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Jed Handelsman Shugerman

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#### Bluebook 21st ed.

Jed Handelsman Shugerman, Rights Revolutions and Counter-Revolutions, 13 YALE J.L. & HUMAN. 531 (2001).

#### ALWD 7th ed.

Jed Handelsman Shugerman, Rights Revolutions and Counter-Revolutions, 13 Yale J.L. & Human. 531 (2001).

#### APA 7th ed.

Shugerman, J. (2001). Rights revolutions and counter-revolutions. Yale Journal of Law & the Humanities, 13(2), 531-556.

#### Chicago 17th ed.

Jed Handelsman Shugerman, "Rights Revolutions and Counter-Revolutions," Yale Journal of Law & the Humanities 13, no. 2 (Summer 2001): 531-556

#### McGill Guide 9th ed.

Jed Handelsman Shugerman, "Rights Revolutions and Counter-Revolutions" (2001) 13:2 Yale JL & Human 531.

#### AGLC 4th ed.

Jed Handelsman Shugerman, 'Rights Revolutions and Counter-Revolutions' (2001) 13(2) Yale Journal of Law & the Humanities 531

#### MLA 9th ed.

Shugerman, Jed Handelsman. "Rights Revolutions and Counter-Revolutions." Yale Journal of Law & the Humanities, vol. 13, no. 2, Summer 2001, pp. 531-556. HeinOnline.

#### OSCOLA 4th ed.

Jed Handelsman Shugerman, 'Rights Revolutions and Counter-Revolutions' (2001) 13 Yale JL & Human 531  
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# Book Note

## Rights Revolutions and Counter-Revolutions

**Jed Handelsman Shugerman\***

Richard A. Primus, *The American Language of Rights*. New York, Cambridge: Cambridge University Press, 1999. \$54.95.

Mary L. Dudziak, *Cold War Civil Rights*. Princeton, Oxford: Princeton University Press, 2000. \$29.95.

The rise of rights talk is a subject that has gripped academia in recent years. Many historians of modern America are now searching for the origins of the rights revolution and the feverish use of rights arguments on the left and on the right. Two recent works of legal history tackle one part of this question with trailblazing interpretations, focusing on left-wing rights discourse and the successes of the civil rights movement. Both

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\* Yale Law School, J.D. expected 2002; Yale University, Ph.D. in History expected 2006. Special thanks to Bruce Ackerman, Nancy Cott, Glenda Gilmore, Robert Gordon, Hillel Levin, Serena Mayeri, Cliff Rosky, and, of course, Danya Handelsman Shugerman.

books offer compelling and well-written narratives of post-war legal issues, and they present innovative arguments that this revolution began in response to global crises.<sup>1</sup> Richard Primus's *The American Language of Rights* argues that rights are not natural truths, but are, rather, historically contingent. Rights, he claims, evolve when a political community reacts to particular adversities and synthesizes established rights with new conceptions of rights to combat that adversity.<sup>2</sup> Just as the Founding and Reconstruction generations articulated systems of rights in response to particular events and evils, the post-World War II generation pursued a vision of human rights defined against the horrors of Nazi and Stalinist totalitarianism. In a parallel story, Mary Dudziak's *Cold War Civil Rights* attributes America's advances in desegregation to a global public relations crisis over the treatment of blacks.<sup>3</sup> As this international embarrassment provided ample fodder for Communist propaganda, presidents from Truman to Johnson heeded a "Cold War imperative" to promote racial justice.

Grappling with the complicated origins of the civil rights movement and the Warren Court's activism, Primus and Dudziak offer coherent explanations that integrate domestic politics, international events, and the world of ideas. By placing this rights revolution so clearly in their global post-war context, they have pushed the boundaries of the legal academy to a more global perspective, and they have contributed to our understanding of the civil rights movement's broader origins. They have also suggested how seemingly unrelated events force leaders to embrace social reform, and how those leaders build on rights traditions to gain momentum. Even as legal academics continue to argue that rights are fundamental and universal, Primus and Dudziak offer evidence that rights are historically constructed, contextually reactive, and ad hoc.

However, both books emphasize the role of elites,<sup>4</sup> and for that matter, of left-leaning elites, which leads to two shared shortcomings. This emphasis enables them to make some particularly insightful observations about the decisions of many significant political leaders, judges, and academics from the 1940s to the 1960s. This perspective creates a great story, but unfortunately, it is only half the story, or more accurately, one quarter of the story. As a result, they overlook some very significant

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1. Both Primus and Dudziak have expanded their arguments from previously published law review articles. Mary L. Dudziak, *Desegregation as a Cold War Imperative*, 41 STAN. L. REV. 61 (1988); Richard Primus, *A Brooding Ominpresence: Totalitarianism in Postwar Constitutional Thought*, 106 YALE L.J. 423 (1996).

2. RICHARD PRIMUS, *THE AMERICAN LANGUAGE OF RIGHTS* 64-65 (1999).

3. MARY L. DUDZIAK, *COLD WAR CIVIL RIGHTS* (2000).

4. Jack Rakove and Elizabeth Beaumont have also offered this critique of Primus's book. See Jack Rakove and Elizabeth Beaumont, *Rights Talk in the Past Tense*, 15 STAN. L. REV. 1865, 1891-94 (2000) (reviewing PRIMUS, *supra* note 2). This Book Note echoes and builds upon those questions, and then extends this critique to Primus's overlooking the rights counter-revolution by conservatives.

differing perspectives on the Cold War and rights discourse.

The first shortcoming is that this perspective does not address perhaps the most significant aspects of this era: the rise of popular rights consciousness and the decisive role played by marginalized social groups that embraced liberal rights talk.<sup>5</sup> Second, the focus on liberal elites obscures two of the most important explanations for the demise of American liberalism: first, the conservative popular revolt against liberal elites; and second, the successful rights counterattack by conservatives. Turning the tables on the New Deal coalition's populism, conservatives recast themselves as defenders of the people's rights against a liberal elite.<sup>6</sup> Conservatives with different interests and backgrounds were able to coalesce around rights rhetoric, libertarianism, and anti-totalitarian Cold War themes to form the ascendant Republican majority.<sup>7</sup> Primus ignores this backlash, which developed equally significant languages of rights in response to totalitarianism. Dudziak does a better job of noting the limits of her study, of identifying the role of non-elites, and of recognizing the eventual backlash. Part of the reason she devotes less attention to how the Cold War undermined civil rights is that this story is the conventional wisdom that she questions so effectively.

This Book Note seeks to extend their insights about the significance of global politics and rights discourse even further, in order to grasp the dynamics of the rights counter-revolution. This conservative response was equally context-driven, globally minded, and anti-totalitarian. Other historians, fleshing out the story with other groups and other rights talk, reveal that this era was less a rights "revolution" with one language prevailing, than a rights "evolution" with multiple vocabularies developing from traditional languages of rights. When Primus's and Dudziak's books are synthesized with this historical scholarship, a rich and complicated story of rights revolutions and counter-revolutions emerges.

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5. See TAYLOR BRANCH, *THE PARTING OF THE WATERS: AMERICA IN THE KING YEARS, 1954-1963* (1988); JOHN DITTMER, *LOCAL PEOPLE: THE STRUGGLE FOR CIVIL RIGHTS IN MISSISSIPPI* (1994); CHARLES M. PAYNE, *I'VE GOT THE LIGHT OF FREEDOM: THE ORGANIZING TRADITION AND THE MISSISSIPPI FREEDOM STRUGGLE* (1995); JAMES PATTERSON, *GRAND EXPECTATIONS: THE UNITED STATES, 1945-1974* (1995).

6. Jonathan Rieder, *The Rise of the Silent Majority*, in *THE RISE AND FALL OF THE NEW DEAL ORDER* 243 (Steve Fraser & Gary Gerstle eds., 1989) (tracing the rise of reactionary populism from the 1950s to its triumph in 1968).

7. See NUMAN BARTLEY, *THE RISE OF MASSIVE RESISTANCE: RACE AND POLITICS IN THE SOUTH DURING THE 1950'S* (1969); DAN T. CARTER, *THE POLITICS OF RAGE: GEORGE WALLACE, THE ORIGINS OF THE NEW CONSERVATISM, AND THE TRANSFORMATION OF AMERICAN POLITICS* (1995); THOMAS SUGRUE, *THE ORIGINS OF THE URBAN CRISIS: RACE AND INEQUALITY IN POSTWAR DETROIT* 209-58 (1996).

## I. RIGHTS TALK

*A. A Language of Rights*

Richard Primus introduces his book with a tale that has become canonical in legal scholarship<sup>8</sup>:

Clifford Geertz tells a now-famous story about being confronted by a man who denied the reigning scientific understanding of planetary orbits, insisting that the earth is in fact borne aloft on the back of an elephant. The elephant, he said, was standing on a turtle. When pressed as to what supported the turtle, he replied that it was another turtle; in fact, he explained, it was "turtles all the way down."<sup>9</sup>

This last line from this tale returns as the title of the final section of Primus's conclusion ("Turtles All the Way Down"), making the turtle theory a satire of natural rights theory. While this anecdote may be overused in the legal academy, it is still an appropriate choice for Primus's project. He comments that rights "are not rights all the way down," and that "perhaps . . . there is no bottom to stand upon," but he is also careful not to dismiss the importance of rights. Formalist rights theory may be flawed, but the "substantive rhetorical power" of rights in American culture means that rights arguments cannot be dismissed, for rights indeed stand for something meaningful in cultural practice. As Primus concludes, "What I hope this study has established is the practice-dependent nature of rights and the historical contours of the relevant practice. That rights exist means that someone has established as normative that some substantive commitment is important and should be protected."<sup>10</sup>

Primus discovers the historical contours of American rights discourse in a pattern of adversity, reaction, and synthesis, which Primus calls

8. Jeanne Schroder offers the following commentary on the "turtles all the way down," and suggests that the story predates Geertz:

I cringe to refer to the unending terrapin tower because it is fast becoming a banal cliché of infinite regress . . . . However, it never fails to make me giggle. Roger Cramton traces the anecdote back to William James (using rocks, the more amusing turtles apparently added by later rewriters who knew a little about Hindu mythology). Roger C. Cramton, *Demystifying Legal Scholarship*, 75 GEO. L.J. 1, 1-2 (1986); see also WILLIAM JAMES, *THE WILL TO BELIEVE AND OTHER ESSAYS IN POPULAR PHILOSOPHY* 104 (1956). Despite this, the story continues to have a life of its own, appearing in two general forms. In one, the anecdote poses as the cosmological myth of some foreign or ancient people. . . . The other versions are variations of the James anecdote. Sometimes the story is presented as an actual encounter with a real scientist.

. . . .

I have no idea whether the anecdote actually originated with James. It is such a good story, that I suspect that it has been around in one version or another for a long time.

Jeanne L. Schroder, *Law and the Post-Modern Mind: The Vestal and the Fasces*, 16 CARDOZO L. REV. 805, 812 n.28 (1995). Schroder cites twelve articles mentioning this tale, and a database search on Lexis lists thirty-four articles with the phrase "turtles all the way down."

9. See PRIMUS, *supra* note 2, at 8-9, citing CLIFFORD GEERTZ, *THE INTERPRETATION OF CULTURES* 28-29 (1973).

10. *Id.* at 246-47.

“concrete negation.” During the Founding, Reconstruction, and post-World War II eras, Americans encountered adversity and evils, reacted to them with reforms, and synthesized their historical experiences, building a new political vocabulary upon the old. As a result, new understandings of rights emerged by a process of negation and reflection. Primus suggests that rights exist “neither of form nor of content but of function, having to do with how claims of rights are used and understood within the discourses of law and politics.”<sup>11</sup> Accordingly, he formulates a notion of rights not as “final resting places,” but as evolving context-based “waystations and placeholders.”<sup>12</sup>

Pursuing this relatively broad cultural history of rights discourse, Primus states that his book is a “middle-level account” of both political and academic discourse—a political history, rather than an intellectual or social history.<sup>13</sup> Primus at one point states that his “focus throughout is on elites,”<sup>14</sup> but he also establishes from the outset that he seeks to cast a wider net to capture a cultural practice.

In his second chapter, Primus responds to the work on historical “transformations” of Akhil Amar, who has heralded Reconstruction as the pivotal rights transformation,<sup>15</sup> and of Bruce Ackerman, who has raised the New Deal to the level of the Founding and Reconstruction.<sup>16</sup> Primus builds on their insights and contends that they have missed a fundamental rights revolution: the anti-totalitarian moment of the mid-twentieth century.<sup>17</sup>

Primus’s treatment of the Founding and Reconstruction illuminates his thesis about concrete negation.<sup>18</sup> While some scholars attribute a

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11. *Id.* at 45.

12. *Id.* at 44.

13. *Id.* at 53-55. See *infra* text accompanying notes 51-55 for a discussion of Primus’s historical focus.

14. *Id.* at 74. See also *id.* at 129.

15. AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* (1998).

16. 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (1991); 2 BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* (1998).

17. Amar emphasizes the revolutionary role of the Fourteenth Amendment in incorporating the Bill of Rights, but Primus insightfully notes that the battle over incorporation took place not in the 1860s, but rather from the 1940s to the 1960s—in the context of anti-totalitarianism. Ackerman, in his theory of constitutional politics and higher lawmaking, posits that the New Deal was a constitutional revolution that gave shape to our current legal structure and led to the rights revolution in the 1950s and 1960s. But again, Primus challenges this view, because this rights revolution generally disregarded economic justice, and instead emphasized “rights against racial discrimination, abusive police practices, censorship, and government regulation of personal privacy. Those issues correspond more closely to the threats of Nazism and Soviet communism than to the problems of the Great Depression and the New Deal.” PRIMUS, *supra* note 2, at 71. Furthermore, he notes that the New Deal court embraced judicial restraint, while the Warren Court prevailed through judicial activism—a shift not only of means, but also of basic values. Thus Primus has set a foundation for his truly innovative argument: World War II and the Cold War produced a legal transformation on par with the Founding and Reconstruction, and fundamentally shaped the modern language of rights.

18. PRIMUS, *supra* note 2, at 7.

theoretical unity of individualism to the Constitution's framers,<sup>19</sup> Primus demonstrates that the framers also embraced collectivist and institutional concepts of rights. He suggests that this seeming inconsistency in fact reveals an underlying consistency: The framers were more context-driven and outcome-based than concerned with theoretical uniformity. They formulated rights ad hoc in reaction to particular British abuses of military intrusion, criminal procedure, trade restriction, and religious establishment.<sup>20</sup> Reconstruction was similarly shaped by historical context. Rather than merely expanding the rights established at the Founding, the Republicans responded to particular threats of the "Slave Power Conspiracy" with new understandings of rights. While legal scholars have tried to interpret Reconstruction's tripartite division of civil, political, and social rights as a coherent system, Primus reveals that the Republicans merely played a shell game with the categories, shifting claims back and forth depending on political support for particular claims.

Primus argues persuasively about the Founding and Reconstruction, but the most original section is his third episode, exploring the Warren Court's rights revolution and the revival of natural law. This chapter navigates not only a broad range of groundbreaking Supreme Court cases; it also elucidates some of the most important legal philosophy of this century. During the 1930s, the New Deal discredited loose "natural law" jurisprudence, which had become the questionable theoretical foundation for the Supreme Court's laissez-faire judicial activism in striking down state and federal economic regulation. In the place of natural rights theory, the New Deal academy embraced "positive law," which found the source of law's legitimacy not in universal abstract rights, but in the will of the people and the democratic rule of the state. However, mass-movement totalitarianism cast a dark cloud on the legitimacy of pure popular will and the state. After World War II, there were three major shifts from the New Deal transformation: from economic rights to non-economic civil rights and civil liberties; from positive law to natural law (or foundationalism); and from judicial restraint to judicial activism. Primus attributes these changes to the influential concept of anti-totalitarianism.<sup>21</sup>

After witnessing the terrifying abuse of state power and "positive law" by Hitler and Stalin, the legal academy turned to universal "foundational" theories of rights. The academy began attacking ideas by suggesting that they could lead to Nazism, a fallacy that Leo Strauss coined as "reductio

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19. Primus cites Michael Sandel for labeling the Founders' conception of rights as unhealthily "individualist." *Id.* at 87.

20. *Id.* at 84-126.

21. Jed Rubenfeld has argued that the right of privacy in *Griswold v. Connecticut* and subsequent cases was founded not on a theory of "personhood," but on a Foucauldian theory of anti-totalitarianism. While his article has been tremendously influential, it is theoretical, and not historical. Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737 (1989).



ad Hitlerum.” After ignoring natural law theory for over a decade, legal academics moved away from positive law and revived natural law in a burst of articles. Building on pre-existing notions of rights, Americans created a new vocabulary of universal human rights: “[C]ertain rights exist and must be respected regardless of the positive law.”<sup>22</sup> While some writers asserted that the concept of “human rights” was really a reformulation of the Enlightenment’s “natural rights of man,” Primus argues that the Enlightenment thinkers’ term included only European men, whereas these new rights theorists were addressing all people, especially minorities.

Primus notes that during the war, racism was not the obvious evil of the Nazis. The Roosevelt administration emphasized that the chief evil of the Nazis was their policy of aggressive warfare. The American prosecution at the Nuremberg Trials, now memorialized for their convictions for “crimes against humanity,” actually focused on Nazi military aggression, rather than the Holocaust. However, with World War II as a cultural mirror, the American people over time began to see Nazi Germany as a reflection of their own worst shortcomings—namely, racism.<sup>23</sup> Americans revised their understanding of the Nuremberg trials and of the war in general to capture the ideal of anti-racism.

In Primus’s account, the Supreme Court adopted an anti-totalitarian consciousness during and after the war. Initially, Nazism served as a powerful lesson to the Supreme Court about state power and minority rights. In *West Virginia State Board of Education v. Barnette* in 1943, the Court overturned state requirements that school children salute the American flag (a salute which, according to community groups cited by the court, looked “too much like Hitler’s” salute).<sup>24</sup> Justice Jackson rejected such coerced conformity as comparable to the “Siberian exiles as a means to Russian unity, [and] to the fast failing efforts of our present totalitarian enemies.”<sup>25</sup> From *Barnette*, the Court turned to protecting racial minorities. Having upheld the Japanese internment in *Hirabayashi v. United States*<sup>26</sup> and *Korematsu v. United States*,<sup>27</sup> the Court eventually condemned the internment in *Ex Parte Mitsuye Endo*<sup>28</sup> in December 1944. This repudiation of the internment may have been too little, too late, but it established the persecution of the Japanese Americans as a negative precedent, and it marked a momentous turn toward protecting racial minorities. Then, turning to discrimination and quasi-state action, the

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22. PRIMUS, *supra* note 2, at 178.

23. *Id.* at 187.

24. *Id.* at 199.

25. *West Virginia State Board of Education v. Barnett*, 319 U.S. 624, 640-41 (1943).

26. 320 U.S. 81 (1943).

27. 323 U.S. 214 (1944).

28. 323 U.S. 283 (1944).

Court struck down all-white primaries<sup>29</sup> in 1944 and racially restrictive covenants<sup>30</sup> in 1948. Primus locates the reasoning of *Brown v. Board of Education*<sup>31</sup> in this line of thinking, especially in Justice Frankfurter's departure from his commitment to judicial restraint and textualism.

The Soviets served as another negative model for this rights revolution. At first, the Court was complicit in McCarthyism,<sup>32</sup> but after Warren took the helm, the Court began to define America against the oppressive Stalinist regime<sup>33</sup> and to protect civil liberties<sup>34</sup> and criminal defendants' rights.<sup>35</sup> Primus then shifts back to the Nazis to explain the academic turn from positivism to universal rights and the Court's recognition of "emanating penumbras" and an unenumerated right to privacy.<sup>36</sup> Up to this point, Primus's study of anti-totalitarianism focuses almost exclusively on the Supreme Court, with a few national politicians mixed in.

Ascending into the rarefied air of academic discourse, Primus concludes his chapter with the Lon Fuller-H.L.A. Hart debate over positivism, and the more recent theories of Richard Posner, Bruce Ackerman, John Rawls, Cass Sunstein, and Ronald Dworkin. There is an ironic twist to Primus's historicist treatment of the anti-historicist natural law theorists. In 1949, Leo Strauss pointed out the paradox of World War II: The United States had won the military battle, but lost the cultural war. Somehow Germany had succeeded in imposing on America "the yoke of its own thought," historicism, which undermined the natural rights foundation of American democracy.<sup>37</sup> On the one hand, Primus's solid evidence of the revival of natural law thinking refutes Strauss's observation, and he adds a twist to Strauss's concern by demonstrating that the return of universal rights was in fact a reaction to the Nazis. On the other hand, Primus's ardent historicist approach to rights theory ultimately validates Strauss's fears. And worst of all for Strauss, Primus's historicist account of American law and jurisprudence is very persuasive.

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29. *Smith v. Allwright*, 321 U.S. 649 (1944).

30. *Shelley v. Kraemer*, 334 U.S. 1 (1948).

31. 347 U.S. 483 (1954).

32. *Dennis v. United States*, 341 U.S. 494 (1951).

33. Here Primus also recognizes Dudziak's work on the Court's response to Cold War in the realm of civil rights, though he distinguishes her pattern of reaction from his. PRIMUS, *supra* note 2, at 212 n.88 (citing Dudziak, *supra* note 1).

34. PRIMUS, *supra* note 2, at 209 (citing MORTON HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW* 260 (1993) for the argument that 1957 was the Court's turning point in protecting civil liberties).

35. The initial expansion of Fourth Amendment protections occurred very soon after World War II. See *Johnson v. United States*, 333 U.S. 10 (1948); *Wolf v. Colorado*, 338 U.S. 25 (1949). The Court then significantly extended defendants' rights in the early 1960s. See *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Escobedo v. Illinois*, 378 U.S. 478 (1964). Primus might have added *Miranda v. Arizona*, 384 U.S. 836 (1966), and *Mapp v. Ohio*, 367 U.S. 643 (1961).

36. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

37. LEO STRAUSS, *NATURAL RIGHT AND HISTORY* 1-2 (1949).

*B. A Cold War Imperative*

When most Americans consider the Cold War's effects on domestic political life, the first things that come to mind are McCarthyism and red-baiting. Conservatives around the country—from J. Edgar Hoover to southern White Citizens' Councils—used anti-communism to block the civil rights movement and undercut organized labor.<sup>38</sup> Against this conventional wisdom, Dudziak reveals a contrary trend: The Cold War created a foreign policy imperative to improve the United States' image abroad by ending segregation. Marshalling an impressive amount of evidence from the Soviet Union, Africa, Asia, Europe, and Latin America, Dudziak shows that America's racial segregation and violence provided potent material for Soviet propaganda and imperiled potential Cold War alliances. As the Cold War was beginning to unfold, President Truman's advisors, diplomats, and Congressional leaders emphasized the significance of civil rights on the world stage.<sup>39</sup> Dudziak then traces the beginning of the propaganda battles between the United States government celebrating the democratic process and its incremental steps toward desegregation, and prominent African Americans who gave the world a far more critical assessment of American democracy.

From this point, Dudziak takes the reader on a tour of the civil rights accomplishments of each administration from Truman to Johnson, and she convincingly links them to the "Cold War imperative." In 1947, Truman's Committee on Civil Rights called for racial justice on foreign relations grounds: "[W]e cannot escape the fact that our civil rights record has been an issue in world politics. The world's press and radio are full of it. . . . [Communist countries] have tried to prove our democracy an empty fraud, and our nation a consistent oppressor of underprivileged people."<sup>40</sup> Looking toward the 1948 election, Truman desegregated the military and created a Fair Employment Board, and then campaigned on this imperative: "Today the democratic way of life is being challenged all over the world. Democracy's answer to the challenge of totalitarianism is its promise of equal rights and equal opportunities for all mankind."<sup>41</sup>

Truman's Justice Department cited the foreign policy damage of racial discrimination in amicus briefs in four prominent racial discrimination

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38. See, e.g., TAYLOR BRANCH, *PILLAR OF FIRE: AMERICA IN THE KING YEARS, 1963-1965* (1998); ALAN DRAPER, *CONFLICTS OF INTEREST: ORGANIZED LABOR AND THE CIVIL RIGHTS MOVEMENT IN THE SOUTH* (1994); MICHAEL HONEY, *SOUTHERN LABOR AND BLACK CIVIL RIGHTS* (1993); GERALD HORNE, *BLACK AND RED: W.E.B. DUBOIS AND THE AFRO-AMERICAN RESPONSE TO THE COLD WAR* (1986); ELLEN SCHRECKER, *MANY ARE THE CRIMES: MCCARTHYISM IN AMERICA* 390-91 (1998); SUGRUE, *supra* note 7, at 209-231; ROBERT H. ZEIGER, *AMERICAN WORKERS, AMERICAN UNIONS, 1920-1985* (1994).

39. DUDZIAK, *supra* note 3, at 29, 33, 35, 39, 43, 45.

40. *Id.* at 80.

41. *Id.* at 87.

cases, and won each case.<sup>42</sup> The Truman Justice Department then decided to participate in the consolidated school segregation cases, *Brown* and *Bolling v. Sharpe*.<sup>43</sup> Its amicus brief included lengthy passages about the Cold War imperative of desegregation, including this closing quotation from the President himself: "If we wish to inspire the world whose freedom is in jeopardy, if we wish to restore hope to those who have already lost their civil liberties, if we wish to fulfill the promise that is ours, we must correct the remaining imperfections in our practice of democracy."<sup>44</sup> When the Court decided *Brown* and *Bolling*, the American propaganda machine kicked into high gear, and the world responded enthusiastically. While most Southerners opposed the ruling, those Southerners who endorsed it explained that it was necessary for improved Cold War public relations.<sup>45</sup>

Eisenhower's appointment of Chief Justice Earl Warren was the key to the 9-0 *Brown* decision, but Eisenhower himself was no believer in civil rights. As Warren recalled, Eisenhower told the Chief Justice as *Brown* was pending that Southern opponents of integration were "not bad people. All they are concerned about is to see that their sweet little girls are not required to sit alongside some big overgrown Negroes."<sup>46</sup> However, Eisenhower's support for desegregation in spite of these prejudices is perhaps the most convincing evidence of the Cold War imperative. In 1957, Arkansas Governor Orval Faubus used state troops in Little Rock to defend white supremacy against the rule of law, and foreign observers compared the American South to Nazi Germany.<sup>47</sup> Eisenhower was very reluctant to intervene, but, as he put it, "the eyes of the world" forced him to enforce the law with federal troops.<sup>48</sup> Dudziak then documents the importance of international praise for the desegregation cases and their enforcement.

President Kennedy had more personal affinity for civil rights than Eisenhower did, but he, too, hesitated in the face of southern opposition. However, popular protests against Jim Crow in the early 1960s met with massive violent resistance, changing the political landscape and again drawing global attention. Following a series of embarrassing events in Alabama, Kennedy unequivocally committed himself to strong civil rights

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42. *Id.* at 91-93. *Shelley v. Kraemer*, 334 U.S. 1 (1948), prohibited the judicial enforcement of racially restrictive covenants. *Henderson v. United States*, 339 U.S. 816 (1950), ruled that segregated railroad dining hall cars violated the Interstate Commerce Act. *Sweatt v. Painter*, 339 U.S. 629 (1950), and *McLaurin v. Oklahoma State Regents for Higher Education*, 339 U.S. 637 (1950), desegregated a graduate school and a law school, respectively.

43. *Bolling v. Sharpe*, 347 U.S. 497 (1954).

44. DUDZIAK, *supra* note 3, at 101-02.

45. *Id.* at 111.

46. *Id.* at 130.

47. *Id.* at 125.

48. *Id.* at 133.

legislation on national television in June 1963, and he invoked the Cold War as a crucial reason for fighting racism. As powerful evidence for Dudziak's thesis, both Eisenhower and Kennedy shied away from promoting civil rights until international scrutiny forced them to act.

Kennedy's proposed Civil Rights Act of 1963 would have created an Equal Employment Opportunity Commission, increased protection for voting rights, denied federal funding to discriminatory programs, and prohibited discrimination in public accommodations. Polls indicated that Americans endorsed Kennedy's civil rights proposals because they would improve America's image abroad and rob the Soviets of their most powerful propaganda. Kennedy's assassination and Lyndon Johnson's moral leadership galvanized support for the Civil Rights Act of 1964, which swept through the House, 290 to 130, and then overcame a three-month Senate filibuster to pass with a similar supermajority, 73 to 27.

Dudziak concludes with Johnson's Great Society, which seemed to be the crowning achievement for Cold War civil rights, but by 1968, the Vietnam War unraveled the Great Society. Soon after Johnson signed the Civil Rights Act, he sought political cover from conservative critics by escalating the Vietnam conflict with the Gulf of Tonkin resolution. Just as the Cold War had mandated an expansion of civil rights, the battle for civil rights mandated an expansion of the Cold War. Unfortunately, this strategy backfired on Johnson's civil rights agenda, as Vietnam shattered the civil rights coalition and overshadowed the social justice agenda. This political shift reversed the "Cold War Civil Rights" pattern to create what I would call a "Civil Rights Cold War"—a disastrous linkage of domestic and foreign strategies.

Dudziak observes that the Cold War imperative became more limited after well-publicized court rulings and legislative reforms eliminated the most glaring injustices. Once the world congratulated America for ending *de jure* segregation, and once the world focused on other crises (such as Vietnam), the Cold War imperative ceased to be a sufficiently powerful force. One example is how the South so easily replaced formal school segregation, which had drawn so much international criticism, with less obvious bureaucratic methods that successfully impeded integration.<sup>49</sup> This limitation on the Cold War's influence helps explain why American schools are still segregated *de facto*.

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49. *Id.* at 149-50.

## II. GRASSROOTS AND BACKLASH

### *A. Recognizing Reaction and Limitation*

Dudziak and Primus present models of historical change that emphasize reaction and negation. In Primus's account, American elites developed an anti-totalitarian principle by recognizing evils abroad, identifying aspects of those evils at home, and negating them with a context-driven vocabulary of rights. Dudziak's model is in some ways a mirror image: Other countries recognize an evil in America, then Americans identify this image problem as a foreign policy crisis, and oppose this evil with context-driven rhetoric addressed to those foreign observers.

Primus and Dudziak, both legal academics, generally fixate on particular elites: liberal academics, left-leaning judges, presidents, diplomats, and federal officials. Their insights about reaction and negation should be applied to other groups: radical grassroots, conservative elites, and reactionary political movements, as they constructed different languages of rights and Cold War imperatives from the same set of historical circumstances.

At one point in his analysis, Primus embraces a broad sociological vision of rights talk by suggesting that rights are defined by "how people use the terms 'rights,'" and thus he adopts an anthropological/historical approach that "look[s] to rights discourse as a social practice."<sup>50</sup> Primus indeed explores the particular uses of rights rhetoric, but emphasizes the discourse of intellectuals and national leaders, and not a broad social practice. If turtles represent history, Primus weaves compelling narrative of the rights revolution from a particular set of turtles on the top end of the pile, but he leaves out the turtles below, and in particular, he leaves out the

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50. PRIMUS, *supra* note 2, at 26. Early on, Primus offers a sound objection to Rawls's "reflective equilibrium" (a term reflecting the way theory and practice respond to one another). According to Rawls, one can identify a set of specific rights outcomes in practice, then create general principles about rights, and later expand or revise that principle when new desirable or undesirable rights outcomes emerge over time. JOHN RAWLS, A THEORY OF JUSTICE 48-50 (1971). Perhaps as a rebuttal, Primus argues that reflective equilibrium is circular, premised upon consensus about what specific outcomes are in fact desirable, when no such consensus may exist. Some moderate rights historicists like Thomas Haskell, seeking a theoretical middle ground between historicism and universalism, have cited Rawls's articulation of reflective equilibrium as historically oriented and organically developing. Thomas L. Haskell, *The Curious Persistence of Rights Talk in the "Age of Interpretation,"* 74 J. AM. HIST. 984 (1987). Haskell suggests that historicism and critical legal studies may go too far in undercutting the validity of rights discourse. Building from a surprising and innovative interpretation of Hume and Rawls, he seeks a balance in this contested "border territory between Reason and History" with the conception of rights as "rational conventions." *Id.* at 1009. He recalls Hume's emphasis upon "social custom and common sense," and then cites Rawls's "Kantian constructivism," a belief that rights should be "congruen[t] with our deeper understanding of ourselves and our aspirations, . . . given our history and our traditions imbedded in our public life." *Id.* at 1008. According to this rights theory of rational conventions, rights discourse should reflect "the (conventional) practices of a community's form of life." *Id.* at 1002. Interestingly, Haskell features Geertz's anecdote about "turtles all the way down," just as Primus does. *Id.* at 991.

“elephant” of the anecdote: the Republican party and its own reactionary rights rhetoric.

It is rare for a scholar to have such a tremendous grasp of both history and philosophy, and Primus does a masterful job of explaining these events and ideas, as well as developing his own analysis. With his argument about anti-totalitarianism, Primus stands tall on the shoulders of other constitutional scholars and makes a very important contribution to legal history and constitutional theory. However, he fails to achieve his stated goals of writing a “middle-level account” of political, legal, and academic discourse.<sup>51</sup> His initial notion of “middle level” appears to be political history somewhere in between intellectual history and social history. He states, “It is not my intention to write a ‘a history from below’ of American rights: indeed, my analysis concentrates on the most powerful members of society.”<sup>52</sup> At the same time, Primus concurs with Cornel West’s critique of scholars who “emphasize intellectuals and exclude politics.”<sup>53</sup> He then criticizes West for not following through: “Ironically, West largely fails to heed his own advice . . . West advocates political and heterogeneous analysis, but seems to have settled for intellectual history.”<sup>54</sup> In a footnote, he repeats this criticism, chiding West for making his plea for diverse perspectives in a book that “is not only intellectual history, but elite intellectual history.”<sup>55</sup>

These comments are rather curious, because Primus also fails to heed his own advice and his criticism of West. Primus’s chapters on the Founding and Reconstruction examine few voices outside the Constitutional Convention and the Reconstruction Congress, and as such, they are clearly not heterogeneous and multileveled political histories. Later, his chapter on totalitarianism reaches even higher into the ethereal realm of intellectual history, focusing almost entirely on Supreme Court justices and academics. Primus’s book is middle-level only if “high level” is the study of the development of ideas with no attention to historical context. However, as intellectual history has become more and more the study of ideas in their historical contexts, this depiction of “high level” lies somewhere between the disciplines of history and philosophy, while Primus’s purported middle level is exactly the kind of elite intellectual history that he himself criticizes. Furthermore, Primus aspires to articulate the “American language” of rights as a cultural practice, but he succeeds mostly in depicting an academic and jurisprudential language of rights. While he invites histories “from below,” he does not address the nuances

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51. PRIMUS, *supra* note 2, at 54-55.

52. *Id.* at 54; *see also id.* at 74, 129.

53. *Id.* at 53.

54. *Id.* at 53-54.

55. *Id.* at 54 n.19.

of political cultures, and he overlooks contrary forms of rights talk.

Dudziak is more cognizant of the limitations and nuances of her thesis. She introduces her argument with an appropriate caveat: "In spite of the repression of the Cold War era, civil rights reform was *in part* a product of the Cold War."<sup>56</sup> Dudziak often recognizes that other factors shaped the civil rights movement, and that the Cold War was simultaneously "an agent of repression and an agent of change."<sup>57</sup> While the struggle with Communism opened doors for racial justice, it also required the government "to contain and manage the story of race," to the exclusion of more controversial narratives.<sup>58</sup> When the civil rights movement demanded broader social changes in the late 1960s, a weary public accepted Nixon's anti-rights campaign of law and order.<sup>59</sup> At times, she seems to suggest that there were two phases of its influence: before and after Vietnam became a full-scale war. She generally suggests that the Cold War was a pro-civil rights influence until 1968,<sup>60</sup> and that the Vietnam War was the main reason for the reversal. While she clearly is aware that the Cold War also undermined the civil rights movement before 1968, her account might have made that influence more explicit.

### *B. The Role of the Grassroots and the Public*

The focus on elites, particularly liberal ones, obscures some important perspectives on the rights revolution. First, this approach underemphasizes one of the most intriguing aspects of the civil rights era: the particularly significant role of liberal grassroots protest in focusing national attention on civil rights reform. While historians and the public have often identified the civil rights movement with the mobilized student protest in the mid-1960s, more recently historians have emphasized the dramatic spread of rights consciousness in the general public and more marginalized groups, predating the 1960s student protests. Whereas Primus suggests that right-consciousness originated with elites, James Patterson's comprehensive work on the post-war era attributes the upheaval of the 1960s to the ever-increasing hopes and expectations among America's various social groups during World War II, and to the post-war social, demographic, and economic changes.<sup>61</sup> While Patterson emphasizes the role of the NAACP and the courts in later years, he also

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56. DUDZIAK, *supra* note 3, at 13 (emphasis in original).

57. *Id.* at 250.

58. *Id.*

59. *Id.* at 248.

60. Dudziak's most prominent example of foreign policy constraining civil rights progress in the 1950s and early '60s was the State Department's crack down on prominent black leaders and their ability to travel. However, this emphasis overlooks the role of the Cold War in the broader political shift against civil rights in the 1950s and 1960s.

61. PATTERSON, *supra* note 5, at 384-85.



emphasizes the role of the grassroots: "The Reverend [Martin Luther King] he didn't stir us up," one young Montgomery woman told a reporter at the time. "We've been stirred up a mighty long time."<sup>62</sup>

Other historians trace black activism and rights claims back even earlier. Glenda Gilmore demonstrates that black rights consciousness emerged in the late nineteenth century.<sup>63</sup> As blacks claimed more status and more political power in southern society, middle-class whites anxiously fought back with segregation and disenfranchisement. This repression did not snuff out black rights claims, as middle class black women grabbed the torch and continued the fight in the early twentieth century. Robin D.G. Kelley reveals a radical world of black communism in 1930s Alabama, which laid a foundation for the civil rights struggles decades later.<sup>64</sup> Risa Goluboff, John Dittmer, and Charles M. Payne illustrate that a powerful rights consciousness had emerged in the southern black community in the mid-1940s, which served as a necessary foundation for the civil rights mobilization in later years.<sup>65</sup>

Thomas Sugrue's study of post-war Detroit shows that rights consciousness spread among northern blacks at the same time, growing out of their experiences during the New Deal and from the war. According to Sugrue, black Detroit residents embraced the New Deal notions of economic rights after the war, and tried to co-opt rights rhetoric to defend their interests. "Subsidized loans and mortgage guarantees, promised by New Deal legislation, became a fundamental right. . . . [Whites] came to expect a vigilant government to protect their segregated neighborhoods. These constituents of the New Deal state reinterpreted the government's rhetoric of homeownership to their own ends."<sup>66</sup> The work of these historians suggests that many minority groups identified with rights rhetoric mostly because of personal lived experience before and during the war, rather than from a concept of anti-totalitarianism.

Scholars have recently engaged in a vibrant debate about whether the civil rights revolution was triggered by elites (i.e., the Supreme Court justices and national politicians), by organized advocates and grassroots activists (the NAACP, the SCLC, and student protesters), and/or by popular consensus. Consensus is an increasingly common explanation. Michael Klarman argues that *Brown* and subsequent court orders produced

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62. *Id.* at 401.

63. GLENDA E. GILMORE, *GENDER AND JIM CROW* (1996). One could also trace black rights consciousness back even earlier.

64. ROBIN D.G. KELLEY, *HAMMER AND HOE: ALABAMA COMMUNISTS DURING THE GREAT DEPRESSION* (1990).

65. DITTMER, *supra* note 5, 1-40; PAYNE, *supra* note 5, at 7-102; Risa Goluboff, "Won't You Please Help Me Get My Son Home": *Peonage, Patronage and Protest in the World War II Urban South*, 24 *LAW & SOC. INQUIRY* 777 (1999).

66. SUGRUE, *supra* note 7, at 62.

change not by their direct impact, but indirectly, by provoking a series of backlashes.<sup>67</sup> After the major integration rulings of the 1950s, schools still remained overwhelmingly segregated. Klarman contends that *Brown's* most significant role was its provoking extreme Southern resistance and violence, which shook the North out of complacency about civil rights and mobilized a national consensus against Jim Crow. As a result, the Civil Rights Act and Voting Rights Act passed with broad majorities. Klarman's interpretation refutes the naïve, lawyerly view of top-down change from the courts, and emphasizes the importance of broad democratic change.

Mark Tushnet contends that the Warren Court was actually cautious and moderate until 1962, and then turned to the left because of two Kennedy appointments, Justices Byron White and Arthur Goldberg.<sup>68</sup> Dudziak's thesis about global scrutiny suggests that this shift was not just about Court personnel, but also about an emerging national consensus reacting to southern violence. Complementing Dudziak's argument, Lucas Powe suggests that the Court's liberal decisions resulted not merely from new appointments, but from the influence of a national consensus emerging around race and rights. Powe's perspective refutes the notion that the Supreme Court's judicial review was counter-majoritarian, and indeed, he suggests that it was surprisingly consensus-oriented.<sup>69</sup>

Throughout American history, wars have promoted national unity and an apparent consensus about values and goals, and both Primus and Dudziak contribute a lot to this linkage of war and rights. Americans have often framed their wars as struggles to defend rights, leading to an expansion of those rights domestically. A crucial element of these expansions was the broad social pressures of war and the ability of excluded groups to mobilize politically and militarily. It was too difficult to recruit soldiers from lower classes and racial minorities if they were denied political rights and inclusion in the national community. These social groups capitalized on the need for popular support by demanding political rights. Alexander Keyssar specifies an example of this bottom-up social pressure during World War II, when blacks demanded, "Prove to us that you are not hypocrites when you say this is a war for freedom." The protests of soldiers provided a different angle on the struggle against totalitarianism, at home and abroad.<sup>70</sup>

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67. Michael Klarman, *How Brown Changed Race Relations: The Backlash Thesis*, 81 J. AM. HIST. 81 (1994).

68. Mark Tushnet, *The Warren Court as History*, in *THE WARREN COURT IN HISTORICAL AND POLITICAL PERSPECTIVE* 7 (Mark Tushnet ed., 1993).

69. LUCAS POWE, *THE WARREN COURT AND AMERICAN POLITICS* (2000).

70. ALEXANDER KEYSSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES*, at xxi (2000). Keyssar shows how the Revolutionary War, the War of 1812, the Mexican-American War, the Civil War, World War I, World War II, the Cold War, and Vietnam

Primus's attention to elites allows him to write a remarkably insightful and focused analysis, but without the public or even mid-level leaders, he falls short of completing his ambitious project. In contrast, Dudziak does a better job of recognizing the role of advocates, grassroots, and the public. She regularly acknowledges the NAACP and other advocates for their role in promoting the Cold War imperative, and she occasionally cites polling data.<sup>71</sup> She also attributes much of Truman's embrace of civil rights to the demands of black voters in 1948,<sup>72</sup> and Kennedy's similar shift to the dramatic rise of grassroots mobilization and student protest in the early 1960s.<sup>73</sup> Skillfully integrating the national narrative with dramatic local stories, Dudziak offers poignant anecdotes of the civil rights crisis. For example, she retells the story of a young African-American boy who, "when asked by his teacher what punishment he would impose upon Adolph Hitler, said: 'I would paint his face black and send him to America immediately!'"<sup>74</sup> While Dudziak emphasizes how political leaders established the rhetoric, she deserves a lot of credit for demonstrating how the Cold War rhetoric resonated with the public and mobilized political action. Her book is a more multi-leveled study, and is a better model for what Primus calls "middle-level" history.

### *C. An Opposing Cold War Imperative*

The Cold War may have sensitized Americans to the appearance of racial strife, but even beyond the problem of McCarthyism, anti-communism stirred fears about increasing federal government power, created a conservative ideological front, and sharply redirected the language of rights. Distinguishing his study of rights from Ackerman's New Deal transformation argument, Primus notes that while the New Deal established economic changes and judicial restraint, the post-war rights revolution was distinctly non-economic and revived judicial activism.<sup>75</sup> Primus is correct to emphasize this difference and link it to anti-totalitarianism, but he does not ask a second-level question: Why were the post-war rights so distinctly non-economic? Or more accurately, why were the post-war economic rights so distinctly conservative (e.g., laissez faire, property rights, and free contract rights)? He recognizes McCarthyism as a problem, but he emphasizes its rejection in the mid-1950s and concludes that anti-Stalinism ultimately led to judicial breakthroughs in civil liberties. However, labor historians and civil rights historians have

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contributed to the expansion of voting rights.

71. DUDZIAK, *supra* note 3, at 187.

72. *Id.* at 23-25.

73. *Id.* at 157-59.

74. *Id.* at 36.

75. PRIMUS, *supra* note 2, at 71, 181.

illustrated how anti-communism still succeeded outside the walls of the Supreme Court, undermining attempts to address class and race issues throughout the country.<sup>76</sup> Certainly, anti-totalitarianism highlighted particular rights, and led to their protection, but it also labeled other rights claims as threats to order, tradition, and national security.

Primus focuses specifically on the rise of “human rights” as the core term in post-war rights language. In America, this term developed a distinctly negative-liberty connotation (a freedom from state action, such as racial discrimination, police state abuses, and invasions of privacy), while at the same time, “human rights” in the United Nations and around the world also meant positive liberty (entitlements to state action, like food, shelter, clothing, and subsistence). Racial justice meant desegregation, but not full de facto integration. The Great Society advanced some class and economic rights, but anti-communism limited and ultimately eroded the welfare state. Primus’s anti-totalitarianism led to the right to privacy and sexual freedom, but only for heterosexuals. According to Elaine Tyler May, the Cold War politically and culturally legitimated homophobia and the repression of homosexuals.<sup>77</sup> May also points out that ostensibly “private” family life became more confining, more conservative, and more public as a cultural extension of the Cold War. Primus contends that the right to privacy, in *Griswold v. Connecticut* (1965), involving birth control and Planned Parenthood, arose out of the Cold War anti-totalitarian ideal. However, in a poignant example, May points to the fact that the “Birth Control Federation of America” changed their name in 1942 to Planned Parenthood Federation of America as part of a shift from a rhetoric of rights to a more conservative, family-oriented image. May cites an article in 1954: “Most of all, [Planned Parenthood] gave the birth control movement ‘a clean image,’ emphasizing not women’s rights, individual freedom, or sexuality, but, as Scientific American noted, ‘the need for individual couples to plan their families and nations to plan their populations.’”<sup>78</sup> This is hardly the language of rights and privacy. It is the repressive rhetoric of national Cold War policy.

These political impulses limiting America’s language of rights created a different Cold War imperative, as Cold War anti-civil rights. Dudziak acknowledges the limits of her thesis, as I have noted before,<sup>79</sup> that the Cold War was only a partial explanation for racial advances, and it was also “an agent of repression.”<sup>80</sup> Repression was part of the imperative to carefully manage and control the public story of race. At the same time,

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76. See works cited *supra* note 7.

77. ELAINE TYLER MAY, *HOMEWARD BOUND* 82-84 (2d ed. 1999).

78. *Id.* at 132-33.

79. DUDZIAK, *supra* note 3, at 250.

80. See *supra* text accompanying note 56-58.

the Cold War's repression could also be attributed to a countervailing "Cold War imperative" about economic, social policy, and social control. Dudziak suggests that Americans grew impatient with the civil rights movement's plea for economic equality because of free market principles, which were deeply ingrained in American history:

Class differences had never been something the nation felt the need to apologize for. Instead, capitalism, which assumed an inequality of wealth and power, was championed as an economic system that would best promote economic growth. Class based inequality did not threaten the nation's core principles. The U.S. Constitution did not address the issue.<sup>81</sup>

This may have been true for Cold War America, but class was a hotly contested issue during the Jacksonian Era, the Populist-Progressive Era, and the Great Depression. In fact, for most of the 160 years before World War II, Americans were far more troubled by class inequality than racial inequality. A majority believed that segregation did not threaten the nation's core principles, and that the Constitution did not explicitly address this issue, either. Similarly, the U.S. Constitution also did not explicitly address privacy or abortion. Yet somehow these issues found constitutional protection during the Cold War, while economic rights did not.

While traditional free market leanings surely played a role in frustrating class equality, a major factor was a socially conservative Cold War imperative, in which conservatives engaged in an ideological public relations battle with the Communists over traditions and economic systems.<sup>82</sup> After World War II, conservative intellectuals could be separated into three strains, which ultimately converged and prevailed in the late 1960s: the libertarians, the traditionalists, and the hard-line anti-communists. Before the war, the libertarians and free marketers had been thoroughly marginalized by the popularity of the New Deal, but as the Cold War unfolded in the late 1940s, they took advantage of a new nemesis and a much more favorable political climate. Communism gave conservatives an opportunity to frighten the public, to revive arguments for free enterprise, and to attack New Deal bureaucracy and the labor movement. These intellectuals presented the nation and the world with ideological arguments that unfettered capitalism was the only true path, and that all statist systems opened the door to totalitarian control. While few mainstream politicians adopted this extreme position in the 1950s and 1960s, the conservative ideology bolstered the opponents of labor, civil

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81. DUDZIAK, *supra* note 3, at 243.

82. See generally GEORGE H. NASH, *THE CONSERVATIVE INTELLECTUAL MOVEMENT IN AMERICA SINCE 1945*, especially at 127 (1976).

rights, and economic redistribution. Just as the civil rights imperative created a need to “manage” race by promoting civil rights while restraining too much dissent, the imperative of social and economic ideology may also have contributed to the Great Society, as proof to the world of welfare capitalism. Nevertheless, the emphasis of this imperative was to rally around the capitalist system and celebrate the free market.

Another group of intellectuals, the traditionalists, followed a Cold War imperative relating to cultural norms. They attributed the rise of totalitarianism and Stalinism to the decline of traditional institutions and morality, and the rise of mass society without values. Borrowing from Edmund Burke, they argued at home and abroad for preserving religious traditions and social order, and they fought to make America an example of social stability for the world. These perspectives on the free market and traditionalism were strong currents in Cold War politics, and eventually, they were an integral part of the Nixon victory in 1968 and the end of the civil rights era.

Dudziak’s project questions the conventional wisdom that the Cold War was fundamentally an impediment to civil rights, so she understandably sets those questions aside in order to focus on her own innovative argument. But once those questions about conservative backlash are reintroduced, her insights can be extended and may lead to an intriguing synthesis. The conventional wisdom is that the Cold War created an atmosphere hostile to social change and civil rights, and Dudziak counters with an argument that the Cold War’s international scrutiny created a period of national self-reflection, self-criticism, and a redefining of goals and rights. A synthesis suggests that conservatives fit into both dynamics: in response to Nazism and Stalinism, and fearful of radical change at home, American conservatives did more than engage in red-baiting McCarthyism. They also generated a powerful rights-based ideology as part of a Cold War ideological struggle, for both an international audience and a domestic constituency. In the context of the Cold War, the American public gravitated to that ideology of laissez-faire capitalism. Americans engaged in a process of self-definition that embraced formalist civil rights along with capitalism and federalism. This moderate-to-conservative vision of rights prevented a more sweeping movement for equality, and it fed the backlash against it.

#### *D. An Opposing Language of Rights*

Primus offers a convincing account of the rights framework of liberal elites, but other groups countered with their own rights rhetoric. In addition to promoting an alternative Cold War imperative, the three branches of conservative intellectuals spoke their own language of rights, often in rebuttal to the liberals, and often in strongly anti-totalitarian

terms. In particular, the libertarians, such as the World War II refugee Friedrich A. Hayek, created a dissenting rights discourse celebrating contract rights and property rights in particular, in opposition to statism, economic regulation, and desegregation. Barry Goldwater's speech, "extremism in defense of liberty is no vice," was an anthem of conservative rights discourse. Not surprisingly, the libertarians regularly linked the New Deal with Stalinism, and used anti-totalitarian imagery even more explicitly than Primus's liberals.

The traditionalists, the second branch, hailed the freedom of religion and defended a religiously-oriented system of natural rights against a relativist and totalitarian threat. They believed that a failure to promote the value of each individual led to "totalitarian messianic democracy," which treated individuals only as a means to misguided social ends. A conservative, divinely-based system of natural rights would save America from ideologies out of control, such as New Deal liberalism.<sup>83</sup> In the midst of World War II, Russell Kirk, the most prominent traditionalist intellectual, praised the established Jeffersonian freedoms of local self government, private property, civil liberties, and economic self-reliance.<sup>84</sup> This appeal for Jeffersonian freedoms served the libertarian agenda, the traditionalist agenda, and also as a critique of totalitarianism. Though the anti-communists' commitment to individual rights was more tenuous, they gravitated to both of these critiques, and generated rights-oriented propaganda by attacking Stalinism's police state abuses.

In one of the most glaring contrasts to Primus's account, William F. Buckley, one of the traditionalists, called for a crackdown on Martin Luther King and the non-violent civil rights protests with a shocking twist on rights discourse and anti-totalitarianism: "Repression . . . is an unpleasant instrument, but is absolutely necessary for civilizations that believe in order and human rights. I wish to God Hitler and Lenin had been repressed."<sup>85</sup> Primus regards the concept of "human rights" as the hallmark of anti-repression, anti-racist rights language, but Buckley demonstrated with stunning clarity how rights talk can be appropriated for opposing purposes. Curiously, Buckley's lesson from the totalitarians was that the state needed to repress more, not less, to promote human rights.

Non-elites also fought the rights counter-revolution by appropriating anti-totalitarianism and rights. Southern "neo-Bourbons" in the 1950s mobilized violent opposition to integration with rights discourse of their own. They resurrected the states' rights doctrine of "interposition" from the antebellum era to reject federal extension of power. The neo-Bourbons harnessed resentment against New Deal bureaucracy and unionization, and

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83. *Id.* at 54.

84. *Id.* at 70.

85. *Id.* at 281.

they filled their attacks with cries of totalitarianism. One Bourbon leader announced:

I consider the Citizens' Council movement the beginnings of a fundamental conservative revolt throughout the country. Much more is involved than the school segregation issue. Many of our membership is [sic] concerned also about the trend toward the welfare state, the drift toward totalitarianism, the dangers of the United Nations. The integration issue is merely an entering wedge. The movement to integrate schools is part of the liberal trend that should be stopped.<sup>86</sup>

The Dixiecrat platform complained: "The national Democratic Party . . . denounced totalitarianism abroad but unblushingly proposed and approved it at home."<sup>87</sup> The Bourbons were also surprisingly vocal in their opposition to the "police state"—as they identified it with centralized power enforcing integration—and perhaps with police protection of blacks from racist obstruction and terrorism.<sup>88</sup> Moreover, they embraced rights discourse in calling for laissez faire economics and evading integration orders with "freedom of choice" plans.<sup>89</sup>

Reactionaries were able to appropriate rights rhetoric to cover their racist agenda with a façade of legal and moral legitimacy. This rhetoric enabled the bourbons to unify parts of the South against integration. Their unified front collapsed after racist violence alienated southern moderates, but eventually moderates shifted back to the right. In the 1960s, George Wallace and other extremist leaders re-unified southern resistance under the rhetoric of anti-totalitarianism and rights, until the Republicans co-opted their message. Wallace, who ran for the Democratic presidential nomination in 1964 and as the States' Rights nominee in 1968, emphasized "freedom of choice," property rights, and the "preservation of individual freedom," and framed these rights against totalitarianism.<sup>90</sup>

With a platform linking states' rights and hard-line anti-communism, Wallace hovered between twenty percent and twenty-five percent in national polls in the 1968 race. Wallace was greeted by rousing support in many midwestern cities, such as Milwaukee and Flint, Michigan. One journalist reflected on what Wallace was thinking as he campaigned in the North: "They all hate black people, all of them. They're all afraid, all of them. Great God! That's it! They're all Southern! The whole United States is Southern!"<sup>91</sup> Nixon realized that he had to tap into Wallace's

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86. BARTLEY, *supra* note 7, at 251.

87. *Id.* at 33.

88. *Id.*

89. *Id.* at 135.

90. CARTER, *supra* note 7, at 262, 346, 294.

91. *Id.* at 344.



base to win, especially as Humphrey regained support in the last month of the campaign. Nixon shifted against desegregation and *Brown*, and then announced his support for anti-integration “freedom of choice” school plans.<sup>92</sup> Nixon siphoned off Wallace’s voters, and Wallace won just fourteen percent of the national vote and fifty-eight electoral votes. Nevertheless, Wallace was still able to win eight percent of the vote outside the Old South, a reflection of the North’s increasing sympathy with southern resistance.

Rather than embracing the rights of minorities and the disempowered, white homeowners in the North shattered the interracial New Deal coalition and framed their opposition to racial justice with their own rights rhetoric. Thomas Sugrue explains that white homeowners were simply reappropriating the rights talk that had empowered other groups after the war.<sup>93</sup> Rights talk was equal opportunity, so to speak, in a manner far more widespread and more hostile to human rights than Primus suggests.

Rather than being chastened by the racist evil of the Nazis, some in the homeowners rights movement called for the establishment of a “National Association for the Advancement of White People” and spoke openly of white supremacy.<sup>94</sup> Later, anti-communism framed the attack against the left. Believing that the civil rights movement was closely linked with communist conspiracies, white homeowners declared war against the integrationists. The Michigan Real Estate Association contended that a law banning discrimination in real estate would “ROB the individual of his ‘property rights’ which are truly inseparable from human rights.”<sup>95</sup> Other anti-integrationists declared, “THIS IS YOUR PERSONAL WAR TO SAVE YOUR PROPERTY RIGHTS,” and “HELP CRUSH DICTATOR RULE.”<sup>96</sup> A “Vigilantes Organizational Meeting” declared, “Help Stamp Out Oppression—Fight for Our Rights.”<sup>97</sup> The homeowner rights movement also prevailed in California, Ohio, and various cities around the North and West—demonstrating the Southernization of American politics. Sugrue links this homeowners movement to mob violence and vigilante attacks against blacks, which increased in the 1960s. With the hot rhetoric of rights and war, homeowners associations whipped up mobs against the black “intruders.” This response led to a double crisis of “fight and flight,” with white violence and then white escape to suburbia, leaving a decaying city behind for an impoverished black population.

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92. *Id.* at 363.

93. *Id.* at 218-19. Sugrue also quotes white homeowners arguing that white veterans earned the right to exclude blacks from their neighborhoods. *Id.* at 79. Fighting in the war solidified their right to keep what you have, not to open opportunities to others.

94. *Id.* at 212.

95. *Id.* at 226.

96. *Id.*

97. *Id.* at 219.

Both Primus and Dudziak note that southern opposition borrowed anti-totalitarian rhetoric from time to time. Primus grants that the 1948 Dixiecrat platform condemned Truman's civil rights policies as "totalitarian government,"<sup>98</sup> and that segregationists compared Eisenhower's federal troops in Little Rock to Hitler's storm troopers. Some conservatives called the 1964 Civil Rights Act "an outrage belonging in Russia," and championed their resistance as a "continuous struggle against totalitarianism."<sup>99</sup> Dudziak also points to some of these incidents, including their Cold War rhetoric.<sup>100</sup> However, both Primus and Dudziak treat these episodes as isolated voices of protest, defeated by more powerful historical forces—anti-totalitarianism and the Cold War imperative. These voices of dissent may have failed to defeat the Civil Rights Act of 1964, but it is crucial to understand how they framed that debate and eventually prevailed. By relentlessly equating the Civil Rights Act with communism and fascism,<sup>101</sup> conservative leaders were able to lay a foundation for a successful political counter-attack in 1968. Unfortunately, Primus ignores the rights counter-revolution and its anti-totalitarian language. Dudziak at least discusses the backlash and the end of the civil rights era, but she does not mention their reactionary rights rhetoric, despite how much this rhetoric often relied upon the Cold War. She attributes the downfall of the civil rights movement to Vietnam and Nixon's "law and order" anti-rights campaign, in response to race riots and a more radical turn in the movement. However, if hers is a study of how leaders articulated the Cold War imperative, she should have investigated how the right wing successfully used the Cold War to frame its rights claims and its opposition to centralized government.

The Republican party returned to power by reversing the roles of populism and paternalism. The New Deal Democrats had come to power on populism, but the Republicans gradually chipped into the New Deal coalition by portraying the Democrats as out-of-touch patricians, elites, bureaucrats, and technocrats. This strategy led Nixon to victory, and it has been the foundation for the conservative successes over the last three decades. Interestingly, this populism contains strains of anti-rights backlash and rights talk. On the one hand, conservative populism rejects minority rights claims and judicial activism as anti-democratic. On the

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98. PRIMUS, *supra* note 2, at 213.

99. *Id.* at 189.

100. DUDZIAK, *supra* note 3, at 136.

101. Conservative representatives and commentators argued that the Civil Rights Act was the product of a Communist conspiracy to foment revolution, that it would lead to a "police state," an "ant-hill society," and a Socialist take-over, that it would result in "involuntary servitude," and that it would even lead to the rise of another Hitler or Stalin. Robert C. Post & Reva B. Siegel, *Equal Protection by Law: Federal Anti-Discrimination Law After Morrison and Kimel*, 110 YALE L.J. 441, 492-93 & nn.243-47 (2000).

other hand, these conservatives use a language of rights to reject the government's violations of property rights, religious freedom, and freedom of association. Today, the "movement conservatives" continue to speak their own language of rights: states' rights; the right to life; victims' rights; the right to bear arms; free exercise of religion; and of course, free market ideology and the freedoms of property and contract. These claims are often as detached from constitutional texts (especially in the recent explosion of Eleventh Amendment sovereign immunity) as the liberal activist rulings that these conservatives decry.

### III. CONCLUSION

These other historical inquiries confirm some of the most important insights in *The American Language of Rights* and *Cold War Civil Rights*. They demonstrate that Primus's theory of "concrete negation" operated in different ways throughout American society, but with varying outcomes. Totalitarianism and the Cold War served both as a mirror, in which Americans identified certain parallel evils and dangers at home, and as a prism, refracting the prior political commitments of liberal and conservatives, elites and non-elites, to produce a spectrum of newly framed commitments enshrined in rights discourse. In demonstrating the influence of international affairs on American law, Primus and Dudziak encourage the American legal academy to broaden its horizons and its scholarly jurisdictions.

While they both deserve credit for providing this broader perspective, their lack of breadth in domestic politics, particularly in overlooking the conservatives' rights counter-revolution, is a shared shortcoming. However, their concentration on particular events and sources allows them to write more clearly about complicated legal transformations. This focus on ideology, rhetoric, and political strategy also generates provocative insights into American politics and a remarkable coherence about the origins of our modern legal order.

But recalling how the Democrats lost their majority by becoming too closely identified with elite liberal politics,<sup>102</sup> legal historians should try not to make a similar mistake.<sup>103</sup> While certain studies demand a focus on particular groups or particular political leanings, legal historians should

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102. Rieder, *supra* note 6.

103. As Roberto Unger observed, "In moments when progressive lawyers have despaired of the possibilities of popular politics or feared its dangers, and found the doors of the political branches of government closed, they have been especially tempted to see in politics through judges the providential surrogate for politics through politics. They have been regularly disappointed." ROBERTO MANGABEIRA UNGER, WHAT SHOULD LEGAL ANALYSIS BECOME? 83 (1996). The same may be true for progressive legal academics.

aspire to balance. Dudziak strikes a better balance than Primus, but both could have engaged the rights counter-revolution. Such an inquiry would have powerfully confirmed their larger arguments about foreign affairs, “concrete negation,” national self-reflection, and legal change.