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### ***BOOK EXCERPT***

#### UNFINISHED BUSINESS: RACIAL EQUALITY IN AMERICAN HISTORY

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Unfinished Business: Racial Equality in American History. By Michael J. Klarman. New York: Oxford University Press. 2007.

*In Unfinished Business, Professor Michael J. Klarman highlights a variety of social and political factors that have influenced the path of racial progress—wars, migrations, urbanization, shifting political coalitions—and he looks in particular at the contributions of law and of court decisions to American equality. The author argues that court decisions tend to reflect the racial mores of the times, which is why the Supreme Court has not been a heroic defender of the rights of racial minorities. And even when the Court has promoted progressive racial change, its decisions have often been unenforced, in part because severely oppressed groups rarely have the resources necessary to force the issue. Klarman also sheds light on the North/South dynamic and how it has influenced racial progress, arguing that as southerners have become more anxious about outside challenges to their system of white supremacy, they have acted in ways that eventually undermined that system. For example, as southern slave owners demanded greater guarantees for slavery from the federal government, they alienated northern-*

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*ers, who came to fear a slave power conspiracy that would interfere with their liberties.*

**D**ESPITE the continued existence of a racially defined urban underclass, America has undeniably made great progress toward racial equality. Slavery, lynching, race-based disfranchisement, and state-mandated segregation have all been eliminated and are unlikely to return.

Racial progress has been episodic rather than ineluctable. Northern blacks were better treated legally in 1810 than in 1860. Southern blacks voted, served on juries, and held public office in 1870 but not in 1910. Northern blacks were more likely to attend racially integrated schools and live in racially integrated neighborhoods in 1910 than in 1930.

The rights of blacks have repeatedly been subordinated to the interests of others. In *Prigg v. Pennsylvania* (1842), the Supreme Court privileged the right of southern masters to recover their fugitive slaves over the interest of northern free blacks in avoiding kidnapping and enslavement. In 1876–77, the Republican Party sacrificed the rights of southern blacks in order to secure the presidency. In the 1930s President Franklin D. Roosevelt refused to support an antilynching bill for fear of alienating southern Democrats whose support he needed to enact New Deal legislation.

Racial progress has rarely been a result of people simply doing the right thing. The Constitution's framers authorized future congressional restrictions on the foreign slave trade mainly because Virginians and Marylanders had more slaves than they needed and wanted to keep the price of slaves high. During Reconstruction, Republicans enfranchised blacks largely because they anticipated that blacks would vote for them. The Truman and Eisenhower administrations supported civil rights principally in order to secure black votes and deprive the Soviet Union of valuable propaganda opportunities.

Blacks have had to fight for every inch of racial progress. Slave escapes and revolts increased the anxiety of southern masters, leading them to demand greater protections for slavery from the federal government, which northerners eventually tired of providing. Between 1910 and 1960, millions of southern blacks migrated to northern cities in search of better jobs and more dignified treat-

ment, eventually producing a dramatic shift in the national politics of civil rights. In 1941 a threatened march on Washington, D.C., by one hundred thousand blacks induced President Roosevelt to issue an executive order banning race discrimination in defense industries.

Black activism alone has been insufficient to generate progressive racial change; auspicious social and political conditions have also been necessary. Ironically, wars have generally advanced the cause of racial equality. The Revolutionary War temporarily weakened slavery in the South and enabled its gradual abolition in the North. The Civil War emancipated slaves and inspired postwar constitutional amendments protecting the civil and political rights of blacks. Black membership in the NAACP increased tenfold during World War I, and World War II helped launch the modern civil rights movement.

Several factors account for wars' racially egalitarian influence. Americans tend to define their war aims in democratic terms. The purpose of World War I was "to make the world safe for democracy," and the goal of World War II was to defeat fascism. The democratic ideologies of these wars forced Americans to confront—and to partially reform—undemocratic practices such as racial subordination. Wars also disrupt traditional patterns of status and behavior. Lincoln was driven to emancipate and then arm the slaves after a yearlong effort at suppressing disunionism without challenging prevailing racial norms had proved unavailing. Finally, wars usually involve common sacrifice for the general good and thus have inescapably egalitarian implications. Thus, the sacrifices of liberated slaves on Civil War battlefields paved the way for black enfranchisement.

Long-term forces such as urbanization, improved education, and technological advances have also fostered progressive racial change. Urban blacks commanded greater economic resources, which allowed them to fund social protest, dramatized the disparities between their economic and social statuses, and enabled them to use economic boycotts to leverage social change. Urban blacks created institutions, such as churches and colleges, which helped to organize and lead social protest; better urban transportation and communication also facilitated such protest.

Cities, even in the South, tended to have more permissive racial mores. Urban blacks found it easier to vote, and they used their political influence to obtain the physical security that enabled social protest. By the 1940s most southern cities had NAACP branches, which shared information about racial conditions elsewhere, offered legal expertise for challenging rights violations, and spread the risks and the costs of racial protest.

Better education for blacks encouraged them to challenge their subordinate social status, made it harder for whites to justify that status, and facilitated the coordination of social protest. Improved education for whites reduced their commitment to the harshest aspects of Jim Crow.

As the South became less insular, whites found racial change harder to resist. World War II introduced millions of southerners, white and black, to novel racial attitudes and practices. The growth of the mass media exposed millions more to outside influences, while undermining the ability of white southerners to restrict outside scrutiny of their treatment of blacks.

Shifting political coalitions have also influenced racial change. In the 1890s, as Republicans discovered that they could control the national government without southern electoral support, they lost their enthusiasm for protecting the voting rights of southern blacks. During the Great Depression, blacks regained national political influence by dividing their votes between the major political parties at the same moment that many northern states became electorally competitive for the first time in generations. One recent impediment to progressive racial change has been the tendency of blacks to vote overwhelmingly Democratic at a time when Republicans have generally dominated national politics.

International developments have affected domestic racial policies. The decolonization of Africa around 1960 inspired American blacks to demand their constitutional rights. During the cold war, competition with the Soviet Union for the allegiance of nonwhite developing nations forced Americans to reform domestic racial practices in order to prove that democratic capitalism was not synonymous with white supremacy.

Improved physical security for southern blacks has been critical to progressive racial change. In 1919 whites in Texas could maim

the NAACP's national secretary in broad daylight and go unpunished. A southern civil rights movement was almost inconceivable in such an environment, and even litigation challenging racial injustice was difficult to sustain. In the 1960s, by contrast, southern civil rights demonstrators could generally engage in direct-action protest without risking deadly physical violence.

Ironically, the relative decline in white-on-black violence, which made civil rights protest possible, ensured that any residual violence would stand out. White southerners lynched a hundred blacks a year around 1900, yet most northerners showed little concern. In the 1960s, however, law enforcement brutalization of peaceful protestors was piped directly into American homes by television, shocking northerners and leading directly to the enactment of civil rights legislation.

Because southern whites staunchly resisted progressive racial change, pressure was required to bring it about. Southern blacks supplied some of that pressure, yet the system of white supremacy was so ruthless and pervasive that internally generated change was difficult to accomplish. Because southern whites did not permit blacks to become very well educated, there were few black lawyers available to challenge the system in court, and most white lawyers refused to take civil rights cases. Southern blacks could not vote, making political reform of white supremacy virtually impossible. Because whites controlled the livelihood of most blacks, racial protest usually resulted in severe economic reprisals. The threat and reality of physical violence ultimately secured the system against most internal challenges.

Only external pressure could change such a system. Northerners fought a civil war to end slavery, and during Reconstruction, the northern-dominated Republican Party temporarily revolutionized southern race relations. In the twentieth century, external pressure was supplied first by the NAACP and later by northern public opinion and the national government.

The NAACP's lobbying campaign for federal antilynching legislation induced southern states to take action against lynching. The NAACP's litigation campaigns prompted southern states to begin equalizing spending on black education and permitting blacks to register to vote. Pressure from the national government helped

create a relatively secure physical environment for southern black protest. Ultimately, civil rights legislation supplied coercive mechanisms that accelerated the downfall of southern Jim Crow.

To be sure, the North was never a bastion of racial equality. Slavery was entrenched in most northern colonies before the Revolutionary War. Jacksonian Democrats in the North proclaimed the equality of all white men while disfranchising blacks, segregating them, and trying to colonize them overseas. After World War I, northern blacks who sought to purchase homes in white neighborhoods frequently encountered howling mobs, burning crosses, and bombs. Martin Luther King Jr.'s greatest defeat came in Chicago, where he unsuccessfully challenged housing segregation in 1966.

Still, the North has usually been more racially tolerant than the South, and this regional variation has driven progressive racial change. Had the North not abandoned slavery, no Civil War would have occurred. Had blacks not been permitted to vote in the North after 1870, the Great Migration could not have enhanced black political power and induced the national government to support civil rights. The NAACP's ability to challenge southern racial practices depended on the relative freedom of northern blacks to organize racial protest.

Much of the racial change driven by regional variation has been unintended. The North went to war against the South in 1861 to suppress disunionism but ended up abolishing slavery as well. During Reconstruction, northern Republicans enacted the Fifteenth Amendment primarily to establish a southern political base, but one of the amendment's most important long-term consequences was the political empowerment of northern blacks following the Great Migration. In *Brown v. Board of Education*, a Supreme Court with a northern majority sought to end southern Jim Crow, but ended up radicalizing southern politics, creating an environment ripe for violence, and ultimately facilitating the enactment of transformative civil rights legislation.

Regional differences in racial mores have created a dynamic that has regularly promoted progressive racial change: anxious and defensive white southerners have taken actions to preserve white supremacy that have impelled northerners to assail it. Increasingly strident northern denunciations of slavery induced anxious south-

ern slave owners to demand and receive slavery guarantees from the federal government, which alienated many northerners, who feared a “slave power conspiracy” to deprive them of their liberties. After World War II, a crescendo of southern white violence aimed at suppressing black civil rights militancy inspired President Truman to appoint a civil rights committee which recommended progressive racial reforms. The massive resistance of southern whites to *Brown* eventually drove the Supreme Court to embrace increasingly egalitarian interpretations of the Constitution. The harder southern whites fought to preserve white supremacy, the more they accelerated its demise.

Law has played an ambiguous role in the history of American racial equality. The law on the books has frequently borne little relationship to the law in action. Many slaves became literate despite legal prohibitions on teaching slaves to read and write. In the 1850s blacks continued to enter those states that had constitutionally barred their admission. Miscegenation bans did not prevent the formation of interracial couples.

Civil rights legislation was often no more consequential. The 1875 Civil Rights Act was a dead letter before the Supreme Court struck it down, and so were the many northern public accommodations laws adopted soon thereafter. In 1875 Congress barred race discrimination in jury selection, but by 1910 blacks were no longer sitting on southern juries. Although southern state constitutions required the equal funding of black schools, enormous racial disparities in educational spending developed after 1900, and they were almost never challenged in court.

Not only was legislation often powerless to undermine white supremacy; it was also usually unnecessary to sustain it. No northern state mandated residential segregation by law, yet northern blacks lived in pervasively segregated neighborhoods. Before World War I, northern blacks were almost universally excluded from decent industrial jobs, even though no law commanded racial discrimination in employment. Most southern railroads segregated their passengers before states enacted compulsory segregation laws. Southern statutes did not require that blacks give way to whites on public sidewalks or refer to whites by courtesy titles, yet blacks failing to do so acted at their peril.

Jim Crow laws were often enacted for symbolic reasons, not functional ones. When Kentucky in 1904 passed a law requiring segregation in education, only one school in the state was racially integrated—and it was barely so. Texas adopted a law excluding blacks from party primaries in order to suppress a handful of renegade counties that permitted blacks to participate.

In other contexts, however, law proved vital to both the creation and the destruction of white supremacy. Voter registration requirements adopted around 1890 disfranchised enough southern blacks and their sympathizers to enable a wholesale assault on black suffrage. Southern utility companies would not have segregated their streetcars early in the twentieth century without legal compulsion. The 1964 Civil Rights Act was critical to the desegregation of southern schools and public accommodations, and the 1965 Voting Rights Act revolutionized black voter registration in the Deep South.

The Supreme Court's contributions to racial equality have also been ambiguous. In the nineteenth century, the Court was a consistent foe of racial minorities. The justices invalidated a northern state's effort to protect free blacks from kidnapping by slave catchers, voided a congressional ban on slavery in the federal territories, denied that free blacks possessed any rights "which the white man was bound to respect," freed the perpetrators of white-on-black lynchings and racial massacres, invalidated a federal public accommodations law, and upheld most of the anti-Chinese measures enacted by state and federal governments.

Well into the twentieth century, the Court sustained the constitutionality of racial segregation and black disfranchisement, and during World War II, it upheld the Japanese American internment. More recently, the justices have invalidated affirmative action plans and legislative schemes designed to promote minority political representation. On the other side of the balance sheet, beginning in the 1910s, the Court gradually eliminated southern schemes for disfranchising blacks, curbed the legal lynching of black criminal defendants, and eventually invalidated racial segregation in housing, transportation, and public education.

This historical performance suggests that the Court has hardly been an unvarnished defender of the rights of racial minorities.



The justices reflect dominant public opinion too much for them to protect truly oppressed groups. That anyone should believe otherwise is probably attributable to *Brown* and its progeny. Yet those rulings reflected social and political change at least as much as they caused them. The justices who decided *Brown* understood this, commenting on the “spectacular” advances and the “constant progress” already being made in race relations. Such changes were sufficient to overcome what several of the justices considered a weak legal case for invalidating school segregation.

Constitutional rights do not matter much unless they are enforced. Even when the Court has issued racially progressive rulings, they have often proved inefficacious. *Buchanan v. Warley* (1917) did not integrate neighborhoods, and for ten years, *Brown* was almost completely nullified in the Deep South. Other decisions have been much more consequential. *Sweatt v. Painter* (1950) integrated public universities outside of the Deep South, and *Smith v. Allwright* (1944) inspired a revolution in black voter registration in southern cities. Which political and social conditions have influenced the efficacy of the Court’s progressive race rulings?

One reason that *Smith* was more immediately efficacious than *Brown* is that all blacks thought they should be allowed to vote, but some blacks preferred equally funded but racially separate schools to integrated ones. In addition, the democratic ideology of World War II more directly implicated the right to vote than the right to nonsegregated education. Black soldiers returning to the South after the war often took their discharge papers straight to city hall to register to vote; they did not proceed directly to local school boards to demand integrated education for their children.

Blacks were more divided over some rights than others, but they were more militant about enforcing all rights after World War II than before. This greater militancy was partly a product of greater physical security. Constitutional rights are not worth much when asserting them is likely to get one beaten or killed. Southern railroads would likely have remained segregated even had *Plessy* been decided differently, because blacks testing a right to nonsegregated travel would have jeopardized their lives in an era of rampant lynching. By 1950, however, lynchings were nearly obsolete, and

postwar black litigants were far more likely to face economical reprisals than physical violence.

The intensity of opponents' resistance also influenced the efficacy of the Court's progressive race rulings. By the 1940s most southern whites were less resistant to black suffrage than they were to integrated grade school education. The democratic ideology of World War II and advances in black education led many southern whites to conclude that white primaries were a "cruel and shameful thing." By contrast, most white southerners continued to fiercely resist grade school desegregation, which involved the race mixing of young children, male and female, and thus for most whites had inevitable connotations of miscegenation.

The public enforcement of civil rights was, unsurprisingly, more effective than private enforcement. The Justice Department commanded far greater resources than did the NAACP; it monopolized criminal enforcement; and it did not bear the same risks of economic reprisals and physical retaliation. One reason that *Smith* proved so efficacious is that the Justice Department made credible threats to enforce it. Similarly, the pace of school desegregation accelerated dramatically after the 1964 Civil Rights Act authorized lawsuits by the attorney general. Public enforcement also offers remedial options that are unavailable to private litigants, such as threats to terminate public funds for rights violators and the appointment of federal administrators to replace recalcitrant state officials.

The availability and the quality of lawyers also affected the enforcement of civil rights. One reason that early litigation victories had such trivial consequences is that few black lawyers practiced in the South and those who did were often poorly trained. Most white lawyers would not take civil rights cases because of the odium attached to them. The NAACP had limited resources; it was absent from much of the South until the 1940s; and it could not intervene without the assistance of local counsel. After World War II, however, white lawyers were more willing to take civil rights cases and more well-trained black lawyers practiced in the South.

The existence of an organization such as the NAACP proved critical to the effective implementation of civil rights. Isolated Court victories made essentially no difference, as follow-up litiga-

tion was invariably required to implement rights. In the absence of a robust NAACP, such litigation proved impossible to sustain. Individual blacks could rarely afford the thousands of dollars necessary to litigate cases through the appeals process. Nor did individuals have much incentive to sue, as litigation generally dragged on for years, disrupting the lives of litigants, while subjecting them to devastating economic reprisals and, occasionally, physical violence.

Only the NAACP, which represented blacks across generations, could capture the benefits of litigation, while spreading the risks and the costs. Without the vast expansion of the association during World War II, the dramatic increases in black voter registration after *Smith* and the widespread assaults on school segregation after *Brown* would not have been possible. Yet the NAACP's virtual monopolization of civil rights litigation was a mixed blessing because it gave white southerners an easy target to attack. Their withering assault on the NAACP in the mid-1950s nearly put it out of business in the Deep South and impeded desegregation litigation.

The relative clarity of legal commands also influenced the implementation of civil rights. Even though most southern federal judges thought that *Brown* was wrongheaded, their sense of professional obligation generally deterred them from defying it; they acknowledged that formal state-mandated school segregation had to end. Yet *Brown II* was so vague as to be meaningless. It provided southern judges with no political cover, which made it difficult for them to aggressively implement it even if they were inclined to do so, which few of them were. Instead, most judges countenanced delay and evasion.

Court decisions are not self-enforcing. Even when civil rights litigants won, their victories meant little unless they possessed sufficient power to enforce them. When southern blacks were most oppressed, they could not even bring equalization suits to challenge the enormous—and obviously unconstitutional—racial disparities that existed in education funding. Challenges to legal lynching reached the Supreme Court only in the 1920s and 1930s, when racial conditions in the South had ameliorated enough to enable civil rights organizations to support such cases. Not a single

school desegregation suit was brought in Mississippi until nine years after *Brown*.

Litigation requires lawyers, economic resources, and some security from physical danger. For much of American history, those most in need of racial justice from the courts were least likely to get it, because conditions were too oppressive to permit legal challenges.

Court decisions can also have indirect consequences, such as raising the salience of an issue and energizing the victors (or their adversaries). *Brown* indisputably focused attention on school segregation. People were forced to take a position on the issue, which they had previously been able to avoid doing. For northern liberals in 1954, this inevitably meant opposing segregation. For southern politicians intent on keeping their jobs, however, the only realistic option was to defend segregation and condemn *Brown*.

*Brown* also inspired blacks to hope and believe that fundamental racial change was possible. *Brown* prompted southern blacks to file petitions and lawsuits seeking school desegregation, shifting their focus away from other issues that had been salient before the Court's ruling—voting rights, school equalization, police brutality, and employment discrimination. This agenda-setting effect of *Brown* was important because southern whites were much more resistant to school desegregation than to many of the other reforms sought by blacks.

There is little evidence that *Brown* educated white Americans to change their positions on school segregation. White southerners bitterly denounced the decision. Most white northerners supported it, but more because they already agreed with its principles than because they were educated by the ruling. Moreover, in the mid-1950s, their endorsement was fairly tepid. Few white northerners supported aggressive enforcement of *Brown* until the early 1960s. Northern opinion on race was educated far more by the civil rights movement than by *Brown*.

Indeed, several of the Court's landmark rulings on race seem to have generated political backlashes rather than educating opinion to support the results. *Prigg v. Pennsylvania* (1842) seemed to inspire northern states to defy the Court by enacting more aggressive measures to protect their free black citizens from kidnapping. *Dred*

*Scott v. Sandford* (1857), which essentially declared the Republican Party unconstitutional by forbidding federal regulation of slavery in national territories, induced Republicans to denounce the Court and rally opposition to it. *Brown* inspired southern whites to mobilize extraordinary resistance to racial change and encouraged extremist politicians to use incendiary rhetoric that fomented violence.

Yet backlashes can produce counterbacklashes, as *Brown* did. The violence that *Brown* induced, especially when directed at peaceful protestors and broadcast on national television, transformed northern opinion on race and paved the way for landmark civil rights legislation.

Civil rights litigation, whether successful or not, served valuable educational, motivational, and organizational functions. NAACP lawyers instructed blacks about their constitutional rights and instilled hope that racial conditions were malleable. Many branches formed around litigation, which also proved to be an excellent fund-raising tool. Black lawyers served as role models to black audiences in courtrooms, as they jostled with whites in the only southern forums that permitted racial interactions on a footing of near-equality, and they demonstrated forensic skills that belied conventional stereotypes of black inferiority.

Before World War II, alternative forms of protest—political mobilization, economic boycotts, street demonstrations, and physical resistance—were largely unavailable to southern blacks, who lived under a ruthlessly repressive regime of Jim Crow. At that time, litigation did not compete with alternative protest strategies for scarce resources, and it offered the advantages of not requiring large-scale participation to succeed and of taking place in the relative safety of courthouses.

Yet litigation by itself could make only limited contributions to racial reform, as early civil rights leaders appreciated. In the 1930s Charles Houston warned that “we cannot depend upon judges to fight . . . our battles,” and he urged that “the social and public factors must be developed at least along with and if possible before the actual litigation commences.” By the 1950s, though, litigation had secured such impressive Court victories and the NAACP was riding so high on its success in *Brown* that direct-action protest

may have been slighted, even though it had become a viable option by then. Litigation and direct action now competed for scarce resources, and litigation seemed to have the edge in the 1950s, until the nullification of *Brown* by white southerners demonstrated the limited capacity of lawsuits alone to produce social change.

Though litigation had performed valuable service in mobilizing racial protest and securing Court victories, some of which produced progressive racial change, it could not serve all of the functions of direct action. Sit-ins, freedom rides, and street demonstrations fostered black agency better than did litigation, which encouraged blacks to place faith in elite black lawyers and white judges rather than in themselves. In addition, direct-action protest more reliably created conflict and incited opponents' violence, which ultimately proved critical to transforming national opinion on race.

"The problem of the Twentieth Century," W. E. B. Du Bois famously proclaimed in 1903, "is the problem of the color line." Du Bois would have been no less accurate had he expanded his claim to cover all of American history.

At the Constitutional Convention in 1787, James Madison repeatedly observed that the principal differences of interest among the states resulted from their varying degrees of dependency on slavery. Seventy-five years later, the nation fought a ghastly civil war over slavery. Conflicting views regarding the rights of blacks were the biggest obstacle to sectional reconciliation in the decades after the Civil War. In the 1960s the nation was riven by civil rights demonstrations, urban race riots, and a militant black power movement. Even today, race is the strongest predictor of national political affiliation.

Tremendous racial progress has been achieved over the course of American history. Slavery and Jim Crow have been abolished. Racially motivated violence has been drastically reduced. Many blacks have made economic, social, and political gains that their grandparents never would have thought possible.

Yet America remains two societies, separate and unequal. *Brown's* integrationist vision has gone largely unfulfilled. In many spheres, the lives of blacks and whites are more separate than they were fifty years ago. The gains achieved by the civil rights move-

ment have mostly bypassed the black urban underclass. These blacks are poor and getting poorer. They come from broken homes, live in dilapidated and crime-ridden neighborhoods, attend inferior schools, and have few prospects for bettering their lives. No matter how one defines racial equality, it is hard to see how they have achieved it.

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