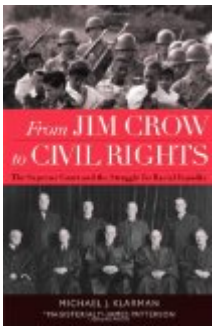
H-Net Reviews
in the Humanities & Social Sciences

Michael J. Klarman. *From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality.* Oxford: Oxford University Press, 2004. 655 S. $35.00, cloth, ISBN 978-0-19-512903-8.



Reviewed by Howard Gillman

Published on H-Law (December, 2004)

In 1957 the political scientist Robert Dahl wrote an article that has become quite influential among contemporary scholars of Supreme Court politics. Entitled "Decision Making in a Democracy: The Supreme Court as a National Policy-Maker," it made a simple point: Supreme Court justices are better viewed as "part of the national governing coalition" than as independent legal guardians of the rights of non-majorities.[1] Dahl demonstrated that the justices rarely challenge the actions of Congress, except when the governing majority that passed legislation some time ago was no longer in power, or when the rapid rise of a new governing coalition temporarily puts the Court out of sync with the preferences of new party leaders (as with the early New Deal battles). This view of the Court was premised on the (very reasonable) assumption that the Supreme Court is a policy-making body and that presidents and senators select justices on the basis of whether their views coincide with the values and preferences of the appointing party. This is what allowed for a predictable "alignment" between the policy-making agenda of the justices and the governing agenda of dominant coalitions in other branches of the national government.

In the decade following Dahl's article, works in constitutional history by political scientists such as Robert McCloskey and Martin Shapiro tended to locate the Supreme Court in the broader structure of American politics. More recently, a good deal of "post-behavioralist" work by Court scholars in political science addresses the various ways in which the U.S. Supreme Court (and other national high courts) might be viewed as a partner in national governing coalitions.[2] But for a very long time law professor commentary about the Supreme Court and American constitutionalism proceeded as if political histories of the justices' decision making were irrelevant to their enterprise. Most notably, at the same time that political scientists were pointing out how the justices were fully integrated into national governance, constitutional theorists in the law professorate were obsessing about the "countermajoritarian difficulty" surrounding the exercise of judicial power.

Over the last ten years an increasing number of law professors have begun to integrate political science accounts of judicial behavior and constitutional politics into their work. Perhaps the best example of this trend came in 2000, when Lucas A. Powe, Jr. explicitly anchored his outstanding history of the Warren Court on a Dahl/McCloskey conception of Supreme Court politics, and thereby demonstrated the ways in which the Warren Court acted as full partners with Great Society liberals in the rest of the national government.[3]

Michael J. Klarman's extraordinary ***From Jim Crow to Civil Rights*** is the la test example of the ways in which political science conceptions and debates can shed new light on American constitutional history. In contrast to the sort of Talmudic doctrinal history that is performed so well by his colleague Barry Cushman, Klarman declares up front that he approaches constitutional history "more as political and social history than as intellectual history of legal doctrine" (p. viii). Klarman is extremely attentive to the actual decisions of the justices in civil rights cases, but he is convinced that we will have a better understanding of these decisions if we trace their connection to contemporaneous social and political contexts than if we take too seriously what the justices say about the influence of previous cases.

Still, this is not merely legal history as political history. The point of the book--beyond providing a comprehensive and revealing examination of the justices' civil rights decision making--is to "further our general understanding of the Supreme Court's role in American society (p. viii). In particular, Klarman wants to focus on the sort of theoretical questions that preoccupy political scientists, namely, "What factors explain judicial rulings such as *Plessy* and *Brown*?" and "How much did the Court decisions influence the larger world of race relations?" (p. 4). To put it another way, he wants to use this case study to explore what influences the Court and how the Court influences the rest of the political system.

This first question engages the social science literature on the determinants of judicial decision making.[4] On this issue Klarman bisects long-standing debates between law-centered approaches and politics-centered approaches by arguing that "when the law is clear, judges will generally follow it, unless they have very strong personal preferences to the contrary," and "when the law is indeterminate, judges have little choice but to make decisions based on political factors" such as "the personal values of judges, the broader social and political context of the times, and external political pressure" (p. 5). However, because Klarman thinks that the law is almost always up for grabs, he argues that the justices' views will sharply coincide with the prevailing attitudes of the national governing elite. In the rare cases where the justices seem to defy public opinion it is not because they are courageously using their independence to protect important legal principles against the preferences of the powerful; rather, it is because they "occupy an elite subculture, which is characterized by greater education and relative affluence," and thus they sometimes have personal views that reflect prevailing elite opinion rather than popular opinion (p. 6).

The second question that frames his analysis is derived from debates about the institutional capacity of the Court to exercise meaningful power in the political system. This issue has been studied a long time in political science, but recently it has been shaped by Gerald Rosenberg's hugely influential (and controversial) book ***The Hollow Hope?: Can Courts Bring About Social Change?***, in which he argues that the Supreme Court has almost no capacity to influence social practices.[5] Klarman stakes out a "middle ground" between those who claim that the Court "created the civil rights movement" and that "it had no impact whatsoever" (p. 7). He is generally sympathetic to Rosenberg's view that the Court's influence has been widely overstated by legal scholars who remain infatuated by the romance of Warren Court activism, but because he is not a political scientist

Klarman is (thankfully) relieved of the overly constraining disciplinary burden to develop a general hypothesis about the Court's impact. Instead, he is satisfied to evaluate the question on a case-by-case basis, looking deeper into the history surrounding particular cases and paying more attention to possible indirect effects. By proceeding historically and inductively Klarman offers a series of lessons on "the social and political conditions that influence efficacy," including "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). Moreover, moving from Rosenberg's focus on the effects of Supreme Court decisions to Michael McCann's work on the effects of "legal mobilization" on social movements,[6] Klarman also addresses "litigation as a method of protest" and whether it had "educational, organizational, and motivational consequences for the civil rights movement" (p. 7).

Klarman's determination to engage these literatures provides the logic for how he structures his historical analysis. Because he wants to assess how the Court's decisions fit into broader patterns of racial politics in the United States he periodizes his treatment of the cases so that they are clustered within similar political and social contexts. He begins with the late-nineteenth century, or what he calls "the ***Plessy*** Era," and then moves to "the Progressive Era," the "Interwar Period," the "World War II Era" (in two chapters), the battles over school desegregation, and finally ***Brown v. Board of Education*** (1954) and the civil rights movement. For each of these periods Klarman begins with a section on "Context" which identifies the factors that shaped state and national policy making on racial matters. These sections provide Court scholars with a breathtaking overview of civil rights policy making and the plight of blacks in the United States. The focus--naturally and appropriately--is on larger structural considerations; e.g., the positions of the national parties, patterns of migration and immigration, the pace of urbanization and industrialization, levels of violence against blacks, the nationalization of the news media, the effects of depression and war, and cultural assumptions about race and human behavior. However, Klarman's knowledge of civil rights history is encyclopedic, and he makes sure that we are introduced to characters who should not be forgotten: Moorefield Storey, the first president of the NAACP; Henry Shields, Yank Ellington, and Ed Brown (the defendants in ***Brown v. Mississippi*** (1936)); Isaac Woodard, who was blinded by a sheriff in South Carolina in the 1940s; Gus Courts, the president of the local NAACP branch in Belzoni, Mississippi, who was shot for his voter registration activity; Freedom rider Jim Zwerg, beaten in Montgomery in May 1961--too many more to mention. Despite his focus on how larger historical changes lead to changes in Supreme Court decision making, Klarman does not let us lose sight of the human face of racial politics in the United States.

After setting the stage Klarman then turns to an examination of the Supreme Court's "Cases" within each of these periods, paying particular attention to whether the decisions are best understood as reflecting the influence of law or politics. He then follows with a discussion of the "Consequences" of the Court's decisions, analyzing whether the justices had any discernible effect (for better or worse) on black civil rights in those areas where they were attempting to intervene. For example, in the chapter on the ***Plessy*** era, Klarman begins by noting how Reconstruction led to some gains in black voting, office holding, jury service, and integration, but that around 1890 "race relations in the South had begun what was to be a long downward spiral" with a rise in lynching, campaigns of disfranchisement, segregation, disparities in educational funding, and the passage of laws designed to coerce black agricultural labor (p. 10). Klarman explains this transfor-

mation as a byproduct of regional changes that affected southern white opinion on race (e.g., economic hardship, the growing political power of poor white farmers, the rise of a new generation of demagogic "Populist" southern political leaders) and national changes that relaxed constraints on white southerners (e.g., an intensification of northern Racial nativism triggered by increased migration of southern blacks and immigration of southern and eastern Europeans, a growing bipartisan desire for sectional reconciliation). After the 1896 presidential election Republicans understood that they could control the national government without having to worry about black political rights in the South; even their national platform "diluted its usual demand for a 'free ballot and a fair count'" (p. 14).

As he reviews the cases of this period Klarman demonstrates how "the racial views of the justices on the *Plessy* Court suggest little deviation from dominant public opinion" (p. 16). Rather than view *Plessy* itself as an illegitimate repudiation of the Fourteenth Amendment, Klarman shows that the weight of precedent was (predictably) in favor of the view that state legislatures had the authority to impose segregation, and "given the strong legal case for sustaining segregation, the justices were unlikely to resist powerful public opinion endorsing the practice" (p. 21). More to the point, "*Plessy* simply mirrored the preferences of most white Americans" in the South and North (p. 22). In fact, the reaction to the decision in the North was almost completely indifferent, with most newspapers giving the case hardly any notice. Klarman's outstanding social and political history, including the history of segregation in northern cities, prevents us from making the mistake of explaining away these decisions as merely a character flaw of reactionary conservative judges, rather than as the consensus opinion of American whites. The same explanation is offered for the Court's lack of concern about black voter disfranchisement. For Klarman, the *Plessy* Court's voting rights decisions reflected the fact that "by 1900, many white northerners shared the view of most white southerners that the Fifteenth Amendment had been a mistake." After all, if Congress was unwilling to enforce "patent violations of section 2 of the Fourteen Amendment, which ***requires*** reduction of a state's congressional representation if its adult male citizens are disenfranchised for any reason other than crime," then "the reluctance of the justices to order remedies for less transparent violations of the Fifteenth Amendment" should be "unsurprising" (pp. 38-39).

When Klarman moves to the Progressive Era he finds examples that allow him to highlight another point about Supreme Court politics, which is that "where the law is relatively clear, the Court tends to follow it, even in an unsupportive context" (p. 62). During this time the political context of race relations was "even more oppressive than that of the *Plessy* era." Teddy Roosevelt, who had endeared himself to some black leaders during his first two years in office, later "declined to condemn black disfranchisement, remained silent after Atlanta's 1906 race riot, ... blamed lynchings primarily on black rapists, ... insisted that 'race purity must be maintained' ... [and] ceased appointing blacks to southern patronage positions" (p. 66). Things got even worse under Taft and reached their nadir at the national level after the 1912 presidential election, when the presidency was controlled by the first native southern president since Andrew Johnson and the Supreme Court was led by the first native southern chief justice since Roger Taney. Among other things Wilson's southern cabinet members ended a fifty-year tradition of an integrated civil service by segregating facilities in their departments.

Nevertheless, there were a number of cases where, at first glance, the justices seemed to be moving in a different direction. In *Guinn v. Oklahoma* (1915) and *Myers v. Anderson* (1915) the Court invalidated the use of grandfather clauses as a mechanism of black voter disfranchisement.

Klarman notes that these state laws were widely understood to be patently obvious efforts to subvert the Fifteenth Amendment, and he demonstrates that even in the oppressive racial climate of the Progressive era northern whites believed that the core protections of that amendment deserved to be obeyed. When the justices, in ***Bailey v. Alabama*** (1911), struck down state peonage laws they were also taking on an issue that was at the heart of the Constitution (in this case, the Thirteenth Amendment), and were doing so with the support of most northerners--and even some white southerners, especially those who were less dependent on black labor and who hoped that a more mobile black work force would migrate to the North. In ***Buchanan v. Warley*** (1917) the justices struck down a residential segregation ordinance, but Klarman correctly notes the justices in that case (like the judges in three of the five southern courts that considered the question) were exhibiting their commitment to property rights rather than their commitment to equal protection.

These nominally pro-civil rights decisions also give Klarman his first opportunity to evaluate the consequences of Supreme Court decisions. He views ***Guinn***'s effect on black voting as "utterly trivial," given that the decision "suppressed a lone outlier" (Oklahoma) and simultaneously signaled "that a literacy test uncorrupted by a grandfather clause was permissible (p. 85). The decision was even completely ineffectual in Oklahoma, where the legislature voted to automatically register all voters in the 1914 congressional election, and then forced everyone else to register during a twelve-day period or be forever disenfranchised. (The federal government refused to challenge the state's response and the Court did not address the issue again for more than two decades.) In the area of peonage, determined states continued to evade the decision by passing near-identical statutes and asserting paper-thin distinctions, and the Supreme Court waited until World War II before it returned to the question. In the wake of ***Buchanan***, residential segregation actually increased across the country.

During the interwar period "the justices were willing to intervene against the worst abuses of Jim Crow, such as the willingness to execute innocent blacks who were convicted on the basis of tortured confessions in farcical trials, but "were less inclined to challenge the more routine but fundamental aspects of white supremacy, such as segregation and disfranchisement, which emerged from this period mostly unscathed" (p. 99). The Court's most conspicuous interventions came in the area of criminal procedure, in cases like ***Powell v. Alabama*** (1932) (involving the infamous trials of the Scottsboro Boys) and ***Brown v. Mississippi*** (1936) (involving a confession obtained through torture), but the decisions had no systematic impact because of "the inability of most southern black defendants to afford counsel, the limited availability of NAACP assistance, the morass of state procedural default rules, and the obstacles to compiling favorable trial records" (p. 157). On the other hand, while concrete results were hard to find, litigation itself was having some less tangible effects: the NAACP increased its fundraising and expanded its branches; the example of black lawyers taking on local sheriffs and election officials provided salutary examples to otherwise dispirited black communities; and (he speculates) the coverage of cases may have made the treatment of blacks a more salient issue to some whites.

While Klarman traces some civil rights progress to the New Deal, Eleanor Roosevelt's progressivism, and the forces of urbanization and industrialization, he insists that the "watershed" historical event that set in motion a more favorable social and political context was WWII--in particular "its democratic ideology, the civil rights consciousness it fostered among blacks, the unprecedented political and economic opportunities it created for blacks, and the Cold War imperative for racial change that followed" (p. 173). More-

over, "the increasing social, economic, and cultural integration made it more costly to maintain aberrant regional practices. The South risked forfeiting industrial relocations, spring-training visits from the integrated Brooklyn Dodgers, and opportunities to host national conventions by resisting national trends toward greater racial equality." Mass media also made it more difficult for "news of southern racial atrocities" to be "contained within the bounds of a generally sympathetic southern community" (p. 188).

It was within this context that the Supreme Court began, for the first time, to demonstrate support for progressive racial change. For some justices, like Felix Frankfurter and Frank Murphy, this change reflected the values of core constituencies of the newly reconfigured Democratic Party. In the case of Truman's appointees their uncharacteristic liberalism in race cases probably reflected "the Cold War imperative for racial change" (p. 195). In any case, to accommodate these circumstances and perspectives the justices were forced to revise long-standing constitutional doctrines. Black voting rights were more aggressively protected, in part by reversing a nine-year-old unanimous decision on the constitutionality of the so-called White Primary, and the result was a significant expansion of black voter registration and voting in the non-rural South--one of the few areas where the Court's civil rights decision making (in combination with a more favorable social and economic climate in the South) had a clearly discernible impact (pp. 244-245). By 1946 there was little tolerance among most national elites for segregation in transportation, and so the justices developed innovative (and in some respects idiosyncratic) understandings of the dormant commerce clause to assault state laws requiring segregation in interstate transportation (pp. 221-222). By 1948 public attitudes had changed on the question of whether racially restrictive covenants should be viewed as a matter of private choice or public policy, and the justices rejected dicta from a unanimous decision twenty-two years earlier in order to reflect new perspectives (pp. 214-215). They also began their assault on *Plessy*.[7]

Given its importance in the imagination of contemporary constitutional scholarship Klarman devotes more than a 150 pages to the fight over school desegregation and the relationship between *Brown v. Board of Education* and civil rights politics. He begins with an extensive analysis of whether the justices' positions in *Brown* should be considered a result of "law" or "politics." When judicial behavioralists within political science consider such questions the discussion tends to flatten under the weight of certain methodological preferences, such as the need to find easily observable indicators of "legal" influence. Klarman's discussion demonstrates the clear superiority of historical and interpretive methods when one is focusing on a manageable dependent variable (such as the decision in *Brown*) and when one has access to a record of the Court's internal deliberations. He is able to distinguish those justices whose legal views coincided with their political preferences from those (like Frankfurter and Jackson) who were personally opposed to segregation but who believed that the Constitution did not prohibit it. The result is a rich and nuanced account of the various considerations that went into the justices' decision-making process in *Brown*. Klarman persuasively argues that "even the most conflicted justices" were "able to overcome their ambivalence" because they were part of a national cultural elite that had emerged from World War II with a consensus view against segregation, and because "by the early 1950s, powerful political, economic, social, and ideological forces for progressive racial change had made judicial invalidation of segregation conceivable." Even Stanley Reed, who thought segregation constitutionally permissible, "conceded that 'of course' there was no 'inferior race'.... It speaks volumes that an upper-crust Kentuckian who had spent much of his adult life in the nation's capital would have said such a thing. Most white southerners--less well educated, less affluent, and less exposed

to the nation's cultural elite--would have demurred" (pp. 308-310).

Klarman also carefully reviews the various considerations that went into the justices' decision against immediate enforcement of the decision, including the position of the federal government, the view that immediate desegregation was impractical and overly provocative, the hope that resistance could be minimized if the justices appeared sympathetic and accommodating, and a lingering racism that led the justices to identify more with white southerners than with blacks. Klarman characterizes the decision in ***Brown II*** as "a solid victory for white southerners" and a clear political blunder, given that it "inspired defiance, not accommodation" (pp. 318, 320). Then again, Klarman is quick to add that the justices' miscalculation probably did not matter much, since "certain features of southern politics and the political dynamics of the segregation issue virtually ensured massive resistance," at least until the entire national government was willing to demonstrate that "resistance was futile and costly" (p. 320). Such a showing was not in the cards in the mid-1950s, when even Democratic presidential candidates were unenthusiastic about ***Brown*** (and even shy about condemning the Southern Manifesto).

Klarman may be at his best when he traces the various and unpredictable ways that the Supreme Court's decision impacted the political dynamics of civil rights in the 1950s and 1960s. First he explains why the Court's decisions had almost no effect on school desegregation, taking into account not only the detailed responses of particular jurisdictions (including token "freedom of choice" plans) but also the lingering consequences of residential segregation in border-state cities, the harassment and intimidation of the NAACP and potential plaintiffs, and the circumstances of southern district court judges. Klarman's analysis of this issue underscores and elaborates Rosenberg's earlier conclusion that "the 1964 Civil Rights Act, not ***Brown***, was plainly the proximate cause of most school desegregation in the South" (pp. 362-363).

At the same time, in what is perhaps Klarman's most original and provocative contribution to our understanding of civil rights history, he notes that in one unusual respect ***Brown*** had an important impact on the passage of the 1964 Civil Rights Act: By stirring up an overheated backlash among southern whites it helped ensure that direct-action protestors "were brutally suppressed by southern law enforcement officers"; in turn, when that violence was broadcast to "national audiences" it "transformed racial opinion in the North" and led "to the enactment of landmark civil rights legislation" (p. 364).

Klarman discounts many other assertions about the importance of ***Brown***. He points out that there is no evidence that the decision "educated" Americans about segregation, or that it led people to support integration when they might previously have opposed it. Most whites outside the South thought that ***Brown*** was right but only a small percentage considered civil rights the nation's most important issue. By contrast, in the South, five out of six whites strongly opposed ***Brown***. Populist politicians in the South (like Big Jim Folsom), who had been making careers out of focusing more on class than race, suddenly found that their political fortunes required them to espouse extreme civil rights positions and advocate massive resistance. Klarman's state-by-state analysis of the "radicalization" of white southern politics in the wake of the decision (pp. 389-421) is an eye-opening and persuasive addition to the familiar discussions of ***Brown***'s importance for American politics.[8]

Of course, Southern blacks did not need to be "educated" about segregation. Many considered ***Brown*** a symbol of hope, but (as Klarman shows) there is no evidence that direct-action protests, such as the Montgomery Bus Boycott or (later) the lunch counter sit-ins, were inspired by ***Brown***.

The best that can be said is that the decision exposed the limits of the NAACP's litigation campaign for racial reform, and this may have led some blacks to adopt more aggressive postures--especially after a very effective campaign of southern state suppression of the NAACP left many with no other choice. This, then, set in motion Klarman's central "backlash-counterbacklash" argument about the political dynamic triggered by *Brown*: "The post-*Brown* racial fanaticism of southern politics produced a situation that was ripe for violence, while *Brown* itself created concrete occasions on which violent opposition to school desegregation was likely.... By helping to lay bare the violence at the core of white supremacy, *Brown* accelerated its demise.... [W]ithout *Brown*, school desegregation would probably not have been a pressing issue in the 1950s. Southern blacks generally had other priorities, including ending police brutality, securing voting rights, gaining access to decent jobs, and equalizing public funding of black schools.... Without *Brown*, negotiation might have continued to produce gradual change without inciting white violence.... Whether and how southern schools would have desegregated in this counterfactual scenario is anybody's guess, but it almost certainly would not have happened as quickly as it did under the 1964 Civil Rights Act. Only the violence that resulted from *Brown*'s radicalization of southern politics enabled transformative racial change to occur as rapidly as it did" (pp. 441-442).

In the end Klarman offers a summary of what his detailed examination of civil rights decision making tells us about the nature of Supreme Court politics. Klarman is willing to concede that "all judicial decisions are products of the intersection of the legal and political axes," but he also knows that "because constitutional clarity lies in the eye of the beholder, no judicial interpretation can ever be a result simply of the legal axis; rather, all such interpretations are inevitably a product of the intersection of both axes" (p. 447). In other words, it is almost never sufficient to explain the behavior of the U.S. Supreme Court with reference to purely legal influences. He notes that some legal scholars object to the idea that the justices may be influenced by extra-legal factors, but he adds that "if the Court's constitutional interpretations have always been influenced by the social and political contexts of the times in which they were rendered, perhaps it is impossible for them not to be. If that is so, then arguing against the inevitable seems pointless" (p. 449). He also correctly claims that his case study demonstrates that it is unrealistic to maintain a view of the Court as a champion of the helpless--except in those cases where--culturally--elites (like justices) have views that are marginally more accommodating or tolerant than mass publics (as with school prayer, flag burning, or gay rights).

In reflecting back on the decisions covered in the book Klarman states that "not a single Court decision involving race clearly contravened national public opinion" (p. 450). Ironically--and in a direct slap to the decades-long c oncern in constitutional theory about the Court's "countermajoritarian difficulty"--Klarman notes that the real "antimajoritarianism of the Senate raises the interesting possibility that the Court's race decisions from the 1920s onward may have reflected national opinion better than did Congress' (in)action." After all, "In the 1920s and 1930s, the justices intervened several times against southern lynch law, while southern Democrats in the Senate thrice killed antilynching bills that had passed the House. The Court invalidated the white primary in the 1940s. In that same decade, the House passed an anti-poll-tax every two years, and the Senate killed them all" (p. 451). Rather than act in a countermajoritarian fashion Klarman believes that the Supreme Court more typically acts to (a) constitutionalize a national political consensus and (b) (in one of his great conceptual contributions to the analysis of Supreme Court politics, elaborated first in law review articles in the late 1990s) "suppress regional outliers." Both of these observations are consistent with Dahl's original

conception of the Court as a partner in a national governing coalition, and his book-length application of these themes to civil rights cases is one of the great scholarly contributions to our understanding of Supreme Court decision making.

In assessing the Court's impact on American politics and society Klarman reiterates many of the considerations he outlines at the beginning of the book, but adds two important points: first, that "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); and second, that "many landmark Court rulings seem to have generated backlashes rather than support"--not just in race politics but also with respect to the death penalty, abortion, and (most recently) gay marriage (p. 464). These observations, combined with his detailed analyses of the Court's civil rights failures (e.g., the criminal procedure decisions of the interwar years) and successes (e.g., black voting rights in the 1940s), as well as his sophisticated and innovative discussion of the significance of ***Brown*** to the passage of the 1964 Civil Rights Acts, represent some of the most important contributions yet to the post-Rosenberg debates about the significance of the Supreme Court for American politics.

It is likely that some Court scholars and constitutional historians will take issue with the vision of judicial politics that underlies Klarman's history--a vision of a Court that is less independent of the political system than some might prefer; less able (or inclined) to defend rule of law values or ignore political contexts (even if it sometimes exhibits a commitment to the enforcement of law); less consequential (even if not completely inconsequential); less important, or at best, occasionally important in very unpredictable ways. There is nothing romantic about Klarman's Court or about the constitutional law that it creates. He is not lifted by lofty rhetoric when it does no good other than to puff up the image of the justices. He does not excuse the Court by treating the bad decisions as unfortunate aberrations. He can muster up outrage at the Court but it is not the outrage of a disappointed suitor; it is the more muted outrage of a sophisticated political analyst who expects very little but is still occasionally surprised at the capacity of our institutions to countenance brutality and injustice.

This is not constitutional history for people who want to be comforted by our constitutional tradition. Nevertheless, given the importance of this subject matter, the sweeping scope of the analysis, the depth of the scholarship, the sophistication of his interpretations, and the originality of his arguments, it is easy to conclude that Michael J. Klarman's magisterial ***From Jim Crow to Civil Rights*** is the first great and indispensable work of American constitutional history in the twenty-first century.

Notes

[1]. Robert Dahl, "Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker," ***Journal of Public Law*** 6 (1957): pp. 279-295.

[2]. See, for example, Robert McCloskey's classic ***The American Supreme Court*** (Chicago: University of Chicago Press, 1960), and Martin Shapiro's ***Law and Politics in the Supreme Court: New Approaches to Political Jurisprudence*** (New York: Free Press, 1964). For an overview of the contemporary literature, see Howard Gillman, "Elements of a New 'Regime Politics' Approach to the Study of Judicial Politics," paper presented at the 2004 Annual Meeting of the American Political Science Association, Chicago, IL, September 2-5, available at http://archive.allacademic.com/publication/index.php?PHPSES-SID=8479f6e6586a3c1f96c48386bce48400.

[3]. Lucas A. Powe, Jr., ***The Warren Court and American Politics*** (Cambridge: Belknap Press, 2000).

[4]. For an overview of some of this literature see Howard Gillman, "What's Law Got to Do With It? Judicial Behavioralists Test the 'Legal Model' of Judicial Decision Making," *Law and Social Inquiry* 26 (2001): pp. 465-504.

[5]. See Gerald N. Rosenberg, *The Hollow Hope? Can Courts Bring About Social Change?* (Chicago: University of Chicago Press, 1991). For a collection of essays addressing the Rosenberg's thesis see David Schultz, ed., *Leveraging the Law: Using the Courts to Achieve Social Change* (New York: Peter Lang, 1998).

[6]. Michael W. McCann, *Rights At Work: Pay Equity Reform and the Politics of Legal Mobilization* (Chicago: University of Chicago Press, 1994).

[7]. Klarman notes that this Court "showed greater hesitancy in criminal cases than in other civil rights contexts.... Not many white suspects were tortured with 'nigger beaters' for several hours and forced to sit with pans of dead people's bones in their laps in an effort to extract confessions. Nor were many white capital defendants provided with defense counsel just three days before their trials. Yet the justices rejected challenges in both of these cases" (p. 231). He notes that this pattern insensitivity to the racial dimensions of the criminal justice system has persisted, and "probably reflects, as constitutional rulings usually do, public opinion. Most white Americans, even today, are reluctant to confront the troubling truths about the extent to which criminal justice remains color-coded" (p. 232). Klarman's blistering analysis of the Court's decisions in these cases leads him to comment that "one is entitled to wonder whether the Court's criminal procedure rulings were not insidious.... Were blacks clearly better off because the Court's rulings that had little practical consequence for southern criminal justice but that enabled the justices to trumpet the vigilant defense that courts offered against racial prejudice in the law? Before the Court's interventions, at least everyone could see mob-dominated trials for what they were: farcical substitutes for lynchings. After such rulings, however, casual observers might have been misled into believing, along with the *New York Times*, that "the High Court stands on guard with flaming sword over the rights of every one of us" (p. 282).

[8]. In making this point Klarman emphasizes that he is not suggesting "that the South was moving gradually but inexorably toward peaceful school desegregation" before the *Brown* decision. "In the absence of *Brown*, southern states almost certainly would *not* have desegregated their schools within a decade or two. Southern whites were much more intensely resistant to school desegregation than to allowing blacks to vote, to become police officers, or to play on integrated baseball teams.... Yet, before *Brown* focused attention on school desegregation, southern politics was generally controlled by moderates, who downplayed race while accommodating gradual racial change. *Brown* turned that political world upside down" (p. 389).

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Citation: Howard Gillman. Review of Klarman, Michael J. *From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality.* H-Law, H-Net Reviews. December, 2004.

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