



# Reconstructing Civil Rights Legal History From the Bottom Up

TOMIKO BROWN-NAGIN'S BOOK, *Courage to Dissent: Atlanta and the Long History of the Civil Rights Movement* (forthcoming in January 2011 from Oxford University Press) is the product of a scholarly journey upon which she embarked many years ago. The book—an ambitious mix of social history and legal history—brings together several strands of her interests. It merges her fascination with the enterprise of public interest lawyering, her study of the social history of the civil rights movement, and her critical engagement with how constitutional law and education law and policy influenced the past and shape the present.

Brown-Nagin entered law teaching in 2003, joined the Law School three years later, and is now the Justice Thurgood Marshall Distinguished Professor of Law. Although she has been in the legal academy for just seven years, Brown-Nagin already is well-known and widely admired for her scholarship in the areas of civil rights, constitutional law, legal history, and education law.

*Brown-Nagin re-conceives how we think about the constitutional and social history of the civil rights movement.*

With the release of her much-anticipated new book, Brown-Nagin will enhance her already superb reputation. *Courage to Dissent* will offer fresh insights about and new perspectives on one of this country's most important episodes—the 20th Century struggle for racial equality.

In the book, which grew out of years of archival and legal research and interviews with key figures of the era, Brown-Nagin re-conceives how we think about the constitutional and social history of the civil rights movement. She moves the historical lens away from the legendary Justice Thurgood Marshall, who famously won the landmark victory in *Brown v. Board of Education*. Unsurprisingly, Marshall's perspective and the strategic choices of the non-profit law firm that he headed, the NAACP Legal Defense Fund, dominate much of the legal history of the civil rights movement. Marshall and the LDF remain important in Brown-Nagin's narrative, but she shifts the focus to less well-known civil rights lawyers and to the question of how grassroots actors experienced and shaped constitutional law making. Brown-Nagin asks: What would the story of the mid-twentieth-century struggle for civil rights look like if legal historians de-centered the U.S. Supreme Court, the national NAACP, and the NAACP LDF and instead considered the movement from the bottom up?

In answering this question, Brown-Nagin discusses a spectrum of lawyers, activists, courts, organizations, strategies, and tactics, and illuminates the movement's dynamism. She examines the careers of lawyers who had strategic disagreements with Marshall and the national NAACP, particularly over *Brown*. Brown-Nagin discusses the careers of attorneys on the Right and the Left—unsung pragmatic and movement lawyers—who sought something different from, or more complicated than, “integration.” She changes the scholarly landscape by adding to the pantheon of historic public interest lawyers: A.T. Walden, one of the South's first African-American lawyers, but dismissed by some as an accommodationist of segregation; Donald Hollowell, “Georgia's Mr. Civil Rights” and an ally of student activists; Len Holt, a radical lawyer-activist and thorn in LDF's flesh who collaborated with scores of community-based organizations throughout the South; Howard Moore, Jr., a lawyer who labored for the

civil rights, anti-poverty, and peace movements; and Margie Pitts Hames, an abortion rights litigator who also advocated for civil rights and welfare rights.

The fuller portrait of legal advocacy presented in her work reframes the scholarly discussion of how civil rights lawyers employed courts and the law as tools of reform. Many of the lawyers in her work—alert to the economic and cultural dimensions of racial inequality—relied on civil rights litigation as a tool of reform less often, and in different ways, than some scholars presume. When they litigated, they did so fully aware that “civil rights” might be an illusory or incomplete prescription for community ills, Brown-Nagin argues. Several supplemented work inside the courtroom with political advocacy outside of the courtroom. Other lawyers sought familiar objectives and employed traditional styles. The personal identities and backgrounds of all of the lawyers shaped their professional pursuits and modes of advocacy. And, for a variety of reasons, most of these advocates found it difficult to fully represent the interests of the poorest African Americans, Brown-Nagin concludes.

Brown-Nagin’s book analyzes the grassroots struggle for social justice over four decades; her work spans 1940 through 1980, setting her book apart from many other works. It moves political and social activists from the periphery to the center of constitutional history, showing how they experienced civil rights litigation during the remedial phase. In Brown-Nagin’s study of law and social change, laypeople are critical; she places them on the same footing as the well-known public interest lawyers in the movement and the justices of the U.S. Supreme Court who decided the leading civil rights cases of the era.

Indeed, a major innovation of Brown-Nagin’s work is the extent to which it blends the methodology of community-based social history, mostly concerned with how local people without access to traditional levers of power seek change, and the methodology of legal history, mostly concerned with courts and doctrine. Her work delves deeply into on-the-ground dynamics in Atlanta’s and the nation’s civil rights movements. Brown-Nagin found the opportunity to interview some of the activists who

participated in the civil rights movement one of most rewarding aspects of her research. She interviewed members of the Student Non-Violent Coordinating Committee, a catalyst of the civil rights movement, and lawyers who were outside of the civil rights mainstream. Equally important, she interviewed little-known local activists, including a central figure in her work, Ethel Mae Mathews, a tenant of an Atlanta housing project and a welfare rights organizer who grew disaffected with veteran movement leaders and civil rights lawyers. Such oral histories played a prominent role in her research. These sources, combined with the many other archival and legal records that she reviewed for her book, provide a depth and breadth that make Brown-Nagin's rendering of movement history distinct.

By paying close attention to a variety of voices, relying on many sources, covering several decades, and anchoring her work in a particular place, Brown-Nagin aspires in *Courage to Dissent* to a compelling synthesis of the social and legal history of the postwar civil rights movement. The book highlights the changing political opportunity structures of lawyers and activists, shifting forms of white resistance to equality, synergies and tensions over racial and economic justice strategies, and strife over war and peace—all set against the dynamic arena of constitutional litigation and doctrine. Ultimately, her work suggests a more nuanced understanding of history, law, and social change. Grand theories about the courts' role in society and heroic narratives about civil rights lawyers are attractive and important, but also can be misleading. Brown-Nagin's bottom-up perspective on civil rights legal history, on the other hand, emphasizes the numerous variables, fragile personalities, tortured debates, and imponderable contingencies that influence change over time. She insists that local citizens shape constitutional law; local-level politics, organized and unorganized, routinely affect the implementation of remedies for constitutional violations. Brown-Nagin argues that dissident, protest action by local groups is a crucial but undervalued element in the failure or success of litigation designed to bring about social change. But, Brown-Nagin is quick to note, the many contingencies of history leave her hopeful, rather than hopeless, that civic engagement, coupled with

thoughtful judging and responsive legislative processes, can push society toward the good.

While Brown-Nagin de-centers and critically analyzes Thurgood Marshall's perspective on civil rights in her historical scholarship, Marshall's advocacy centers her own life experience. Brown-Nagin's scholarly interest in questions of law, inequality, and social change are partly rooted in the world she experienced as a young girl growing up in South Carolina. Brown-Nagin enrolled in her local public elementary school just a few years after the local county had finally resigned itself to desegregation. The school system had desegregated in the wake of threats by the U.S. Department of Health, Education and Welfare to withhold federal funds pursuant to its enforcement powers under Title VI of the Civil Rights Act of 1964. U.S. Supreme Court decisions that Brown-Nagin later would study for the first time as a law student—*Alexander v. Holmes County* (1969) and *Swann v. Charlotte-Mecklenburg County School Board* (1971)—had also spurred the school system to action. Although almost two decades had passed since *Brown v. Board of Education*, the Ku Klux Klan rallied when school desegregation finally occurred in the early 1970s. Given white resistance, Brown-Nagin's parents—who had lived under Jim Crow and attended segregated schools—sent her off to experience school desegregation with a mixture of hope and trepidation.

AS IT TURNED OUT, BROWN-NAGIN FLOURISHED ACADEMICALLY. She thrived, in part, because her mother and father insisted on it. Her father, who had labored as a sharecropper in his youth and then worked as a machine operator in a textile factory, pushed Brown-Nagin to seize every opportunity. Assigned to classes for advanced students because of her performance on standardized tests—exams initially administered to children in first grade—she found it a thrill to learn in the same classroom as the children of the town's college professors, doctors, and lawyers.

Even as she maximized her opportunities within the local educational system, she came away from the experience with questions that she continues to puzzle over in her scholarship. Although Brown-Nagin's school

district had officially desegregated in the 1970s, blacks and whites virtually never attended class together. The school system sorted and tracked students using so-called intelligence tests and subjective assessments of ability; pursuant to this system, whites simply did not share classroom space with blacks. The children in her “high-ability” classes invariably were white and from upper-middle class or wealthy families; indeed, white males dominated the ranks of her classes for the “gifted.” The overwhelming majority of black students, whose own parents had attended Jim Crow schools, were assigned to the general curriculum for “low-ability” students, where teacher expectations were low and matriculation to college was not considered an attainable goal. In essence, two different school systems existed within one building. In the eyes of the law, however, the school system had desegregated; to be sure, the schools’ testing and sorting mechanisms began early in a student’s life and had disparate racial impacts, but it did not rely on explicit racial classifications. Still, the demographic make-up of her public school classes troubled Brown-Nagin and inspired much of her interest in civil rights history and law.

Before she entered academia, those interests led her on a career path that included expected and unexpected turns. She obtained a law degree from Yale and a Ph.D. in history from Duke. She did stints in internships at LDF, the Department of Justice, Civil Rights Division, and the Lawyers Committee for Civil Rights. She clerked on the U.S. District Court for the Southern District of New York and the U.S. Court of Appeals for the Third Circuit. For two years, Brown-Nagin practiced law in New York City with a major litigation firm. All the while, she plodded along on the dissertation that, over many years, grew into *Courage to Dissent*. The Samuel I. Golieb Fellowship in Legal History at New York University School of Law and the Charles Hamilton Houston Fellowship at Harvard Law School facilitated her transition to academia.

Brown-Nagin has examined questions of structural inequality in several articles. For it turns out that the challenges Brown-Nagin first observed in a southern elementary school in the aftermath of *Brown* are common still today across the country. The South’s social patterns represented an

extreme form of a general phenomenon. The question of under what circumstances classes protected by the Civil Rights Act of 1964 can be denied educational and employment opportunities on the basis of tests and other evaluations of merit remains a live issue in educational settings, ranging from K–12 education to law schools, and in workplace settings. Discussions of the so-called “achievement gap,” its causes and remedies, are ubiquitous. Debates over whether school integration helps or harms black students persist. Meanwhile, the integration-as-equality paradigm associated with *Brown* is deeply controversial in contexts outside of race—for other students of color, for English-language learners, for students with disabilities. She discusses this theme in a forthcoming review of Martha Minow’s new book, *In Brown’s Wake: Legacies of America’s Educational Landmark*. The review, entitled “Hollow Tropes: Fresh Perspectives on Courts, Politics, and Inequality,” also examines books on the courts and reform in the contexts of the labor movement and interracial marriage. In the review, Brown-Nagin urges balanced appraisals of how courts interact with lawmakers and citizens to shape law and policy. Currently, she argues, it is fashionable to emphasize courts’ limitations as problem solvers; it is just as important to appreciate judicial competencies and courts’ social utilities.

Brown-Nagin also has wrestled with the difficulties surrounding *Brown*’s legacy in several articles at the intersection of constitutional law, educational policy, and socio-legal history. In a 2003 article, “Race as Identity Caricature: A Local Legal History Lesson in the Salience of Intra-racial Conflict,” published in the *University of Pennsylvania Law Review*, Brown-Nagin rejected an exclusively race-based theory of plaintiffs’ interests in civil rights litigation. This article constituted Brown-Nagin’s initial effort to move the scholarship in civil rights legal history away from its heavy focus on doctrine and familiar heroes and villains, and toward community-based social history. In this piece, she argued that scholars had overemphasized white resistance and inadequate doctrine as explanations for failed school desegregation campaigns. Brown-Nagin instead explored intra-racial class conflict over the meaning of equality in school desegregation cases as a factor relevant to remedial success. Taking an

interdisciplinary vantage point that has become characteristic of her legal scholarship, Brown-Nagin pushed scholars of law and inequality to take class seriously as an analytical factor—something that leading scholars in other disciplines had done for years. She highlighted the agency of the black middle class—actors missing from juri-centric scholarship. Brown-Nagin told a narrative in which local black decision makers successfully allied with whites to oppose school integration in Atlanta. In *Courage to Dissent*, she deepens her analysis, and connects the conflagration over school desegregation in Atlanta during the 1970s to the long struggle of local black professionals against employment discrimination and for affirmative action as a tool to achieve job equity.

In a 2005 *Columbia Law Review* article, Brown-Nagin turned her attention to the University of Michigan affirmative action cases. In “Elites, Social Movements, and the Law: The Case of Affirmative Action,” she used an attempt by a group of intervenors in the litigation who styled themselves a “mass movement” for social justice to engage the literatures on law and social movements. The intervenors hoped to highlight the adverse impact of the university’s admissions criteria on black students—an argument that the university itself could not be expected to make. They made little headway. Brown-Nagin used their relative lack of success to highlight the difference between protests that define themselves through litigation and protests that are un-tethered to the courtroom. She argued that the latter types of protests have distinct advantages over the former. Additionally, Brown-Nagin suggested that advocates should consider the disadvantages of participating in equal protection litigation over affirmative action, where courts employ doctrinal frameworks that have long excluded meaningful discussions of structural discrimination. Instead, problems related to educational inequality can also be addressed through a range of political tactics. In policy forums and informal political circles, stakeholders can formulate their own agendas with due attention to the cultural dimensions of the educational process.

Brown-Nagin also has written about constitutional law and democratic experimentalism in the context of charter schools. The juxtaposition of

opposing narratives about charter schools piqued Brown-Nagin's interest in the subject. Initially, she read news stories that critiqued charter schools as the new "segregation academies." Commentators feared that whites would use the autonomy permitted by charter school laws to found all-white, state-supported schools, as segregationists did during the era of resistance to *Brown*. However, she then read of excitement in local communities of color, where charter schoolteachers had found the freedom to experiment with their curricula in ways that addressed the needs of at-risk students, in particular. In a 2000 *Duke Law Journal* article, completed when she was a legal fellow, Brown-Nagin argued that courts should be open to local-level charter school experimentation for disadvantaged students. She wrote "Toward a Pragmatic Understanding of Status-Consciousness: The Case of Deregulated Education," at a time when courts appeared poised to thwart such experiments, especially in districts with extant school desegregation orders. Brown-Nagin found this potential outcome ironic and even perverse, since many whites had fled those districts, leaving the families of color left behind with few educational options. More recently, however, when Brown-Nagin comments on charter schools, she cautions against overreliance on charter schools as the *exclusive* engines of national educational policy, given their tendency to exacerbate race and class segregation.

Currently, Brown-Nagin is launching a major new project that requires her to think like a lawyer, a historian, a social scientist, and perhaps, she notes, a psychologist, too. She is writing a biography of the Honorable Constance Baker Motley, the first African-American woman appointed to the federal bench, the first black woman elected to the New York State Senate, the first female Manhattan Borough President, and a trailblazing litigator with the NAACP Legal Defense Fund, where she worked alongside her mentor, Thurgood Marshall. Motley co-counseled the Atlanta school desegregation case for several years and is one of the lawyers featured in *Courage to Dissent*. Brown-Nagin became fascinated with the judge based on what she learned about Motley during research for *Courage to Dissent*.

The daughter of Caribbean immigrants, Motley grew up in working-class New Haven, Connecticut; her father worked as a chef for Yale's Skull and Bones, the famous secret society for the children of the country's elites. Motley endured discrimination on several fronts, but overcame fantastic odds and went on to storied careers in law and politics. Motley embodied social change, Brown-Nagin notes, and is a compelling subject for a judicial biography. Motley's service on the United States District Court for the Southern District of New York provides an intriguing perspective from which to consider judges' roles and the impact of courts on society. The prospect of writing about how Motley's background, values, and experiences as a practicing lawyer, a legislator, a woman, a person of color, and a daughter of immigrants, influenced her, and perhaps, the path of law in the wide variety of cases that she either litigated or presided over—criminal law, trademark, environmental, sex discrimination, school desegregation, disabilities, securities—strikes Brown-Nagin as a project worthy of the next few years of her life. 🌿

## EXCERPTS

*Courage to Dissent: Atlanta and the Long History of the Civil Rights Movement*

(forthcoming, Oxford University Press, 2011)

AUSTIN THOMAS (“A.T.”) WALDEN, THE SON OF ILLITERATE FORMER slaves, graduated with honors from the University of Michigan Law School in 1911. Walden established a law practice in Georgia in 1912 while Thurgood Marshall, who one day would be known nationwide as the man who slew Jim Crow, was still in high school. Walden—one of the South’s first African-American attorneys—charted Atlanta’s path toward racial equality in the years before and after *Brown v. Board of Education*, the landmark Supreme Court decision outlawing segregation in public schools.

Walden, the president of the Atlanta branch of the NAACP for many years, became Thurgood Marshall’s “man” in Atlanta once Marshall took the helm of the NAACP’s legal committee. In public, at annual conferences and at meetings of the legal committee, Walden had dutifully pledged allegiance to Marshall’s strategy.

In practice, the story was more complicated. Rather than obediently follow the NAACP’s strategy, Walden and other leaders in Atlanta, the thriving metropolis of black education and culture, exercised considerable agency and independence. Reflecting the perspectives of the band of middle-class blacks that W. E. B. Du Bois had called the “Talented Tenth,” Walden added his own designs to Marshall’s blueprint for achieving equality through law. He fashioned a brand of socially conscious lawyering that fit local circumstances, and deviated in crucial ways from the model of legal activism of the NAACP Legal Defense Fund (LDF). Walden did not oppose elements of the NAACP’s strategy because he and his clients lacked an affirmative vision of racial justice. Rather, black Atlanta’s leadership deviated from the

NAACP's course for what they saw as compelling reasons. Most tellingly, they sought to preserve the economic self-sufficiency that black elites had achieved under Jim Crow, expand black political influence, and preserve personal autonomy. This book terms this approach pragmatic civil rights.

During the 1960s, Walden and like-minded leaders greeted calls for direct action with great skepticism. His approach to civil rights activism, now expressed in tepid support for civil disobedience, cost him many admirers. Some among a new generation of dissenters from the racial status quo now called Walden—a man whom the Klan had wanted dead because of his work in the cause of racial equality—an “Uncle Tom.”

Walden's skepticism could not hold back the new wave of dissenters, the students who launched sit-ins across the South. In Atlanta and elsewhere, the sit-ins raised numerous questions—ranging from the practical to the legal. Would such efforts at civil disobedience succeed in helping to loosen Jim Crow's hold over public accommodations? Who would represent the students, now bound in jail, against the charges they faced? Did the Constitution truly confer upon the students a right to enter and use these properties? Could the students really hope to claim constitutional rights through social activism in the streets? What role would the Student Non-violent Coordinating Committee (SNCC), the organizational vanguard of the new student movement founded in April 1960, play in the struggle for civil rights and its interactions with the law and lawyers over time?

Unsurprisingly, the advent of the sit-in movement and the emergence of SNCC caused alarm within Atlanta's white power structure. But it also inspired uneasiness among some prominent blacks. Soon after the sit-ins began, reports surfaced of a rift between sit-in leaders and civil rights lawyers, who already had done so much to weaken Jim Crow. The national media claimed that the sit-ins constituted a shift in the direction and the leadership of the civil rights movement. Just six years earlier, the LDF, the nation's premier civil rights law firm, had achieved its great legal victory in *Brown*. Now, the lawyers of the NAACP—the nation's oldest and largest civil rights organization—had apparently been toppled as leaders of the civil rights movement.

Then, the tables turned. During the early 1970s, new rebels emerged. A group of desperately poor black women arose to challenge some of the same student leaders who had been such fierce critics of the NAACP, the LDF, and the Atlanta pragmatists. Ethel Mae Mathews, the president of the Atlanta chapter of the National Welfare Rights Organization, took center stage in this drama. In 1950, Mathews had arrived penniless in Atlanta with a sixth-grade education after toiling with her parents, Alabama sharecroppers, on “Mister Charlie’s farm.” Ten years later, Mathews still toiled for whites—now as a maid—but had found her political voice. A community organizer, she coordinated a push for school desegregation among fellow public housing residents.

Mathews squared off against Lonnie King, the heroic sit-in activist who ten years earlier had led the student movement’s assault on segregation. He now led an assault on the LDF’s interpretation of *Brown*. King, who had become president of the Atlanta NAACP branch, repudiated his long-held position that *Brown* required pupil integration.

With the passage of the Voting Rights Act—what John Lewis, now a Congressman, called the “finest hour” of the black freedom struggle—civil rights activists had assumed that black access to the political process would yield effective political representation. A cohesive black community, it was thought, could achieve its policy goals by voting for preferred candidates and by continuing to work through interest groups such as the NAACP. Civil rights litigation, the tool of social change that Thurgood Marshall had used to tear down Jim Crow and to begin opening up the political process, would continue to be vital, buttressing African Americans’ political and social position. Yet, reality proved more complicated than imagined. The community did not always unite as hoped. Black leaders, elected and self-appointed, did not, and perhaps could not, represent the entire community. Interest groups did not easily rise to the challenges of the new racial order. Civil rights litigation could have unintended negative consequences. Meanwhile, white domination still constrained the world in which all African Americans lived.

Ethel Mae Mathews and Atlanta’s black poor confronted this uncertain world. They believed that many of the old student radicals and much of

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new black middle class, now a part of the establishment, had become a part of the problem. Consequently, Mathews and her comrades lost faith in black representatives, spurned the local NAACP and even the LDF, whose lawyers proved unreliable sources of help. Ultimately, Mathews and others turned to the American Civil Liberties Union for assistance. The episode reinforced how difficult it always had been for African Americans to represent multidimensional black interests—whether battles against racism occurred inside or outside of the courtroom.

The disagreements between Walden and Marshall during the 1940s and 1950s; between Marshall, Walden, and sit-in leaders during the 1960s; and between Mathews and black officials during the 1970s were three of many important conversations within black communities about the goals, strategies, and tactics of the civil rights struggle. This book tells the story of these divisions, and the vibrant debates that accompanied them in Atlanta—simultaneously home to many of the South's leading civil rights organizations, to its largest black middle class, and to black ghettos ravaged by poverty—from the postwar era through the 1970s.

In telling these stories, I seek to answer the following question: What would the story of the mid-twentieth-century struggle for civil rights look like if legal historians de-centered the U.S. Supreme Court, the national NAACP, and the NAACP LDF and instead considered the movement from the bottom up? The answer, I contend, is this: a picture would emerge in which local black community members acted as agents of change—law shapers, law interpreters, and even law makers. Each contested and contingent step in the struggle for racial change comes into clearer focus. One can only see this picture by looking beyond the Court and the national NAACP and LDF, and examining developments in local communities before, during, and after lawyers launched civil rights litigation.

To these ends, this study uncovers the agency of local people in Atlanta—lesser-known lawyers and organizers, litigators and negotiators, elites and the grassroots, women and men—and visions of law and social change that sometimes were in conflict with that of the national NAACP and the NAACP LDF. In so doing, the perspectives of local client

communities have been moved from the periphery to the center of the legal history of the civil rights era. These Atlantans and their stories show how struggles for social change involving the law and lawyers look in action on the ground. This local perspective is crucial. As important as national organizations and national leaders were, local actors helped to define equality, too—and did so in profound ways. Local actors worked to create the conditions necessary to achieve change. They played leading roles in everyday struggles to ameliorate inequalities in the social and political order. And they experienced the gap between civil rights and remedies once the movement achieved formal equality.

By analyzing tensions and synergies between the national and local civil rights movements, this project seeks to understand more fully the interaction between civil rights lawyers and communities. I consider consensus and conflict between those who championed equality inside the courts and those who did so outside the courts. The complicated and changing relationships between leaders of the national and local NAACP, and between leaders of the national and local civil rights bars, are at the root of this narrative. In the story told here, members of the national bar and bench, considered the primary engines of racial change even in much recent scholarship, play important, but less commanding roles. They remain protagonists and catalysts of change, but I critically examine the national actors in relation to the local clients and communities on whose behalf they labored. 🌿

## “Elites, Social Movements, and the Law: The Case of Affirmative Action”

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### INTRODUCTION

SUPREME COURT OPINIONS ARE FORMS OF PUBLIC DISCOURSE that both shape and reflect national debates about controversial subjects, including race. For this reason, identifying the voices in legal discourses about race, listening to their stories, and connecting them to themes in the Court’s equal protection jurisprudence can be illuminating. This exercise can reveal much about both political and constitutional cultures.

*Grutter v. Bollinger* and *Gratz v. Bollinger*, the University of Michigan affirmative action cases, underscore this point. Robert Post aptly characterizes the dynamic between the legal and political cultures in the Michigan decisions: “[C]onstitutional law and culture are locked in a dialectical relationship, so that constitutional law both arises from and in turn regulates culture.” Post notes, for example, that the “beliefs and values of non-judicial actors” heavily influenced the Court’s result in *Grutter*. Surely, Post’s insights are correct.

This Article expands on the observation that constitutional law and culture are mutually reinforcing by exploring questions concerning the nature and consequences of this dialectic. Which beliefs and values of nonjudicial actors affect the Court? How are their values reflected in the Court’s opinions? What does the dialectical process by which cultural norms influence constitutional norms suggest about the relationship between law and democracy? These are complex questions, and this Article does not purport to address all of them completely. Instead, it begins a conversation that uses these questions as points of departure for analyzing *Grutter* and *Gratz* from sociopolitical and cultural perspectives, and considers, in particular, what the cases suggest about the relationship between

law and social movements. Based on my analysis of the cases and the sociopolitical dynamics around them, I contend that social movements—defined as politically insurgent and participatory campaigns for relief from socioeconomic crisis or the redistribution of social, political, and economic capital—are [in many ways] incompatible with constitutional litigation. My argument primarily rests not on assumptions about the institutional capacity of courts to produce change, a topic that has been considered many times by others, but on observations about the nature and purposes of social movements themselves. In short, progressive social movements should not make juridical law definitional to their campaigns for social justice. To date, the legal literature has failed to appreciate the tension between social movements and the law, and thus has overstated the utility of juridical law to movements for social justice.

The affirmative action cases are excellent texts to consider from a social movement perspective because they featured a group of intervenors in *Grutter* who styled themselves a “mass movement” for social justice. The intervenors entered the law school case to offer a perspective they believed to be missing in the diversity-based defense of affirmative action offered by the university and buttressed by amici curiae representing the military, business, academia, and leading professional organizations. These amici made utilitarian arguments in support of the law school’s affirmative action policies. By contrast, the *Grutter* intervenors focused on discrimination and distributive justice.

Values, arguments, and narratives evident in [public and litigants’] discourse about the Michigan cases found expression in the Court’s description of the benefit of diverse educational environments. Sociopolitical and cultural norms also influenced how the Court analyzed the harm of overwhelmingly white colleges and universities and of admissions systems that give preferential treatment to minorities.

At the same time, these decisions suggest that the more moderate (and most elite) elements of the mobilization were the greatest influence on the majority’s decision upholding affirmative action in law school admissions. As Justice Thomas noted, the *Grutter* majority justified the constitutionality

of affirmative action in terms favored by the “cognoscenti”—the military, business, academic, and professional elites who championed the University of Michigan’s race-conscious admissions policies.

The attention of the *Grutter* majority was not focused solely on the cognoscenti. The Court heard other voices as well. The Center for Individual Rights (CIR), the public interest litigator that represented the plaintiffs, prevailed in *Gratz*. But its view on a crucial issue also found expression in *Grutter*—a case that it ostensibly lost. The *Grutter* majority tacitly accepted the premise of the CIR’s case (shared or undisputed by the law school) that, by virtue of better average performance on the relevant admissions criteria, the plaintiffs were more qualified for—and hence more deserving of admission to—the law school than were the affirmative action admits. Hoping to draw attention to the issue of discrimination, the intervenors turned the CIR’s argument on its head and asserted that affirmative action was justified as a remedy for the university’s reliance on discriminatory admissions criteria. The intervenors, however, were unsuccessful on this point. The claim of credentials bias was met with silence, even in concurrences by Justices Ginsburg, Souter, Stevens, and Breyer.

The fate of the *Grutter* intervenors and their “mass movement” for social justice is my point of entry into the scholarly conversation about the relationship between social movements and law in the courts. The reigning view in the legal literature, advanced principally in the work of Professor Bill Eskridge, is that juridical law is and should be a critical player in the creation and evolution of social movements. Legal mobilization theorists agree that law and legal discourse can be an especially useful point of reference for social movements.

In contrast, this Article argues that social movements and juridical law are fundamentally in tension. I turn to nineteenth- and twentieth-century social movement history and the social science literature to demonstrate this point. I then argue that in privileging law in analyses of social movements, constitutional theorists and legal mobilization scholars are overlooking an important distinction—namely, the difference between

the definitional and inspirational roles that constitutional law in the courts can play in protest movements. Social movements may profitably use rights talk to inspire political mobilization, although with less success than legal mobilization theorists assume. But social movements that define themselves through law in the courts risk undermining their insurgent role in the political process, thus losing their agenda-setting ability....

### III. IMPLICATIONS

The legal literature on social movements speaks in a different voice about popular efforts to effect change than does the literature developed by sociologists, political scientists, and social historians. Constitutional and legal mobilization theorists typically write about social movements from a perspective internal to law. The discussions of these scholars pivot around the legal system and, more particularly, around judges and the texts that they interpret in the adjudication process.

This Part suggests that the scholarship on law and social movements is in need of further refinement because the power of law is still exaggerated in the literature. Given the hegemony of law in our society, the positive claim of legal scholars that law is definitive in social relations and that judges are pivotal as arbiters of these relations is undeniable. It is the normative implication of the positive claim—the assumption that (judge-made) law should define social movements—that is troubling. It is contrary to my understanding of how social movements have interacted with law over time and how they are best positioned to achieve their goals. Nineteenth- and twentieth-century social movement history, as well as the social science literature, counsel that law and social movements are fundamentally in tension. They teach that social movements attain leverage in the political and legal processes by engaging in disruptive protest action taken outside of institutionalized political structures; that legal and political change are codependent, but that influence runs from politics to law.

## A. CONSTITUTIONAL THEORY ON SOCIAL MOVEMENTS

In a recent symposium article on social movement scholarship, Professor Edward Rubin noted that legal scholars seem “oblivious” to the social science literature on social movements. He assumed that this lacuna results from the juricentrism of law. Professor Bill Eskridge’s interdisciplinary, theoretically sophisticated, and wide-ranging work on social movements suggests that Rubin is only half right. Eskridge, the leading legal theorist of social movements, is well versed in the literature and finds it wanting. The major objective of his scholarship is to correct the fact that “law and even legal actors” are “bit players” in social movement theory (written by social scientists). Eskridge freely acknowledges that social movements have “generated many important statutes we now take for granted” and contributed more to the “modern meaning of the Equal Protection Clause” than “the Fourteenth Amendment’s framers.” But his aim is to demonstrate that “[l]aw and legal actors are critical to the instigation and dynamics, as well as the goals, of [the identity-based social movement].”

Eskridge’s scholarship in this area is profound and refreshing, but one must nevertheless ask whether the conceptual foundation on which his arguments rest is persuasive. As an initial matter, his rhetoric of “identity” suggests a major question about his normative vision of social movements. The one-dimensional identity that the law of equal protection and interest group politics imposes on “suspect” racial classes is deeply problematic for claims of distributive justice, as I have argued above. It limits the goals of political struggle and legal agenda to those objectives preferred by and most useful to elites. Second, Eskridge’s failure to discuss the formation, organization, evolution, strategies, and tactics of social movements simplifies and flattens these movements into static repositories or mirrors of legal epistemologies, norms, and processes. Eskridge overlooks the interactive and temporal dimensions of a social movement’s engagement with law; law envelops and defines the movements, in his telling. Most troubling, Eskridge’s vision of “peaceable

pluralism” is an ... undesirable portrait of society and of social movement’s role in the polity—a reaction that even he anticipates. In his view, human agency is excessively subservient to the dictates of law and order. This portrait bears little relation to the social history of the marginalized groups that Eskridge concedes have been so influential in shaping constitutional history. Nevertheless, Eskridge’s vision probably does accurately describe how the Supreme Court has mediated democracy and social movements in recent history; thus, it helps to explain the fate of the Grutter intervenors’ “mass movement....”

### C. DISTINGUISHING LAW FROM SOCIAL MOVEMENTS

Legal theorists’ confidence in the compatibility of law and political struggles for change, including identity-based movements, flows, I propose, from their tendency to characterize social movements in ways that deny their distinctive features. Those who champion the centrality of law to social movements or advance the concept of legal mobilization wrongly conflate politicized legal campaigns with “social movements.”

In ascribing such vast capacities to lawyers or constitutional text as mobilizing agents, or assigning judges the role of “necessary safety valve” “channeling” movements in “assimilative directions,” legal scholarship overlooks the characteristics of social movements that make them unique.

Attaching concrete meaning to the term “social movement” illuminates the distinction that I offer between social movements as agents of “peaceable pluralism” and progressive social movements that seek political agency outside of the law. In using the term “social movement,” I mean to suggest a set of characteristics and activities typically associated with and flowing from participatory democratic action. Participants in social movements engage in a sustained, interactive campaign that makes sustained, collective claims for relief or redistribution in response to social marginalization, dislocation, change, or crisis. The hallmark of such participatory democratic action is the effort by citizens to influence public

policy by appealing directly to the public and a target audience of decision-makers. Participatory democracy thus functions quite differently from indirect democracy, in which citizen preference is subsumed within the organizational structures and strategic apparatus of political parties and interest groups. Instead, citizens seek influence through political activism that occurs outside of such structures, and they practice a “contentious politics,” as Professor Charles Tilly, a leading theoretician of social movements, has explained.

Social movement activity is characterized by organization, cohesion, and agenda setting. Despite planning, social movements retain fluidity and an improvisational quality. They must retain the ability to change course and tactics quickly because they must respond to the changing political environment if they are to sustain themselves and achieve and implement their goals. As historian Jo Freeman has maintained, “It is the tension between spontaneity and structure that gives a social movement its peculiar flavor.”

Members of progressive social movements typically participate in the decision-making process on equal footing, although they may choose leaders or spokespersons to act on behalf of the group. “[M]ost movements are not subject to hierarchical control,” Freeman explains, because hierarchy and the structure that it implies can undermine the egalitarian ethos that animates social movements. Moreover, a hierarchical structure can undermine movement goals such as mobilizing and organizing communities to challenge authority. This is true in part because the constituency typically involves “ordinary people as opposed to army officers, politicians, or economic elites.” These are people on society’s margins—for instance, poor people with little formal education—for whom the domination and status differentiation associated with hierarchy would be counterproductive. Or the constituency might simply lack the social and intellectual capital, and thus the confidence, of people in dominant positions in society, as was true of many women at the beginning of the second wave feminist movement. Either case suggests why elite and/or professional involvement in social movements is fraught with difficulty:

Professionals are accustomed to hierarchy, expect to occupy leadership roles, and expect to utilize their expertise; their perspectives can clash with those of lower-status participants in a social movement.

Lawyers ... must translate claims about social problems into the language and form of law, framing them as constitutional issues. They do so for purposes of appealing in a formal forum (the courtroom) to a fact-finder unaccountable to the public, rather than to the public generally, or to those with direct power over public policy. Law is, then, the essence of a state-mediated process, one that privileges arcane language and expertise over the frames of reference familiar to laypeople.

Even when favorable outcomes are achieved through the legal process, legal remedies are unlikely to satisfy a social movement's conception of substantive justice because courts are likely to adopt a centrist alternative to a progressive social movement's goals. Remedies that aspire to distributive justice—for instance, structural injunctions used in school desegregation cases—are considered extraordinary exercises of judicial power. Thus, these judicial remedies generally have not fared well during the implementation process. Given the limited nature of legal remedies, the unpredictable ways in which legal strategies can aid social movements, and the ancillary role that law often plays to politics, law in the courts is an implausible tool of choice for protest groups seeking distributive justice.

#### D. THE DEFINITIONAL/INSPIRATIONAL ROLE DISTINCTION

The relationship between social movements and law is essentially antagonistic, but activists do and must utilize legal processes when necessary to advance their goals. Given the tension between the two, however, the objectives of such movements typically will be best served by circumspection about legal epistemologies and processes. Calculated, strategic uses of law that do not threaten the movement's ability to exercise influence by introducing conflict may be advantageous. Litigation

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or the threat of litigation might be a tactic among a broader arsenal of tools to which the movement turns at an opportune moment. But if law wholly defines a social movement in the way that recent constitutional scholarship suggests that it does or should, the movement likely would lose its capacity to shape, or stand outside of, the decision-making processes of political and legal elites.

The decision-making calculus that I suggest can be captured by distinguishing between two ways in which law and social movements can relate: Law in the courts can play either a definitional role or an inspirational role in social movements. Social movements may profitably use rights talk to inspire political mobilization, even though legal mobilization theorists overstate law's effectiveness in this regard. But social movements that make litigation definitional to their agendas threaten their insurgent role in the political process. Without an insurgent element, social movements lose their agenda-setting ability. 🌿

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