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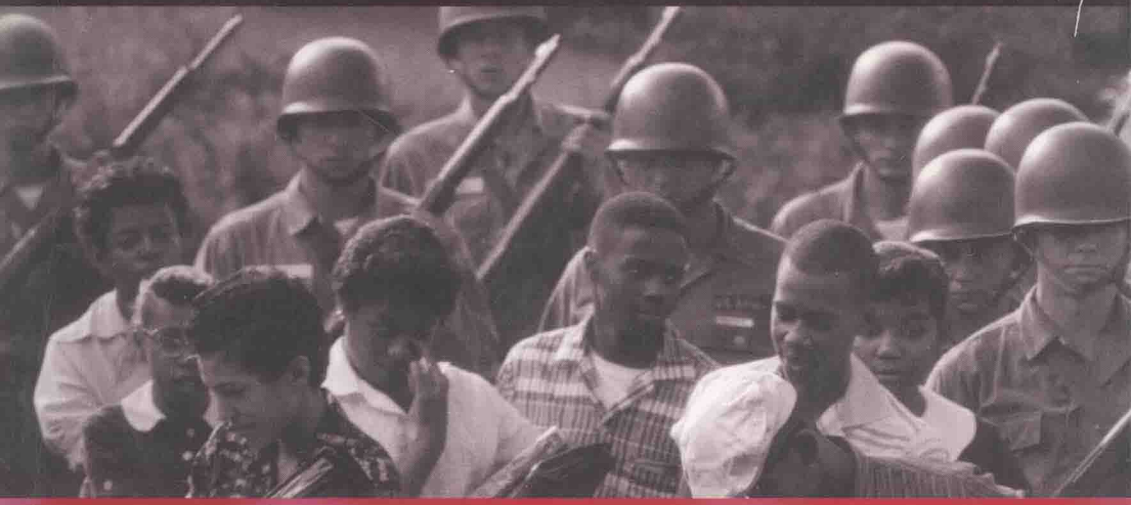

From JIM CROW *to* CIVIL RIGHTS

The Supreme Court and the Struggle for Racial Equality

MICHAEL J. KLARMAN

"MAGISTERIAL!" —JAMES PATTERSON

MICHAEL J. KLARMAN

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PREFACE

I signed a contract to write this book in the spring of 1998, but in some sense I have been working on it since the first semester that I taught constitutional law at the University of Virginia School of Law—the spring of 1988. Every teacher of constitutional law must ultimately make peace with *Brown v. Board of Education* (1954), which is widely deemed to be the most important Supreme Court decision of the twentieth century. Figuring out what one thinks about *Brown* has two dimensions. Why is the decision right? (Virtually everyone today agrees that it is right, though this was not so in 1954, when it was decided.) How important was the ruling in the history of American race relations?

My first stab at answering the normative question—why *Brown* is right—was a 1991 law review article that considered whether *Brown* could be defended on the ground that the southern political system was antidemocratic: In the 1950s, southern blacks were generally not permitted to vote, and state legislatures were badly malapportioned in favor of rural whites, who were the most committed to maintaining white supremacy. In subsequent scholarship, I turned to the question of impact—how much *Brown* mattered to race relations in the United States. This work situated *Brown* within a host of forces—political, social, economic, demographic, ideological, and international—that were pushing the United States toward greater racial equality in the middle of the twentieth century. I wondered whether these broad background forces might not have rendered *Brown* unneces-

sary, and I inquired into the connections between *Brown* and the 1960s civil rights movement. As I taught and wrote about American constitutional history through the 1990s, I developed certain perspectives that I thought shed light on the Court's role in American society and governance: the connection between the work of the justices and public opinion, the extent to which the Court protects minority rights, the general indeterminacy of constitutional law, and the unpredictable consequences of Supreme Court decision making.

This book attempts to weave together the various strands of this earlier scholarship. While it is primarily about the constitutional history of race discrimination, I hope that it also furthers our general understanding of the Supreme Court's role in American society.

Though I am first and foremost a law professor, I have had formal training in history, and in this book I have drawn on scholarship from a wide range of disciplines: constitutional law and constitutional theory, history, political science, and sociology. My goal has been to write a book that is not only multidisciplinary but that might also appeal to educated laypersons with an interest in race, the Supreme Court, or the civil rights movement. Parts of the book do contain technical legal discussion; I do not believe that one can really understand Court decisions without paying some attention to legal doctrine. Yet because of my general approach to constitutional history—which is to understand it more as political and social history than as the intellectual history of legal doctrine—most of the book should be accessible even to those with no legal background.

In the course of this project, I have accumulated a huge string of debts, which it gives me great pleasure to acknowledge here. I could not possibly have read and researched as widely as I have for this project without the able and cheerful transcription of my dictation by the following people: Tina Baber, Kathy Burton, Sue DeMasters, Jeanne Gordon, Evelyn Gray, Sharon Hutchinson, Kim Jennings, Dianne Johnson, Lisa Lambert, Pam Messina, Christine Moll, Diane Moss, Susan Simches, and Karen Spradlin. I owe special thanks on this score to Cindy Derrick and on this and every other score to Phyllis Harris.

I am grateful to Beth Marsh at the *Journal of American History* for sharing with me her substantial knowledge of how to illustrate a scholarly work. India Artis at the Crisis Publishing Company was very helpful at coming up with possible illustrations from the *Crisis*, which is the journal of the National Association for the Advancement of Colored People. Susan Armeny edited two of my articles, eight years apart, for the *Journal of American History*, and both times I learned valuable lessons from her work. Lynn Lightfoot copyedited the main body of the text before delivery of the manuscript to Oxford University Press. I am grateful to both Susan and Lynn for making this book more readable than it would otherwise have been. I also want to thank Dedi Felman, my editor at Oxford University Press, who has

graciously coped with the paranoia of this first-time book author and been a constant source of encouragement and guidance.

A small army of talented and good-natured law students at the University of Virginia have provided outstanding research assistance: Susan Burgess, Carter Burwell, Kathleen Carignan, Miriam Cho, Lance Conn, Peggy Cusack, Vanessa Horbaly, David Marcus, Laura Mazzarella, Genevieve McCormack, Nicole McKinney, Amy Miller, Catherine Morgen, Michelle Morris, Jim Morse, Dilip Paliath, Joe Palmore, Afi Johnson Parris, Stephene Parry, Terence Rasmussen, Julia Rasnake, Sean Reid, Dimitri Rocha, Reuel Schiller, Josh Segev, Michael Signer, Earnhardt Spencer, Mark Stancil, Joel Straka, Hilary Talbot, and Dana Williams. At Stanford Law School, where I was privileged to spend the academic year of 2001–2002, I benefited from the able research assistance of Jeremiah Frei-Pearson, Sanjay Mody, and Ryan Spiegel. Several other research assistants have made it possible for me to access distant archives without spending the time necessary to travel there: Carlton Currens at the University of Kentucky, Christopher Karpowitz at Princeton University, Daniel London at the University of Michigan, Evan Schultz at the Library of Congress, and Bradley Visosky at the University of Texas.

Another, smaller group of University of Virginia law students spent an entire summer of their careers or a comparable block of time during the academic year helping with this project, and they deserve special thanks: John Blevins, Jay Carey, Rebecca Edwards, Wijdan Jreisat, Elena Lawrence, Melissa Mather, Viva Moffat, Ted Murphy, Stephanie Russek, Andrew Schroeder, Leslie Shaunty, Ryan Sparacino, Cecelia Walthall, and Rai Wilson. Several of these young men and women must have long since assumed that this project had fallen by the wayside. It had not; I am just a slow worker.

The reference librarians at the University of Virginia School of Law are, in a word, fabulous. I have imposed on them in ways too numerous to mention and sometimes hard even to fathom, but they have never yet denied a single request. I could not possibly have researched this book the way I wanted to without their assistance. Thanks to Taylor Fitchett, Micheal Klepper, Xinh Luu, Barbie Selby, and Joe Wynne for their many contributions, and special thanks to Kent Olson and Cathy Palombi. I also want to thank Paul Lomio, the head reference librarian at the Stanford Law School, who was a tremendous help during my year visiting there. I am grateful as well to Deb Brent, Mandana Hyder, and Laura Skinner for helping to collect many thousands of pages of material.

Many friends and colleagues have read and commented on a chapter or more of the book while it was in manuscript form. I am grateful to the following for their valuable comments: Barry Adler, Akhil Amar, Ed Ayers, John Q. Barrett, David Bernstein, Alan Brinkley, Dan Carter, Lance Conn, Matt Dillard, John Donohue, John Hart Ely, Jon Entin, Adam Fairclough, Eric Foner, Barbara Fried, Barry Friedman, David Garrow, Paul Gaston, Howard

Gillman, John Harrison, Sam Issacharoff, John Jeffries, Walter Kamiat, Pam Karlan, Herbert Klarman, Mary Klarman, Muriel Klarman, J. Morgan Kousser, Hal Krent, Andrew Kull, Earl Maltz, Richard McAdams, Chuck McCurdy, Neil McMillen, Dan Ortiz, James Patterson, Rick Pildes, Jack Rakove, Eric Rise, Gerald Rosenberg, Bill Ross, Andrew Schroeder, Bruce Schulman, Stephen Siegel, David Strauss, David Thelen, Mark Tushnet, Stephen Ware, Ted White, Stephen Whitfield, and two sets of anonymous referees for the *Journal of American History*.

I presented various chapters or portions of chapters as lectures or in faculty workshops at the following schools: Case Western Reserve University School of Law, University of Chicago School of Law, Cumberland School of Law, University of Florida College of Law, Florida State University School of Law, Hastings College of Law, University of Illinois College of Law, Marshall Wythe School of Law at the College of William and Mary, University of Miami School of Law, University of Southern California Law School, Stanford Law School, University of Texas School of Law, University of Virginia Corcoran Department of History, University of Virginia School of Law, and Yale Law School. I also presented portions of the manuscript at conferences on various topics at the American Society for Legal History, the University of Colorado School of Law, the University of North Carolina at Greensboro History Department, the Institute for Southern Studies at the University of South Carolina, the University of Sussex in Brighton, England, and the Marshall Wythe School of Law at the College of William and Mary. I wish to thank the participants in all these events for their stimulating comments.

Several chapters or portions of chapters have been published as articles, and I would like to thank the journals that published them for granting me permission to reproduce my work here. An earlier version of chapter 1 was published in the 1998 *Supreme Court Review* as "The *Plessy* Era" (copyright © 1999 by the University of Chicago. All rights reserved), and an earlier version of chapter 2 was published in 1998 in the *Vanderbilt Law Review* as "Race and the Court in the Progressive Era." The criminal procedure material in chapter 3 appeared in a different form as "The Racial Origins of Modern Criminal Procedure," published in 2000 in the *Michigan Law Review*. A revised version of the criminal procedure material in chapters 4 and 5 was published in the *Journal of American History* in 2002 as "Is the Supreme Court Sometimes Irrelevant? Race and the Southern Criminal Justice System in the 1940s" (copyright © Organization of American Historians. Reprinted with permission). Much of the white-primary material in chapters 4 and 5 appeared in the *Florida State University Law Review* in 2001 as "The White Primary Rulings: A Case Study in the Consequences of Supreme Court Decisionmaking" (copyright © Florida State University Law Review). A much earlier and significantly different version of the backlash argument in chapter 7 first appeared in 1994 in the *Journal of American History* as "How *Brown* Changed Race Relations: The Backlash Thesis" (copyright © Organization of American Historians. Reprinted with permission) and in the *Vir-*

ginia Law Review as "*Brown*, Racial Change, and the Civil Rights Movement." I would also like to thank Roy M. Mersky at the University of Texas Law School for granting me permission to quote from the Tom C. Clark Collection and Melissa Jackson for permission to quote from the Robert Jackson Papers.

Two deans at the University of Virginia School of Law—Bob Scott and John Jeffries—have provided all the support that any scholar could wish for. I have repeatedly asked them for favors to which I am not entitled, and they have rarely denied a request. Even more important, both Bob and John have encouraged me to believe that this was a worthwhile project and that I could pull it off. I am enormously grateful for their support. I would also like to thank Dean Kathleen Sullivan of the Stanford Law School for inviting me to spend the 2001–2002 academic year as a visitor there. It was in that wonderful environment that I was able to do most of the writing of the last two chapters.

My good friend Ken Hoge read the entire manuscript and made many helpful suggestions. My former student and research assistant Andrew Schroeder not only devoted an entire summer of his life to working on this project but then, glutton for punishment that he is, read a late version of the manuscript and offered a dozen pages of valuable suggestions for improving it.

Five former students, who later became colleagues and have remained good friends, deserve special mention for their contributions. As a law student nearly a decade ago, Reuel Schiller provided both able research assistance and useful commentary on my initial effort to understand the connections between *Brown* and the civil rights movement. More recently, he has read and provided extremely helpful comments on several chapters. Barry Cushman was my research assistant over a dozen years ago when I first became interested in the topic of race and equal protection. He also provided valuable comments on several chapters and, perhaps more important, has been a constant source of stimulation over the years as we have continued to debate the merits of our respective approaches to constitutional history. (Mine is right, of course, though I have never managed to convince Barry of that or, come to think of it, any of my other legal history colleagues here at Virginia.) Liz Magill also read several chapters in manuscript form, and her comments, especially with regard to the last two chapters, proved instrumental in my revisions. Daryl Levinson and Jim Ryan read virtually the entire manuscript, treated it with the care that they accord to their own scholarship, and provided detailed suggestions on how to improve it. It is students and colleagues such as these who make law teaching and scholarship such rewarding endeavors.

My two largest professional debts are to Mike Seidman and Bill Stuntz. Most of what I think about constitutional law has been influenced by Mike, who is one of the most creative constitutional theorists in America. I twice had the privilege of coteaching a course on constitutional theory with him, and that experience has profoundly shaped my approach to the subject.

Mike has read nearly every word in this book, and he generously provided dozens of pages of detailed, thoughtful, and constructive comments. Bill Stuntz and I began our teaching careers at Virginia one year apart, in 1986 and 1987. During the last fifteen years, he has read and commented on nearly all of the scholarship that I have produced. He has also been a constant source of advice, encouragement, and good cheer (and, he thinks, of baseball wisdom). Not only have Mike and Bill made enormous contributions to this book, but for years they have served as models of excellence—scholarly, pedagogical, and collegial—that I have tried in some small way to emulate.

With all this help, I should have written a perfect book.

My personal debts are fewer but no less substantial. My brother, Seth Klarman, not only took time from a hectic schedule to read the entire manuscript, offering many helpful suggestions, but over the years he has been a dependable source of moral and other support. My mother, Muriel Klarman, has always stressed the importance of academic excellence and the worth of scholarly achievement, and during my childhood she strove to create a home environment that was conducive to both. My children—Muli, Rachael, Ian, and Teymura—made essentially no constructive contribution to this book, nor did I expect them to. Yet they have had to live with the burden of it for much too long. Because of them, the next book will have to wait a while. My greatest debt is to my spouse, Lisa Landsverk, who has had to bear far more than her fair share of the familial load because of my obsession with this project. Without her love and support, I could not have written this book, and I would not have wanted to.

My principal regret about this book is that I could not finish it fast enough for my father, Herbert Klarman, to have read it. I hope he would have liked it.

CONTENTS

FROM JIM CROW TO CIVIL RIGHTS

INTRODUCTION

In the years 1895–1900, an average of 101 blacks were lynched a year—mostly in the South. In 1898, a white supremacist campaign to eliminate black political influence culminated in a race riot in Wilmington, North Carolina, which killed at least a dozen blacks. In 1897, President William McKinley declared that "the north and the south no longer divide on the old [sectional] lines," as he and the Republican party turned an increasingly blind eye to violations of the civil and political rights of southern blacks. In 1895, the acknowledged leader of southern blacks, Booker T. Washington, acquiesced in racial segregation and black disfranchisement and urged blacks instead to pursue education and economic advancement. Segregation spread through most spheres of southern life, and blacks were almost entirely barred from voting and from serving on southern juries. Most scientists agreed that the black race was biologically inferior.[1]

In the years 1950–1955, lynchings of blacks had decreased to nearly zero. President Harry S Truman had recently issued executive orders that desegregated the federal military and the federal civil service. Southern black voter registration rose to roughly 20 percent, up from 3 percent just a decade earlier. The walls of segregation were beginning to crumble, as police forces, minor league baseball teams, juries, public universities, and public accommodations were desegregated in many cities of the border states, the peripheral South, and occasionally even the Deep South. Blacks were serving on the federal judiciary and in Congress; Ralph J. Bunche had won the 1950

Nobel Peace Prize; and black players were starring in professional baseball. Few scientists any longer believed in biological racial differences.

In 1896, the U.S. Supreme Court ruled in *Plessy v. Ferguson* that railroad segregation laws were permissible under the Fourteenth Amendment. In 1954, the Court's decision in *Brown v. Board of Education* held that the same constitutional provision invalidated statutes that segregated public schools. This book 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?

Many different sorts of factors—political, economic, social, demographic, ideological, international, and legal—account for the transformation in American racial attitudes and practices over time. As blacks moved from southern farms to northern cities, they gained access to the franchise, and they eventually began to wield significant clout in national politics. As blacks secured better jobs and higher incomes, they acquired financial resources and heightened expectations with which to challenge the racial status quo. As blacks moved from farms to cities, they developed social networks that facilitated collective protest, and they escaped the oppressive racial mores of the countryside. As the nation fought wars "to make the world safe for democracy" and to defeat Nazi fascism, millions of white Americans reconsidered the meaning of democracy and whether it was consistent with a racial caste system. As African and Asian nations achieved independence after World War II and the United States competed with the Soviet Union for the allegiance of the Third World, Jim Crow became an albatross around America's neck. Between 1900 and 1950, Supreme Court justices grew more committed to racial equality and invalidated a variety of schemes that had segregated and disfranchised southern blacks. This book analyzes these and other factors behind the nation's racial transformation and evaluates the relative importance of legal and extralegal forces.

Legal scholars and political scientists have long debated how to understand judicial decision making. One school, that of the formalists, argues that judges decide cases by interpreting legal sources, such as texts (statutes and constitutions), the original understanding of such documents, and legal precedents. According to an extreme version of this view, judges engaged in constitutional review "lay the article of the Constitution which is invoked beside the statute which is challenged and . . . decide whether the latter squares with the former." In its more moderate (and more plausible) form, formalism holds that judicial decision making is significantly constrained by legal sources such as text, original understanding, and precedent, even though some room for judicial discretion remains. A competing school, that of the realists or the attitudinalists, argues that judicial interpretation mainly reflects the personal values of judges. In its crudest form, this perspective attributes judicial decision making to what the judge ate for breakfast. In its

subtler (and more plausible) form, it is reflected in a famous statement by Justice Oliver Wendell Holmes: "The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed."[2]

This book argues that judicial decision making involves a combination of legal and political factors. A legal axis, which consists of sources such as text, original understanding, and precedent, exists along a continuum that ranges from determinacy to indeterminacy. In other words, some legal questions have fairly clear answers, while others do not. A political axis, which consists of factors such as the personal values of judges, the broader social and political context of the times, and external political pressure, exists along a continuum that ranges from very strong preferences to relatively weak ones. In other words, judges feel more strongly, as a matter of personal preference or as a reflection of broader social mores, about some issues than about others. When the law is clear, judges will generally follow it, unless they have very strong personal preferences to the contrary. When the law is indeterminate, judges have little choice but to make decisions based on political factors. Moreover, different judges accord different weights to these two axes, and some judges may deem a particular factor in decision making to be legal, while others will regard that same factor as political. Thus, different judges, even when confronted with the same legal sources and holding the same personal preferences, might reach different legal interpretations because they prioritize the legal and political axes differently.

An important qualification is necessary: This book makes no claim about how judges *should* decide cases. This is not a work of normative constitutional theory. It does not prescribe, but rather it seeks to describe and to interpret how the justices decided cases involving race and the Constitution from *Plessy v. Ferguson* (1896) to *Brown v. Board of Education* (1954). No pejorative connotation is intended by the term "political axis." No conclusion turns on whether particular factors in judicial decision making are labeled "legal" or "political." I have simply tried to sort the various factors into categories in a way that approximates how most justices during this period would have understood their jobs. But I do not mean to suggest that it is illegitimate for judges to consider political factors in their constitutional decision making.

This book argues that because constitutional law is generally quite indeterminate, constitutional interpretation almost inevitably reflects the broader social and political context of the times. "Equal protection of the laws" does not plainly condemn school segregation, and the Fifteenth Amendment's ban on race-based qualifications to the suffrage does not plainly prohibit race-neutral voter qualifications that disparately affect blacks. In the absence of determinate law, constitutional interpretation necessarily implicates the values of the judges, which themselves generally

reflect broader social attitudes. At a time when most white Americans deemed the Fifteenth Amendment to be a mistake, the justices were naturally inclined to sustain disfranchisement measures that did not flagrantly violate it. At a time when most whites were intent on preserving "racial purity" and assumed that blacks were inferior, the justices were naturally predisposed to sustain racial segregation, which the Fourteenth Amendment does not plainly proscribe. Once racial attitudes had changed, as a result of the factors to which I have already alluded, the justices reconsidered the meaning of the Constitution.

The notion that the values of judges tend to reflect broader social mores requires qualification: Though judges live in a particular historical and cultural moment, they are not perfect mirrors of public opinion. Judges occupy an elite subculture, which is characterized by greater education and relative affluence. On many constitutional issues, people's opinions are highly correlated with such factors. For example, although most Americans at the beginning of the twenty-first century support voluntary, nondenominational prayer in public schools, most highly educated, reasonably affluent Americans do not. Reflecting such elite views, most justices continue to regard such prayer as unconstitutional, even though 60–70 percent of Americans disagree. Yet the fact that judges occupy an elite subculture does not negate the principal point: Judges are part of contemporary culture, and they rarely hold views that deviate far from dominant public opinion. Thus, the justices did not protect women under the Equal Protection Clause until after the women's movement, and they 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.[3]

One implication of this perspective on constitutional interpretation is that the justices are unlikely to be either heroes or villains. Judges who generally reflect popular opinion are unlikely to have the inclination, and they may well lack the capacity, to defend minority rights from majoritarian invasion. It is difficult to treat them as villains, because their rulings simply reflect the dominant opinion of their time and place. Yet neither are their interventions on behalf of minority rights likely to be particularly heroic, as such decisions will usually reflect the views held by a majority or a sizable minority of the population. For the justices to have invalidated racial segregation in 1896 would have been heroic, yet for the most part they were not even tempted to do so. When they finally did invalidate segregation in 1954, their decisions reflected views that were held by roughly half the country. I emphasize again that my purpose in this book is neither to criticize nor to defend decisions such as *Plessy* or *Brown* but only to explain them. I do not argue that Court rulings *ought* to reflect popular opinion, only that they usually do.

Finally, this book investigates the consequences of the Court's constitutional decision making in the race context. Some scholars have contended that Court rulings make little if any difference, while others have claimed that they make a vast difference. At one extreme, we hear that *Brown v. Board*

of Education created the civil rights movement and at the other that it had no impact whatsoever. This book argues for a middle ground: Some Court decisions involving race were much more efficacious than were others. By examining which Court rulings mattered and why, we can identify the social and political conditions that influence efficacy—factors such as the intensity of opponents' resistance, the capacity of the beneficiaries of Court decisions to capitalize on them, the ease with which particular rulings are evaded, the availability of sanctions against those who violate rights, the relative attractiveness of particular rights-holders, and the availability of lawyers to press claims. A related question is how important was the role that law played in the subordination of blacks. Court decisions that invalidated statutes that segregated and disfranchised blacks might not have been very consequential if segregation and disfranchisement depended more on social custom and physical force than on law.[4]

Court decisions can have a wide variety of consequences. Analyzing only their direct effects—such as how many schools *Brown* desegregated—misses the possible indirect consequences of Court rulings, which include raising the salience of an issue, educating opinion, motivating supporters, and energizing opponents. None of these indirect consequences is susceptible to precise measurement, but this book tries to say something about the variety of ways in which Court rulings may have influenced the larger world of race relations.[5]

Litigation can also have consequences that are independent of those that result from Court decisions. Litigation is a method of protest that is distinct from alternative methods, such as political mobilization, economic pressure, street demonstrations, and physical resistance. Whether or not it succeeded in securing Court victories, litigation may have had educational, organizational, and motivational consequences for the civil rights movement. This book analyzes litigation as a distinct method of social protest and evaluates its advantages and disadvantages.

Profound changes in American race relations took place between 1895 and 1965. Let us now turn to the questions of why those changes occurred and how much the constitutional rulings of the U.S. Supreme Court had to do with it.