From the Streets to the Courts: Doing Grassroots Legal History of the Civil Rights Era

COURAGE TO DISSENT: ATLANTA AND THE LONG HISTORY OF THE CIVIL RIGHTS MOVEMENT. By Tomiko Brown-Nagin. New York, New York: Oxford University Press, 2010. 578 pages. $34.95.

Reviewed by Ariela J. Gross*

I. Introduction

In *Courage to Dissent: Atlanta and the Long History of the Civil Rights Movement*, Tomiko Brown-Nagin brings us the definitive legal history of the civil rights movement from the bottom up. This rich, dense narrative account of the day-to-day creation of civil rights law at the local level finally gives the "long" civil rights movement its legal history. Social and political historians have recovered the "long" local histories of the movement, re-centering our focus away from Congress and the Supreme Court and toward the grass roots, and shifting our attention backwards in time, away from the landmark cases and legislation of the 1960s, back toward the 1940s and 1950s.[1] Yet legal historians have remained remarkably attached to *Brown v. Board of Education*,[2] its roots, and its aftermath. For some it has been a beacon, for others a foil. Whether we are writing about what *Brown* should have said, or the effects *Brown* did or did not have, or the paths not taken when the National Association for the Advancement of Colored People (NAACP)

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1. *See, e.g.*, MARTHA BIONDI, TO STAND AND FIGHT: THE STRUGGLE FOR CIVIL RIGHTS IN POSTWAR NEW YORK CITY (2003) (chronicling New York's civil rights movement); CIVIL RIGHTS HISTORY FROM THE GROUND UP: LOCAL STRUGGLES, A NATIONAL MOVEMENT (Emilye Crosby ed., 2011) (collecting original works on the history of the bottom-up civil rights movement); JOHN DITTMER, LOCAL PEOPLE: THE STRUGGLE FOR CIVIL RIGHTS IN MISSISSIPPI (1994) (providing accounts of the grassroots civil rights movement in Mississippi); ALDON D. MORRIS, THE ORIGINS OF THE CIVIL RIGHTS MOVEMENT: BLACK COMMUNITIES ORGANIZING FOR CHANGE (1984) (detailing the role of local community groups in the civil rights movement); CHARLES M. PAYNE, I'VE GOT THE LIGHT OF FREEDOM: THE ORGANIZING TRADITION AND THE MISSISSIPPI FREEDOM STRUGGLE (1995) (describing the role local people played in the civil rights movement in Mississippi); THOMAS J. SUGRUE, SWEET LAND OF LIBERTY: THE FORGOTTEN STRUGGLE FOR CIVIL RIGHTS IN THE NORTH (2008) (exploring local citizens' efforts to advance the civil rights movement in the North).

2. 347 U.S. 483 (1954).

Legal Defense Fund (LDF) pursued the *Brown* litigation, we are entranced by the *Brown* case, by the United States Supreme Court, and by the national players who sought to influence the Court, notably Thurgood Marshall and the NAACP LDF.[3] In this work, Tomiko Brown-Nagin joins Risa Goluboff and Kenneth Mack and in heralding a new kind of constitutional history with regard to race and law, one that puts *Brown* in perspective as only one aspect of an ongoing engagement by African-American lawyers and activists with struggles for equality, representation, and resources.[4]

Brown-Nagin brings to light some important and neglected themes in this history. One major contribution of her book is to demonstrate the intense conflict within the "black community" over the direction of civil rights strategy and policy. Brown-Nagin uncovers disputes between the local Atlanta NAACP, led by lawyer A.T. Walden, and the national NAACP, led by Thurgood Marshall, in the 1940s and 1950s; between both Marshall and Walden on the one hand, as well as with student movement leaders in the 1960s; and between poor and working-class black parents and middle-class black officials during the 1970s.[5] When one looks to the local level, one can see division within the black community. As in the work of Kenneth Mack on black lawyers and of Dylan Penningroth on an earlier era of African-American history,[6] Brown-Nagin takes on what was once taboo in writing the history of a subordinated group: internal conflict. Even those who early on challenged the progressive orthodoxy that canonized *Brown*, such as Derrick Bell, presupposed a monolithic local black community whose interests were overridden by the national civil rights lawyers pushing integration at all

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3. *See, e.g.*, MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY (2004) (investigating the history of the Supreme Court's rulings on race); RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF *BROWN V. BOARD OF EDUCATION* AND BLACK AMERICA'S STRUGGLE FOR EQUALITY (rev. ed. 2004) (detailing the history of *Brown*); MARK V. TUSHNET, MAKING CIVIL RIGHTS LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1936–1961 (1994) (recounting the legal struggle, led by the NAACP and Thurgood Marshall, to secure civil rights for African Americans); WHAT *BROWN V. BOARD OF EDUCATION* SHOULD HAVE SAID: THE NATION'S TOP LEGAL EXPERTS REWRITE AMERICA'S LANDMARK CIVIL RIGHTS DECISION (Jack M. Balkin ed., 2001) (re-deciding *Brown v. Board of Education* using nine opinions each drafted by a different legal expert).

4. *See* RISA L. GOLUBOFF, THE LOST PROMISE OF CIVIL RIGHTS 6 (2007) (recovering the history of African-American claims to equality in the workplace and freedom from peonage unrelated to the battle against segregation in education); KENNETH W. MACK, REPRESENTING THE RACE: THE CREATION OF THE CIVIL RIGHTS LAWYER (forthcoming 2012) [hereinafter MACK, REPRESENTING THE RACE] (presenting a collective biography of African-American lawyers during the segregation era); Kenneth W. Mack, *Rethinking Civil Rights Lawyering and Politics in the Era Before* Brown, 115 YALE L.J. 256, 352 (2005) (challenging the assumption that *Brown* is the endpoint of the civil rights movement while reconstructing the era before *Brown* and emphasizing the role of racial uplift in the civil rights movement).

5. *See infra* Part II.

6. *See* MACK, REPRESENTING THE RACE, *supra* note 4 (describing the tension faced by African-American lawyers during the segregation era between their racial and professional identities); DYLAN C. PENNINGROTH, THE CLAIMS OF KINFOLK: AFRICAN AMERICAN PROPERTY AND COMMUNITY IN THE NINETEENTH-CENTURY SOUTH 123 (2003) (showing that court records indicate disputes existed among former slaves).

costs.[7] By contrast, Brown-Nagin shows a local community internally divided, not only by class but even within the middle and working classes. While middle-class professionals, especially teachers and principals, fit Bell's thesis that blacks were sold out by the national NAACP, a significant number of poor black families wanted integrated schools because they thought it was their best chance at a good education.

Brown-Nagin also shows the importance of class to African-American history. *Courage to Dissent*, read alongside Risa Goluboff's *Lost Promise of Civil Rights*—which illuminated the claims working-class African Americans made to the NAACP and the Justice Department in the 1930s and 1940s[8]—demonstrates the different economic and political interests at work in the "black community." Goluboff's book concludes that, most of the time, the interests of the poor majority, both white and black, were consistently ignored and underserved by those with political power.[9] *Courage to Dissent*, therefore, adds an important historical dimension to longstanding debates regarding the gulf in achievement and integration between middle-class blacks on the one hand and the "truly disadvantaged" black underclass on the other. While there are structural explanations for that divide,[10] Brown-Nagin shows that there were also political and legal choices that contributed to the disadvantage.[11] Yet Brown-Nagin seeks to do more than show the complexity of African-American strategies and motivations. By "looking to the bottom," as Mari Matsuda exhorted critical scholars of race to do a generation ago,[12] Brown-Nagin offers a counter-narrative of civil rights.

According to Brown-Nagin, grassroots history holds out the promise of an alternative narrative of constitutional history by focusing attention on local-black-community members as "agents of change—law shapers, law interpreters, and even law makers."[13] Brown-Nagin tells us that "[t]hese actors contested the constitutional conceptions of equality propounded by powerful judges and celebrated lawyers."[14] A.T. Walden and the local

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7. *See* Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470, 507 (1976) (describing the divergence between local blacks' interests and national lawyers' aims).

8. GOLUBOFF, *supra* note 4, at 6.

9. *Id.* at 9. Kenneth Mack also emphasizes class divisions in the conceptualization of "civil rights" among African-American lawyers. *See generally* MACK, REPRESENTING THE RACE, *supra* note 4.

10. *See, e.g.*, WILLIAM JULIUS WILSON, THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS, AND PUBLIC POLICY 56–58 (1987) (arguing that the disparity between middle-class and underclass blacks was exacerbated by the exodus of more economically stable families from the ghettos to suburbs and better urban neighborhoods).

11. *See infra* notes 118–19 and accompanying text.

12. Mari J. Matsuda, *Looking to The Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 324 (1987).

13. TOMIKO BROWN-NAGIN, COURAGE TO DISSENT: ATLANTA AND THE LONG HISTORY OF THE CIVIL RIGHTS MOVEMENT 7 (2011).

14. *Id.* at 431.

NAACP leaders interpreted constitutional norms in line with "middle-class prerogatives"; student activists and movement lawyers demanded political and economic equality; and poor women in the decades after *Brown* claimed equality in education for their children, even if it meant busing them to the suburbs.[15] *Courage to Dissent* recovers a lost history of progressive and feminist lawyering attentive to political protest and class inequality and emphasizing a thicker notion of racial injustice than simply exclusion from public accommodations.

To some degree, Brown-Nagin's book follows a venerable legal–historical tradition of uncovering jurisprudential and legal–political paths not taken. For a generation now, legal and constitutional historians have recovered the alternative constitutional visions of social movements on the left, beginning with Willard Hurst's squatters,[16] taking inspiration from Hendrik Hartog's famous "Pigs and Positivism,"[17] and reaching a cottage industry in the 1990s with a rich history of the labor movement's claims on the Constitution in the works of William Forbath, Christopher Tomlins, and Robert Steinfeld.[18] Reva Siegel, the leading practitioner of this form of legal history, has illuminated the constitutional visions of social movements on both the left and the right: the feminist movement, the abortion-rights movement as well as the anti-abortion movement, and most recently, the grassroots history of gun rights.[19] Their work challenges the sometimes monolithic portrayal of "the people" in recent political-science-inflected legal scholarship on popular constitutionalism, which examines the Supreme

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15. *Id.* at 431–32.

16. *See* JAMES WILLARD HURST, LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH-CENTURY UNITED STATES 3–6 (1956) (discussing the legal and constitutional order built by the Pike River Claimants' Union).

17. *See generally* Hendrik Hartog, *Pigs and Positivism*, 1985 WIS. L. REV. 899 (breaking new ground in bottom-up legal history).

18. *See generally* WILLIAM E. FORBATH, LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT (1991) (describing the alternative constitutional vision of the Knights of Labor); ROBERT J. STEINFELD, THE INVENTION OF FREE LABOR: THE EMPLOYMENT RELATION IN ENGLISH AND AMERICAN LAW AND CULTURE, 1350–1870 (1991) (discussing the clash between artisan republicanism and the new "free labor" ideology); CHRISTOPHER L. TOMLINS, LAW, LABOR, AND IDEOLOGY IN THE EARLY AMERICAN REPUBLIC (1993) (discussing the dominant and "subterranean" legal and constitutional understandings of free labor in the early nineteenth-century United States); William E. Forbath, *Caste, Class, and Equal Citizenship*, 98 MICH. L. REV. 1 (1999) (comparing constitutional traditions from the Reconstruction Era).

19. *See* Jack M. Balkin & Reva B. Siegel, *Principles, Practices, and Social Movements*, 154 U. PA. L. REV. 927 (2006) (discussing various social movements and how they affect the meaning of constitutional principles); Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in* Heller, 122 HARV. L. REV. 191 (2008) (uncovering the influence of the gun-rights movement's constitutional vision on the U.S. Supreme Court's Second Amendment jurisprudence); Reva B. Siegel, *Home as Work: The First Woman's Rights Claims Concerning Wives' Household Labor, 1850–1880*, 103 YALE L.J. 1073 (1994) (discussing the relationship between the nineteenth-century feminist movement's legal and constitutional vision and the jurisprudence of the late nineteenth century); Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261 (1992) (using historical analysis to discuss the regulation of abortion).

Court's relationship to "public opinion."[20] Grassroots and social-movement constitutional historians, by contrast, uncover the many competing claims on the Constitution and visions of what the Constitution meant from very different political perspectives. Yet while this approach has been applied to many aspects of constitutional history, it has been surprisingly absent from civil rights history until this landmark work.

Brown-Nagin's book is in the tradition of legal and constitutional histories that focus on the alternative visions of social movements, but unlike many of these works, it is not a jeremiad for what might have been had alternative paths been followed. Instead, *Courage to Dissent* is considerably more sanguine, celebrating the good fight waged by ordinary people who, whether or not they actually won, had their day in court and exercised their "agency."[21] While I admire the optimism in this approach, I often find myself reaching somewhat more cynical conclusions about the successes of her forgotten heroes. In addition, Brown-Nagin hews closely to her sources, and resists drawing sweeping conclusions or fitting the evidence into a grand predetermined narrative, so that at times the alternative visions of her protagonists are not fully fleshed out, and the book falls short of drawing all of the conclusions it might have from the compelling evidence gathered here.

Yet if this is a flaw, it is one that to my mind magnifies rather than lessens the significance of the book. The refusal of an overarching thesis may be the inevitable result of a fine-grained social history of law, but in my view, the implications of stories Brown-Nagin has uncovered are far reaching, and the conclusions could be pushed even farther. Each part of this sweeping narrative, organized chronologically from the 1940s through the 1970s, challenges accepted versions of the relationship among law, politics, and social change, and in particular, of the complex negotiations and confrontations among different segments of the black community and the white community. I will highlight two of them here: one, the relationship between dissent among black activists and their white opponents; and two, the relationship between law and movement politics.

A crucial aspect of Brown-Nagin's local focus is to emphasize that the civil rights movement did not operate in a vacuum. One of her most powerful points is that blacks always acted in reaction to and in anticipation of the

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20. *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) (positing that the Supreme Court is responsive to public opinion); LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW (2004) (arguing that for most of American history, authority rested with "the people themselves"). For an insightful critique of this literature, see generally Justin Driver, *The Consensus Constitution*, 89 TEXAS L. REV. 755 (2011).

21. For an insightful discussion of "agency" in social history, see generally Walter Johnson, *On Agency*, 37 J. SOC. HIST. 113 (2003). For some of my own thoughts on "agency" in legal history, see Ariela Gross, *Beyond Black and White: Cultural Approaches to Race and Slavery*, 101 COLUM. L. REV. 640, 655–64 (2001).

actions of whites: "Above all else, white domination framed and constrained the paths toward equality that each of this story's actors took."[22] When Walden counseled patience or caution, it was in part because "he had to contend with intense white resistance."[23] National figures like Marshall did not face this resistance directly: "Walden practiced amid violent white racial hatred and the threat of racial terror on a daily basis for most of his professional life."[24] And in addition to the terror of white violence, the movement had to continually readjust its strategies to deal with the more subtle opposition they faced in Atlanta: elites who retreated into their all-white enclaves and working-class whites who learned the language of "freedom of choice," "freedom of association," and freedom from taxes to oppose African Americans' claims to full participation in public life.[25] The legal strategies of the civil rights movement dovetailed with, and counterpunched against, the legal strategies of these white opponents who did not form a monolithic "backlash" any more than civil rights activists were a monolithic "black community."[26]

Furthermore, both blacks and whites used law in a variety of ways, at different times, and "law" in Brown-Nagin's rendering had different and more expansive meanings than earlier civil rights historians have given it: not only landmark desegregation litigation[27] but also defending protestors from criminal prosecution;[28] "omnibus" lawsuits that challenged Jim Crow in numerous arenas at once;[29] and other forms of legal maneuvering that took its cues from movement activists themselves.[30] Whereas the debate in the past over the significance of *Brown* has at times posed political protest at one pole opposed to litigation at the other, Brown-Nagin shows that there were myriad forms of civil rights movement lawyering other than desegregation litigation, just as there were other forms of anti-movement activity besides massive resistance. In this way, Brown-Nagin's work shines a bright light on why it is that African Americans may have reason to have greater faith in legal-rights claims than critical legal scholars had understood.[31]

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22. BROWN-NAGIN, *supra* note 13, at 12.

23. *Id.* at 33.

24. *Id.* at 34.

25. *See infra* note 145 and accompanying text.

26. BROWN-NAGIN, *supra* note 13, at 359.

27. *See, e.g.*, Swann v. Charlotte-Mecklenberg Sch., 402 U.S. 1 (1971) (upholding the busing of students to promote integration); Brown v. Board of Educ., 347 U.S. 483 (1954) (declaring state laws segregating public schools unconstitutional).

28. *See infra* notes 97–98 and accompanying text.

29. *See infra* notes 84–86 and accompanying text.

30. *See infra* notes 88–89 and accompanying text.

31. *See, e.g.*, PATRICIA J. WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS 148–51 (1991) (comparing her own experience of "rights talk" to that of critical legal scholar Peter Gabel and arguing that people of color have benefited from rights talk as much as they have been limited by it).

Courage To Dissent is divided into three parts, each covering a great sweep of civil rights history. In Part II of this Review, I will consider each in turn, showing the way Brown-Nagin illuminates conflict and class, and emphasizing the reaction of local whites to the initiatives of the civil rights movement and the encroachment of African Americans on "white" spaces. In doing this, I draw on the work of Kevin Kruse and other historians of the conservative movement, as well as my own research on the grassroots legal history of race and conservatism. Part III of the Review turns specifically to the other side of the story—the grassroots movement to oppose civil rights—and suggests that these two sides of the story must go hand in hand to truly understand the civil rights era and rewrite the standard narrative of *Brown* and its aftermath.

II. *Courage to Dissent*

A. The 1940s and 1950s

Brown-Nagin devotes the first part of her book to the 1940s and 1950s. Rather than viewing this period as the run-up to and aftermath of *Brown*, she turns to three areas—housing, education, and public accommodations—to look at the way black leaders and activists pushed for change, integration, or otherwise. Her chief protagonist in this part is A.T. Walden, a "pragmatist" who sometimes pursued litigation but also worked together with leading white politicians and businessmen to effect other, less confrontational solutions.

For example, in the area of housing, the 1950s saw a major black migration to Atlanta, but only 10% of the city's land was allotted to African Americans.[32] Walden pursued biracial negotiation to gain more housing for blacks. The West Side Mutual Development Committee (WSMDC), put together by moderate Mayor William Hartsfield, consisted of Walden; a black builder; a black "realtist" (the term used for African Americans who sold real estate but were not allowed to win realtors' licenses); and three officials of the Southwest Citizens Association, a white anti-integrationist organization that was heir to the Klan and other more violent hate groups.[33] While the WSMDC was formed to "put out fires,"[34] it "played the pivotal role in determining the course of residential racial change in post-war Atlanta."[35] Its goal was to find "suitable" areas for black housing, while maintaining segregation.[36] The WSMDC employed informal means—surveying an area that was undergoing racial transition, cajoling whites and

32. BROWN-NAGIN, *supra* note 13, at 61.

33. KEVIN M. KRUSE, WHITE FLIGHT: ATLANTA AND THE MAKING OF MODERN CONSERVATISM 78 (2005).

34. BROWN-NAGIN, *supra* note 13, at 65.

35. KRUSE, *supra* note 33, at 78.

36. BROWN-NAGIN, *supra* note 13, at 65.

blacks to maintain a racial boundary line, repurchasing black homes to keep a white area's "community integrity," etc.—but it did so with the full backing of the city government.[37] Furthermore, the WSMDC was the direct heir of white resistance groups in West Side neighborhoods who adopted many of the tactics of the Klan, as well as their membership, but cloaked them in greater respectability.[38] For example, the Mozley Park Home Owners' Protective Association raised money to repurchase homes from black "encroachers," then established a "voluntary boundary line for Negro expansion."[39] The threat of mob violence often lay just behind the offers to repurchase. In this climate, the WSMDC program of "organizing residents, repurchasing homes, and revitalizing the 'white market,'"[40] could look like pragmatic biracial cooperation or like the "Uncle Tomism" of which later activists accused Walden.[41] As Brown-Nagin concludes, Walden's accommodationist approach gained some housing for blacks but also increased the ghettoization that had terrible long-term consequences for African Americans in Atlanta.[42]

Litigation, however, proved equally dead-end. In the North, lawsuits that attempted to build on the gains of *Shelley v. Kraemer*,[43] which held in 1948 that racially restrictive real property covenants were unenforceable,[44] went nowhere. In Georgia, the national NAACP, with A.T. Walden's cooperation, brought a lawsuit against segregation in Savannah's public housing but lost in the trial court and eventually in the Fifth Circuit.[45] But the real story in residential segregation was twofold: white flight and "Negro removal," as critics termed the "urban renewal" plans of the 1950s and 1960s.[46] As Kevin Kruse chronicles, most whites in Atlanta voted with their feet, leaving the city and its public spaces to African Americans and moving to the suburbs.[47] Within the city, as various forms of roadblocks and barriers

37. KRUSE, *supra* note 33, at 78–79.

38. *See id.* at 77–78 (explaining how the Ku Klux Klan had evolved into more "respectable" organizations, such as the Southwest Citizens Association, whose top three officials would later compose half of the WSMDC).

39. *Id.* at 65–66.

40. *Id.* at 85.

41. *See id.* at 166–68 (recounting Walden's settlement negotiations with white leaders during the 1961 Atlanta sit-in movement and the vocal activists' response that Walden had "'sold out' the civil rights of other African Americans").

42. *Id.* at 81–82.

43. 334 U.S. 1 (1948).

44. *Id.* at 23.

45. Heyward v. Pub. Hous. Admin., 154 F. Supp. 589 (S.D. Ga. 1957), *aff'd sub nom.* Cohen v. Pub. Hous. Admin., 257 F.2d 73, 78 (5th Cir. 1958); BROWN-NAGIN, *supra* note 13, at 71.

46. BROWN-NAGIN, *supra* note 13, at 68.

47. KRUSE, *supra* note 33, at 5, 13.

failed to keep blacks out of neighborhoods, postwar redevelopment turned to slum clearance and relocation of blacks to segregated public housing.[48]

In education, a similar pattern took hold: first interracial diplomacy, and only later litigation, with limited success after six years in the courts.[49] The local NAACP began with a campaign for teacher-salary equalization, first appealing to the white teachers' union and the Board of Education and then bringing a lawsuit for pay equity in 1943–1944.[50] After having a limited victory overturned in the Fifth Circuit on procedural grounds,[51] Walden and the local NAACP then turned to school-funding-equalization litigation in 1950, just when the national NAACP was turning from equalization litigation to a direct attack on Jim Crow.[52] The threat of integration became a lever for equalization, and the Georgia General Assembly started pouring money into black education.[53] But *Aaron v. Cook*,[54] the school case, was taken off the state docket, pending the outcome of similar cases filed in other states that would be consolidated into *Brown v. Board of Education*.[55] And the local NAACP reacted to *Brown* with caution, not rushing to push for desegregation.[56]

As for the desegregation of public spaces and public transit, A.T. Walden and the black elite decided to begin with "realms that few blacks might have prioritized"—golf courses rather than swimming pools, parks, or playgrounds.[57] *Holmes v. City of Atlanta*[58] showed Walden's "continued commitment ... to interracial diplomacy and the separate but equal principle."[59] Desegregation in Atlanta came to follow "a familiar pattern"[60]: First, local African Americans cautiously challenged the segregation of a particular realm.[61] Then, local officials waited for court orders.[62] Finally, they implemented a token desegregation of a public space, without violence but also without any great effort on the part of local blacks to push for actual

48. RONALD H. BAYOR, RACE AND THE SHAPING OF TWENTIETH-CENTURY ATLANTA 69–71 (1996).

49. BROWN-NAGIN, *supra* note 13, at 88.

50. *Id.* at 88–90.

51. Davis v. Cook, 80 F. Supp. 443 (N.D. Ga. 1948), *rev'd* Cook v. Davis, 178 F.2d 595, 600–01 (5th Cir. 1949); BROWN-NAGIN, *supra* note 13, at 93.

52. BROWN-NAGIN, *supra* note 13, at 95.

53. *Id.* at 104.

54. Civ. No. 3923 (N.D. Ga. filed Sept. 19, 1950).

55. BROWN-NAGIN, *supra* note 13, at 105; *see* Thomas V. O'Brien, *The Dog that Didn't Bark:* Aaron v. Cook *and the NAACP Strategy in Georgia Before* Brown, 84 J. NEGRO HIST. 79, 87 n.9 (1999) (describing events in the five years leading up to the filing of *Aaron v. Cook*).

56. BROWN-NAGIN, *supra* note 13, at 106–07.

57. *Id.* at 115.

58. 350 U.S. 879 (1955) (per curiam).

59. BROWN-NAGIN, *supra* note 13, at 116.

60. KRUSE, *supra* note 33, at 106.

61. *Id.*

62. *Id.*

integration.[63] Even the more aggressive "Love, Law, and Liberation Movement," known as "Triple L," begun by the well-known local minister William Holmes Borders to test the *Gayle v. Browder*[64] holding striking down state segregation statutes on the bus lines, was remarkably limited: the ministers announced their protest ahead of time, were arrested in order to bring a test case, and did not try to ride the buses again.[65] After the favorable 1959 ruling in *Williams v. Georgia Public Service Commission*,[66] Borders warned his congregants not to "sit down by any white woman," "be drawn into any trap," or "irritat[e] anybody."[67] The Triple L and *Williams* litigation "channeled and controlled dissent."[68]

Whites simply fled the system. While upper-class whites could retreat to private all-white country clubs and transportation, working-class whites reacted with outrage to even the token desegregation of public spaces like streetcars, golf courses, public parks, and swimming pools: "First and foremost, they believed that these public spaces, which they considered their own, had been 'stolen' from them and 'given' to another race."[69] They reacted by voting down bond measures for public works projects and revolting against taxes in all forms.[70]

B. The 1960s

In the second part of the book, Brown-Nagin turns to the 1960s and the student movement's challenge to both Walden and Hartsfield's pragmatic biracial coalition on the one hand, and to the "legal liberal" litigation strategy of Marshall and the national NAACP on the other. Brown-Nagin "holds a magnifying glass to the sit-in movement in Atlanta during its first year and finds enormous and perhaps surprising complexity in African Americans' conceptions of equality and the law."[71] She writes against a literature that has portrayed the sit-in movement as wholly outside the law, forcing the hand of Congress and the President without regard to the Supreme Court.[72] Brown-Nagin's portrait is more complex. Although in 1960, student leaders saw the Supreme Court as having failed the African-American community, that very failure galvanized them to direct action to claim the rights *Brown*

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63. *Id.*

64. 352 U.S. 903 (1956) (per curiam).

65. BROWN-NAGIN, *supra* note 13, at 126–27; KRUSE, *supra* note 33, at 111–16.

66. [1959] 4 Race Rel. L. Rep. (Vand. Univ. Sch. Law) 166 (N.D. Ga. Jan. 21, 1959).

67. BROWN-NAGIN, *supra* note 13, at 128 (alteration in original).

68. *Id.* at 130.

69. KRUSE, *supra* note 33, at 125.

70. *Id.* at 125–27.

71. BROWN-NAGIN, *supra* note 13, at 134.

72. *But see* Christopher W. Schmidt, *The Sit-Ins and the State Action Doctrine*, 18 WM. & MARY BILL RTS. J. 767, 777–79 (2010) (arguing that civil disobedience can be thought of not as an abandonment of law but as a type of constitutional claim, reflecting the highest faith in the existing legal order).

had announced.[73] Furthermore, the student activists displayed varied attitudes toward litigation, innovating new litigation strategies and a new style of "movement lawyering."

The opening salvo of the student movement was a full-page advertisement in Atlanta newspapers on March 9, 1960, with a declaration by the newly formed Committee on Appeal for Human Rights (COAHR), couched in the language of the Declaration of Independence and the Constitution, demanding the abolition of segregation and the elimination of racial disparities in education, health, voting, and many other areas of public life.[74] The COAHR, led by Lonnie King and Julian Bond, included the older generation of black leaders among its advisers, who thought they could contain it.[75] However, Walden and Hartsfield had lost that power.[76] When the student protestors pressed their demonstrations against white-owned restaurants and businesses, pragmatists urged the protestors to be prudent and work together with white businessmen.[77] As white resistance groups, including the KKK and "Georgians Unwilling to Surrender," led by Governor-Elect Lester Maddox, staged counter-demonstrations, Walden asked the students to cancel a rally in support of arrested demonstrators and instead attend a strategy meeting, pledging in return to support them "for the duration."[78] Walden considered the limited desegregation of downtown businesses "a high point of a lifetime of service in the cause of civil rights," whereas the students were disillusioned.[79] Brown-Nagin considers the campaign a success, "[d]espite [the students'] disillusionment," because they had "taken initial strides toward their conception of freedom—comprehensive desegregation, with attention to the interests of the working class—and had brought the rest of Atlanta along with them."[80]

The hero of this part of the book is Len Holt, who wrote to the Student Nonviolent Coordinating Committee (SNCC) executive secretary James Forman in 1962 proposing a new approach to civil rights lawyering, in which the lawyer would be an adjunct to the direct-action movement, providing ground support to the protestors and deferring to their decision making and methods.[81] SNCC protestors were refusing bail in 1960–1961, a tactic the NAACP and the NAACP LDF strenuously objected to because they thought

73. BROWN-NAGIN, *supra* note 13, at 134–35.

74. *Id.* at 148; Comm. on Appeal for Human Rights, *An Appeal for Human Rights*, ATLANTA CONSTITUTION, Mar. 9, 1960, at 13.

75. BROWN-NAGIN, *supra* note 13, at 148.

76. *Id.* at 130.

77. *See id.* at 166–71 (detailing the brokering of an agreement between activists and white businessmen and the tensions it caused between the elder generation of activists and students).

78. *Id.* at 163–66.

79. *Id.* at 172.

80. *Id.* at 173.

81. *Id.* at 175.

it threatened the legal battle against segregation.[82] The NAACP expected to exercise more control over SNCC in return for its financial contributions, and it resented SNCC's collaboration with the National Lawyers Guild, which NAACP leaders saw as communist.[83] Len Holt's innovation in the fight against Jim Crow was the "omnibus integration" suit.[84] As Holt explained, "Instead of just seeking to integrate a library[, for example,] it attacks racial discrimination in the cemetery, swimming pool, public hospital, dog pound, parks, auditoriums, buses, public housing and you-name-it . . . and it does all this attacking simultaneously, at one time."[85] Even if the suit failed on the merits, it "could loosen the mental chains of racism and generate public concern about injustice."[86] In Atlanta, Holt attained some success with the combination of an omnibus suit and direct action, which "persuaded Mayor Allen to push for implementation of the court order."[87]

According to Brown-Nagin, what made movement lawyering like Holt's so successful is that he worked together with activists, even following their lead. With lawyers like Holt, "court-based social change strategies" could be effective, and some lawyers and activists moved fluidly between lawyering and politics.[88] As Brown-Nagin observes, "[Holt's] work challenges the idea that civil rights litigation undermined political activism. . . . This principle can be generalized. A host of factors determined whether or to what extent law and litigation, whether undertaken by Holt or NAACP-affiliated lawyers, aided or demobilized the struggle for racial justice."[89] Yet Brown-Nagin's conclusion is, at the end, a somewhat limited one. The only generalization she draws is that law and social movements "interacted dynamically" and that movement lawyering gave activists another tool to work with, one that could at times provide synergy for direct action.[90] Even losses might have benefits to the community in terms of their organizing potential.

Direct action in Atlanta came to a head in 1963–1964, with the SNCC and COAHR campaign against privately owned restaurants, hotels, and retailers, at the same time that Bull Connor turned the dogs on demonstrators in Birmingham, Alabama. The wave of demonstrations across the South, including in Atlanta, directly inspired landmark legislation—the Civil Rights Act of 1964—and led inexorably to Supreme Court litigation when reactionary firebrands Lester Maddox and Moreton Rolleston Jr., owners of the Pickrick Restaurant and the Heart of Atlanta Motel, respectively, resisted the

82. *Id.* at 179.
83. *Id.* at 182–83.
84. *Id.* at 192.
85. *Id.* (alterations in original).
86. *Id.* at 193.
87. *Id.* at 198.
88. *Id.* at 209.
89. *Id.*
90. *Id.* at 210.

new Act. Rolleston filed a legal challenge to the constitutionality of the Civil Rights Act "exactly two hours and ten minutes after" its passage, while Maddox was sued after refusing to comply with the Act at his restaurant.[91] This was an explosive time, and there were a variety of white and black responses—in Atlanta and in the nation—to the quickening pace of racial change. While some whites, like Maddox, hardened their resistance and drew a line in the sand, others, like Mayor Ivan Allen, flew to Washington to testify in favor of the Civil Rights Act.[92] The student activists saw Allen's actions as too little, too late, while A.T. Walden praised Allen's "leadership"—though not the bill itself.[93] A plethora of black activist groups came together in the Atlanta Summit Leadership Conference (ASLC) on October 19, 1963, to approve negotiation to break the stalemate over the desegregation of hotels and restaurants,[94] but it was a new wave of protests, pickets, and boycotts, combined with the decision in *Heart of Atlanta*,[95] that finally forced change.[96] At the same time, much of the energy of movement lawyers went into defending arrested student protestors in court as they faced hostile local trial judges.[97] Those trials did a great deal to galvanize black opposition and energize the movement.[98]

This part is the heart of Brown-Nagin's argument that citizens can shape the law, as she believes the students "catalyzed social, political, and constitutional change" even though it was extraordinarily difficult to accomplish their intended end—the desegregation of Atlanta.[99] Despite her positive view of the movement's successes, her evidence could support a more pessimistic conclusion. While massive resistance may have been routed toward and indeed helped trigger national action, far more effective forces lined up against the movement: the so-called white moderates, who backed limited desegregation as a tactic to hinder protest and forestall true integration.[100] Moderates used "appeals to social custom, property rights, and an inviolate state action doctrine long embraced by the courts," as well as a solid working relationship with Walden and other black pragmatists.[101] However, despite their efforts to speak for a broader base of Atlantans, poor blacks did not end up with much of a voice in the movement. The Atlanta Project, SNCC's organizing venture among poor blacks for "economic justice," ran out of

91. *Id.* at 243–44.

92. *Id.* at 224–25.

93. *Id.* at 226.

94. *Id.* at 228–29.

95. Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964).

96. BROWN-NAGIN, *supra* note 13, at 229–31, 244–45.

97. *See, e.g.*, *id.* at 235–36 (detailing the work of attorney Donald Hollowell, known as Georgia's "Mr. Civil Rights," in defense of activists in a hostile judge's courtroom).

98. *Id.* at 234–42.

99. *Id.* at 247.

100. *Id.* at 248.

101. *Id.*

steam quickly, and the new antipoverty programs evolved with little input from actual poor Atlantans.[102] Julian Bond, elected to the Georgia State Legislature by a poor black constituency, had to fight in court to be seated; when he finally made it to the legislature, there was little he could do.[103] Rent strikes against slum lords and legal battles to make the eviction process fairer for poor Atlantans achieved only limited success.[104] Much energy was dissipated fighting the court battles of Bond and fellow SNCC leader Stokely Carmichael.[105] In the end, this narrative does not conclude with features entirely different from those of many more familiar tales of the late 1960s: diffusion of energy, exhaustion, and frustration.

C. The 1970s

The final third of *Courage to Dissent* takes us into the 1970s, the era of the long, drawn-out school-desegregation litigation grinding through the courts. So many whites had fled the Atlanta school system that it was now 80% black, leading Lonnie King to observe, "You've got to have some white kids to integrate with."[106] The Atlanta school-desegregation case, *Calhoun v. Latimer*,[107] "represented one of LDF's highest profile assaults on resistance to *Brown*,"[108] and ended in one of its most crushing failures.[109] The case began in 1958, under the direction of Constance Baker Motley, the NAACP LDF lawyer and critic of Walden's compromises.[110] While Atlanta's schools were nominally desegregated in 1961, "the racial integrity of most schools in Atlanta and all schools outside of the city remained unblemished."[111] Over the course of the 1960s, the LDF pushed for a "unitary" school district,[112] while the local community, fearful of a "one-way stream" from black to white schools,[113] registered complaints about racial inequality in schools but failed to support an all-out push for integration.[114] The LDF, hurt by its lack of community connection and without extralegal leverage, made no headway.

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102. *Id.* at 266–69, 297–304.

103. *Id.* at 256–62, 290–99.

104. *Id.* at 269–72.

105. *Id.* at 280–97.

106. *New Deal in Atlanta*, NEWSWEEK, July 30, 1973, at 42, 42.

107. 377 U.S. 263 (1964) (per curiam).

108. BROWN-NAGIN, *supra* note 13, at 308.

109. *Id.* at 330–31.

110. *Id.* at 309–10.

111. *Id.* at 325.

112. *See id.* at 369–70 (discussing the LDF's "plan for a unitary system that would bus fewer than 10 percent of the city's students").

113. *Id.* at 346.

114. *See id.* at 321 (observing that at public hearings, "[m]any blacks refused to endorse school desegregation" and expressed "concern about teacher equality and employment opportunities for black teachers after desegregation," with some making the case for "equal but separate schools"); *see also id.* at 345–46 ("Even as the LDF slogged it out in court for a massive pupil desegregation plan, Atlanta's civil rights mainstream endorsed freedom-of-choice").

Just as the LDF won a major legal victory in the *United States v. Jefferson County Board of Education*[115] case, Constance Baker Motley was appointed to the federal bench.[116] The miserable denouement of the *Calhoun* litigation was the "Atlanta Compromise," a deal brokered between the local branch of the NAACP, led by Lonnie King, and the white administration, trading student integration for a specified number of spots for black educators in the administration of the school system.[117] While black middle-class professionals, especially teachers and principals, preferred this outcome, poor blacks dissented: they wanted better schools for their kids, and they were willing to bus them to those schools.[118] As one critic of the compromise complained, "All these black kids are being sold out for jobs."[119]

In 1971, the United States Supreme Court decided *Swann v. Charlotte-Mecklenburg Board of Education*,[120] which was as close as the Court ever got to endorsing busing; it allowed broad judicial discretion and robust remedies to redress school board discrimination.[121] However, a Northern District of Georgia court "declared *Swann* remedies unworkable in Atlanta."[122] In Brown-Nagin's words, "The 'annual agony of Atlanta' should end, the judges explained, for three interrelated reasons: the city's lack of buses, uncontrollable white flight, and black opposition to busing."[123] Their analysis of white flight "traced the racial make-up of the city and its public schools to the Calhoun litigation itself."[124] In other words, school desegregation had caused white flight, and therefore, school desegregation must cease. As the lawyers of the LDF and Lonnie King descended into internecine battle in 1972, ending with the dramatic ouster of the LDF from its own case, local parents were the losers.[125]

As settlement negotiations dragged on, the ACLU filed a lawsuit, *Armour v. Nix*,[126] arguing that residential segregation in Atlanta was a product of deliberate choices by public officials and, therefore, that the only solution to school desegregation must be a "metropolitan" solution, busing

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115. 372 F.2d 836 (5th Cir. 1966).

116. BROWN-NAGIN, *supra* note 13, at 344.

117. *Id.* at 359.

118. *Id.*; *see also* BAYOR, *supra* note 48, at 247–51 (outlining the specifics, as well as the divisive effect, of the Atlanta Compromise).

119. *New Deal in Atlanta*, *supra* note 106, at 42.

120. 402 U.S. 1 (1971).

121. *See id.* at 15 ("Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies.").

122. BROWN-NAGIN, *supra* note 13, at 366 (citing Calhoun v. Cook, 332 F. Supp. 804, 805–08 (N.D. Ga. 1971) (per curiam)).

123. *Id.* at 367.

124. *Id.* (emphasis omitted).

125. *Id.* at 376–77.

126. Civ. No. 16708, 1979 U.S. Dist. LEXIS 9609 (N.D. Ga. Sept. 24, 1979).

students between black Atlanta and the white suburbs.[127] The hero of Brown-Nagin's final part is Ethel Mae Mathews, spokesperson for the *Armour* plaintiffs and a civic and social organization leader in her own right, who worked together with feminist white lawyer Margie Pitt Hames to fight the *Calhoun* settlement.[128] Mathews and the welfare mothers she represented saw themselves as at times equally at odds with middle-class black professsionals as they were with whites.[129] At the public hearings on the Compromise, "long-festering rifts in the black community" were revealed: "differences over the value of desegregation, the meaning of equality, the salience of class in the black experience, and the priority of working-class interests in the struggle for racial justice."[130]

Despite all the attacks on the Compromise, the Fifth Circuit finally bowed out and let it stand in October 1975.[131] Its defenders argued that local autonomy and administrative control of the system was a concrete victory, compared to the hollow prize of integrating black students with the few remaining whites in Atlanta.[132] To its opponents, the compromise sold out the interests of the mass of black families in a backroom negotiation among cronies.[133] Brown-Nagin concludes that "the compromise advanced the priorities and worldviews of the negotiators and the black middle class, but it did not necessarily advance the interests of the large swath of black Atlantans whom the local NAACP leader claimed to represent."[134] Brown-Nagin also examines the courtroom strategies employed by Margie Hames, a lawyer who came to the fight against racial discrimination because of her outrage at the way black women were treated in the South.[135] She was willing to open up messy questions about the way black leaders had worked against the interests of poor blacks in upholding segregated housing as well as schools by acquiescing in the construction of the "Atlanta wall," a concrete barrier on Peyton and Harlan Roads physically marking the racial divide on the west side and functioning to keep rental units out of middle-class home-owning neighborhoods.[136] In the end, faced with the impossible Supreme Court precedent of *Milliken v. Bradley*,[137] *Armour* went down to defeat.[138]

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127. BROWN-NAGIN, *supra* note 13, at 373.

128. *Id.* at 385–86, 411–13.

129. *Id.* at 386.

130. *Id.* at 387–88.

131. Calhoun v. Cook, 522 F.2d 717, 720 (5th Cir. 1975); BROWN-NAGIN, *supra* note 13, at 400–01.

132. BROWN-NAGIN, *supra* note 13, at 403–04.

133. *Id.* at 406.

134. *Id.*

135. *Id.* at 411–12.

136. *Id.* at 418–19.

137. 418 U.S. 717 (1974).

138. Armour v. Nix, 446 U.S. 930, 930 (1980); BROWN-NAGIN, *supra* note 13, at 426.

Yet Brown-Nagin sees a positive side to the *Armour* story in the courtroom assertion of rights by poor women like Ethel Mae Mathews:

> Mathews's verbal jousts with men who first denied her rights and then tried to deny her humanity, she believed, were acts of civic participation rarely seen from the dispossessed. Mathews and her peers were also able to confront power brokers on behalf of those on society's bottom rungs. In so doing, the plaintiffs, many of whom were involved in welfare rights and other forms of political and social activism prior to *Armour*, demonstrated how legal and social movements can fortify one another, regardless of whether plaintiffs achieve victory in court.[139]

Ultimately, Brown-Nagin concludes, the conflicting visions of the Constitution of the pragmatists, the student protestors, and the poor women claiming educational equality were not a drain on the movement for civil rights but rather an energizing and often improving factor.[140] While litigation was not always successful, neither were lawyers a drain on the movement.[141] Instead, the Constitution remained an inspiration to ordinary people, and litigation could be an important tactic when combined with direct action.[142]

If we interpret *law* to mean only Supreme Court cases, then we may see local political protest as at odds with a law-based approach to civil rights. But if, instead, we expand our understanding of law to encompass other forms of legal activity, then we will see how engaged with law local political actors truly were. And when we look to the microhistory of interactions between movement activists, their allies, their opponents, and those in between, we may discover a more complicated story of whose interests were privileged and whose sold out at different moments in history. Accommodationism looks more pragmatic in the local political landscape at certain times, while at other times, local leaders' prioritizing the aims of black professionals means that the interests of poor people were better represented by national organization lawyers—and by themselves.

III. Conflict at the Grass Roots on the Left and Right

The story Brown-Nagin tells of the civil rights movement at the grass roots, deeply divided by dissenting approaches, also describes the opposition to integration. In Atlanta, puffed by city leaders as "the city too busy to hate,"[143] white residents resisted integration of their neighborhoods, schools, and public institutions not only through violence but also, and increasingly,

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139. BROWN-NAGIN, *supra* note 13, at 428–29.

140. *Id.* at 432–33.

141. *Id.* at 433–34.

142. *Id.* at 434.

143. *Id.* at 213, 230, 247; *New Deal in Atlanta*, *supra* note 106, at 42.

nonviolently and legally.[144] Conservatives learned to couch their opposition in terms of individual freedom of choice, including the freedom to choose religious schools, and they merged the issues of religious-school tax exemptions with opposition to taxation for the provision of public goods (such as parks and swimming pools) that were once whites-only.[145] These grassroots movements for school vouchers and against taxes became important parts of the rise of the New Right from the 1960s through the 1990s.[146] Over time, they found common ground with the same white, moderate coalition that had worked together with black pragmatists to substitute token desegregation for full integration.[147] Yet their voices have been lost in the dominant narratives about the history of race, law, and politics in the United States, which has centered on the Supreme Court on the one hand and national electoral politics on the other.

The dominant, liberal, *Brown*-centered narrative of constitutional history depicts an upward arc from *Brown* to the Civil Rights Act of 1964 and the Voting Rights Act of 1965, legislative victories buttressed by the Warren Court's protection of individual rights and freedoms.[148] Peaking in the mid-1970s, however, the tide began to turn as the increasingly conservative Burger Court refused to move beyond formal equality, and to paraphrase Justice Blackmun, to take account of race in order to get beyond racism.[149] In the standard story about race and the Constitution, the Supreme Court moved from progressive race consciousness to race neutrality, or "color blindness," as it moved to the right.[150] Color blindness itself started as a

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144. *See* Kevin M. Kruse, *The Fight for "Freedom of Association": Segregationist Rights and Resistance in Atlanta*, *in* MASSIVE RESISTANCE: SOUTHERN OPPOSITION TO THE SECOND RECONSTRUCTION 99, 103 (Clive Webb ed., 2005) (describing the state board of education's sympathetic acceptance of a white father's argument that his daughter's freedom-of-association rights should allow her to transfer to an all-white school).

145. *See* Joseph Crespino, *Civil Rights and the Religious Right*, *in* RIGHTWARD BOUND: MAKING AMERICA CONSERVATIVE IN THE 1970S, at 90, 90–95, 99–100 (Bruce J. Schulman & Julian E. Zelizer eds., 2008) [hereinafter RIGHTWARD BOUND] (describing conservatives' large-scale opposition to the IRS removing the tax-exempt status of racially discriminatory private schools); James Forman, Jr., *The Rise and Fall of School Vouchers: A Story of Religion, Race, and Politics*, 54 UCLA L. REV. 547, 579 (2007) (stating that Southern states used freedom-of-choice plans to avoid complying with desegregation rulings); Kermit L. Hall, *Justice Brennan and Cultural History:* New York Times v. Sullivan *and Its Times*, 27 CAL. W. L. REV. 339, 347 (1991) (noting that rather than desegregate, segregationist Montgomery officials chose to sell the city's parks).

146. *See* Forman, *supra* note 145, at 579 (linking the segregationists' ulterior support of vouchers in the 1960s and 1970s with the religious constituency that supports vouchers in order to send their children to private schools that embrace their spirituality).

147. *See id.* (reasoning that the constituencies in favor of vouchers advance the ways vouchers can promote racial justice in order to bolster support for vouchers more generally).

148. BROWN-NAGIN, *supra* note 13, at 9.

149. *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 407 (1978) (Blackmun, J., concurring in part and dissenting in part) ("In order to get beyond racism, we must first take account of race.").

150. *See* Frank R. Parker, *The Damaging Consequences of the Rehnquist Court's Commitment to Color-Blindness Versus Racial Justice*, 45 AM. U. L. REV. 763, 764 (1996) (asserting decisions

liberal position in the 1940s and 1950s but became co-opted by conservatives, who made the idea of redress for past harms illegitimate and countenanced only "diversity" as a justification for race-conscious programs.[151] By the 1990s, "color-blind conservatism" had become the reigning ideology of the U.S. Supreme Court, whose majority opinions in successive cases regarding affirmative action in education and employment extolled race neutrality as the dominant value in equality jurisprudence.[152] A generation of critical-race theorists has traced the rise of this ideology in legal doctrine.[153] Yet legal scholars have not explored its links to the grassroots politics of conservatism in local battles over schools, taxes, and public spaces, and social and political historians tend to slight law in their histories.

The story of color-blind constitutionalism on the Supreme Court is matched by a top-down political history in which the civil rights movement had broad national support when it demonstrated nonviolently against violent, white, and massive resistance in the South.[154] But as African Americans radicalized, turned to Black Power, opposed the Vietnam War, and rioted in the cities, the movement lost white support and dissipated its energy.[155] The white Southern reaction to the civil rights movement has been so well chronicled as to become a truism in the standard narrative of the twentieth century.[156]

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from the conservative-dominated Rehnquist Court represented "striking departures" from the Court's prior decisions and "enormous setback[s] to minority efforts to achieve equal opportunity").

151. *See* Christopher W. Schmidt, Brown *and the Colorblind Constitution*, 94 CORNELL L. REV. 203, 236 (2008) ("Interpretations of *Brown* as embodying colorblind constitutionalism . . . inaugurated a new era of colorblind constitutionalism in which it would become the favored interpretation of conservatives. But this new era had its roots in a deep commitment among liberal Americans at the time of *Brown* to the idea of a colorblind society.").

152. Matthew D. Lassiter, *The Suburban Origins of "Color-Blind" Conservatism: Middle-Class Consciousness in the Charlotte Busing Crisis*, 30 J. URB. HIST. 549 (2004); *see also* ERWIN CHEMERINSKY, THE CONSERVATIVE ASSAULT ON THE CONSTITUTION 60–61 (2010) (describing decisions dating back to the 1990s that represent a conservative viewpoint and a shift in constitutional jurisprudence).

153. *See generally, e.g.*, Neil Gotanda, *A Critique of "Our Constitution is Color-Blind,"* 44 STAN. L. REV. 1 (1991) (providing an overview of the history of color-blind constitutionalism and arguing that its use by the Court actually subordinates African Americans in modern society).

154. *See* BROWN-NAGIN, *supra* note 13, at 214 (describing how "images of young marchers pitted against fire hoses, snarling dogs, and club-wielding police officers" created a favorable environment for the passage of the Civil Rights Act of 1964).

155. *Id.* at 277.

156. *See generally* NUMAN V. BARTLEY, THE RISE OF MASSIVE RESISTANCE: RACE AND POLITICS IN THE SOUTH DURING THE 1950'S (1969) (providing a historical survey of massive resistance); DAVID CHALMERS, BACKFIRE: HOW THE KU KLUX KLAN HELPED THE CIVIL RIGHTS MOVEMENT (2003) (chronicling the reappearance and downfall of the Ku Klux Klan as it tried to intimidate the nascent civil rights movement through violence, which ultimately strengthened the movement's resolve); MASSIVE RESISTANCE, *supra* note 144 (discussing the diverse origins and ideology of Southern whites engaging in massive resistance).

Yet the story of white backlash is a remarkably regionalized—even segregated—history of "massive resistance" in the South.[157] According to this story, which places racism in the South (and the Northern working class), a Southern backlash to the civil rights movement fueled the electoral shift from a solid white South for the Democratic to the Republican Party.[158] This led to the "Southernization" of American politics, as race became a reliable "wedge issue" for Republicans to pry white working-class voters away from the Democratic Party.[159] The move from civil rights to color blindness, especially as associated with New Right political figures like Norman Podhoretz and Nathan Glazer, epitomized the end of 1960s liberalism, the marginalization of the radical left and Black Power, and a national mood of "racial exhaustion."[160]

However, as a new generation of historians of racial politics in the South as well as in the urban North have shown, the South is not, and has never been, "another country."[161] The politics of nonviolent—and legal—backlash against African Americans moving into white neighborhoods and

157. MASSIVE RESISTANCE, *supra* note 144; *see* REG MURPHY & HAL GULLIVER, THE SOUTHERN STRATEGY 2–12 (1971) (discussing the segregated nature of Southern politics in the 1960s and summarizing tumultuous political contests as white Southern voters began to support Republican candidates).

158. *See* THOMAS BYRNE EDSALL & MARY D. EDSALL, CHAIN REACTION: THE IMPACT OF RACE, RIGHTS, AND TAXES ON AMERICAN POLITICS 43 (paperback ed. 1992) (describing the shift to the Republican party of white Southern voters as a response to the strengthening of ties between the Democratic party and black voters).

159. *See* JOHN EGERTON, THE AMERICANIZATION OF DIXIE: THE SOUTHERNIZATION OF AMERICA 128–30 (1974) (contending that Nixon's "handling of racial issues" was a key component of his success in capturing the majority of white voters in the South, including those who had formerly aligned with the Democratic party).

160. *See, e.g.*, DAN T. CARTER, FROM GEORGE WALLACE TO NEWT GINGRICH: RACE IN THE CONSERVATIVE COUNTERREVOLUTION, 1963–1994, at 28–40 (1996) [hereinafter CARTER, FROM WALLACE TO GINGRICH] (tracing the cause of this shift to economic factors as the 1950s boom ended and more pressure came to bear on the working class, putting economic concerns over racial ones for many poor whites); DAN T. CARTER, THE POLITICS OF RAGE: GEORGE WALLACE, THE ORIGINS OF THE NEW CONSERVATISM, AND THE TRANSFORMATION OF AMERICAN POLITICS 347–50 (2d ed. 2000) (same); EDSALL & EDSALL, *supra* note 158, at 47–98 (identifying forces that began to fracture the civil rights coalition during the 1960s, including the inability to prevent riots, which ultimately led many Americans to shift to a more conservative outlook and ultimately paved the way for Richard Nixon's 1968 presidential victory). For an account of the development of neoconservatism after the 1970s, see Carl T. Bogus, *Rescuing Burke*, 72 MO. L. REV. 387, 461–62 (2007). For a brilliant discussion of "racial exhaustion"—a tendency to feel that racial injustice had sufficient remedies, leading to reluctance to discuss further racial remedies—see generally Darren Lenard Hutchinson, *Racial Exhaustion*, 86 WASH. U. L. REV. 917 (2009).

161. *See* JOSEPH CRESPINO, IN SEARCH OF ANOTHER COUNTRY: MISSISSIPPI AND THE CONSERVATIVE COUNTERREVOLUTION 4–5 (2007) (noting important connections between conservative white Southerners and conservative white Americans, and the common causes they shared with other conservative constituencies); *see also* Matthew D. Lassiter, *De Jure/De Facto Segregation: The Long Shadow of a National Myth*, *in* THE MYTH OF SOUTHERN EXCEPTIONALISM 25, 44 (Matthew D. Lassiter & Joseph Crespino eds., 2010) (denying that the reputation of America as a whole can be separated from the reputation of the Jim Crow South).

public spaces was a national phenomenon, tied centrally to the rise of the New Right and the conservative legal movement.[162]

Moreover, conservatives in law and in politics successfully drew on historical narratives about race that told reassuring stories about the path from slavery to freedom. Color-blind constitutionalism has a history in postwar America.[163] Conservatives appropriated this once liberal ideology not only through legal-opinion writing but drawing on the narratives generated by grassroots movements of opposition to integration, especially in housing and schools.[164] These narratives about freedom of choice, meritocratic individualism, and religious freedom took on a life of their own, beyond their origins in battles over racial integration—but they remain grounded to race, in their effects as well as their inspiration. Furthermore, these political movements were linked to popular cultural invocations of collective memory about the past, especially the slave past. Romanticism about Confederate symbols, narratives of progress from slavery to freedom, and celebrations of the 1787 Constitution provide the emotional substratum of conservative arguments against civil rights initiatives.[165]

New bottom-up legal and political histories of civil rights, desegregation, and racial politics have taught us that the history of race in

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162. *See* Joseph Crespino, *Mississippi as Metaphor: Civil Rights, the South, and the Nation in the Historical Imagination*, *in* THE MYTH OF SOUTHERN EXCEPTIONALISM, *supra* note 161, at 99, 110 (describing Northern white homeowner's resistance to integrations of their neighborhoods); Kevin M. Kruse, *Beyond the Southern Cross: The National Origins of the Religious Right*, *in* THE MYTH OF SOUTHERN EXCEPTIONALISM, *supra* note 161, at 286, 286 (noting that the Religious Right was a national, not Southern, phenomenon); Nancy MacLean, *Neo-Confederacy vs. The New Deal: The Regional Utopia of the Modern American Right*, *in* THE MYTH OF SOUTHERN EXCEPTIONALISM, *supra* note 161, at 308, 311–12, 322–23 (explaining that the resistance of whites to black advances was a national phenomenon, that neo-Confederatism allowed Northerners to support the rollback of civil rights, and that both the Federalist Society and the promotion of original-intention interpretation of the Constitution were products of this movement); Jeanne Theoharis, *Hidden in Plain Sight: The Civil Rights Movement Outside the South*, *in* THE MYTH OF SOUTHERN EXCEPTIONALISM, *supra* note 161, at 49, 51 (explaining that Northern white residents also attempted to block job, school, and housing opportunities from being made available to African Americans); *see also* CARTER, FROM WALLACE TO GINGRICH, *supra* note 160, at 41–42 (revealing that in the North, George Wallace's 1968 presidential campaign received the most votes where blacks and whites were in close proximity, "whether in their neighborhoods or in their schools"); Thomas J. Sugrue & John D. Skrentny, *The White Ethnic Strategy*, *in* RIGHTWARD BOUND, *supra* note 145, at 171, 174–75, 192 (revealing that whites reacted to demands for open housing and calls for educational desegregation by asserting their own group identities and that this "ethnic revival" led to many Northerners joining the Republican Party in the 1970s); Thomas J. Sugrue, *Affirmative Action from Below: Civil Rights, the Building Trades, and the Politics of Racial Equality in the Urban North, 1945–1969*, 91 J. AM. HIST. 145, 147 (2004) (stating that affirmative action led to Northern whites embracing the New Right).

163. For a beginning to this story, see generally Lassiter, *supra* note 161, and Sugrue, *supra* note 162.

164. *See generally* Lassiter, *supra* note 152 (detailing the conservative grassroots movement developed in Charlotte in opposition to integration by busing).

165. *See generally* Ariela Gross, *When Is the Time of Slavery? The History of Slavery in Contemporary Legal and Political Argument*, 96 CALIF. L. REV. 283 (2008) (expounding on the history of slavery put forth by conservatives that presents a romanticized notion of the period).

America is not just a Southern story. Just as Jim Crow existed in the North and West as well as South, there was both violent backlash and legal, nonviolent resistance to desegregation and the civil rights movement in cities across the North and West. The phenomenon was not one of "Southernization" because the South was never "another country."[166] And as Brown-Nagin has shown, the civil rights movement itself, including lawyers, contained more diversity about means and ends regarding integration and institutions than has previously been acknowledged.

Today, the withdrawal of white Americans from public school systems, the segregated pattern of most of our major urban areas, *and* the continued de facto segregation of public life, appear to be natural patterns of class stratification, yet they came about as the result of active choices. Formal color-blind conservatism did not legally ratify changes that happened naturally, socially, or through individual actions; on the contrary, grassroots conservatives consciously pursued legal strategies to fight integration from the ground up as well as the top down.

One of *Brown*'s chief effects may have been, as Michael Klarman suggests, the massive resistance that spurred Northerners to intervene to implement civil rights initiatives,[167] but it had other effects at the grass roots. On the one hand, *Brown* made it possible for student activists for civil rights to push for changes that simply were not available before. And a generation of black activists turned to the courts in a variety of ways to make demands on the legal and political system. On the other hand, *Brown* also unleashed a white reaction of legal, nonviolent resistance, including white flight, school vouchers, and tax revolts, both North and South.[168] In this, Atlanta was emblematic and not unusual.

In Atlanta, the revolt against taxes began in the 1950s, not the 1970s, where many historians have traditionally placed it. Whites who believed their public spaces and institutions had been stolen by black usurpers, and mistakenly believed they paid all the taxes, rebelled against bond measures. "SHALL YOU CONTINUE TO PAY FOR THEIR PLEASURE?" blared one anti-tax message.[169] Record turnout in a local election brought down Mayor Hartsfield's proposed Piedmont Park cultural center in a swirl of rumors that it would become a haven for integration.[170] The first schools to which whites fled impending integration were indeed "segregation academies," paid for by tuition grants from the state government, but very

166. *See supra* notes 161–62 and accompanying text.

167. KLARMAN, *supra* note 3, at 421–24.

168. Of course, *Brown* may have only accelerated processes already underway since the end of World War II. *See* JASON MORGAN WARD, DEFENDING WHITE DEMOCRACY: THE MAKING OF A SEGREGATIONIST MOVEMENT AND THE REMAKING OF RACIAL POLITICS, 1936–1965, at 4 (2011) ("The roots of this opposition movement lay not only in the shallow soil and emotionally volatile politics of school desegregation. They pushed more deeply into the two preceding decades.").

169. KRUSE, *supra* note 33, at 125–28.

170. *Id.* at 128–30.

quickly—as Atlanta nominally desegregated its schools and the state legislature abandoned segregation statutes, allowing the "local option" plan to proceed—the real trend was toward religious schools whose populations swelled in the 1950s and 1960s.[171] Families learned to request transfers from desegregating schools "to maintain freedom of association."[172] Class divisions among blacks were matched by class divisions among whites, especially between those who could escape into private enclaves and those who had relied on public goods for their social lives.

The rise of a conservative movement organized to preserve white prerogatives, but increasingly voiced in color-blind and individualistic terms as a right to free choice and free association, took place not only in Atlanta and other Southern spots but as far afield as Los Angeles, California, during the same era. In 1954, when the U.S. Supreme Court decided *Brown v. Board of Education*, Los Angeles was already well on its way to having one of the most segregated school systems in the United States.[173] By the mid-1960s, when civil rights activists began to push integration of the schools—including busing children between districts—to the top of the political agenda, nearly half of Los Angeles Unified School District schools were classified as more than 50% minority ("black" or "Mexican").[174]

Jim Crow lived outside the South, as did a vibrant civil rights movement—and an active movement of reaction and opposition to integration of African Americans and Mexican Americans into public institutions and neighborhood spaces. The conservative activists who organized in reaction to desegregation claimed rights for white people, but they did so

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171. *Id.* at 169–72; *see also* Joseph Crespino, *supra* note 145, at 90–98 (describing the national debate over federal tax benefits for private schools in the South, a debate that would continue well beyond the 1960s).

172. KRUSE, *supra* note 33, at 161.

173. Despite the landmark Ninth Circuit decision in *Westminster School District v. Mendez*, 161 F.2d 774, 780–81 (9th Cir. 1947), declaring that Mexican Americans could not be relegated to separate schools according to the California school segregation statute, Los Angeles and Orange County school districts used annexation and secession to gerrymander whites and "Mexicans" into separate school systems. For example, in the area that was litigated in the *Mendez* case, an all-Anglo section of the El Modena school district transferred into the all-white Tustin School District in the fall of 1947, and six years later, a number of school districts in Orange County were unified, diluting Mexican-American political power. Ariela J. Gross, *"The Caucasian Cloak": Mexican Americans and the Politics of Whiteness in the Twentieth-Century Southwest*, 95 GEO. L.J. 337, 384 (2007).

174. Paul Egly, Crawford v. Los Angeles Unified School District*; An Unfulfilled Plea for Racial Equality*, 31 UNIV. LA VERNE L. REV. 257, 267 fig.2 (2010); *see also* Crawford v. Board of Educ. of the City of L.A., 551 P.2d 28, 31–32 (Cal. 1976) ("[T]he statistical evidence before the trial court reveals that in 1968 a substantial proportion of the district's schools had student populations of either 90 percent or more minority students or 90 percent or more white students."); U.S. COMM'N ON CIVIL RIGHTS, A GENERATION DEPRIVED: LOS ANGELES SCHOOL DESEGREGATION 4–8 (1977) (summarizing further demographic studies, including the factual finding by the trial judge in *Crawford* that most of the district's schools were either 90% white or 90% minority students, as well as a 1971 U.S. Department of Health, Welfare, and Education enrollment survey finding that 86.6% of black pupils in the area attended schools that were more than 80% black).

in terms that were rarely explicitly racial. In Los Angeles, the leading organization opposing the Congress of Racial Equality and NAACP's integration campaign was known as the Taxpayers' Rebellion of California, formed in mid-1963.[175] The Taxpayers' Rebellion demanded tax cuts by equating government spending with integration, special privileges for minorities, and welfare programs that would support blacks at whites' expense.[176] As Camille Walsh has argued, whites in the North as well as the South claimed the right to education in battles over segregation in terms of their taxpayer status; both whites and African Americans framed their legal claims as "taxpaying citizens."[177]

At the very same time taxpayers were rebelling in Los Angeles, a major campaign was underway to fight fair-housing legislation. The proponents of Proposition 14, placed on the ballot in 1963, sought to overturn the Rumford Fair Housing Act, and succeeded in doing so, with the argument that the Rumford "Forced Housing Act" took away property owners' "freedom of choice."[178] The "free-choicers" argued that residential segregation was a matter of individual choices, just as they did in Atlanta.[179] Yet the "national myth" of "de facto" segregation in the North and West being something entirely different from de jure segregation in the South remains strong in our historical tradition.[180]

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175. BECKY M. NICOLAIDES, MY BLUE HEAVEN: LIFE AND POLITICS IN THE WORKING-CLASS SUBURBS OF LOS ANGELES, 1920–1965, at 302–03 (2002).

176. *Id.*

177. Camille Walsh, "We Are Tax Paying Citizens": Race and the Right to Education 1, 5 (Nov. 2011) (unpublished manuscript) (on file with author).

178. *See, e.g.*, COMM. FOR YES ON PROPOSITION #14, WHY "YES" ON PROPOSITION #14? (archived in Radical Right Collection, Box 4, Hoover Inst. Archives, Stanford Univ.) (urging that a *yes* vote "[w]ill abolish those provisions of the Rumford Forced Housing Act of 1963 which took from Californians their freedom of choice in selling or renting their residential property"); REG F. DUPUY, FORCED HOUSING VS. FREEDOM OF CHOICE (archived in Radical Right Collection, Box 38, Hoover Inst. Archives, Stanford Univ.) ("[Proposition 14] will outlaw forced housing. It will guarantee in plain and simple language, the right of any property owner to sell, rent or lease all or part of his property to any person he chooses. It restores the principle of Freedom of Choice."); WILLIAM STEUART MCBIRNIE, UNITED CMTY. CHURCH, WHY YOU SHOULD VOTE *YES* ON PROPOSITION 14 (archived in Radical Right Collection, Box 4, Hoover Inst. Archives, Stanford Univ.) ("Proposition 14 proposes to abolish those provisions of the Rumford Forced Housing Act which have taken away from California residential property owners their right to choose the person or persons to whom they may wish to sell or rent their property.").

179. *See, e.g.*, DUPUY, *supra* note 178 ("But doesn't Freedom of Choice involve discrimination? . . . No, discrimination means simply that a person makes a choice. Everybody discriminates in many things every day regarding food, shelter, T.V. programs and so on. In order to discriminate[,] [o]ne has to be *free to make a choice*, or free to prefer one thing to another.").

180. *See generally* Lassiter, *supra* note 161 (tracing the development of the de jure–de facto distinction from its origin as an NAACP strategy to appeal to the consciences of policy makers to the ultimate, unintended result of insulating many segregated Northern communities from liability).

IV. Conclusion

If it is true that the fiercest enemies the civil rights movement faced, in Atlanta as well as Los Angeles, Chicago, and New York, were not demagogues and massive resisters like Lester Maddox and Bull Connor but rather the ordinary people who moved to the suburbs, took their children out of the public school system, rebelled against paying taxes for "their" public services, and demanded the right to "freedom of choice," what does that tell us about the choices movement lawyers made? Does A.T. Walden appear especially prescient for working in coalition with white elites in Atlanta to keep whites in the city and to shore up black voting power while allowing segregation to remain in place? Or does Walden appear hopelessly shortsighted for not demanding more change during a window of opportunity and for allowing Jim Crow to harden into greater permanence through the highways that divided the city? Does Lonnie King reveal himself as the worst sort of villain for selling out the interests of black parents for the vain hope of black political power, or was he the true pragmatist?

Traditionally, legal scholars have asked whether social movements should or should not look to the courts, or frame their claims in legal and constitutional terms, and turn to the history of *Brown* to ask that question. Tomiko Brown-Nagin's magisterial work has already taken us a great distance from that tired debate by showing us that at the grass roots, activists and lawyers had much more complicated relationships with the courts and that there was not an either–or relation between community organizing and litigating. We might also ask: If color-blind conservatism came from below as well as from above, what does that tell us about the possibilities of organizing for racial justice at the grass roots? What kinds of strategies are necessary for social change if the alternative constitutional claims of the civil rights movement are met by equally deeply felt constitutional claims from the right? These are the questions we continue to struggle with today.