transformation.”²⁴ One year later, Klarman again restated the crux of his complaint, namely that “legal scholars have overwhelmingly portrayed *Brown* as the principal cause of the civil rights revolution” rather than correctly realizing that the Supreme Court decision itself was nothing more than the product of social and political changes that were sweeping American society.²⁵

Now, a decade after his earlier writings on *Brown*, Klarman presents us with a massively inclusive book that assays the entire corpus of Supreme Court case decisions concerning race, from the infamous *Plessy v. Ferguson*²⁶ in 1896 to *Brown* itself in 1954. “This book,” he writes in his Introduction, “addresses three principal questions: What factors explain the dramatic changes in racial attitudes and practices that occurred between 1900 and 1950? What factors explain judicial rulings such as *Plessy* and *Brown*? How much did such Court decisions influence the larger world of race relations?”²⁷ Noting that he has no normative or prescriptive aspi-

²⁰ Michael J. Klarman, *Civil Rights Law: Who Made It And How Much Did It Matter?*, 83 *Geo. L.J.* 433 (1994).

²¹ Mark V. Tushnet, *Making Civil Rights Law: Thurgood Marshall and the Supreme Court, 1936-1961* (1994).

²² Klarman, *supra* note 20, at 459.

²³ *Id.* at 433.

²⁴ *Id.* at 436.

²⁵ Michael J. Klarman, *Brown, Originalism, and Constitutional Theory: A Response to Professor McConnell*, 81 *Va. L. Rev.* 1881, 1934 (1995).

²⁶ 163 U.S. 537 (1896).

²⁷ Michael J. Klarman, *From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality* 4 (2004) [hereinafter Klarman, *From Jim Crow to Civil Rights*].

2004] “*Happy Birthday*” *Brown v. Board of Education*? 697

rations, Klarman says he just “seeks to describe and to interpret how the justices decided cases.”²⁸

Klarman states that his general approach to constitutional history is an attempt “to understand it more as political and social history than as the intellectual history of legal doctrine.”²⁹ More specifically, he argues “because constitutional law is generally quite indeterminate, constitutional interpretation almost inevitably reflects the broader social and political context of the times.”³⁰ In fact, he asserts, since “the values of judges tend to reflect broader social mores,” Supreme Court justices “rarely hold views that deviate far from dominant public opinion.”³¹ Signaling how his approach will apply to this book’s central questions, Klarman writes that the justices “did not invalidate racial segregation until after public opinion on race had changed dramatically as a result of various forces that originated in, or were accelerated by, World War II.”³² In a nutshell, “[o]nce racial attitudes had changed,” and *only* once public attitudes had changed, did it come to pass that “the justices reconsidered the meaning of the Constitution” with regard to whether state-imposed segregation of the races violated the Equal Protection Clause of the Fourteenth Amendment.³³

This Review will devote its first four Parts to explicating the interpretive sweep of Klarman’s book: its treatment of the Jim Crow decades, of the World War II years, of the *Brown* decision, and of the civil rights movement. Part V then will critically consider Klarman’s overarching argument concerning the Supreme Court’s supposedly minimal role and influence in American politics and society. Lastly, the Conclusion will contend that Klarman’s analysis, when understood in conjunction with recent writings by Professor Rosenberg, Professor Tushnet, and Professor Jeffrey Rosen, represents both a potent and a potentially dangerous new political critique of the Supreme Court’s traditional power of constitutional judicial review.

²⁸ Id. at 5.

²⁹ Id. at viii.

³⁰ Id. at 5.

³¹ Id. at 6.

³² Id.

³³ Id.

I. KLARMAN ON JIM CROW

Klarman's first chapter concerns what he calls "The *Plessy* Era," and right from the outset he makes clear that his belief that *Brown v. Board of Education* was a product rather than a cause of social evolution similarly applies to that earlier age: "[T]he *Plessy* Court's race decisions reflected, far more than they created, the regressive racial climate of the era."³⁴ Klarman goes on to detail his argument that "the oppression of blacks was largely the work of forces other than law,"³⁵ such as "the convergence of northern and southern racial attitudes" in the decades immediately following the end of Reconstruction.³⁶

For instance, concerning the specific subject at issue in *Plessy*, Klarman states, "railroad integration appears to have been declining even before the first segregation statutes were enacted."³⁷ When those laws were approved, "what formal segregation replaced for the most part was not integration, but informal segregation."³⁸ Klarman is thus arguing not only that "[s]egregation laws were probably unnecessary for segregating railroad travel,"³⁹ but also that "the constitutional case for sustaining railroad segregation was strong"⁴⁰ at the time that *Plessy* came before the Supreme Court. The outcome in *Plessy*, upholding state-imposed racial segregation, "simply mirrored the preferences of most white Americans,"⁴¹ and in northern states there was a "[g]enerally indifferent reaction"⁴² to news reports of the 8-1 decision.

Klarman forcefully asserts that "there is no direct evidence that *Plessy* led to an expansion of segregation,"⁴³ and, with regard to how the *Plessy* majority found no conflict between state-imposed racial segregation and the Equal Protection Clause, Klarman says that "*Plessy* was at least plausible, and it was arguably right" as a

³⁴ Id. at 9.

³⁵ Id. at 10.

³⁶ Id. at 12.

³⁷ Id. at 18.

³⁸ Id.

³⁹ Id. at 50.

⁴⁰ Id. at 21.

⁴¹ Id. at 22.

⁴² Id. at 23.

⁴³ Id. at 48.

2004] “Happy Birthday” Brown v. Board of Education? 699

constitutional holding.⁴⁴ Referring to *Cumming v. Richmond County Board of Education*,⁴⁵ decided just three years later, Klarman notes that *Plessy* “did not hold that the Constitution required racially separate facilities to be equal” and instead had suggested only that “the Constitution required reasonableness, not equality.”⁴⁶

The *Cumming* Court found no constitutional violation in the provision of a public high school education for white students but not for black ones;⁴⁷ nine years later, in *Berea College v. Kentucky*, the Court upheld a state law prohibiting integrated private higher education.⁴⁸ Klarman likens the impact of *Berea College* to *Plessy*: there was a “generally indifferent reaction in the northern press to the Court’s validation of the Kentucky statute.”⁴⁹

Klarman’s comment about *Cumming*, while wholly in keeping with his relentlessly consistent interpretive paradigm, nonetheless deserves careful consideration. “With the law indeterminate,” he writes, “the outcome probably depended on the justices’ personal views, which likely reflected general societal attitudes.”⁵⁰

The two most revealing words in that sentence are the adverbs, “probably” and “likely.” Indeed, anyone who reads even just a single chapter of *From Jim Crow to Civil Rights* will quickly realize that “probably” is one of the most frequently used words in Klarman’s vocabulary. That sentence characterizing *Cumming* is a particularly bright red flag, though, for it reveals more starkly than most of Klarman’s case comments how his assertions and interpretation, in the absence of any extensive archival records or detailed archival research in whatever justices’ papers still survive, amount to little more than well-educated guesswork by an author always inclined to construe a case’s outcome in a manner that fully comports with his overarching historical template. Klarman’s narrative method in his *Plessy* chapter, as in all of *From Jim Crow to Civil Rights*, is to create a decisional mosaic in which virtually every case

⁴⁴ Id. at 449.

⁴⁵ 175 U.S. 528 (1899).

⁴⁶ Klarman, *From Jim Crow to Civil Rights*, supra note 27, at 46.

⁴⁷ See *Cumming*, 175 U.S. at 544–45.

⁴⁸ 211 U.S. 45, 58 (1908).

⁴⁹ Klarman, *From Jim Crow to Civil Rights*, supra note 27, at 24.

⁵⁰ Id. at 46; see also id. at 41 (“In the absence of law . . . the Court’s resolution was bound to be influenced by public sentiment.”).

outcome conforms to Klarman's historical thesis. This method of construction allows Klarman to slap his chosen color of paint on whichever piece of the mosaic is at hand, without having to weigh any further evidence about a constitutional holding than the language in which it was rendered. Therefore, careful readers ought to realize that the cumulative power of Klarman's case is decidedly more modest than a quick skimming of his manuscript might otherwise suggest.

There is no mistaking Klarman's interpretive insistence, however. "Jim Crow law reflected, more than it produced, segregationist practices,"⁵¹ he writes at one point in his *Plessy* chapter; eight pages later the reader is again instructed that "Jim Crow laws merely described white supremacy; they did not produce it."⁵² In that same paragraph Klarman states that "[e]ntrenched social mores . . . were primarily responsible for bolstering the South's racial hierarchy" and that segregation laws were "often more symbolic than functional."⁵³ Twenty-two pages later, in the succeeding chapter, Klarman repeats the same two points:

Jim Crow legislation was generally more symbolic than functional. Blacks were mostly disfranchised and railroad travel mostly segregated before legislatures had intervened. . . . White supremacy depended less on law than on entrenched social mores, backed by economic power and the threat and reality of violence. Invalidating legislation would have scarcely made a dent in this system.⁵⁴

Klarman's second chapter declares that the Progressive Era featured "a racial context even more oppressive than that of the *Plessy* era."⁵⁵ Yet the Supreme Court's record in race cases during those years forces Klarman to modify if not deviate from his interpretive template, for many of its decisions, such as *Buchanan v.*

⁵¹ Id. at 51.

⁵² Id. at 59.

⁵³ Id. at 60.

⁵⁴ Id. at 82; see also id. at 461 ("[W]hite supremacy depended less on law than on entrenched social mores, economic power, ideology, and physical violence [W]hite supremacy ultimately depended more on extralegal forces than on law").

⁵⁵ Id. at 62.

2004] “Happy Birthday” Brown v. Board of Education? 701

Warley,⁵⁶ were resolutely pro-equality. Klarman responds to this challenge in two ways, first by adjusting his repeated invocation of “general societal attitudes”⁵⁷ to specify that “even in the depths of Progressive Era racism, national opinion still supported formal compliance with constitutional norms.”⁵⁸ Thus the Court’s behavior was neither in conflict with, nor in advance of, popular opinion. Second, returning briefly to his as-yet underdeveloped reference to the general indeterminacy of constitutional law,⁵⁹ Klarman states that “where the law is relatively clear, the Court tends to follow it, even in an unsupportive context.”⁶⁰ This concession is more significant than Klarman chooses to acknowledge, however, for the relative clarity of arguably controlling precedents is ostensibly subsumed under the general indeterminacy Klarman otherwise is eager to invoke.

Klarman nonetheless passes through this chapter of the Court’s history almost twice as quickly as he does through the *Plessy* era. Many of the pro-civil rights rulings did little more than suppress “outliers” and “isolated practice[s],”⁶¹ he states, and “[b]ecause they were concerned more with form than substance,” the “Progressive Era race decisions proved inconsequential.”⁶² Only briefly does he confront the question of whether these favorable rulings may have encouraged African-Americans to pursue further litigation and activism in subsequent years. “Success for any social protest movement requires convincing potential participants that its goals are feasible,”⁶³ Klarman quite accurately notes, but he quickly adds that “[t]he motivational impact of Court decisions is difficult to confirm or disprove.”⁶⁴ Yet it is significant that Klarman acknowledges that rulings such as *Buchanan*, which voided a residen-

⁵⁶ See 245 U.S. 60, 77–82 (1917).

⁵⁷ Klarman, *From Jim Crow to Civil Rights*, supra note 27, at 46.

⁵⁸ *Id.* at 62.

⁵⁹ *Id.* at 5.

⁶⁰ *Id.* at 62.

⁶¹ *Id.* at 76, 78; see also *id.* at 124 (discussing the justices’ willingness to apply “consensus national norms to a few outliers”); *id.* at 136 (offering an example of “constitutional law’s proclivity for suppressing outliers”); *id.* at 453 (referring to the Court’s “tendency to constitutionalize consensus and suppress outliers”).

⁶² *Id.* at 62.

⁶³ *Id.* at 93.

⁶⁴ *Id.* at 94.

tial segregation ordinance in Louisville, Kentucky,⁶⁵ may have “inspired blacks to believe the racial status quo was malleable.”⁶⁶

With his third chapter, covering the interwar period, Klarman begins to present his most important material. Following in many historians’ footsteps, Klarman notes that “quite unintentionally, the New Deal proved a turning point in American race relations” since its policy emphasis on helping poor Americans meant that blacks “benefited disproportionately” from those programs simply on account of their greater poverty and privation.⁶⁷ Klarman likewise correctly observes that “one must not overstate the New Deal’s racial progressivism,”⁶⁸ nor the pre-World War II prospects for any judicially instigated racial progress. When *Gong Lum v. Rice*⁶⁹ came before the Supreme Court in 1927, any “Court invalidation of school segregation was inconceivable,”⁷⁰ and, as Klarman accurately observes, once the Court had unanimously upheld the practice in that case,⁷¹ “school segregation was as securely grounded as ever.”⁷²

Readers of *From Jim Crow to Civil Rights* are on notice from the book’s opening pages that World War II will be the primary line of demarcation.⁷³ Accordingly, when Klarman significantly minimizes the import of the Supreme Court’s first prewar ruling against racial segregation in higher education, *Missouri ex rel. Gaines v. Canada*⁷⁴ in 1938, readers should be unsurprised. Klarman allows that “[t]he extralegal context of race relations had changed significantly by 1938,”⁷⁵ thereby suggesting that the Hughes Court’s pro-civil rights decision was quite in keeping with his interpretive

⁶⁵ 245 U.S. at 82.

⁶⁶ Klarman, *From Jim Crow to Civil Rights*, supra note 27, at 94; see also id. at 95 (“Progressive Era litigation may have helped motivate and organize civil rights protest . . .”).

⁶⁷ Id. at 110.

⁶⁸ Id. at 111.

⁶⁹ 275 U.S. 78 (1927).

⁷⁰ Klarman, *From Jim Crow to Civil Rights*, supra note 27, at 148.

⁷¹ See *Gong Lum*, 275 U.S. at 78.

⁷² Klarman, *From Jim Crow to Civil Rights*, supra note 27, at 147.

⁷³ See id. at 6.

⁷⁴ 305 U.S. 337 (1938).

⁷⁵ Klarman, *From Jim Crow to Civil Rights*, supra note 27, at 151.

2004] “*Happy Birthday*” *Brown v. Board of Education*? 703

analysis, but he nonetheless insists that, *Gaines* notwithstanding, “[p]ublic school segregation seemed as secure in 1940 as in 1920.”⁷⁶

Klarman asserts repeatedly that only the advent of the war initiated the prospect of meaningful civil rights progress. “Racial change appeared to be in the offing by 1940,” he writes, “but it was the cataclysmic events of World War II, not the Great Depression or the New Deal, that were responsible for fundamental changes in U.S. racial attitudes and practices.”⁷⁷ At one point, with reference to *Gaines*, Klarman fudges his time frame slightly, saying that “American race relations underwent enormous change between 1938 and 1950,”⁷⁸ but his central contention remains that “[n]ot until World War II catalyzed fundamental shifts in U.S. racial attitudes and practices did the justices begin transforming the constitutional jurisprudence of race.”⁷⁹

Klarman is most explicit in attributing direct causation to the war itself: “World War II would fundamentally transform the nation’s, and the justices’, views regarding black suffrage,” he writes at one point.⁸⁰ Just as in his previous chapter on the Progressive Era, Klarman again seeks to minimize both the actual impact of pro-civil rights rulings such as *Gaines*—“Court victories produced little change in racial practices”—and their inspirational effect.⁸¹ As before, Klarman admits that it is “possible” that such constitutional litigation “was more important for its intangible effects,” but concludes that such “intangible consequences are impossible to measure.”⁸² Yet once again Klarman concedes that the motivational impact “may nonetheless have been real and perhaps even substantial.”⁸³

II. KLARMAN ON WORLD WAR II

From Jim Crow to Civil Rights devotes well over one hundred pages, divided into two closely linked chapters, to the World War

⁷⁶ Id. at 169.

⁷⁷ Id.

⁷⁸ Id. at 162.

⁷⁹ Id. at 152.

⁸⁰ Id. at 141.

⁸¹ Id. at 163.

⁸² Id.

⁸³ Id.

II era. In some particular instances, such as the Court's straightforward 1939 voiding of a "grandfather clause" statute in *Lane v. Wilson*,⁸⁴ Klarman acknowledges in passing that civil rights progress undeniably predated the war. For the justices of the Supreme Court, "the incipient racial changes of the late 1930s made them more solicitous of black suffrage."⁸⁵ This assertion stands in at least some visible tension with his earlier statement that only World War II itself "would fundamentally transform . . . the justices' views regarding black suffrage."⁸⁶

But with regard both to African-American voting rights in the South and race questions more broadly, Klarman portrays World War II as bringing about a rapid sea change in the behavior of the U.S. Supreme Court. In sudden contrast to the pre-1938 Court, "the justices seemed willing to vindicate nearly any claim for progressive racial reform," Klarman writes, "even if doing so required considerable legal creativity."⁸⁷ Klarman pounds home his argument about the transformative impact of World War II on page after page, asserting at one juncture that "World War II's contribution to progressive racial change cannot be overstated"⁸⁸ and at another that the war "crystallized a national civil rights consciousness."⁸⁹

Some readers may be convinced by the insistency of Klarman's presentation, while others may find it so repetitiously heavy-handed that they draw back from Klarman's all but proconflagration celebration of "the egalitarian impact of war."⁹⁰ Klarman repeatedly specifies that this "egalitarian impact" was felt only or largely once the war was over, writing at one point that "the nation developed its civil rights consciousness after the war"⁹¹ and at another that "the changes in racial attitudes and practices that oc-

⁸⁴ 307 U.S. 268, 275 (1939).

⁸⁵ Klarman, *From Jim Crow to Civil Rights*, supra note 27, at 197.

⁸⁶ *Id.* at 141 (internal punctuation omitted).

⁸⁷ *Id.* at 173.

⁸⁸ *Id.* at 174; see also *id.* at 193 (noting "the powerful impulses for progressive racial change that had been ignited by the war").

⁸⁹ *Id.* at 219.

⁹⁰ *Id.* at 174.

⁹¹ *Id.* at 191.

2004] “Happy Birthday” Brown v. Board of Education? 705

curred in the 1940s were more rapid and fundamental than any that had taken place since Reconstruction.”⁹²

With regard to the actual decisional behavior of the Supreme Court, Klarman builds his transformative-impact-of-war argument on three principal cases. The first is *Smith v. Allwright*, which in 1944 by an 8-1 vote swept away the “white primary” election practices that most southern states’ Democratic parties had employed in order to exclude registered African-American voters from participating in the often all-determinative party primaries that chose Democratic nominees in advance of the usually uncompetitive general elections.⁹³

Just nine years earlier, in *Grovey v. Townsend* in 1935, the Court had upheld a twice-refined “white primary” system in Texas on the grounds that Texas had finally succeeded (after two earlier cases in which the Court had voided Texas’s exclusionary practices⁹⁴) in constructing an all-white Democratic primary that did not involve “state action” under the Fourteenth Amendment.⁹⁵ Klarman places exceptionally strong emphasis on the historical noteworthiness of *Smith*’s overruling of *Grovey*:⁹⁶ “This shift, within the short span of nine years, from a unanimous decision sustaining white primaries to a near-unanimous ruling invalidating them, is unprecedented in U.S. constitutional history.”⁹⁷

Only two members of the Court that decided *Grovey*, however, remained on the bench nine years later; one of them, Justice Harlan Fiske Stone, did indeed “change sides,” while Owen Roberts was *Smith*’s lone dissenter. Klarman insists that the key to *Smith*’s reversal of *Grovey* is “the fundamental importance of World War II,”⁹⁸ but he badly minimizes a crucial intervening influence identified by virtually all historians who have carefully ex-

⁹² Id. at 288.

⁹³ 321 U.S. 649, 661–63, 666 (1944).

⁹⁴ See *Nixon v. Condon*, 286 U.S. 73, 88–89 (1932); *Nixon v. Herndon*, 273 U.S. 536, 541 (1927).

⁹⁵ 295 U.S. 45 (1935).

⁹⁶ *Smith*, 321 U.S. at 661–63, 666.

⁹⁷ Klarman, *From Jim Crow to Civil Rights*, supra note 27, at 200.

⁹⁸ Id.

amined the sequence of white primary cases⁹⁹—the Court’s 1941 decision in *United States v. Classic*, a Louisiana ballot corruption case which generated a major reinterpretation of the “state action” doctrine with regard to party primaries.¹⁰⁰ *Classic* required the *Smith* Court to examine the constitutionality of Texas’s white primary in a significantly different doctrinal context than had existed prior to 1941, but since Klarman’s thesis champions the controlling primacy of social context over doctrinal developments, he must mute the decisive and arguably determinative influence of *Classic*.

Klarman’s second principal case is *Shelley v. Kraemer*, a 1948 decision in which all six justices who sat on the case invalidated judicial enforcement of racially restrictive housing covenants.¹⁰¹ Emphasizing how the Court in 1945 had denied certiorari to another constitutionally similar challenge,¹⁰² Klarman asserts, “[r]arely have the justices changed their minds about an issue so swiftly and unanimously. But then, rarely has public opinion on any issue changed as rapidly as public opinion on race did in the postwar years.”¹⁰³

There are two problems with this characterization. First, as any careful student of the Court well knows, a denial of certiorari is never formally, and rarely even informally, understood to represent any sort of comment on a case’s substantive merits. Thus the claim that the justices had “changed their minds” is at least an overstatement, if not erroneous. Moreover, two justices, Frank Murphy and Wiley Rutledge, recorded their votes in favor of granting the 1945 petition,¹⁰⁴ and so the justices did not “unanimously” change “their minds” between 1945 and 1948 in any event.

Klarman nonetheless energetically commits to using *Shelley* to advance his interpretation. “By 1948, public attitudes toward race discrimination . . . had changed enough to enable the justices to de-

⁹⁹ See, e.g., Darlene Clark Hine, *Black Victory: The Rise and Fall of the White Primary in Texas 225–33* (2d ed. 2003); Steven F. Lawson, *Black Ballots: Voting Rights in the South, 1944–1969*, at 41–45 (1976).

¹⁰⁰ 313 U.S. 299, 326 (1941).

¹⁰¹ 334 U.S. 1, 23 (1948).

¹⁰² *Mays v. Burgess*, 147 F.2d 869 (D.C. Cir. 1945), cert. denied, 325 U.S. 868 (1945).

¹⁰³ Klarman, *From Jim Crow to Civil Rights*, supra note 27, at 215.

¹⁰⁴ *Mays*, 325 U.S. at 868–69. Two other justices, Robert H. Jackson and Stanley Reed, did not participate in *Mays*, *id.*, and the two of them, plus Justice Rutledge, did not participate in *Shelley*. *Shelley*, 334 U.S. at 23.

2004] “Happy Birthday” Brown v. Board of Education? 707

cide *Shelley* as they did,” he writes.¹⁰⁵ “In *Shelley*, the personal values of the justices and the broader social and political context trumped the traditional legal sources” which pointed toward an opposite outcome.¹⁰⁶ “*Shelley* unanimously jettisoned precedent,” Klarman asserts, “because racially restrictive covenants struck the justices as egregious social policy.”¹⁰⁷

This fairly bald assertion might be supportable after extensive archival research in the surviving case files and conference notes of the *Shelley* justices, but that agenda of internally focused research leads in exactly the opposite direction from Klarman’s insistence upon a controlling, external social context. Despite presenting *Shelley* as a remarkably notable judicial endorsement of greater racial equality, Klarman once again characterizes the decision itself as utterly inconsequential, saying that it had a “negligible effect on segregated housing patterns”¹⁰⁸ and “almost no integrative effect.”¹⁰⁹

Klarman’s third principal case, or pair of cases, are *Sweatt v. Painter*¹¹⁰ and *McLaurin v. Oklahoma State Regents*,¹¹¹ both decided on June 5, 1950. He states that *Sweatt*, which ordered the admission of a black applicant to the previously all-white University of Texas Law School,¹¹² “essentially nullified segregation in higher education”¹¹³ and “functionally overruled *Plessy* with regard to higher education.”¹¹⁴ Klarman also correctly asserts that “[t]he Court’s focus on intangibles in *Sweatt* and *McLaurin* was unprecedented” and that the ways in which the two opinions confronted the inherent paradox of “separate but equal” “represented clear changes in the law.”¹¹⁵ Yet Klarman takes explicit issue with other scholars, such as Professor Tushnet, who have previously concluded that the *Sweatt* and *McLaurin* decisions made *Brown* itself all but inevita-

¹⁰⁵ Klarman, From Jim Crow to Civil Rights, supra note 27, at 214.

¹⁰⁶ Id. at 216.

¹⁰⁷ Id.

¹⁰⁸ Id. at 159.

¹⁰⁹ Id. at 264.

¹¹⁰ 339 U.S. 629 (1950).

¹¹¹ 339 U.S. 637 (1950).

¹¹² *Sweatt*, 339 U.S. at 636.

¹¹³ Klarman, From Jim Crow to Civil Rights, supra note 27, at 206.

¹¹⁴ Id. at 205.

¹¹⁵ Id. at 208.

ble. Quoting Professor Tushnet, Klarman declares that “the result in *Brown* was anything but ‘a foregone conclusion in 1950.’”¹¹⁶ Klarman writes that even after *Sweatt* and *McLaurin*, “the justices had yet to decide how far to go”¹¹⁷ and reiterates that *Brown* “was not foreordained in 1950.”¹¹⁸

Klarman does not minimize *Sweatt* and *McLaurin* as he does *Shelley*, but he nonetheless insists that “*Sweatt* and *McLaurin* . . . are best explained in terms of social and political change”¹¹⁹ rather than by reference to doctrine. Indeed, Klarman’s insistence that “justices tend to reflect the opinions of a cultural elite”¹²⁰ appears to directly echo the recent complaints of Justice Antonin Scalia that his colleagues’ decisionmaking in a series of high profile constitutional cases has been decisively, and far too heavily, influenced by the cases’ cultural context.¹²¹ Klarman’s contention is, of course, simply interpretive or descriptive, but the same is likewise true of Justice Scalia’s criticisms as well. Klarman’s ultimate conclusion that during the World War II era “[s]ocial practices changed because of shifting mores, not legal compulsion,”¹²² is fully consistent with his overall analysis.

III. KLARMAN ON *BROWN*

A more than fifty-page chapter of *From Jim Crow to Civil Rights* focuses almost exclusively on *Brown v. Board of Education*, “widely deemed to be the most important Supreme Court decision of the twentieth century.”¹²³ Klarman revisits the internal history of the Court’s two-year consideration of the first *Brown* decision (*Brown I*), territory that has been thoroughly analyzed by, among

¹¹⁶ Id. at 212 (quoting Tushnet, *supra* note 21, at 145).

¹¹⁷ Id.

¹¹⁸ Id. at 211.

¹¹⁹ Id. at 209.

¹²⁰ Id. at 210; see also *id.* at 450 (describing “the culturally elite values of the justices”).

¹²¹ See *Lawrence v. Texas*, 123 S. Ct. 2472, 2496 (2003) (Scalia, J., dissenting) (calling the Court’s opinion “the product of a Court, which is the product of a law-profession culture”); *Romer v. Evans*, 517 U.S. 620, 636 (1996) (Scalia, J., dissenting) (noting “the elite class from which the Members of this institution are selected”); *id.* at 652 (Scalia, J., dissenting) (noting “the views and values of the lawyer class from which the Court’s Members are drawn”).

¹²² Klarman, *From Jim Crow to Civil Rights*, *supra* note 27, at 266.

¹²³ Id. at vii.

2004] “Happy Birthday” *Brown v. Board of Education*? 709

others, Richard Kluger¹²⁴ and Professor Tushnet.¹²⁵ Unsurprisingly, Klarman’s presentation falls far closer to that of Kluger (who portrayed the arrival of new Chief Justice Earl Warren in October 1953, following the sudden and unexpected death of his predecessor Chief Justice Fred M. Vinson in early September as decisive to *Brown*’s resolution¹²⁶) than that of Professor Tushnet. Prior to Chief Justice Warren’s arrival on the Court, only four of the justices, Hugo L. Black, Harold H. Burton, William O. Douglas, and Sherman Minton, had clearly favored finding racially segregated public schools unconstitutional.¹²⁷ Of their four other brethren, two (Justices Tom C. Clark and Stanley F. Reed) appeared to join Chief Justice Vinson in opposing such a ruling, while the remaining two, Justices Felix Frankfurter and Robert H. Jackson, suffered from intensely conflicting impulses.¹²⁸ As Klarman relates, like others before him, for Justices Frankfurter and Jackson “[t]heir quandary was how to reconcile their legal and moral views,”¹²⁹ for while they both morally opposed segregation, neither was convinced that racially separate schools were unconstitutional.

Klarman emphasizes that the arrival of the new Chief Justice, who felt no uncertainty about the issue, “made a majority” of five and was therefore “instrumental to the outcome” in *Brown*.¹³⁰ Before Chief Justice Warren took his seat, Justices Frankfurter and Jackson had represented the Court’s balance wheel, but “[a]fter December 1953,” when *Brown* was reargued before a bench that now included Chief Justice Warren, “they were irrelevant to the outcome, whereas a year earlier they had controlled it.”¹³¹ Klarman’s treatment of *Brown* is extremely sympathetic to the concerns and hesitations of Justices Frankfurter and Jackson.¹³²

¹²⁴ Richard Kluger, *Simple Justice: The History of Brown v. Board of Education and Black America’s Struggle for Equality* 678–700 (1976).

¹²⁵ See Tushnet, *supra* note 21, at 187–96.

¹²⁶ See Kluger, *supra* note 124, at 678–700; see also Klarman, *From Jim Crow to Civil Rights*, *supra* note 27, at 301–02.

¹²⁷ See Kluger, *supra* note 124, at 679.

¹²⁸ See Klarman, *From Jim Crow to Civil Rights*, *supra* note 27, at 301–03.

¹²⁹ *Id.* at 303.

¹³⁰ *Id.* at 302.

¹³¹ *Id.* at 302–03.

¹³² See *id.* at 308 (“In *Brown*, the law—as understood by Frankfurter and Jackson—was reasonably clear: Segregation was constitutional.”).

Klarman also asserts that Thurgood Marshall and the NAACP had “a relatively weak legal case”¹³³ in *Brown*, and that what accounted for the Supreme Court’s favorable vindication of their claim was neither previous case law, such as *Sweatt*, nor the evidence and arguments the attorneys mustered to depict the sorry and tragic reality of racially segregated public schools. Instead, Klarman again stresses “the importance of social and political context to constitutional interpretation.”¹³⁴ “By the early 1950s,” he writes, “powerful political, economic, social, and ideological forces for progressive racial change had made judicial invalidation of segregation conceivable.”¹³⁵

Only in the midst of his *Brown* chapter does Klarman explicitly clarify an analytical framework that clearly but often silently underlies much of his argument in *From Jim Crow to Civil Rights*. “Legal factors” in any given constitutional case, he writes, “range along an axis from determinacy to indeterminacy”;¹³⁶ Klarman himself clearly believes that most socially controversial ones fall towards the latter end of that axis. In similar fashion, “[p]olitical considerations” in the minds of the justices “array along a continuum from indifference to intense preference”¹³⁷ and trump the legal elements far more often than most traditional constitutional scholars care to acknowledge. “[J]ustices engaged in constitutional interpretation,” Klarman explains, “have substantial room to maneuver; they cannot help but be influenced by their personal values and the social and political contexts of their times.”¹³⁸

Klarman’s account of *Brown* is therefore fundamentally defined by his conviction that “[c]onstitutional law generally has sufficient flexibility to accommodate dominant public opinion.”¹³⁹ In his view, *Brown* was simply the “conversion of an emerging national consensus into a constitutional command,”¹⁴⁰ since “[b]y 1954, segregation

¹³³ Id. at 449.

¹³⁴ Id.

¹³⁵ Id. at 310.

¹³⁶ Id. at 308.

¹³⁷ Id.

¹³⁸ Id. at 448.

¹³⁹ Id. at 449.

¹⁴⁰ Id. at 310.

2004] “Happy Birthday” *Brown v. Board of Education*? 711

seemed like such an egregious evil to the nation’s cultural elite that the justices simply could not make themselves sustain it.”¹⁴¹

Klarman’s infatuation with the power of “the current of history”¹⁴² certainly puts him in good company in some respects. No less a figure than Dr. Martin Luther King, Jr., employed a similar explanation to account for how the December 1, 1955, arrest of Rosa Parks sparked the Montgomery bus boycott just eighteen months after *Brown I* was handed down. Noting that Mrs. Parks had not been “planted” by any civil rights organization on the Montgomery City Lines bus on which she refused to surrender her seat,¹⁴³ King explained instead that Mrs. Parks simply responded to “both the forces of history and the forces of destiny. She had been tracked down by the *Zeitgeist*—the spirit of the time.”¹⁴⁴

The contention that *Brown* was “so difficult to justify legally”¹⁴⁵ that external cultural forces left the justices no choice but to “elevate politics over their understanding of the law”¹⁴⁶ seems both harsh and cynical. Yet Klarman’s insistence that *Brown* was first and foremost the product of “an emerging national consensus”¹⁴⁷ stands in considerable tension with his subsequent argument about the reception and reactions that *Brown I*, and then the second *Brown v. Board of Education* decision (*Brown II*)¹⁴⁸ a year later, engendered—or did not engender—both in the South and on the part of the two federal political branches.

“The mostly restrained southern reaction to *Brown I*”¹⁴⁹ may have surprised some observers and may still surprise those who fail

¹⁴¹ Id. at 450; see also id. at 343 (noting that for the *Brown* justices, “fundamental changes in the extralegal context of race relations had rendered a contrary result too unpalatable to most of them”).

¹⁴² Id. at 310.

¹⁴³ Martin Luther King, Jr., *Stride Toward Freedom: The Montgomery Story* 44 (1958); see also David J. Garrow, *Bearing the Cross: Martin Luther King, Jr., and the Southern Christian Leadership Conference* 11–12 (1986) (detailing the circumstances in which Parks was arrested for refusing to surrender her seat); J. Mills Thornton III, *Dividing Lines: Municipal Politics and the Struggle for Civil Rights in Montgomery, Birmingham, and Selma* 57–58 (2002) (same).

¹⁴⁴ King, *supra* note 143, at 44.

¹⁴⁵ Klarman, *From Jim Crow to Civil Rights*, *supra* note 27, at 450.

¹⁴⁶ Id. at 204.

¹⁴⁷ Id. at 310.

¹⁴⁸ 349 U.S. 294 (1955).

¹⁴⁹ Klarman, *From Jim Crow to Civil Rights*, *supra* note 27, at 320.

to differentiate the dramatic events of 1956–57 from the significantly different context of two years earlier. That notable southern restraint, however, had little if any encouraging impact on the justices as they deliberated and prepared *Brown II*, for, as Klarman rightly notes, “the justices never seriously considered ordering immediate integration.”¹⁵⁰ The brief *Brown II* opinion, issued in May 1955, “was hardly an order to do anything,”¹⁵¹ Klarman observes, and thus represented “a solid victory for white southerners.”¹⁵² Yet *Brown II* “inspired defiance, not accommodation”¹⁵³ on the part of white southerners, and the Court clearly failed to appreciate how *Brown II*’s absolute lack of any “clear mandate for action” on the part of southern school boards “seemed to invite evasion” rather than even a minimal pretense of compliance.¹⁵⁴

Klarman says that “[i]n retrospect, the justices should have been firm and imposed deadlines and specific desegregation requirements,”¹⁵⁵ but he immediately undercuts that bold but apt observation by discounting the importance of the Court’s error. He asks, “Did their miscalculation matter much?”¹⁵⁶ but immediately answers, “Probably not,” because the rise of “massive resistance” on the part of segregationist white southerners was “virtually ensured” irrespective of whatever the Court did or did not do.¹⁵⁷

IV. KLARMAN ON THE CIVIL RIGHTS MOVEMENT

From Jim Crow to Civil Rights devotes its final chapter of almost one hundred pages—nearly one fourth of the book—to the relationship between the *Brown v. Board of Education* decision and the civil rights movement, the same topic Klarman addressed in his two 1994 articles.¹⁵⁸ Klarman begins by asserting that “*Brown* radicalized southern politics,”¹⁵⁹ and repeatedly asserts that point

¹⁵⁰ Id. at 313.

¹⁵¹ Id. at 356.

¹⁵² Id. at 318.

¹⁵³ Id. at 320.

¹⁵⁴ Id. at 350.

¹⁵⁵ Id. at 320.

¹⁵⁶ Id.

¹⁵⁷ Id.

¹⁵⁸ See supra notes 1–2 and accompanying text.

¹⁵⁹ Klarman, *From Jim Crow to Civil Rights*, supra note 27, at 350.

2004] “Happy Birthday” Brown v. Board of Education? 713

throughout the balance of the chapter.¹⁶⁰ Although “racial moderates prospered in southern politics between World War II and *Brown*,”¹⁶¹ *Brown* “dramatically increased the importance of race in southern politics”¹⁶² and thereby put the putative white moderates at an almost insuperable disadvantage. In Klarman’s view, however, the rise of vituperative segregationists such as Governors Orval Faubus in Arkansas, Ross Barnett in Mississippi, and George C. Wallace in Alabama turned out to be a quintessential case of a sow’s ear turning into a silk purse. “The electoral incentives of southern politicians,” Klarman writes in a sentence that nicely captures the underlying irony of his analysis, “led them to respond to *Brown* in ways that ultimately facilitated its enforcement.”¹⁶³

Just as he argued a decade ago, Klarman writes in *From Jim Crow to Civil Rights* that “[o]nly the violence that resulted from *Brown*’s radicalization of southern politics enabled transformative racial change to occur as rapidly as it did.”¹⁶⁴ Echoing earlier analyses that reach back to the late 1970s,¹⁶⁵ Klarman states that “[i]t was televised scenes of officially sanctioned brutality against peaceful black demonstrators that transformed northern [white] opinion on race”¹⁶⁶ and led to “the enactment of landmark civil rights legislation” in 1964 and 1965.¹⁶⁷

Not only did *Brown*’s “radicalization” of white southern officialdom lead to passage of the Civil Rights Act of 1964 and the Voting Rights Act of 1965, but it also “was the brutality of southern whites resisting desegregation that ultimately rallied national opinion behind the enforcement of *Brown*” itself.¹⁶⁸ Examining the passivity and tardiness that, with few exceptions,¹⁶⁹ characterized the Supreme Court’s failure to press for the active implementation of

¹⁶⁰ See id. at 391, 421.

¹⁶¹ Id. at 386.

¹⁶² Id. at 365.

¹⁶³ Id. at 462.

¹⁶⁴ Id. at 442.

¹⁶⁵ See David J. Garrow, *Protest at Selma: Martin Luther King, Jr., and the Voting Rights Act of 1965*, at 133–60 (1978).

¹⁶⁶ Klarman, *From Jim Crow to Civil Rights*, supra note 27, at 441–42.

¹⁶⁷ Id. at 364.

¹⁶⁸ Id. at 385.

¹⁶⁹ See *Cooper v. Aaron*, 358 U.S. 1 (1958).

Brown between 1955 and 1968, Klarman asserts that “[n]ot until popular opinion mobilized behind *Brown* did the Court become more interventionist.”¹⁷⁰ Klarman reports, however, that according to 1956 Gallup Poll results “more than 70 percent of whites outside the South thought that *Brown* was right,” whereas in the South itself “only 16 percent of whites agreed with *Brown*.”¹⁷¹ By 1959, the first figure had risen to seventy-five percent, while the southern one had dropped by half, to eight percent.¹⁷² Thus national popular support for *Brown* appears to have been strong and sustained well before both the 1960 onset of mass civil rights protests across the deep South and the Court’s own subsequent efforts to truly enforce *Brown*.

In contrast with those southern white public opinion figures, Klarman also reports poll findings that in 1956, fifty-five percent of white southerners believed that school desegregation was inevitable, but eighteen months later, only forty-three percent still shared that belief.¹⁷³ The contrast suggests that a more resolute pursuit of *Brown*’s enforcement might well have attenuated the strength of the segregationist backlash that dominated the South from 1956 until 1964. Klarman notes that the Supreme Court began to move forward with *Brown*’s enforcement as early as 1963, when in *Goss v. Board of Education*,¹⁷⁴ the Court “invalidated the same minority-to-majority transfer scheme that the justices had declined to review in 1959.”¹⁷⁵ But Klarman’s contention that the justices’ incipient progress was simply a response to the external political context—“in 1963–1964, they were following, not leading, national opinion”¹⁷⁶—stands in some tension with the public opinion figures he cites from as early as 1956.¹⁷⁷

¹⁷⁰ Klarman, From Jim Crow to Civil Rights, *supra* note 27, at 452–53.

¹⁷¹ *Id.* at 365–66. Yet Klarman rejects any suggestion that *Brown* itself might have generated such strong support for its own mandate, saying that the decision “did not fundamentally transform the racial attitudes of most Americans.” *Id.* at 368. Instead, “[p]owerful political, economic, social, and ideological forces were impelling Americans toward more egalitarian racial views.” *Id.*

¹⁷² *Id.* at 367–68.

¹⁷³ *Id.* at 417. By 1961, the number had jumped to seventy-six percent. See *id.* at 405.

¹⁷⁴ 373 U.S. 683 (1963).

¹⁷⁵ Klarman, From Jim Crow to Civil Rights, *supra* note 27, at 341.

¹⁷⁶ *Id.* at 343.

¹⁷⁷ See *id.* at 459 (“Congress and the president ultimately got behind *Brown* . . . because the civil rights movement had altered public opinion on school segregation.”).

2004] “Happy Birthday” Brown v. Board of Education? 715

Klarman, however, remains committed to insisting that “the success of the civil rights movement probably explains much of the justices’ more aggressive posture on desegregation in the 1960s,”¹⁷⁸ in contrast to the late 1950s. He notes that “[t]he percentage of southern black children in desegregated schools shot up from 1.18 percent in 1964, to 6.1 percent in 1966, 16.9 percent in 1967, 32 percent in 1969, and roughly 90 percent in 1973.”¹⁷⁹ Yet he cites those statistics, which reflect that most desegregative progress occurred well after the civil rights movement peaked in 1965 and then slid into internal and popular turmoil with the advent of “Black Power” in mid-1966,¹⁸⁰ just three pages after asserting that “[t]he pace of school desegregation accelerated primarily because of the civil rights movement.”¹⁸¹

If not simply inaccurate, that assertion is too simple by much more than half, for it overlooks and wrongly minimizes the essential stimulus that a few judges on the U.S. Fifth Circuit Court of Appeals, especially Judge John Minor Wisdom, gave to the Supreme Court’s dilatory embrace of desegregative enforcement.¹⁸² First in *Singleton v. Jackson Municipal Separate School District* in mid-1965, in which he declared that “[t]he time has come for foot-dragging public school boards to move with celerity toward desegregation,”¹⁸³ and then in *United States v. Jefferson County Board of Education* in December 1966, which held—in full italics—that “*the only adequate redress for a previously overt system-wide policy of segregation directed against Negroes as a collective entity is a system-wide policy of integration*,”¹⁸⁴ Judge Wisdom forced the Supreme Court to confront its own ongoing failure to make good on *Brown*’s promise. When the Court, in *Green v. County School Board of New Kent County*,¹⁸⁵ embraced, in the words of now-Judge J. Harvie Wilkinson III, “Wisdom’s critical premise . . . that school boards had a positive duty to integrate, not merely to stop

¹⁷⁸ Id. at 342.

¹⁷⁹ Id. at 363.

¹⁸⁰ See Garrow, *supra* note 143, at 475–525.

¹⁸¹ Klarman, *From Jim Crow to Civil Rights*, *supra* note 27, at 360.

¹⁸² See David J. Garrow, *Visionaries of the Law: John Minor Wisdom and Frank M. Johnson, Jr.*, 109 *Yale L.J.* 1219, 1222–26 (2000).

¹⁸³ 348 F.2d 729, 729 (5th Cir. 1965).

¹⁸⁴ 372 F.2d 836, 869 (5th Cir. 1966).

¹⁸⁵ 391 U.S. 430 (1968).

segregating,” that new holding “transformed the face of school desegregation law.”¹⁸⁶ Judge Wisdom’s crucial contribution was purely judicial, and purely doctrinal, and therefore does not fit at all within Klarman’s interpretive analysis.¹⁸⁷ No thorough and open-minded consideration of southern school desegregation history can depreciate the extent to which the tardy, late 1960s implementation of *Brown* was achieved, not because of the largely spent force of the civil rights movement, but because of the innovative insistence of a small number of creative and committed jurists.

Klarman’s analysis of *Brown* and the civil rights movement also extensively revisits, and significantly alters, his 1994 treatment of *Brown*’s impact and influence on black civil rights activism. A decade ago, Klarman erred in saying that *Brown* “did not” provide “critical inspiration for the modern civil rights movement.”¹⁸⁸ Now, however, Klarman expressly acknowledges that “*Brown* prompted southern blacks to challenge Jim Crow more aggressively than they might otherwise have done in the mid-1950s.”¹⁸⁹ Indeed, in the book’s concluding pages, Klarman admits that “*Brown* raised the hopes and expectations of black Americans”¹⁹⁰ and “plainly inspired blacks,” since it “furthered the hope and the conviction that fundamental racial change was possible.”¹⁹¹

Nevertheless, Klarman’s change of mind is both grudging and incomplete. Writing that *Brown* “produced no general outbreak of direct-action protest in the 1950s,”¹⁹² he asks, “If *Brown* was a direct inspiration, why did the protests not begin until 1960?”¹⁹³ Klarman states that “the evidence that *Brown* directly inspired such protests is thin”¹⁹⁴ and asserts that “the civil rights revolution

¹⁸⁶ J. Harvie Wilkinson III, *From Brown to Bakke: The Supreme Court and School Integration: 1954-1978*, at 111–12 (1979).

¹⁸⁷ See Klarman, *From Jim Crow to Civil Rights*, supra note 27, at 363 (“The 1964 Civil Rights Act, not *Brown*, was plainly the proximate cause of most school desegregation in the South.”).

¹⁸⁸ See Klarman, *Racial Change*, supra note 1, at 84.

¹⁸⁹ Klarman, *From Jim Crow to Civil Rights*, supra note 27, at 369; see also *id.* at 368 (stating that *Brown* “unquestionably motivated [blacks] to challenge” segregation).

¹⁹⁰ *Id.* at 467.

¹⁹¹ *Id.* at 463.

¹⁹² *Id.* at 373.

¹⁹³ *Id.* at 374.

¹⁹⁴ *Id.* at 370; see also *id.* at 364 (“*Brown* was less directly responsible than is commonly supposed for the direct-action protests of the 1960s.”); Michael Klarman, *Are*

2004] “*Happy Birthday*” *Brown v. Board of Education*? 717

of the 1960s had little to do with *Brown*”; rather, it was instead “mainly spawned by World War II.”¹⁹⁵

If Klarman’s position is coherent rather than inconsistent, it may be because he believes that *Brown* “encouraged blacks to litigate, not to protest in the streets.”¹⁹⁶ Indeed, he maintains, “the extent to which *Brown* may have discouraged direct-action protest” on the part of black southerners is reflected in “the relative absence of such protest in the middle to late 1950s.”¹⁹⁷

The most clear counterexample to Klarman’s claims is the famous Montgomery bus boycott of 1955–56. Ten years ago, this writer cited the writings and statements of a number of leading Montgomery black activists—including Professor Jo Ann Gibson Robinson, who instigated the boycott; Rosa Parks, whose arrest spurred Professor Robinson’s effort; Dr. Martin Luther King, Jr., who was chosen as the boycotters’ primary spokesperson; and Reverend Edgar N. French, another early boycott leader¹⁹⁸—to demonstrate that Klarman’s 1994 dismissal of an inspirational if not directly causal relationship between *Brown* and the Montgomery protest was seriously underinformed. Now, in seeming response, Klarman concedes that “*Brown* may have induced Jo Ann Robinson” to first warn white officials of the likelihood of a bus boycott if the treatment of black riders was not improved significantly,¹⁹⁹ but he then immediately asks why, if *Brown* “directly” inspired the December 1955 boycott, the boycott activists did not demand fully integrated bus seating from the very onset of the protest, rather than only after it was two months old?²⁰⁰

The grudging nature of Klarman’s modest concession with regard to Professor Robinson is highlighted by his contention that “*Brown* probably . . . did not foster the view [among blacks] that they could personally help to end” segregation.²⁰¹ The counterex-

Landmark Court Decisions All That Important?, *Chron. of Higher Educ.*, Aug. 8, 2003, at B10 (“*Brown* neither educated many whites to abandon white supremacy, nor inspired blacks to commence direct-action street protest.”).

¹⁹⁵ Klarman, *From Jim Crow to Civil Rights*, supra note 27, at 376.

¹⁹⁶ *Id.* at 377.

¹⁹⁷ *Id.*

¹⁹⁸ See Garrow, supra note 3, at 154–56.

¹⁹⁹ Klarman, *From Jim Crow to Civil Rights*, supra note 27, at 371.

²⁰⁰ *Id.*

²⁰¹ *Id.* at 380.

amples to this claim are numerous indeed, beginning with some that were featured in the 1994 *Virginia Law Review* exchange.²⁰² Mrs. Parks, in her autobiography, stated that after *Brown*, “African Americans believed that at last there was a real chance to change the segregation laws.”²⁰³ Reverend French, reflecting on the boycott as early as 1962, said that “[t]he Supreme Court decision of 1954 restored hope to a people who had come to feel themselves helpless victims of outrageous and inhuman treatment.”²⁰⁴ Dr. King, writing even earlier, in 1958, remarked that *Brown* had “brought hope to millions of disinherited Negroes who had formerly dared only to dream of freedom.”²⁰⁵ Even more pointedly, Dr. King added that *Brown* had “further enhanced the Negro’s sense of dignity and gave him even greater determination to achieve justice.”²⁰⁶

Much more recently, Professor J. Mills Thornton III’s definitive history of the modern civil rights struggle in Alabama, *Dividing Lines*,²⁰⁷ provides even more extensive evidence of how great an effect *Brown* had on African-Americans in Alabama. “[I]n the months immediately following the U.S. Supreme Court’s school desegregation decision in May 1954,” Professor Thornton writes, “various Montgomery blacks moved to try to avail themselves of it.”²⁰⁸ In July, Reverend Solomon Seay, one of the city’s leading activists, “appeared at a public meeting of the state board of education to call for the immediate integration of the University of Alabama.”²⁰⁹ Two months later, “Montgomery’s NAACP chapter submitted a formal desegregation petition to the city-county board of education, and on the first day of classes twenty-three black children . . . presented themselves for admission to a newly constructed white elementary school near their homes.”²¹⁰ Their petition was ignored, but one year later “the city’s NAACP chapter

²⁰² See Garrow, *supra* note 3, at 155–56.

²⁰³ Rosa Parks, *Rosa Parks: My Story* 100 (1992).

²⁰⁴ Edgar N. French, *Beginnings of a New Age*, in *The Angry Black South* 33 (Glenford E. Mitchell & William H. Peace III eds., 1962).

²⁰⁵ King, *supra* note 143, at 191.

²⁰⁶ *Id.*

²⁰⁷ See Thornton, *supra* note 143.

²⁰⁸ *Id.* at 40.

²⁰⁹ *Id.*

²¹⁰ *Id.*

2004] “Happy Birthday” Brown v. Board of Education? 719

again petitioned the board of education for the adoption of a plan to integrate the schools.”²¹¹

Even in the rural western Alabama “black belt,” there was “unmistakable evidence during the summer and fall [after *Brown*] that blacks were preparing to use their landmark victory” to push for desegregation.²¹² Come September, four other NAACP chapters in addition to the one in Montgomery—Anniston, Brewton, Fairfield, and Roanoke—“submitted formal desegregation petitions to their boards of education.”²¹³ Eleven months later, the Birmingham NAACP chapter, “seeking the implementation” of *Brown*, petitioned both the city and the county boards of education,²¹⁴ as did ten other chapters throughout Alabama, including Selma’s.²¹⁵

The evidence of how *Brown* mobilized African-American civil rights supporters across Alabama is too copious for even the most single-minded scholar to ignore. Klarman actually admits at one juncture that “black efforts to implement *Brown* stimulated more resistance than did the decision itself.”²¹⁶ Professor Gerald Rosenberg had correctly emphasized that point back in 1994,²¹⁷ and Professor Thornton’s impressively thorough history underscores that same conclusion: “[I]t was only when the threat of integration actually manifested itself locally that most segregationists were shaken out of their complacency”²¹⁸ and joined the active and sometimes violent ranks of “massive resistance.”²¹⁹

Both Klarman’s treatment of *Brown*, and his argument about how the white segregationist backlash had the ironic effect of increasing support for federal civil rights enforcement and legislation, would have been far stronger and more persuasive had he explicitly acknowledged and embraced the importance of newly stimulated black activism to the dynamic. *Brown* had far more of

²¹¹ *Id.*

²¹² *Id.* at 392.

²¹³ *Id.* at 392–93.

²¹⁴ *Id.* at 196.

²¹⁵ *Id.* at 394.

²¹⁶ Klarman, *From Jim Crow to Civil Rights*, supra note 27, at 369.

²¹⁷ See Rosenberg, supra note 4, at 168 (“[I]t was not the *Brown* decision but rather the visceral challenge to segregation of blacks acting in the local areas that engendered a violent response.”).

²¹⁸ Thornton, supra note 143, at 196.

²¹⁹ Klarman, *From Jim Crow to Civil Rights*, supra note 27, at 320.

an immediate impact upon black southerners than it did upon white southerners, and the increased black activism of 1954–56 in a state like Alabama had far more to do with the suddenly increased “radicalization”²²⁰ of southern politics than did the *Brown* decision itself. As this writer stressed a decade ago in this *Review*, “[T]he southern ‘backlash’ against *Brown* actually seemed to get underway neither with *Brown I* nor *Brown II* but instead with the February 1956 battle over the short-lived desegregation of the University of Alabama by Autherine Lucy.”²²¹ That battle

came just as the two-month-old Montgomery bus boycott was beginning to draw violent opposition and was reaching its most intensely conflictual—and newsworthy—moments. Then, just a few additional weeks later, on March 12, 1956, came the dramatic and remarkable “Southern Manifesto,” the most frontal and high-status assault ever mounted on *Brown*.²²²

Klarman’s failure to give full weight or credit to these decisive intervening events represents a missed opportunity of a most significant dimension.

V. KLARMAN ON THE SUPREME COURT

Klarman’s goal in *From Jim Crow to Civil Rights* is to demonstrate and articulate interpretive conclusions that apply broadly to American constitutional litigation, rather than just to the story of the Supreme Court and race from *Plessy v. Ferguson* through *Brown v. Board of Education*. In his “Conclusion,” he reiterates his belief that “changes in the social and political context of race relations preceded and accounted for changes in judicial decision making.”²²³ His insistence that World War II was “a watershed in the history of U.S. race relations”²²⁴ leads him to assert that “[w]ars have proved instrumental in advancing progressive racial change”²²⁵—an argument that appears perfectly plausible for World

²²⁰ Id. at 442.

²²¹ Garrow, *supra* note 3, at 158–59.

²²² Id. at 159.

²²³ Klarman, *From Jim Crow to Civil Rights*, *supra* note 27, at 443.

²²⁴ Id. at 445.

²²⁵ Id. at 444.

2004] “Happy Birthday” Brown v. Board of Education? 721

Wars I and II but that may not apply in the slightest to either Korea or Vietnam.²²⁶

Klarman champions the beneficial effects of war at the same time that he denigrates the value of constitutional litigation. “[T]he capacity of litigation to transform race relations was limited,”²²⁷ he insists, and “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.”²²⁸ Thus, he says, “segregation and disfranchisement began to seem objectionable to the justices only as blacks became a vital New Deal constituency, achieved middle-class status and professional success,” etc.²²⁹ Hence only those “deep background forces set the stage for mass racial protest,” and “*Brown* was not the spark that ignited” the civil rights movement.²³⁰

But Klarman seeks to build on his assertions about race and *Brown*. From his conclusion that “not a single Court decision involving race clearly contravened national public opinion,”²³¹ he broadens his analysis to assert that “[j]udges who generally reflect popular opinion are unlikely . . . to defend minority rights from majoritarian invasion.”²³² He emphasizes this supposed lesson in his book’s final pages, warning that “[t]he justices reflect dominant public opinion too much for them to protect truly oppressed groups.”²³³ Echoing his conclusion about African-Americans quoted in the preceding paragraph,²³⁴ Klarman further claims:

[C]ourts are likely to protect only those minorities that are favorably regarded by majority opinion. Ironically, when a minority group suffering oppression is most in need of judicial protec-

²²⁶ See *id.* (“[World Wars I and II] created political and economic opportunities for black advancement and had egalitarian ideological implications . . .”).

²²⁷ *Id.* at 379.

²²⁸ *Id.* at 468.

²²⁹ *Id.* at 450; see also *id.* at 443 (arguing that rulings such as *Brown* “reflected social attitudes and practices more than they created them”).

²³⁰ *Id.* at 377. But see *id.* at 7 (asserting that he takes a “middle ground” stance between the opposing assertions that *Brown* “created” the civil rights movement and that *Brown* “had no impact whatsoever”).

²³¹ *Id.* at 450.

²³² *Id.* at 6.

²³³ *Id.* at 449.

²³⁴ See text accompanying notes 227–30.

tion, it is least likely to receive it. Groups must command significant social, political, and economic power before they become attractive candidates for judicial solicitude.²³⁵

Klarman's contention that Supreme Court justices "are unlikely to side with litigants who lack significant social standing"²³⁶ appears to go hand in hand with his most grandiose claim of all, that "[c]ourt decisions . . . cannot fundamentally transform a nation."²³⁷ This assertion is presented as *the* great conclusion of his book, for if even *Brown*, widely seen as *the* "symbol of the use of courts to produce significant social reform,"²³⁸ actually had no transformative effect on racial discrimination and inequality in America, then how could it be denied that the Supreme Court is essentially toothless and that constitutional litigation will open no progressive doors that would not otherwise be unlatched by "deep background forces"²³⁹ in society?

CONCLUSION: THE NEW CRITICS OF JUDICIAL REVIEW

Klarman's eagerness to contend that even Supreme Court decisions of *Brown v. Board of Education*'s stature "cannot fundamentally transform a nation"²⁴⁰ is not merely an historical claim. It is also, visibly and inescapably, an ideological policy contention that unfortunately parallels a dismaying but undeniably flourishing trend in American constitutional criticism.

Over a decade ago Professor Rosenberg published his book, *The Hollow Hope: Can Courts Bring About Social Change?*, a volume which answered its subtitled question with a most resounding "No!"²⁴¹ Extreme conservatives were ecstatic²⁴² that a serious legal scholar would so thoroughly and forcefully seek to disparage the

²³⁵ Klarman, *From Jim Crow to Civil Rights*, supra note 27, at 450; see also *id.* at 463 ("Litigation is unlikely to help those most desperately in need.").

²³⁶ *Id.* at 463.

²³⁷ *Id.* at 468.

²³⁸ Rosenberg, supra note 4, at 171.

²³⁹ See Klarman, *From Jim Crow to Civil Rights*, supra note 27, at 377, 468.

²⁴⁰ *Id.* at 468.

²⁴¹ Gerald N. Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* 343 (1991).

²⁴² See Gary L. McDowell, Scholarly "Hope" Says Court Rarely Ignites Big Changes, *Wash. Times*, Aug. 26, 1991, at F1.

2004] “Happy Birthday” *Brown v. Board of Education?* 723

widespread belief that the greatest lesson of modern American legal history is that the Supreme Court can, and often has, almost single-handedly brought about transformative change in American life in decisions ranging from *Brown* to *Baker v. Carr*²⁴³ to *Roe v. Wade*.²⁴⁴

Professor Rosenberg’s view that “*Brown* was merely a ripple,” as he wrote in the *Virginia Law Review* in 1994, was even more dismissive than Professor Klarman’s.²⁴⁵ Professor Rosenberg’s contentions unfortunately proved influential, however, even among those without an ideological predisposition for embracing them. Professor David L. Kirp, writing in *The Nation*, criticized Rosenberg for ignoring “the extent to which the unanimous ruling in *Brown* . . . gave a powerful symbolic endorsement to those seeking integration.”²⁴⁶ Yet Professor Kirp nonetheless adopted some of Professor Rosenberg’s deleterious conclusions, recounting, for example, how “[o]utside of the NAACP, blacks were mostly uninspired by the ruling” in *Brown*.²⁴⁷

More powerful evidence of such an effect came several years later, after Professor Klarman’s two 1994 articles had given *Brown* much the same treatment it earlier had received from Professor Rosenberg. Writing in *The New Republic*, Circuit Court Judge

²⁴³ 369 U.S. 186 (1962).

²⁴⁴ 410 U.S. 113 (1973). On *Roe*, Professor Klarman unfortunately repeats an error that all too many journalists and scholars have committed when he writes that “*Roe* mobilized antiabortion activists who had not previously played a significant role in American politics.” Klarman, *From Jim Crow to Civil Rights*, supra note 27, at 464. But see David J. Garrow, *Liberty and Sexuality: The Right to Privacy and the Making of Roe v. Wade* 545–47 (1994) [hereinafter Garrow, *Liberty and Sexuality*] (describing the pre-*Roe* political mobilization of abortion opponents); David J. Garrow, *Abortion Before and After Roe v. Wade: An Historical Perspective*, 62 *Alb. L. Rev.* 833, 840–41 (1999) (detailing how the 1970 “legalization of abortion in New York led to a very rapid mobilization of right to life opposition”).

²⁴⁵ Rosenberg, supra note 4, at 165; see also *id.* at 163 (complaining that Klarman “overstates *Brown*’s influence”).

²⁴⁶ David L. Kirp, *How Now, Brown?*, 254 *The Nation* 757, 758 (1992) (reviewing Rosenberg, supra note 241). The critical literature on *The Hollow Hope* is extensive, though it is much more widely known among political scientists than it is among law professors. See, e.g., Kevin J. McMahon and Michael Paris, *The Politics of Rights Revisited: Rosenberg, McCann, and the New Institutionalism*, in *Leveraging the Law: Using the Courts to Achieve Social Change* 63, 106 (David A. Schultz, ed., 1998) (concluding that “Rosenberg’s claims about a lack of connection between *Brown* (and the courts) and Montgomery are largely unfounded”).

²⁴⁷ Kirp, supra note 246, at 758.

Richard A. Posner cited Professor Klarman's work as grounds for the belief that while *Brown*, "in the short term," was "a triumph of enlightened social policy," in "a longer perspective . . . the decision seems much less important, even marginal."²⁴⁸

For as influential an intellectual voice as Judge Posner to describe *Brown* as a "marginal" decision reflected the serious impact of the Rosenberg-Klarman diminution of the case. More importantly, Judge Posner voiced that characterization while reviewing Professor Tushnet's highly significant book, *Taking the Constitution Away from the Courts*.²⁴⁹ As early as 1993, Professor Tushnet had asserted that "the liberal constitutional agenda has been exhausted,"²⁵⁰ but his 1999 book represented a full-throated attack upon the political desirability of judicial review. Judge Posner noted how just a decade earlier, opposition to judicial review had come almost exclusively from extreme conservatives such as Judge Robert H. Bork,²⁵¹ but that the writings of Professors Klarman and Tushnet now reflected a very different ideological coloration among what he termed "the swelling chorus of 'judicial review' skeptics."²⁵² Those skeptics, Posner wrote, "have undermined the complacent belief that judicial review is unequivocally a good thing."²⁵³ Referring perhaps to his judicial superiors on the Supreme Court, Posner optimistically welcomed that challenge, for "the result may be to make the judiciary more sensitive to the dangers to society of throwing its weight around in the name of judicial review."²⁵⁴ Four years later, however, it now appears as if at least Chief Justice Rehnquist and Justices O'Connor, Scalia, Kennedy, and Thomas either remain wholly unfamiliar with the writings of Professors Klarman, Rosenberg, and Tushnet, or that the writings have not provoked the greater sensitivity that Judge Posner wishfully envisaged.

²⁴⁸ Richard A. Posner, Appeal and Consent, *The New Republic*, Aug. 16, 1999, at 36, 39.

²⁴⁹ Mark Tushnet, *Taking the Constitution Away from the Courts* (1999).

²⁵⁰ Mark Tushnet, A Choice for Stability, *Legal Times*, June 21, 1993, at 26, 31.

²⁵¹ See Robert H. Bork, *The Tempting of America: The Political Seduction of the Law* (1990).

²⁵² Posner, *supra* note 248, at 36.

²⁵³ *Id.* at 40.

²⁵⁴ *Id.*

2004] “Happy Birthday” Brown v. Board of Education? 725

Surprisingly few academic voices have addressed the highly supportive relationship between the Rosenberg-Klarman disparagement of landmark decisions such as *Brown*, and the new left-liberal skepticism towards judicial review, first highlighted by Judge Posner. Indeed, the only explicit discussion of this concatenation that so far exists in the law reviews appeared in Professor Erwin Chemerinsky’s 2000 review of Professor Tushnet’s important book.²⁵⁵ Much like Judge Posner, Professor Chemerinsky correctly noted that “[i]n the last decade, it has become increasingly trendy to question whether the Supreme Court and constitutional judicial review really can make a difference.”²⁵⁶ He noted that first there was Professor Rosenberg, then Professor Klarman, and that now Professor Tushnet “goes much further” and “contends that, on balance, constitutional judicial review is harmful” and should be abolished.²⁵⁷

Most important of all, Professor Chemerinsky emphasized how “Tushnet relies on scholars such as Gerald Rosenberg and Michael Klarman to support his argument that judicial review has minimal benefits.”²⁵⁸ Although Chemerinsky did not pose it, one question that occurs quickly, especially if one is troubled by the political implications of Professor Tushnet’s change of heart, is to what extent this new “swelling chorus of ‘judicial review’ skeptics”²⁵⁹ might be less attracted to or persuaded by the new left-liberal attack on judicial review if the chorus members realized what an incomplete, selective, significantly overstated, and sometimes downright erroneous set of historical accounts formed much of the foundation for the new assault.

As Professor Chemerinsky wrote four years ago, “the erosion of faith in judicial review may cause courts to be less willing to enforce the Constitution.”²⁶⁰ Like Judge Posner’s prediction, this warning, too, may significantly overestimate the impact that academic trends and the writings of the professoriat have in the real

²⁵⁵ Erwin Chemerinsky, *Losing Faith: America Without Judicial Review?*, 98 Mich. L. Rev. 1416 (2000) (reviewing Tushnet, *supra* note 249).

²⁵⁶ *Id.* at 1416.

²⁵⁷ *Id.*

²⁵⁸ *Id.* at 1427.

²⁵⁹ Posner, *supra* note 248, at 36.

²⁶⁰ Chemerinsky, *supra* note 255, at 1435.

world of the federal courts. But if enough graduates of the Georgetown University Law Center and the University of Virginia School of Law take to heart the teachings that they may have encountered in their Constitutional Law sections, then future years, and their future careers, might prove Professor Chemerinsky's fear to have been an appropriate one indeed.

In *Taking the Constitution Away from the Courts*, Professor Tushnet declares that "we all ought to participate in creating constitutional law through our actions in politics."²⁶¹ In sounding such a distinctive, though perhaps odd, clarion call, Professor Tushnet echoed a remarkable self-contradiction that had appeared several years earlier in an editorial pronouncement in *The New Republic*. Expanding upon its long-standing disparagement of *Roe v. Wade*²⁶² to attack the Supreme Court's landmark decision in *Planned Parenthood of Southeastern Pennsylvania v. Casey*²⁶³ as even "far less defensible than *Roe*,"²⁶⁴ *The New Republic* declared that abortion was simply "a right that should be protected by politics."²⁶⁵

As this writer first observed one year prior to the publication of Professor Tushnet's book, *The New Republic*, in offering that amazing editorial declaration, "failed to describe exactly what role—if any—either the Supreme Court or the Constitution would be left to play" if constitutional rights "ought to be protected only by politics, and not by the judiciary."²⁶⁶ That derogation of both the desirability of judicial review and the value of constitutional law, while presaging Professor Tushnet's new position, was nonetheless also wholly in keeping with the ongoing critique of judicial assertiveness that Professor Jeffrey Rosen, *The New Republic's* Legal Affairs Editor, has for many years now regularly offered in that magazine's pages.

To group Professor Rosen with Professor Tushnet is not necessarily to argue that Rosen's criticisms of the Rehnquist Court are inaccurate or overstated. Yet Rosen's consistent distaste for what

²⁶¹ Tushnet, *supra* note 249, at 157.

²⁶² 410 U.S. 113 (1973).

²⁶³ 505 U.S. 833 (1992).

²⁶⁴ *The Case Against Casey*, *The New Republic*, July 27, 1992, at 7.

²⁶⁵ *Id.*

²⁶⁶ Garrow, *Liberty and Sexuality*, *supra* note 244, at 701.

2004] “Happy Birthday” Brown v. Board of Education? 727

he terms “the rhetoric of judicial supremacy”²⁶⁷ requires him to deprecate such language, not only in *Casey*, but even in the case that was *Casey*’s rhetorical paragon, *Cooper v. Aaron*.²⁶⁸ The Rehnquist majority’s proclivity for combining “haughty declarations of judicial supremacy with contempt for the competing views of the political branches,” Rosen says, has shown time and again how “the defining characteristic” of the Rehnquist Court is “hubris.”²⁶⁹ The justices’ “aggrandizement of the Supreme Court’s power at the expense of Congress and the state legislatures”²⁷⁰ is reflected in the “imperious tone” that the Rehnquist Court “routinely adopts.”²⁷¹ Chief Justice Rehnquist’s “self-aggrandizing” majority opinion in *Nevada Department of Human Resources v. Hibbs*,²⁷² Rosen recently observed, was “the latest assertion of the judicial supremacy that represents his most important legacy.”²⁷³

Professor Rosen’s critique of the Rehnquist Court may well appeal to a decidedly wider audience of people than those who are willing to embrace Professor Tushnet’s revolutionary renunciation of judicial review or Professors Klarman and Rosenberg’s highly similar diminutions of *Brown*. These four commentators differ from each other in significant and readily visible ways, but their interrelated and complementary claims overlap frequently enough to suggest that the apparent historical findings of Rosenberg and Klarman provide important foundational support for the present day constitutional critiques of Professors Tushnet and Rosen.

These commentators’ writings all significantly bolster the fundamentally antijuristic belief that judicial muscularity on the part of the Supreme Court is both deleterious and oftentimes quixotic. Voices such as *The New Republic* have articulated that contention for many years now with regard to *Roe*,²⁷⁴ but one need not accept *The New Republic*’s overheated diatribes, nor Professor Tushnet’s

²⁶⁷ Jeffrey Rosen, The End of Deference, *The New Republic*, Nov. 6, 2000, at 39, 42 (reviewing Lucas A. Powe, Jr., *The Warren Court and American Politics* (2000)).

²⁶⁸ 358 U.S. 1 (1958); Rosen, *supra* note 267, at 42.

²⁶⁹ Jeffrey Rosen, Pride and Prejudice, *The New Republic*, July 10 & 17, 2000, at 16.

²⁷⁰ *Id.* at 17.

²⁷¹ Rosen, *supra* note 267, at 42.

²⁷² 123 S. Ct. 1972 (2003).

²⁷³ Jeffrey Rosen, Sister Act, *The New Republic*, June 16, 2003, at 14.

²⁷⁴ See, e.g., Dump ‘Roe,’ *The New Republic*, May 18, 1992, at 7 (denouncing the “brazen judicial activism” allegedly exhibited in *Roe*).

excessively dour pessimism, in order to largely subscribe to Professor Rosen's well-articulated critique of the Rehnquist Court, or at least that Court's federalism rulings.

The historical analyses of scholars like Professors Rosenberg and Klarman can, however, if absorbed uncritically by influential commentators and jurists, give significant intellectual reinforcement to judicial policy agendas that range from Professor Tushnet's to Professor Rosen's. In the latter case, that may entail only a modest effect and no foreseeable harm, for one need not welcome the Rehnquist Court's federalism opinions from *United States v. Lopez*²⁷⁵ through *Hibbs* in order to lustily defend both the constitutional correctness and the historical importance of *Brown*, *Roe*, and *Casey*. But in a world, or in a legal academia, where experienced voices such as Professor Tushnet want to cite not only the constitutional record of the Rehnquist Court but also that of its two immediate predecessors as historical evidence for why the U.S. Supreme Court's power of judicial review should ideally be truncated, historical arguments such as Professor Klarman's can have serious real world consequences.

Almost a half century ago, the conservative jurist Learned Hand voiced much the same call for constitutional self-abnegation on the part of the federal judiciary that progressive voices such as Professor Tushnet now have taken up.²⁷⁶ At that time, judges and commentators alike rebuffed and scorned Judge Hand's prescriptions. A similar moment may now be at hand, and the tremendous historical richness of *From Jim Crow to Civil Rights* should not lead anyone to accept that its excessive and disappointing diminution of *Brown*, and of the Supreme Court itself, is persuasive evidence in support of the constitutional cynicism being currently advanced by Professor Tushnet. Professor Michael Klarman has presented us with an impressive work of scholarship, but his interpretation of *Brown* will not be embraced by celebrants of *Brown*'s fiftieth anniversary. Yet more is at stake here than simply *Brown*'s historical stature and reputation, as Professor Klarman knows full well. His policy goal, to convince us that no decision of the U.S. Supreme

²⁷⁵ 514 U.S. 549 (1995).

²⁷⁶ Learned Hand, *The Bill of Rights* (1958).

2004] “*Happy Birthday*” *Brown v. Board of Education*? 729

Court can ever “fundamentally transform a nation,”²⁷⁷ is not one that should be accepted or embraced on account of *From Jim Crow to Civil Rights*.

²⁷⁷ Klarman, *From Jim Crow to Civil Rights*, supra note 27, at 468.