The Sit-ins and the Failed State Action Revolution

Christopher W. Schmidt

American Bar Foundation

750 North Lake Shore Drive
Chicago, IL 60611
(802) 384-1616 • cschmidt@abfn.org

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ABSTRACT

This article revises the traditional account of why the Supreme Court, when faced in the early 1960s with a series of cases arising out of the lunch counter sit-in movement, refused to hold racial discrimination in public accommodations unconstitutional. These cases are the great aberration of the Warren Court. At a time when the justices confidently reworked one constitutional doctrine after another, often in response to the moral challenges of the civil rights movement and often in the face of considerable public resistance, they broke pattern in the sit-in cases. And they did so despite a transformation in popular opinion in support of non-discriminatory access to public accommodations—a transformation largely brought about by the sit-in protests, which initiated a far-reaching national reconsideration of the scope of the constitutional equal protection guarantee.

Traditional explanations have emphasized the doctrinal complexities of the "state action" limitation on the Fourteenth Amendment and institutional limitations of the judiciary in dealing with the problem of private discrimination. While these factors played a role, I argue that a key reason the sit-in cases failed to fundamentally reshape the reach of the constitutional antidiscrimination requirement was the Supreme Court's refusal to tolerate civil disobedience. In the early sit-in cases, the justices avoided the crux of the state action dilemma, instead attacking southern resistance to *Brown v. Board of Education* and overturning protesters' convictions based on the existence of official state segregation policy. By 1964, when the Court confronted a case in which there was no state segregation policy to strike down, the increasingly confrontational tactics of the civil rights movement led several justices to become antagonistic toward efforts to challenge laws and practices, however unjust, outside the judicial process. Now it was the disobedience of the civil rights protesters that prevented a majority from supporting the protesters' constitutional claim. In the end, concerns with protecting the rule of law in the face of a society that seemed pulled in increasingly lawless directions prevented a doctrinal revolution.

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* Visiting Scholar, American Bar Foundation; Visiting Associate Professor, Chicago-Kent College of Law. B.A. 1996, Dartmouth College; M.A. 2000, Ph.D. 2004, Harvard University (History of American Civilization); J.D. 2007, Harvard Law School. For helping to inspire this work and offering invaluable guidance along the way, I thank Robert Post and Reva Siegel. For their thoughtful comments and suggestions on various versions of this article, many thanks to Richard Fallon, Jon Gould, Kate Masur, Serena Mayeri, Lucy Salyer, Kristen Stilt, Allison Tirres, and the participants of the Public Law Workshop at Harvard Law School, the Northeast Regional Law and Society Meeting Junior Scholar Session, and the Chicago Legal History Seminar.

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INTRODUCTION

When African American students sat down at segregated lunch counters across the South in the spring of 1960, they presented a profound challenge to the custom and law of white supremacy. It would be hard to imagine a form of protest that more powerfully demonstrated the flagrant and perverse injustice of the Jim Crow South. Here were well dressed students, carrying schoolbooks and Bibles, quietly seated at lunch counters—many located in department stores that welcomed black customers to purchase anything in the store, including food, as long as they did not take a seat in the restaurant—and all they were asking for was a cup of coffee. The moral lines of this scene were only sharpened when the demonstrations attracted an audience of angry white youths shouting epithets at the unmoved protesters, spitting at them, pouring food and drinks on their heads, and, in some cases, physically attacking them.

The sit-ins, as acts of civil disobedience, had two primary goals. First, they sought to draw attention to injustice, to juxtapose immoral laws with higher principles of right and wrong. In this regard, the sit-ins were surely one of the most successful episodes of civil disobedience in modern American history. As the protests spread, shutting down restaurants, sending hundreds of students to jail, sparking sympathy boycotts in the North, they forced the nation to pay attention. With heroic simplicity, the protests made obvious the injustice of discrimination in public accommodations and put to rest lingering assumption that African Americans in the South were satisfied with the existing system of race relations or with piecemeal reforms. They stirred a national outpouring of support for the basic cause the demonstrators represented—equal access to public accommodations. Yet civil disobedience seeks not only to draw attention, but also to change behavior and laws: protesters aim to diminish or remove the gap between morality and legality. Here too the sit-ins were remarkably effective. Local businesses voluntarily desegregated in response to the sit-ins, hundreds of cities and many states passed public

accommodations statutes, and, most significantly, Congress passed Title II of the Civil Rights Act of 1964, which prohibited racial discrimination in nearly all places of public service.

The dramatic accomplishments of the sit-in movement had unmistakable implications for the ways in which Americans understood the meaning of their Constitution. In the wake of *Brown v. Board of Education*,[1] it was inevitable that the challenge to race-based exclusion from public accommodations would be viewed as a constitutional dilemma. The sit-ins pressed upon the nation, with an urgency and sincerity of purpose that could not be captured in a traditional legal challenge, the question of whether *Brown*'s desegregation mandate—which, by 1960, covered all state-operated facilities—applied to privately owned facilities that opened their doors to the general public. The controversy surrounding the sit-ins was pervasively engaged with the Constitution, as all sides claimed to be acting in accordance with constitutional values. And many assumed that the eventual success of the sit-ins provided the basis for a new understanding of the constitutional equality principle, one that moved beyond legalistic distinctions between official and private actors and gave greater recognition to the centrality of human dignity in the struggle for racial equality. The sit-ins exemplified the ways in which a social movement could effectively transform popular and political understandings of the Constitution.

There was one place, however, where the challenge of the sit-ins found only limited success: the Supreme Court. The institution that during this period led the way in attacking racial discrimination in criminal justice, voting, and schools refused to accept the students' constitutional claim. In one sit-in case after another, the justices avoided the central constitutional question of whether the protections of the Equal Protection Clause of the Fourteenth Amendment extended to service in privately owned public accommodations. This issue centered on the Fourteenth Amendment's "state action" doctrine, which limited the amendment's application to discriminatory actions of "state actors," excluding actions of private individuals. The justices found ways to side with the students, overturning their trespassing and breach-of-peace convictions on narrow, fact-based grounds, while dodging the constitutional issue. Most observers assumed that the Court was allowing the issue to develop further, allowing public opinion to come around more to the antidiscrimination principle. Yet by 1964, when faced with a case, *Bell v. Maryland*,[2] in which the constitutional issue seemed unavoidable, when the moral cause of the civil rights movement had pushed itself so deeply into the national consciousness that even Congress, that most reluctant of institutions on questions of civil rights, was responding, the Court refused to extend the logic of *Brown* to public accommodations. In fact, a majority of the Court was prepared to explicitly hold the exact opposite: that the Constitution did *not* require racially equal access to public accommodations.[3]

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[1] 347 U.S. 483 (1954).
[2] 378 U.S. 226 (1964).
[3] The aberrational quality of the sit-in cases is further reinforced by a recent generation of scholarship that has emphasized the majoritarian tendencies of the Supreme Court. While the Court serves a distinct role in the American political system, responding to somewhat different pressures than the elected branches, these scholars argue that it is fundamentally moved by majority sentiment and that opinions that appear to protect minority rights are, more often than not, best understood as the imposition of majority sentiment on outlier practices. *See, e.g.,* JEFFREY ROSEN, THE MOST DEMOCRATIC BRANCH: HOW THE COURTS SERVE AMERICA (2006);

This outcome was averted by Justice Brennan's creative maneuvering, resulting in another narrow opinion that avoided the constitutional issue. The practical consequences of the Court's avoidance tactics were minimized by congressional passage of Title II, which created a statutory right in place of the constitutional right the Court had refused to find.

Why was the Supreme Court so wary of supporting the students' constitutional claim in the sit-in cases? Traditional explanations highlight the complexities of state action doctrine and the doctrinal innovation that would be required to place public accommodation under the restrictions of the Equal Protection Clause. They also emphasize the institutional limitations of the courts, concluding that the justices recognized that this kind of socially contested problem was better left to state and federal lawmakers.[4] These explanations, while perhaps normatively appealing (they often are framed as justifications for the Court's constitutional avoidance tactics in the sit-in cases), are limited as a descriptive matter. For the Supreme Court to apply the constitutional antidiscrimination norm to public accommodations would not require a major overhaul of existing doctrine and it would not have been a dramatic departure from the ambitious course the Warren Court was already charting in the area of civil rights. It certainly would be nothing so doctrinally and institutionally innovative as the school desegregation decision or the reapportionment decisions.[5] By late 1963, it would not have been nearly as controversial as, say, the Court's 1962 ruling striking down school prayer.[6] A holding that proprietors of public accommodations who opened their doors to the general public must abide by the antidiscrimination requirement of the Fourteenth Amendment—or that a state that supports these discriminatory practices through enforcement of trespassing or disorderly conduct laws violates the Equal Protection Clause—would have been, to be sure, a significant reinterpretation of constitutional law. But it would not have been a dramatic departure for the Warren Court.

Traditional explanations of the sit-in cases fail to adequately appreciate the pervading influence of civil disobedience as a limiting factor for the Court—specifically the justices' desire to identify and condemn illegal behavior, in all its manifestations.[7] Far more than abstract

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MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY (2004); LUCAS A. POWE, JR., THE WARREN COURT AND AMERICAN POLITICS (2000).

[4] *See, e.g.,* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 176-77 (1962); ARCHIBALD COX, THE WARREN COURT: CONSTITUTIONAL DECISION AS AN INSTRUMENT OF REFORM 31-41 (1968); Monrad G. Paulsen, *The Sit-In Cases of 1964: "But Answer Came There None,"* 1964 Sup. Ct. Rev. 137, 170.

[5] Reynolds v. Sims, 377 U.S. 533 (1964); Baker v. Carr, 369 U.S. 186 (1962).

[6] Engel v. Vitale, 370 U.S. 421 (1962); POWE, *supra* note 3, at 187-90 (describing reaction to *Engel*).

[7] Although I have attempted to summarize a "traditional" account of the sit-ins as a constitutional issue, there is surprisingly limited scholarship, either historical or legal-historical, on the sit-in movement. Compare, for example, the scholarship on the Montgomery Bus Boycotts. This topic has earned three analytical legal-historical articles, Christopher Coleman, Laurence D. Nee, & Leonard S. Rubinowitz, *Social Movements and Social Change Litigation: Synergy in the Montgomery Bus Protest*, 30 LAW & SOC. INQUIRY 663 (2005); Robert Jerome Glennon, *The Role of Law in the Civil Rights Movement: The Montgomery Bus Boycott, 1955-1957*, 9 LAW &

concerns with property rights and judicial legitimacy, I argue it was the context of massive resistance and the vehicle by which the constitutional claims arrived at the Supreme Court, a movement of targeted lawbreaking, that explain the failure of the revolution of the state action doctrine.

Intolerance for civil disobedience prevented the Court from appreciating the achievement of the sit-in protests. Rather than considering the implications of the sit-ins for the social construction of public and private space or for the role of human dignity in defining the reach of constitutional equality—the central lessons of the sit-ins on the level of popular constitutional belief—the Court used the early sit-in cases as an opportunity to strike out at defiant southern whites who refused to accept the mandate of *Brown* and its progeny. The justices focused on bringing the states in line with *Brown*, hunting out state segregation policy wherever they could

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HIST. REV. 59 (1991); Randall Kennedy, *Martin Luther King's Constitution: A Legal History of the Montgomery Bus Boycott*, 98 YALE L.J. 999 (1989), in addition to countless historical accounts in monographs and biographies of Martin Luther King, Jr. Another comparable protest movement from the early civil rights era, the Freedom Rides, has recently received an exhaustive historical account. RAYMOND ARSENAULT, FREEDOM RIDES: 1961 AND THE STRUGGLE FOR RACIAL JUSTICE (2006).

The sit-ins, which raised much more fundamental legal and constitutional questions than either the Montgomery Bus Boycotts or the Freedom Rides, have received remarkably little scholarly attention since the 1960s. The only studies of the legal issues raised by the sit-ins appeared contemporaneously with the civil rights movement. MARTIN OPPENHEIMER, THE SIT-IN MOVEMENT OF 1960 (1989) (*reprint of* Ph.D. diss., U. Penn., 1963); JAMES H. LAUE, DIRECT ACTION AND DESEGREGATION, 1960-1962: TOWARD A THEORY OF RATIONALIZATION OF PROTEST (1989) (*reprint of* Ph.D. diss., Harvard., 1966); MILES WOLFF, LUNCH AT THE FIVE AND TEN: THE GREENSBORO SIT-INS (1970); Martin Oppenheimer, *The Southern Student Movement: Year 1*, 33 J. NEGRO ED. 396, 397 (1964); Daniel H. Pollitt, *Dime Store Demonstrations: Events and Legal Problems of the First Sixty Days*, 1960 DUKE L.J. 315. Scholarship on the Supreme Court's consideration of the sit-in cases also peaked in the 1960s. *See, e.g.,* Joel B. Grossman, *A Model for Judicial Policy Analysis: The Supreme Court and the Sit-In Cases*, in FRONTIERS OF JUDICIAL RESEARCH 405-60 (Joel B. Grossman & Joseph Tanenhaus eds. 1968); Jack Greenberg, *The Supreme Court, Civil Rights, and Civil Dissonance*, 77 YALE L. J. 1520 (1968); Burke Marshall, *The Protest Movement and the Law*, 51 VA. L. REV. 785 (1965); Charles L. Black, *The Problems of the Compatibility of Civil Disobedience with American Institutions of Government*, 34 TEXAS L. REV. 492 (1965); Paulsen, *supra* note 4; Thomas P. Lewis, *The Sit-In Cases: Great Expectations*, 1963 SUP. CT. REV. 101. Subsequent scholarship on the sit-ins largely ignores the constitutional ramifications of the protests; rather, it has focused on local studies, see, e.g., DAVID HALBERSTAM, THE CHILDREN (1998); WILLIAM H. CHAFE, CIVILITIES AND CIVIL RIGHTS: GREENSBORO, NORTH CAROLINA, AND THE BLACK STRUGGLE FOR FREEDOM 79-101 (1980), movement mobilization studies, see, e.g., CLAYBORNE CARSON, IN STRUGGLE: SNCC AND THE BLACK AWAKENING OF THE 1960S 9-18 (2d. ed. 1995); ALDON D. MORRIS, THE ORIGINS OF THE CIVIL RIGHTS MOVEMENT: BLACK COMMUNITIES ORGANIZING FOR CHANGE 188-215 (1984); AUGUST MEIER & ELLIOT RUDWICK, CORE: A STUDY OF THE CIVIL RIGHTS MOVEMENT, 1942-1968 101-31 (1973); and histories of consumerism, see, e.g., LIZABETH COHEN, A CONSUMERS' REPUBLIC: THE POLITICS OF MASS CONSUMPTION IN POSTWAR AMERICA 166-91 (2003).

find it, and then punishing this disobedience by overturning the convictions of the protesters based on the presence of discriminatory state action. Effective at sending a message to southern states while also overturning convictions of civil rights protesters, this approach limited the scope of constitutional analysis by the justices. While the nation was talking about the indignity of segregation practices and the importance of public accommodations in modern American society, the Court was hunting out state actors who continued to defy *Brown*.

By 1963, official segregation policy was being abandoned in the South, and the justices faced a new round of sit-in cases in which the central constitutional question, it seemed, had to be resolved. But by this point, the civil disobedience of the sit-ins no longer appeared as focused, carefully scripted challenges to obviously unjust practices, but the harbinger of a new generation of increasingly aggressive protest tactics that seemed to challenge not only Jim Crow but also traditional, institutional pathways for social reform. When put to the test, the Court sided with an affirmation of the legal process over a retrospective sanction of extra-legal actions. Concerns with protecting the rule of law in the face of a society that seemed pulled in increasingly lawless directions, in the end, prevented a doctrinal revolution.

I. THE SIT-INS AS A CONSTITUTIONAL CHALLENGE

The students who launched the sit-in movement, beginning with the four Greensboro A&T freshman who sat down at a downtown Woolworth's on February 1, 1960, were not concerned with the doctrinal complexities of the state action doctrine. Indeed, they did not see themselves as making a constitutional claim—at least not one that required judicial recognition. In fact, the motivations for the first generation of sit-in protesters in the spring of 1960 pointed in the exact opposite direction: they wanted to stake a claim for equal treatment and respect that would not have to be settled in the courtroom. They feared that once their protests were turned into a formal legal claim, they would lose control over the direction of the protests to the lawyers, and the very point of the protest—which concerned the opportunity to enact their dignitary claim, and not just petition for its recognition—would be compromised.[8]

Intentions of the first generation of student protesters notwithstanding, the lunch counter protests quickly became a constitutional challenge, to be evaluated both inside and outside the courts. When protesters were arrested, they drew upon the expertise of lawyers. And when these lawyers came from civil rights organizations, such as the NAACP, which agreed to represent any arrested sit-in demonstrator, they wanted to appeal the convictions to establish test cases that could be brought to the federal courts. But it was not just the work of civil rights lawyers who transformed the protests into constitutional challenges. The historical moment in which the sit-ins took place ensured that the protests would be understood as raising not just a moral or legal claim, but a *constitutional* claim. Simply stated, *Brown* shaped how the nation received the sit-ins. The uncertain status of the state action doctrine in 1960, reflected in the spectrum of predictions about which way the Court was likely to rule in the sit-in cases, extended

[8] *See* Christopher W. Schmidt, The Sit-Ins, the NAACP, and the Role of the Constitution in the Civil Rights Movement, (paper delivered to the Annual Meeting of the American Society for Legal History, October 2007).

beyond court decisions and law school commentary. *Brown*—and particularly the series of per curium decisions that followed, extending *Brown*'s mandate to public beaches, golf courses, buses, and other publicly controlled facilities[9]— convinced many observers that the logic of *Brown* applied to all facilities open to the public, even those privately owned. At the time of the sit-ins, both allies and opponents of the civil rights movement recognized the lunch counter protests as an issue to be resolved through a struggle over the meaning of the Constitution.

A. Civil Disobedience as a Constitutional Claim

The idea of civil disobedience as a constitutional claim is at once controversial and banal. The concept undoubtedly carries with it deeply subversive connotations. Yet to consider civil disobedience as an technique of constitutional interpretation, we must first reject the assumption that civil disobedience represents an abandonment of law and constitutionalism. The United States, as practically every American proponent of the value of civil disobedience has pointed out, was born of collective law breaking. Advocates of civil disobedience during the civil rights movement frequently emphasized its long, valuable American heritage.[10]

Although the term "civil disobedience" may be used loosely to cover acts that are in fact subversive of the legal system, political and legal theorists have offered more rigorous definitions that emphasize the constructive role of civil disobedience in the legal system. John Rawls defined civil disobedience as "a public, nonviolent, conscientious yet political act contrary to law usually done with the aim of bringing about a change in the law or policies of the government."[11] Robert Cover's definition—"[t]he decision to act in accord with an understanding of the law validated by the actor's own community but repudiated by the officialdom of the state"[12]—highlights the cultural roots of the protester's alternative vision of the law, thereby emphasizing the valuable "jurisgenerative" capacity of civil disobedience.[13] A protest community can generate an alternative vision of the law that, through an act of civil disobedience, is placed in conflict with the existing legal system. Out of this conflict, new legal norms can emerge. "In law," observed Paul A. Freund, "creativity is a product of the tension between heresy and heritage."[14]

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[9] New Orleans City Park Improvement Ass'n v. Detiege, 358 U.S. 54 (1958) (per curium) (parks); Gayle v. Browder, 352 U.S. 903 (1956) (buses); Holmes v. City of Atlanta, 350 U.S. 879 (1955) (per curium) (municipal golf courses); Mayor and City Council of Baltimore v. Dawson, 350 U.S. 877 (1955) (per curium) (public beaches); Muir v. Louisville Park Theatrical Ass'n, 347 U.S. 971 (1954) (per curium) (public auditoriums).

[10] *See, e.g., Interview on "Meet the Press,"* April 17, 1960, in 5 THE PAPERS OF MARTIN LUTHER KING, JR. 431 (1992) [hereinafter KING PAPERS] (King describing a willingness to break "man-made laws in conflict with what we consider the law of God, or the moral law of the universe" as "in our American tradition all the way from the Boston Tea Party on down.").

[11] JOHN RAWLS, A THEORY OF JUSTICE 364 (1971).

[12] Robert M. Cover, *Foreword: Nomos and Narrative,* 97 HARV. L. REV. 4, 43 (1983).

[13] *Id.* at 11.

[14] Paul A. Freund, *Civil Rights and the Limits of Law*, 14 BUFF. L. REV. 199, 207 (1964).

The key point, then, is that civil disobedience can be an act of respect for the basic institutions of a society. Judge Frank Johnson described civil disobedience as a "*procedure* for challenging law or policy."[15] This paradoxical idea—respecting the law by breaking a law—was exemplified by the version of civil disobedience practiced by Martin Luther King, Jr., and the student protesters. King's advocacy of breaking laws "openly, lovingly," only makes sense, Stephen Carter has noted, "if one first accepts the essential justness of the state."[16] "[T]he individual who disobeys the law, whose conscience tells him it is unjust and who is willing to accept the penalty by staying in jail until that law is altered," King explained, "is expressing at the moment the very highest respect for the law."[17] The belief that an open act of disobedience can cause change is, at bottom, a statement of faith in the existing legal order.

B. Three Models of Social Protest as Legal Appeal: The Montgomery Bus Boycotts, the Sit-Ins, and the Freedom Rides

The first three major protest campaigns of the modern civil rights movement—the Montgomery Bus Boycotts, the sit-ins, and the Freedom Rides—each used direct-action protests as a tool for making a legal claim. They should be understood, in Bickel's words, as "extra-legal processes of law formation."[18] These claims were often evaluated by the courts, but the public nature of the protests meant that the legal claim was not aimed exclusively, or even primarily, at the courts. The nature of the legal claim for each was distinct: the Freedom Rides sought enforcement of clear federal law; the bus boycotts culminated in the declaration of new federal law; and the sit-ins created pressures to clarify ambiguous federal law. A brief comparison of the legal issues at stake and the effect of the protest tactics in these protest campaigns offer tangible examples of legal claims emerging from extrajudicial action.

The Montgomery Bus Boycotts began with a modest goal: a fairer system of segregation on the city buses. It was only the intransigent white city leadership that led the protest leaders to elevate the demands of the boycott into a call to desegregate the entire bus system. When the boycotts first began, with Rosa Park's refusal to give up her seat to a white passenger in December 1955, the practice of segregation on intrastate transportation did not appear to violate the Constitution (or any federal law). The Supreme Court had recently decided *Brown* and *Brown II*, the implementation decision, but it had given only minimal indications about whether the reasoning of the school desegregation cases applied beyond the schools. The wording of the *Brown* decisions was carefully limited to the context of education, and the stated reasoning of *Brown*, with its reliance on the psychological effects of school segregation on black children, seemed to indicate that separate-but-equal might still apply in places where such psychological damage could not be demonstrated. Yet there were also some early indications that the Court was willing to consider challenges to state-sanctioned segregation beyond the schools. In 1955

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[15] Frank M. Johnson, Jr., *Civil Disobedience and the Law*, 20 U. FLA. L. REV. 267, 269 (1968).
[16] STEPHEN L. CARTER, INTEGRITY 182 (1996). *See also id.* at 184 ("Conversely, a society that could not be moved by nonviolent protest was not really a just one.").
[17] Martin Luther King, Jr., *Love, Law, and Civil Disobedience*, NEW SOUTH (Dec. 1961), *reprinted in* A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS AND SPEECHES OF MARTIN LUTHER KING, JR. 49 (James M. Washington ed. 1986).
[18] ALEXANDER M. BICKEL, POLITICS AND THE WARREN COURT 82 (1965).

the Court issued brief per curium decisions striking down segregation of public beaches[19] and municipal golf courses,[20] each consisting of little more than a citation to *Brown*.[21] (In light of the reaction of the white South to *Brown*, the justices felt this approach might be less inflammatory.[22]) So, at the time of the bus boycotts, the open question, in terms of constitutional law, was whether the Court would be willing to extend *Brown* one more step, to cover a city bus system. In November 1956, after a year-long boycott, the Court did just this in *Gayle v. Browder*.[23]

The legal claim raised by the Freedom Rides of 1961, required no judicial innovation or extrapolation. This protest relied on the considerable play in the joints of legality within the federal system. By 1961 federal law clearly prohibited segregation in carriers and facilities engaged in interstate transportation.[24] Indeed, the protest was directly inspired by the Supreme Court's decision in *Boynton v. Virginia*,[25] which held that segregation in interstate transportation facilities violated the Interstate Commerce Act. Yet the command of the Court seemed to have been missed on the South. James Farmer, the national director of the Congress of Racial Equality (CORE), received a steady stream of letters following *Boynton* from African Americans travelers who were still required to sit in separate seating on buses and eat at separate lunch counters and use separate restroom facilities in the bus terminals.[26] CORE envisioned the protests as creating pressure on the states to follow clearly defined federal law. So when the Freedom Riders refused to follow the orders of southern state officials who were acting in opposition to federal law, the protest became an act of civil disobedience toward local and state law, but not superior federal law. The gap between state and federal law created the possibility of civil disobedience that challenged state law in order to vindicate higher law.

In contrast to the clear federal law supporting the Freedom Rides, the legal basis of the sit-ins was deeply contested, a product of the instability of the state action concept itself and the shifting interpretations of state action doctrine in the middle decades of the twentieth century. As the legal realists emphasized decades before the civil rights era, in modern society there is no unproblematic, neutral manner by which the line between the public and private spheres can be drawn.[27] Once one appreciates that the absence of state involvement is itself a choice, is itself a form of state "action," government responsibility can be found everywhere. The critical question

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[19] Mayor and City Council of Baltimore v. Dawson, 350 U.S. 877 (1955) (per curium).
[20] Holmes v. City of Atlanta, 350 U.S. 879 (1955) (per curium).
[21] *See also* Muir v. Louisville Park Theatrical Ass'n, 347 U.S. 971 (1954) (per curium) (desegregating public auditoriums).
[22] Dennis J. Hutchinson, *Unanimity and Desegregation: Decisionmaking in the Supreme Court, 1948-1958*, 68 GEO. L.J. 1, 63-64 (1979)
[23] 352 U.S. 903 (1956).
[24] Mitchell v. United States, 313 U.S. 80 (1941); Morgan v. Virginia, 328 U.S. 373 (1946); Henderson v. United States, 339 U.S. 816 (1950); Boynton v. Virginia, 364 U.S. 454 (1960).
[25] 364 U.S. 454 (1960).
[26] ARSENAULT, *supra* note 7, at 93.
[27] *See, e.g.,* Louis L. Jaffe, *Law Making by Private Groups*, 51 HARV. L. REV. 212 (1937); Morris R. Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8 (1927); Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470 (1923).

becomes the *extent* of state involvement in a particular practice, a judgment that typically depends on the perceived value of the constitutional principle at issue. Thus, it was the strength of the moral claim of civil rights for African Americans in the middle decades of the twentieth century that brought the first sustained judicial reconsideration of the state action doctrine since its inception in the late nineteenth century.[28] For the two decades preceding the sit-in cases, the Court had steadily expanded its definition of state action, sometimes in quite radical ways,[29] to cover more and more acts that had previously been relegated to the private sphere. In the early 1960s, many legal scholars assumed that either the Court had already ruled by implication that public accommodations were covered by the Equal Protection Clause or, more plausibly, if the Court were directly faced with the issue, the justices would explicitly hold so. Others refused to hazard a guess as to where the Court would go. "Except in the primary areas of governmental service" (such as a primary election), Elias Clark wrote in 1957, "no one can predict the reach of the Fourteenth Amendment."[30]

When laws are unclear, or when social developments suggest the need for new interpretations of existing legal norms, civil disobedience may be a way of pressuring courts to elucidate ambiguities. In this way, acts of lawbreaking may serve a role in society analogous to more traditional acts of challenging legislation. In some situations, the gap between morality and legality that the act of civil disobedience is premised upon may be fungible enough, particularly in cases where the boundaries of the law are vague or shifting, that morality is a valuable guide for legality. This is particularly true when the legal norm at issue is one of the open-textured provisions of the Constitution. As Ronald Dworkin has written: "In the United States, at least, almost any law which a significant number of people would be tempted to disobey on moral grounds would be doubtful—if not clearly invalid—on constitutional grounds as well. The constitution makes our conventional political morality relevant to the question of validity."[31] Thus, civil disobedience offers (drawing again on Dworkin's words) "a means of testing relevant hypotheses." The act of disobedience itself takes on an educational function. "If the question is whether a particular rule would have certain undesirable consequences, or whether a particular rule would have limited or broad ramifications, then, before the issue is decided, it is useful to know what does in fact take place when some people proceed on that rule. . . . If the question is whether and to what degree a particular solution would offend principles of justice or fair play deeply respected by the community, it is useful, again, to experiment by testing the community's

[28] *See* Smith v. Allwright, 321 U.S. 649 (1944); Shelley v. Kraemer, 334 U.S. 1 (1948); Terry v. Adams, 345 U.S. 461 (1953).

[29] *See, e.g.,* Marsh v. Alabama, 326 U.S. 501 (1946); Shelley v. Kraemer, 334 U.S. 1 (1948).

[30] Elias Clark, *Charitable Trusts, the Fourteenth Amendment, and the Will of Stephen Girard*, 66 Yale L. J. 979, 982-83 (1957). *See also* William W. Van Alstyne & Kenneth L. Karst, *State Action*, 14 STAN. L. REV. 3, 58 (1961) ("The state action cases, at least since *Smith v. Allwright*, have fulfilled Holmes' prophecy: 'Certainty generally is illusion, and repose is not the destiny of man.'" (footnotes omitted).

[31] RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 208 (1978).

response."[32] This was precisely what the sit-in protesters were attempting to accomplish: Simply by sitting down at the lunch counter, the students were enacting a different constitutional norm.[33]

The sit-ins, as an extrajudicial claim on the Constitution, can best be understood as falling somewhere between the Montgomery Bus Boycotts and the Freedom Rides. If one were to assume, as many civil rights advocates in 1960 did, that if the Supreme Court were squarely faced with the question of whether privately owned public accommodations could discriminate based on race, it would extend the state action doctrine to encompass this issue, then the sit-ins raised precisely the same issue as the Freedom Rides: it was a matter of enforcing federal law against state efforts to nullify that law. But if one were to accept the belief, still widely held, that the question of the constitutionality of segregation in privately owned public accommodations was at best ambiguous and probably more likely opposed to their actions, the sit-ins presented a somewhat different legal issue claim. The goal here was to clarify or actually change federal law. This comes closer to the dynamic of the Montgomery Bus Boycotts (although with the added element of civil disobedience at issue in the sit-ins). If understood in this way, Bickel explained, the sit-ins become "an exercise in law formation through exploitation of the natural tension between two coexisting systems of law, state and federal."[34] The existence of different levels of government opens the possibility for forms of civil disobedience that are actually working within the system. In a unitary system of government, an act of civil disobedience like the sit-ins would have been "a revolutionary act, at war with the legal order." But in the United States federal system, "the appeal to higher law is not a call for revolutionary change to be imposed on the legal order by forces operating from outside, but an appeal—almost in a technical legal sense—to higher lawmaking institutions, which the system provides. In such a system some flouting of the local law, aimed at provoking action by the higher sovereignty, is virtually invited."[35]

This idea of the sit-ins as an "appeal" of uncertain federal law—aimed toward Congress and national opinion, as well as toward the judiciary—resonated with many influential observers. Charles Black, a Yale Law School professor and legal adviser for the NAACP, wrote that the sit-inner "acted under a claim of right, a claim not virtually certain of validity, as with the Freedom

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[32] *Id*. at 212.

[33] "The idea was to demonstrate the reality of eating together without coercion, contamination or cohabitation." Patricia Stephens, *Tallahassee: Through Jail to Freedom*, in SIT-INS: THE STUDENTS REPORT (Jim Peck ed. 1960). *See also* Mark Tushnet, *Popular Constitutionalism as Political Law*, 81 CHI.-KENT. L. REV. 991, 994 (2006) ("People *perform* constitutional law as political law through (some of) their mobilizations in politics."); Kenneth Karst, *Boundaries and Reasons: Freedom of Expression and the Subordination of Groups*, 1990 U. ILL. L. REV. 95, 96 ("The demonstrators were . . . acting out a living narrative, claiming their equal citizenship with their bodies." (footnote omitted).); Cover, *supra* note 12, at 44 ("[A] legal interpretation cannot be valid if no one is prepared to live by it. . . . The transformation of interpretation into legal meaning begins when someone accepts the demands of interpretation and, through the personal act of commitment, affirms the position taken." (footnote omitted).).

[34] ALEXANDER M. BICKEL, THE MORALITY OF CONSENT 97 (1975).

[35] BICKEL, *supra* note 18, at 79;.

Riders, but tenable at the least and put forward in good faith";[36] Burke Marshall, Assistant Attorney General for the Civil Rights Division under Kennedy and Johnson, came to much the same conclusion.[37] In short, a good faith challenge based on doubtful or unstable federal law, many believed, should not even be considered law-breaking, or at least not punishable law-breaking. For those who approved of the sit-ins, they served the same institutional function as a test case appealed through the courts.[38]

C. The "Logic of Brown"[39] and The Sit-Ins as a Constitutional Claim

Although scholars have recently challenged traditional assumptions that *Brown* provided the spark that ignited the civil rights movement,[40] *Brown* clearly shaped the way the nation understood the significance of the sit-ins. *Brown*—and particularly the series of per curium decisions that followed, extending *Brown* into public beaches, golf courses, buses, and other publicly controlled facilities—convinced many observers that the logic of *Brown* applied to public accommodations. When Martin Luther King first spoke to the student participants in the

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[36] Black, *supra* note 7 at 497.

[37] Marshall, *supra* note 7, at 796; *see also* Greenberg, *supra* note 7, at 1521 n. 3.

[38] The fact that the laws the protesters were breaking were not actually the laws they were challenging adds another complication to understanding the sit-ins as an act of civil disobedience. The protesters were arrested under a variety of statutes—trespassing, disturbing the peace, disorderly conduct—but the object of their protest were the segregation laws, customs, and practices that pervaded the nation. This dynamic has often been described as "indirect" civil disobedience in which "secondary" laws are broken. See, e.g., Bedau, *supra* note 11, at 657; CARL COHEN, DISOBEDIENCE: CONSCIENCE, TACTICS, AND THE LAW 51 (1971). Thoreau's refusal to pay taxes as an act of protest against the nation's foreign policy is the classic example in this category. This distinction can also be captured in Dworkin's distinction between "integrity-based" civil disobedience (refusing to follow a law when doing so would violate one's conscience—e.g., an abolitionist ignoring the Fugitive Slave Act or a Jehovah's Witness refusing to salute the flag) and "justice-based" civil disobedience (breaking the law in order to demonstrate opposition to unjust policy or practices—e.g., lunch counter sit-ins or certain anti-war protests). RONALD DWORKIN, A MATTER OF PRINCIPLE 107 (1985).

In his "Letter from Birmingham Jail," Martin Luther King, Jr., famously addressed the question of whether breaking a secondary law, such as a trespass law, is properly considered an act of civil disobedience. "Sometimes a law is just on its face and unjust in application," such as a parading permit, he wrote. In this case, the ostensibly neutral law is "unjust when it is used to maintain segregation and to deny citizens the First-Amendment privilege of peaceful assembly and protest." Martin Luther King, Jr., *Letter from Birmingham City Jail* in TESTAMENT OF HOPE, *supra* note 17, at 294. For King, the trespassing and disorderly conduct laws used against lunch counter protesters was precisely this kind of law: facially just but applied to further discriminatory ends.

[39] Bell v. Maryland, 378 U.S. 226, 316 (1964) (Goldberg, J., concurring) ("[T]he logic of *Brown v. Board of Education* . . . requires that petitioners claim be sustained.").

[40] KLARMAN, supra note 3 at 344-442; GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 39-169 (1991).

sit-in movement, he described the situation as the logical extension of the school segregation struggle. "Separate facilities, whether in eating places or public schools, are inherently unequal," he told the students, echoing the famous words of Warren's *Brown* opinion.[41]

To think about this in more general terms, the process by which a grassroots action is transformed into a constitutional claim has to do not only with the nature of the action and the conscious decision of the protesters to make a constitutional claim, but also the context in which the protest takes place. In 1960, as a product of the NAACP's litigation campaign, *Brown*, and Little Rock, the issue of racial equality and segregation had become first and foremost a constitutional concern. The Montgomery Bus Boycotts was a powerful precedent: it had followed a trajectory from protest to judicial resolution. So when the sit-ins began there was already a well established narrative for how to understand these events—and this narrative pointed toward a direct connection between a challenge to racial exclusion and the Constitution.

Consider the words of President Eisenhower soon after the sit-ins flooded across the South. Responding to a question about the sit-ins at a press conference, he noted that "we have a responsibility in helping to enforce or seeing that the constitutional rights guaranteed are not violated," before wavering and claiming uncertainty about the constitutional status of these protests.[42] A few days later he seemed to have more confidence, noting that "demonstrations, if orderly and seeking to support the rights of equality, were constitutional" and that "my own understanding is that when an establishment is, belongs to the public, opened under public charter and so on, that equal rights are involved."[43] Eisenhower's public comments highlight the fact that the claims raised by the sit-ins were, at minimum, viable in public constitutional discourse. The students had effectively destabilized any certainty about whether the *Brown* mandate applied to restaurants. Even a president who was no supporter of *Brown* in the first place was inclined to view the issue as raising some basic constitutional issues and to side with the students.

Despite considerable discomfort with direct action protests as a tactic for reform, the student protesters earned a remarkable level of sympathy and support throughout the nation. Eleanor Roosevelt publicly backed the protests,[44] and both the Republican and Democratic Party platforms in 1960 included expressions of support for the sit-ins. Standing before the Supreme Court in a 1960 case unrelated to the sit-in movement but raising analogous constitutional claims, Solicitor General J. Lee Rankin urged the Court to revise its state action doctrine to protect against racially discriminatory treatment in all public accommodations.[45] The following year, Attorney General Robert Kennedy publicly backed the students' cause and privately

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[41] Martin Luther King, Jr., *A Creative Protest*, speech to student protesters in Durham, NC, Feb. 16, 1960, in 5 KING PAPERS, *supra* note 10, at 368.
[42] *Transcript of President's News Conference*, WASH. POST, May 12, 1960, at A21.
[43] *Transcript of Eisenhower's News Conference on Domestic and Foreign Matters*, N.Y. TIMES Mar. 17, 1960, at 16; *Ike Asks Mixed Teams To End South's Tensions,* CHICAGO DEFENDER, Mar. 17, 1960, at A2.
[44] *'Sit-Ins' Are Supported*, N.Y. TIMES, Mar. 23, 1960, at 18.
[45] Brief for the United States as Amicus Curiae, 16-27, Boynton v. Virginia, 364 U.S. 454 (1960).

backed their constitutional claim.[46] The six year experience with school integration as a constitutional issue allowed for this sort of intuitive transformation of the sit-ins into a constitutional issue to which the logic of *Brown*'s desegregation mandate seemed to apply. "It seems clear that this 'lunch counter movement' will become a historic milestone in the American Negro's efforts to win the rights of citizenship which are guaranteed him by the Constitution," declared *Commonweal* magazine.[47]

This trend accelerated in the following years. President Kennedy gave an address in February 1963 in which he said: "No act is more contrary to the spirit of our democracy and Constitution—or more rightfully resented by a Negro citizen who seeks only equal treatment—than the barring of that citizen from restaurants, hotels, theaters, recreational areas and other public accommodations and facilities."[48] Later that spring, in announcing his support for federal civil rights legislation, Kennedy declared the "right to be served in facilities which are open to the public" as an "elemental right," comparable to education and voting.[49] Members of Congress, in their debate over the public accommodations provision of the Civil Rights Act of 1964 (Title II), identified two constitutional provisions that granted Congress the power to regulate privately owned public accommodations: the Fourteenth Amendment, and the Commerce Clause. The commerce power was widely believed to be the stronger basis for the law; it was the one that the Kennedy and Johnson administration aggressively pushed, and it was on these grounds that the Supreme Court upheld Title II.[50] But the idea that the Fourteenth Amendment could encompass this kind of intervention was never abandoned. It received considerable favorable attention in Congress[51] and in the press,[52] and it was reserved as a question by the Court.[53] Justices Douglas and Goldberg engaged with the issue and found authority for the new law in both the Commerce Clause and the Fourteenth Amendment.[54]

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[46] KEN GORMLEY, ARCHIBALD COX: CONSCIENCE OF A NATION 156 (1997).
[47] *Quoted in* WOLFF, *supra* note 7, at 66.
[48] John F. Kennedy, Special Message to the Congress on Civil Rights, Feb. 28, 1963, PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES (1963).
[49] John F. Kennedy, Radio and Television Report to the American People on Civil Rights, June 11, 1963, PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES (1963).
[50] Heart of Atlanta v. United States, 379 U.S. 241 (1964); Katzenbach v. McClung, 379 U.S. 294 (1964).
[51] *See* DONALD G. MORGAN, CONGRESS AND THE CONSTITUTION: A STUDY OF RESPONSIBILITY 297 (1966); Robert C. Post & Reva B. Siegel, *Equal Protection by Law: Federal Antidiscrimination Legislation After* Morrison *and* Kimel*,* 110 YALE L.J. 441, 489, 494-99 (2000); HUGH DAVIS GRAHAM, THE CIVIL RIGHTS ERA: ORIGINS AND DEVELOPMENT OF NATIONAL POLICY, 1960-1972, at 79-81, 87-93, 125-34 (1990); *see generally* Christopher W. Schmidt, The Civil Rights Act of 1964 and Congressional Interpretation of the Fourteenth Amendment (unpublished paper, to be delivered at the 2008 Policy History Conference).
[52] *See, e.g.,* Arthur Krock, *When Legislation Rests on a 'Moral' Basis*, N.Y. TIMES, July 4, 1963, at 16.
[53] *Heart of Atlanta*, 379 U.S. at 250.
[54] *Id.* at 286-91 (Douglas, J., concurring); *id*. at 291-93 (Goldberg, J., concurring).

Thus, in numerous public forums, the constitutional claims raised by the sit-in protesters were embraced. As a claim pressed upon national opinion and the political branches of government, the students offered a persuasive reinterpretation of the scope of the equal protection of the law. Ralph McGill, the editor of the *Atlanta Constitution*, pressed this point: "The sit-ins were, without question, productive of the most change. . . . No argument in a court of law could have dramatized the immorality and irrationality of such a custom as did the sit-ins. . . . Not even the Supreme Court decision on the schools in 1954 had done this. . . . The central moral problem was enlarged."[55] By acting as they did, by protesting at privately owned lunch counters, at municipal pools, in bus terminals, in the libraries, and in other publicly owned places, and arguing that segregation in all these places raises the same fundamental concerns about dignity and citizenship, the protesters were making a case to the larger society that the government had a responsibility to combat private racial discrimination. The time appeared ripe for a judicial reconsideration of the state action doctrine.

II. THE SIT-IN CASES IN THE SUPREME COURT

"The Court is our greatest educational institution," explained Alexander Bickel in the spring of 1963. "It may bring a question up to the forefront of public consciousness, reduce it, and play with it—a sort of cat and mouse game, perhaps—until there comes a moment of inarticulable judgment, of political feel, not at all different from the sense of timing that other political officers have, when the time seems ripe for a final adjudication. And the Court will then act."[56] Only in the sit-in cases, even when the time was surely "ripe" by the Warren Court's typical standards, when the cultural work of the sit-in movement was well underway and its achievement unmistakable, the Court still refused to act. In one of the most striking developments of the Warren Court era, the Court ducked, repeatedly, a major civil rights issue that was winning widespread public support. An informal agreement emerged among the justices (save for Justice Douglas) that minimalist holdings were best in these cases, at least for a time. Chief Justice Warren explained the strategy as "taking these cases step by step, not reaching the final question until much experience had been had."[57] The Court would overturn convictions of the sit-inners, but on narrow grounds, reserving the difficult state action question.

The puzzle is, then, why the Court never decided the constitutional question, even when public opinion had clearly swung behind the basic rightness of the equality principle put forth by the sit-ins.[58] In June 1963, approval for the proposed federal civil rights legislation was at about

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[55] *Quoted in* HOWARD ZINN, SNCC: THE NEW ABOLITIONISTS 27-28 (1964).
[56] *The Proper Role of the United States Supreme Court in Civil Liberties Cases*," 10 WAYNE L. REV. 457, 477 (1964) (comments made by Bickel at symposium).
[57] THE SUPREME COURT IN CONFERENCE, 1940-1985 718 (Del Dickson ed., 2001) [hereinafter IN CONFERENCE].
[58] *See* Bell v. Maryland, 378 U.S. 226, 284 (1964) (opinion of Douglas, J.) (appendix listing state public accommodation laws); *Survey Shows Rights Laws Now Cover 65% of Nation*, WASH. POST, Dec. 26, 1963, at A17; William E. Blundell, *30 States, Some Cities Bar Discrimination in Public Accommodations*, WALL ST. J., Oct. 22, 1963, at 1, 14.

the same level—about 50%—as approval for school desegregation was in 1954.[59] In the coming months, approval for the Civil Rights Act increased steadily; after the passage of the bill in the House in February 1964, approval was at 68%.[60] Yet, despite this transformation taking place outside the Court, the justices by 1964 seemed *less* willing to recognize the constitutional claims of the sit-ins protesters than they had been when they first consider the issue three years earlier. By 1964, when forced to face the constitutional issue squarely, a majority of the justices were poised to reassert their commitment to the state action doctrine and to decide in favor of the claims of the discriminating lunch counter operators.

Why they did so had less to do with the constitutional issue raised by the sit-ins than with the vehicle by which the claim emerged—acts of coordinated civil disobedience. The sit-in cases presented a direct conflict between the two ideals embodied in *Brown*: that segregation in public life was unconscionable and that the established legal process, especially the courts, was the best hope for resolving the nation's minority problems. When forced to choose between the two, the majority of the justices stood behind a reassertion of the legal process and the rule of law.

A. *Burton* and *Garner*: The Foundations of the State Action Revolution

The Court's first confrontations with the sit-in cases laid the foundations for a subsequent transformation of state action. Although the facts of the first cases allowed for relatively limited holdings, their reasoning and language were potentially expansive, reflecting that civil disobedience tactics were not understood as the threat they would become, in the eyes of several of the justices, in the coming years. In subsequent sit-in cases, the Court would actually backtrack from the reasoning of these initial decisions.

Burton v. Wilmington Parking Authority[61] involved racial discrimination in a privately run restaurant located in a space leased from the city. The Court located the necessary state involvement in the nominally private discriminatory choice to satisfy the state action requirement of the Fourteenth Amendment. The analysis in the majority opinion, written by Justice Tom Clark, relied upon what was essentially a context-driven balancing test to evaluate whether there is the necessary state entanglement with private action to constitute state action. The test for when "nonobvious involvement of the State in private conduct" can violate the Equal Protection Clause requires the "sifting facts and weighing circumstances."[62] Clark then went further—potentially much further—by referencing state "inaction" in the face of private discrimination as an element in finding state action,[63] a reference with dramatic implications. In suggesting the

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[59] CHARLES AND BARBARA WHALEN, THE LONGEST DEBATE: A LEGISLATIVE HISTORY OF THE 1964 CIVIL RIGHTS ACT 155 (1985); Herbert H. Hyman and Paul B. Sheatsley, *Attitudes toward Desegregation*, 195 SCI. AM. 35 (1956).
[60] WHALEN, *supra* note 59, at 155.
[61] 365 U.S. 715 (1961).
[62] *Id*. at 722.
[63] *Id.* at 725.

existence of affirmative government obligations under the Equal Protection Clause, Clark opened the door to a radical reworking of government's constitutional responsibilities.[64]

Burton was not technically a sit-in case; the case derived from an unplanned, isolated event that occurred in 1958. The first case that arose out of the student sit-in movement of 1960 to reach the Court was *Garner v. Louisiana*.[65] Warren was initially inclined to decide the constitutional issues in favor of the protesters, holding the students' actions protected under both the First and Fourteenth Amendments.[66] Frankfurter would prevail on him to issue a more minimalist opinion. In a letter to the Chief Justice, Frankfurter explained that the sit-in cases "go to the very heart of constitutional views regarding state-federal relations, the rights of the individual against the coercive power of the State. . . . they should be disposed of on the narrowest allowable grounds. . . . I would make of this a little case, precisely for the reason that we are all fully conscious of the fact that it is just the beginning of a long story."[67] He preferred to "creep along rather than be general," Frankfurter told the justices.[68] Warren eventually agreed that, at this point, narrower holdings were preferable.[69] Douglas, unaffected by Frankfurter concerns, forged ahead and decided the Fourteenth Amendment issue in his concurrence, where he argued that the fact that state and local governments grant licenses to restaurants implicated the state in their discriminatory practices.[70]

Perhaps the most important words in *Garner* came in the concurrence of Justice Harlan. Harlan would become the most consistent critic of the Warren Court's expansion of the state action limitation, but in this early case he was somewhat more willing to consider the merits of the constitutional issues put forth by the NAACP. Particularly striking was his discussion of the possibility of a First Amendment claim for the sit-in protests. "There was more to the conduct of those petitioners than a bare desire to remain at the 'white' lunch counter and their refusal of a police request to move from the counter," Harlan wrote. "We would surely have to be blind not to recognize that petitioners were sitting at these counters, where they knew they would not be served, in order to demonstrate that their race was being segregated in dining facilities in this part of the country." Thus, in certain circumstances, a sit-in protest should be viewed as "as much a part of the 'free trade in ideas,' as is verbal expression, more commonly thought of as 'speech.' It, like speech, appeals to good sense and to 'the power of reason as applied through

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[64] Laurence Tribe notes that *Burton* "remains the high-water mark in a tide of state action doctrine that has since been almost constantly at ebb." LAURENCE TRIBE, CONSTITUTIONAL CHOICES 251 (1985).
[65] 368 U.S. 157 (1961).
[66] BERNARD SCHWARTZ, SUPER CHIEF: EARL WARREN AND HIS SUPREME COURT—A JUDICIAL BIOGRAPHY 402-04 (1983).
[67] Frankfurter to Warren, Dec. 4, 1961 (Earl Warren Papers, Library of Congress, Box 600, "Nos. 26, 27 & 28 – Garner, etc. v. Louisiana").
[68] IN CONFERENCE, *supra* note 57, at 708.
[69] Earl Warren to Felix Frankfurter, Dec. 6, 1961 (Warren Papers, Box 600, "Nos. 26, 27 & 28 – Garner, etc. v. Louisiana"); *Garner*, 368 U.S. at 163.
[70] 368 U.S. at 181-85 (Douglas, J., concurring).

public discussion,' just as much as, if not more than, a public oration delivered from a soapbox at a street corner."[71]

Never again would the Court take so seriously the idea that the sit-ins as the basis for a free speech claim. Harlan's suggestion that the sit-in protests might deserve constitutional protection under the First Amendment proved the end of the road on this question. Partly, the reasons for this are doctrinal: the *Garner* case was the only breach-of-peace conviction deriving from a sit-in protest that the Court would consider, and this area of law was more amendable to free speech claims. The basis of Harlan's First Amendment analysis derived from his concern that the disorderly conduct law was overly vague.[72] As importantly, Harlan's analysis depended on the factual situation in the case, where the restaurant owner did not explicitly object to the presence of black patrons.[73] But the students' lawyers continued to press First Amendments claims in subsequent sit-in cases, even when the convictions were for trespassing or disorderly conduct. The Warren Court would considerably expand the scope of free speech protections, often in support of the cause of civil rights,[74] but the justices were notably less enthusiastic about using the First Amendment to protect the acts of civil rights protesters.[75]

In a 1964 lecture, Harry Kalven, the leading First Amendment scholar of the day, recalled Harlan's free speech analysis in *Garner* and hoped that it would be picked up and extended in the near future.[76] Peaceful civil rights protest should be recognized as "a massive petition for the redress of grievances, a form of political action, in the courts and in the streets,"[77] and thus protected under the First Amendment, a possibility for which he saw Harlan's *Garner* opinion ("a venture rich in imaginative daring"[78]) laying out the framework. Kalven spoke too soon, however. The justices never came close to locating a free speech claim in the sit-in protests—or any other significant act of civil disobedience.[79] What might have been conceivable in 1960 or 1961 was, as far as the justices were concerned, off the table by the mid-1960s.[80] In 1964, in his *Bell* dissent, Black summarily dismissed the protesters' free speech claim.[81] Where Kalven saw the protesters demonstrating extraordinary "tact," skeptical justices saw their actions as challenging the rule of law that was the basis of a free nation.

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[71] *Id*. at 201 (Harlan, J., concurring).
[72] *Id*. at 202.
[73] *Id*. at 202.
[74] New York Times v. Sullivan, 376 U.S. 254 (1964); NAACP v. Button, 371 U.S. 415 (1963); NAACP v. Alabama, 357 U.S. 449 (1958).
[75] *See, e.g.,* Adderley v. Florida, 385 U.S. 39 (1966) (upholding trespassing conviction resulting from protest outside county jail).
[76] HARRY KALVEN, JR., THE NEGRO AND THE FIRST AMENDMENT 129-60 (1966).
[77] *Id*. at viii.
[78] *Id*. at 132.
[79] *Cf.* Edwards v. South Carolina, 372 U.S. 229 (1963) (overturning breach-of-peace conviction for mass demonstration on grounds of state capital as protected expression).
[80] Petitioners continued to raise free speech claims in the sit-in cases, but the Court refused to consider them. *See, e.g.,* Peterson v. Greenville, 373 U.S. 244, 247 (1963).
[81] *Bell*, 378 U.S. 226, 325 (Black, J., dissenting).

B. From *Garner* to *Bell*

Burton and *Garner* would prove to be the furthest the Court would go toward recognizing the students' actions as constitutionally protected. From this point, the Court actually retreated in its approach to state action, although their retreat was not readily noticeable because the justices continued to find non-constitutional ways to overturn the convictions of the protesters. Yet the way in which the justices went about avoiding the constitutional question is revealing. It demonstrated the Court's continued unwillingness to directly confront the student's challenge to traditional, legalistic definitions of public and private space or their emphasis on human dignity as a component of the constitutional analysis of equal protection. Rather, the Court focused on reforming southern states, pressuring them to abide by the rule of law as established in *Brown*.

The sit-in cases gave the Court the opportunity to continue the work of *Brown*. The justices avoided the difficult constitutional question by focusing on misbehavior by southern state actors—actions that defied the Court's *Brown* mandate. They used the sit-in cases to create incentives for the southern states to get rid of any hint of official segregation. They would overturn any conviction, even if based on a private discriminatory choice if that state had on the books a law requiring segregated public accommodations. The mere presence of a segregation ordinance was enough—even when the prosecution at issue was not based on that ordinance and there was no evidence that the law influenced the proprietor's decision to discriminate.[82] If there were no segregation laws on the books, any expressed support for segregated public accommodations by local officials would do the job. In a case out of New Orleans, where there was no applicable segregation law, statements made by the mayor and police chief in support of segregation practices was enough for the Court to find that a restaurant owner's segregation policy was not truly private.[83] In all these cases, official action in support of segregation, rather than the student demand for service, became the illegality that needed to be countered; the proper path toward restoring order was to get the state out of the business of directly supporting segregation.

These cases have often been explained as an effort by the Supreme Court justices to balance their sympathy for the protesters with concerns about the doctrinal and institutional implications of ruling in their favor on constitutional grounds.[84] A recognition of the basic unjustness of the protester convictions played a role in these cases, to be sure, but the text of the opinions and the internal history of the Court's deliberations indicate the path of decision-making is better explained by a focus not on the protesters, but on the *states*. Support for the protesters was incidental to the central message of the sit-in cases, which was directed at state officials. This message was simple: stop defying *Brown*. Thus, the sit-in cases were more the progeny of *Cooper v. Aaron*, a ruling that denounced defiance of the Supreme Court, than state action cases such as *Shelley v. Kraemer* or *Marsh v. Alabama*. In *Cooper* the Court dedicated itself to attacking official segregation policy even when the state made efforts to hide its role: "[T]he prohibitions of the Fourteenth Amendment extend to all action of the State denying equal

[82] Peterson v. Greenville, 373 U.S. 244 (1963); Gober v. City of Birmingham, 373 U.S. 374 (1963); Avent v. North Carolina, 373 U.S. 375 (1963).
[83] Lombard v. Louisiana, 373 U.S. 267 (1963).
[84] *See, e.g.,* POWE, *supra* note 3, at 227; Greenberg, *supra* note 7, at 1528.

protection of the laws . . . whatever guise in which it is taken . . . ."[85] By the early 1960s, the logic of *Brown,* both doctrinally and culturally, had come to stand for the position that state-supported segregation was unconstitutional, including efforts to cloak official segregation policy as private action. The sit-in cases gave the Court an opportunity to pressure the states to get rid of laws and official practices that supported segregation. This, not support for direct-action protest, and certainly not recognition of civil disobedience as a tactic of social reform, was the driving motivation of the sit-in cases.

C. *Bell v. Maryland*: The Failure of the State Action Revolution

The justices exclusive focus on official state action made *Bell v. Maryland*,[86] which they first considered in the fall of 1963, particularly challenging. Here the state as a bad actor was less evident. Indeed, since the students had been arrested, the state had passed a public accommodation law. The justices could no longer divert attention from the possible illegality of the protests through their hunt for more fundamental illegality by the state. In *Bell* it appeared that the justices finally had a sit-in case in which there was no way to avoid the constitutional issue.

Yet the Court ducked once again. Avoidance of the constitutional issue here required a novel argument, put forth by Justice Brennan, that the passage of state and local public accommodation laws following the demonstrators' convictions were grounds for reversal. The sit-ins "would not be a crime today,"[87] he wrote in the controlling opinion, and therefore it would be unjust to allow the convictions to stand. Although six justices wanted the constitutional issue resolved, they split evenly on whether to side with the claims of the demonstrators or the restaurant owners, making Brennan's end-run around the constitutional issue the opinion of the Court, and leaving existing state action doctrine largely intact.

Prior to Brennan's discovery of a non-constitutional basis for the decision, the justices were prepared to face the constitutional issue—and to rule against the protesters.[88] In the fall of 1963, the Court was divided 5-4 on the constitutional question, with Black assigned to write the majority opinion (joined by Clark, Harlan, Stewart, and White), affirming the convictions and reasserting the principle that the Fourteenth Amendment does not apply to private discrimination and that a restaurant owner's policy of who to serve was a private choice. Yet Black lost his majority, largely because Brennan was able to convince Clark and Stewart that such a decision would hurt the pending federal civil rights legislation.[89] The decision was handed down on June 22, 1964, just weeks before passage of the 1964 Civil Rights Act. Clark and Stewart joined Brennan's opinion, disposing of the case without reaching the merits of the constitutional claim;

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[85] 358 U.S. 1, 17 (1958).
[86] 378 U.S. 226 (1964).
[87] *Id*. at 230.
[88] *See* Brad Ervin, *Result or Reason: The Supreme Court and Sit-In Cases*, 93 VA. L. REV. 181, 186 (2007); ROGER K. NEWMAN, HUGO BLACK: A BIOGRAPHY 544-48 (rev. ed. 1997).
[89] HUGO L. BLACK & ELIZABETH BLACK, MR. JUSTICE AND MRS. BLACK 112 (1986); A.E. Dick Howard & John G Kester, The Deliberations of the Justices in Deciding the Sit-in Cases of June 22, 1964, at 5 (Hugo L. Black Papers, Library of Congress, Box 376, "Oct. Term 1963: Sit-in Cases").

White and Harlan joined Black's opinion finding no state action; and Warren, Goldberg, and Douglas all expressed a willingness to find racial discrimination in public accommodations a violation of the Equal Protection Clause.

The six justices who were willing to face the constitutional question in *Bell* all believed that the Court had a responsibility to offer a clear, principled resolution of the sit-in controversy that would restore law and order to national situation that risked spiraling out of control. They differed sharply, however, on whether those who were demanding change or those who were committed to preserving the status quo were more to blame for the disorder. In the context of the sit-in cases, the question came down to which party was the primary lawbreaker, the discriminating proprietor or the sit-in demonstrator. This question had a circularity to it, of course, because locating the source of the breakdown of the rule of law required a prior judgment about what the law actually required in this situation. The text of the *Bell* opinions and the internal history of the justices' deliberation in this case indicate that the crucial judgment of which party was acting outside the law had more to do with attitudes toward civil disobedience as a tactic for claiming a new legal right than the abstract question of whether the discriminatory choice was truly private.

The concurrences by Douglas and Goldberg, in which they argued that the right to non-discriminatory service in public accommodations was constitutional protected, laid out the terms of the problem. "The whole Nation has to face the issue," Douglas wrote. "Congress is conscientiously considering it; some municipalities have had to make it their first order of concern; law enforcement officials are deeply implicated, North as well as South; the question is at the root of demonstrations, unrest, riots, and violence in various areas. The issue in other words consumes the public attention. Yet we stand mute, avoiding decision of the basic issue by an obvious pretense."[90] Douglas expressed as much concern with preserving order and law as his more conservative colleagues. "When we default, as we do today, the prestige of law in the life of the Nation is weakened."[91]

Goldberg also position himself as attacking lawlessness. A state should not be permitted to abridge the constitutional right of non-discriminatory access to places of public accommodation by "legitimating a proprietor's attempt at self-help" through enforcement of trespassing laws. He quoted from *Cooper v. Aaron*, noting that "law and order are not . . . to be preserved by depriving the Negro . . . of [his] constitutional rights,"[92] and challenged Black's dire warning of the need to protect property rights in the name of preserving order. "Of course every member of this Court agrees that law and order must prevail; the question is whether the weight and protective strength of law and order will be cast in favor of the claims of the proprietors or in favor of the claims of petitioners. In my view the Fourteenth Amendment resolved this issue in favor of the right of petitioners to public accommodations and it follows that in the exercise of that constitutionally granted right they are entitled to the 'law's protection.'"[93]

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[90] *Bell*, 378 U.S., at 243.
[91] *Id*. at 245.
[92] *Id.* at 311 (quoting Cooper v. Aaron, 358 U.S. 1, 16 (1958)).
[93] *Id*.

In his long, impassioned dissent, Black argued that the Fourteenth Amendment does not apply to choices made by restaurant owners "in the absence of some cooperative state action or compulsion." "It would betray our whole plan for a tranquil and orderly society," Black asserted, "to say that a citizen, because of his personal prejudices, habits, attitudes, or beliefs, is cast outside the law's protection and cannot call for the aid of officers sworn to uphold the law and preserve the peace."[94] Reading the Fourteenth Amendment to require business owners to serve blacks would "severely handicap a State's efforts to maintain a peaceful and orderly society."[95] To prohibit trespassing prosecutions in these cases would "penalize citizens who are law-abiding enough to call upon the law and its officers for protection instead of using their own physical strength or dangerous weapons to preserve their rights."[96] The protection of public order, Black concluded, was the primary goal of government.

> [T]he Constitution does not confer upon any group the right to substitute rule by force for rule by law. Force leads to violence, violence to mob conflicts, and these to rule by the strongest groups with control of the most deadly weapons. . . . At times the rule of law seems too slow to some for the settlement of their grievances. But it is the plan our Nation has chosen to preserve both "Liberty" and equality for all. On that plan we have put our trust and staked our future. This constitutional rule of law has served us well. Maryland's trespass law does not depart from it. Nor shall we.[97]

III. CIVIL DISOBEDIENCE AND THE SUPREME COURT

As Black's paean to "peaceful and orderly society" in his *Bell* dissent indicates, a critical factor—perhaps *the* critical factor—in the ultimate failure of the constitutional claim put forth by the students in the sit-in cases was the Court's concern with the role of civil disobedience in American society. The concerns the justices had with extrajudicial methods of resistance were more pervasive, systematic, and gained strength earlier than scholars have generally appreciated. The Warren Court's hesitancy on the sit-in cases was not just a visceral reaction to street demonstrations. It was also a product of disappointment with the turn away from the Courts that the demonstrations embodied. An underappreciated aspect of the Warren Court was its insistent, even passionate commitment to formal legal process—to the belief that the rule of law was *the* path toward the promotion of social welfare. This Court was driven by the idea that, in Bickel's words, "law is not so much a process, and certainly not a process in continual flux, as it is a body of rules binding all, rules that can be changed only by the same formal method by which they were enacted."[98] The Warren Court was moved not only by a commitment to racial equality, but also by a pervading concern with disorder and lawlessness.

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[94] *Id*. at 327-28.
[95] *Id.* at 327.
[96] *Id*. at 328.
[97] *Id.* at 346
[98] BICKEL, *supra* note 34, at 5.

The justices' reaction to civil disobedience was rooted in their confrontation with massive resistance. It was in the attempts of white southerners to resist the Court's interpretation of the Fourteenth Amendment in *Brown* that the Court most emphatically defended the importance of the rule of law and judicial supremacy. The use of state and local power to enforce pervasive policies of segregation in public accommodations was a challenge to the rule of law as defined by the Supreme Court in *Brown*. By 1960, the Court had made clear that officially sanctioned segregation practices was unconstitutional. Yet these laws still existed in much of the Deep South, and they symbolized an on-going refutation by the southern states of the supremacy of the Supreme Court. In this way, the sit-in cases should be seen in the light of *Cooper v. Aaron* and the heightened awareness of the Court during this period of the need to continually reassert its authority and to strike out whenever possible at states that refused to fall in line behind the Court's desegregation mandate.

The growing concern among a number of the justices with what they saw as the lawlessness of civil rights protesters cannot be fully explained as just another manifestation of the "law and order" movement of Reagan and Nixon, which emerged in the second half of the 1960s. While the growing discomfort among the justices, particularly Justice Black, with the protest tactics of the civil rights movement in the mid- and late-sixties was certainly of a piece with the larger reaction of much of the nation to recurrent urban rioting and the growing radicalism of the civil rights and anti-war movements, the justices concerns with civil disobedience preceded these events. The Court was pulling back from the constitutional challenge posed by the sit-ins even as the rest of the nation was pushing ahead on the same issue, passing public accommodations laws at all level of government and canonizing the cause of equal access to public accommodations. The problem of civil disobedience for the Court in the sit-in cases was both a harbinger of a direction many Americans would be following in the coming years and a problem that was distinctive to the judiciary.

The student protesters and their allies recognized the use of civil disobedience was fraught with risks. Their actions opened them to inevitable accusations of embracing a double standard: they seemed to be challenging the rule of law at the very time the law was moving in their direction. The primary thrust of the civil rights community prior to the sit-ins was to demand that the federal government follow through on the rule of law in the face of widespread resistance to *Brown* and other federal desegregation mandates by the white South. As King wrote from his Birmingham jail cell: "Since we so diligently urge people to obey the Supreme Court's decision of 1954 outlawing segregation in the public schools, at first glance it may seem rather paradoxical for us consciously to break laws."[99] Asserting a right to break certain laws was especially problematic during a time when failure to enforce laws was a key tactic of white supremacists.

The problem of civil disobedience on behalf of a morally just cause led to considerable concern on the part of judges and legal commentators in the 1960s. Not surprisingly, the legal profession was overwhelmingly critical of the idea of civil disobedience. Even a committed civil

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[99] Martin Luther King, Jr., *Letter from Birmingham City Jail*, *in* A TESTAMENT OF HOPE, *supra* note 17, at 293.

rights advocate such as Thurgood Marshall expressed considerable skepticism toward direct action tactics and civil disobedience.[100] In 1965 Justice Charles E. Whittaker, who during his brief tenure on the Supreme Court proved an uncompromising critic of civil disobedience, blamed "the current rash and rapid spread of lawlessness" on, in part, "the preachments of self-appointed leaders of minority groups to 'obey the good laws, but to violate the bad ones.'"[101] "The logical and inescapable end of civil disobedience is the destruction of the public order," explained president of the American Bar Foundation and future Supreme Court Justice Lewis F. Powell, Jr,[102] Even a supporter of the protesters such as Justice Goldberg went out of his way to assert the need to limit excessive protest.[103]

Within the Supreme Court, no one was more antagonistic toward civil disobedience than Justice Black. Black was the critical figure among the justices who stood opposed to the basic constitutional claim of the protesters. His powerful and passionate statements on the basic issues at stake defined the terms of the debate within the Court. For Black, the issue was first and foremost a question of protecting the rule of law. In conference discussions, he referenced the need to protect the associational rights of private citizens as a basic tenet of an orderly society. In his files relating to the October Term 1963 sit-in cases, he kept a collection of newspaper clippings filled with stories of the escalating tensions resulting from efforts to integrate public accommodations. One story told of an owner of a Maryland restaurant who, with the aid of several friends, "hurled" over a dozen civil rights demonstrators from his restaurant; the police, who were watching this private ejection from the street, promptly arrested the protesters for disorderly conduct.[104] Another story was of a Florida hotel manager who poured acid into the hotel pool in order to force "integrationists" out of the water. When the protesters were driven from the water, "club-swinging policemen rained blows on the heads, backs, and shoulders of the Negroes."[105] Another story described the growth of "anti-white gangs" in Harlem, including ominous references to the training of black youth in martial arts.[106]

In opinions and private discussions, Justice Black returned again and again to his belief that liberties ultimately suffer when protesters take to the streets rather than rely on the courts to

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[100] MARK V. TUSHNET, MAKING CIVIL RIGHTS LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1936-1961 301-13 (1994); Derrick Bell, *An Epistolary Exploration for a Thurgood Marshall Biography*, 6 HARV. BLACKLETTER J. 51, 55-56 (1989).
[101] Charles E. Whittaker, *Law and Order*, 37 N.Y. STATE B.J. 397 (1965).
[102] Lewis F. Powell, Jr., *A Lawyer Looks at Civil Disobedience*, 23 WASH. & LEE L. REV. 205, 230 (1966).
[103] Cox v. Louisiana, 379 U.S. 536, 554.
[104] Stephens Broening, *12 Pickets Thrown Out Of Store*, WASH. POST, Mar. 3, 1964, at A1 (found in Hugo Black Papers, Box 376, "Oct. Term 1963: Sit-in Cases"); *Pickets Back At Annapolis After Talks*, EVENING STAR, Mar. 3, 1964, at A1 (same).
[105] *Police Club Negroes in Motel Pool*, WASH. POST, June 19, 1964, at A1, A2 (found in Black Papers, Box 376, "Oct. Term 1963: Sit-in Cases"); *see also The Acid Test*, EVENING STAR, June 19, 1964, at A1 (same).
[106] *Harlem: The Tension Underneath*, N.Y. TIMES, May 29, 1964, at 1, 13 (found in Black Papers, Box 376, "Oct. Term 1963: Sit-in Cases").

protect their rights.[107] "[M]inority groups, I venture to suggest, are the ones who always have suffered and always will suffer most when street multitudes are allowed to substitute their pressures for the less glamorous but more dependable and temperate processes of the law," Black wrote in a 1965 dissent.[108] A year later, Black wrote in an opinion for the Court: "[T]he crowd moved by noble ideals today can become the mob ruled by hate and passion and greed and violence tomorrow."[109]

Although Black's unwillingness to extend judicial protection to those excluded from public accommodations might be justified in terms of the limits of judicial competence, this was not the way Black explained his position in either conference or in his opinions. Rather, he emphasized the risks of lawless behavior by protesters and the need for courts to strictly enforce the rule of law. For Black, the critical difference between the courts and legislatures was that courts confer retrospective approval for past behavior, while a legislature makes a new legal standard that is typically applied prospectively. For a court to rule that the actions of the sit-inners was in fact constitutionally protected might allow, indeed encourage, future lawbreaking whenever a legal standard was ambiguous or strongly contested.

Black was not alone in his antagonistic attitude toward extralegal protest actions. Prior to signing on to Black's *Bell* dissent, Justice White had drafted a brief dissent in which he warned that treating a state trespass conviction derived from a private discriminatory choice as impermissible state action "would be nothing short of an invitation to private warfare and a complete negation of the central peace-keeping function of the State."[110] Along with Justice Harlan, who also joined Black's dissent, Justices Black and White constituted a solid bloc of justices whose instinctive reaction against the protests contributed to their staunch opposition to using the sit-in cases as a platform for a reconsideration of the state action doctrine.

This problem of the retroactive approval of civil disobedience came to the forefront in *Hamm v. City of Little Rock*,[111] the last of the sit-in cases. In a 5-4 decision, the Court held that the passage of Title II of the 1964 Civil Rights Act abated all pending convictions of sit-in protesters. Despite congressional silence on the effect of Title II on pending appeals, the majority found grounds for applying it retrospectively. The justices, through the mechanism of statutory interpretation, in effect, used the legislature as a laundering mechanism for getting rid of thousands of sit-in appeals. Justice Clark's opinion for the majority noted that "the law generally condemns self-help," but the new federal law created a right that immunizes from prosecution "nonforcible attempts to gain admittance to or remain in establishments covered by the Act."[112]

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[107] *See* Christopher W. Schmidt, *Hugo Black's Civil Rights Movement*, *in* THE TRANSFORMATION OF LEGAL HISTORY: IDEOLOGY, POLITICS AND LAW (Alfred L. Brophy and Daniel W. Hamilton, eds., forthcoming, 2008).

[108] Cox v. Louisiana, 379 U.S. 559, 583-84 (1965) (Black, J., concurring in part, dissenting in part).

[109] Brown v. Louisiana, 383 U.S. 131, 168 (1966) (Black, J., dissenting).

[110] Byron R. White, unpublished draft dissent, Bell v. Maryland, June 17, 1964, at 1 (Warren Papers, Box 512, "No. 12 – Bell v. Maryland, Opinion by Justice White").

[111] 379 U.S. 306 (1964).

[112] *Id*. at 311.

"The great purpose of the civil rights legislation was to obliterate the effect of a distressing chapter of our history. . . . The peaceful conduct for which petitioners were prosecuted was on behalf of a principle since embodied in the law of the land.[113]

Black would have none of this. "[O]ne of the chief purposes of the 1964 Civil Rights Act," he wrote in dissent, "was to take such disputes [over access to public accommodations] out of the streets and restaurants and into the courts . . ."[114] Justice White was similarly outraged at the Court's acceptance of civil disobedience. "Whether persons or groups should engage in nonviolent disobedience to laws with which they disagree perhaps defies any categorical answer for the guidance of every individual in every circumstance. But whether a court should give it wholesale sanction is a wholly different question which calls for only one answer."[115]

While the Court of the late 1960s showed less tolerance for civil rights protest than it had in the early years of the civil rights movement,[116] the sit-in cases demonstrate that the Court never accepted the legitimacy of civil disobedience as a reform tactic. Among the justices, supporters of the legal claims of the sit-in protesters were always on the defensive. The more they engaged with the issue, the less disposed they seemed to be toward the Fourteenth Amendment claim of the protesters. They failed to offer the other justices a persuasive defense of the protesters' cause, preferring instead to work within the doctrinal framework of existing state action doctrine, in which they sniffed out any hint of state complicity in segregation and then attempted to make the case to the other justices that this involvement was significant enough to apply the Fourteenth Amendment. This approach fit well with the work the Court had been already doing in *Brown* and *Cooper*, but it hindered the justices from squarely considering the effect of the sit-ins on American society.

IV. AN ALTERNATIVE APPROACH TO STATE ACTION

As a legal and constitutional claim to the nation, the sit-ins had two goals. One was to reshape the way people thought about the line between the public sphere and the private sphere. By drawing attention to the commercial realm as a forum for discrimination, the sit-ins emphasized the artificiality of traditional legal distinctions between public and private. From the victim's perspective, the experience of discrimination at a lunch counter could be every bit as harmful as discrimination in schooling or other public institutions.[117] The other goal was to place human dignity as a central value in the constitutional calculus of equal protection. The protests sought to demonstrate that discrimination in public accommodations was an affront to the dignity of African Americans, a point that was sharpened by the manner in which the protests

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[113] *Id*. at 315-16.
[114] *Id*. at 318-19 (Black, J., dissenting).
[115] *Id*. at 328 (White, J., dissenting).
[116] *See* Adderley v. Florida, 385 U.S. 39 (1966); Walker v. Birmingham, 388 U.S. 307 (1967).
[117] *See, e.g.,* Earl Lawrence Carl, *Reflections on the "Sit-Ins,"* 46 CORNELL L. Q. 444, 455 (1961).

were conducted.[118] In the larger society, these claims were remarkably successful. Despite pockets of intransigence, the basic cause of the sit-ins triumphed, as indicated through public accommodation laws passed at all levels of government, throughout the nation, and by a growing acceptance of the principle of non-discriminatory access to public accommodations.

Yet the lessons the sit-ins brought to the nation were largely lost upon the justices of the Supreme Court. While those justices who were willing to decide the constitutional issue in *Bell* for the students recognized that the civil rights movement demanded a reconsideration of the state action doctrine along the lines suggested by the sit-ins, the other justices were unmoved. They remained tied to an approach to the state action doctrine that focused almost exclusively on the state—on tangible, unquestioned state action. This was the approach the Court relied upon in most of the sit-in cases. This approach had the benefit of creating strong incentives for states to repeal their segregation laws—albeit through the rather strange device of turning all segregation laws into de facto public accommodation laws. In this way, it served the project initiated in *Brown*. But as an approach to the sit-in cases, it was limited, for it prevented the justices from examining the ways in which social and cultural developments reshaped the place of public accommodations in modern in American life—the central message of the sit-in protests.

There was an alternative approach to the state action issue, which would have steered them toward a more direct consideration of the claims raised by the protests. This approach focuses on the function that a particular institution or activity plays in society: the more significant this role, the more responsibility that institution or activity has to the public interest.[119] The seminal decision in this area is *Marsh v. Alabama*,[120] in which a private "company town" was treated as a public entity for purposes of the First Amendment because it had assumed all the functions of a traditional municipality—and therefore it took on the

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[118] *See, e.g.,* Diane Nash, *Inside the Sit-ins and Freedom Rides: Testimony of a Southern Student*, *in* THE NEW NEGRO 85 (Mathew H. Ahmann ed., 1961) ("The purpose of the movement and of the sit-ins and the Freedom Rides and any other such actions, as I see it, it to bring about a climate in which all men are respected as men, in which there is appreciation of the dignity of man and in which each individual is free to grow and produce to his fullest capacity.").

[119] *See* Civil Rights Cases, 109 U.S. 3, 37-43 (1883) (Harlan, J., dissenting) (offering early version of a public function analysis in the state action context).

There were some efforts to describe the public function served by public accommodations using the *Lochner*-era language "affected by the public interest." *See, e.g.,* Bell v. Maryland, 378 U.S. 226, 314 n. 33 (1964) (opinion of Goldberg, J.); *id*. at 255 (opinion by Douglas, J.). Justice Black and Professor Freund rejected this line of analysis as (1) relating to the scope of legislative power, not constitutional protections; and (2) having been abandoned by the Court in *Nebbia v. New York*, 291 U.S. 502 (1934). *Bell*, 378 U.S. at 341 n. 37 (Black, J., dissenting); Brief of Professor Paul A. Freund, at 1188, Hearings, Senate Commerce Committee, 88th Cong., 1st sess., part 1 (1963).

Current "public functions" doctrine is limited to private entities that exercise a traditional and *exclusive* state function—a definition that clearly excludes public accommodations. *See* Flagg Bros. v. Brooks, 436 U.S. 149, 157 (1978); Jackson v. Metro. Edison Co., 419 U.S. 345, 352 (1974).

[120] 326 U.S. 501 (1946).

additional constitutional responsibilities. Black wrote the opinion for the Court: "Ownership [of property] does not always mean absolute dominion. The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it."[121] This same analysis could have been applied to the sit-in cases, and it would have allow for a more direct evaluation of the claims that emerged from the protests themselves.

Thurgood Marshall, initially skeptical of the constitutional arguments in support of the sit-in protesters, recognized the common-sense logic of a functional approach to the state action problem. "Once a Negro, or any other law abiding person has been admitted to a store to buy pins and needles," Marshall explained at a press conference in 1960, "he has the right to buy everything in the store."[122] The initial invitation into the store effectively converted the private business into a public space, activating the restrictions of the Equal Protection Clause. A focus on the public nature of the activity allows for an engagement with the public/private and dignitary elements of the sit-in protests.[123] While this approach still raised difficult line-drawing questions, it has the benefit of taking into account the ways in which changing cultural assumptions and social practices can affect the reach of constitutional protections.[124]

The Court's swing justices were ultimately blinded to this approach, however, largely because of their concerns with threats to the primacy of the rule of law and of the Supreme Court. In the face of massive resistance, followed by an escalating campaign of civil disobedience and direct-action protest by civil rights activists, the justices focused on striking out against lawlessness, real and perceived.

CONCLUSION

Many in the early 1960s considered the sit-ins a fundamental challenge to existing constitutional law. The sit-ins presented the "most crucial" legal issue since *Brown*, one law professor argued, the resolution of which "may have more far-reaching implications and greater

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[121] *Id.* at 502.
[122] *NAACP Sits Down With the 'Sit-Inners'*, N.Y. AMSTERDAM NEWS, Mar. 26, 1960, at 24.
[123] *See* Brief for Petitioners, *Bell v. Maryland*, 378 U.S. 226 (1964).
[124] Another approach to the sit-in cases, closely analogous to the "public functions" analysis, which would have similarly fundamentally restructured the scope of the state action doctrine was to recognize established *custom*—particularly when structured by since-abandoned official policy—as a form of state action. This approach is hinted at in the *Civil Rights Cases*, 109 U.S. 11, 17 (1883) (referencing "[s]tate authority in the shape of laws, *customs*, or judicial or executive proceedings" (emphasis added)). In the context of the sit-in cases, prominent efforts to locate state action in entrenched social practices included: Bell v. Maryland, 378 U.S. 226, 304 (1964) (opinion of Goldberg, J); Tom Clark, draft opinion in Bell v. Maryland (unpublished), at 9, June 11, 1964 (Warren Papers, Box 512, "No. 12 – Bell v. Maryland, Opinion by Justice Clark"); Supplemental Brief by the United States as Amicus Curiae, *Bell v. Maryland*, 378 U.S. 226 (1964).

consequences than even the *School Segregation Cases*."[125] Justice Goldberg, in a private conference of the justices in late 1963, declared the sit-in cases as presenting "the most serious problem before the Court in recent years."[126] "No question preoccupies the country more than this one," Justice William O. Douglas wrote in *Bell*.[127] The problem of state action, Charles Black summarized in 1967, "is the most important problem in American law. We cannot think about it too much; we ought to talk about until we settle on a view both conceptually and functionally right."[128]

The Supreme Court never responded to Professor Black's call to confront the "conceptual disaster area"[129] of state action doctrine. State action "is a continuing doctrinal anachronism," Arthur Kinoy observed in 1967. It "rests upon a major premise to which the Court and the nation should no longer adhere and depends upon an analysis of the substantive rights created by the Wartime Amendments which no longer corresponds to the Court's own understanding of both the history and the reality of the present."[130] Yet the intense interest in the subject sharply declined in the following decades,[131] and today most scholars agree that the state action doctrine is an embarrassment of constitutional law.[132] Although constitutional law is filled with anachronisms and conceptually confused doctrines, state action stands out. The history of the sit-in cases helps explain why this is so. When the Court had the opportunity to modernize the state action doctrine, it was unable to do so. As a result, one of the most important questions of American constitutionalism—namely, how far constitutionally protected rights reach into American society—is still inextricably tied to the *Civil Rights Cases* of 1883, a Supreme Court decision from an era in which the Court and most of American society had fundamentally different views about questions of federalism and civil rights.[133] The Warren Court's inability to reconsider the state action doctrine in the light of the social, cultural, and political transformations of the civil rights movement was one of its most conspicuous failures.

If there ever was an opportunity to fundamentally reshape the state action doctrine, it was in the Court's confrontation with the sit-in cases. The doctrinal groundwork was in place; the underlying cause at issue supported in national opinion. Yet the justices who were willing to take this step avoided doing so in the early cases, on the assumption that the passage of time would make this momentous step less jarring for the nation. They supported decisions that only

[125] Lewis, *supra* note 7, at 101.
[126] IN CONFERENCE, *supra* note 57, at 721.
[127] 378 U.S. at 244.
[128] Charles L. Black, Jr., *The Supreme Court, 1966 Term—Foreword: "State Action," Equal Protection, and California's Proposition 14*, 81 HARV. L. REV. 69, 70 (1967).
[129] *Id.* at 95.
[130] Arthur Kinoy, *The Constitutional Right of Negro Freedom*, 21 RUTGERS L. REV. 387, 415 (1967).
[131] Erwin Chemerinsky, *Rethinking State Action*, 80 NW. U. L. REV. 503, 503 (1985).
[132] *See, e.g., id.*; Henry J. Friendly, *The Public-Private Penumbra—Fourteen Years Later*, 130 U. PA. L. REV. 1289, 1290 (1982).
[133] *See, e.g.,* Black, *supra* note 128, at 70 (referring to *Plessy* and the *Civil Rights Cases* as "fraternal twins"); Post & Siegel, *supra* note 51, at 486 (arguing that the civil rights movement made the *Civil Rights Cases* "obsolete").

obliquely addressed the state action issue, focusing instead on lashing out at continued southern resistance to *Brown* and its progeny. By late 1963, when the passage of time would seem to have relieved the concerns of the justices in the early sit-in cases, when the serious injustice of public accommodation discrimination was widely recognized, and when Congress was finally moving to address this problem, new concerns dominated the Court. These concerns were based in the emergence of civil disobedience and direct action protest as a powerful alternative to the established judicial process. In one of the most paradoxical developments of the Warren Court, as the civil rights movement gained strength, the Court became *less* likely to decide the constitutional question in favor of the sit-inners. The failed doctrinal revolution in *Bell* was as much the product of an effort to reassert basic principles of law and order as it was the product of the inherent complexities of state action doctrine or concerns with a Court stepping beyond its proper judicial role.

Thus, at the heart of the sit-ins is an irony: the very tactic of civil disobedience that contributed to the sit-in protests' success as a social and cultural challenge limited their success in the Supreme Court. As a matter of popular and legislative constitutionalism, the sit-ins were transformative. As a matter of constitutional doctrine, they proved a dead end. Social movements that contribute to a shift in constitutional culture can exert pressure on courts, often resulting in new doctrine; in general, this was the dynamic of the civil right movement. But as this article explains, certain forms of extrajudicial constitutional pressure, no matter how powerful in the realm of constitutional culture, may be limited in moving the courts. They may have the unintended consequences of threatening the dialogue between the Court and the nation that is the lifeblood of a robust constitutional tradition. An effective act of civil disobedience has the unique potential of sowing the seeds of a constitutional controversy, driving a wedge between a society that is moved by the sincerity and moral force of the protest to reconsider the meaning of constitutional principles and a judiciary whose recognition of this claim is obscured by a hesitancy to legitimate a challenge to the judicial process and the rule of law.