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Justice for All

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BOOK REVIEW

Social Movements, Legal Change, and the Challenges of Writing Legal History

Christopher W. Schmidt[*]

TOMIKO BROWN-NAGIN, COURAGE TO DISSENT: ATLANTA AND THE LONG HISTORY OF THE CIVIL RIGHTS MOVEMENT (Oxford University Press, 2011).

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All scholars have their holy grail—that platonic ideal of argument and analysis that lurks in the back of the mind, occasionally bursting forth onto the page, if only to come out just a bit off, not quite achieving what it had in its inarticulate form. My holy grail is likely that of many a legal historian, or at least those who study social movements and the law. It is to write history in which the experiences, actions, and commitments of "ordinary people"[1] as they struggle to make sense of and improve the world around them blend seamlessly with legal change. Such an account would capture the ways in which social action external to established legal institutions affects (or fails to affect) the path of the law as well as the ways in which formal legal norms translate into lived experience. Lines of causation and influence would run in both directions. Law professors who are interested in such things talk about "popular constitutionalism" and judicial dialogue;[2] socio-legal scholars talk about "legal mobilization" and "legal consciousness";[3] historians talk about "bottom-up" and "top-down" accounts of legal change.[4] Whatever the field and whatever the terminology, all of this scholarship, in one way or another, is concerned with the mechanisms of influence that operate between formal law and the people.

The challenge, as anyone who has delved into this area quickly learns, is to locate and persuasively explain the connections between developments that take place at disparate levels, from the lived

1. Such an awkward and imprecise term, but (a) it seems to get the point across, and (b) other candidates—e.g., nonelites, local people, the people, the people themselves—are equally awkward and imprecise.

2. *See, e.g.*, BARRY FRIEDMAN, THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION (2009); LARRY KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW (2004); Robert Post & Reva Siegel, *Popular Constitutionalism, Departmentalism, and Judicial Supremacy*, 92 CALIF. L. REV. 1027 (2004).

3. *See, e.g.*, PATRICIA EWICK & SUSAN S. SILBEY, THE COMMON PLACE OF LAW: STORIES FROM EVERYDAY LIFE (1998); MICHAEL W. MCCANN, RIGHTS AT WORK: PAY EQUITY REFORM AND THE POLITICS OF LEGAL MOBILIZATION (1994); SALLY ENGLE MERRY, GETTING JUSTICE AND GETTING EVEN: LEGAL CONSCIOUSNESS AMONG WORKING-CLASS AMERICANS (1990); Laura Beth Nielson, *Situating Legal Consciousness: Experience and Attitudes of Ordinary Citizens About Law and Street Harassment*, 34 LAW & SOC'Y REV. 1055 (2000).

4. *See, e.g.*, CHARLES M. PAYNE, I'VE GOT THE LIGHT OF FREEDOM: THE ORGANIZING TRADITION AND THE MISSISSIPPI FREEDOM STRUGGLE (1995).

experiences of nonelites all the way up to the decisions of those officially empowered to make and enforce the law. This is hard work, of course, and one can only do so much. Life is short. Pages add up. For historians, archival research can be particularly time-consuming. Causal linkages are difficult to demonstrate, strong conclusions hampered by source limitations. Even if one is able to offer as full a portrait as possible of some slice of the law-society continuum—a grassroots reform campaign, say—and even if one can reconstruct the details and institutional context of some legal development, the connective tissue between "law" and "society" can be elusive. Assumptions and inferences are required, and the gaps between different spheres of legal experience become quickly apparent. Popular constitutionalism falls back on a simplistic or idealized portrait of the people themselves; legal consciousness and mobilization turn formal legal pronouncement into so much background noise; history from the bottom up doesn't get very far off the ground, and history from the top down gets stuck up in the ether. In short, creating compelling, supported linkages between the various levels of the law-society continuum, and packaging all this into a readable historical account, is a formidable challenge.

Tomiko Brown-Nagin's *Courage to Dissent: Atlanta and the Long History of the Civil Rights Movement*[5] is among the most thorough and ambitious efforts to confront this challenge in the literature today. It is an exceptional piece of scholarship—deeply researched and richly detailed, written with passion and intelligence, and filled with provocative, challenging material. It also well illustrates how thorough historical investigation, coupled with creative scholarship, can overcome many of the obstacles to writing legal histories of grassroots social-reform efforts.

It is important to note at the outset that Brown-Nagin does not fully embrace the holy grail that I outlined above. In some of her past work she has engaged creatively and insightfully with legal history at the "top," including the development of constitutional doctrine.[6] This is not her focus in *Courage to Dissent,* which offers what she labels a

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5. TOMIKO BROWN-NAGIN, COURAGE TO DISSENT: ATLANTA AND THE LONG HISTORY OF THE CIVIL RIGHTS MOVEMENT (2011).

6. *See* Tomiko Brown-Nagin, *Elites, Social Movements, and the Law: The Case of Affirmative Action*, 105 COLUM. L. REV. 1436 (2005) [hereinafter Brown-Nagin, *Elites*]; Tomiko Brown-Nagin, *The Transformative Racial Politics of Justice Clarence Thomas?: The* Grutter v. Bollinger *Opinion*, 7 U. PA. J. CONST. L. 787 (2005); Tomiko Brown-Nagin, *An Historical Note on the Significance of the Stigma Rationale for a Civil Rights Landmark*, 48 ST. LOUIS U. L.J. 991 (2004) [hereinafter Brown-Nagin, *Historical Note*].

"ground-level view of legal history,"[7] a "bottom-up narrative" of local lawyers and activists.[8] Brown-Nagin's interest lies predominantly in the relationship among lawyers and between lawyers and their "clients" (broadly defined). Formal legal developments are secondary to thick description of the work of the African-American community in Atlanta and the lawyers—some locally based and some affiliated with national civil rights organizations such as the National Association for the Advancement of Colored People ("NAACP")—who sought to represent them in the period from the 1940s through the 1970s.

In this Essay, I identify the key contributions that *Courage to Dissent* makes to the legal history of the civil rights movement. In examining Brown-Nagin's important book, I also consider the difficulties of writing legal history that engages with multiple levels of socio-legal development. In Part I, I describe Brown-Nagin's basic approach and summarize the material she covers. In Part II, I describe some of the key contributions Brown-Nagin makes to our understanding of the civil rights movement. Finally, in Part III, I situate *Courage to Dissent* among several other prominent legal histories of the civil rights era. I offer some brief thoughts on this book's achievements and, more generally, on the challenges of creating historical accounts that illuminate the complex intersections of legal change and social activism.

I. THE BOOK

A. Methodology

"What would the story of the mid-twentieth-century struggle for civil rights look like if legal historians de-centered the U.S. Supreme Court, the national NAACP, and the NAACP LDF [Legal Defense Fund] and instead considered the movement from the bottom up?" Brown-Nagin asks in the book's opening pages.[9] *Courage to Dissent* is an extended response to this question.

> The answer, I contend, is this: a picture would emerge in which local black community members acted as agents of change—law shapers, law interpreters, and even law makers. Each contested and contingent step in the struggle for racial change comes into clearer focus. One can only see this picture by looking beyond the [U.S. Supreme] Court and the national NAACP and LDF, and examining developments in local communities before, during, and after lawyers launched civil rights litigation.[10]

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7. BROWN-NAGIN, *supra* note 5, at 433.
8. *Id.* at 8.
9. *Id.* at 7.
10. *Id.* at 7–8.

Toward the end of the book, Brown-Nagin calls upon fellow scholars of law and social change to expand their horizons so as to "include a larger cast of lawyers and lay activists."[11]

Central to Brown-Nagin's project is the concept of agency—the ability of individuals to exert some level of control over their environment, including the legal regimes under which they live. She seeks to "uncover[] the agency of local people in Atlanta,"[12] to show how "local people and unsung members of the civil rights bar actively participated in the making and shaping of constitutional law."[13] The levers of the law are moved not only by those who have been formally empowered with the authority to make and shape the law, but also by those who lack such authority—even those who might seem, on first blush, to have little to do with directing the course of the American legal system. "As important as national organizations and national leaders were, local actors . . . worked to create the conditions necessary to achieve change," Brown-Nagin writes. "They played leading roles in everyday struggles to ameliorate inequalities in the social and political order. And they experienced the gap between civil rights and remedies once the movement achieved formal equality."[14]

Although the book insists that national legal institutions and civil rights organizations should not dominate our understanding of the civil rights movement—or any moment in history, for that matter—these institutions and organizations retain a prominent place in Brown-Nagin's account, albeit predominantly as a foil for the main protagonists. Her focus centers on the "tensions and synergies between the national and local civil rights movements."[15] Judges and lawmakers are relevant because formal law is a key component of the context in which local actors—both lawyers and nonlawyers—operate. But they are largely background characters. Even the national-level NAACP lawyers, whose work is given wonderfully detailed descriptions, are examined predominantly for the ways in which they clashed with local actors. This is a story of intersections between different groups of people, all of whom are united by virtue of being African Americans struggling to inter Jim Crow. Beyond this important point of convergence, however, their differences stand out most prominently.

11. *Id.* at 433.
12. *Id.* at 8.
13. *Id.* at 432.
14. *Id.* at 8.
15. *Id.*

B. Atlanta's Long Civil Rights Movement—In Three Parts

Brown-Nagin divides Atlanta's "long" civil rights movement into three periods; each receives its own section. The first section examines the 1940s and 1950s, when civil rights reform in Atlanta was dominated by a generation of middle-class black lawyers who eschewed direct confrontation with the white power structure that created and supported Jim Crow, favoring instead tactics of negotiation, compromise, and incremental change. The second section looks at the 1960s, when a younger generation of student activists rose up to challenge segregation and other forms of racial subordination as well as the older generation of black lawyers whose tactics they felt were too slow and legalistic. The third section looks at the late 1960s and 1970s. It focuses in particular on the work of social-welfare activists, largely poor African-American women, who believed aggressive school integration was the best way to secure economic opportunity—a position that put them in opposition with Atlanta's newly empowered black political establishment.

The central figure of the first section of the book is A.T. Walden, one of the leading black lawyers in Atlanta during the 1940s and 1950s. Walden practiced what Brown-Nagin terms "pragmatic civil rights." This approach "privileged politics over litigation, placed a high value on economic security, and rejected the idea that integration (or even desegregation) and equality were one and the same."[16] On questions of civil rights tactics, Walden often found himself in opposition to the lawyers in the national office of the NAACP. Walden's commitment to voting rights stemmed from his belief that securing political power was the surest route to racial equality. This route might involve litigation, and there were certain kinds of litigation campaigns that he enthusiastically and aggressively pressed, such as attacking the white primary following *Smith v. Allwright*.[17] But courts were secondary to community-based organization. Indeed, Walden was, in Brown-Nagin's assessment, "one of the most effective organizers of black voting in modern times."[18] Yet his vision of popular political engagement was also limited by a strain of elitism that led him to underestimate the value of mobilizing mass political participation and prevented him from aiming his attentions beyond the black middle class. "From the viewpoint of Atlanta's black

16. *Id.* at 2.
17. 321 U.S. 649 (1944) (striking down racially exclusionary rules in primary elections).
18. BROWN-NAGIN, *supra* note 5, at 57.

elite, many blacks were not yet ready to enter the respectable world of electoral participation."[19]

When it came to school desegregation, Atlanta's black leaders in this period favored incremental reform through political pressure and negotiation with white leaders. Walden and the local black elite felt they could achieve more by creating alliances with powerful whites than by confrontational tactics, such as litigation directly challenging segregated schools—a position that put them increasingly at odds with the NAACP's national office. This mode of racial reform would look increasingly insufficient as the civil rights movement gained momentum and as more assertive forms of protest took center stage. And this commitment to biracial negotiation invariably put black middle-class interests before those of the working class. Yet during the 1940s and 1950s, the pragmatic approach led to some important concessions by the white power structure, including more black voters,[20] more funding for black schools,[21] and more housing for black residents.[22]

Civil rights pragmatism, as developed in Brown-Nagin's careful analysis, defies easily categorization. It was hardly mere "accommodationism," as its critics labeled it. It had certain characteristics that might be considered "conservative," but it was also notably responsive to local needs, and at times it could be quite effective in improving the material condition of African Americans. Consider, for example, the pragmatist approach to residential segregation, which Brown-Nagin describes in a fascinating early chapter.[23] Whites who ran Atlanta were committed to keeping the races apart, which they argued was necessary to maintain racial order. The black elite by no means accepted this assumption, but they realized that they could achieve more on the ground if they worked with it. Civil rights pragmatists were basically willing to sidestep direct challenges to policies that perpetuated patterns of residential segregation in exchange for more housing opportunities for black residents, who faced a severe housing shortage in the postwar years.

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19. *Id.* at 58; *see also id.* at 255 ("Walden's theory of black inclusion in the electoral system rested on the 'better class' of blacks—the well-educated, the professionals, the veterans—fitting into the system and playing the game, just like whites, but for the benefits of blacks. The benefits of black representation, Walden believed, would flow to the black working class, whose members naturally would strive to be a part of the better class. The question of whether the poorest blacks would also benefit was not explicitly a part of Walden's equation.").

20. *See id.* at 50–58.

21. *See id.* at 94–105.

22. *See id.* at 72–79.

23. *Id.* ch. 3.

They negotiated for more black housing, but did so by focusing on areas that would not challenge the residential color line. This approach did not sit well with the NAACP's national office, which, following the Supreme Court's decision in *Shelley v. Kraemer*,[24] was dedicated to challenging the legal props of residential segregation. Nonetheless, the pragmatic path offered readily identifiable benefits to many in the black community. It responded to unavoidable social realities, including "violent white resistance to black expansion, discrimination in the housing market, self-interest, practical concerns, and the limited success of LDF's housing desegregation litigation."[25] Brown-Nagin does not defend this approach—its long-term consequences included the tragedy of perpetuating black ghettos—but she offers a characteristically balanced and sympathetic portrayal of the pragmatist position.

The second section of the book examines the protests that exploded across Atlanta (and much of the rest of the South) in the 1960s and the resulting conflicts between the younger generation who led these protests and the established civil rights community. The agenda of the young civil rights insurgents in Atlanta, most of whom would become active in the Student Non-Violent Coordinating Committee ("SNCC"), was ambitious. Not only did they target (with much success) segregated lunch counters and other public accommodations, but, by the mid-1960s, they also sought to expand the scope of their protests to include poverty and urban slums. Brown-Nagin emphasizes that, contrary to recent scholarship that has downplayed the linkage between *Brown* and the direct-action protests of the civil rights movement,[26] these actors were very much influenced by the Supreme Court.[27] The Court in *Brown* created expectations that

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24. 334 U.S. 1 (1948) (declaring racially restrictive covenants unenforceable in courts).

25. BROWN-NAGIN, *supra* note 5, at 72.

26. *See especially* GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 39–169 (1991) (arguing that the actions of the Supreme Court were of little importance to the civil rights movement). Michael Klarman has also challenged the idea that *Brown* served to directly inspire the direct-action protests of the civil rights era. In contrast to Rosenberg, he recognizes that there were numerous "indirect" and unintended ways in which the Supreme Court influenced the development of civil rights protest. Among these was the unintended consequence of demonstrating the limits of litigation as a weapon of social change. MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 368–85 (2004).

27. Brown-Nagin's account focuses on the influence of numerous Supreme Court opinions, not just *Brown*. In addition to analyzing the work of Walden and others to break the white primary in the aftermath of *Smith v. Allwright*, BROWN-NAGIN, *supra* note 5, at 47–58, the book details the impact in Atlanta of *Gayle v. Browder*, 352 U.S. 903 (1956) (per curiam), the decision that struck down segregation in public transportation and thus ended the Montgomery Bus Boycott. BROWN-NAGIN, *supra* note 5, at 122–30. It also discusses *Boynton v. Virginia*, 364 U.S.

were flagrantly unrealized in subsequent years. The student protests were, in part, an effort to demonstrate frustration with court-based reform.[28] They were seeking new ways to fight for racial equality that would not rely on the uncertain and disempowering (for nonlawyers) process of litigation. It was, Brown-Nagin demonstrates, frustration rather than inspiration that linked *Brown* to the sit-ins and the protests of this period.

Although one of the central developments of the early 1960s was the students' rejection of litigation, lawyers retained a key role throughout this period. The NAACP and the students formed what Brown-Nagin calls a "volatile alliance," as each group saw advantage in drawing on the other's resources. Also, a new kind of lawyer gained the trust and support of the student activists in this period, one that was quite different from either the older generation of pragmatists or the NAACP attorneys with their carefully orchestrated litigation campaigns. One of these new kind of lawyers was Donald Hollowell, whose uncompromising courtroom defenses of student protesters gave him "mythic status" among the younger activists.[29] Another was Len Holt, a young black lawyer who, frustrated with the NAACP's rigid commitment to school-desegregation litigation, sought out new ways to integrate litigation with movement activism. Holt saw himself as a "movement lawyer," using litigation as just one tool among many in creating the conditions of social change. The courtroom was as much a mechanism for mobilizing local communities—for, as Brown-Nagin writes, "extending a voice to citizens shut out of formal politics"[30]—as a forum in which law could be changed. His was "a bottom-up approach to lawyering, one in which activists would lead and lawyers would follow."[31] One of Holt's most effective innovations was the "omnibus litigation" strategy, in which a single suit would challenge segregation policy in all walks of life in a particular locality, with all public officials (including judges who ran segregated courtrooms) named as defendants.[32] This approach, which had considerable success in Atlanta and elsewhere, was designed to use the courtroom as a highly visible focal point for a broader protest campaign.

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454 (1960), which struck down racial discrimination at interstate bus terminals as violative of federal law, sparking a round of protests and helping to inspire the Freedom Rides of 1961. BROWN-NAGIN, *supra* note 5, at 164–66.

28. *See* BROWN-NAGIN, *supra* note 5, ch. 6 (describing the origins and development of the student-led protest movement of the early 1960s).

29. *Id.* at 250.

30. *Id.* at 200.

31. *Id.* at 188.

32. *See id.* at 187–200.

The second section concludes with a chapter on efforts by young civil rights activists in the mid-1960s to steer the movement toward the problems of black poverty. Julian Bond, a leader of SNCC, was elected to the Georgia legislature in 1965 with a call for a "new politics" that would mobilize the neediest communities. This was a politics, Bond explained, that would be "grounded in the hopes and needs of the very poor."[33] Energized by Bond's electoral success—as well as by the effort by his new colleagues to deny him his seat—SNCC launched a drive to organize residents of poor, black neighborhoods. This chapter details the work of Howard Moore, Jr., SNCC's lawyer, who fought in federal court to ensure that Bond would gain his rightful place in the Georgia legislature while also defending SNCC's leaders against state prosecution. The chapter concludes with the dissipation of organizational efforts targeting poor communities as the civil rights movement fractured. "In addition to being overly ambitious," Brown-Nagin writes, "the project [of mobilizing the black ghettos] did not achieve all of its high aims because it dissented so much, in so many directions, all at once."[34]

The third and final section focuses on the late 1960s and 1970s, by which point the insurgents of the early 1960s had begun to secure positions in Atlanta's power structure. A coalition of black middle-class professionals and sixties-era student activists was now part of the (liberal) political mainstream. Thus emerged a new, more powerful black establishment. But just as many of them had made their names by challenging the pragmatists of an earlier generation, now they too were challenged, the voices of dissent this time being poor and working-class blacks who felt their own interests were not being recognized. At the forefront of their agenda was school desegregation, a civil rights issue that had been relegated to the sidelines among Atlanta activists for much of the 1950s and 1960s. Although NAACP lawyers had been pursuing school-desegregation litigation in Atlanta, local activists preferred targeting discrimination in public accommodations and voting.

The relative lack of attention to school desegregation among Atlanta's civil rights insurgents in the 1960s carried over into the agenda of those heading the new black establishment. They felt the focus should be on ensuring black control over the schools. This, more than racial integration, would lead to improved education. They had the support of black teachers—a core group of the black middle class—as well as the white elite. Black and white elites sought to implement

33. *Id.* at 257.

34. *Id.* at 302.

a limited desegregation plan that would be coupled with increased opportunities for African-American teachers and administrators.

Two obstacles stood in the way of this biracial agreement on schools, however. One was the federal judiciary, which, after a decade of delay in enforcing actual integration of schools, became more assertive in the late 1960s and early 1970s. NAACP lawyers capitalized on this new judicial attitude by pushing for maximum possible integration.[35] The other was the emergence of a grassroots movement of black Atlantans, many of whom came from the lower class. Poor African Americans stood by the integrationist ideal that wealthier blacks had largely abandoned (if they ever fully accepted it). The commitment of lower-class blacks to integration was thoroughly pragmatic: integration was valuable because they believed it offered the best way to lift up the most desperate of Atlanta's black children. NAACP lawyers and poor black activists, most of whom were women, worked together in trying to convince the courts to adopt aggressive desegregation orders.[36]

This coalition achieved only limited success in the courtroom. The final chapter of the book details the history of *Armour v. Nix*,[37] a desegregation suit filed in 1972 by a group of mostly female, poor, black Atlantans that would be litigated through the rest of the decade. The state's defense of its school policy played up the plaintiffs' sex, race, and class in an effort to delegitimize their legal claim.[38] Not only did they lose their case, but their lawyer allies often limited their role in the litigation. Yet Brown-Nagin concludes that their involvement constituted an important accomplishment in the story of the civil rights movement in Atlanta. These activists made clear that blacks had not in fact given up on integration by the 1970s. "[T]he case's full measure cannot be taken in terms of whether the plaintiffs prevailed in court. Grassroots activists had never assumed that courts would do justice in their cases and, consequently had never valued their campaigns in strictly legal terms."[39]

II. THE BOOK'S CONTRIBUTIONS

Courage to Dissent vastly expands our understanding of the role of law and lawyers in the civil rights movement. In this section I highlight three of the book's particularly noteworthy contributions.

35. *See id.* at 344–46, 348, 360, 363–73.
36. *See id.* at 385–91, 411–15.
37. 446 U.S. 930 (1980) (per curiam).
38. *See* BROWN-NAGIN, *supra* note 5, at 413–15.
39. *Id.* at 427.

First, rather than limiting itself to the more traditional story of the 1950s and 1960s, it expands analysis of the civil rights movement to include the 1940s and the 1970s. Second, it highlights the complex and evolving divisions among African Americans on questions of civil rights. Finally, it draws attention to the role of class and gender in the struggle for racial equality.

A. *Going Long*

One of the obvious contributions of this book is Brown-Nagin's decision to adopt the time frame of the "long" civil rights movement, beginning in the 1940s and going through the 1970s. This choice allows Brown-Nagin to present an account of the civil rights movement that unfolds over time in all its fascinating complexity and drama. The end result is legal history as saga: there is a kind of intergenerational epic quality to Brown-Nagin's account, in which each generation of activists gives rise to new challengers who both build on and critique choices and achievements of the previous generation.

The dominant narrative of the civil rights movement, inside and outside the academy, has long centered on its "classical" phase, beginning in the mid-1950s with *Brown* or the Montgomery Bus Boycott and continuing through the mid-1960s. In recent years, however, historians have sought to expand the time horizons of the movement. In her 2004 presidential address to the Organization of American Historians, Jacquelyn Dowd Hall called for increased attention to the decades preceding and following the "classical" phase.[40] By opening our eyes to the movement in a "long" perspective, Hall believed a portrait would emerge that included more attention to the movement outside the South and more attention to the place of economic justice in the struggle for black equality. Much of the recent scholarship that has adopted the long view has examined linkages between the labor and civil rights movements in the 1930s and 1940s.[41]

Brown-Nagin's account differs from much of the historical scholarship that has pushed the starting date of the civil rights movement back to the 1940s, in that she does not unearth the kind of radical civil rights tradition that other scholars have found in this

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40. Jacquelyn Dowd Hall, *The Long Civil Rights Movement and the Political Uses of the Past*, 91 J. AM. HIST. 1233, 1234–35 (2005).

41. *See, e.g.*, GLENDA ELIZABETH GILMORE, DEFYING DIXIE: THE RADICAL ROOTS OF CIVIL RIGHTS, 1919–1950 (2008); RISA L. GOLUBOFF, THE LOST PROMISE OF CIVIL RIGHTS (2007).

decade. To the contrary, in Atlanta the dominant mode of racial-reform activism in this period was the pragmatism favored by A.T. Walden and the black elite, a notably unradical approach that embraced incrementalism and showed little interest in reforms aimed at working-class concerns. Yet, as Brown-Nagin demonstrates, the pragmatists did dissent from the legalist antisegregation campaign the NAACP was pushing—in this way, they offered an important alternative vision to the one that would come to dominate popular memory of what the civil rights movement was all about. While not necessarily a radical alternative, it was one that internalized certain fundamental insights often associated with leftist approaches to reform, such as the limitations of legal rights and the necessity of political power.

The more radical voices, those demanding increased attention to the most disadvantaged and marginalized of African Americans, would emerge in Atlanta—but not until the 1960s and 1970s. Brown-Nagin's decision to follow the course of Atlanta's movement through the 1970s allows for a whole new set of historical actors to be included in the black freedom struggle. Many scholars have sought to make sense of the civil rights movement in the late 1960s and 1970s, when, in the face of white backlash and internal divisions, it seemed to lose focus and momentum. Brown-Nagin deals with this challenge by focusing on a single issue: school desegregation. The battle over schooling in Atlanta during the late 1960s and 1970s encapsulated the new landscape of civil rights activism in this period. It was a period in which black political power was being realized, resulting in a new iteration of alliances and divisions within the black community. It was a period when integrationism remained an ideal, but one that was often pursued for distinctly strategic purposes. The working-class advocates of integrated schools judged integration to be the best path toward improved education and economic empowerment. More than in previous decades, members of Atlanta's black working class were able to speak out and highlight the disconnect between themselves and the black professional class.

Simply by opening our eyes to periods of civil rights activism previously treated as prologue and afterword to the main events, and by insisting that these periods are just as central as the more renowned "classical" period, Brown-Nagin has reframed our understanding of the civil rights movement. In fact, one theme that emerges from the tripartite organization of *Courage to Dissent* is the continuity between the pressing issues of the 1940s and 1950s and those of the 1970s. Looked at in this way, the dramatic events of the 1960s were both a culmination and something of an aberration. Our

overemphasis on the "classical" period has diverted our attention from the underlying continuities of civil rights activism in the second half of the twentieth century.

B. A Movement Divided

Although division within the black community is not a new issue, Brown-Nagin has gone as far as any legal historian in untangling these dynamics during the civil rights era. A central theme of much of her scholarship has been the persistent yet constantly evolving divergences among African Americans on civil rights goals and tactics, with a particular emphasis on the role of lawyers and litigation in both creating and diffusing intraracial tensions.

In *Courage to Dissent*, Brown-Nagin offers remarkable descriptions of a black community that was deeply divided over school desegregation—a point too often overlooked in the historical literature.[42] African-American ambivalence toward school desegregation persisted throughout the period of the long civil rights movement. Blacks were often resistant to the NAACP's litigation strategy, and the *Brown* victory did little to change this fact. Unlike other issues of the civil rights era—such as public-accommodations discrimination and voting rights—school desegregation did not readily lend itself to protest remedies. The NAACP's campaign was predominantly focused on changing the law by getting the constitutional right declared and then convincing courts to issue orders to enforce that right.

African Americans resisted many other civil rights advances that have since become iconic in the public imagination. Direct-action protest always split the black community, a point that has been explored in much recent literature on the civil rights movement.[43] Atlanta was no exception. The Civil Rights Act of 1964, for instance, divided black activists. Brown-Nagin describes a striking scene in which the mayor of Atlanta, Ivan Allen, met with a group of twenty-four leaders of the black community to explain his decision to break ranks with practically all other white Southern officials and publicly back the pending civil rights bill. Most of the group were opposed, believing it an act of political suicide on behalf of an issue best resolved at the local level. (Allen ignored their advice and went on to

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42. Notable exceptions include ADAM FAIRCLOUGH, A CLASS OF THEIR OWN: BLACK TEACHERS IN THE SEGREGATED SOUTH (2007); Kenneth W. Mack, *Rethinking Civil Rights Lawyering and Politics in the Era Before* Brown, 115 YALE L.J. 256 (2005).

43. *See, e.g.*, J. MILLS THORNTON III, DIVIDING LINES: MUNICIPAL POLITICS AND THE STRUGGLE FOR CIVIL RIGHTS IN MONTGOMERY, BIRMINGHAM, AND SELMA (2002).

testify in support of the bill at a congressional hearing.)[44] On the other end of the ideological spectrum, some of the young radicals in the civil rights community also had reservations about the Civil Rights Act. SNCC chairman John Lewis had initially planned to attack the bill at the March on Washington in August 1963 as insufficient because it failed to address the plight of the black poor. Only under pressure from March organizers did he temper some of his rhetoric and express support for the Civil Rights Act.[45]

By identifying divisions within the black community over school desegregation in the late 1960s and 1970s, Brown-Nagin is responding to Derrick Bell's influential 1976 article, *Serving Two Masters*.[46] Bell portrayed the NAACP's insistence on pressing school desegregation, despite opposition by poorer blacks, as a product of its alliance with middle-class blacks.[47] Brown-Nagin makes a powerful critique of Bell's conclusions, which simply do not hold up in the context of Atlanta.[48] While the intraracial fissures that Bell identified certainly existed, Brown-Nagin demonstrates that in Atlanta the dynamic was precisely reversed: poorer African Americans placed more hope in aggressive enforcement of desegregation suits, while middle-class blacks were more willing to work for advantages (such as more positions for black teachers and administrators) within the existing system of segregated schools. This exceptionally interesting and important point demonstrates that the fault lines dividing the African-American community on the most basic civil rights issues often ran in unexpected directions.

C. *Class and Gender in the Civil Rights Movement*

A focus on the understudied intersections of class, gender, and race marks another contribution of *Courage to Dissent*. A theme throughout the book, class and racial divisions emerge in particularly sharp form in the third section, when, in the 1970s, a coalition of poor black women and social-welfare activists takes on Atlanta's black establishment. The challengers were led by Ethel Mae Mathews, who was raised in an Alabama sharecropping family. After relocating to

44. BROWN-NAGIN, *supra* note 5, at 225.

45. *Id.* at 226–27.

46. Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470 (1976).

47. *Id.* at 489–92.

48. *See* BROWN-NAGIN, *supra* note 5, chs. 11–12; *see also* Tomiko Brown-Nagin, *Race as Identity Caricature: A Local Legal History Lesson in the Salience of Intraracial Conflict*, 151 U. PA. L. REV. 1913, 1924–28 (2003) (disputing Bell's thesis as applied to Atlanta).

Atlanta, she became a mother of five, worked as a maid, and went on to become a welfare-rights activist. Her poverty defined her every bit as much as her race: "The experience of moving from a rural to an urban area, and of negotiating the city and an invasive welfare bureaucracy after enduring the injustices of Jim Crow in Alabama, had toughened her," Brown-Nagin writes.[49] She targeted anyone who used power to shortchange the interests of the poor, regardless of race. The book charts her fight for more aggressive school desegregation, which she and her allies felt was the best way to secure resources and opportunity for the poorest of black Atlantans. In contrast, local black political leaders felt that the interests of the black professional class were better served by prioritizing black political power, including administrative control over local schools, even if this meant less school integration. Thus, an intraracial battle over the core civil rights issue of school desegregation took shape along class lines.

One person who took up Mathews's struggle was the lawyer Margie Pitts Hames, who spearheaded *Armour v. Nix*,[50] an aggressive and innovative lawsuit against segregated schools throughout the Atlanta region. Her work with the mostly female plaintiffs demonstrates the key role of gender, alongside class and race, in the third phase of the civil rights struggle in Atlanta. A white woman who was raised in poverty, Hames experienced various episodes—including flagrant sex discrimination as a lawyer—that steered her toward progressive views on issues of race and gender. She became an attorney for the American Civil Liberties Union and dedicated herself to feminist and civil rights issues. Prior to coming to Atlanta to litigate the school case, she successfully argued *Doe v. Bolton*,[51] the companion case to *Roe v. Wade*.[52] Hames saw similarities between her work in Atlanta and her abortion work: both sought to protect the interests of women whose life choices had been constrained by poverty and government policy. The courtroom battle set Hames and her mostly female group of plaintiffs against a team of white male lawyers representing the city and suburban school districts. (Hames was seeking a metropolitan-wide desegregation order). At trial, the school board's lawyers focused on the plaintiffs' sex, race, and class as a way to delegitimize their legal claim. They questioned the plaintiffs about their marital status, whether they received welfare, and how many children they had. The lawyers' goal, Brown-Nagin explains, was to

49. BROWN-NAGIN, *supra* note 5, at 385.
50. 446 U.S. 930 (1980) (per curiam).
51. 410 U.S. 179 (1973).
52. 410 U.S. 113 (1973).

"underscore how different the plaintiffs were from traditional white middle-class parents of school-age children."[53]

In the end, this effort of poor black women to use the courts to secure better schooling for their children failed—as did most metropolitan desegregation claims—in the face of white flight and legal limitations such as *Milliken v. Bradley*.[54] Brown-Nagin draws two quite different conclusions from the desegregation fight. On the one hand, it shows "the potential agency of marginalized groups in campaigns for change."[55] On the other hand, "Hames's failed crusade to redeem *Brown* revealed how challenging the struggle for social justice had become in an era of federal court resignation to white resistance to school desegregation and divergent black interests over a range of public policy issues."[56] Although *Courage to Dissent* is hardly overflowing with breakthrough victories, even the measured achievements found in the first two phases of the long civil rights movement are mostly absent in the final phase. When demands for racial justice intersected with demands for economic justice, and when the primary claimants were economically vulnerable women, as was the case in Atlanta's school-desegregation battles of the 1970s, victories were rare. Simply having joined the battle, regardless of the outcome, was an achievement.

III. WRITING HISTORIES OF SOCIAL REFORM AND LEGAL CHANGE

A. Three Approaches

In order to better understand the challenge of writing histories of the intersection of social activism and formal legal change, I will briefly describe the approaches of three notable legal-historical works on the civil rights movement. Richard Kluger's classic treatment of *Brown*, *Simple Justice*, exemplifies the genre of narrative litigation history. Michael Klarman's *From Jim Crow to Civil Rights* presents an approach in which the primary mechanisms of legal change are broad historical processes rather than individuals. And Risa Goluboff's *The Lost Promise of Civil Rights* offers something of a middle-ground approach in which lawyers act as imperfect intermediaries between social activism and legal institutions. Examining the various ways in which scholars have faced the challenge of writing about social

53. BROWN-NAGIN, *supra* note 5, at 414.

54. 418 U.S. 717, 744–45 (1974) (holding that courts cannot bus across districts to achieve desegregation unless there is an "interdistrict violation and interdistrict effect").

55. BROWN-NAGIN, *supra* note 5, at 428.

56. *Id.* at 429.

movements and legal change offers some context with which to assess the contributions of Brown-Nagin's *Courage to Dissent*.

1. Litigation as Causal Narrative

Richard Kluger's *Simple Justice*,[57] published in 1976, is a masterpiece of narrative history—engaging, accessible, and exhaustively researched—and it makes no pretense of having any kind of methodological or theoretical ambition. Kluger's approach assumes a direct and unproblematic connection between the demands of African Americans and the remedies that courts are able to supply, and in fact did supply in *Brown*. The book opens with a group of brave African Americans in Clarendon County, South Carolina, coming together, with the help of the NAACP, as plaintiffs in a lawsuit challenging school segregation: "Their yearnings had been gathered up and committed to paper and were being directed by able lawyers of their own race to the courts of the government of the United States."[58] In Kluger's account, the social experience of African Americans leads to a lawsuit, which the lawyers pursue through the judicial system, and, in the end, the Supreme Court responds. The *Brown* decision was "nothing short of a reconsecration of American ideals";[59] it was "simple justice."[60] Little to nothing, it seems, is lost as the issue moves from social protest to legal suit to judicial opinion. The essence of the wrong, racial segregation, becomes the target of the court-defined remedy.

The effects of judicial doctrine are similarly direct. If the NAACP lost *Brown*, Kluger writes, "[s]egregation would be reinforced as the law of the land and the Negro's yearning for equality might be stifled for new generations."[61] When law fails to address social needs, it is because of failures of empathy and will on the part of judges and lawmakers. Limitations inherent in legal reform and legal institutions are not at fault.

All of this makes for a dramatic and inspiring story, and it certainly captures the highest hopes that many, both black and white, put into *Brown*. Similar litigation-based frameworks, reliant on the

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57. RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF *BROWN V. BOARD OF EDUCATION* AND BLACK AMERICA'S STRUGGLE FOR EQUALITY (1976).

58. *Id.* at 25.

59. *Id.* at 710.

60. *Id.* Brown-Nagin has criticized Kluger for assuming "that all African-Americans experienced subordination in exactly the same way, and thus were all sure to experience *Brown* as a kind of salvation." Brown-Nagin, *Historical Note*, *supra* note 6, at 996 n.21.

61. KLUGER, *supra* note 57, at 284.

same kinds of assumed causal connections, are commonplace in the legal-historical literature.[62] But this approach also idealizes the capacities of courts and legal remedies, marginalizes the possibility of alternative approaches to achieving racial equality, and tends to assume that all right-thinking African Americans were on board with the NAACP's litigation campaign—all points with which more recent scholarship, including *Courage to Dissent*, takes sharp issue.

2. Zeitgeist as Cause and Constraint

A less idealistic and romanticized approach is on display in Michael Klarman's *From Jim Crow to Civil Rights*, a work that has largely dislodged *Simple Justice* as the standard book on *Brown*. Whereas Kluger emphasizes the role of lawyers and litigation in forcing courts to confront the fundamental ills of society, Klarman is skeptical of litigation as an independent causal mechanism for formal legal change.[63] What moves judges to change the law is not savvy legal argumentation but changing social and cultural norms. The key causal mechanism for legal development is the zeitgeist. "Judges are part of contemporary culture, and they rarely hold views that deviate far from dominant public opinion."[64] As a result, even seemingly transformative Supreme Court rulings actually "reflected social attitudes and practices more than they created them."[65]

Not only are courts generally reflective of the broader political environment, Klarman argues, but their capacity to change that environment is far more circumscribed than scholars like Kluger assume: "Because white supremacy depended less on law than on entrenched social mores, economic power, ideology, and physical violence, the amount of racial change that litigation could produce was inevitably limited."[66] Court opinions can affect society, but their influence is often indirect, unpredictable, ironic. The most obvious impact of *Brown*, Klarman argues, was not to inspire black activism.

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62. Classics in this genre include ANTHONY LEWIS, GIDEON'S TRUMPET (1964) and LOREN MILLER, THE PETITIONERS: THE STORY OF THE SUPREME COURT OF THE UNITED STATES AND THE NEGRO (1966).

63. *See, e.g.*, KLARMAN, *supra* note 26, at 468 ("[D]eep background forces ensured that the United States would experience a racial reform movement regardless of what the Supreme Court did or did not do.").

64. *Id.* at 6.

65. *Id.* at 443. Another recent work in the field that reflects similar assumptions about the importance of the zeitgeist—in this case foreign-policy imperatives—in pressuring legal institutions to reform civil rights policy is MARY L. DUDZIAK, COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY (2000).

66. KLARMAN, *supra* note 26, at 461.

It was to inspire massive resistance, white backlash against civil rights.[67] Furthermore, its "indirect" effects should not be romanticized or exaggerated:

> [A]lthough *Brown* probably contributed to the belief among blacks that Jim Crow was vulnerable, it did not foster the view that they could personally help to end it. Rather, the high court's ruling encouraged additional investment in litigation, as elite NAACP lawyers tried to convince white judges to end segregation. *Brown* possibly discouraged direct-action tactics, which had the capacity to enhance individual agency and to generate transformative conflict.[68]

The end result of Klarman's analysis is a portrait of the Supreme Court as an institution deeply situated in a broader social context and therefore limited in its ability (or willingness) to buck public opinion. The Court is also limited in its ability to uproot entrenched social practices. When it does make efforts in this direction, unintended effects of the Court's actions often complicate matters for the intended beneficiaries.[69]

3. Legal Practice as Intermediary Mechanism

Another formulation of the law-society crossroads in the context of civil rights history can be found in Risa Goluboff's 2007 book, *The Lost Promise of Civil Rights*. Notably explicit in theorizing the linkage between social activism and formal law, Goluboff describes her book as "a study of how social phenomena become legal problems."[70] The intermediary mechanism for this process of translation is legal practice—the work of lawyers who respond to concerns that citizens bring to them and then frame these concerns in terms that courts and other formal legal institutions might respond to. At the center of *The Lost Promise of Civil Rights* is the Civil Rights Section of the Department of Justice and the NAACP's legal department in the 1940s. The process of law creation begins, in Goluboff's account, with letters from individuals requesting legal assistance from the Justice Department or the NAACP. "Legal change does not begin with the doctrines courts create or even the rhetorical strategies lawyers employ," she writes. "It begins with the injuries individuals experience."[71] At that point, the work of lawyering reshapes the complaint, responding to the "the interwoven legal,

67. *See id.* ch. 7; *see also* Michael J. Klarman, *How* Brown *Changed Race Relations: The Backlash Thesis*, 81 J. AM. HIST. 81 (1994).

68. KLARMAN, *supra* note 26, at 380–81.

69. For an important survey of U.S. constitutional history that revolves around these basic assumptions, see FRIEDMAN, *supra* note 2.

70. GOLUBOFF, *supra* note 41, at 6.

71. *Id.* at 5.

political, and institutional cultures" in which lawyers work.[72] Out of this emerge what are hoped to be viable legal arguments.

The particular complaint-to-legal-argument process that Goluboff highlights is the effort in the 1940s to forge a legal remedy to the economic exploitation of black workers. This "lost" vision of civil rights was centered on the intersection of race and labor interests and often focused on remedies against private as well as state actors. It included a belief in "collective labor rights to governmentally provided economic security and affirmative rights to material and economic equality."[73] Yet it was largely displaced in the 1950s by a conception of civil rights that focused on discrimination by state actors. This was the version of civil rights vindicated in *Brown*. By careful attention to the experience of legal practice among government lawyers and civil rights lawyers, Goluboff demonstrates the existence of a vision of civil rights that has largely been marginalized in the legal and historical literature.

As a general framework of analysis, Goluboff's approach bears some similarity to Kluger's, in that both highlight the role of lawyer elites in translating social demands into legal argument. Yet, whereas Kluger assumes a one-to-one correlation between society and law, the central theme of Goluboff's book is the disconnect that often emerges between social demands and legal response:

> By the time a case reaches the Supreme Court, the complexities not only of social life but also of the lawyering process itself have been winnowed into neat legal questions. Those questions represent only a small slice of the social milieu and legal practice that generated and nurtured the original complaint.[74]

This is the process of, as Goluboff nicely puts it, "doctrinal distillation."[75] Far from Kluger's portrayal of *Brown* as directly responsive to a generalizable experience of racial oppression, *Brown*, in Goluboff's telling, was the end product of countless iterations of translation and refinement. It responded only to "a partial and particular image of Jim Crow."[76]

B. Local People as Agents of Constitutional Change

How does *Courage to Dissent* fit with this other scholarship that has sought to explain the place of law in responding to and instigating social change? As important as the book is in the field of

72. *Id.* at 13.
73. *Id.* at 5.
74. *Id.* at 238.
75. *Id.*
76. *Id.* at 251.

legal history, and as considerable its theoretical implications, this is not a particularly easy question to answer, because Brown-Nagin insistently avoids overarching claims about the role of law and courts in social-movement mobilization. The book's clearest "big claim" is an anticlaim: it is Brown-Nagin's critique of historians and legal scholars who attempt to make big causal claims. Its most sweeping pronouncement is a denunciation of sweeping pronouncements: "There should be no grand, absolutist theories about courts, lawyers, and social change."[77] In Brown-Nagin's view, generalizations about law and social change necessarily marginalize local stories. Attention to localized experiences introduces ambiguity and complexity and contradictions, all of which undermine grand historical arguments. Once one understands "how social movements actually evolved over time in real communities,"[78] no broad claims of law and social change can survive.

Thus, the conclusion that Brown-Nagin draws from her study of Atlanta and the civil rights movement is that there are few—and perhaps no—predictable patterns when it comes to the interplay between social activism and the legal system. "Court action both mobilized and demobilized the civil rights movement."[79] The moving parts were always shifting; "the relationship between the courts, civil rights litigation, and activists was dynamic."[80] "Upon engaging in a bottom-up historical analysis—featuring local lawyers, activists, clients, and organizations, alongside more traditional repositories of legal power—an incredibly complex picture emerges."[81]

An argument for complexity is most effective when framed as critique. Any historian who spends time in interdisciplinary settings has likely had the following experience: A nonhistorian presents some samplings of historical material and then makes an interesting and sweeping conclusion from that material. The historian responds, in so many words, "But it's more complex than that!" Others in the audience nod sympathetically and then continue trying to fine-tune their preferred theory to explain the material. For those who have been critical of much recent legal and political-science scholarship on law and social movements, Brown-Nagin's insistence on context and complexity is going to be welcome indeed.[82] For those who prefer

77. BROWN-NAGIN, *supra* note 5, at 434.

78. *Id.*

79. *Id.* at 250.

80. *Id.* at 174.

81. *Id.* at 84.

82. *See, e.g.*, Kenneth W. Mack, *Law and Local Knowledge in the History of the Civil Rights Movement*, 125 HARV. L. REV. 1018, 1020 (2012) (reviewing BROWN-NAGIN, *supra* note 5) ("It is

historical inquiry to result in some generalizable conclusions, some broadly applicable theory of law and social change, her resistance to this kind of theorizing may be seen as a limitation.[83]

Rather than relying on an overarching causal claim about law or courts, *Courage to Dissent* revolves around a central theme, namely Brown-Nagin's belief in the ability of local actors to shape the world in which they live, including its legal rules. Contra the arguments of those who view litigation as demobilizing for social movements,[84] Brown-Nagin demonstrates that litigation can often serve as a focal point for grassroots activism: "[L]egal and political approaches to pursuing equality were not incompatible."[85] The book includes chapter and section titles like "Local People as Agents of Constitutional Change" and "How Do Citizens Shape Law?" To say that ordinary people have agency is to say that, to some extent, they can affect the social, political, economic, and legal structures in which they live. If we think in terms of the basic challenge of writing socio-legal history, these claims of bottom-up agency serve as the connective tissue linking the world of everyday people with the dynamics of formal legal change.

How exactly does a local actor become an agent of constitutional change? Brown-Nagin suggests two dynamics at play. One, involving the enforcement of legal norms, offers a fully persuasive account of bottom-up agency in action. Ordinary people can exert considerable resistance to law when it does not align with their own beliefs and experiences: "In the end, local people determine

precisely [its] appreciation for complexity that constitutes the greatest strength of *Courage to Dissent*, in a field where broad, thesis-driven narratives have dominated the debate.").

83. Brown-Nagin has engaged in some level of descriptive theorizing in her previous work. For example, in her 2005 *Columbia Law Review* article, "Elites, Social Movements, and the Law: The Case of Affirmative Action," she examines the litigation and activism surrounding the Supreme Court's rulings in the Michigan affirmative action cases of 2003, *Grutter v. Bollinger*, 539 U.S. 306 (2003), and *Gratz v. Bollinger*, 539 U.S. 244 (2003). She concludes that social movements—defined as "politically insurgent and participatory campaigns for relief from socioeconomic crisis or the redistribution of social, political, and economic capital"—"are generally incompatible with constitutional litigation." Brown-Nagin, *Elites*, *supra* note 6, at 1439 (citation omitted). One of the key contributions of this article is to emphasize the different ways in which constitutional law and the rights-centered discourse it encourages can hinder social movement mobilization. A focus on rights can offer a powerful, inspirational focal point for mobilization. But it can also hem in mobilization efforts, for "social movements that define themselves through law in the courts risk undermining their insurgent role in the political process, thus losing their agenda-setting ability." *Id.* at 1443. *Courage to Dissent* seems to offer a more optimistic, if still measured, appraisal of the potential for a symbiotic relationship between social-movement mobilization and court-centered reform.

84. *E.g.*, ROSENBERG, *supra* note 26.

85. BROWN-NAGIN, *supra* note 5, at 208.

whether constitutional rules are accepted and implemented."[86] This observation is similar to Klarman's claim regarding the limited capacity of courts to affect commitments that are embedded in society. Klarman emphasizes this argument by pointing to the judiciary's limitations in forcing racial equality upon whites committed to white supremacy.[87] Brown-Nagin demonstrates that whites were not the only ones able to resist legal mandates. Blacks were also able to shape (within limits) the implementation of top-down legal reform. When the NAACP and, after 1954, the Supreme Court called for school integration, black Atlantans found ways to leverage white resistance so as to steer resources to black schools. In this way, Brown-Nagin argues, "local people in Atlanta shaped what meaning *Brown* would have."[88] The ways in which top-down legal developments were leveraged and resisted on the local level is an undeniably important instance of legal agency outside formal legal institutions.

Brown-Nagin's other agency dynamic is a more standard claim for bottom-up legal change. It involves social activists whom she credits with pressuring official legal institutions to change the law. Here, local people act as what Brown-Nagin describes as "law makers."[89] On this count, some of the book's arguments, while suggestive and plausible, are underdeveloped. Lines of connection feel strained in places, with causal claims reliant on underexamined assumptions. Take, for example, Brown-Nagin's identification of the 1964 Civil Rights Act as an instance in which there was a direct link between local activism and constitutional change.[90] The argument here is quite simple: civil rights protests in Atlanta led Mayor Allen to accept the need for federal intervention, and Allen's support played a key role in the passage of the landmark federal civil rights law.[91] But

86. *Id.* at 403.

87. *See, e.g.*, KLARMAN, *supra* note 26, at 461 ("Because white supremacy depended less on law than on entrenched social mores, economic power, ideology, and physical violence, the amount of racial change that litigation could produce was inevitably limited.").

88. BROWN-NAGIN, *supra* note 5, at 109.

89. *Id.* at 7, 431.

90. I fully accept the implication here that the passage of the Civil Rights Act marked not only an expansion of federal civil rights law, but also a basic change for American constitutionalism. *See* Ernest A. Young, *The Constitution Outside the Constitution*, 117 YALE L.J. 408 (2007); *see also* Christopher W. Schmidt, *The Sit-Ins and the State Action Doctrine*, 18 WM. & MARY BILL RTS. J. 767, 802–23 (2010) (discussing constitutional debate over the passage of the Civil Rights Act of 1964); Rebecca E. Zeitlow, *To Secure These Rights: Congress, Courts and the 1964 Civil Rights Act*, 57 RUTGERS L. REV. 945 (2005) (same).

91. *See* BROWN-NAGIN, *supra* note 5, at 247–48 ("President Kennedy turned to Ivan Allen to break the congressional logjam that impeded enactment of a strong civil rights law precisely because of Atlanta's symbolic importance. Protests . . . played a causal role in Allen's embrace of federal intervention. Hence, the Atlanta demonstrations indirectly pushed Congress toward

to really make this point would require attention not only to activists on the ground, and not only to Mayor Allen's strategizing, but also to those people who were directly responsible for the Civil Rights Act—members of Congress, the Kennedy and Johnson administrations, leading opinionmakers—who might have been influenced by the mayor's support (or by the local protests). This becomes tricky terrain, of course, as major legal transformations quickly come to appear hopelessly complex and overdetermined, making vulnerable any narrow causal claims.[92] Nonetheless, some inquiry into the question, or at least reference to other work that has examined the question, would seem required to make a compelling case for agency, if agency is to be defined as influence on legal change at an institutional level.

Agency may be demonstrated in ways other than by influencing formal policy or law, of course. Brown-Nagin argues that speaking out against oppression, organizing citizens, and participating in public debate all are indications of the agency of everyday people. Defined in this way, examples of agency can be readily located—*Courage to Dissent* is filled with them. The question then becomes whether this rather thin definition—one in which agency appears practically everywhere if one is looking for it—is all that helpful. Consider the argument Brown-Nagin offers for the achievements of local welfare-rights activists who fought alongside NAACP lawyers to try to secure a strong school-desegregation decree in the 1970s. They lost their lawsuit, Brown-Nagin notes, yet they "achieved a measure of satisfaction simply by identifying how they were wronged and by asserting rights in court."[93] This is a critically important point: to call power to account is certainly an indispensible element in the exercise of agency. From the perspective of the actors themselves, the act of resistance is paramount. But to say that resistance alone shows agency—without demonstrating from a more generalizable, systemic perspective that some change actually occurred as a result—seems a narrow and not particularly useful conception of agency. To show ordinary people acting as agents of change would seem to require showing the changes that can be attributed, directly or indirectly, to their actions.

passage of the 1964 Civil Rights Act. Contrary to the claims of the Act's sponsors, civil disobedience *did* help to bring equal protection under the laws.").

92. Consider the ink spilled over the causes of the "Constitutional Revolution of 1937." *See, e.g.*, Symposium, *The Debate over the Constitutional Revolution of 1937*, 110 AM. HIST. REV. 1046, 1046–1115 (2005); Symposium, *Twentieth-Century Constitutional History*, 80 VA. L. REV. 1, 201–90 (1994).

93. BROWN-NAGIN, *supra* note 5, at 428.

All of this is offered less as a critique of the book's reliance on agency as an analytical tool for connecting grassroots activism and legal change than as a commentary on how truly challenging it is to make this connection. Once we abandon simplistic assumptions that there are direct lines of causation from protest to Supreme Court doctrine, we are left with the hard work of demonstrating on a more fine-grained level the intersections along the many stages of the society-law continuum. Our focus must necessarily be narrowed. At the center of Klarman's inquiry are the Justices of the Supreme Court; at the center of Goluboff's are elite attorneys; and at the center of Brown-Nagin's are community activists and lawyers. These are choices, all perfectly defensible to my mind, but they necessarily limit the scope of persuasive historical argument.

C. *Dissent, Activism, and Legal Change*

One of the conclusions Brown-Nagin draws from her history is that dissent is the lifeblood of successful social-movement activism:

> At crucial points, the movement benefited from the conflict that percolated—sometimes intensely—among the NAACP, LDF, and local civil rights groups. Even when conflict did not produce immediate benefits, dissenters pointed out flaws in dominant approaches. . . . [T]he friction between and among lawyers and political activists over ideology and methods often energized the civil rights movement in Atlanta.[94]

Dissent—and its correlative, democracy—is good not only for society at large, but also as an organizing principle for groups dedicated to reforming society. The civil rights movement was most effective when it drew in a larger number of voices, not only because it had wider support, but also because it took into account a broader array of issues, particularly those of the black working class.[95] Pragmatists were forced to accept more aggressive and confrontational techniques and a more sweeping critique of Jim Crow; NAACP civil rights lawyers were pressured to play a more supportive role in direct-action protest; and student radicals benefited from being required to "modulate their protests in ways consistent with lawyers' tactical objectives."[96] Brown-Nagin celebrates a "legal culture that . . . was open to goals and approaches developed by local citizens out of the clash of ideas and political dissensus."[97]

Of course, dissent and democracy in social movements can cut both ways, as Brown-Nagin acknowledges. For those dedicated to

94. *Id.* at 432.
95. *See, e.g.*, *id.* at 173–74 (discussing impact of student activists on the movement).
96. *Id.* at 174.
97. *Id.* at 441.

mobilization and legal change, dissent is often precisely what they want to avoid. Consider, for example, the NAACP as it pursued its school-litigation campaign. As Brown-Nagin well documents, ambivalence, even outright opposition, to school-desegregation litigation was widespread within the black community throughout the period leading up to *Brown* and in the years immediately following. For this reason, one of the unrecognized achievements of the NAACP was to rally black skeptics and neutralize those who refused to go along. Thurgood Marshall and his legal team certainly knew the extent of resistance, but they dismissed this particular dissenting voice as illegitimate. Marshall "had no patience for uncertainty about school desegregation," Brown-Nagin writes.[98] He dismissed black opponents as accommodationists, as people who were too beaten down and too fearful to stand up for their constitutional rights. This was a deeply unfair characterization, and one of the great contributions of *Courage to Dissent* is to give sympathetic (while not uncritical) attention to those who embraced this particular strand of intraracial dissent.

The interesting question is whether Thurgood Marshall and his colleagues were necessarily wrong for forging ahead in this instance. To make a compelling case before the court of public opinion and the U.S. Supreme Court, Marshall portrayed the issue as one of simple justice. Not only was the wrongness of racial segregation obvious, but so was the solution. It was a top-down, federally enforced mandate to end segregation as soon as possible. The obviousness of this solution would have been undermined if the considerable dissent within the black community on the question of remedies was given the respectful hearing that it perhaps deserved.[99]

Similar questions arose in the later eras that Brown-Nagin describes. The direct-action phase of the movement in the early 1960s was effective not only when dissenting voices were heard, but also when there was a general consensus on key issues of targets and tactics. Dissent energized the civil rights community by introducing new and powerful ways of undermining segregation. But dissent also pulled valuable alliances apart—a fact that the student movement

98. *Id.* at 108.

99. Marshall's actions here do not come off well in Brown-Nagin's account. *See, e.g.*, *id.* at 102 ("Marshall and his staff barreled ahead with the direct assault, convinced of its rightness, working on the assumption that local people who might disagree would eventually bend to LDF's will.").

experienced with particularly disillusioning consequences in the mid- and late 1960s.[100]

Dissent is a powerful theme for Brown-Nagin because it highlights the intergenerational conflicts and intraracial tensions that stand out among the book's most innovative elements. Assuming for the sake of argument that such things can be asserted with any level of accuracy, perhaps, on balance, voices of dissent did more to strengthen than to weaken civil rights activism.[101] But perhaps here is another place to insert the historian's plea for complexity. Dissent (like litigation) can be generative and empowering, and (like litigation) it can work in precisely the opposite manner.

When it comes to the value of dissent to protest movements, I suspect that Brown-Nagin abandons her resistance to broad claims because voicing dissent remains such a vital weapon for the powerless. And if there is one constant in her book's dynamic, complex historical account, it is the marginalization of the interests of the black working class. This marginalization was "a remarkable point of convergence among lawyers and activists for racial change."[102] To champion the cause of poor and working-class African Americans, as Brown-Nagin clearly does, is to champion the weapon that no amount of repression or inattention can take away. When there is a stable consensus across generational and racial lines that minimizes the needs of poor blacks, dissent serves a constant role in challenging this consensus.

CONCLUSION

Courage to Dissent is quite simply the best legal history of the civil rights movement. Although centered on Atlanta, it offers the most comprehensive account of movement mobilization and legal change in the civil rights era in the scholarship today. No other legal scholar has gone as far in telling the story of the movement on such a grand scale. Brown-Nagin captures the complex dynamics of activism, intraracial tension, generational conflict, and legal mobilization as they unfolded over four decades. She draws attention to class and gender conflict as central factors in the long civil rights movement. She brings to the foreground a large cast of African-American men

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100. *See, e.g.*, *id.* at 300 (describing 1966 as spawning "a maelstrom of dissent within the civil rights movement").

101. Perhaps the value of dissent varies over the life cycle of social-movement mobilization. It clearly serves a critical role in the early, formative stages, when dissenting claims serve to define and unify a movement's mission. But at later stages dissent within a movement often functions as a key factor in its dissolution.

102. BROWN-NAGIN, *supra* note 5, at 434.

and women—a few familiar names and many less familiar, lawyers and nonlawyers, some from relatively privileged backgrounds and some raised dirt poor—and presents them as the primary agents of legal change. This is a compelling and challenging book. That it does not fully resolve all the questions it raises is, as this Essay has sought to demonstrate, a testament to its ambition and to the difficulties inherent in writing persuasive legal histories of social movements. Brown-Nagin's book stands as one of the small number of essential texts in the field of modern American legal history.