
BOOK REVIEW

LAW AND LOCAL KNOWLEDGE IN THE HISTORY OF THE CIVIL RIGHTS MOVEMENT

COURAGE TO DISSENT: ATLANTA AND THE LONG HISTORY OF THE CIVIL RIGHTS MOVEMENT. By Tomiko Brown-Nagin. Oxford: Oxford University Press. 2011. Pp. xi, 578. \$34.95.

*Reviewed by Kenneth W. Mack**

We live in chastened times. A generation ago, young legal academics often desired to explain how the Supreme Court could be an effective participant in the social controversies of the day, and young liberal lawyers believed that public impact litigation could be an effective strategy for social reform.¹ The most visible evidence for that optimism was the NAACP's desegregation litigation that led to the Court's decision in *Brown v. Board of Education*,² which was conventionally seen as the opening act of the civil rights movement.³ At present, such dreams seem hopelessly utopian. Ambitious legal scholars now make their careers by explaining how, as a descriptive or normative matter, one should not expect courts to be agents of social change.⁴ Conservative lawyers, rather than liberals, spend decades developing strategies to effect public policy through the judiciary.⁵ Nominees to the Supreme Court routinely express the requisite reverence for the Court's decision in *Brown*, and the equally requisite aversion to the judicial role that people once thought the decision symbolized.⁶ Historians,

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¹ See LAURA KALMAN, THE STRANGE CAREER OF LEGAL LIBERALISM 1–10 (1996); Harry Brill, *The Uses and Abuses of Legal Assistance*, PUB. INT., Spring 1973, at 38.

² 347 U.S. 483 (1954).

³ See, e.g., C. VANN WOODWARD, THE STRANGE CAREER OF JIM CROW 147 (3d rev. ed. 1974); Owen Fiss, *A Life Lived Twice*, 100 YALE L.J. 1117, 1118 (1991).

⁴ See MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 5–6, 443 (2004); GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 9–169 (2d ed. 2008); BARRY FRIEDMAN, THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION 381 (2009); CASS R. SUNSTEIN, A CONSTITUTION OF MANY MINDS: WHY THE FOUNDING DOCUMENT DOESN'T MEAN WHAT IT MEANT BEFORE 142 (2009).

⁵ See generally STEVEN M. TELES, THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT: THE BATTLE FOR CONTROL OF THE LAW (2008).

⁶ See, e.g., *Confirmation Hearing on the Nomination of Hon. Sonia Sotomayor, to Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 398–99 (2009).

too, who once celebrated the NAACP's school desegregation litigation as a guidepost on the road to racial equality, marked the half-century anniversary of the decision in 2004 with more regret than celebration.⁷ Some even lamented the disappearance of the black autonomy that is thought to have existed in a segregated society.⁸ In our own time, it has become common to rely on a familiar trope of social thought to explain these changing opinions on the role of law in American life. We are social realists now, the argument goes, and have left behind the liberal idealism of an earlier age.⁹ In *Courage to Dissent: Atlanta and the Long History of the Civil Rights Movement*, Professor Tomiko Brown-Nagin steps into this contentious territory to show what legal history can contribute to a field where academic writing and political culture seem to have reached a confluence. She uses the local story of the movement in Atlanta to challenge what is fast becoming the received wisdom about an era whose history has become a touchstone for a much larger set of debates about the role of law in American life.

Courage to Dissent addresses the role of the judiciary as a participant in the political conflicts of the day — an issue about which Americans are still ambivalent, even as they have exported the idea of a Supreme Court with the power of judicial review around the world. The book is divided into three parts, each of which critiques a particular school of scholarship on law and social change during the civil rights era. First, Brown-Nagin orients herself against a view of civil rights law and history that might be termed “legal liberal,” the familiar narrative that focuses on national actors like the NAACP and its campaign to convince the Supreme Court to invalidate de jure segregation.¹⁰ Second, she critiques a group of scholars who claim that the NAACP's Supreme Court litigation was, for the most part, ineffective and mobilized opponents of integration more than it did those who

⁷ See, e.g., *Round Table: Brown v. Board of Education, Fifty Years After*, 91 J. AM. HIST. 19 (2004).

⁸ See, e.g., DAVID S. CECELSKI, *ALONG FREEDOM ROAD: HYDE COUNTY, NORTH CAROLINA, AND THE FATE OF BLACK SCHOOLS IN THE SOUTH* 7–10, 173–74 (1994); Adam Fairclough, *The Costs of Brown: Black Teachers and School Integration*, 91 J. AM. HIST. 43, 43–44 (2004) (collecting sources).

⁹ KLARMAN, *supra* note 4, at 449 (“[T]he romantic image of the Court . . . is probably unrealistic.”); FRIEDMAN, *supra* note 4, at 380–81. The realism versus idealism trope is of long vintage. See, e.g., BRIAN Z. TAMANAHA, *BEYOND THE FORMALIST-REALIST DIVIDE* 13–110 (2010) (criticizing the claim made by the Legal Realists of the 1920s and 1930s that they were more “realist” than their predecessors). Legal academics continue to invoke social realism. See, e.g., Jerry Kang & Mahzarin R. Banaji, *Fair Measures: A Behavioral Realist Revision of “Affirmative Action”*, 94 CALIF. L. REV. 1063, 1064–65 (2006) (invoking the “behavioral realism” of social psychology in the debate over the constitutional status of affirmative action).

¹⁰ See generally Kenneth W. Mack, *Rethinking Civil Rights Lawyering and Politics in the Era Before Brown*, 115 YALE L.J. 256 (2005) (arguing that the legal liberal interpretation of civil rights history should be viewed with caution).

sought to challenge the status quo.¹¹ Third, she criticizes those scholars who contend that desegregation — particularly in the schools — was an elite, idealistic project that did not mesh with the desires of local black communities that often simply wanted good schools for their children.¹² All three bodies of scholarship, she contends, wrongly view civil rights history through the prism of the national organization that claimed to speak for African Americans — the NAACP — and the Supreme Court litigation that became the organization’s most visible project.

Although she doesn’t frame it that way, Brown-Nagin is asking a question of representation — who can speak for members of a minority group? On the local level, she contends, many actors competed with each other to determine who could represent black people, and no one truly spoke for African Americans as a whole.¹³ Moreover, blacks and whites often took unexpected positions in Atlanta’s politics of race — at least from the perspective of the existing scholarship on law during the civil rights movement. Posing the question of representation also allows Brown-Nagin to make an intervention in the ongoing debate over the role of law during the civil rights movement. Law, including Supreme Court decisions, often helped and hindered the participants in civil rights-era controversies in unexpected ways, she argues. Presenting what she calls “a bottom-up historical analysis,” Brown-Nagin concludes that “an incredibly complex picture emerges” of the legal and social history of Atlanta’s civil rights movement (p. 84). It is precisely that appreciation for complexity that constitutes the greatest strength of *Courage to Dissent*, in a field where broad, thesis-driven narratives have dominated the debate.

I. CIVIL RIGHTS LEGAL HISTORY, FROM THE BOTTOM UP

The book’s title, *Courage to Dissent*, is taken from a 1966 statement by the then-young Atlanta activist (now NAACP elder statesman) Julian Bond, who won election to the Georgia House of Representatives but was excluded from that body after he criticized the Vietnam War. In defending himself against the firestorm that his comments produced, Bond stated that “I hope . . . that throughout my life I shall always have the courage to dissent” (p. 262). The young ac-

¹¹ See, e.g., Michael J. Klarman, *How Brown Changed Race Relations: The Backlash Thesis*, 81 J. AM. HIST. 81 (1994).

¹² See, e.g., Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470 (1976).

¹³ Representation, as used here, refers to the question of whether any one person or organization can speak with the voice of an entire racial group. See KENNETH W. MACK, REPRESENTING THE RACE: THE CREATION OF THE CIVIL RIGHTS LAWYER (forthcoming 2012).

tivist's stance placed him far outside the civil rights mainstream, and Brown-Nagin frames her book as an examination of those African Americans who chose to dissent from national civil rights orthodoxy. She begins with the "pragmatic civil rights" vision of Atlanta lawyer A.T. Walden, who dominates the first part of her book. Born in rural Georgia only two decades after the close of the Civil War, Walden was intimately familiar with "[t]he ways of white folks in the South — what they would and would not permit blacks to do" (p. 27). He used that local knowledge to carve out a role for himself that was distinct from the more confrontational approach of the lawyers in the NAACP's national office, such as Thurgood Marshall and Charles Houston. Walden was a leading figure among the practical-minded Atlanta black leadership that "sought to preserve the economic self-sufficiency that black elites had achieved under Jim Crow, expand black political influence, and preserve personal autonomy" (p. 2).

In the first part of *Courage to Dissent*, which covers the 1940s and 1950s, Brown-Nagin explains why Walden and the black leadership "did and did not turn to litigation" (p. 19) when confronted with discrimination in voting rights, housing, schools, and public places. When dealing with the national NAACP, Walden often gave the impression that he was eager to attack all forms of race discrimination (p. 18). In Atlanta, however, he picked his targets carefully. Sometimes, he moved forcefully. For instance, in the wake of the NAACP's 1944 victory in *Smith v. Allwright*,¹⁴ in which the Supreme Court invalidated the Texas Democratic Party's whites-only primary, Walden moved so aggressively to protect black voting rights and register African Americans to vote that the Ku Klux Klan planned to kill him (pp. 41–58).

In other areas, however, Walden and the Atlanta leadership moved with less dispatch. Some local African Americans pushed to take advantage of the Supreme Court's ruling in *Brown v. Board of Education* — but the breakthrough victory came in a case that desegregated the local municipal golf course, and the leadership was divided about the wisdom of even that limited challenge to segregation (pp. 115–20). In most other public places, the black leadership usually asked for more resources and better treatment in segregated parks, pools, and playgrounds (p. 116). They waited years before bringing a legal case to desegregate the local buses, despite a Supreme Court decision, *Gayle v. Browder*¹⁵ (which ended the Montgomery Bus Boycott), that allowed them to demand desegregation as a matter of right (pp. 122–28). With regard to housing discrimination, too, black Atlanta moved slow-

¹⁴ 321 U.S. 649 (1944).

¹⁵ 352 U.S. 903 (1956) (mem.) (per curiam).

ly in the aftermath of the NAACP's victory in *Shelley v. Kraemer*,¹⁶ in which the Supreme Court ruled that racially restrictive covenants were unenforceable.¹⁷ While the national NAACP and local civil rights advocates around the country filed housing cases throughout the 1950s (including one in Savannah, Georgia, where Walden provided assistance), the Atlanta leaders negotiated with white officials for more housing to be opened to blacks, but only in areas that were contiguous with existing black neighborhoods (pp. 59–82).

School desegregation followed a similar pattern. In a 1943 suit to abolish pay inequities between black and white teachers within the segregated schools, Walden displayed uncharacteristic anger, pounding his fist on the table for emphasis (p. 92). But when Walden and the national NAACP filed a suit in 1950 that asked for desegregation of the Atlanta schools or, in the alternative, equalization of resources in black and white schools, it divided the black community like nothing else (pp. 98–99). Morehouse College President Benjamin Mays, an important mentor to Martin Luther King, Jr., stated publicly that he wasn't even sure blacks wanted integration (pp. 101–03). After the victory in *Brown*, the Atlanta branch of the NAACP declined to push its lawsuit and spent years petitioning the school board to implement desegregation, to no avail (pp. 109–11). In all these controversies, Atlanta's black leadership made common cause with a group of equally pragmatic local whites, led by longtime Atlanta mayor William Hartsfield, who were determined to chart their own local path out of Jim Crow.

The first part of Brown-Nagin's book serves as a cautionary tale for those who would downplay the problem of representation when writing about historically disadvantaged groups, or who would believe that such a problem can be resolved easily. On the surface, it often seemed as though people like Walden and the NAACP spoke with one voice, and that dissenters were cowards — “accommodationists” as the historical literature calls them.¹⁸ But Walden had good reasons for his pragmatism, given the diversity of local black opinion on matters of desegregation and the potential for violence and backlash that always lay beneath the surface during each civil rights controversy.

Likewise, those scholars who ask whether the Supreme Court could or did eradicate Jim Crow by itself are asking a question that would have been intelligible only within the NAACP's national office — and probably not even there, as will be discussed below. On the local level, “advocates participated in litigation both less frequently and more op-

¹⁶ 334 U.S. 1 (1948).

¹⁷ *Id.* at 20.

¹⁸ See generally AUGUST MEIER, *NEGRO THOUGHT IN AMERICA, 1880–1915: RACIAL IDEOLOGIES IN THE AGE OF BOOKER T. WASHINGTON* (1963).

portunistically than is often presumed" (p. 11). They declined to assert clear legal rights when such claims might have provoked repression, and used some Supreme Court victories strategically to wring more resources out of a segregated system. But they could also aggressively push to implement a Court ruling when it was politically advantageous. Supreme Court rulings were often pragmatically useful to people like Walden in ways that the existing literature on civil rights—era law and social change largely misses. Walden and his allies were also a middle-class leadership and, as Brown-Nagin reminds the reader, they negotiated compromises that arguably buttressed their own power and left poorer blacks underserved (pp. 21–22, 38–39). Like most people, Walden saw the world through the eyes of persons like himself. In his voting advocacy, for instance, he had little sympathy for those blacks who, for a variety of reasons, found it difficult to exercise the formal voting rights that he had helped to create (p. 58). Inevitably, a new corps of dissenters arose to challenge the representativeness of those leaders, and those new dissenters would change just about everything in Atlanta's civil rights politics.

The second part of *Courage to Dissent* focuses on the student protest movement that broke out throughout the South after four black students sat in at a whites-only North Carolina lunch counter in February of 1960. As the demonstrators organized themselves into the Student Nonviolent Coordinating Committee (SNCC), headquartered in Atlanta, the new movement threatened to sweep the local biracial coalition aside (p. 136). Led by local student leaders Bond and Lonnie King, the young Atlanta sit-in protesters took inspiration from the *Brown* decision — at least negatively. They began by issuing a manifesto that stated: "We do not intend to wait placidly for those rights which are legally and morally ours to be meted out to us one at a time" (pp. 148–49). They were impatient with their elders' lack of progress in delivering the rights that they thought the Court had given them. In March 1960, the students launched a local sit-in movement that forced Walden and his black allies to stop negotiating for freedom and instead to file a series of lawsuits to desegregate public accommodations in selected Atlanta locales (pp. 137–38, 149–51). Over the next year, the students and the old guard developed a dialectical relationship. As both sets of civil rights advocates competed and cooperated with one another, and also negotiated with Mayor Hartsfield, each made strategic moves in response to the entreaties, or the threats, of the other (pp. 149–64).

The Supreme Court gave the students a crucial boost in December, when the NAACP convinced it to rule that the Interstate Commerce Act protected a black student who was denied service at an interstate

bus terminal in Virginia.¹⁹ The students — perhaps mistakenly — seemed to read the decision as an affirmation of their right to service in local public accommodations. They announced a new round of sit-ins where protesters would refuse bail when arrested, and the students pledged to continue their call for a boycott of downtown merchants that excluded blacks from their eating facilities. With the city at an impasse and tensions rising, Walden stepped in to help negotiate a compromise agreement, and Martin Luther King, Jr., helped convince the sit-in protesters to accept it. That agreement resulted in a carefully managed desegregation of selected local eating facilities in the fall of 1961 (pp. 164–71).

The students believed that their direct action tactics made them more authentic representatives of ordinary black people than the pragmatists or the national NAACP were, but the young activists soon found that representation was indeed a slippery concept. In Atlanta and throughout the South, the students desperately needed lawyers to defend them when they were arrested and to arrange for bail funds, and thus found themselves reliant on the NAACP (pp. 182–83). The venerable organization's leaders believed they could dictate strategy to their young rivals. As a result, the young activists found themselves linked to an organization that they believed could no longer speak for the masses of black southerners.²⁰ Moreover, the NAACP's lawyers seemed to represent the virtues of carefully managed and often-ineffective legalism, while direct action promised both confrontation and more immediate challenge to local segregationist power (pp. 199–200).

The young Virginia lawyer Len Holt supplied an alternative view, which Brown-Nagin calls “movement lawyering,” in contrast to the “top-down” approach of the NAACP, or Walden's “pragmatic lawyering” (pp. 177, 190). Holt invented a litigation tactic he called “omnibus litigation” (p. 194). An omnibus suit attacked legal segregation in almost every aspect of public life in a locality — hospitals, cemeteries, swimming pools, parks, buses, public housing, city employment, teacher assignments — in one lawsuit. It might name dozens of local officials as defendants. Along with Holt's confrontational courtroom persona, it was designed to inspire local communities to throw off the chains of segregation themselves, regardless of how the courts ruled on the suit (p. 194). Holt believed that omnibus suits should originate with activists and local communities themselves, not lawyers, and worked to convince SNCC that his ideas could mesh with its direct ac-

¹⁹ See *Boynton v. Virginia*, 364 U.S. 454 (1960).

²⁰ For the sake of clarity, in the text for the most part I do not distinguish between the NAACP and its closely allied former litigating arm, the NAACP Legal Defense and Educational Fund.

tion tactics (pp. 175–76, 187–94). With his help, four young activists filed such an omnibus suit, pro se, in the Atlanta federal court on the seventh anniversary of the *Brown* decision. In August 1962 the suit produced something Walden had not achieved in his piecemeal public accommodations suits — a ruling that a wide variety of Atlanta ordinances requiring segregation were unconstitutional. It took several more years of student protest and activism, however, to complete the desegregation of the facilities covered in the omnibus suit (pp. 195–98).

The events of 1962 seemed to buttress the sit-in protesters' belief that they had found a way to speak for both the masses of black Atlantans and the virtues of movement lawyering, but things quickly grew more complicated. In a series of rulings, the Court came close to, but then backed away from, holding that sit-ins in private establishments were protected by the Fourteenth Amendment. Brown-Nagin concludes that "the Supreme Court largely remained a bystander" (p. 249) in the national public accommodations debate; however, recent work by Christopher Schmidt challenges that characterization.²¹ In this uncertain legal environment, the sit-in protesters blocked traffic and used other more confrontational tactics, while local authorities began to prosecute them aggressively under state trespass laws (pp. 222–23). The Civil Rights Act of 1964 combined with these other developments to bring the controversy to a tentative resolution (pp. 218–31). Meanwhile, the students were drawn into high-profile legal battles, including Bond's challenge to the Georgia legislature's refusal to seat him (p. 266) and an effort to defend the former student activist Stokely Carmichael after local authorities accused him of inciting a riot in the poor black section of the city (pp. 280–84). The sit-in protesters announced a shift to a "war on Atlanta's slums" (p. 269), but their energy soon dissipated (pp. 297–300).

The drama of the high-profile litigation seemed to occupy most people's attention, including Brown-Nagin's. But perhaps that is her point. "The right to be represented in the decision-making process — and the right to participate in decision-making — were distinct concepts," she notes (p. 303). Like the pragmatists before them, the young protesters found themselves standing in for poor black Atlantans, who seemed to have little voice in the conflicts being waged in their name.

Brown-Nagin's account of the young sit-in protesters is probably her most original contribution to scholarship in this area. She teases out a complicated process that ultimately swept in the students, the pragmatists, the national NAACP, and the Supreme Court, as various

²¹ Christopher W. Schmidt, *The Sit-Ins and the State Action Doctrine* (Aug. 2009) (unpublished manuscript), available at http://works.bepress.com/christopher_schmidt/24 (arguing that the Court's resolution of the sit-in cases profoundly influenced the way that Congress and the Executive Branch drafted Title II of the Civil Rights Act of 1964).

actors reacted to one another in ways that completely upend the conventional debate over the Court and the civil rights movement. Students found “movement lawyering,” as well as the traditional lawyering of the pragmatists and the NAACP, to be of immense use in their direct action struggles. Civil rights protesters took inspiration — both positive and negative — from what the Court was doing and found themselves increasingly entangled with law and lawyers. A Supreme Court decision gave a jolt to the movement at an opportune time. Litigation could be quite effective, when buttressed by the actions of local protest movements. However, Brown-Nagin argues, when the pragmatists and the students litigated without such support, desegregation decrees took a long time to implement and were less effective than the students’ omnibus litigation (pp. 195–98). In the end, the students who organized to speak for the people wound up doing exactly that — speaking *for* poor black Atlantans, and not with them. It is to that unheard population’s story that the final part of *Courage to Dissent* turns.

The third part of *Courage to Dissent* begins with the “curious silence” of the young protesters and the traditional local leaders on the subject of school desegregation, even as they mounted aggressive direct action and litigation campaigns to challenge race discrimination in other areas (p. 307). Constance Baker Motley, a prominent lawyer for the NAACP Legal Defense and Educational Fund (LDF), eventually took charge of a class action lawsuit, *Calhoun v. Latimer*, brought to desegregate the Atlanta schools (pp. 309–10). But the local black leadership was unwilling to get squarely behind it. Meanwhile, U.S. District Judge Frank Hooper was determined to read *Brown* as requiring only the removal of explicit color bars, rather than affirmative steps to ensure that blacks and whites attended the same schools (pp. 312–14). In Atlanta, as elsewhere, the city now relied on residential segregation (which it had promoted, in concert with the pragmatists) to keep the schools segregated. The city eventually won court approval of a plan that produced only token desegregation (pp. 316–26). Brown-Nagin argues that Motley viewed the lawsuit as a process where initiative stayed with the lawyers. Thus, the LDF lawyer took few steps to cultivate the mass support that might have placed more pressure on Hooper and the local authorities (pp. 333–39).

Two Supreme Court opinions, issued in 1969 and 1971,²² broke open the fragile peace and exposed fissures between the national NAACP and the local leadership, and within the local black community itself. After years of equivocating, the Court finally ruled that for-

²² See *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971); *Alexander v. Holmes Cnty. Bd. of Educ.*, 396 U.S. 1218 (1969) (Black, J., opinion in chambers).

merly segregated school districts had to take affirmative steps to ensure that black and white children attended school together, and that busing was a permissible remedy to achieve this result.²³ With integration looming as a possibility, whites began fleeing the Atlanta school system in great numbers. The national NAACP and its former litigating arm, the LDF, which it had spun off years earlier for tax reasons, both remained steadfast in support of maximum pupil integration in the formerly segregated schools (pp. 360–73, 376).

In Atlanta, Lonnie King, the onetime student leader who was now president of the moribund local NAACP chapter, and Benjamin Mays, now head of the local Board of Education, saw things differently, as did many black teachers and administrators who had often publicly disavowed school desegregation. Teachers and educators were the backbone of the black middle class, in Atlanta and elsewhere in the South, and protected their own interests. Former insurgents like King were now part of an emerging local black political class, and sought to buttress African American political power. Others, like Mays, had long equivocated about their desire for integration, given local whites' commitment to maintaining segregation. King, Mays, and others among the local black leadership began secretly negotiating with local white leaders, and formulated a plan that would combine a small amount of busing with significant increases in opportunities for black teachers and administrators to obtain jobs in formerly white schools (pp. 373–78). When the LDF insisted on pupil integration, King tried to fire the LDF counsel and to substitute lawyers of his own choosing to represent the plaintiff class, but the two sides soon made up and disavowed any dissention between them (pp. 376–82). The national leadership of the NAACP and LDF later objected to the settlement, but it was now too late. In 1974, the district court approved a final settlement in the *Calhoun* litigation that ensured jobs for black teachers and administrators but deemphasized efforts to attain pupil integration (pp. 391–400).

The “Atlanta compromise” — as Brown-Nagin calls the settlement (p. 395), deliberately evoking Booker T. Washington’s famous address where he promised to accede to segregation in exchange for economic opportunity²⁴ — served the needs of upwardly mobile blacks, but who spoke for the poor? That is the last subject the book takes up, and it provides a sobering answer. Brown-Nagin argues that poor blacks found their voice, in part, in *Armour v. Nix*, a suit filed under the aus-

²³ See *Swann*, 402 U.S. at 28–31.

²⁴ See Booker T. Washington, President, Tuskegee Normal and Indus. Inst., Address at the Cotton States and International Exposition: The Atlanta Compromise (Sept. 18, 1895), in *RIPPLES OF HOPE: GREAT AMERICAN CIVIL RIGHTS SPEECHES* 132, 134 (Josh Gottheimer ed., 2003).

pices of the ACLU in 1972, which claimed that local authorities were complicit in setting the residential patterns that allowed the schools in Atlanta and its suburbs to remain segregated. The suit was consolidated with *Calhoun* and affected the momentum for the Atlanta compromise (pp. 373–74). However, the most striking thing about the new suit was the plaintiffs. Many of the *Armour* plaintiffs were poor black women, who showed up in court to assert forcefully that they wanted better schools for their children and that better schools were the ones that were integrated (pp. 412–14). They were led by Ethel Mae Matthews, founder and president of the Atlanta chapter of the National Welfare Rights Organization (p. 385). The proceedings in *Armour* continued for several years after the compromise settlement was reached in *Calhoun*, but were ultimately dismissed for lack of a showing of discriminatory intent (p. 425). Although their voices were often drowned out by those of their own lawyers, the poor plaintiffs believed that they “achieved a measure of satisfaction” — “agency” as Brown-Nagin calls it (p. 428) — just by being able “to confront power brokers on behalf of those on society’s bottom rungs” as they sparred with the defendants’ lawyers in court (p. 429). That was as much satisfaction as they would ever receive from a controversy where the black and white local leadership seemed to hold all the trump cards.

Brown-Nagin thus ends her narrative by taking up a subject about which much ink has been spilled — the divisions among African Americans about the NAACP’s desegregation strategy — and she directly challenges the terms of a debate that has often pitted idealist integrationist lawyers against practical-minded defenders of all-black schools. In some contexts, segregation did promote black autonomy, as some of the nostalgic writing on the Jim Crow era has contended, but in Atlanta, it was the autonomy of a self-interested middle class that used desegregation the same way it had used segregation — to promote its own interests. Many poor black parents viewed desegregation not as an idealistic project imposed from above, but as a way to get better education for their children — which was exactly how Charles Houston had defended it at the beginning of the NAACP’s school campaign.²⁵ But the LDF was incapable of taking advantage of that potential support, as lawyers like Jack Greenberg and James Nabrit III openly disdained local input into the increasingly fractious national politics of integration (pp. 390, 402). Brown-Nagin, however, avoids the temptation to dismiss the local middle-class leadership as misguided. As she notes, there were pragmatic benefits to be gained through the strategic use of desegregation litigation, even if the deal the leadership struck ultimately turned out to be a bad one. No one

²⁵ See Charles H. Houston, *Educational Inequalities Must Go!*, 42 THE CRISIS 300 (1935).

group of actors had the right answer (p. 428). No one truly represented African Americans as a group, for that would have been an impossible task.

Courage to Dissent will be rightly celebrated for what it is: a textbook example of how local knowledge can be applied to a set of debates that often take place at a high level of generality — those over racial representativeness, and over the role of law in the Jim Crow era. Brown-Nagin is directly challenging much of the thesis-driven work that has been done in this area. It has often been contended that the NAACP's school desegregation campaign was an idealistic, middle class-inflected project that crowded out other constitutional visions that might have been more useful to ordinary African Americans.²⁶ It has also become an article of faith among many political science-oriented legal scholars that the *Brown* litigation was ineffective and mobilized opponents, rather than proponents, of integration. On the local level, Brown-Nagin argues, no one was doing what this scholarship assumes. Local black leaders were using the Court's rulings strategically, or ignoring them when that was useful. Middle-class black Atlantans wanted black-controlled institutions, while working-class blacks desired integrated schools. Supreme Court rulings gave an impetus to civil rights protesters in ways no one could have imagined. The paradigmatic anti-“legal” direct action movement, the students affiliated with SNCC, deployed its own brand of litigation that was more ambitious than that of the supposedly legalistic NAACP. Local white leaders sometimes accommodated themselves to part of what the Supreme Court was demanding, but used ambiguities in its desegregation rulings to manage change at their own pace. With an exhaustively researched and detailed analysis of local context — perhaps too exhaustively for the nonspecialist reader — Brown-Nagin demonstrates a complicated relationship between law and social change that would otherwise be invisible.

II. SOCIAL HISTORY VERSUS HISTORICAL ARGUMENT

Courage to Dissent is, unapologetically, a history of law and racial politics in the civil rights movement, and a social history at that. Brown-Nagin believes that it is her task to take the reader inside the worlds of social movement actors during the civil rights era, and to explain in detail why they took certain actions, how they understood and responded to law, and what consequences their actions had for civil rights politics in one important local context. She deploys a methodology of thick local description to challenge some ambitious theories

²⁶ For a recent iteration, see RISA L. GOLUBOFF, *THE LOST PROMISE OF CIVIL RIGHTS* 240–50 (2007).

about the social effects of law. Her claim, at its core, is methodological. Much of the debate about race and law in the civil rights era has invoked history, and has presented historical arguments. But many of the leading works in this field should not be understood as works of history in the conventional sense. That conclusion seems compelling after one finishes reading *Courage to Dissent*. To see how that is so, it is useful to turn to the political science-inspired literature on the Court and the civil rights movement that the first two-thirds of the book explicitly challenges.

Gerald Rosenberg deserves credit for popularizing the argument that *Brown* mattered little in civil rights history. Measuring the effects of *Brown* primarily by how many black children attended school with whites, Rosenberg contended that the Supreme Court accomplished little on the desegregation front until mid-1960s-era congressional enactments and civil rights protests pushed things forward.²⁷ Moreover, he argued that the decision had little effect in sparking civil rights protests or forcing whites to confront the wrongness of segregation.²⁸ He concluded that the NAACP “drained off the talents of people such as Thurgood Marshall” by relying on futile Supreme Court litigation.²⁹ The organization, he contended, should have supported grassroots organizing and direct action movements instead. Thus, direct action and litigation were mutually exclusive avenues for social change, and the NAACP chose the wrong one.³⁰ Michael Klarman has worked in much greater historical detail to generalize Rosenberg’s argument for the entire period between the Court’s decisions in *Plessy v. Ferguson*³¹ and *Brown*.³² He also added an extended discussion on the Court and public opinion. Klarman argued that, for the most part, the Court’s decisions simply reflected majority white opinion and were ineffective in eradicating Jim Crow.³³ He further contended that the NAACP’s legal victory in *Brown* may have slowed the development of direct action movements.³⁴ Klarman also contributed the “backlash thesis,” which was his argument that the main effect of *Brown* was to drive southern politics to the right, and thus to place staunch opponents of integration in political power just as civil rights protesters

²⁷ See ROSENBERG, *supra* note 4, at 49–51.

²⁸ See *id.* at 74–93.

²⁹ *Id.* at 423; see also *id.* at 139–155.

³⁰ See *id.* at 42–156. In the second edition of *The Hollow Hope*, Rosenberg reached basically the same conclusions as he did in the first. See GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (1st ed. 1991).

³¹ 163 U.S. 537 (1896).

³² See KLARMAN, *supra* note 4, at 94–97.

³³ See, e.g., *id.* at 356–57.

³⁴ See *id.* at 377.

were asking local authorities to desegregate.³⁵ Ironically, this backlash furthered civil rights protesters' efforts, by allowing segregation to show its most reprehensible face just as white northerners began to pay sustained attention to southern politics in the early 1960s.³⁶

Despite its historical orientation, this particular school of thought has focused more on the question of what the Court can and cannot do as a general matter than on the more contextual question of how blacks and whites actually responded to the Court, and engaged with law more generally, during the civil rights era. The first of these questions is likely to prompt serious interest from political scientists and scholars of constitutional law, while the second is of more interest to historians. That is, a political scientist might ask a question like this: when and how can the Supreme Court be an effective proponent of social change? A historian, by contrast, would ask: how did blacks and whites respond to a world in which *Brown* had been decided? Historians are committed to explaining what happened in a particular context, while many political scientists are comfortable explaining trans-historical phenomena.³⁷ This distinction between history and political science can be fuzzy around the edges, particularly for someone like Klarman who can write with considerable historical detail. That fact has sometimes led historians to engage the political scientists on their own terms, rather than ask whether they are doing history.³⁸ Brown-Nagin's work, for the most part, addresses itself to historical questions and is engaged in a very different enterprise than the revisionist literature to which she responds.

The political scientists have tried to refute a general model of the relationship between the Court and social change, which Rosenberg calls the "Constrained Court view," and to substitute another model for it.³⁹ They ask historical questions, but narrowly focused ones that al-

³⁵ See *id.* at 385–98; see also Klarman, *supra* note 11, at 94–103.

³⁶ Klarman, *supra* note 11, at 110. Klarman and Rosenberg clearly have read and been influenced by each other's work. Klarman is quite generous in citing Rosenberg's prior work as a source of data for his theses, although not as a source for his own ideas. Rosenberg declines to return even this favor, failing to cite Klarman at all in the second edition of *The Hollow Hope*, save for one small article. ROSENBERG, *supra* note 4, at 481; see KLARMAN, *supra* note 4, at 469 n.4; Klarman, *supra* note 11, at 84–91 nn.4, 5, 6, 9, 10, 15, 18.

³⁷ This is not intended to describe political science as an entire discipline, but rather the particular institutional mode of that discipline that has dominated the debate about the Court and social change.

³⁸ Historians have often responded to the political science-type arguments by debating the narrow questions that the revisionist literature asks, rather than asking whether the revisionists' arguments can be accepted as history. See, e.g., David J. Garrow, "Happy" Birthday, *Brown v. Board of Education? Brown's Fiftieth Anniversary and the New Critics of Supreme Court Muscularity*, 90 VA. L. REV. 693, 712–22 (2004) (reviewing KLARMAN, *supra* note 4); David J. Garrow, *Hopelessly Hollow History: Revisionist Devaluing of Brown v. Board of Education*, 80 VA. L. REV. 151, 158–59 (1994) [hereinafter Garrow, *Hopelessly Hollow History*].

³⁹ See, e.g., ROSENBERG, *supra* note 4, at 9–36.

low them to shed light on general models of law and social change. For instance, they expend much of their effort in asking whether a particular Court decision was enforced — for example, how many black children attended desegregated schools after the Court outlawed segregation. With regard to the broader interactions between law and society during the civil rights movement, they largely narrow their focus to two specific propositions that are related to their model of law and social change: (1) that *Brown* was the primary cause that induced southern African Americans to organize and begin the direct action protests of the 1950s and 1960s, and (2) that *Brown* was a primary cause in inducing many whites to come to believe that *de jure* segregation was wrong. Much of the actual history of how blacks and whites responded to the Court thus falls outside of their purview. A useful example of this tendency to exclude what does not fit within the model comes from their treatment of the Montgomery Bus Boycott, the year-long boycott of segregated buses in Montgomery, Alabama, that is often considered the opening act of the civil rights movement and that catapulted a previously unknown twenty-six-year-old minister named Martin Luther King, Jr., to national prominence.

Both Rosenberg and Klarman limit their discussion of Montgomery to the question of whether *Brown* “directly inspired the boycott.”⁴⁰ This is a useful enterprise if one is formulating a general theory of the Court and social change, but an enterprise with significant limitations if one is writing the history of the role of law in the boycott. For instance, Klarman concludes that “*Brown*’s most significant contribution to the events in Montgomery may have been its impact on whites” in making them more likely to resist the boycotters’ demands.⁴¹ However, for a generation, historians have known that *Brown* was a but-for cause of the boycotters’ eventual victory over the Montgomery authorities. The boycotters’ initial demand was for a more humane form of segregation on the buses. But they needed legal advice and their local lawyers thus turned to the national NAACP, which, flush with its victory in *Brown*, urged them to demand integration and file a lawsuit. Local authorities eventually responded with an injunction that most likely would have crushed the boycott, according to the leading legal history of the Montgomery protest.⁴² Local African Americans’ only real defense was their own NAACP-supported lawsuit, which even-

⁴⁰ KLARMAN, *supra* note 4, at 371; *see also* ROSENBERG, *supra* note 4, at 134–38.

⁴¹ KLARMAN, *supra* note 4, at 371.

⁴² Randall Kennedy, *Martin Luther King’s Constitution: A Legal History of the Montgomery Bus Boycott*, 98 YALE L.J. 999, 1016–28, 1048 (1989); *see also* Robert Jerome Glennon, *The Role of Law in the Civil Rights Movement: The Montgomery Bus Boycott, 1955–1957*, 9 LAW & HIST. REV. 59 (1991). Oddly enough, Kennedy’s leading history of the boycott goes uncited in both Klarman’s and Rosenberg’s accounts of that protest action.

tually convinced the Supreme Court to invalidate Alabama's bus segregation laws in a 1956 per curiam opinion.⁴³ The key precedent cited in the Court's opinion was *Brown v. Board of Education*.⁴⁴

The unwary reader could leave Klarman's and Rosenberg's accounts of the boycott thinking that *Brown* had little to do with the boycott and that local African Americans' success was solely a product of what Klarman calls "black agency" — "the power of nonviolent protest" outside the bounds of law.⁴⁵ Both scholars undoubtedly know the history recounted above. Indeed, some of it appears in Klarman's account of the boycott, but he contends that to acknowledge any significant role for the courts somehow undercuts the "agency" of the boycotters.⁴⁶ It is certainly useful to know whether *Brown* inspired the boycott, and quite useful if one is a political scientist or constitutional scholar formulating a model of the Court and social change. But an actual history of the boycott would never fail to foreground what was obviously most important to blacks and whites as they struggled through the yearlong boycott. For them, the main contribution of *Brown* to the boycott was not its speculative effect on white opinion, but rather that the *Brown* decision allowed the boycotters to win.

There is a similar problem with the political scientists' most historical claim — Klarman's backlash thesis that the principal effect of the *Brown* decision was to sweep away southern white political moderates and to elevate hard-core segregationists to political office. The primary evidence for that backlash comes from the degree of temporal correlation between *Brown* and the increase in segregationist political sentiment.⁴⁷ But scholars have long pointed out that Klarman presents little evidence that *Brown* "caused" the segregationist upsurge, other than the fact that the upsurge happened a year or two after the Court rendered its decision.⁴⁸ By that time, two other events had rocked the consciousness of white southerners — the Montgomery Bus Boycott, and the NAACP's successful effort to allow a black woman named Autherine Lucy to begin her studies at the University of Alabama, which produced a race riot and spurred massive resistance throughout the state.⁴⁹

⁴³ *Gayle v. Browder*, 352 U.S. 903 (1956) (mem.) (per curiam).

⁴⁴ Kennedy, *supra* note 42, at 1046–54.

⁴⁵ KLARMAN, *supra* note 4, at 372.

⁴⁶ *Id.*

⁴⁷ See, e.g., Klarman, *supra* note 11, at 97–110, 116–17 ("The dramatic rightward lurch in southern politics occurred before the major civil rights initiatives of the early 1960s, and thus it is most plausibly attributable to *Brown*." *Id.* at 116.)

⁴⁸ See, e.g., Gerald N. Rosenberg, *Brown Is Dead! Long Live Brown! The Endless Attempt to Canonize a Case*, 80 VA. L. REV. 161, 163, 164 (1994).

⁴⁹ Garrow, *Hopelessly Hollow History*, *supra* note 38, at 158–59; DAN T. CARTER, *THE POLITICS OF RAGE: GEORGE WALLACE, THE ORIGINS OF THE NEW CONSERVATISM, AND THE TRANSFORMATION OF AMERICAN POLITICS* 83–84 (1995).

Moreover, the rightward drift in politics did not begin in full force until well after the second *Brown*⁵⁰ decision in 1955, in which the Court signaled that it would not order immediate desegregation. Thus, *Brown I*, where the Court threatened to directly confront southern folkways, generated a relatively restrained reaction from white southerners — at least as measured by later events. However, the Court's far more conciliatory message in *Brown II* supposedly left them outraged.⁵¹ The prospect of school desegregation decrees most likely played a role in the rightward drift of southern politics, but the direct action movements that the political scientists extol as an alternative to legalism had a significant impact.

The political scientists, and their critics, have argued from a series of predetermined positions on law and social change, and have often mobilized historical evidence with these predetermined positions in view. With the exception of a few notable case studies,⁵² we still lack a true history of law and social movements during the post-*Brown* era. Such a history would present an actual account of the interactions between law, direct action movements, and southern white reaction in the mid-1950s. That is exactly what Brown-Nagin attempts to do.

Courage to Dissent tries to supply the type of detail that is missing from the political science-driven arguments about the role of law in the civil rights movement, in one important battleground locale. Indeed, it serves as a useful corrective for a literature that often overclaims in presenting some very particular arguments about the Court and the civil rights movement as a general history of the Court and the civil rights movement. However, it is also true that the core claims of the literature that Brown-Nagin responds to are structural in nature, and to be responsive to them, a social history would have to engage with structural questions. If Brown-Nagin effectively demolishes the political scientists' pretensions to have written the history of law and social change during the civil rights era, it may also be true that *Courage to Dissent's* approach to social history does not directly respond to their core concerns. A case in point is the effort of her local legal history to demonstrate the "agency" of African Americans in Atlanta.

Courage to Dissent sets as one of its central ambitions the recovery of a history where "local black community members acted as agents of change — law shapers, law interpreters, and even law makers" (p. 7). That goal is understandable, given that the political scientists — in

⁵⁰ *Brown v. Bd. of Educ. (Brown II)*, 349 U.S. 294 (1955).

⁵¹ KLARMAN, *supra* note 4, at 389–400. Klarman responded to this criticism by claiming that "white southerners interpreted the Court's willingness to be accommodating [in *Brown II*] as a sign of weakness." *Id.* at 343. This is a speculative claim and, like the general reasons for the rightward swing, remains to be documented.

⁵² See, e.g., Kennedy, *supra* note 42; Glennon, *supra* note 42.

their effort to show that the Court was often irrelevant — equate black “agency” with direct action protests that, they believe, had little to do with law. No one could reach such a conclusion after reading *Courage to Dissent*. Brown-Nagin convincingly shows how difficult it would have been to be a civil rights protester disengaged with law, and ultimately with the Supreme Court. Martin Luther King, Jr., and the sit-in protesters knew this best of all.

It is also true, however, that “agency” has been a hotly debated term in legal history, and other fields, over the past several decades. The term was initially employed as a useful corrective to histories whose causal motors lay in structural features of life — ideologies, macroeconomic forces, group psychology, and state institutions. In that context, to write about “agency” was to claim that ordinary people were a significant cause of historical change, and to signal one’s normative commitment to the democratization of the subjects of history.⁵³ In the 1980s and 1990s, a vigorous debate ensued in legal history, and in social theory more generally, between scholars who emphasized the structural constraints of ideology — disempowering belief systems that one could find encoded in formal legal doctrine — and those who emphasized the “agency” of ordinary people who resisted those ideologies.⁵⁴ Some scholars ultimately resolved this debate through midlevel social theory that combined structure and agency.⁵⁵ Others combined insights from both tendencies into theories of performance and performativity.⁵⁶ The result was that it became impossible to write about “agency” without at once specifying exactly what one meant by this term. It became equally impossible to assert that one could recover “agency” without taking account of structural constraints on the ability of ordinary people to effect social change.⁵⁷

Courage to Dissent fits squarely within recent trends in American social history in invoking the recovery of “agency” as one of its central aims. It criticizes political scientists for disregarding the “agency of student activists” by focusing on Supreme Court litigation. In contrast to a literature that focuses on the NAACP and the Court, it proposes to recover the story of the sit-in protesters as “the predominant agents

⁵³ See, e.g., Walter Johnson, *On Agency*, 37 J. SOC. HIST. 113, 113, 120–21 (2003).

⁵⁴ See, e.g., Rosemary J. Coombe, *Room for Manoeuver: Toward a Theory of Practice in Critical Legal Studies*, 14 LAW & SOC. INQUIRY 69, 69–72 (1989).

⁵⁵ See, e.g., William E. Forbath, *The Shaping of the American Labor Movement*, 102 HARV. L. REV. 1109 (1989); Hendrik Hartog, *Pigs and Positivism*, 1985 WIS. L. REV. 899.

⁵⁶ See, e.g., Ariela J. Gross, *Litigating Whiteness: Trials of Racial Determination in the Nineteenth-Century South*, 108 YALE L.J. 109 (1998).

⁵⁷ The political scientists represent one pole of this debate. That is, they posit some “agency” of the direct action movements of the 1950s and 1960s that exists without reference to law and, in particular, without reference to the actions of the Supreme Court. Brown-Nagin’s book, despite its claims about agency, shows how difficult it is to maintain such a position.

of social and political change” (p. 135). It sums up the story of the *Armour* litigation by arguing that the poor plaintiffs “demonstrated how legal and social movements can fortify one another” because the case gave them the satisfaction of being able to confront opposing counsel in court (p. 429). However, this concept of “agency” differs little from the definition offered in the literature that Brown-Nagin criticizes. Both Klarman and Rosenberg believe that the true engines of the civil rights movement were the direct action protesters, even if both scholars believe that direct action was somewhat antithetical to litigation.⁵⁸ What *Courage to Dissent* really adds to these accounts is not a refutation of a claim that the protesters lacked agency, but a deep engagement with the protesters themselves and a demonstration that their protests were intertwined with law.

III. “BOTTOM-UP HISTORY” AND STRUCTURAL RESISTANCE TO SOCIAL CHANGE

To acknowledge that civil rights protesters inevitably found themselves using legal institutions as a mode of protest is also to return to the subject matter that lies at the heart of the political scientists’ work — the structural constraints that hamper the ability of courts to act as engines of protest. For instance, Brown-Nagin celebrates the efficacy of Len Holt’s “movement lawyering.” But it is also true that “[t]he full power of the Virginia justice system rained down on Holt after he filed an omnibus suit in Hopewell, Virginia” (p. 193). Holt’s omnibus suit and confrontational style got him held in contempt of court and resulted in years of litigation before the Supreme Court vindicated him. Holt did expose the bias of the trial judge, as Brown-Nagin asserts, but it is not at all clear in the book how doing so helped the local movement (pp. 193–94). Even the most visible success of the omnibus suits — the pro se Atlanta litigation — resulted in a desegregation ruling where the federal court declined to enter an injunction enforcing its decree, leaving the protesters in possession of a right without a remedy (p. 493 n.58). Similarly, Brown-Nagin’s assertion that the *Armour* plaintiffs could come to court and speak their minds doesn’t introduce the reader to the difficult task of trying to discern when a poor client’s courtroom statement gives her “agency,” a

⁵⁸ In the interests of clarity, I have suppressed some subtle differences in emphasis between Rosenberg’s and Klarman’s work. Among these differences is Rosenberg’s contention that the Court had little effect in driving southern white politics to the right, and Klarman’s concession (in response to his critics) that *Brown* may have provided some motivational energy to black southerners, even though he continues to maintain that it did not directly spark the civil rights movement. Rosenberg, *supra* note 48, at 165–69; KLARMAN, *supra* note 4, at 368–84.

problem previously identified in a thoughtful essay by Lucie White.⁵⁹ *Courage to Dissent* supplies plenty of information that shows how all these protest actions were significantly constrained by the structural limitations of courts as agents of reform. It is not clear what an invocation of “agency” adds to that conclusion.

Something similar is at work with the central organizing feature of the book — “dissent.” One of the book’s central projects is to recover the agency of those who dissented from the NAACP’s supposedly single-minded focus on desegregation. At times, *Courage to Dissent* seems to accept uncritically a now-familiar but partly stereotypical image of liberal public interest lawyers, in contrast to the nuanced treatment that the book gives to local civil rights advocates.⁶⁰ Mark Tushnet’s underappreciated work on the NAACP’s school litigation established long ago that, up to the end of the 1940s, lawyers like Houston and Marshall were themselves pragmatists in their school litigation. They worked within the bounds of separate-but-equal in their early school cases, which asked for equalization of resources between black and white schools, when local African American communities would not support an all-out attack on segregation.⁶¹ Houston traveled thousands of miles each year as the NAACP’s chief lawyer during the 1930s before handing off the job to Marshall; their responsibility was precisely to take the measure of local communities to see what types of civil rights initiatives they would and would not support.⁶² Only in 1950 did the NAACP resolve to withdraw its support from cases brought within the separate-but-equal frame — a decision that turned out to be useful during the early stages of the Montgomery boycott. But even here Marshall and his colleagues remained pragmatic and cautious about certain types of cases, such as those involving laws banning interracial marriage, despite the NAACP’s new mandate.⁶³

⁵⁹ Lucie E. White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 BUFF. L. REV. 1 (1990).

⁶⁰ A number of works have criticized this stereotypical image as applied to contemporary public interest lawyers. See Michael McCann & Helena Silverstein, *Rethinking Law’s “Allurements”*: A Relational Analysis of Social Movement Lawyers in the United States, in CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES 261, 266 (Austin Sarat & Stuart Scheingold eds., 1998); Ann Southworth, *Lawyers and the “Myth of Rights” in Civil Rights and Poverty Practice*, 8 B.U. PUB. INT. L.J. 469 (1999).

⁶¹ See generally MARK V. TUSHNET, *THE NAACP’S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925–1950* (1987).

⁶² PATRICIA SULLIVAN, *LIFT EVERY VOICE: THE NAACP AND THE MAKING OF THE CIVIL RIGHTS MOVEMENT* 211 (2009).

⁶³ JACK GREENBERG, *CRUSADERS IN THE COURTS: HOW A DEDICATED BAND OF LAWYERS FOUGHT FOR THE CIVIL RIGHTS REVOLUTION* 102 (1994) (describing letter from Thurgood Marshall).

Sometime between the victory in *Brown* and the early 1970s, many NAACP and LDF lawyers did come to reflect the familiar image that *Courage to Dissent* presents: single-minded opposition to segregation and resistance to local input in civil rights controversies. A number of factors influenced this evolution, among them Marshall's increasing distance from local communities as he remained in the New York office more and more during the 1950s; the split between the LDF and the NAACP, which left the LDF with no direct connection to local NAACP chapters; and the increasingly fractious national politics of school integration in the 1960s and early 1970s.⁶⁴ That story, however, has yet to be told.

Up to its discussion of the mid-1950s, *Courage to Dissent* seems to be less about the agency of dissenters from a national civil rights orthodoxy than it is about an ambivalence and pragmatism that one could find among African Americans nationally on the general subject of desegregation. Moreover, on the local level, the Atlanta pragmatists seem less like courageous dissenters in the mode of Julian Bond, and more like cautious and practical-minded conformists to the desires of local blacks and whites. The core of the book's narrative is more about divisions and ambivalence within black communities than it is about the agency of black people in their struggles with Jim Crow. At our present juncture in history, agency is so malleable a concept that even the political scientists believe that their work demonstrates its existence. It may be that the social historians' standard invocation of agency has now become more a rhetorical device than a methodological commitment with explanatory power.

Part Three of *Courage to Dissent* deals most explicitly with the question of representation, but it, too, ultimately raises questions about structural constraints that affected the course of civil rights politics. Here Brown-Nagin upends much of the work that contends, or often implies, that desegregation was a utopian project that undermined the autonomy and self-reliance of local black communities. Although she is not the first historian to point to divisions within black communities about desegregation, Brown-Nagin makes a strikingly original contribution in showing that, to many poor black parents, integration meant better schools for their children.⁶⁵ Her real target here is former LDF lawyer and law professor Derrick Bell, who argued in a famous 1976 article that the Atlanta Compromise was a homegrown, pragmatic black-led effort that idealistic NAACP and LDF lawyers tried to overrule. School desegregation was becoming more and more difficult to

⁶⁴ See generally MACK, *supra* note 13; Mack, *supra* note 10.

⁶⁵ For a nuanced account of black ambivalence about school desegregation, incorporating insights from previous scholarship in this area, see ADAM FAIRCLOUGH, *A CLASS OF THEIR OWN: BLACK TEACHERS IN THE SEGREGATED SOUTH* (2007).

accomplish by the mid-1970s, Bell argued, and civil rights lawyers in places like Atlanta, Detroit, and Boston were doing their clients a disservice by dismissing efforts at compromise.⁶⁶ Brown-Nagin deserves immense credit for unearthing the hidden history of the Atlanta controversy to show that the real issue there was racial representation, and that no one involved in the controversy could speak for the interests of local African Americans as a whole. Representation, of course, is always a paradox. Our society has long evinced a deep need for leaders to speak for the unified interests of minority groups, but such interests were often nowhere to be found, even in the era of segregation.⁶⁷

It is also true, however, that Bell's 1976 article was a key marker in the evolution of his own thinking about the wisdom of desegregation, which would eventually lead him to conclude that whites derived such "economic, political, and psychological advantages" from segregation that school integration projects were bound to fail.⁶⁸ Like recent efforts to prove whether portions of Bell's overall thesis on race relations are falsifiable, it perhaps misses some of the core thrust of Bell's argument to show that things worked differently in Atlanta than he imagined.⁶⁹ The major thrust of Bell's structuralist reading of American history is that almost any effort to bring educational equality to the masses of blacks in Atlanta was bound to fail. That is, Bell's social theory is not intended to explain particular outcomes (for instance, to describe who wanted what in Atlanta). Rather — rightly or wrongly — his theory is intended to explain the overall path of American race relations. For him, almost any solution that well-meaning liberals would have proposed would have left large numbers of poor black Atlantans without the educational equality that they sought. That is the depressing conclusion that one reaches by the end of *Courage to Dissent*, despite its closing thoughts on the agency of the poor plaintiffs in *Armour*.

CONCLUSION

These criticisms, however, do not detract from the overall power and importance of *Courage to Dissent*. It deserves many accolades for

⁶⁶ Bell, *supra* note 12, at 482–93.

⁶⁷ See MACK, *supra* note 13.

⁶⁸ Derrick A. Bell, *Bell, J., Dissenting, in WHAT BROWN V. BOARD OF EDUCATION SHOULD HAVE SAID: THE NATION'S TOP LEGAL EXPERTS REWRITE AMERICA'S LANDMARK CIVIL RIGHTS DECISION* 185, 185 (Jack M. Balkin ed., 2001).

⁶⁹ See Justin Driver, *Rethinking the Interest-Convergence Thesis*, 105 NW. U. L. REV. 149 (2011). The accusation that structuralist socio-legal theory is nonfalsifiable is a familiar one to readers of legal history. Compare Douglas Hay, *Property, Authority and the Criminal Law, in ALBION'S FATAL TREE: CRIME AND SOCIETY IN EIGHTEENTH-CENTURY ENGLAND* 17, 17–63 (Douglas Hay, Peter Linebaugh, John G. Rule, E.P. Thompson & Cal Winslow eds., 1975), with John H. Langbein, *Albion's Fatal Flaws*, 98 PAST & PRESENT 96, 114–15 (1983).

its immensely detailed local examination of the workings of law and social movements in a field where many scholars have invoked realism but have instead dealt in generalities. Moreover, it serves as a reminder of an era much different from our own — an era when civil rights lawyers, and civil rights advocates, dared to believe that they could change the world, and often found unexpected rewards, and disappointments, in their efforts to do so. It was an era when one could file a case, or begin to organize, without knowing where that single act would lead, but could still have the confidence to believe that simply to challenge the status quo was at least a beginning. It was an era when young people armed with idealism, their elders armed with pragmatic wisdom, and NAACP lawyers armed with legal briefs, all found that they had unexpected roles to play in opposing a system of racial inequality that was backed up by state power, extralegal violence, and seemingly unmovable segregationist folkways. It was an era fraught with both triumph and heartbreak. Perhaps it is this sense — a feeling that unexpected possibilities lay just out of view — that is the greatest casualty of our own sober-minded age when cold social science data, and ambitious models, seem to shrink the horizons for visions of law and social change. History, like the humanities more generally, helps remind the reader of the contingency, irony, and paradoxes that attended — and still attend — the nation's long struggle for racial equality. For reminding the reader of this, and for many other things, *Courage to Dissent* will linger in one's consciousness long after one has finished reading its richly rewarding pages.