



ARTICLE

***Brown* and Red:
Defending Jim Crow in Cold War America**

Gregory Briker & Justin Driver*

Abstract. It would be difficult to overstate the centrality of *Brown v. Board of Education* to American law and life. Legal scholars from across the ideological spectrum have lavished more attention on that Supreme Court decision than any other issued during the last century. In recent decades, the standard account of *Brown* has placed that most-scrutinized opinion in a geopolitical context. *Brown*, the standard account maintains, must be viewed as a product of the Cold War era. By the 1950s, the persistence of laws codifying racial subordination had become an embarrassment for the United States on the global stage. The U.S. effort to defeat communism around the world thus rendered the recognition of civil rights for Black Americans a Cold War imperative.

This Article complicates and challenges that account by exploring the central role that anticommunism played in segregationists' opposition to *Brown* and civil rights. Throughout most of the twentieth century, a broad array of Americans contended that preserving Jim Crow was a Cold War imperative in its own right. For this group, anticommunism and segregation were not just compatible, but inextricably intertwined. Their ranks included northerners and southerners alike: politicians, jurists, columnists, and ordinary citizens. White supremacists did not invoke anticommunism merely as a disingenuous ploy to combat *Brown*. Both long before and long after 1954, anticommunism helped to shape the contours of segregationist thought. The defenders of Jim Crow assailed integration as a product of communistic central government authority. They insisted that racial equality would create discord within the United States, just as the Soviets desired, and that civil rights activists were tainted by communist affiliations. Many segregationists viewed themselves as committed Cold Warriors, undertaking closely connected fights against both a foreign ideological threat and a domestic social one. As such, the Cold War

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represented not only a divide between the United States and the Soviet Union; it also reflected a debate within the United States over the relationship between racial justice, national security, and foreign policy.

Understanding that segregationists viewed their cause as a Cold War imperative recasts dominant views within legal academia, where this essential component of *Brown's* geopolitical context remains underappreciated. While it is tempting to dismiss every segregationist invocation of anticommunism as the product of either irrationality or opportunism, it would be a mistake to do so. Linking segregation with anticommunism transformed the defense of Jim Crow from a regional priority into a national one. Anticommunism also helped resolve a core tension in the segregationist belief that Black citizens did not actually want integration, allowing civil rights lawsuits to be attributed to communist agitation. Reckoning with this significant element of the civil rights era, this Article thus illuminates the logic of a racist worldview. In so doing, it provides a fuller, more accurate portrait of a critical period in constitutional history, of the complex dynamics undergirding legal change, and of the malleable, tenacious character of racism in modern America.

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Introduction

*Brown v. Board of Education*¹ is the most thoroughly scrutinized and celebrated Supreme Court opinion in modern American history. It would be virtually impossible to overstate *Brown*'s centrality to modern constitutional law, as leading scholars and jurists from across the ideological spectrum have argued that any viable theory of constitutional interpretation must accommodate the 1954 decision. Pamela Karlan has contended that "every constitutional theory must claim *Brown* for itself," as a theory failing to do so gains no "traction."² *Brown* has become sacrosanct, with then-Judge Richard Posner calling it "the most esteemed judicial opinion in American history,"³ and Justice Stephen Breyer deeming it the Supreme Court's "finest hour."⁴ Fifty years after the decision was announced, Judge Robert Carter, a litigator in *Brown*, described it as "one of the most important icons of American law," for it "effected a revolutionary change in American life."⁵ It is thus hardly an exaggeration to conclude, as J. Harvie Wilkinson III did, that "*Brown* may be

1. 347 U.S. 483 (1954).

2. Pamela S. Karlan, Lecture, *What Can Brown® Do for You?: Neutral Principles and the Struggle Over the Equal Protection Clause*, 58 DUKE L.J. 1049, 1060 (2009); see also Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947, 952 (1995) ("Such is the moral authority of *Brown* that if any particular theory does not produce the conclusion that *Brown* was correctly decided, the theory is seriously discredited."); ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 77 (1990) ("[A]ny theory that seeks acceptance must, as a matter of psychological fact, if not of logical necessity, account for the result in *Brown*."); Richard A. Posner, *Bork and Beethoven*, 42 STAN. L. REV. 1365, 1374 (1990) ("No constitutional theory that implies that *Brown* . . . was decided incorrectly will receive a fair hearing nowadays . . .").

3. Richard A. Posner, *The Spirit Killeth, but the Letter Giveth Life*, NEW REPUBLIC, Sept. 13, 2012, at 18, 19 (book review).

4. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 867 (2007) (Breyer, J., dissenting). *Parents Involved* was a bitter dispute over the legacy and meaning of *Brown*, but no Justice challenged *Brown*'s legitimacy. See *id.* at 747 (plurality opinion) (describing the debate in the case as being over "which side is more faithful to the heritage of *Brown*"); see also STEPHEN BREYER, *MAKING OUR DEMOCRACY WORK: A JUDGE'S VIEW* 50-51 (2010) (calling *Brown* "more than just a legal decision" and a "symbol" of the law's potential to "advance justice"); MARTHA MINOW, IN *BROWN'S WAKE: LEGACIES OF AMERICA'S EDUCATIONAL LANDMARK* 187-88 (2010) (noting "[t]he iconic status of *Brown*"); Randall L. Kennedy, *Ackerman's Brown*, 123 YALE L.J. 3064, 3073-74 (2014) (contending that *Brown* is so "iconic" that it "cannot be questioned seriously outside of academia without risk of severe self-discrediting"); Brad Snyder, *How the Conservatives Canonized Brown v. Board of Education*, 52 RUTGERS L. REV. 383, 385-88 (2000) (describing how conservatives helped *Brown* achieve its sacrosanct status in American constitutional law).

5. Robert L. Carter, *The Conception of Brown*, 32 FORDHAM URB. L.J. 93, 93 n.*, 97-98 (2004).

the most important political, social, and legal event in America's twentieth-century history."⁶

In recent decades, the standard account of *Brown* has placed the decision in geopolitical context, portraying it largely as a product of the Cold War. On this view, the persistence of racial segregation became an international embarrassment in the American fight against communism after World War II. Jim Crow amounted to a public-relations disaster from the perspective of U.S. officials seeking to win the global confrontation of ideas, particularly in "Third World" nations where people of color made up the majority of the population. This concern led Americans with political power—from members of Congress and diplomats to presidents and judges—to conclude that *Plessy v. Ferguson*'s doctrine of separate but equal⁷ must be jettisoned. In 1980, Derrick Bell introduced his interest-convergence theory, arguing that "[t]he interest of blacks in achieving racial equality will be accommodated only when it converges with the interests of whites."⁸ According to Bell, *Brown* exemplified interest convergence, with the Cold War playing an indispensable role in motivating white Americans to seek the end of school segregation.⁹ In law review articles and a subsequent book, Mary Dudziak offered extensive historical support for Bell's theory, finding evidence that federal officials consciously responded to international criticism of Jim Crow by embracing civil rights.¹⁰ Desegregation thus became a "Cold War imperative."¹¹ The Cold War-imperative thesis has found receptive audiences throughout the legal academy, with distinguished scholars and leading constitutional casebooks endorsing it.¹²

6. J. HARVIE WILKINSON III, FROM *BROWN* TO *BAKKE*—THE SUPREME COURT AND SCHOOL INTEGRATION: 1954-1978, at 6 (1979). Wilkinson is now an esteemed judge on the U.S. Court of Appeals for the Fourth Circuit. *Judge J. Harvie Wilkinson III*, U.S. CT. APPEALS FOR THE FOURTH CIR., <https://perma.cc/77U9-6F9Z> (archived Jan. 30, 2022).

7. 163 U.S. 537, 544-52 (1896).

8. Derrick A. Bell, Jr., Comment, *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523-24 (1980).

9. *See id.* at 524.

10. *See* MARY L. DUDZIAK, COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY 12-14 (rev. ed. 2011) [hereinafter DUDZIAK, COLD WAR]; Mary L. Dudziak, *The Little Rock Crisis and Foreign Affairs: Race, Resistance, and the Image of American Democracy*, 70 S. CAL. L. REV. 1641, 1648 (1997) [hereinafter Dudziak, *Little Rock*]; Mary L. Dudziak, *Desegregation as a Cold War Imperative*, 41 STAN. L. REV. 61, 62-66 (1988) [hereinafter Dudziak, *Desegregation*].

11. DUDZIAK, COLD WAR, *supra* note 10, at 249-50; Dudziak, *Little Rock*, *supra* note 10, at 1648; Dudziak, *Desegregation*, *supra* note 10, at 62-66.

12. *See, e.g.*, MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 183 (2004) ("The importance of the Cold War imperative for racial change is hard to overstate . . ."); Jack M. Balkin, *What Brown Teaches Us About Constitutional Theory*, 90 VA. L. REV. 1537, 1554 (2004) ("The foreign-
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This Article complicates and challenges this standard geopolitical account by emphasizing that a broad array of Americans viewed preserving, rather than destroying, Jim Crow as a Cold War imperative. Segregationist Cold Warriors contended that anticommunism required maintaining racial separation in the United States. They assailed integration as a product of central governmental authority, itself an apparent hallmark of communism that undermined American federalism. To segregationist ears, the death knells of “separate but equal” and of “states’ rights” were one and the same. Communists purportedly celebrated the newly enfeebled states because an America with a single strong federal government was both more aligned with communism and easier to influence than one with dispersed, decentralized power structures. Segregationists further believed that integration would weaken the nation in a showdown against the Soviet Union by creating racial discord, internal disunity, and social strife. They feared that integrated classrooms would inexorably yield integrated bedrooms, spelling the end of American strength on the world stage by contaminating white racial purity.¹³

policy demands of the Cold War made ending the most blatant features of Jim Crow a national imperative.”); Richard Delgado, *Locating Latinos in the Field of Civil Rights: Assessing the Neoliberal Case for Radical Exclusion*, 83 TEX. L. REV. 489, 517 (2004) (book review) (crediting Bell and Dudziak with demonstrating that “*Brown* came about when it did because of the country’s need to bolster international appearances during a time of intense Cold War competition with the Soviet Union for the loyalties of the uncommitted Third World”); Frederick Schauer, *The Supreme Court, 2005 Term—Foreword: The Court’s Agenda—and the Nation’s*, 120 HARV. L. REV. 4, 37 n.124 (2006) (describing as “persuasive[.]” Dudziak’s argument that *Brown* was “attentive to the extent to which racial segregation in the United States was an international embarrassment” during the Cold War); Judith Resnik, *Law’s Migration: American Exceptionalism, Silent Dialogues, and Federalism’s Multiple Ports of Entry*, 115 YALE L.J. 1564, 1598 (2006) (describing the Cold War–imperative thesis as so widespread as to have become “shorthand”); Cass R. Sunstein, *Did Brown Matter?*, NEW YORKER (April 25, 2004), <https://perma.cc/45TA-M7PY> (noting the Cold War–imperative thesis); PAUL BREST, SANFORD LEVINSON, JACK M. BALKIN, AKHIL REED AMAR & REVA B. SIEGEL, *PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS* 855, 1019–20 (7th ed. 2018) (describing the Cold War–imperative thesis and agreeing that the postwar “international situation provided a strategic advantage to American opponents of segregation”). Such endorsement is not confined to the academy; its adherents have also included such figures as W.E.B. DuBois and Judge Jack Weinstein. See W.E.B. DUBOIS, *THE AUTOBIOGRAPHY OF W.E.B. DUBOIS: A SOLILOQUY ON VIEWING MY LIFE FROM THE LAST DECADE OF ITS FIRST CENTURY* 333 (1968) (writing that *Brown* would not “have been possible without the world pressure of communism” because it became “simply impossible for the United States to continue to lead a ‘Free World’ with race segregation kept legal over a third of its territory”); Jack B. Weinstein, *The Role of Judges in a Government Of, By, and For the People: Notes for the Fifty-Eighth Cardozo Lecture*, 30 CARDOZO L. REV. 1, 11 (2008) (calling the Cold War “an important factor . . . in the government’s support of *Brown*”).

13. See JUSTIN DRIVER, *THE SCHOOLHOUSE GATE: PUBLIC EDUCATION, THE SUPREME COURT, AND THE BATTLE FOR THE AMERICAN MIND* 259–60 (2018) (noting that the “crippling fear
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When it came to segregation in the United States, anticommunism cut both ways.

Crucially, these defenders of Jim Crow were not confined to the fringes of American public life.¹⁴ They included prominent government officials, current and former jurists, nationally syndicated columnists, and ordinary citizens. Former Supreme Court Justice and Secretary of State James Byrnes, Federal Bureau of Investigation (FBI) Director J. Edgar Hoover, and dozens of sitting governors and congressmen all linked anticommunism to segregation. Some of the Senate's main power brokers—including at least four future presidents pro tempore—endorsed these views.¹⁵ Proponents spoke in legal cadences, waging what one Alabama columnist termed a “constitutional cold war” against integration.¹⁶ The rhetoric of anticommunism was used to justify segregation in wide-ranging contexts, from Citizens’ Council rallies to congressional galleries.¹⁷

Legal scholarship has largely overlooked critical moments in which segregationists appealed to anticommunism. To take only one prominent example, scholars have thus far failed to note that before *Brown* at least one federal judicial decision explicitly invoked anticommunism to rationalize rejecting a challenge to separate but equal.¹⁸ Anticommunism was so ubiquitous among segregationists that Chief Justice Earl Warren was unsurprised when, in the wake of *Brown*, the Supreme Court received hundreds of pieces of hate mail—many of which condemned the decision as

that integrated classrooms would lead to integrated bedrooms” formed “the crux of white opposition to school desegregation”).

14. IRA KATZNELSON, *FEAR ITSELF: THE NEW DEAL AND THE ORIGINS OF OUR TIME* 17-18 (2013) (arguing that supporters of Jim Crow “acted not on the fringes but as an indispensable part of the governing political party” during the New Deal and its aftermath).
15. These include Richard B. Russell, Jr. (President Pro Tempore from 1969-1971), Allen J. Ellender (1971-1972), James O. Eastland (1972-1978), and Strom Thurmond (1981-1987; 1995-2001). See *About the President Pro Tempore*, U.S. SENATE, <https://perma.cc/89NA-CATQ> (archived Jan. 17, 2022). For these individuals’ views on race and communism, see Part II below. John C. Stennis also served as President Pro Tempore from 1987 to 1989, and while members of the public seemed to read anticommunism into his opposition to integration, it is unclear if he explicitly linked these two ideas. See *About the President Pro Tempore*, *supra*; *infra* notes 308-10 and accompanying text.
16. JASON MORGAN WARD, *DEFENDING WHITE DEMOCRACY: THE MAKING OF A SEGREGATIONIST MOVEMENT AND THE REMAKING OF RACIAL POLITICS, 1936-1965*, at 126, 146, 212 n.59 (2011).
17. Citizens’ Councils formed a widespread network of white-supremacist organizations that emerged after *Brown* to oppose integration. See *infra* notes 266-78 and accompanying text.
18. *Hayes v. Crutcher*, 108 F. Supp. 582, 586 (M.D. Tenn. 1952), *abrogated by* *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

“pure Communism.”¹⁹ When the Court reconvened a year later to provide guidance on the enforcement of desegregation, several southern states submitted briefs that explained how anticommunism demanded either segregation or a gradual approach to integration.²⁰

The alleged connections between communism and civil rights proved essential to the segregationist worldview. Many white southerners fervently believed that Black and white people alike wanted to maintain the segregated status quo, and that both races benefited from Jim Crow.²¹ The stereotypical image of Black people as docile and submissive—an image older than the Civil War—dovetailed with the belief that they accepted and even cherished segregation.²² But tension existed between the claim that Black people did not want integration and the fact that legal and political challenges to racial segregation were occurring with increasing frequency. Anticommunism helped to resolve this tension: Though Black people did not truly desire integration, they had been manipulated into demanding civil rights by outside agitators. These agitators included northern “carpetbagger” activists and communist agents—groups that the segregationist mind conflated. The NAACP and the CCCP thus combined to create an utterly unappetizing alphabet soup, a concoction made up of intermingled, alien forces. Those forces, segregationists held, were bent on dismantling not just the southern way of life, but the American way of life, too.

Some white people could not even begin to fathom the idea that segregation actually harmed Black students. As a result, when the *Brown* Court cited social-science research to that effect in the notorious Footnote Eleven, segregationist commentators did not merely question its integrity or appropriateness in a legal decision.²³ In fact, they also insisted that the social scientists that *Brown* relied upon were tainted by communist affiliations. To them, these allegations magnified *Brown*’s danger: The decision pushed the country toward communism by authorizing federal intervention in local affairs, and it did so by endorsing false, communist-tinged evidence. While every law student learns about this most infamous footnote in constitutional

19. EARL WARREN, *THE MEMOIRS OF EARL WARREN* 302-03 (1977).

20. See Amicus Curiae Brief of the Attorney General of Florida, *Brown v. Bd. of Educ.* (*Brown II*), 349 U.S. 294 (1955) (Nos. 1 et al.), 1954 WL 45715, at *201-02; Brief of Harry McMullan, Attorney General of North Carolina, Amicus Curiae at 27, *Brown II*, 349 U.S. 294 (Nos. 1 et al.), 1954 WL 72727.

21. See, e.g., Sam J. Ervin, Jr., *The Case for Segregation*, LOOK, Apr. 3, 1956, at 32, 32-33.

22. Regarding the history of Black docility in the white imagination, see generally GEORGE M. FREDRICKSON, *THE BLACK IMAGE IN THE WHITE MIND: THE DEBATE ON AFRO-AMERICAN CHARACTER AND DESTINY, 1817-1914* (Harper Torchbooks 1972) (1971).

23. See *infra* Part II.B.

law, an anticommunist lens is necessary to provide a complete picture of why, precisely, it proved so contentious.

The concern that communism and civil rights were entangled emerged predominantly in the South but resonated across the country. The fusion of anticommunism and segregation also long predated both the advent of the Cold War in the 1940s and the Red Scare that peaked during the 1950s, when anticommunist rhetoric attained its greatest potency. More than a decade before Joseph McCarthy took his seat in the U.S. Senate, federal lawmakers proclaimed that communists had infiltrated the civil rights movement and the legislative process. While some scholars assert that segregationists wielded anticommunism as simply a convenient political weapon—that they were anticommunists in name only²⁴—we argue that such dismissals misconstrue the opposition to integration. Segregationists undoubtedly prioritized the continuance of racial apartheid in America, but they cannot invariably be cast aside as disingenuous anticommunists. Upon reflection, it should not be astonishing that segregationists availed themselves of anticommunist rhetoric and ideas during the twentieth century given that the Cold War exerted a sort of gravitational pull on virtually all of American social, political, and legal life.²⁵ But anticommunism was also more than a mere ornament for racist argumentation. Some segregationists doubtless employed anticommunist rhetoric as an empty, almost reflexive epithet; many others, however, developed detailed, sophisticated conceptions of why and how integration would benefit the communist cause.

The Cold War imperative contributed to the internationalizing of *Brown* and the broader civil rights movement. As Dudziak has argued, *Brown* should be understood as a “Cold War case.”²⁶ We wholeheartedly agree. No hard line separates the histories of American foreign and domestic policy.²⁷ Thus far, though, legal academia’s efforts to place *Brown* in its Cold War context have

24. GLENDA ELIZABETH GILMORE, *DEFYING DIXIE: THE RADICAL ROOTS OF CIVIL RIGHTS, 1919-1950*, at 417 (2008) (describing how some “Cold War conservative domestic forces” that opposed desegregation were “[m]asquerading as anti-Communist”).

25. See KEN I. KERSCH, *CONSERVATIVES AND THE CONSTITUTION: IMAGINING CONSTITUTIONAL RESTORATION IN THE HEYDAY OF AMERICAN LIBERALISM* 201 (2019) (“[B]etween the 1940s and the 1970s, anticommunism was the consensus position for the mainstream of both major political parties, and, within them, of liberals and conservatives alike.”). For an argument that anticommunism was more than a “convenient pretext” for conservatives in this era, see GEORGE H. NASH, *THE CONSERVATIVE INTELLECTUAL MOVEMENT IN AMERICA, SINCE 1945*, at 107 (1976).

26. Mary L. Dudziak, *Brown as a Cold War Case*, 91 J. AM. HIST. 32, 42 (2004).

27. Andrew L. Johns, *Introduction—Janus, Tocqueville, and the World: The Nexus of Domestic Politics and US Foreign Policy*, in *THE COLD WAR AT HOME AND ABROAD: DOMESTIC POLITICS AND US FOREIGN POLICY SINCE 1945*, at 1, 2-5 (Andrew L. Johns & Mitchell B. Lerner eds., 2018); Dudziak, *supra* note 26, at 42.

focused on only one side of the coin: how American anticommunist interests paved the way for civil rights, particularly the advancement of formal racial equality.²⁸ While the Cold War is most commonly understood as a contest *between* the United States and the Soviet Union for the hearts and minds of the “Third World,” we emphasize that it was also a contest of ideas *within* the United States.²⁹ The defenders and opponents of Jim Crow engaged in an intense battle over which side could legitimately claim the mantle of Cold Warrior.

This element of the geopolitical story of *Brown* and the larger struggle for civil rights has been largely overlooked by the legal academy. Indeed, while a number of historians have incisively examined the fusion of anticommunism and segregation, legal scholars have dedicated virtually no sustained attention to segregationists’ Cold War arguments.³⁰ The term “massive resistance” is

28. See, e.g., H. Timothy Lovelace, Jr., *Civil Rights as Human Rights*, 71 DUKE L.J. (forthcoming 2022) (manuscript at 5) (on file with authors) (“Much of the Cold War civil rights scholarship has demonstrated how U.S. interest in winning the hearts and minds of the Third World spurred these domestic civil rights reforms.”). Several scholars have underscored how the Cold War simultaneously enabled formal civil rights while obstructing efforts to achieve material equality. See DUDZIAK, COLD WAR, *supra* note 10, at 11-17; CAROL ANDERSON, EYES OFF THE PRIZE: THE UNITED NATIONS AND THE AFRICAN AMERICAN STRUGGLE FOR HUMAN RIGHTS, 1944-1955, at 5-7 (2003); GILMORE, *supra* note 24, at 7-9; Robbie Lieberman & Clarence Lang, *Introduction to ANTICOMMUNISM AND THE AFRICAN AMERICAN FREEDOM MOVEMENT: “ANOTHER SIDE OF THE STORY”* 1, 4-10 (Robbie Lieberman & Clarence Lang eds., 2009). Anticommunism even shaped which legal arguments civil rights lawyers felt they could make, particularly with respect to labor-related litigation. See RISA L. GOLUBOFF, THE LOST PROMISE OF CIVIL RIGHTS 13-14 (2007) [hereinafter GOLUBOFF, THE LOST PROMISE]; Risa Lauren Goluboff, “Let Economic Equality Take Care of Itself”: *The NAACP, Labor Litigation, and the Making of Civil Rights in the 1940s*, 52 UCLA L. REV. 1393, 1458-67 (2005). Relatedly, we focus on how the Cold War was construed to obstruct formal racial equality.

29. For thoughtful explorations of the Cold War written by a leading scholar of the subject, see generally JOHN LEWIS GADDIS, THE COLD WAR: A NEW HISTORY (2005) (synthesizing Cold War histories and discussing the role of ideology in the conflict); and JOHN LEWIS GADDIS, STRATEGIES OF CONTAINMENT: A CRITICAL APPRAISAL OF AMERICAN NATIONAL SECURITY POLICY DURING THE COLD WAR (rev. and expanded ed. 2005) [hereinafter GADDIS, STRATEGIES OF CONTAINMENT] (discussing the evolution of America’s strategy of containment). Regarding the domestic dimensions of the Cold War, see generally STEPHEN J. WHITFIELD, THE CULTURE OF THE COLD WAR (1991) (examining the impact of Cold War anticommunism on American culture); and THOMAS G. PATERSON, ON EVERY FRONT: THE MAKING AND UNMAKING OF THE COLD WAR (rev. ed. 1992) (exploring the role of American attitudes in the origins of the Cold War).

30. We are deeply indebted to the scholarship of historians George Lewis, Jeff Woods, and others whose important work in this area informs our analysis throughout. See generally GEORGE LEWIS, THE WHITE SOUTH AND THE RED MENACE: SEGREGATIONISTS, ANTICOMMUNISM, AND MASSIVE RESISTANCE, 1945-1965 (2004) [hereinafter LEWIS, THE WHITE SOUTH AND THE RED MENACE]; GEORGE LEWIS, MASSIVE RESISTANCE: THE

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widely recognized as the white-supremacist strategy to undermine *Brown*.³¹ But few in legal academia appear to realize that the phrase itself was designed to evoke the Cold War concept of “massive retaliation.”³² That “massive resistance” has been severed from its etymological origins is emblematic of how severely anticommunist segregationism has been neglected in legal scholarship.

This Article pursues these claims in three Parts. Part I begins by briefly reviewing the Cold War–imperative thesis. An extension of interest convergence, the Cold War–imperative thesis argues that domestic advances in civil rights during the postwar era were motivated by American foreign policy concerns. While the United States sought to win over the “Third World,” it struggled to do so because of the international embarrassment caused by Jim Crow. As a result, the thesis contends, white Americans, particularly those wielding political power, came to view the demise of Jim Crow as in their interest. This theory has garnered broad acceptance within legal academia, but it seems to assume that anticommunism cohered more naturally with integration than with segregation. Part II challenges this assumption by presenting evidence that many Americans, including lay citizens and political leaders, insisted that segregation, not integration, was the true Cold War imperative. These arguments predated *Brown* itself, appearing

WHITE RESPONSE TO THE CIVIL RIGHTS MOVEMENT (2006) [hereinafter LEWIS, MASSIVE RESISTANCE]; JEFF WOODS, BLACK STRUGGLE, RED SCARE: SEGREGATION AND ANTI-COMMUNISM IN THE SOUTH, 1948-1968 (2004); George Lewis, *White South, Red Nation: Massive Resistance and the Cold War*, in MASSIVE RESISTANCE: SOUTHERN OPPOSITION TO THE SECOND RECONSTRUCTION 117 (Clive Webb ed., 2005); ELIZABETH GILLESPIE MCRAE, MOTHERS OF MASSIVE RESISTANCE: WHITE WOMEN AND THE POLITICS OF WHITE SUPREMACY (2018); GILMORE, *supra* note 24; THOMAS BORSTELMANN, THE COLD WAR AND THE COLOR LINE: AMERICAN RACE RELATIONS IN THE GLOBAL ARENA (2001); JASON SOKOL, THERE GOES MY EVERYTHING: WHITE SOUTHERNERS IN THE AGE OF CIVIL RIGHTS, 1945-1975 (Vintage Books 2007) (2006); STEPHANIE R. ROLPH, RESISTING EQUALITY: THE CITIZENS' COUNCIL, 1954-1989 (2018); JAMES GOODMAN, STORIES OF SCOTTSBORO (Vintage Books 1995) (1994) (recounting the infamous trial of nine Black teenagers for rape in 1931 and the Communist Party's role in contributing to their legal defense); NELL IRVIN PAINTER, THE NARRATIVE OF HOSEA HUDSON: THE LIFE AND TIMES OF A BLACK RADICAL (W.W. Norton & Co. 1994) (1979) (examining the life of a Black man born in the rural South who became a leading Communist Party organizer); Wayne Addison Clark, *An Analysis of the Relationship Between Anti-communism and Segregationist Thought in the Deep South, 1948-1964* (1976) (Ph.D. dissertation, University of North Carolina at Chapel Hill) (ProQuest) (exploring the relationship between the Cold War and race relations in the political thought and rhetoric of southern whites). We build on existing work by unearthing many new sources, foregrounding legal connections, and highlighting for legal audiences essential takeaways that have gone unexamined.

31. See, e.g., Opinion, *Brown v. Board of Education*, N.Y. TIMES (May 16, 2004), <https://perma.cc/V6XL-X6EP>.

32. See LEWIS, MASSIVE RESISTANCE, *supra* note 30, at 3.

pervasively in political speeches, newspaper columns, judicial decisions, and legislative actions. The ubiquity of such arguments made sense at the time, as they helped both to nationalize the defense of racial segregation and to resolve central tensions within the white-supremacist view of Black citizens. Part III steps back to examine the implications of observing the opposition to *Brown* and the civil rights movement through the lens of anticommunism. From a historical perspective, this richer understanding recasts our perceptions of the civil rights era by challenging the standard distinction between cases regarding race and cases regarding communism and by underscoring the need to investigate the losing sides of landmark Supreme Court cases. It contributes to debates over the nature of legal change by highlighting variance within white interests and the contingent nature of *Brown*. And it demonstrates how racist ideas evolve and extend their lifespan and appeal by interacting with other political forces.

This Article brings to the fore disturbing arguments against the efforts of Black Americans to achieve racial equality. In so doing, we aim to understand, but in no way excuse, these racist attacks and the offensive language that accompanied them. Jim Crow, and the efforts by white supremacists to prolong it, were quite simply abominations. That defenders of Jim Crow appealed so extensively to anticommunism nevertheless warrants the attention of legal audiences. Scholars ought to investigate precisely which claims segregationists deployed, and how those claims shaped the broader landscape of race relations and civil rights law in the United States. We believe that studying the opposition to *Brown* and the civil rights revolution can deepen and transform our understanding of a critical period in American legal history. Only by reckoning with that ugly history can we fully comprehend the profound ways it continues to shape our world today.

I. The Standard Geopolitical Account of *Brown*

While early analyses of *Brown* debated its legal soundness,³³ subsequent generations of scholars have sought to place the decision in its historical context.³⁴ One interpretation, most prominently championed by Derrick Bell

33. See, e.g., Alexander M. Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1 (1955) (discussing whether school segregation was among the evils addressed by the Fourteenth Amendment as envisioned by its framers); Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421 (1960) (arguing that *Brown* was correctly decided); see also Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 26, 31-35 (1959) (critiquing *Brown* for having no “basis in neutral principles”).

34. See generally MARK V. TUSHNET, *THE NAACP’S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925-1950* (1987) (examining the NAACP’s internal strategic concerns in the generation before *Brown*); KLARMAN, *supra* note 12 (exploring the history of
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and Mary Dudziak, frames *Brown* largely as a product of the Cold War. On this view, which has become dominant in legal academia, segregation amounted to an international embarrassment for the United States, especially in the contested “Third World.” As a result, desegregation became a Cold War imperative from the perspective of American officials, activists, and courts. For many, the dismantling of separate but equal was thus not solely (or even primarily) a moral demand, but rather a boon to American foreign policy.

Derrick Bell’s influential concept of interest convergence offers a theoretical basis for the Cold War–imperative thesis. First introduced in the *Harvard Law Review* in 1980—while the Cold War remained bitterly contested—the interest-convergence theory holds that “[t]he interest of blacks in achieving racial equality will be accommodated only when it converges with the interests of whites.”³⁵ According to Bell, civil rights victories are not chiefly attributable to formal legal reasoning or moral clarity about the need for racial equality.³⁶ Rather, they are products of an “unspoken and perhaps subconscious” sense among judges and policymakers that those victories “will secure, advance, or at least not harm societal interests deemed important by middle and upper class whites.”³⁷ Bell argued that “[r]acial remedies” in litigation are possible only if they further or do not threaten white interests: They are never granted for their own sake, particularly if they augur a change to “the superior societal status of middle and upper class whites.”³⁸

Bell analyzed *Brown* as the paradigmatic example of interest convergence. One could make sense of the decision only by considering its concrete “value to whites” in the form of “economic and political advances at home and abroad that would follow abandonment of segregation.”³⁹ In particular, the context of the Cold War provided essential motivation for the decision. As the United States competed with the Soviet Union “to win the hearts and minds of

Supreme Court rulings related to race, from *Plessy* to *Brown*); JAMES T. PATTERSON, *BROWN V. BOARD OF EDUCATION: A CIVIL RIGHTS MILESTONE AND ITS TROUBLED LEGACY* (2001) (surveying the origins and aftermath of *Brown*); FROM THE GRASSROOTS TO THE SUPREME COURT: *BROWN V. BOARD OF EDUCATION AND AMERICAN DEMOCRACY* (Peter F. Lau ed., 2004) (discussing the genesis and impact of *Brown* in a variety of local and grassroots contexts); Justin Driver, *Constitutional Outliers*, 81 U. CHI. L. REV. 929, 989 (2014) (contending that *Brown* cannot accurately be viewed as a decision that invalidated a practice among outliers); Justin Driver, *The Consensus Constitution*, 89 TEX. L. REV. 755, 802-21 (2011) [hereinafter Driver, *The Consensus Constitution*] (contesting the notion that *Brown* should be viewed as the product of a national consensus, or even an emerging national consensus).

35. Bell, *supra* note 8, at 523.

36. *See id.* at 522-23.

37. *Id.* at 523.

38. *See id.*

39. *Id.* at 524.

emerging third world peoples,” Jim Crow constituted a stain on America’s “credibility” as the global champion of freedom and democracy.⁴⁰ Eradicating segregation therefore became a foreign policy necessity.

Whereas Bell’s initial discussion of interest convergence argued that policymakers and judges may only “subconscious[ly]” consider such priorities,⁴¹ he later suggested that the Cold War imperative played a more active role in decisions like *Brown*. Though the *Brown* opinion itself did not discuss foreign policy concerns, they formed “a major motivation for outlawing racial segregation in 1954.”⁴² The Supreme Court Justices were “surely able to make a connection” between the Cold War and civil rights, including the potential benefit that a desegregation decision could lend to the anticommunist cause.⁴³ According to Bell, “[t]his benefit was not unforeseen,” with civil rights lawyers and journalists underscoring it.⁴⁴ As such, it was likely obvious to the Supreme Court Justices as well.

Mary Dudziak’s historical work substantiates Bell’s theory of interest convergence as applied to desegregation and the Cold War.⁴⁵ In her astute and compelling scholarship, Dudziak argued that during the 1950s and 1960s, federal officials considered American foreign policy concerns when endorsing racial desegregation and other civil rights initiatives.⁴⁶ She examined how foreign newspapers covered segregation—including reports on discrimination experienced by prominent nonwhite visitors to the United States—demonstrating that Jim Crow “received increasing attention from other countries.”⁴⁷ Segregation amounted to a “troublesome and embarrassing” aspect of American life as Washington asserted itself as a moral leader on the postwar world stage.⁴⁸ This realization paved the way for the convergence of Black and white interests, for it became clear to American officials that “efforts to

40. *Id.*

41. *Id.* at 523.

42. DERRICK BELL, SILENT COVENANTS: *BROWN V. BOARD OF EDUCATION* AND THE UNFULFILLED HOPES FOR RACIAL REFORM 49 (2004).

43. *Id.* at 66-67.

44. DERRICK BELL, RACE, RACISM AND AMERICAN LAW § 7.11.3, at 640-41 (3d ed. 1992).

45. See BELL, *supra* note 42, at 60 (observing that his analysis of *Brown* was “impressively substantiated” by Dudziak); Dudziak, *Desegregation*, *supra* note 10, at 64 (framing her own work as filling in a gap given that “neither Bell nor other scholars have developed [the interest-convergence] approach historically”).

46. Dudziak, *Desegregation*, *supra* note 10, at 62-63; Dudziak, *Little Rock*, *supra* note 10, at 1657; DUDZIAK, COLD WAR, *supra* note 10, at 12-13.

47. DUDZIAK, COLD WAR, *supra* note 10, at 12.

48. *Id.*

promote civil rights within the United States were consistent with and important to the more central U.S. mission of fighting world communism.”⁴⁹

Dudziak did not suggest that postwar racial justice victories were solely attributable to the Cold War imperative, nor did she insist that all civil rights activists were motivated by foreign policy concerns. That the Cold War sparked the need “to make credible the government’s argument about race and democracy” in the largely nonwhite “Third World” constituted “one element” of the motivation for civil rights reform.⁵⁰ Dudziak focused specifically on federal actors, for whom “international criticism” of Jim Crow created “an incentive to promote social change at home.”⁵¹ She uncovered evidence that Cold War concerns played a critical role in civil rights history, including the Department of Justice’s decision to intervene in *Brown* on behalf of the plaintiffs,⁵² Dwight Eisenhower’s use of federal troops to enforce desegregation in Little Rock,⁵³ and John F. Kennedy’s embrace of civil rights despite his initial reluctance.⁵⁴

While there is no corresponding evidence of Supreme Court Justices taking the Cold War into account when deciding *Brown*, Dudziak, like Bell, concluded that they must have been “well aware of this issue.”⁵⁵ Indeed, Dudziak asserted elsewhere that Cold War concerns motivated not only presidents but also “the courts . . . to act on civil rights” in the 1950s.⁵⁶ For this reason, “*Brown* belongs in the Cold War chapter of American legal history,” as it was made possible in part by the unique foreign policy concerns that arose out of the government’s anticommunist priorities.⁵⁷ The Cold War imperative “created an opportunity” for civil rights reform where one had not previously existed.⁵⁸

The Cold War–imperative theory suggests that *Brown* was made possible by and contributed to American anticommunist priorities, as the outlawing of segregated schools removed one of America’s most blatant moral liabilities in the global ideological battle. Desegregation provided the United States with greater credibility as the nation extolled the virtues of liberal democracy on the world stage. To be sure, the Cold War did not serve singularly as a force for

49. *Id.*

50. *See id.* at 13-14.

51. *Id.* at 12.

52. *Id.* at 90-91.

53. *Id.* at 130-31.

54. *Id.* at 180-81.

55. *Id.* at 104-05.

56. *See* Dudziak, *supra* note 26, at 34.

57. *Id.* at 34, 40-42.

58. *Id.* at 41.

civil rights progress; Dudziak argued that it in fact “frame[d]” and “limit[ed] the nation’s civil rights commitment,” with the powerful force of an anticommunist consensus keeping “discussions of broad-based social change, or a linking of race and class, off the agenda.”⁵⁹ But it has become received wisdom in the legal academy that anticommunism played a pivotal role in enabling decisions like *Brown*.⁶⁰

We applaud Bell and Dudziak for insisting that *Brown*, and by extension other landmark judicial opinions, be considered in geopolitical context. Far too often, constitutional law is viewed exclusively through a domestic lens, an approach that leads to parochial and fractured legal understandings. Yet there is another side to the story of anticommunism and civil rights that has not been brought to center stage in legal scholarship.⁶¹ While the Cold War imperative seems to assume that anticommunism cohered more naturally with integration than with segregation,⁶² anticommunism formed a central part of the argument for segregation. This connection between anticommunism and segregation emerged decades prior to *Brown* and persisted in the decades afterward. Indeed, throughout much of the twentieth century, there appeared to be nothing dissonant about adhering fervently to both segregation and anticommunism.

In a few instances, scholars have dismissed the conflation of anticommunism and segregation as simply a white-supremacist rhetorical ploy.⁶³ In fact, such dismissals have occurred since the civil rights era itself, when activists periodically characterized anticommunist segregationism as utterly irrational.⁶⁴ For other scholars, even if some southerners understood

59. DUDZIAK, *COLD WAR*, *supra* note 10, at 13. Dudziak certainly acknowledged anticommunist sentiment among segregationists. *See, e.g., id.* at 28. Her core project, however, focused on examining the role that anticommunism played on the other side of the integration debate. For further discussion on how Cold War politics limited the substantive reach of the civil rights movement, see ANDERSON, *supra* note 28, at 5-7; and GILMORE, *supra* note 24, at 7-9.

60. *See supra* note 12.

61. *See* KATZNELSON, *supra* note 14, at 427 (noting a “countercurrent” to the Cold War imperative through which southern politicians insisted that “an affinity existed between their wish to resist black political advancement and their preference for a robust national security state”).

62. *See, e.g.,* Lovelace, *supra* note 28, at 5.

63. *See, e.g.,* JOHN EARL HAYNES, *RED SCARE OR RED MENACE? AMERICAN COMMUNISM AND ANTICOMMUNISM IN THE COLD WAR ERA* 186 (1996) (“The campaign to link civil rights to communism failed chiefly because it was untrue.”); *see also* ANDERS WALKER, *THE GHOST OF JIM CROW: HOW SOUTHERN MODERATES USED BROWN V. BOARD OF EDUCATION TO STALL CIVIL RIGHTS* 13 (2009) (characterizing as “implausib[le]” Senator James Eastland’s claim that *Brown* “was part of a Communist plot”).

64. *See, e.g.,* ANNE BRADEN, *HOUSE UN-AMERICAN ACTIVITIES COMMITTEE: BULWARK OF SEGREGATION* 8-9 (1963).

segregation as a Cold War imperative, integration as a Cold War imperative reflected the “dominant political and social” currents.⁶⁵ Michael Klarman’s *From Jim Crow to Civil Rights*, for example, discussed the use of anticommunist rhetoric in both integrationist and segregationist arguments.⁶⁶ But Klarman portrayed the Cold War primarily as an engine for the liberalizing of racial attitudes throughout the country. Due in part to “the Cold War imperative for racial change,” Klarman maintained, southern whites’ “commitment to white supremacy” became “less intense” during the postwar years.⁶⁷

The segregationist commitment to anticommunism, however, burned bright throughout the long Cold War era. Indeed, the notion that civil rights became imperative during the Cold War formed but one of two competing visions of the relationship between American national security and domestic civil rights. The officials examined in Dudziak’s work adopted largely an *external* view of the communist threat: For them, the Cold War played out in battles over America’s international standing.⁶⁸ Meanwhile, many of those who defended segregation invoked anticommunism to do so, but they took a more *internal* view. They believed that civil rights agitation was a product of stateside communist infiltration. They argued that federal enforcement of desegregation would violate states’ rights, which distinguished the United States from communist states. And they insisted that advances in racial justice would unravel the American social fabric, dooming the nation if the Cold War ever turned hot.⁶⁹ For segregationists, anticommunism was less about America’s credibility on the world stage than its security and purity on the home front. These figures were not confined to the fringes of society—they included judges, prominent elected officials, and prize-winning columnists. They spoke in the language of the law, and their ideas resonated across the nation: While anticommunist segregationism was undeniably rooted in the South, it also found receptive audiences well beyond the states of the former Confederacy.⁷⁰ That the United States both ended legal segregation and won

65. BORSTELMANN, *supra* note 30, at 93, 108.

66. KLARMAN, *supra* note 12, at 182-83, 191-92.

67. *Id.* at 187; see also Michael J. Klarman, *How Brown Changed Race Relations: The Backlash Thesis*, 81 J. AM. HIST. 81, 91 (1994) (arguing that “the Cold War imperative for racial change” was among “the forces that helped create the civil rights movement”).

68. DUDZIAK, COLD WAR, *supra* note 10, at 12 (arguing that Jim Crow succeeded in “tarnish[ing]” the “image of American democracy”).

69. See KERSCH, *supra* note 25, at 201-06 (noting that within the bipartisan consensus of anticommunism, conservatives fused anticommunism with “moral crusades” and embraced a distinctive understanding of communism as “a plot designed to weaken the moral fiber of the United States, softening it up in preparation for the country’s ultimate moral subversion”).

70. In some accounts, the ideology of anticommunist segregationism is portrayed as an exclusively regional phenomenon. See WOODS, *supra* note 30, at 1-2 (arguing that the
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the Cold War masks the fact that these developments were neither preordained nor necessarily synergistic. For much of the twentieth century, it was deeply disputed whether Cold War considerations in fact demanded the destruction of Jim Crow—or instead required its preservation.

II. Jim Crow as a Cold War Imperative

The anticommunist defense of Jim Crow relied on several overlapping theories of the relationship between race and communism. Unlike their integrationist opponents, segregationist Cold Warriors understood the communist threat as most salient within the United States. For them, the Cold War did not require attending to America's credibility abroad, but to protecting racist institutions and values at home. This domestic Cold War was primarily a struggle over racial hierarchies in America rather than geopolitical power. Some segregationists argued that integration threatened core American institutions like federalism, separation of powers, and small government—and thus amounted to a descent toward a foreign, authoritarian system. Others insisted that integration would destabilize and weaken the United States in its ideological struggle with the Soviet Union. It could do so by both creating social strife between the races and paving the way for intermarriage, which opponents deemed “mongrelization” and feared would pollute the white gene pool. Still others suggested that communists were inherently suspicious and untrustworthy, thus their support for desegregation rendered that project tainted by association. These themes are hardly comprehensive, nor are they mutually exclusive.⁷¹ They were intertwined from the earliest days of anticommunist opposition to civil rights, a generation before *Brown v. Board of Education*.

“southern red scare . . . had at its core a regional desire to protect the ‘southern way of life’ from outside threats”); LEWIS, *THE WHITE SOUTH AND THE RED MENACE*, *supra* note 30, at 6-8, 124 (discussing the variable nature of anticommunist segregationism across different regions of the South). Yet we demonstrate that white people outside the South also defended segregation on anticommunist grounds, and we join other scholars who contest the traditional understanding of Jim Crow as an exclusively southern institution. *See, e.g.*, JEANNE THEOHARIS, *A MORE BEAUTIFUL AND TERRIBLE HISTORY: THE USES AND MISUSES OF CIVIL RIGHTS HISTORY*, at xxii-xxiii (2018); Jacquelyn Dowd Hall, *The Long Civil Rights Movement and the Political Uses of the Past*, 91 J. AM. HIST. 1233, 1239-40 (2005).

71. George Lewis has persuasively argued that the precise contours of anticommunist segregationism shifted over space and time, “as different groups and various individuals made what were often very personal choices about whether or not to red-bait.” *See* LEWIS, *THE WHITE SOUTH AND THE RED MENACE*, *supra* note 30, at 92-95.

A. Before *Brown*

In January 1938, Richard Russell took to the floor of the United States Senate to warn the nation of threats posed by a hidden enemy.⁷² The first-term Senator from Georgia rose in opposition to an anti-lynching bill, emerging as a tactical leader of the southern bloc that successfully filibustered and defeated the proposed legislation.⁷³ But Russell did not simply characterize the statute as unwise, unnecessary, or even unconstitutional: Instead, it was pernicious. In what would become a familiar segregationist refrain, Russell insisted that this civil rights law was neither desired by Black Americans nor in their best interests. “The Negro race will not be served by passing a bill of this kind,” he explained.⁷⁴ The law was “uncalled-for,” and yet “[c]ertain interests” lobbied for it nonetheless.⁷⁵ Anti-lynching legislation was, according to Russell, only the first step in a vast communist conspiracy. It formed part of a “program which the Communists are now advancing to the Negroes of the South” that jeopardized core American values and institutions.⁷⁶

What, in Russell’s view, did communists have to gain by supporting anti-lynching legislation and by making Black Americans into their unwitting allies? Russell offered several explanations. The first was simple ideology: “[A] Communist does not believe in any States’ rights. The Communists believe in having one government.”⁷⁷ Federal legislation on civil rights—whether in the form of anti-lynching, voting rights, or desegregation—thus fueled the communist agenda. Russell contrasted communist and democratic societies: Only in the latter are “the rights of the minority . . . protected.”⁷⁸ The minorities Russell had in mind were not, of course, Black people living under the yoke of Jim Crow, but the white defenders of segregation whose “rights to express themselves” were under attack.⁷⁹ This degradation of free expression served to slide the United States closer to communism.

But for Russell, communists supported civil rights for strategic as well as ideological ends. A civil rights agenda would feed communist geopolitical goals by destabilizing the United States and undermining its security. The quest for desegregation would “stir up racial discord where now there is peace and

72. KEITH M. FINLEY, *DELAYING THE DREAM: SOUTHERN SENATORS AND THE FIGHT AGAINST CIVIL RIGHTS, 1938-1965*, at 41 (2008).

73. *Id.* at 41-44, 49-54.

74. 83 CONG. REC. 374 (1938).

75. *See id.* at 1100-01.

76. *Id.* at 1101-02.

77. *Id.* at 1108-09.

78. *Id.* at 1111-12.

79. *See id.*

amity”⁸⁰ and “destroy the harmonious relations which exist between the races in the South.”⁸¹ Such disunity would yield chaos, and perhaps even a second Reconstruction, resulting in “horrible condition[s] that would drench the South in blood.”⁸² Russell contended, moreover, that communists would erode American democracy by taking credit for this chaos and showing “that the Communist Party [was] powerful enough to secure the passage” of its legislative aims in Congress, to disastrous effect.⁸³ Finally, Russell stated, communists outside the United States would use the opening created by racial discord to achieve their ultimate objective: “the establishment of a Negro soviet republic in the South.”⁸⁴ For their part, American civil rights activists—even if not communists themselves—gave “aid and comfort” to America’s enemies by sharing their objectives.⁸⁵

Senator Russell was hardly a peripheral figure in American politics. Early in his career, the Democrat and former Governor of Georgia was in no way a red-baiter; to the contrary, he ardently defended economic programs from charges of communism.⁸⁶ As the Cold War heated up, he mirrored the country’s escalating commitment to anticommunism.⁸⁷ But for Russell, the fight against communism and the fight against integration became linked, as he promised in the same breath to oppose both movements “with every power at [his] command.”⁸⁸ Russell was not alone in espousing these deep, twinned commitments to battling communism and civil rights.

As early as the 1910s, long before the Cold War is conventionally understood to have commenced,⁸⁹ supporters of civil rights were routinely branded as radicals, outside agitators, and communists.⁹⁰ These

80. *Id.* at 1116.

81. *Id.* at 1102.

82. *See id.* at 1107-08, 1116.

83. *Id.* at 1103.

84. *See id.* at 1116.

85. *See id.* at 1102.

86. GILBERT C. FITE, RICHARD B. RUSSELL, JR., SENATOR FROM GEORGIA 79, 91 (1991).

87. *See id.* at 218, 253-55, 279.

88. *Id.* at 345.

89. While the Cold War, of course, had no formal starting point, the announcement of the Truman Doctrine in 1947 is “customarily” cited as its beginning. Prasenjit Duara, *The Cold War as a Historical Period: An Interpretive Essay*, 6 J. GLOB. HIST. 457, 457 (2011). John Lewis Gaddis’s magisterial study of the “origins” of the Cold War similarly concludes by analyzing the proclamation of the Truman Doctrine in 1947. JOHN LEWIS GADDIS, *THE UNITED STATES AND THE ORIGINS OF THE COLD WAR, 1941-1947*, at xiii (rev. ed. 2000); *see also* John Lewis Gaddis, *Reconsiderations, Was the Truman Doctrine a Real Turning Point?*, 52 FOREIGN AFFS. 386, 386 (1974).

90. Regarding opponents of Black equality who linked civil rights to communism in the wake of World War I, *see* HEATHER COX RICHARDSON, *HOW THE SOUTH WON THE CIVIL*
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characterizations were informed by the fact that communists, socialists, and other political radicals in the United States all supported the cause of Black equality.⁹¹ This fact served as fodder for defenders of segregation, who used any evidence of associations between communism and civil rights activism to condemn racial justice. These defenders included prominent political actors at the national level. In 1940, Congressman Martin Dies of Texas argued that communism constituted a “Trojan Horse in America,” and particularly a “Trojan Horse for Negroes.”⁹² He argued that communists “considered the Negroes of the United States as excellent potential recruits for the Communist Party” and that they hoped to use civil rights “to create racial hatred” as an “auxiliary to the class struggle and civil war.”⁹³ Civil rights groups, Dies claimed, were simply “one . . . of Stalin’s Trojan Horse devices for revolution.”⁹⁴

For other segregationists, integration was a communist plot because it would invite greater intermingling of the races, thereby weakening the racial purity of white Americans. In 1947, Senator Theodore Bilbo of Mississippi endorsed this position in a book titled *Take Your Choice: Separation or Mongrelization*. Bilbo argued that one of the “chief aims” of communists was “[t]he destruction of all racial barriers.”⁹⁵ Doing so would enable “social equality”—akin to “communism in its worst form”—as well as “intermarriage of the races.”⁹⁶ Racial “amalgamation” would in turn create a “mongrelized Nation.”⁹⁷ Bilbo also assailed integration simply because some American

WAR: OLIGARCHY, DEMOCRACY, AND THE CONTINUING FIGHT FOR THE SOUL OF AMERICA 132-33 (2020); and DAVID S. FOGLESONG, AMERICA’S SECRET WAR AGAINST BOLSHEVISM: U.S. INTERVENTION IN THE RUSSIAN CIVIL WAR, 1917-1920, at 42 (1995). On such rhetoric in the 1920s and 1930s, see MCRAE, *supra* note 30, at 98; JOHN EGERTON, SPEAK NOW AGAINST THE DAY: THE GENERATION BEFORE THE CIVIL RIGHTS MOVEMENT IN THE SOUTH 153, 455-56 (1994); and Y.W.C.A. *Speakers Discuss Communism, Segregation, Southern Attitudes at Meet*, AFRO-AM. (Balt.), May 12, 1934, at 20.

91. GILMORE, *supra* note 24, at 4; JANE DAILEY, WHITE FRIGHT: THE SEXUAL PANIC AT THE HEART OF AMERICA’S RACIST HISTORY 163 (2020). See generally ROBIN D.G. KELLEY, HAMMER AND HOE: ALABAMA COMMUNISTS DURING THE GREAT DEPRESSION (25th anniversary ed. 2015) (examining the Communist Party in the American South, including its advocacy for racial equality during the Great Depression); HARRY HAYWOOD, BLACK BOLSHEVIK: AUTOBIOGRAPHY OF AN AFRO-AMERICAN COMMUNIST (1978) (reflecting on the Communist Party’s policies towards race in America).

92. See MARTIN DIES, THE TROJAN HORSE IN AMERICA 118 (1940); *Ex-Rep. Martin Dies, 71, Is Dead; Led Un-American Activities Unit*, N.Y. TIMES, Nov. 15, 1972, at 1.

93. DIES, *supra* note 92, at 118-19.

94. See *id.* at 126-27.

95. THEODORE G. BILBO, TAKE YOUR CHOICE: SEPARATION OR MONGRELIZATION 154 (1947).

96. *Id.* at 154, 178.

97. *Id.* at 172-73. The specter of interracial sex loomed large in the segregationist mind, with many scholars suggesting that these fears motivated the broader Jim Crow regime. See, e.g., PEGGY PASCOE, WHAT COMES NATURALLY: MISCEGENATION LAW AND THE MAKING OF RACE IN AMERICA 1-4 (2009); RANDALL KENNEDY, INTERRACIAL

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communists endorsed it. The mere fact that communists supported racial equality “should not only make us suspicious of such objectives but should definitely mark them as un-American.”⁹⁸ Guilt by association was another vehicle to rebuke the validity of integration altogether, and the “heroic fight against social equality between the white and black races . . . and against alien ideologies” became deeply intertwined.⁹⁹

Like other defenders of Jim Crow, Bilbo insisted that “right-thinking and straight-thinking” Black Americans did not truly want integration, and contended that such demands were pushed instead only by “Negro leaders,” white “Quislings,” and communists.¹⁰⁰ Strom Thurmond, Governor and later Senator from South Carolina, echoed this idea, stating in 1949 that “outside agitators” including “agents of the Kremlin” were the ones pushing for integration, while “our colored people . . . have abiding belief and faith in the [segregated] American way of life.”¹⁰¹ Thurmond emphasized that white southerners regularly interacted with their Black neighbors; though Jim Crow enforced segregation in housing, schools, and other facilities, Black and white people encountered one another on sidewalks, in stores, and even as domestic servants and employers in homes.¹⁰² Demands for integration befuddled many white southerners, who preferred to view their relationships with Black people as characterized by separated comity. Construing the growing civil rights movement not as a genuine product of Black demands but as the product of a communist plot enabled white southerners to reconcile this apparent tension.

The ominous association between communism and civil rights not only helped southerners create a coherent worldview; it proved a useful and common political tactic in the pre-*Brown* South. Long before he represented

INTIMACIES: SEX, MARRIAGE, IDENTITY, AND ADOPTION 22-24 (2003); DAILEY, *supra* note 91, at 2; Justin Driver, *Of Big Black Bucks and Golden-Haired Little Girls: How Fear of Interracial Sex Informed Brown v. Board of Education and Its Resistance*, in *THE EMPIRE OF DISGUST: PREJUDICE, DISCRIMINATION, AND POLICY IN INDIA AND THE US* 41, 43 (Zoya Hasan, Aziz Z. Huq, Martha C. Nussbaum & Vidhu Verma eds., 2018). The ideas of communism and “mongrelization” were so commonly intertwined that they appeared together in popular literature. See RICHARD WRIGHT, *NATIVE SON* 167 (5th ed. 1940) (“Did he say he would let you meet some white women if you joined the Reds?”).

98. BILBO, *supra* note 95, at 154.

99. See *id.* app. B at 318.

100. *Preface to id.*; *id.* at 69-71.

101. NADINE COHODAS, *STROM THURMOND AND THE POLITICS OF SOUTHERN CHANGE* 14-15, 198-99 (1993).

102. See *id.* at 199; STEPHEN A. BERREY, *THE JIM CROW ROUTINE: EVERYDAY PERFORMANCES OF RACE, CIVIL RIGHTS, AND SEGREGATION IN MISSISSIPPI* 3 (2015); Susan Tucker, *A Complex Bond: Southern Black Domestic Workers and Their White Employers*, 9 *FRONTIERS*, no. 3, 1987, at 6, 6.

North Carolina in the Senate, Jesse Helms supported Willis Smith's successful 1950 Senate campaign against former University of North Carolina (UNC) president and civil rights supporter Frank Porter Graham. Helms charged that Graham was "up to his neck" in communist affiliations and favored the "mingling of the races."¹⁰³ UNC, Helms quipped, stood for the "University of Negroes and Communists."¹⁰⁴ The segregationist Smith would serve just three years, until his death in 1953; twenty years later, Helms ascended to the same seat.¹⁰⁵

Whatever the nature of the purported connection between communism and civil rights, segregationists developed an unyielding intellectual framework which routinely connected communism, demands for Black equality, and central governmental power.¹⁰⁶ When Strom Thurmond headed the Dixiecrat presidential ticket in 1948,¹⁰⁷ he presented himself not merely as attacking civil rights but also as defending American institutions. Already an ardent segregationist, he announced his opposition to "police state tactics . . . a federal gestapo . . . a totalitarian state and . . . the threat of Communist infiltration."¹⁰⁸

In some instances, specific civil rights issues, organizations, and supporters became lightning rods for communist accusations. President Franklin Roosevelt's Fair Employment Practices Committee (FEPC), established by executive order in 1941 to ban discrimination in war-related industries, withstood frequent red-baiting.¹⁰⁹ In private letters, Richard Russell argued that the program was run largely by Black people with communist affiliations, and as such, there could be no "greater menace to the future of the entire country."¹¹⁰ James Eastland, a U.S. Senator from Mississippi who was particularly vociferous in his views on Black inferiority, filibustered appropriations for the FEPC, pointing out that it was supported by the Congress of Industrial Organizations (CIO), a group run by "alien

103. SOKOL, *supra* note 30, at 38-39.

104. *Id.*; see also Jonathan Gentry, *All That's Not Fit to Print: Anticommunist and White Supremacist Campaign Literature in the 1950 North Carolina Democratic Senate Primary*, 82 N.C. HIST. REV. 33, 33 (2005).

105. *Willis Smith, N. Carolina Senator, Dies*, WASH. POST, June 27, 1953, at 19; Steven A. Holmes, *Jesse Helms Dies at 86; Conservative Force in the Senate*, N.Y. TIMES (July 5, 2008), <https://perma.cc/RVD9-F756>.

106. ROLPH, *supra* note 30, at 8-9, 29.

107. EGERTON, *supra* note 90, at 499-500.

108. *Id.* at 500 (alterations in original). For an engaging biography of Strom Thurmond, see generally JOSEPH CRESPIANO, *STROM THURMOND'S AMERICA* (2012).

109. KATZNELSON, *supra* note 14, at 186.

110. FITE, *supra* note 86, at 182.

Communists.”¹¹¹ In 1946, as Congress debated whether to enact a permanent fair-employment bill that would extend beyond the war effort, Senators Allen Ellender of Louisiana and J. Lister Hill of Alabama filed a Labor Committee report arguing that such a law would “encourage Communism.”¹¹² These arguments reverberated widely: Critics who attacked the FEPC from an anticommunist perspective included not only politicians but also local journalists. At a PTA meeting in Mississippi, a columnist for the *Delta Democrat Times* contended that the FEPC would reflect “some crackpot’s conception of the law, or some communist’s idea, or some Negro’s.”¹¹³

Predictably, civil rights activists fared no better than civil rights initiatives when it came to accusations of communist leanings. The Southern Conference for Human Welfare (SCHW), a civil rights group founded by liberal southerners during the New Deal,¹¹⁴ was constantly tagged as a communist front. In his 1947 book, Senator Bilbo called it a “deceiving” and “communistic” organization.¹¹⁵ Such attacks on the SCHW were so widespread that even racial liberals parroted them. Also in 1947, Pulitzer Prize-winning columnist Ralph McGill—a noted proponent of civil rights—described the group as “Communist-infiltrated.”¹¹⁶ The organization eventually collapsed, in part because it struggled to escape such red-baiting. Its successor, the Southern Conference Educational Fund (SCEF), received similar anticommunist invective; in the early 1950s, Eastland identified it as a part of the “Communist conspiracy.”¹¹⁷

Americans living outside of the Deep South also wielded anticommunism to oppose civil rights. During the late 1940s and into the 1950s, opponents of residential integration in cities like Chicago asserted that communist subversion was lurking behind the racial succession of formerly all-white neighborhoods.¹¹⁸ FBI Director J. Edgar Hoover frequently sent reports to

111. J. LEE ANNIS JR., *BIG JIM EASTLAND: THE GODFATHER OF MISSISSIPPI* 61, 63-64 (2016). Eastland made the same argument about the CIO’s support for anti-poll tax legislation in the mid-1940s. *Id.* at 60-61.

112. *Negro Votes Target of Rights Bill—Stennis*, ATLANTA CONST., Mar. 5, 1948, at 14.

113. MCRAE, *supra* note 30, at 5-6, 133-34.

114. See DAVID R. GOLDFIELD, *BLACK, WHITE, AND SOUTHERN: RACE RELATIONS AND SOUTHERN CULTURE, 1940 TO THE PRESENT*, at 50 (1990).

115. BILBO, *supra* note 95, at 139-40.

116. GOLDFIELD, *supra* note 114, at 70-71; see *Ralph McGill Dies; Atlanta Editor*, 70, N.Y. TIMES, Feb. 4, 1969, at 1 (describing McGill as “a long-time champion of civil rights”).

117. GOLDFIELD, *supra* note 114, at 70-71. See generally IRWIN KLIBANER, *CONSCIENCE OF A TROUBLED SOUTH: THE SOUTHERN CONFERENCE EDUCATIONAL FUND, 1946-1966* (1989) (examining the history of the SCEF).

118. ARNOLD R. HIRSCH, *MAKING THE SECOND GHETTO: RACE AND HOUSING IN CHICAGO, 1940-1960*, at 200-02 (1983).

President Harry Truman detailing supposed linkages between racial justice activists and the Communist Party.¹¹⁹ Hoover maintained this posture for years, writing in 1958 of how communists had waged a “campaign of agitation” for Black equality in the South since the 1920s and 1930s.¹²⁰ Even Truman himself, who supported some civil rights advances, understood international racial justice efforts—namely decolonization—as motivated by a Moscow-based communist conspiracy.¹²¹ To ensure that domestic actors did not fall victim to communist machinations, Truman established a loyalty program for government employees in 1947.¹²² Whether by design or not, this program furthered the notion that civil rights advocacy and communist disloyalty were interwoven. One loyalty-board chairman pressed this point memorably: “The fact that a person believes in racial equality doesn’t *prove* that he’s a Communist. . . . But it certainly makes you look twice, doesn’t it? You can’t get away from the fact that racial equality is part of the Communist line.”¹²³ After Truman sought to advance racial equality—including by desegregating the military and establishing a presidential commission on civil rights—he was quickly targeted by segregationists for capitulating to communism and undermining American democracy.¹²⁴

Loyalty programs, like the one established by President Truman, proliferated throughout the country and had very real consequences for advocates of racial justice. Individual states adopted their own analogues for government employees, such as public-school teachers.¹²⁵ Such policies created an atmosphere of hostility toward any perceived subversives, including supporters of civil rights. When white teachers in New York tried to demand that the Board of Education integrate schools in the early 1950s, they were branded as communists and sometimes even fired.¹²⁶ State legislatures, as well as the House Un-American Activities Committee (HUAC), used the specter of communist affiliation to investigate and intimidate civil rights activists.¹²⁷

119. BORSTELMANN, *supra* note 30, at 65.

120. J. EDGAR HOOVER, *MASTERS OF DECEIT: THE STORY OF COMMUNISM IN AMERICA AND HOW TO FIGHT IT* 226-27 (Giant Cardinal ed. 1959).

121. BORSTELMANN, *supra* note 30, at 65.

122. *See* DAILEY, *supra* note 91, at 163.

123. *Id.*

124. MCRAE, *supra* note 30, at 140.

125. Dudziak, *Desegregation*, *supra* note 10, at 74-75; *Adler v. Bd. of Educ.*, 342 U.S. 485, 489-91 (1952), *overruled by* *Keyishian v. Bd. of Regents*, 385 U.S. 589 (1967).

126. THEOHARIS, *supra* note 70, at 44.

127. *See* *Gibson v. Fla. Legis. Investigation Comm.*, 372 U.S. 539, 542 (1963); JAMES GRAHAM COOK, *THE SEGREGATIONISTS* 301 (1962); BRADEN, *supra* note 64, at 9-12 (discussing how HUAC and other federal and state investigative bodies suggested that civil rights groups were tainted by communism); Sarah Hart Brown, *Congressional Anti-communism* footnote continued on next page

When defenders of Jim Crow used anticommunism to justify preserving segregation, they did so for a variety of reasons. In some instances, politicians realized that emphasizing anticommunism could play well politically, thereby bolstering the appeal of segregation.¹²⁸ But it would be a mistake to view political expediency as the sole driver of this discourse. Figures like Russell and Bilbo did not simply spew the epithet “communist” to attack civil rights. Instead, they offered detailed, even elaborate, theories of how communists stood to gain from advances in racial equality.¹²⁹ The notion that communism and civil rights were entangled formed a critical part of the worldview of those in and out of elected office.¹³⁰ Southern editorialists, for instance, highlighted this entanglement throughout the 1940s. The *Raleigh Times* published editorials fusing anticommunist and anti-integrationist rhetoric; one headline read, “A New Red Look for Fo’ty Acres an’ Mule.”¹³¹ Such language evinced a worldview which, given the simultaneous rise of civil rights activism and Soviet strength, easily merged the two phenomena.¹³²

In some cases, anticommunism served not only to deride the civil rights movement rhetorically, but to repress it in more tangible ways. In 1954, Anne and Carl Braden—white civil rights activists based in Kentucky—purchased a house on behalf of a Black family in a segregated suburb of Louisville.¹³³ The Bradens were soon charged with sedition, as prosecutors insisted that they were communist agitators who used the straw purchase to create interracial strife.¹³⁴ John Hitt, a *Newsweek* columnist, testified before the grand jury, “I feel as though the entire move was a Communist move. I feel it is Communist backed. I think that the purchase was a premeditated fraud to cause trouble out

and the Segregationist South: From New Orleans to Atlanta, 1954-1958, 80 GA. HIST. Q. 785, 788-89 (1996) (describing how state investigative committees sought to tie civil rights organizations to communism following *Brown*).

128. See CRESPIANO, *supra* note 108, at 76, 151-52; BORSTELMANN, *supra* note 30, at 65; EGERTON, *supra* note 90, at 519-20; *see also* MCRAE, *supra* note 30, at 174-75.

129. *See supra* notes 73-88, 95-100 and accompanying text.

130. For an argument that anticommunist segregationists were both “opportunists” and “ideologues,” *see* WOODS, *supra* note 30, at 7-8 (“For most of the leaders of the southern red scare, the balance between political opportunism and true belief shifted frequently.”). *See also* LEWIS, *THE WHITE SOUTH AND THE RED MENACE*, *supra* note 30, at 18 (arguing that among segregationists who took “anticommunist stances,” some “did so because they feared for the safety of their region,” while others “realized that [anticommunism] was a tool that could fulfill useful political and, indeed, social, ends”).

131. MCRAE, *supra* note 30, at 135.

132. *Id.* at 139-40.

133. Margalit Fox, *Anne Braden, 81, Activist in Civil Rights and Other Causes, Dies*, N.Y. TIMES (Mar. 17, 2006), <https://perma.cc/6NQ6-A2BJ>.

134. *See id.*

there, which it has.”¹³⁵ During Carl Braden’s trial, prosecutor Scott Hamilton amplified Hitt’s theory: “[T]he communists want to create class conflicts throughout the world. In other words, they want to see trouble between the colored and the white races in this country.”¹³⁶ Later in the trial, Hamilton explained that civil rights agitation threatened to put Americans “at loggerheads” and undermine “all good Americans regardless of their color” from a shared mission of opposing communism.¹³⁷ Hamilton’s assistant prosecutor, Lawrence Higgins, underscored the geopolitical stakes of the case: “We must ruthlessly cut out this cancer of communism, and here is one place to start.”¹³⁸ While Anne Braden’s case never went to trial, Carl was convicted and sentenced to fifteen years, serving seven months before the verdict was overturned.¹³⁹

At least one federal judge explicitly endorsed the conflation of civil rights and communism. In 1952, Thurgood Marshall assisted two Tennessee civil rights attorneys with a lawsuit against the Nashville Board of Park Commissioners.¹⁴⁰ The suit challenged the City’s maintenance of segregated public golf courses, alleging that the practice violated the Fourteenth Amendment.¹⁴¹ When *Hayes v. Crutcher* arrived in the Middle District of Tennessee, it was heard by a northerner. Robert Wilkin, a retired judge from the Northern District of Ohio, presided over a special three-week term to help the federal court in Nashville tame its overloaded docket.¹⁴² Wilkin was the son of an Ohio Supreme Court Justice, a University of Virginia School of Law graduate, and a former environmental attorney.¹⁴³ Wilkin briefly served on the Ohio Supreme Court himself after he helped set into motion the Tennessee Valley Authority, a New Deal project inspired by his own work on a conservation district in eastern Ohio.¹⁴⁴

135. ANNE BRADEN, *THE WALL BETWEEN* 91 (1958).

136. *See id.* at 245.

137. *See id.* at 251.

138. *See id.* at 252.

139. Fox, *supra* note 133.

140. *Hayes v. Crutcher*, 108 F. Supp. 582, 583 (M.D. Tenn. 1952), *abrogated by* *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954). The local attorneys were Avon N. Williams, Jr.—Thurgood Marshall’s first cousin—and Z. Alexander Looby. For a description of their work, see Will Sarvis, *Leaders in the Court and Community: Z. Alexander Looby, Avon N. Williams, Jr., and the Legal Fight for Civil Rights in Tennessee, 1940-1970*, 88 J. AFR. AM. HIST. 42, 42-54 (2003).

141. *Hayes*, 108 F. Supp. at 583.

142. *Original Booster of TVA Coming Here to Aid Davies*, NASHVILLE TENNESSEAN, Nov. 4, 1952, at 3; *Golf Case Ruling Slated for Today*, NASHVILLE TENNESSEAN, Nov. 21, 1952, at 19.

143. *Original Booster of TVA Coming Here to Aid Davies*, *supra* note 142.

144. *Id.*

Judge Wilkin rejected the plaintiffs' challenge, directly invoking the purported relationship between federal judicial intervention, desegregation, and communism. A judicial decree requiring Nashville to end segregation would be an abuse of judicial authority, Judge Wilkin maintained, "bring[ing] democracy and law into disrepute and disintegration."¹⁴⁵ To Wilkin, such a decision threatened American security. The disintegration of law and democracy was part of a broader "tendency . . . incited and increased by open champions and subversive agents of the world revolution which has been advancing under the banner of communism."¹⁴⁶ For a federal court to order integration would therefore aid communists in their "avowed purpose . . . to eradicate all religion and to destroy our system of law and jurisprudence."¹⁴⁷ For Judge Wilkin, a decision upholding segregation was necessary, so as not to "play into the hands of the revolutionaries."¹⁴⁸ Civil rights activists, he concluded, threatened to "destroy[] the delicate balance and apportionment of powers upon which our way of life depends" and bring about "totalitarianism."¹⁴⁹

Judge Wilkin's interpretation of the Fourteenth Amendment did not, of course, ultimately carry the day. Just two years later, the Supreme Court in *Brown* determined that segregated schools violated the Constitution, and it later extended its rationale to other public institutions.¹⁵⁰ Judge Wilkin's reasoning, however, portended the reaction to *Brown*. The defenders of Jim Crow, just as they had done for a generation, turned to anticommunism to explain, discredit, and obstruct the march toward integration.

B. *Brown*

When confronted with the Supreme Court's decision in *Brown*, only hours elapsed before segregationists insisted that the opinion was part of a communist scheme. On May 18, 1954—one day after *Brown* was handed down—

145. See *Hayes*, 108 F. Supp. at 585-86.

146. *Id.* at 586.

147. *Id.*

148. See *id.*

149. See *id.*

150. The Court followed *Brown* with a series of per curiam opinions extending its rationale to contexts beyond schools. See, e.g., *Gayle v. Browder*, 352 U.S. 903 (mem.) (per curiam) (public transportation), *aff'g* 142 F. Supp. 707 (M.D. Ala. 1956); *Holmes v. City of Atlanta*, 350 U.S. 879 (mem.) (per curiam) (public golf courses), *vacating* 223 F.2d 93 (5th Cir. 1955); *Muir v. Louisville Park Theatrical Ass'n*, 347 U.S. 971 (1954) (mem.) (per curiam) (theaters in public parks), *vacating* 202 F.2d 275 (6th Cir. 1953). The parties in *Hayes* continued to litigate until 1956, when a judge relied on cases like those just cited to set aside Judge Wilkin's original opinion. *Hayes v. Crutcher*, 137 F. Supp. 853, 854 (M.D. Tenn. 1956).

Georgia Lieutenant Governor Marvin Griffin told reporters that he was “not surprised” by the decision given that “the meddlers, demagogues, race-baiters and Communists in the United States are determined to destroy every vestige of states['] rights.”¹⁵¹ The same day, Griffin’s fellow Georgian, Tic Forrester, a member of the U.S. House of Representatives, took to the floor of Congress to excoriate *Brown* as the product of “the leftwingers and the un-American groups in this country” who sought “the mongrelizing of the races.”¹⁵² Griffin would soon announce his candidacy for governor, winning later that year on a platform of preserving school segregation “come hell or high water.”¹⁵³ He maintained his conviction that *Brown* furthered a “plot” by “Russian Imperial Communism,” explaining that “Communists and fellow travelers” had lit “the fuse that, if not quenched . . . will blow white civilization into bits and substitute the Negro civilization.”¹⁵⁴

Few elements of *Brown* generated more immediate backlash than its citation of social-scientific evidence for the proposition that segregated schooling generated a “sense of inferiority” among Black children.¹⁵⁵ Footnote Eleven became the most infamous citation in the *United States Reports*, with J. Harvie Wilkinson III describing it as among “the most inflammatory English ever in fine print.”¹⁵⁶ The controversy surrounding Footnote Eleven is widely recognized within the corridors of legal academia.¹⁵⁷ Too often overlooked, however, is the fact that many segregationists attacked Footnote Eleven from an anticommunist vantage. The Footnote’s notoriety, in other words, stemmed in no small part from allegations that the cited authors were infected with communist affiliations.

The prominent role of social science in the NAACP’s desegregation litigation came under scrutiny from segregationists and non-segregationists alike. Prior to *Brown*, southern states repudiated the NAACP’s psychological evidence in their briefs, suggesting that figures like Kenneth Clark—co-author

151. See Albert Riley, *Candidates Vow to Keep Barriers; Gowen, Hand Warn Against Haste*, ATLANTA CONST., May 18, 1954, at 1.

152. 100 CONG. REC. 6777 (1954).

153. David Bird, *Marvin Griffin, 74, Former Governor*, N.Y. TIMES (June 14, 1982), <https://perma.cc/B8YN-HVG7>.

154. See *Griffin Blames Communists for End of Segregation “Plot,”* ATLANTA DAILY WORLD, June 18, 1954, at 1.

155. *Brown v. Bd. of Educ.*, 347 U.S. 483, 494-95, 494 n.11 (1954) (citation omitted) (internal quotation marks omitted).

156. See WILKINSON, *supra* note 6, at 31.

157. See, e.g., Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles Over Brown*, 117 HARV. L. REV. 1470, 1485-86 (2004); Sanjay Mody, Note, *Brown Footnote Eleven in Historical Context: Social Science and the Supreme Court’s Quest for Legitimacy*, 54 STAN. L. REV. 793, 803-05 (2002).

of the well-known doll experiment—were outsiders with little knowledge of the South and whose views had been “warped” by their own experiences.¹⁵⁸ Following the announcement of *Brown*, this skepticism only intensified. One day after the decision, James Reston—a Pulitzer Prize-winning *New York Times* reporter¹⁵⁹—asserted that the “opinion read more like an expert paper on sociology than a Supreme Court opinion” and that Chief Justice Earl Warren had invited controversy by “[r]elying more on the social scientists than on legal precedents.”¹⁶⁰ Some scholars raised serious questions regarding the validity of studies like Clark’s. Edmond Cahn, for example, criticized *Brown* for resting “the constitutional rights of Negroes” on “such flimsy foundation as some of the scientific demonstrations in these records.”¹⁶¹

While Footnote Eleven constituted only one element of *Brown*,¹⁶² it became a glaring target for segregationists, who impugned it as the product of communist maneuvers. Just ten days after *Brown*, Senator Eastland argued on the Senate floor that the Court had relied on “unprecedented, unsound, and irrelevant” scientific authorities, and posed a charged rhetorical question to show where this slippery slope led: “What is to prevent the Court from citing as an authority in some future decision the works of Karl Marx?”¹⁶³ Four years earlier, Senator Joseph McCarthy had wielded a lengthy list of alleged communist infiltrators at the State Department.¹⁶⁴ In the wake of *Brown*, Senator Eastland similarly asserted that the Supreme Court had been

158. Brief for Appellees at 22-24, *Brown*, 347 U.S. 483 (No. 4); see also Brief for Appellees at 19-21, 26, *Brown*, 347 U.S. 483 (No. 2); Brief for Petitioners at 13-14, 27-29, *Brown*, 347 U.S. 483 (No. 5). At least one member of the legal team opposing school segregation also deemed it unwise to rely upon Clark’s research. William Coleman, the first Black law clerk at the Supreme Court, exclaimed: “Jesus Christ, those damned dolls! I thought it was a joke.” RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA’S STRUGGLE FOR EQUALITY* 292, 321 (1st Vintage Books ed. 1977) (1975).

159. R.W. Apple, Jr., *James Reston, for Many Years a Nonpareil Among American Journalists, Dies at 86*, N.Y. TIMES (Dec. 8, 1995), <https://perma.cc/ACQ4-4MXV>.

160. See James Reston, *A Sociological Decision: Court Founded Its Segregation Ruling on Hearts and Minds Rather than Laws*, N.Y. TIMES, May 18, 1954, at 14.

161. Edmond Cahn, *Jurisprudence*, 30 N.Y.U. L. REV. 150, 157-58 (1955).

162. Cf. Black, *supra* note 33, at 430 n.25 (describing as a “canard” the idea that in *Brown* “anything like principal reliance was placed on the formally ‘scientific’ authorities, which are relegated to a footnote and treated as merely corroboratory of common sense”).

163. 100 CONG. REC. 7252 (1954).

164. DAVID M. OSHINSKY, *A CONSPIRACY SO IMMENSE: THE WORLD OF JOE MCCARTHY* 112-14 (1st Free Press trade paperback ed. 2019) (1983).

“indoctrinated and brainwashed by left-wing pressure groups” and “Communist-front organizations.”¹⁶⁵

Two months later, Eastland returned to the Senate floor with more direct accusations against the authors cited in Footnote Eleven. Some authors allegedly worked for organizations that were “Communist-front[s],” if not “Communist-run and Communist-directed.”¹⁶⁶ Eastland wondered aloud whether the Justices sought “to socialize this country,” concluding that “it is manifest that they do, because they adopted in [*Brown*] a line of reasoning that would give them power to do anything.”¹⁶⁷ On this view, *Brown* was doubly dangerous: Not only did it increase the power of the federal government, itself a step towards communism, but it did so by relying on communist-tinged authorities. Eastland suggested that the House of Representatives consider impeaching the Justices for their “disgraceful procedure” of relying upon “the works of a few Communists or near-Communists.”¹⁶⁸

Eastland was called the “Voice of the South,” with his statements reprinted widely in newspapers and quoted by other politicians in public speeches.¹⁶⁹ Since World War II, he had been a committed anticommunist, eventually likening communists to the Radical Republicans of Reconstruction, who were bent on social destruction. He saw communist plots lurking behind labor organizations and efforts to advance civil rights.¹⁷⁰ Eastland concluded that the entire *Brown* decision, including Footnote Eleven, was no oversight by the Justices; instead, they had succumbed to “political pressure groups” related to “a radical pro-Communist political movement in this country” which sought “the destruction of the American system of government, and the mongrelization of the white race.”¹⁷¹ Like his Senate colleague Richard Russell, Eastland emphasized that Black Americans did not truly prize integration: “The negro is being used as a pawn,” he argued, by the “Communist conspiracy” to bring about “the destruction of our Government.”¹⁷²

165. See 100 CONG. REC. 7254 (1954). For a compelling biography of McCarthy, see generally OSHINSKY, *supra* note 164. *Brown*, as it happens, was handed down on the same day that the Army–McCarthy hearings concluded, as McCarthy’s influence dwindled. Dudziak, *Desegregation*, *supra* note 10, at 62 n.5.

166. See 100 CONG. REC. 11,523 (1954).

167. *Id.* at 11,524.

168. See *id.* at 11,525.

169. FRANCIS M. WILHOIT, *THE POLITICS OF MASSIVE RESISTANCE* 81–82 (1973); PATTERSON, *supra* note 34, at 88.

170. ANNIS, *supra* note 111, at 59–61, 64, 94, 101, 104.

171. See Senator James O. Eastland, “We’ve Reached Era of Judicial Tyranny”: An Address by Senator James O. Eastland of Mississippi Before the Statewide Convention of the Association of Citizens’ Councils of Mississippi 4, 5, 14–15 (Dec. 1, 1955) (transcript available in the University of Mississippi Libraries).

172. *Id.* at 10.

In 1955, Eastland escalated this line of attack, introducing a formal resolution to investigate the authors cited in Footnote Eleven. The resolution reviewed the “shocking degree” to which *Brown’s* cited authorities were participants “in the worldwide Communist conspiracy.”¹⁷³ As such, it asserted that Americans were “entitled to know . . . the complete extent and degree of Communist and Communist-front activity and influence” behind them.¹⁷⁴ In an accompanying speech, Eastland explained that Footnote Eleven’s social science relied on “social doctrines” which “can be traced to Karl Marx.”¹⁷⁵ He singled out Gunnar Myrdal, the Swedish author of *An American Dilemma*—the groundbreaking study of American racism cited “generally” by the Warren Court—as “a Socialist who had served the Communist cause.”¹⁷⁶ Eastland indicted *Brown* for its dependence on sociological evidence, which could theoretically change, rather than on eternal truths. This method was “based upon the winds of vacillating, political, and pseudoscientific opinion”; it was quintessentially un-American, for only “the Peoples Courts of Soviet Russia” embraced such a “jurisprudence.”¹⁷⁷

Segregationists like Eastland built a foundation for resisting integration by condemning *Brown’s* social-scientific sources as communist. In the same speech, Eastland asked, “Who is obligated morally or legally to obey a decision whose authorities rest not upon the law but upon the writings and teachings of pro-Communist agitators . . . ?”¹⁷⁸ He predicted that southerners would not “permit” their way of life “to be swept aside by a Court who relies . . . not upon the law but upon pro-Communist agitators.”¹⁷⁹ Eastland’s ideas became a touchstone for defenders of Jim Crow, and their reach proved extensive.¹⁸⁰ National publications frequently featured his anticommunist, segregationist views. In *American Mercury*, Eastland reiterated that Myrdal was a socialist and that “the Court has been ‘brain-washed,’ by minority, even alien, pressure groups” to further “the Communist conspiracy.”¹⁸¹ He committed to a view of the Supreme Court as an institution which was “moving step by step, paragraph by

173. S. Res. 104, 84th Cong., 101 CONG. REC. 6963-64 (1955).

174. *Id.*

175. 101 CONG. REC. 7120 (1955).

176. *See id.* at 7122-23.

177. *Id.* at 7120.

178. *Id.* at 7124.

179. *Id.*

180. PATTERSON, *supra* note 34, at 88 (calling an Eastland speech that was widely disseminated “one of the most important documents of the southern resistance”).

181. *See* James O. Eastland, *An Alien’s Ideology Is Not the Law of Our Republic*, AM. MERCURY, Mar. 1958, at 28, 28-29.

paragraph, decision by decision, toward establishment of the Communist conspiracy in the U.S.”¹⁸²

Journalists also repeatedly contended that the social scientists referenced in Footnote Eleven were communists. Westbrook Pegler, a northern-born, Pulitzer-winning columnist, described Myrdal as a “radical” and a “Swedish Socialist.”¹⁸³ He called Myrdal “Warren’s friend” and urged skepticism of Chief Justice Warren and his wife, who were “of Scandinavian background.”¹⁸⁴ Pegler argued that with *Brown*, Chief Justice Warren had “flouted the Constitution in favor of radical propagandists.”¹⁸⁵ The *Chicago Daily Tribune* tagged Myrdal as a “Swedish carpetbagger” who was “sympatico with Russia.”¹⁸⁶ *Southern Advertising and Publishing* ran an opinion piece underscoring “how deeply we condemn Dr. Gunnar Myrdal, the ‘Swedish carpetbagger.’”¹⁸⁷ It continued, “this Myrdal should be watched closely,” given that he sought to “underwrite the socialistic reforms of the world.”¹⁸⁸ The article questioned the Supreme Court’s complicity, wondering whether the Justices “knew of Myrdal’s record with the Russian Communists when they held him up as authority for radically changing the Constitution.”¹⁸⁹ Relatedly, John Temple Graves, an editor of the *Birmingham Post Herald*, wrote that in deciding *Brown*, the Supreme Court “forsook precedent, Constitution and commonsense in 1954, in favor of Swedish sociologist Gunnar Myrdal.”¹⁹⁰

In some instances, states took official action based on these accusations. The Georgia General Assembly formally called on the U.S. Representatives from Georgia to impeach certain Justices of the Supreme Court.¹⁹¹ According to the resolution, *Brown* altered “the rights of the people” by relying on the “psychological conclusions” of people like Myrdal, “rather than [on] the legal conclusions of Taft, Holmes, Van Devanter, Brandeis and their contemporaries.”¹⁹² In so doing, the resolution held, the Justices lent credence

182. Robert G. Sherrill, *James Eastland: Child of Scorn*, 201 NATION 184, 193 (1965).

183. Westbrook Pegler, *Eastland vs. Warren*, CINCINNATI ENQUIRER, Nov. 27, 1959, at 5-A; Alden Whitman, *Free-Swinging Critic*, N.Y. TIMES, June 25, 1969, at 43.

184. See Pegler, *supra* note 183.

185. *Id.*

186. *5 Billion a Year in Hush Money*, CHI. DAILY TRIB., Dec. 18, 1956, at 20.

187. Garland B. Porter, *Swedish Carpetbagger Dreams Up Another Modern Theory*, S. ADVERT. & PUBL’G, Jan. 1957, reprinted in 103 CONG. REC. app. at A4073 (1957) (statement of Rep. James C. Davis).

188. See *id.*

189. *Id.* at A4074.

190. John Temple Graves, *The South Won’t Surrender!*, AM. MERCURY, July 1956, at 39, 40.

191. H.R. 174, 1957 Gen. Assemb., Reg. Sess. (Ga. 1957), reprinted in 2 Race Rel. L. Rep. 485, 486 (1957).

192. *Id.* at 487-88.

to the communist cause—and “committed high crimes and misdemeanors and gave aid and comfort to the communist enemies of the United States.”¹⁹³

Brown drew anticommunist-inflected attacks for reasons well beyond its citations of allegedly subversive social scientists. In 1955, Judge Tom Brady published *Black Monday*, a book which synthesized many of the anticommunist arguments against *Brown*.¹⁹⁴ *Time* labeled Judge Brady—a graduate of the Lawrenceville School and Yale University¹⁹⁵—the “philosopher” of the movement to resist desegregation in Mississippi.¹⁹⁶ *Black Monday* included familiar refrains that associated integration, a strong central government, and communism. Judge Brady contended that *Brown* was “an illegal usurpation” of states’ rights,¹⁹⁷ echoing Senator Eastland’s characterization of *Brown* as an instance of “judicial tyranny” which undermined “our Republican form of Government.”¹⁹⁸ As a result, he argued, “The hoards of Russia and Red China know that another deadly blow has been dealt [to] our Constitution.”¹⁹⁹ These “hoards” embraced this development: “The Communist masses of Russia and Red China must have howled with glee on ‘Black Monday.’”²⁰⁰

Judge Brady also highlighted that desegregation would produce social strife in service of the communist goal of internal disunity within the United States. He contended that it was “one of Communist Russia’s aims” to establish “a beachhead through the negro” in America²⁰¹ and that integration would “alienate racial groups against racial groups,” precisely “what Russia desires.”²⁰² It would also quickly lead to miscegenation: The civil rights movement sought for Black people “every right and privilege,” leading to “intermarriage”—and “that is what Russia wants.”²⁰³ The resulting “monogrelized [sic] race,” he claimed, would dilute the purity and strength of the white race, creating “disastrous” consequences akin to the interbreeding of cattle.²⁰⁴ Communists

193. *Id.*

194. TOM P. BRADY, *BLACK MONDAY* (1955).

195. Interview by Orley B. Caudill with Thomas P. Brady, Assoc. Just., Miss. Sup. Ct., in Jackson, Miss. (Mar. 4, 1972), <https://perma.cc/4NNG-YZ93>.

196. *The Education of Tom Brady*, *TIME*, Oct. 22, 1965, at 94, 94.

197. BRADY, *supra* note 194, at 62–63.

198. *See* Eastland, *supra* note 171, at 4, 15.

199. BRADY, *supra* note 194, at 62.

200. *Id.*

201. *Id.* at 54.

202. *Id.*

203. *See id.* at 65.

204. *See id.* at 66–67 (“The American negro . . . realizes that he can ameliorate [his] inherent deficiencies by intermarriage, just as the strain of a long horn can be improved by being bred with a white-faced Hereford. It is disastrous to the white-face, but it is fine for the long horn. The Communists want a race of long horns here . . .”).

desired this “grading down” of white American “moral and intellectual potential,” because “[t]he Communist leaders” knew that “a mongrelized [sic] race is an ignorant, weak, easily conquered race.”²⁰⁵ Finally, in keeping with the broader currents of segregationist thought, Judge Brady insisted that communists had duped Black people into seeking integration. The civil rights struggle was not a product of genuine Black mobilization in the South but rather of “Communist-front organizations” and their allies that were “determined to indoctrinate the Southern negro” with ideas of racial equality “and arouse him to follow them in their social program for amalgamation of the two races.”²⁰⁶

Fears of a communist-inspired plot to “mongrelize” America animated defenses of Jim Crow before *Brown* by figures like Senator Bilbo,²⁰⁷ and they continued to do so after. In 1955, the same year that Brady published *Black Monday*, former Georgia Governor and later U.S. Senator Herman Talmadge published *You and Segregation*, in which he agreed with Brady’s assessment of the threat of interracial marriage.²⁰⁸ According to Talmadge, “God created [the races] all different” and “did not intend them to be mixed.”²⁰⁹ The danger of such marriages was one of genetic weakness: “[N]ations composed of a mongrel race lose their strength and become weak, lazy and indifferent.”²¹⁰ This was no mere accidental consequence of integration, but by sinister design. Racially integrated societies “become easy preys to outside nations. And isn’t that just exactly what the Communists want to happen to the United States?”²¹¹ Talmadge’s tract proved extraordinarily popular in the white South.²¹²

American officials at the highest levels of government recognized the deep anxieties that interracial intimacy provoked among white southerners. When asked about school integration in 1957, President Dwight Eisenhower acknowledged the “very strong emotions” experienced by “people that see a picture of a mongrelization of the race.”²¹³ While President Eisenhower did

205. *See id.* at 67.

206. *See id.* at 64.

207. *See supra* text accompanying notes 95-98.

208. HERMAN E. TALMADGE, *YOU AND SEGREGATION* (2d rev. prtng. 1955); Adam Clymer, *Herman Talmadge, Georgia Senator and Governor, Dies at 88*, N.Y. TIMES (Mar. 22, 2002), <https://perma.cc/5JN5-6GWP>.

209. TALMADGE, *supra* note 208, at 44.

210. *See id.* at 44-45.

211. *Id.*

212. BORSTELMANN, *supra* note 30, at 108.

213. President Dwight D. Eisenhower, Remarks at The President’s News Conference (Sept. 3, 1957), in Gerhard Peters & John T. Woolley, *Dwight D. Eisenhower, The President’s News Conference Online*, AM. PRESIDENCY PROJECT, <https://perma.cc/GB3U-WWDJ> (archived Jan. 28, 2022).

not link “mongrelization” to communism directly, his attitude toward *Brown* offers insights into the relationship between civil rights and communism during the 1950s. That President Eisenhower eventually enforced desegregation in Little Rock despite his own lack of enthusiasm for *Brown* is often cited as an example of the Cold War imperative in action.²¹⁴ On its face, his initial failure to embrace *Brown* seems inexplicable; as a staunch anticommunist, he should have easily recognized *Brown*’s value as a tool to promote American democracy abroad. Under the Cold War–imperative framework, his lukewarm view of the decision is explained as merely an episode of inconsistency and a failure to vindicate his own anticommunist priorities.²¹⁵

On the ground, though, there was nothing dissonant about opposing communism and ignoring or even defending Jim Crow. Eisenhower’s initial inaction and lack of support for *Brown* can be understood not only as ambivalence about racial justice but also as ambivalence about the geopolitical value of supporting civil rights. It was not clear to figures like Eisenhower that desegregation was an unambiguous boon to the anticommunist cause. The President and his advisers, for example, did not disagree with J. Edgar Hoover’s assessment that civil rights groups were infiltrated by communist agents.²¹⁶ Ultimately, Eisenhower’s refusal to embrace *Brown* when it was first decided amounted to a significant statement about his, at most, tepid support for integration and his understanding of its relationship to American foreign policy.²¹⁷

214. See, e.g., DUDZIAK, COLD WAR, *supra* note 10, at 130-31. For President Eisenhower’s personal attitude toward *Brown*, see Michael S. Mayer, *With Much Deliberation and Some Speed: Eisenhower and the Brown Decision*, 52 J.S. HIST. 43, 74-75 (1986) (“Eisenhower’s hesitancy expressed itself during the furor which arose following the Court’s [*Brown*] decision when he repeatedly declined to give the decision his personal endorsement.”); and Jack Greenberg, *Brown v. Board of Education: An Axe in the Frozen Sea of Racism*, 48 ST. LOUIS U. L.J. 869, 878 (2004) (“President Eisenhower disagreed with *Brown*.”).

215. See, e.g., BORSTELMANN, *supra* note 30, at 86.

216. *Id.* at 108.

217. Several eminent figures directly involved in *Brown* criticized Eisenhower’s initial nonendorsement of the decision. See CONSTANCE BAKER MOTLEY, *EQUAL JUSTICE UNDER LAW: AN AUTOBIOGRAPHY* 110 (1998) (“Eisenhower should never be forgiven for his failure to lead the nation into its new era at that critical time.”); JACK GREENBERG, *CRUSADERS IN THE COURTS: HOW A DEDICATED BAND OF LAWYERS FOUGHT FOR THE CIVIL RIGHTS REVOLUTION* 213 (1994) (“Eisenhower expressed his antipathy in refusing to endorse the Court’s [*Brown*] decision . . . [S]tatements by the president of the country, which could be read as a rejection of the wisdom in the Court’s decision, surely encouraged some to express themselves in more extreme fashion.”); WARREN, *supra* note 19, at 291 (“With his popularity, if Eisenhower had said that black children were still being discriminated against . . . [and] that the Supreme Court of the land had now declared it unconstitutional to continue such cruel practices, . . . we would have been relieved . . . of many of the racial problems which have continued to plague us.”).

The notion of a connection between communism and civil rights activism resonated with ordinary Americans who did not hold positions of political power as well. Even prior to the *Brown* decision, as the case was pending, some white southerners believed that the mere possibility of a desegregation order from the Supreme Court stemmed from a “Communist plot.”²¹⁸ In a book about his travels through the post-*Brown* South, Robert Penn Warren recalled one conversation with a white resident of “a black county” who feared a “take over” by Black citizens if they achieved civil rights: “You couldn’t walk down the sidewalk. You’d be communized, all right.”²¹⁹ Another white resident distributed fliers that connected the civil rights movement to the Soviets themselves: “Russia . . . continues to prod us to accept 14,000,000 Negroes as social equals and we are doing everything possible to please her.”²²⁰ White southerners were not the only ones who raised such concerns. Following *Brown*, a Denver resident condemned the decision in a letter to Senator Eastland, writing: “Our Supreme Court has become a Red court. . . . The vengeful Red rattlesnakes will next convince the Court to abrogate [other segregated aspects of American society]. . . . The Red Bolsheviks aim to destroy Christianity and America.”²²¹

For some, *Brown* represented an intrusion by outsiders—activists, communists, and federal powers—into education, a sphere traditionally controlled by parents and localities. This point struck a chord with white women in particular;²²² a member of the American Association of University Women argued that *Brown* furthered “a Socialistic-Communitistic scheme to aid eventual federal control of local community living.”²²³

Americans who did not have their own platforms of expression voiced their complaints directly to the Supreme Court in the form of hate mail. Chief Justice Warren anticipated that *Brown* would provoke an intense public reaction, and he noted that the Court received “between six and seven hundred letters” about *Brown* in the months following the decision.²²⁴ The letters were, according to Chief Justice Warren, “almost equally divided [between] pro and con,” with some critics of *Brown* “contend[ing] that it was pure Communism; that we were trying to ‘mongrelize’ the nation.”²²⁵ That these letters evidently

218. See JOHN BARTLOW MARTIN, *THE DEEP SOUTH SAYS “NEVER”* 1 (1957).

219. See ROBERT PENN WARREN, *SEGREGATION: THE INNER CONFLICT IN THE SOUTH* 27 (1956).

220. *Id.* at 24-25.

221. 100 CONG. REC. 11,527 (1954) (statement of Sen. James O. Eastland).

222. See generally MCRAE, *supra* note 30 (analyzing the role of white women in resisting integration).

223. *Id.* at 175.

224. WARREN, *supra* note 19, at 302.

225. *Id.* at 302-03.

did not surprise Chief Justice Warren attests to the prevalence of anticommunist arguments against integration.

Arguments against integration rooted in anticommunism made their way from the arenas of politics and media to that of law. As Dudziak shows, the federal government and the NAACP filed briefs in civil rights cases, including *Brown*, that invoked the Cold War as a justification for integration.²²⁶ The government explicitly argued that the continuance of segregation threatened American foreign policy interests.²²⁷ Yet the government and the NAACP were not the only entities to file briefs discussing the relationship between communism and civil rights. In *Brown II*, the case addressing *Brown*'s remedy, several southern states offered anticommunist justifications for more gradual desegregation decrees. According to the Attorney General of Florida, a more "gradual approach" to integration was necessary because an immediate one would face "great difficulty."²²⁸ One reason for this was that local civic leaders were reluctant to lead school integration, in part because "the more violent pro-segregationists . . . identify" integration "with the Communist Party."²²⁹ North Carolina's arguments opposing speedy desegregation even more closely resembled those that segregationists had been making for years. The state argued that integration would disrupt the "peace and friendship between white and Negro North Carolinians," thereby creating social strife.²³⁰ Instead of focusing on integration, the government could use this peace and friendship as "a more effective answer to Communism, at home or abroad."²³¹

In May 1955, the Supreme Court infamously held in *Brown II* that public schools had to be integrated "with all deliberate speed," enabling federal judges and school boards to delay the process of desegregation.²³² While courts passively allowed segregation to continue, Jim Crow's defenders—from private citizens and local officials to senators and Klansmen—committed themselves to actively obstructing integration at every turn. They inaugurated an era of massive resistance, in which anticommunism continued to figure prominently in their rhetoric, tactics, and worldview.

226. DUDZIAK, COLD WAR, *supra* note 10, at 95-102.

227. Brief for the United States as Amicus Curiae at 6-8, *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (Nos. 1 et al.), 1952 WL 82045.

228. Amicus Curiae Brief of the Attorney General of Florida, *Brown v. Bd. of Educ. (Brown II)*, 349 U.S. 294 (1955) (Nos. 1 et al.), 1954 WL 45715, at *203-04.

229. *See id.* at *202.

230. *See* Brief of Harry McMullan, Attorney General of North Carolina, Amicus Curiae, *supra* note 20, at 27.

231. *Id.*

232. *Brown II*, 349 U.S. at 301; KLARMAN, *supra* note 12, at 316-17. For an argument that the searing denunciations of *Brown II* may well be overstated given the constraining historical context, see DRIVER, *supra* note 13, at 256-64.

C. Massive Resistance

On February 24, 1956, Senator Harry Byrd of Virginia called for southern states to engage in “massive resistance” against *Brown* to demonstrate that “racial integration is not going to be accepted in the South.”²³³ Opponents of school desegregation employed various tactics, from school closures to freedom of choice statutes to extralegal violence.²³⁴ The concept of massive resistance received its most prominent endorsement in March 1956 through the Southern Manifesto, a declaration signed by roughly one hundred members of Congress announcing their intention to “resist forced integration by any lawful means.”²³⁵ During the era of noncompliance with *Brown* that followed, segregationists relied extensively on anticommunism to bolster their stance.

The very language of massive resistance itself was drawn from the Cold War; the term was derived from John Foster Dulles’s concept of “massive retaliation” against potential communist aggression.²³⁶ Proponents of massive retaliation sought to deter adversaries from taking aggressive actions by promising severe escalation in response to any attack—a sequence of events that would render all geopolitical conflicts unwinnable for any side.²³⁷ Massive resisters issued a similar threat of absolute opposition to desegregation. In the years following Byrd’s pronouncement of massive resistance, Alabama newspaper columnist John Temple Graves gave speeches throughout the country in which he referred to the South’s battle to preserve segregation as a “constitutional cold war.”²³⁸ While the Southern Manifesto did not explicitly invoke communism, the document can be read as containing anticommunist

233. James R. Sweeney, *Interposition and Delay: January 10, 1956-March 4, 1956*, in RACE, REASON, AND MASSIVE RESISTANCE: THE DIARY OF DAVID J. MAYS, 1954-1959, at 95, 97 (James R. Sweeney ed., 2008).

234. PATTERSON, *supra* note 34, at 87, 99-101.

235. See 102 CONG. REC. 4459-61 (1956); Matthew D. Lassiter & Andrew B. Lewis, *Massive Resistance Revisited: Virginia’s White Moderates and the Byrd Organization*, in THE MODERATES’ DILEMMA: MASSIVE RESISTANCE TO SCHOOL DESEGREGATION IN VIRGINIA 1, 1 (Matthew D. Lassiter & Andrew B. Lewis eds., 1998). For extensive analysis of the Southern Manifesto, see generally Justin Driver, *Supremacies and the Southern Manifesto*, 92 TEX. L. REV. 1053 (2014); and JOHN KYLE DAY, THE SOUTHERN MANIFESTO: MASSIVE RESISTANCE AND THE FIGHT TO PRESERVE SEGREGATION (2014).

236. See LEWIS, MASSIVE RESISTANCE, *supra* note 30, at 1-3.

237. GADDIS, STRATEGIES OF CONTAINMENT, *supra* note 29, at 173-74 (“The logic of ‘massive retaliation,’ in short, was to convince all adversaries that any such conflict might escalate to a level at which none could hope to prevail.” (emphasis omitted)).

238. WARD, *supra* note 16, at 126, 145-46, 212 n.59 (citing Paul Dumas, *No Surrender on Integration, Says Speaker*, TACOMA NEWS TRIB., Oct. 12, 1957, at 6; *South Plans Segregation “Cold War,” Club Is Told*, ROCKFORD MORNING STAR, Oct. 23, 1957, at 4A; and Sam Jensen, *South Waging “Constitutional Cold War,” Dixie Newsman Says Here*, LINCOLN EVENING J. & NEB. ST. J., Oct. 15, 1957, at 16).

inflections. The statement condemned the “explosive and dangerous condition created by [*Brown*] and inflamed by outside meddlers” who advocated for civil rights.²³⁹ Essie Mae Washington-Williams, the Black daughter of Manifesto framer and vehement segregationist Strom Thurmond, recalled her father “touting his manifesto” and assailing “‘outside agitators,’ the South’s favorite euphemism for Communist sympathizers.”²⁴⁰

While anticommunist attacks on integration were amplified with the rise of massive resistance, they were still drawn from a familiar segregationist playbook. Some continued to castigate the Supreme Court as the intentional or unwitting accomplice of the communists. In a speech in October 1958, Thurmond assailed the Justices as “nine puppets of the NAACP” who had become tools for “a fulfillment of the Marxist prophecy of our internal collapse.”²⁴¹ Through both its decisions on civil rights and on communist dissidents, Thurmond contended that the Court was placing “a premium on being a member of a minority group or an adherent to a red-tinged philosophy,” which made it “the greatest enemy of the American people.”²⁴²

The idea of judicial tyranny as a communist plot to erode democracy loomed large in segregationist rhetoric. On the Senate floor, Thurmond implied that the “tyranny of the judiciary in the United States” was in line with “the tyranny in Hungary.”²⁴³ During this speech, anticommunism and white supremacy easily blended together: Thurmond discussed, in the same breath, the Court’s “usurpation of [state] power in the school cases” and its gentle treatment of “an acknowledged Communist” in a criminal sedition case.²⁴⁴ The specter of judicial tyranny became so pervasive that a 1957 bill proposed responding to it by stripping the Supreme Court of jurisdiction in areas related to civil rights.²⁴⁵ The bill’s staunch anticommunist sponsor, Senator William Jenner of Indiana, described the proposal as a way of preventing the Justices from “conforming the law” to what they “think the law should be” and thus creating “a judicial oligarchy.”²⁴⁶ The failed bill has been described as an effort launched by a coalition of “prosegregationists, states['] rights advocates, and

239. 102 CONG. REC. 4460 (1956).

240. See ESSIE MAE WASHINGTON-WILLIAMS & WILLIAM STADIEM, DEAR SENATOR: A MEMOIR BY THE DAUGHTER OF STROM THURMOND 170 (2005).

241. Press Release, Sen. Strom Thurmond, Address Before Pee Dee Area Citizens Councils at Olanta, South Carolina 1 (Oct. 14, 1958) (on file with the Strom Thurmond Collection, Clemson University Libraries).

242. *Id.*

243. 103 CONG. REC. 10,333-34 (1957).

244. *Id.* For the case that Thurmond discussed, see generally *Pennsylvania v. Nelson*, 350 U.S. 497 (1956).

245. See S. 2646, 85th Cong. (1957).

246. See 104 CONG. REC. 18,635, 18,641 (1958).

anti-Communists.”²⁴⁷ But these were not distinct groups, for the categories of segregationists and anticommunists continued to overlap significantly.

For other segregationists in the era of massive resistance, the notion that *Brown* itself was informed by communist authorities remained a central concern. At a Montgomery Citizens’ Council rally, Congressman George Grant proclaimed himself a “friend of the Negro race” and instead focused his vitriol on the allegedly communist-connected authors cited in Footnote Eleven.²⁴⁸ This concern dovetailed with the generation-old fear of a communist conspiracy to “mongrelize” the United States. In a speech in Arkansas in 1956, Congressman James Davis of Georgia called integration a “malignant experiment” waged by “mongrelizers” and the “radical NAACP” with the “ultimate goal” of “intermarriage and complete mongrelization of the American people.”²⁴⁹ Davis added: “The fact that this is also the identical aim of the Communist Party of the United States is more than just coincidental.”²⁵⁰

Regardless of their particular theory of integration’s supposed harms, segregationists continued to maintain that Black people in the South did not genuinely desire the end of Jim Crow. Instead, they asserted, Black people had been tricked into advocating for civil rights by communist masterminds. In 1957, Representative Thomas Abernethy of Mississippi read an anti-Semitic hoax into the congressional record, which asserted that the civil rights movement was a plot engineered by “Israel Cohen, a leading Communist in England.”²⁵¹ The nonexistent Cohen allegedly understood that the communists’ “most powerful weapon is racial tension,” so he set out to brainwash Black Americans to agitate for integration.²⁵² According to Abernethy, “[m]any thousands in America today who are in no sense Communists are helping to carry out the Communist plan.”²⁵³ These ideas echoed far beyond the chambers of Congress. In a 1958 sermon at Thomas Road Baptist Church in Lynchburg, Virginia, a young Jerry Falwell informed

247. GREENBERG, *supra* note 217, at 213-14; MORTON J. HORWITZ, *THE WARREN COURT AND THE PURSUIT OF JUSTICE* 64-65 (1998) (describing the Jenner-backed bill as being supported by “a coalition of McCarthyite legislators and Southern opponents of *Brown*”); see also LUCAS A. POWE, JR., *THE WARREN COURT AND AMERICAN POLITICS* 134 (2000) (“[T]he southern concern was blacks, not reds. What had been drawing together in . . . Congress[] was a coalition that wanted the Court brought to heel for decidedly different reasons.”).

248. See MARTIN, *supra* note 218, at 112-14.

249. Representative James C. Davis, Speech at West Memphis, Arkansas (Mar. 31, 1956), reprinted in 102 CONG. REC. 6821-24 (1956) (statement of Rep. John Bell Williams).

250. *Id.*

251. See 103 CONG. REC. 8559 (1957).

252. *Id.*; *Bigots’ Israel Cohen Hoax is Revealed, Retracted*, AM. ISRAELITE, Aug. 10, 1961, at 1.

253. 103 CONG. REC. 8559 (1957).

the congregation that “[t]he true Negro does not want integration. . . . Who then is propagating this terrible thing? First of all, we see the hand of Moscow in the background.”²⁵⁴

The NAACP, victorious in *Brown*, provided a natural target for segregationist red-baiting. The nation’s premier civil rights organization, long based in New York City, drew comparisons to carpetbaggers; Senator Allen Ellender of Louisiana tagged groups like the NAACP as “outside agitators” in 1956.²⁵⁵ This vision of civil rights organizations as alien forces readily cohered with anticommunist rhetoric. Georgia Attorney General Eugene Cook called the NAACP “the most ominous” threat to southern rights and liberties, because it “and its fellow-traveling fronts” sought to “force upon the South the Communist-inspired doctrine of racial integration and amalgamation.”²⁵⁶ The NAACP, according to Cook, had always been “directed and subsidized” by “South-hating white people with long records of affinity for, affiliation with, and participation in” communist groups.²⁵⁷ This communist infiltration extended to the NAACP’s legal arm: Thurgood Marshall, for instance, was formerly a board member of the “‘Communist front’ National Lawyers Guild.”²⁵⁸ Cook underscored that “[t]he racial aims of the Communist Party of the United States and those of the NAACP are virtually identical.”²⁵⁹ Cook stopped short of insisting that the NAACP was an intentionally communist project; it was simply “part and parcel of the Communist conspiracy,” whether “knowingly or unwittingly,” and as such it worked toward the “overthrow” of American democracy and the “deliver[y] [of] this nation into the hands of international Communism.”²⁶⁰

Several other segregationists also identified the NAACP as communism incarnate. Representative James Davis of Georgia grouped the NAACP with “the Communists, the pinkos, the radicals,” noting that all “are clamoring for desegregation and mongrelization.”²⁶¹ An influential Louisiana district attorney, Leander Perez, opined that “[t]he NAACP is a Communist front

254. Myra MacPherson, *Big-Time Politics from the Pulpit of Old-Time Religion*, WASH. POST (Sept. 27, 1984), <https://perma.cc/32EX-MEE4>.

255. *Ellender Warns South Not to Use Violence in Resisting Integration*, N.Y. TIMES, Mar. 18, 1956, at 87.

256. Ga. Att’y Gen. Eugene Cook, *The Ugly Truth About the NAACP: An Address Before the 55th Annual Convention of the Peace Officers Association of Georgia 1* (n.d.) (transcript available in the Citizens’ Council Collection, University of Mississippi Libraries Archives and Special Collections).

257. *Id.* at 3.

258. *Id.* at 5.

259. *Id.* at 9.

260. *Id.* at 10.

261. Davis, *supra* note 249, at 6821-22.

organization.”²⁶² J.B. Matthews, a former staff director for Senator Joseph McCarthy, published pamphlets titled “Communism and the NAACP.”²⁶³ Beyond the South, those who resisted school integration invoked anticommunism while setting their sights on the NAACP. As New York began efforts to desegregate its schools in the mid-1950s, an anonymous anti-integration group distributed pamphlets, including *The Ugly Truth about the NAACP* and *The Red Hand in New York Schools*, to white residents of Queens.²⁶⁴ Even civil rights supporters began to take notice. Sylvan Meyer, a Georgia journalist and chairman of the state’s advisory committee to the U.S. Commission on Civil Rights, observed that “[t]he NAACP is anathema to much of the white South: it is equated with Communism.”²⁶⁵

A key element of the massive-resistance movement was the rise of grassroots groups that organized opposition to integration, such as the Citizens’ Councils. These segregationist organizations were deeply dedicated to anticommunism, building on the already-existent strain of thought that associated civil rights with communism and federal overreach.²⁶⁶ Robert Patterson, founder of the first Citizens’ Council, decried “the Communist theme of all races and mongrelization” and set out to “defeat this communistic disease that is being thrust upon us.”²⁶⁷ The Citizens’ Councils of America (CCA) consisted of a widespread network of chapters linked by a central organization that set an ideological agenda.²⁶⁸ On an episode of its official radio show, the group heard from Congressman Martin Dies of Texas, an expert on anticommunism by virtue of being a former chair of HUAC.²⁶⁹ Dies discussed the relationship between communism and racial strife, warning against the “trend toward centralized government and the destruction of our states’ rights.”²⁷⁰

Anticommunism also figured prominently in the CCA’s official journal, the *Citizen*. The September 1962 issue featured an article titled *Forced Integration*

262. MARTIN, *supra* note 218, at 141.

263. COOK, *supra* note 127, at 299-300.

264. See MATTHEW F. DELMONT, WHY BUSING FAILED: RACE, MEDIA, AND THE NATIONAL RESISTANCE TO SCHOOL DESEGREGATION 33 (2016).

265. Sylvan Meyer, *The Press and the Schools*, in RACIAL CRISIS AND THE PRESS 29, 29, 38-39 (1960).

266. See ROLPH, *supra* note 30, at 29, 112.

267. See DUDZIAK, COLD WAR, *supra* note 10, at 111 (quoting MARTIN, *supra* note 218, at 2).

268. See NEIL R. McMILLEN, THE CITIZENS’ COUNCIL: ORGANIZED RESISTANCE TO THE SECOND RECONSTRUCTION, 1954-64, at 138-41 (1971).

269. ROLPH, *supra* note 30, at 60-61.

270. *Id.*

is *Communism in Action!*²⁷¹ Integration, the author alleged, “is a strategic campaign of the *world Communist movement*. It is just that—nothing more and nothing less.”²⁷² Communists were uninterested in integration per se but were using it to achieve “the destruction of the existing white society in this country” by eroding “racial integrity,” undermining “Constitutional liberty”—or even carrying out the “physical extermination of the whites.”²⁷³ In 1963, CCA national president Roy Harris used the *Citizen* to reiterate that the leaders of the “integration movement” were largely affiliated with “Communist, Communist-front and pink organizations.”²⁷⁴ Harris alleged that the movement’s most prominent leader, Martin Luther King, Jr., had “prior Communist connections” which were “well known.”²⁷⁵

The Citizens’ Councils attempted to import these ideas directly into legal disputes. In 1962, the Memphis Citizens’ Council sought to file a brief in a school-desegregation case, arguing that *Brown* “irrefutably favors and serves [the] aims of . . . Communism.”²⁷⁶ Desegregation, the Council explained, was a “‘pet’ of Communism,” favored by “Soviet leaders” who wanted to take advantage of the “cleavage in the United States . . . on the issue of racial school integration” to create social unrest and undo “peace and tranquility.”²⁷⁷ This development would make “for easier control by Communism,” allowing communist agents to further their “conspiracy to subvert and change all nations to their state-controlled and Godless rule.”²⁷⁸

The Citizens’ Councils were perhaps the most prominent—but hardly the only—group to both organize massive resistance at the grassroots level and appeal to anticommunism in doing so. Robert Lee Davidson, Imperial Wizard of the Ku Klux Klan, believed that “the Communists” were behind civil rights and other aspects of society that were growing more racially inclusive: “Even the radio and TV are communist controlled and communist inspired. . . . Every time you turn on the TV to a cowboy show, you find a n— playing in the lead.”²⁷⁹ The John Birch Society, a conservative advocacy group founded in

271. Medford Evans, *Forced Integration Is Communism in Action!*, *CITIZEN*, Sept. 1962, at 10, 10-11.

272. *Id.* at 11.

273. *Id.* at 13.

274. Roy V. Harris, *How We Can Win the Fight!*, *CITIZEN*, Dec. 1963, at 19, 21.

275. *See id.*

276. Motion of Memphis Citizens’ Council, a Corp., of Memphis, Tennessee, for Leave to File a Brief Amicus Curiae, in the Above Styled Cause & Amicus Curiae Brief, of Memphis Citizens’ Council, a Corp., of Memphis, Tennessee at 41, Bd. of Educ. v. Northcross, 370 U.S. 944 (1962) (No. 1022), 1962 WL 115533.

277. *Id.* at 42-43.

278. *Id.*

279. *See* COOK, *supra* note 127, at 120, 127 (racial epithet not elided in original source).

1958, was named in memory of a Georgia missionary killed by Chinese communists.²⁸⁰ Founder Robert Welch wrote that “the whole Supreme Court is a nest of socialists” and demanded the impeachment of Chief Justice Earl Warren.²⁸¹ Welch argued that Chief Justice Warren had allowed “the storm over integration,” a “trouble . . . brought on by Communists for their own purposes.”²⁸² The communists, Welch continued, sought “riots and civil disorders[,] . . . interracial distrust and bitterness[,] . . . [and] animosities between North and South”—all to “serve . . . communist purposes.”²⁸³

The fusion of anticommunism and white supremacy during the era of massive resistance was not only an element of political rhetoric; it manifested as a formal stance of southern states and other public institutions. Presiding over a 1956 lawsuit regarding segregated public buses, the South Carolina Public Service Commission observed that “part of the tactics of the Communist party in this country is to create tensions among the races.”²⁸⁴ The Commission reasoned that upsetting the “practice and custom” of racial segregation “would increase racial tensions” in the state and thus “promote the ends and aims of the Communist party.”²⁸⁵ As a result, the Commission suggested that the Supreme Court “reconsider and reverse the decisions in the school segregation cases.”²⁸⁶ The following year, the Georgia General Assembly took an even firmer stance against *Brown* and the Warren Court, recommending the impeachment of the Justices for their pursuit of a “pro-communist racial integration policy.”²⁸⁷

One month after Georgia lawmakers formally supported impeaching the Warren Court, the Louisiana Joint Legislative Committee conducted an investigation into the communist machinations behind the civil rights movement. The Committee heard testimony from Manning Johnson, a Black New Yorker and former communist.²⁸⁸ Johnson agreed with a state representative who asked him whether Black people generally, and the NAACP specifically, were “being exploited as allies for the Communist party

280. *Id.* at 264–65.

281. *Id.*

282. *Id.* at 265.

283. *Id.*

284. *Bus Suit Involving Separate Transp. Facilities*, 1 Race Rel. L. Rep. 1141, 1143 (S.C. Pub. Serv. Comm’n Sept. 26, 1956).

285. *Id.*

286. *See id.*

287. H.R. 174, 1957 Gen. Assemb., Reg. Sess. (Ga. 1957), reprinted in 2 Race Rel. L. Rep. 485, 488 (1957).

288. COOK, *supra* note 127, at 297–99.

toward world domination.”²⁸⁹ According to both Johnson and the legislator, “the so-called communist Trojan horse is stabled today within the NAACP.”²⁹⁰ Mississippi and Louisiana each established a State Sovereignty Commission, in 1956 and 1960, respectively, which investigated and publicized connections between communism and civil rights.²⁹¹ The Louisiana Commission published “educational” literature about this topic, including one pamphlet which asked readers whether “we want our children to attend racially integrated schools . . . setting the stage for interracial marriages?”²⁹² The report warned that “the ‘Carpet Baggers’ are with us again” in the form of civil rights activists, including “actual Communists.”²⁹³ They were “not really interested in promoting better race relations” but instead sought “to stir up racial hatred” in order to “weaken and destroy America” and advance the communist cause.²⁹⁴

These ideas came not just from the fringes of American society. They were aired by prominent figures in American law and politics. Two years after *Brown*, James F. Byrnes—a former U.S. Supreme Court Justice, U.S. Secretary of State, and South Carolina Governor—wrote an article in a national magazine condemning the Warren Court for its “usurpation . . . of the power to amend the Constitution and destroy State governments.”²⁹⁵ Byrnes assailed *Brown* because it would “break down social barriers” between the races and lead to “intermarriage” and “mongrelization.”²⁹⁶ The former leader of American foreign policy identified the alien interests that benefitted from integration: “The present trend brings joy to Communists and their fellow travelers who want to see all power centered in the Federal Government because they can more easily influence one Government in Washington than the 48 governments in 48 States.”²⁹⁷ Another prominent member of the Executive Branch, J. Edgar Hoover, echoed such concerns. In 1958, Hoover argued that communist agents searched for “agitational points” in domestic American politics in an effort to intensify internal strife.²⁹⁸ They could find these points

289. *Id.* at 299.

290. *Id.*

291. See YASUHIRO KATAGIRI, *THE MISSISSIPPI STATE SOVEREIGNTY COMMISSION: CIVIL RIGHTS AND STATES' RIGHTS*, at xi, 87-89 (2001); ADAM FAIRCLOUGH, *RACE & DEMOCRACY: THE CIVIL RIGHTS STRUGGLE IN LOUISIANA, 1915-1972*, at 324 (1995).

292. COOK, *supra* note 127, at 252.

293. *See id.*

294. *Id.*

295. James F. Byrnes, “*The Supreme Court Must Be Curbed*,” *U.S. NEWS & WORLD REP.*, May 18, 1956, at 50, 50-51.

296. *See id.* at 56.

297. *Id.* at 58.

298. HOOVER, *supra* note 120, at 203.

in civil rights causes, Hoover asserted, and the Community Party's "claim that it is working for Negro rights is a deception and a fraud."²⁹⁹ In reality, he contended, communists' "sole interest" was "to hoodwink the Negro, to exploit him and use him as a tool to build a communist America."³⁰⁰

Segregationists outside of government and politics similarly wielded arguments rooted in anticommunism, including in the pages of notable publications. In a 1956 issue of the *Atlantic*, South Carolina writer Herbert Ravenel Sass described the horrors of "racial amalgamation," claiming that the "pure-blooded white nations" have generally "outstripped . . . mixed-blood nations" in terms of "achievements."³⁰¹ Accordingly, white southerners were reasonable to resist "mixed schools."³⁰² Sass directly contested the idea that Cold War considerations required the fall of Jim Crow, arguing that integration did not necessarily further American interests. That America's image abroad had been degraded was a function of framing, not the fact of segregation itself.³⁰³ Black people in the United States were "by far the most fortunate members of their race to be found anywhere on earth," Sass insisted, so "[w]hat America, including the South, has done for the Negro . . . should be trumpeted abroad in rebuttal of the Communist propaganda."³⁰⁴ Sass suggested that it was far from self-evident that integration would "appease the peoples of Asia and Africa and wean them away from Communism."³⁰⁵ "[P]ro-Negro propagandists" depicted segregationists as occupying a "villainous role," a characterization which Sass believed the government ought to challenge.³⁰⁶

The idea that the Cold War created an imperative for massive resistance resonated with ordinary citizens throughout the country. When Congress debated a civil rights bill in 1956, North Carolina resident Jewell Lamm wrote about her opposition to the proposal in a letter to her congressman: "We want to resist communism at home as well as abroad. . . . God and Christ gave us segregation. . . . The commies propose to give us integration."³⁰⁷ The same year, Senator John Stennis of Mississippi received a letter praising the resistance to integration that Stennis had helped outline in the Southern Manifesto.³⁰⁸ The

299. *Id.* at 203, 246.

300. *Id.*

301. Herbert Ravenel Sass, *Mixed Schools and Mixed Blood*, ATLANTIC, Nov. 1956, at 45, 45.

302. *See id.* at 48.

303. *Id.* at 45-46.

304. *Id.* at 45.

305. *See id.* at 45-47.

306. *See id.*

307. SOKOL, *supra* note 30, at 40-41 (second alteration in original).

308. *See* Letter from John Metcalf to Sen. John C. Stennis (Mar. 27, 1956) (on file with the Mitchell Memorial Library, Mississippi State University).

author, a resident of Langley, Washington, assured Stennis that his views reflected “the position of a great many thinking people in the North” and subsequently linked civil rights to communism.³⁰⁹ “You and I know,” he wrote, that integration “fits very smoothly into the over-all plan of softening up our people to communism.”³¹⁰ Senator Richard Russell received similar letters of encouragement. Shortly after the Southern Manifesto appeared, a married couple from Kansas City, Missouri, wrote that they hoped that Russell would succeed in his effort “to get the ruling on schools reversed,” and that along the way “it can be proved that the NAACP is a Communist-front organization.”³¹¹ Another writer, also from Kansas City, confided to Russell that in the midst of the civil rights movement, “the South is all that is left of the old-time united America,” while people in the rest of the nation were “selling out the country to Russia.”³¹²

For some Americans, individual episodes in the saga of integration crystallized the preservation of Jim Crow as a Cold War imperative. A Missouri resident, observing the armed confrontation over the desegregation of Little Rock’s Central High School in 1957, concluded that such efforts presented “a threat to internal security and put another weapon in the long list we have recently handed Communism.”³¹³

Massive resisters argued that America’s security and international standing demanded resistance to integration, not enforcement of *Brown*. Therefore, they often invoked anticommunism in their public demonstrations. In the 1950s, opponents of integration in Atlanta held signs that read, “Don’t Push our Children out the Back door and Let the Communists in thru the Front Door.”³¹⁴ In 1959, segregationist picketers, also in Atlanta, concisely endorsed this claim: “Moscow Wants Integration.”³¹⁵ That same year, protesters in Little Rock defended segregation with signs asserting, “Race

309. *Id.*

310. *Id.*

311. See Letter from Mr. and Mrs. C.A. Schoor to Sen. Richard Russell (Mar. 22, 1956) (on file with the Richard B. Russell, Jr. Collection, University of Georgia Special Collections Libraries).

312. Letter from Floyd E. Jacobs, Partner, Howell, Jacobs & Howell, to Sen. Richard Russell (Mar. 12, 1956) (on file with the Richard B. Russell, Jr. Collection, University of Georgia Special Collections Libraries).

313. J. Lukin Brown, Letter to the Editor, *Little Rock Views*, ST. LOUIS POST-DISPATCH, Sept. 29, 1957, at 20; see also Dudziak, *Little Rock*, *supra* note 10, at 1645.

314. KEVIN M. KRUSE, *WHITE FLIGHT: ATLANTA AND THE MAKING OF MODERN CONSERVATISM* 135 fig.5.1 (2005).

315. MATTHEW D. LASSITER, *THE SILENT MAJORITY: SUBURBAN POLITICS IN THE SUNBELT SOUTH* 76 (2006).

Mixing is Communism.”³¹⁶ As Clemson alumni protested the university’s integration in the early 1960s, they chanted that “Integration is Communism in action.”³¹⁷ Even when segregationists were not directly protesting events or institutions, they retaliated against and red-baited their neighbors who accepted *Brown*. White southern moderates on the race question were often branded “traitor[s],” “Red[s],” and “n— lover[s].”³¹⁸

If massive resistance reflected a change in the tactics and priorities of the movement to defend Jim Crow, it maintained much of the movement’s prior ideology and rhetoric. A central piece of that ideology was anticommunism, which animated segregationist arguments throughout the United States. These sentiments appeared long before the rise of massive resistance, and they remained visible long after that movement’s regrettable heyday.

D. The Long Tail

In the 1960s, as the civil rights movement gained political momentum, segregationists continued to associate this cause with communism to both obstruct integration and make sense of a changing world.³¹⁹ Southerners who struggled to understand the upheaval of a generations-old system of racial apartheid continued to insist that Black Americans did not truly desire integration but had instead become unwitting Soviet tools. For them, what had changed in recent years were not attitudes about race, but the communists’ strategy.

As the direct-action phase of the civil rights movement reached its apex, segregationists routinely asserted that communists in fact served as the movement’s directors. When students used sit-ins to protest segregated lunch counters, Southern politicians, editorialists, and even former President Harry Truman suggested that the campaign was inspired by communists.³²⁰ In 1961, Alabama Attorney General MacDonald Gallion explained that “it’s the communists who are behind this integration mess.”³²¹ That same year, Freedom Riders tested the nonenforcement of integration on buses, and Strom

316. Lisa Wade, “Race Mixing is Communism,” SOC’Y PAGES: SOCIO. IMAGES (Oct. 10, 2009), <https://perma.cc/F2NE-6EBA>.

317. JACK BASS & MARILYN W. THOMPSON, STROM: THE COMPLICATED PERSONAL AND POLITICAL LIFE OF STROM THURMOND 178 (2005).

318. HODDING CARTER III, THE SOUTH STRIKES BACK 18 (1959) (racial epithet not elided in original source).

319. For an exemplary history of the civil rights movement’s transformative impact on the world of white southerners, see SOKOL, *supra* note 30, at 17-18.

320. CHRISTOPHER W. SCHMIDT, THE SIT-INS: PROTEST AND LEGAL CHANGE IN THE CIVIL RIGHTS ERA 81-82 (2018).

321. BRADEN, *supra* note 64, at 3.

Thurmond later assailed these activists as “Red pawns.”³²² The head of the Mississippi Highway Patrol concurred that the Freedom Rides were “directed, inspired and planned by known Communists.”³²³ Such attacks were so widespread that even the *New York Times* had no trouble using anticommunist epithets to make this point, printing headlines such as *Reds Called Key to Freedom Rides*.³²⁴ In 1963, when white supremacists bombed Black churches, homes, and hotels in Birmingham, Alabama, Governor George Wallace blamed the violence not on segregationists but on “outside subversives,” given that “[v]iolence and internal disorder are the stock in trade of the Communists.”³²⁵ Wallace’s inaugural address earlier that year had famously concluded: “[S]egregation now . . . segregation tomorrow . . . segregation forever.”³²⁶ Less well-known, however, is that earlier in his speech Wallace had vowed to protect Alabama’s “Anglo-Saxon people” from “communistic amalgamation” with Black citizens.³²⁷ Southern-born novelist Walker Percy commented that in these years, Dixie residents continued to maintain that “[t]here is no ill-feeling . . . between the races” and that “the Negroes like things the way they are.”³²⁸ As proof, white southerners would offer to “call my cook out of the kitchen and you can ask her.”³²⁹ White supremacists often claimed that the “trouble” in the South was not a function of Jim Crow, but of “outside agitators who are communist-inspired.”³³⁰

Segregationist politicians and protestors loudly red-baited other civil rights victories and tactics. Strom Thurmond called the passage of the Civil Rights Act of 1964 “a tragic day for America, when Negro agitators, spurred on by Communist enticements to promote racial strife, can cause the United States Senate to be steamrolled into passing the worst, most unreasonable and unconstitutional legislation that has ever been considered by the Congress.”³³¹

322. BASS & THOMPSON, *supra* note 317, at 175.

323. *Reds Called Key to Freedom Rides*, N.Y. TIMES, June 30, 1961, at 25.

324. *Id.*

325. *King Pleads for Calm, Says Truce Pact Holds*, NEWSDAY, May 13, 1963, at 2; *Gov of Ala. Challenges JFK on Federal Force*, NEWSDAY, May 13, 1963, at 3.

326. DAN T. CARTER, *THE POLITICS OF RAGE: GEORGE WALLACE, THE ORIGINS OF THE NEW CONSERVATISM, AND THE TRANSFORMATION OF AMERICAN POLITICS 9-11* (La. State Univ. Press, 2d ed. 2000) (1995) (alterations in original).

327. *Id.* at 108; Howell Raines, *George Wallace, Segregation Symbol, Dies at 79*, N.Y. TIMES (Sept. 14, 1998), <https://perma.cc/Z93S-KGLU>.

328. See GOLDFIELD, *supra* note 114, at 137, 154-55.

329. See *id.* at 154-55. Relatedly, the *New York Times* reported that it was a southern cliché for segregationists to assert: “[T]he Negroes don’t want integration—my cook told me.” See Gladwin Hill, *Louisiana*, N.Y. TIMES, Mar. 13, 1956, at S5.

330. See GOLDFIELD, *supra* note 114, at 154-55.

331. BASS & THOMPSON, *supra* note 317, at 180.

John Roussetot, a John Birch Society official and former California congressman, echoed Thurmond, calling the law a “Communist-created solution[.]” to racial inequality that gave the federal government “fantastic and unbelievable powers.”³³² Segregationists even succeeded in leveraging anticommunism to alter the Civil Rights Act; Mississippi congressman and Southern Manifesto signatory William Colmer inserted an amendment to Title VII which excluded members of the Communist Party from employment-discrimination protections.³³³ During the Selma to Montgomery March the following year, Citizens’ Councils erected billboards along the route with photos of Martin Luther King, Jr., and Rosa Parks attending the Highlander Folk School.³³⁴ The photos were falsely captioned, “Communist training school.”³³⁵ This experience was not new for either King or Parks, who had been called communists by opponents of civil rights since the Montgomery Bus Boycott of 1955.³³⁶

Even as a bipartisan consensus accepted the Civil Rights Act as the law of the land, opposing both integration and communism remained politically salient. The Republican Party Platform of 1964 spoke out on both issues.³³⁷ Adopted just days after the passage of the Civil Rights Act, the Platform called for “full implementation and faithful execution” of the new law, but it also explicitly opposed “Federally-sponsored ‘inverse discrimination,’ whether by the shifting of jobs, or the abandonment of neighborhood schools, for reasons of race.”³³⁸ Meanwhile, the Platform separately declared that the “supreme challenge” to advancing freedom abroad was “an atheistic imperialism—

332. See Dick Hebert, *Rights Law Benefits Reds, Bircher Says*, ATLANTA CONST., Feb. 18, 1965, at 42. The John Birch Society took its anticommunist critique of the Civil Rights Act well beyond the South. See, e.g., *Birchers Blast Rights Chiefs at Meet Here*, PHILA. TRIB., Aug. 22, 1964, at 3. For more on the connection between support for segregation and anticommunism in the 1960s, see LISA MCGIRR, *SUBURBAN WARRIORS: THE ORIGINS OF THE NEW AMERICAN RIGHT* 183-84 (2001).

333. See Civil Rights Act of 1964, Pub. L. No. 88-352, § 703(f), 78 Stat. 241, 256 (codified at 42 U.S.C. § 2000e-2(f)); 102 CONG. REC. 4460 (1956). For the legislative history and meaning of the “Colmer anti-Communist amendment,” see Francis J. Vaas, *Title VII: Legislative History*, 7 B.C. INDUS. & COM. L. REV. 431, 440-41 (1966); and Ronald A. Bender, Comment, *Title VII Seven Years After: A Glance at the Basic Statutory Scheme and Content of Title VII of the Civil Rights Act of 1964 and the Judicial Gloss Placed Upon It by Recent Developments*, 32 MONT. L. REV. 229, 235 (1971).

334. THEOHARIS, *supra* note 70, at 178.

335. See *id.*

336. *Id.* at 87, 177.

337. See MCGIRR, *supra* note 332, at 140.

338. Republican Party Platform of 1964 (July 13, 1964), reprinted in Gerhard Peters & John T. Woolley, *Republican Party Platforms, Republican Party Platform of 1964 Online*, AM. PRESIDENCY PROJECT, <https://perma.cc/5DLF-NUEU>; see Civil Rights Act of 1964, 78 Stat. 241.

Communism.”³³⁹ A decade after the Supreme Court decided *Brown* and the Senate censured McCarthy, integration and communism still served as convenient targets for attack in mainstream political venues.

When anticommunism lost its potency as a political weapon over the course of the 1960s, some segregationists nevertheless continued to wield it to justify their opposition to civil rights victories. Congress and the courts had coalesced around formal racial equality, but these segregationist voices were hardly confined to the political periphery. According to a 1963 poll, 27% of southerners and 21% of northerners believed that communists were the “[i]nstigators” of civil rights protests.³⁴⁰ In a Gallup poll taken two years later, 48% of respondents agreed that there was “a lot” of communist involvement in civil rights demonstrations, and another 27% felt there was at least “some” such involvement.³⁴¹

Politicians fueled and capitalized on these sentiments. In 1968, George Wallace ran for president as a third-party candidate, campaigning in large part on defending segregation, attacking the federal courts for their overreach, and assailing the “pro-Communist” elements of society like college professors.³⁴² His speeches drew thousands of spectators,³⁴³ and he won five states and forty-six electoral votes in the general election; over 13% of the nation—nearly 10 million citizens—cast their ballots for Wallace.³⁴⁴ That same year, Wallace published a book reiterating his earlier warning about the communist plot of race mixing: “[I]f we amalgamate into the one unit as advocated by the Communist philosophy, then the enrichment of our lives, the freedom for our development is gone forever. We become, therefore, a mongrel unit”³⁴⁵

In 1968, Strom Thurmond also published a book that denounced the “Supreme Court’s assault on the Constitution,” which produced “[c]rime in the streets, a free rein for communism, riots, agitation, collectivism and the breakdown of moral codes.”³⁴⁶ This assault, he argued, could be traced back to a single “conspicuous moment” when the Justices abandoned their fidelity to the Constitution: “The date when that blow was struck was 1954; the case was

339. Republican Party Platform of 1964, *supra* note 338.

340. Hazel Erskine, *The Polls: Demonstrations and Race Riots*, 31 PUB. OP. Q. 655, 664 (1967).

341. *Id.* (capitalization altered).

342. *See* CARTER, *supra* note 326, at 334-35, 339, 344.

343. *Id.* at 335.

344. *United States Presidential Election Results*, DAVE LEIP’S ATLAS U.S. PRESIDENTIAL ELECTIONS, <https://perma.cc/A3J6-UPQE> (archived Jan. 30, 2022) (to locate, select “View the live page,” then select the “General by Year” tab, and select “1968”).

345. GEORGE C. WALLACE, “HEAR ME OUT” 118 (1968) (quoting his 1963 gubernatorial inaugural address).

346. STROM THURMOND, *THE FAITH WE HAVE NOT KEPT* 13-14 (2d prtg. 1968).

Brown v. Board of Education³⁴⁷ Like Wallace, Thurmond cannot be dismissed as a marginal figure. He would remain in the Senate for another three decades, serving as President Pro Tempore and Chairman of the Judiciary Committee.³⁴⁸

In the 1970s, many observers continued to connect the struggle for civil rights with the ongoing struggle against communism. When Jimmy Carter became Governor of Georgia in the early 1970s and hung a portrait of Martin Luther King, Jr., in the state capitol, then-Lieutenant Governor Lester Maddox commented that Reverend King “did more to spread the cause of communism and socialism than any Georgian ever to live.”³⁴⁹ In the North, where school districts were beginning to contemplate meaningful integration, those who sought to maintain separate schools drew on anticommunism as a critical part of their ideology. In Boston—the site of perhaps the most vehement opposition to school integration in the North—organizations like the John Birch Society alleged that integration by busing was part of a communist conspiracy.³⁵⁰ After issuing a desegregation decree, Judge Arthur Garrity ordered the creation of school-specific “Racial-Ethnic Parent Councils,” committees of parents that would help implement integration.³⁵¹ According to a board member of the anti-integration group Massachusetts Citizens Against Forced Busing, “[i]f you’re on a racial council, you’re called pro-busing, a pinkie, a communist, a n— lover.”³⁵² The views of many white parents were represented on the Boston City Council by fervid anti-integration activists, including the notorious Louise Day Hicks and her successor, Albert “Dapper” O’Neil.³⁵³ O’Neil should be remembered for his

347. *Id.* at 14.

348. BASS & THOMPSON, *supra* note 317, at ix, xiii. As late as 2002, a leader in the U.S. Senate could be heard publicly commenting: “When Strom Thurmond ran for president [in 1948 as a Dixiecrat], we voted for him. We’re proud of it. And if the rest of the country had followed our lead, we wouldn’t have had all these problems over all these years, either.” Sheryl Gay Stolberg, *Under Fire, Lott Apologizes for His Comments at Thurmond’s Party*, N.Y. TIMES (Dec. 10, 2002), <https://perma.cc/CN9N-LZUQ>.

349. COHODAS, *supra* note 101, at 439.

350. See RONALD P. FORMISANO, BOSTON AGAINST BUSING: RACE, CLASS, AND ETHNICITY IN THE 1960S AND 1970S, at 174 (2004). We are, of course, sensitive to the claim that objections to “busing” were driven by racial considerations. In 1972, Julian Bond, who cofounded the Student Nonviolent Coordinating Committee before becoming an elected official in Georgia, advanced this idea: “What people who oppose busing object to, is not the little yellow school buses, but rather to the little black bodies that are on the bus.” DELMONT, *supra* note 264, at 10, 168. More pithily, Bond sometimes stated before Black audiences: “It’s not the bus, it’s us.” DRIVER, *supra* note 13, at 287.

351. See FORMISANO, *supra* note 350, at 89.

352. *Id.* at 90-91 (racial epithet not elided in original source).

353. See RICK PERLSTEIN, REAGANLAND: AMERICA’S RIGHT TURN, 1976-1980, at 672-73 (2020).

aggressive red-baiting, as he often tagged integrationists as “Communist dupes” and characterized Judge Garrity’s desegregation order as “a Communist plot against Boston.”³⁵⁴

Even in the 1980s, as the Cold War began to show signs of waning, the notion that the civil rights revolution was linked to communism lingered in American politics. While fewer Americans were willing to contest racial equality outright, some continued to wage collateral attacks on integration by invoking the Red Menace. As Congress debated whether to establish a federal holiday honoring Reverend Martin Luther King, Jr., conservatives like Senator Jesse Helms of North Carolina opposed it in part because of King’s supposed affiliation with communism.³⁵⁵ According to Helms—who, three decades earlier, had called UNC the “University of Negroes and Communists”³⁵⁶—King endorsed “radical” positions such as “action-oriented Marxism,” and was thus not deserving of memorialization by Congress.³⁵⁷ Echoing earlier objections to civil rights, Helms suggested that the holiday would constitute a major, unwarranted exercise of federal power: This was no symbolic action but instead a “serious” and “far reaching” one “which will shut down this country for another day each year.”³⁵⁸ Federal power, according to Helms, should not be exerted so freely, particularly to celebrate a man whose “association with . . . elements in the Communist Party” was “clear.”³⁵⁹ The Berlin Wall would fall just six years later, but the sense that the civil rights movement was inspired, directed, or at least tainted by communism proved to hold astonishing durability in the American public consciousness.

III. Implications of the Cold War Counterimperative

Brown is the most studied, celebrated, and scrutinized Supreme Court case from the twentieth century. The broader movement for racial integration of which it was a part is now a central element of modern American law and life.³⁶⁰ This Article has foregrounded how anticommunism played a critical role in the defense of Jim Crow, both well before and long after *Brown*. Centering this story has implications for our understandings of the history of

354. *See id.*

355. THEOHARIS, *supra* note 70, at 3-4.

356. *See supra* text accompanying note 104.

357. Helen Dewar, *Helms Stalls King’s Day in Senate*, WASH. POST, Oct. 4, 1983, at A01.

358. *See* 129 CONG. REC. 28,069 (1983).

359. *See id.*

360. *See, e.g.*, 3 BRUCE ACKERMAN, WE THE PEOPLE: THE CIVIL RIGHTS REVOLUTION 1, 5-6 (2014).

the civil rights movement, the process of legal change, and the nature of racism in modern American society.

A. On Histories of Civil Rights

In recent years, historians have increasingly examined the relationship between the Cold War and domestic race relations. This Article expands on these historiographical interventions, and the story told here contributes to the legal and political histories of civil rights. Not merely a rhetorical cudgel, anticommunism helped shape segregationist ideology. Attending to the role of anticommunism in the opposition to integration creates a more complete, more accurate portrait of the twentieth century's iconic legal decision.

First, recognizing the ways in which anticommunism and white supremacy were deeply intertwined helps to recast our understandings of the Warren Court, an institution that engaged with both of these momentous forces. While some distinguished scholars treat the Court's decisions on communism separately from those on civil rights, this approach creates an artificial, rigid dichotomy. Anticommunism and the Red Scare have traditionally served as contextual background in discussions of civil rights law, rather than being portrayed as inextricably linked to it.³⁶¹ For example, June 17, 1957, is typically identified as the point at which the Warren Court finally intervened against McCarthyism.³⁶² That date quickly became known as "Red Monday" around the nation, as the Court issued four separate opinions delivering perceived victories to communists, including *Yates v. United States*.³⁶³

For many segregationists, however, the Supreme Court had already begun its surrender to communism three years earlier. To them, Black Monday—May 17, 1954, when the Court handed down *Brown*—and Red Monday were one and the same. The controversy engulfing *Brown*'s Footnote Eleven underscores the point. The citation is, of course, notorious, but scholars often trace its notoriety to general attacks on the referenced authors' motives,

361. Morton Horwitz, for example, describes the difficulty that *Brown* litigants faced in achieving civil rights change and "social revolution" while the country was "in the midst of anti-Communist paranoia." He also describes how cases litigated by civil rights activists and those litigated by communists all contributed to the development of First Amendment doctrine. See HORWITZ, *supra* note 247, at 22, 34-37, 56-59, 67-73. Ultimately, however, Horwitz treats the Court's efforts to "stand[] up to McCarthyism" as distinct from its engagement with the civil rights movement. See *id.* at 32, 52 (capitalization altered).

362. See, e.g., Elizabeth J. Elias, *Red Monday and Its Aftermath: The Supreme Court's Flip-Flop Over Communism in the Late 1950s*, 43 HOFSTRA L. REV. 207, 209, 212 (2014).

363. 354 U.S. 298 (1957), *overruled in part by* *Burks v. United States*, 437 U.S. 1 (1978); HORWITZ, *supra* note 247, at 59.

credibility, and scientific rigor.³⁶⁴ Kenneth Clark, whose research on race and doll preferences was cited first, consistently portrayed the infamy of Footnote Eleven as a debate over whether it is appropriate for courts to use social science.³⁶⁵ Clark is far from the only scholar to see the controversy in that narrow manner, as law professors have also framed Footnote Eleven as a piece of the history of legal realism and sociological jurisprudence.³⁶⁶ Yet the uproar over Footnote Eleven was also part of a parallel history: that of anticommunism in the United States. From almost the moment it appeared, Footnote Eleven elicited controversy not simply because it applied social science to the law, but also because the specific authors it referenced drew accusations of communist affiliations.³⁶⁷ *Brown* can thus usefully be understood as a “Cold War case,” but to do so fully we must reckon with how both its proponents and its opponents wielded anticommunism for their respective ends. For segregationists and integrationists alike, the Cold War served to widen their appeal and to diminish criticism.³⁶⁸

While the iconic status of *Brown* and the civil rights revolution is hardly in dispute, their histories remain hotly contested.³⁶⁹ Understanding the profound complexity of these events requires acknowledging not only how separate but

364. See, e.g., Michael Heise, *Brown v. Board of Education, Footnote 11, and Multidisciplinarity*, 90 CORNELL L. REV. 279, 294-95 (2005) (describing the Footnote Eleven controversy as rooted in “a technical critique” of “the quality of the research cited” and a “theoretical critique” of the Court’s apparent reliance on nontraditional sources); Mody, *supra* note 157, at 805 (reviewing critiques of the Court’s “reliance on social science” in the *Brown* decision based on the “flimsy” quality of the evidence and the questionable role of social science in constitutional theory); MINOW, *supra* note 4, at 3-4 (“[*Brown*] triggered heated controversies over particular studies and over social science as a predicate for legal decision-making.”).

365. See Kenneth B. Clark, *The Desegregation Cases: Criticism of the Social Scientist’s Role*, 5 VILL. L. REV. 224, 224 (1959-1960) (underscoring the importance of the “question of the propriety of social scientists playing any role” in the Footnote Eleven controversy); Kenneth B. Clark, *Social Policy, Power, and Social Science Research*, 43 HARV. EDUC. REV. 113, 113 (1973) (reflecting on how Footnote Eleven “raised the question among social scientists of the propriety of their involvement or the validity of their contribution to [legal] decisions”).

366. See, e.g., Morton J. Horowitz, *The Warren Court: Rediscovering the Link Between Law and Culture*, 55 U. CHI. L. REV. 450, 455-56 (1988) (“The Warren Court also drew on the earlier efforts of Sociological Jurisprudence and Legal Realism The Brandeis Brief . . . was a forerunner of the controversial footnote in *Brown* describing the sociological effects of segregation on black school children.”). For a crisp appraisal of the Brandeis Brief and its legacy, including its connection to the NAACP’s brief in *Brown*, see MELVIN I. UROFSKY, *LOUIS D. BRANDEIS: A LIFE* 219-25 (2009).

367. See *supra* Part II.B.

368. Dudziak, *supra* note 26, at 36.

369. On the contested history of the civil rights movement and *Brown*, see THEOHARIS, *supra* note 70, at 44; and Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination?*, 58 U. MIA. L. REV. 9, 10-13 (2004).

equal met its demise, but also how large swaths of Americans sought to preserve that odious regime. A central part of the latter story involves the fusion of anticommunism and segregation. By reckoning with this convergence, *Brown*, its context, and its legacy come into sharper focus.

The prevalence of anticommunism in segregationist rhetoric also raises questions about the historical origins of the Cold War—imperative argument itself. In Bell and Dudziak’s telling, supporters of civil rights began invoking anticommunism to support their position in the early years of the Cold War as a response to an American public-relations crisis. On this account, media coverage of Jim Crow—particularly in foreign outlets—negatively impacted “international perceptions of American democracy,”³⁷⁰ thereby damaging the nation’s “credibility” and “prestige” in its “struggle with Communist countries.”³⁷¹ Accounts of segregation and racial discrimination, disseminated around the world, formed “a blot’ on the nation.”³⁷² Advancing civil rights thus served as damage control, countering this negative image. But the prevalence of segregationists’ anticommunist arguments raises the possibility that integrationists initially invoked anticommunism to rebut these segregationist claims. On this theory, advocates promoting civil rights during the Cold War may have begun voicing their arguments from a defensive crouch. Proponents of racial equality could thus be viewed as fighting fire with fire, fending off both the publicity crisis in foreign media and the anticommunist claims of Jim Crow’s domestic supporters.

Studying the anticommunist opposition to *Brown* also provides a more nuanced understanding of some of modern history’s most prominent antagonists. In both civil rights and other areas of law, scholars have shed significant light on the relationship between courts and social movements by examining the losing side of major legal decisions.³⁷³ But such studies remain too few.³⁷⁴ While historians have dedicated substantial attention to the

370. DUDZIAK, COLD WAR, *supra* note 10, at 6.

371. See Bell, *supra* note 8, at 524 (quoting Derrick A. Bell, Jr., Lecture, *Racial Remediation: An Historical Perspective on Current Conditions*, 52 NOTRE DAME L. REV. 5, 12 n.31 (1976)).

372. DUDZIAK, COLD WAR, *supra* note 10, at 23.

373. In the area of civil rights, see, for example, Klarman, *supra* note 67, at 82-83. Other areas of law in which scholars have offered important studies of backlash and judicial losers include reproductive and LGBTQ+ rights. See, e.g., Robert Post & Reva Siegel, Essay, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373, 373-74 (2007); Reva B. Siegel, *Community in Conflict: Same-Sex Marriage and Backlash*, 64 UCLA L. REV. 1728, 1730 (2017); William N. Eskridge Jr., *Backlash Politics: How Constitutional Litigation Has Advanced Marriage Equality in the United States*, 93 B.U. L. REV. 275, 277-78 (2013).

374. See SOKOL, *supra* note 30, at 8 (“Historians have yet to capture those narratives of white southerners during the age of civil rights in all their complexity.”); cf. Douglas NeJaime, *footnote continued on next page*

anticommunist justifications for segregation, the legal academy has lagged behind.³⁷⁵ Whatever the underlying reasons behind this disjunction between history departments and law schools, it is regrettable that winners' histories have been permitted to dominate legal academia.³⁷⁶

Regardless of their origin, accounts of *Brown* which center the Warren Court and the NAACP as protagonists often either ignore or caricature the arguments advanced by the segregationist antagonists of that story.³⁷⁷ In turn, they blind us to the various arguments leveraged in opposition to the most studied legal opinion in modern American history. For example, bringing the anticommunism espoused by defenders of Jim Crow to center stage helps to illuminate their conception of why civil rights campaigns and lawsuits were being waged against them. Segregationists frequently argued that Black people did not truly favor integration.³⁷⁸ Particularly in the South, the subordination of Black people enabled some white people to understand Jim Crow as perfectly compatible with, if not responsible for, interracial comity. For some segregationists, then, the civil rights movement was genuinely confounding

Winning Through Losing, 96 IOWA L. REV. 941, 943-46 (2011) (noting lawyers' preoccupation with winning and describing how this impacts legal analysis).

375. Katie R. Eyer, *The New Jim Crow Is the Old Jim Crow*, 128 YALE L.J. 1002, 1005-07 (2019) (reviewing MCRAE, *supra* note 30; and THEOHARIS, *supra* note 70) (noting that historians have "offer[ed] a much richer account of opponents of desegregation").

376. For critiques of winners' history in various areas of American law, see Christopher W. Schmidt, *Beyond Backlash: Conservatism and the Civil Rights Movement*, 56 AM. J. LEGAL HIST. 179, 183-84 (2016); Laura M. Weinrib, *Civil Liberties Outside the Courts*, 2014 SUP. CT. REV. 297, 323; and Morton J. Horwitz, Essay, *History and Theory*, 96 YALE L.J. 1825, 1827 (1987). Cf. R.H. HELMHOLZ, CANON LAW AND ENGLISH COMMON LAW 3 (1983) ("Legal history is winner's history."). For broader assessments of how lawyers have used history for celebratory or self-justificatory purposes, see generally Randall Kennedy, *Race Relations Law and the Tradition of Celebration: The Case of Professor Schmidt*, 86 COLUM. L. REV. 1622 (1986); and Morton J. Horwitz, Review Essay, *The Conservative Tradition in the Writing of American Legal History*, 17 AM. J. LEGAL HIST. 275 (1973).

377. Hall, *supra* note 70, at 1239 (noting the "trope of the South as the nation's 'opposite other'").

378. See, e.g., GOLDFIELD, *supra* note 114, at 154-55 (noting that as proof of this argument, southerners would offer to "call my cook out of the kitchen and . . . ask her"); see also *supra* notes 328-30 and accompanying text. Senator Sam Ervin of North Carolina provides a case in point. While Ervin did not explicitly link segregation and anticommunism, he argued that both white and Black people were "disturbed by the proposals to abolish racial segregation" because doing so would destroy "the harmonious race relations now existing in the South." Ervin, *supra* note 21, at 32-33; see also *Segregation and Sex*, AFRO-AM. (Balt.), Apr. 21, 1956, at 8 (quoting Ervin as commenting that "social comingling of the races is alien to the way of life of Southerners of both races").

and could only be explained as the product of outside agitation rather than of the genuine discontent of local Black people.³⁷⁹

The idea that outside forces had somehow orchestrated the civil rights movement neatly mapped onto an understanding of *Brown* and its ilk as elements of a broader communist conspiracy. This conspiracy, the argument ran, was less interested in fostering racial equality than in fomenting national division. The anticommunist lens thus clarifies the segregationist worldview, providing insight into their understanding of *why* calls for integration were happening at all.³⁸⁰ To be sure, this lens neither deracializes the worldview of segregationists nor absolves them of deep-seated white supremacy. To the contrary, it provides a clearer understanding of the precise dehumanizing ways that defenders of Jim Crow viewed Black people. In this segregationist mindset, Black people were alternately and inconsistently understood as militants angrily demanding social change and simpleminded folks blindly doing communists' bidding.³⁸¹ The latter mode portrayed Black people as easily duped and misled into seeking desegregation that they did not actually prize.

Attending to the losers in cases like *Brown* also brings the constitutional history of civil rights into harmony with broader histories of the American state. As Ira Katznelson has argued, the post–New Deal state reflected both a crusade against international fascism and communism and a “rotten

379. See Ervin, *supra* note 21, at 32 (insisting that the assault on racial segregation was directed by “well-meaning outsiders” who were unfamiliar with the South, “political opportunists,” and “Negro leaders”); cf. JAMES T. SPARROW, *WARFARE STATE: WORLD WAR II AMERICANS AND THE AGE OF BIG GOVERNMENT* 97–98 (2011) (“To local whites, the sudden assertiveness of their black neighbors seemed suspicious, amounting to a conspiracy, and the threat to Jim Crow assumed the appearance of an insurrection by force . . .”).

380. See LEWIS, *THE WHITE SOUTH AND THE RED MENACE*, *supra* note 30, at 73 (“[The idea of a communist conspiracy] helped many segregationists explain the need for agitation among the region’s African Americans, since the white South had long clung to the paternalistic belief that blacks were content with their lot.”); see also POWE, *supra* note 247, at 155 (“A major public relations tenet of the southern defense against civil rights, which southerners may have myopically believed, was that southern Negroes were happy in their condition and that those pushing change were ‘outside agitators’ and communists.”).

381. On Black activists’ balancing act between militance and moderation, see THOMAS F. JACKSON, *FROM CIVIL RIGHTS TO HUMAN RIGHTS: MARTIN LUTHER KING, JR., AND THE STRUGGLE FOR ECONOMIC JUSTICE* 188 (2007) (“Racial militancy risked alienating white allies. . . . But bland moralism and ‘reasonable restraint’ risked losing the activist and grassroots vanguard, who became increasingly disillusioned with delay, ‘tokenism,’ and liberal compromise.”). See also FREDRICKSON, *supra* note 22, at 276 (noting that since the era of slavery, the Black man in the white imagination had a “dual nature” of “docile and amiable” on one hand and “ferocious and murderous” on the other).

compromise” with the white supremacist South that preserved segregation.³⁸² The United States became a “two-sided state,” campaigning against illiberal communism while simultaneously protecting “antidemocratic pathologies” including Jim Crow.³⁸³ Understanding the extent to which opponents of *Brown* relied on anticommunism accords with this history. The fusion of anticommunism and segregation was not an aberration or a one-off political ploy, but a tactic in keeping with the two-sided state.

While it may be tempting to understand racial justice and geopolitical advantages as naturally and mutually reinforcing during the *Brown* era, this view risks engaging in what Randall Kennedy termed a false “celebratory tradition” in the constitutional law of race.³⁸⁴ The story told in this Article, however, makes it clear that actors who paid extensive attention to geopolitics still arrived at the conclusion that such considerations required preserving Jim Crow.³⁸⁵ This dynamic comes into sharpest focus when the opponents of desegregation are studied on the terms in which they understood themselves. Segregationists viewed themselves not so much as *attacking* civil rights, but instead as *defending* American traditions and values—including liberty, limited government, and capitalism.³⁸⁶

Finally, this story brings to the fore questions of sincerity and motivation that dog all historical accounts examining intellectual developments. Did segregationists actually believe what they said—that integration could pave the way for America’s fall to communism? Or did they simply employ communism as a convenient rhetorical tool, linking racial justice to an abstract evil because of the political advantage of so doing? Admittedly, doubting the sincerity of anticommunist sentiment contains undeniable appeal. After all, reflexively accusing one’s opponents of being “Reds,” “commies,” or “pinkos” in the hopes

382. See KATZNELSON, *supra* note 14, at 484-86 (quoting AVISHAI MARGALIT, ON COMPROMISE AND ROTTEN COMPROMISES 7 (2010)).

383. See *id.*

384. See Kennedy, *supra* note 376, at 1622-23.

385. Dudziak rejects the idea that the Cold War was “a good thing for American civil rights” but acknowledges that her Cold War-imperative thesis has at least on occasion given that impression. DUDZIAK, COLD WAR, *supra* note 10, at xix; see, e.g., Steven F. Lawson, Book Review, 107 AM. HIST. REV. 246, 246 (2002) (reviewing DUDZIAK, COLD WAR, *supra* note 10) (“Dudziak contends that, overall, the Cold War played a positive role in extending first-class citizenship to African Americans.”).

386. See KRUSE, *supra* note 314, at 9 (“[L]ike all people, [segregationists] did not think of themselves in terms of what they opposed but rather in terms of what they supported.”). But see WOODS, *supra* note 30, at 1-4 (arguing that the thought of anticommunist segregationism was “defensive” and a “regional ideology, defined as much by what its adherents opposed as what they favored”); LEWIS, THE WHITE SOUTH AND THE RED MENACE, *supra* note 30, at 51 (“Where McCarthy used red-baiting for self-promotion, southern segregationists used it in self-defense.”).

of scoring political points is something of an American tradition.³⁸⁷ At least some of the segregationists chronicled herein almost certainly participated in that very tradition.³⁸⁸

We maintain, however, that it is deeply mistaken to dismiss *all* segregationists' invocations of anticommunism as thoughtless, cynical appendages to the defense of Jim Crow. Charges of "communism" often functioned as more than naked, reflexive epithets in the segregationist toolkit. While some segregationists insisted that civil rights supporters were guilty of communism by mere association, anticommunism frequently played a more significant role in shaping white supremacist thought. From Richard Russell and Theodore Bilbo in the 1930s and 1940s to James Eastland and James Byrnes in the wake of *Brown*, prominent defenders of Jim Crow often articulated detailed theories as to how integration advanced the communist cause.³⁸⁹ These political actors, as best as we can discern, did not voice these claims insincerely. Even assuming *arguendo* that these politicians did not really believe their anticommunist contentions deep down, though, it is important to realize that they would have had every incentive to select arguments that they believed would resonate widely with their constituents. This point suggests that many citizens were inclined to give credence to these anticommunist arguments.

It is also important to recognize, moreover, that these arguments were not confined to the sphere of elected officials. Journalists and judges, lawyers and lay citizens all repeatedly contended that segregation amounted to a Cold War imperative, and they did so in a variety of settings. Given the prevalence and often expansive nature of these arguments, it seems implausible in the extreme that everyone who trafficked in them did so out of insincerity. The Cold War loomed impossibly large in the American psyche during much of the twentieth century, and ardent segregationists would have had ample reasons to hold that their fight against integration dovetailed with their fight against communism. In fact, it would have been surprising had they concluded otherwise.

While we find the segregationists' arguments about communism wholly unpersuasive, we are nevertheless also persuaded that those arguments were often sincere rather than merely expedient. Arguments at least sometimes can be made in good faith for a bad cause. That doubts about segregationists'

387. See, e.g., GREG MITCHELL, *TRICKY DICK AND THE PINK LADY: RICHARD NIXON VS. HELEN GAHAGAN DOUGLAS—SEXUAL POLITICS AND THE RED SCARE*, 1950, at 170-71 (1998) (noting that Richard Nixon insisted in his 1950 Senate campaign that his opponent, Helen Gahagan Douglas, was "pink right down to her underwear").

388. See WHITFIELD, *supra* note 29, at 21 ("The struggle for civil rights . . . aroused the suspicion of those who inferred from the evidence that Communism was loathsome the conclusion that anything loathsome was Communism.").

389. See *supra* Part II.

sincerity spring so readily to mind today attests to just how far we are now removed from the era of *Brown* and the Red Scare. That period is not, of course, ancient history. But one of the values of this historical inquiry is its ability to demonstrate that yesterday's commonplace can become today's cockamamie.³⁹⁰

B. On Theories of Legal Change

The anticommunist defense of Jim Crow complicates predominant theories of courts and social change. For one, the duality of anticommunist sentiment regarding race during the twentieth century reveals that the notion of “interests” in the interest-convergence theory contains considerable indeterminacy. Accounting for Jim Crow anticommunism thus challenges the interest-convergence thesis on the very terrain where it originated. While interest convergence asserts that in *Brown*, white Americans eliminated de jure school segregation because of the perceived geopolitical benefits of integration, this story shows that white perspectives on the relationship between civil rights and communism were varied rather than singular. For many white people, the best way to oppose communism was to oppose integration. They advocated this position for diverse reasons: some because integration reflected a Soviet-style central government takeover, others because integration would pave the way for the weakening of America through internal strife or interracial marriage.³⁹¹

White interests, in short, were not homogeneous when it came to the relationship between the Cold War and civil rights. The story of *Brown* is therefore not one in which Black interests necessarily converged with those of white elites. In describing the concept of interest convergence, Bell defined the converging sides as “[r]acial justice” on the one hand and “societal interests” deemed important by “society’s policymakers,” on the other.³⁹² But the white policymakers of the United States were, as the foregoing has emphasized, hardly monolithic.³⁹³ As Dudziak has demonstrated, some executive officials

390. Jack Balkin has argued that legal and political advocacy can shift claims from being “off-the-wall” to being “on-the-wall.” See Jack M. Balkin, “*Wrong the Day It Was Decided*: *Lochner* and Constitutional Historicism,” 85 B.U. L. REV. 677, 718-19 (2005). This history is a case study of the reverse: Anticommunist segregationism is today considered far off-the-wall, but only a few generations ago it appears to have been squarely on-the-wall.

391. See *supra* Part II.

392. Bell, *supra* note 8, at 523.

393. See Justin Driver, *Rethinking the Interest-Convergence Thesis*, 105 NW. U. L. REV. 149, 165 (2011) (highlighting how the interest-convergence thesis “accords insufficient attention to . . . intraracial cleavages” and portrays racial interests as “singular”). That article explored the interest-convergence thesis at a relatively high level of abstraction, whereas this Article foregrounds and analyzes underappreciated historical realities for legal audiences.

concluded that desegregation was indeed a Cold War imperative.³⁹⁴ But for many others who staunchly opposed communism—in the FBI and the halls of Congress, as well as statehouses and living rooms throughout the country—desegregation was understood as a liability rather than an asset for America in the Cold War.³⁹⁵ It is not too much to say that these figures all viewed Jim Crow, rather than desegregation, as a Cold War imperative.

The pervasive segregationist contention that Black Americans did not actually covet integration, but instead were mere communist dupes, further underscores the indeterminate nature of racial interests. To be clear, we find this segregationist trope noxious, as it is predicated on notions of Black docility and inferiority that stem directly from the era of slavery.³⁹⁶ It is important to observe, however, that white supremacists were not alone in linking civil rights activism to communism in an effort to undermine desegregation. By the 1950s and 1960s, some Black separatists—from pastors to newspaper publishers—invoked anticommunism to justify their opposition to integration.³⁹⁷ Such luminaries as Zora Neale Hurston assailed *Brown* as a “most astonishing” capitulation to Moscow “just when the nation is exerting itself to shake off the evils of Communist penetration.”³⁹⁸

Outside of the Cold War context, scholars and activists have disagreed on the value of integration, providing additional evidence for the variability of racial interests. Indeed, some of Bell’s most prominent scholarship has cast doubt on and even outright rejected school desegregation as a worthy goal for Black Americans.³⁹⁹ We hasten to add that Bell—and many other significant thinkers, including Black Power advocates, who have questioned the wisdom of pursuing racial integration—in no way accept the white-supremacist doctrines of Black docility and inferiority.⁴⁰⁰ Bell and Black Power

394. See *supra* Part I.

395. See *supra* Part II.

396. See FREDRICKSON, *supra* note 22, at 51-58, 101-09; see also *supra* notes 380-81 and accompanying text.

397. LEWIS, *THE WHITE SOUTH AND THE RED MENACE*, *supra* note 30, at 119-23.

398. See Letter from Zora Neale Hurston to the Editor of the Orlando Sentinel (Aug. 11, 1955), in ZORA NEALE HURSTON: A LIFE IN LETTERS 738, 738-40 (Carla Kaplan ed., 2002).

399. See Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470, 471-72, 512-13 (1976) (contending that civil rights lawyers elevated their interest in achieving integration above their clients’ interests in educational quality); BELL, *supra* note 42, 20-27 (supporting the view that in *Brown* the Supreme Court should have upheld *Plessy*’s separate-but-equal doctrine, while requiring schools for Black children to be truly equal).

400. See, e.g., KWAME TURE & CHARLES V. HAMILTON, *BLACK POWER: THE POLITICS OF LIBERATION IN AMERICA* 54-55 (Vintage Books 1992) (1967) (“[I]ntegration’ is a subterfuge for the maintenance of white supremacy.”). For a valuable historical examination of the many intellectuals who questioned whether integration should be
footnote continued on next page

proponents, of course, detested the white-supremacist mindset and dedicated themselves to vanquishing it. Yet the fact that devotees of both white supremacy and Black Power devalued integration's significance to Black citizens, even for profoundly different reasons, attests to the deeply nebulous, contested nature of what precisely constitutes a racial interest.

Beyond interest convergence, focusing upon the anticommunist positions of Jim Crow's defenders addresses other questions regarding the nature of legal change. For instance, this history highlights the contingent nature of law and politics, cautioning against assigning overly tidy causal connections between them. Anticommunist rhetoric was ubiquitous in the *Brown* era, wielded by both supporters and opponents of desegregation. Prominent, powerful figures, such as J. Edgar Hoover and James Byrnes, contended that integration would hamper America's foreign policy interests.⁴⁰¹ For them, the fight to preserve segregation was quintessentially a Cold War fight.⁴⁰² It is entirely plausible that people holding similar views could have occupied the White House, the Solicitor General's office, or perhaps even formed a majority on the Supreme Court during the 1950s and 1960s.

This insight offers a lesson for scholars of civil rights and builds upon previous accounts that challenge the apparent inevitability of *Brown* in popular and academic history.⁴⁰³ *Brown* was far from inevitable; so too was the outcome of the Cold War. That the civil rights movement and the United States achieved their respective victories was in no way foreordained.⁴⁰⁴ These mutual successes make it easy to view them as compatible only with one

Black Americans' ambition, see generally ANDERS WALKER, *THE BURNING HOUSE: JIM CROW AND THE MAKING OF MODERN AMERICA* (2018).

401. See *supra* Part II. For a discussion of Hoover's views, see the text accompanying notes 119-20, 216, 299-300 above. For a discussion about Byrnes, see the text accompanying notes 295-97 above.

402. For a description of how Byrnes's views on domestic policy evolved from "ideological flexibility" to fervent anticommunism, see ROBERT L. MESSER, *THE END OF AN ALLIANCE: JAMES F. BYRNES, ROOSEVELT, TRUMAN, AND THE ORIGINS OF THE COLD WAR* 222, 238 (1982).

403. See, e.g., Kenneth W. Mack, *Rethinking Civil Rights Lawyering and Politics in the Era Before Brown*, 115 YALE L.J. 256, 258-65 (2005) (reframing "[t]raditional civil rights histories"); GOLUBOFF, *THE LOST PROMISE*, *supra* note 28, at 4 (countering "the dominant historical narrative" in which *Brown* appears inevitable despite the fact that "*Brown* represented only one possible form of modern civil rights doctrine"); Risa Goluboff, *Lawyers, Law, and the New Civil Rights History*, 126 HARV. L. REV. 2312, 2319-22 (2013) (reviewing KENNETH W. MACK, *REPRESENTING THE RACE: THE CREATION OF THE CIVIL RIGHTS LAWYER* (2012)) (discussing a "new civil rights history" which "highlights complexity and contingency" and "decenter[s]" cases like *Brown*); Sunstein, *supra* note 12 (noting that *Brown* "has . . . acquired an aura of inevitability" even though "it didn't seem inevitable at the time").

404. See Driver, *The Consensus Constitution*, *supra* note 34, at 783-84 (cautioning against historical approaches that treat judicial decisions as foreordained).

another. Had the Court decided *Brown* the other way, however, it might well be tempting to argue that such an outcome was driven by anticommunist goals, since anticommunist rhetoric was so pervasive among segregationists.⁴⁰⁵ Appreciating that some Cold Warriors supported *Brown* and others fought *Brown* counsels against concluding that Cold War considerations inevitably led toward desegregation. The reality on the ground was far more complex.

Emphasizing the uncertain causal relationship between politics and legal decisions may help to reconceptualize major Supreme Court decisions interpreting the Equal Protection Clause during the post-*Brown* period. Cases like *Milliken v. Bradley*—which invalidated an interdistrict desegregation plan in metropolitan Detroit in 1974⁴⁰⁶—are not typically construed as being part of the Cold War era. But echoes of the anticommunist arguments explored above in Part II can be heard in that decision. After *Brown*, segregationists declared that integration amounted to a “Socialistic–Communitistic scheme” in which the federal government interfered with “control of [the] local community,” including educational matters.⁴⁰⁷ *Bradley* certainly did not mention communism. But the opinion voiced the very same concerns about federal overreach that animated segregationist Cold Warriors. In invalidating the interdistrict remedy in Detroit, the Court stated that “no single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential . . . to the maintenance of community concern and support for public schools.”⁴⁰⁸ Although the Red Scare had ended long before the 1970s, the Cold War still simmered. We do not suggest, of course, that the Cold War single-handedly controlled the outcome in *Bradley*. That claim would be preposterous, as valorizing local control in judicial decisions long predates 1974. Many different factors doubtless met—and even collided—when the Court issued *Bradley*. But that same dynamic also applied when the Court issued *Brown*.

405. On the debate between contingency and inevitability with respect to *Brown* and social change more broadly, compare Mark Tushnet, *The Significance of Brown v. Board of Education*, 80 VA. L. REV. 173, 174 (1994) (critiquing “a determinist account of social change”), with Michael J. Klarman, *Brown v. Board of Education: Facts and Political Correctness*, 80 VA. L. REV. 185, 197 n.37 (1994) (arguing that in light of “political, economic, social, demographic, and ideological forces,” racial change was in fact “inevitable”). For additional discussion of the notion that “racial change was inevitable,” see BELL, *supra* note 42, at 134.

406. 418 U.S. 717, 730, 752-53 (1974).

407. MCRAE, *supra* note 30, at 174-75 (quoting Flora B. Surles, Letter to the Editor, *U.S. School Aid*, NEWS & COURIER (Charleston, S.C.), Dec. 5, 1955, at 12).

408. *Bradley*, 418 U.S. at 741.

C. On Racism's Malleability and Tenacity

Finally, the fusion of anticommunism and segregation presents a case study of the malleable, tenacious character of racism itself. Regardless of whether it was their strategic intent, when white supremacists linked their cause to the Cold War, they broadened its appeal beyond the South. While Jim Crow as a legally mandated regime was most commonly associated with and most fiercely defended by the white South, anticommunism provided white citizens across the country a rationale for embracing the segregationist cause.⁴⁰⁹

This recognition cuts against the stereotypical depiction of Jim Crow's defenders as being unsophisticated, fanatical, and frothing-mouthed bumpkins, for anticommunism helped to nationalize and diversify the opposition to integration. If integration amounted to a capitulation to Moscow and a threat to national security, then all Americans—not only southerners—could be construed as having an interest in permitting the South to preserve Jim Crow. The standard geopolitical account, as articulated by Bell and Dudziak, suggests that national security conservatives who were ambivalent on issues related to race supported civil rights because doing so offered foreign policy benefits.⁴¹⁰ Yet this Article has demonstrated that geopolitical considerations often pointed in the opposite direction: Segregationist denunciations of the Supreme Court as a pro-communist institution paved the way for alliances between national security conservatives and Jim Crow's defenders.⁴¹¹

Did anticommunism actually succeed in broadening the opposition to desegregation? The answer to that question must be equivocal. It seems clear that some white people in the North felt comfortable assailing the struggle for civil rights as a communist plot. They embraced this notion ostensibly in defense of national security rather than of white supremacy, often under the imprimatur of the federal government itself.⁴¹² But it is also quite possible that anticommunist rhetoric simply provided a fig leaf for northerners' preexisting

409. See LEWIS, *MASSIVE RESISTANCE*, *supra* note 30, at 73.

410. See *supra* Part I.

411. For a discussion of other instances in which anticommunism and defenses of segregation produced shared political interests, see David J. Garrow, *Bad Behavior Makes Big Law: Southern Malfeasance and the Expansion of Federal Judicial Power, 1954-1968*, 82 ST. JOHN'S L. REV. 1, 16 (2008) (opposition to the Court's antisubversion decisions); and MCRAE, *supra* note 30, at 139-41 (opposition to U.N. human rights initiatives).

412. For example, Anne Braden argued that the focus of HUAC on civil rights groups as subversive—often undergirded by debunked evidence—gave anticommunist segregationism the “stamp of approval of a government committee” and helped “the segregationist to tie his kite to the national issue of communism and thus pose, not as the defender of a corrupt Southern status quo, but as a guardian of the national security.” BRADEN, *supra* note 64, at 13-14.

latent, racist inclinations. Whatever their precise motivations, though, the most significant point is that anticommunist segregationism found ardent supporters throughout the nation, even if their worldview did not ultimately carry the day.

Well before *Brown*, segregationists marshaled geopolitical arguments to stave off their dreaded day of integration.⁴¹³ Long after *Brown*, they continued to do so to condemn and ultimately constrain the decision.⁴¹⁴ Segregationists fused concepts like anticommunism, liberty, states' rights, local autonomy, and parental control of education. In the context of the Cold War, they used anticommunism to proclaim that their opposition to school integration was rooted in legitimate, widespread foreign policy concerns.⁴¹⁵ Anticommunism thus became one of many "colorblind" frameworks, alongside others like parental and property rights, that enabled the emerging conservative movement to defend segregation.⁴¹⁶

To the extent that anticommunism served as a vehicle for shoring up the commitment to segregation beyond the South, it is a reflection of the very malleability and tenacity of racism. Racist ideas concealed themselves within claims about America's security, social fabric, and system of government. In hindsight, the anticommunist arguments against *Brown*—whether as a violation of federalism or an incitement of social strife—may be easy to identify as thinly veiled racist attacks. But they are also a potent reminder that racism is multifaceted, and its vileness often arrives in concealed forms. Reckoning with this element of our past can alert us to how racism persists beyond its most flagrant manifestations.

Conclusion

Whether or not history is ultimately written by the victors, it is most often written about them. *Brown* has been examined from innumerable vantage points since the 1950s. The decision's losers, however, are still too often caricatured, disregarded, or even ignored altogether. In recent decades, legal scholars have produced valuable work that seeks to place *Brown* in a geopolitical context, emphasizing the convergence of anticommunism and civil rights reform during the Cold War. But as this Article has illustrated,

413. See *supra* Part II.A.

414. See *supra* Part II.D.

415. See MCRÆ, *supra* note 30, at 174-75.

416. Eyer, *supra* note 375, at 1020-21; see also KERSCH, *supra* note 25, at x (arguing that rhetoric about "the defense of and restoration of the Constitution," including that rooted in anticommunism, "served as a politically effective rallying cry" for the conservative ascendancy of the late twentieth century).

many steadfast opponents of civil rights simultaneously identified as fervent anticommunists. For segregationists, those two causes were not at odds, but instead went hand in glove. Those who sought first to avert and then reverse the demise of Jim Crow did so by invoking the nation's campaign against communism at home and abroad. Segregationists—from judges to columnists to duly elected officials to lay citizens from both the North and the South—positioned themselves as Cold Warriors, undertaking an intertwined fight against a foreign ideological threat and a domestic social one. It was far from obvious to many Americans that desegregation created a Cold War imperative. Instead, they framed Cold War considerations as demanding Jim Crow.

Investigating the losing side of this iconic legal event in American history is a vital intellectual endeavor because of what this investigation illuminates.⁴¹⁷ The fusion of anticommunism and segregation resolved significant tensions in the racist worldview that struggled to understand why Black citizens who theoretically liked Jim Crow sought to destroy it. Anticommunism broadened the appeal of segregation well beyond communities in the South by transforming the quest to retain racial apartheid from a regional obsession into a national security priority. With these dynamics in view, scholars can add nuance to their understandings of the *Brown* era, the Warren Court, and prominent theories of constitutional change. There is no doubt that Jim Crow's defenders, like its opponents, were motivated by a wide variety of factors.⁴¹⁸ Highlighting anticommunism among those factors sheds light on the ferocity of the opposition to racial equality—in both its historical and contemporary dimensions.⁴¹⁹

417. For earlier legal scholarship examining aspects of this terrain, see, for example, Driver, *supra* note 235, at 1055-58; and Christopher W. Schmidt, *Litigating Against the Civil Rights Movement*, 86 U. COLO. L. REV. 1173, 1176-77 (2015).

418. See DUDZIAK, COLD WAR, *supra* note 10, at 13-14.

419. See, e.g., Jacey Fortin, *The Long History of the "Outside Agitator,"* N.Y. TIMES (updated June 9, 2020), <https://perma.cc/WM4S-3C6S> (noting the connection between accusations of "outside agitators" being hurled at protestors during the civil rights movement and in the wake of George Floyd's murder); Philip Bump, *The White Scare: The Critical Race Theory Debate Echoes with History*, WASH. POST (June 24, 2021, 1:35 PM EDT), <https://perma.cc/PA7A-R927> (noting that the foremost proponent of anti-Critical Race Theory legislation has expressly sought to discredit the theory by linking it to communism).