

Divided by Law: The Sit-ins and the Role of the Courts in the Civil Rights Movement

CHRISTOPHER W. SCHMIDT

A central goal of the lunch counter sit-ins of 1960, the protests that launched the direct-action phase of the Civil Rights Movement, was to give new meaning to the very idea of “civil rights.” To the students who took part in the protests, civil rights work entailed litigation and lobbying. It required relying on the older generation of civil rights activists and working through established civil rights organizations. It meant surrendering student control over the demonstrations. And, as the great unrealized promise of the then 6-year-old Supreme Court ruling in *Brown v. Board of Education* made painfully clear, it meant patience.¹ For the thousands of students who joined the sit-in movement, reliance on their elders, litigation, and patience—the stuff of civil rights, traditionally understood—was precisely what they wanted to avoid.

The lawyers in the national office of the National Association for the Advancement of Colored People (NAACP), not surprisingly, had a very different understanding of the sit-in movement. At first wary toward this

1. *Brown v. Board of Education*, 347 U.S. 483 (1954).

Christopher W. Schmidt is associate professor, IIT Chicago–Kent College of Law and a faculty fellow, American Bar Foundation <cschmidt@kentlaw.iit.edu>. For comments and suggestions that have immeasurably improved this article, I thank Felice Batlan, Martha Jones, Michael Klarman, Laura Beth Nielsen, William Novak, Dylan Penningroth, Robert Post, Reva Siegel, and Mark Tushnet; participants at the American Bar Foundation seminar, the University of Michigan Legal History Workshop, and the 2012 Junior Faculty Forum; and my anonymous reviewers. This article won the 2014 Association of American Law Schools Scholarly Paper Prize Competition.

dramatic departure from the carefully scripted litigation strategy they had famously pioneered, Thurgood Marshall and his colleagues at the NAACP Legal Defense and Educational Fund (LDF) came to see the sit-ins as offering the opportunity to revitalize their own work. LDF's litigation efforts, centered at the time on school desegregation lawsuits, had become bogged down in legal maneuverings in the face of organized Southern resistance. When African American students were arrested for requesting service at "whites only" lunch counters, LDF lawyers—after initial uncertainty about the legal merits of the students' claim for equal services—recognized the possibility of a new litigation campaign, supported by an already mobilized social protest movement receiving national attention. This campaign would take on the question of whether *Brown's* desegregation mandate extended beyond state-run facilities to include restaurants and other accommodations that were open to the public but privately owned and operated. By transforming the students' protest into a matter of litigation, with the primary goal of winning test cases in federal court, these lawyers sought to remake the students' challenge into a more traditional civil rights claim, an approach they believed was the best way to ensure lasting reform.

As the sit-ins exploded across the South, students and NAACP lawyers were not the only ones debating the role of the courts. Defenders of the racial status quo in the South were also divided on this question. Southern officials generally were confident that existing law was on the side of the lunch counter operator's right to use race as a qualification for service. They saw prosecution of the protesters on trespass or disorderly conduct charges as the best way to reassert the rule of law and protect the property rights of business owners. However, lunch counter operators often sought to keep the law at bay, believing that the issue was best handled outside the courts. They felt the legal process to be too costly, both financially, and as a matter of public relations. Divergent assumptions about the role of the courts, therefore, created divisions that ran through all sides of the struggle. In this article, I offer a legal history of the opening months of the sit-in movement that highlights and explains these divisions over the role of courts.

For such a seminal event as the sit-ins, it is surprising that their legal history has long been neglected. At the time of the protests, commentators recognized the legal and constitutional issues surrounding the sit-ins as being of central importance.² These issues remained at the center of

2. See, for example, Daniel H. Pollitt, "Dime Store Demonstrations: Events and Legal Problems of First Sixty Days," *Duke Law Journal* (1960): 315–65; Richard W. Ervin and

debates over the sit-ins in the years immediately following, as the courts faced waves of appeals of protester convictions, and as Congress considered a federal prohibition on racial discrimination in public accommodations.³ However, subsequent historical accounts of the sit-in movement largely sidestepped the core legal issues raised by the sit-ins.⁴ Their primary focus has been the experiences of the students who initiated the movement, with particular attention to dynamics of grassroots organization and social protest mobilization.⁵

I argue in this article that the sit-in movement in its explosive early months cannot be fully understood without attention to how law and

Bruce R. Jacob, "'Sit-In' Demonstrations: Are They Punishable in Florida?" *University of Miami Law Review* 15 (1960): 123–37; Earl Lawrence Carl, "Reflections on the 'Sit-Ins,'" *Cornell Law Quarterly* 46 (1961): 444–57; Frank E. Schwelb, "The Sit-In Demonstration: Criminal Trespass or Constitutional Right?" *NYU Law Review* 36 (1961): 779–809; and Marion A. Wright, "The Sit-In Movement: Progress Report and Prognosis," *Wayne Law Review* 9 (1963): 445–57.

3. See, for example, William W. Van Alstyne and Kenneth L. Karst, "Comment: Sit-Ins and State Action—Mr. Justice Douglas Concurring," *Stanford Law Review* 14 (1962): 762–76; Thomas P. Lewis, "The Sit-In Cases: Great Expectations," *Supreme Court Review* (1963) 101–51; Monrad G. Paulsen, "The Sit-In Cases of 1964: 'But Answer Came There None,'" *Supreme Court Review* (1964): 137–70; Burke Marshall, "The Protest Movement and the Law," *Virginia Law Review* 51 (1965): 785–803; Charles L. Black, "The Problems of the Compatibility of Civil Disobedience with American Institutions of Government," *Texas Law Review* 34 (1965): 492–506; and Donald G. Morgan, *Congress and the Constitution: A Study of Responsibility* (Cambridge, MA: Harvard University Press, 1966), 292–330.

4. One slice of the legal history of the sit-ins that has received recent scholarly attention is the Supreme Court's internal deliberations in the appeals of criminal convictions resulting from sit-in protests. See Michael Klarman, "An Interpretive History of Modern Equal Protection," *Michigan Law Review* 90 (1991): 213–318, at 291–95; McKenzie Webster, "The Warren Court's Struggle with the Sit-In Cases and the Constitutionality of Segregation in Places of Public Accommodation," *Journal of Law and Policy* 17 (2001): 373–407; Brad Ervin, "Result or Reason: The Supreme Court and Sit-In Cases," *Virginia Law Review* 93 (2007): 181–233; and Christopher W. Schmidt, "The Sit-Ins and the State Action Doctrine," *William and Mary Bill of Rights Journal* 18 (2010): 767–829, at 791–802.

5. See, for example, William H. Chafe, *Civilities and Civil Rights: Greensboro, North Carolina, and the Black Struggle for Freedom* (New York: Oxford University Press, 1980), 79–101; Aldon D. Morris, *The Origins of the Civil Rights Movement: Black Communities Organizing for Change* (New York: Free Press, 1984), 188–215; Clayborne Carson, *In Struggle: SNCC and the Black Awakening of the 1960s*, 2nd ed. (Cambridge, MA: Harvard University Press, 1995), 9–18; David Halberstam, *The Children* (New York: Random House, 1998); and Francesca Polletta, "'It Was Like a Fever . . .': Narrative and Identity in Social Protest," *Social Problems* 45 (1998): 137–159. A welcome exception to this long neglect of the legal history of the sit-ins is Tomiko Brown-Nagin's *Courage to Dissent: Atlanta and the Long History of the Civil Rights Movement* (New York: Oxford University Press, 2011), chap. 6–7.

expectations of law shaped the development of the movement. In rejecting traditional conceptions of civil rights reform, the students were acting upon their understanding of the distinctive legal landscape of the period. The responses of LDF lawyers, Southern politicians, and Southern business owners to the sit-ins were affected by their own assessments about the state of the law and the opportunities and limitations of court-based remedies. Each of these groups put forth their own vision of civil rights, their own claim on the meaning of the Constitution. They were all responding to their own understanding of the state of the law and the likelihood that legal institutions might further their interests.

Analyzing disputes over the role of the courts also offers a vehicle for charting the ways law and perceptions of law affected the development of the protests at various levels: in the streets as well as the courts, among laypeople as well as lawyers and judges. It offers an opportunity to capture what Risa Goluboff has identified as law's "vertical" quality. Rather than centering on "legal output at a single level of the legal system," this approach attempts to capture the "the movement of consciousness, arguments, and doctrine throughout the process of law creation."⁶ The legal history of the sit-ins requires attention to formal legal developments and their effects on society. It also requires attention to the legal consciousness of grassroots, non-elite actors. And it requires particular attention to those mechanisms by which legal claims and ideas move from bottom to top and from top to bottom. One such mechanism, clearly evident in the history of the sit-ins, is the legal profession. Lawyers serve as "intermediaries" (Goluboff's useful term) between the world of formal legal institutions and the world of informal claim making.⁷ I argue that courts—more specifically, differing expectations of the role the courts could or should play in the civil rights struggle—provide another linking mechanism. The key actors in the sit-in story all assessed the costs and benefits of litigation and court-based remedies. It was this issue, more than the intricacies of the Equal Protection Doctrine, that provided a legal common ground on which judges, lawyers, politicians, and lay actors could talk to each other, argue with each other, and, sometimes, influence each other.

Placing disputes over the courts at the center of my account of the sit-ins also allows for a better understanding of the ways in which the Supreme Court's rulings in *Brown* and other civil rights decisions of the period influenced the development of the protests. *Brown's* most consequential influence on the sit-in movement was in creating and nurturing certain

6. Risa Goluboff, "Lawyers, Law, and the New Civil Rights History," *Harvard Law Review* 126 (2013): 2312–35, at 2319, 2323.

7. *Ibid.*, 2322.

expectations about the courts. For the LDF lawyers, their victory in *Brown* demonstrated the transformative potential of litigation-based reform strategies. For the students who launched the sit-in movement, *Brown* had created expectations for change that, when unmet, emboldened them to take matters into their own hands, and to do so in a way that side-stepped lawyers and courts. The students' rejection of litigation-based strategies, in turn, attracted sympathetic observers who felt that a new approach was just what was needed at a time when LDF's court-focused challenge to segregation seemed at an impasse. The Supreme Court also influenced the development of the sit-ins through its "state action" decisions, in which the Court steadily expanded the scope of coverage of the Fourteenth Amendment. These suggestive rulings created an atmosphere of uncertain and conflicting predictions regarding the legality of the students' action and the legal options available to lunch counter operators. By allowing such doctrinal uncertainty, the Court, in effect, had delegated to nonjudicial actors considerable discretion in their assessment of whether the courts would serve their interests. Conflicting expectations about what the courts could and could not do—and about what they should and should not do—were evident among lawyers and non-lawyers, among civil rights activists and defenders of Jim Crow, and among the many people who were watching the dramatic events unfolding across the South in the spring of 1960 and trying to determine what it all meant.

I. The Sit-Ins

The sit-in movement began on the afternoon of Monday, February 1, 1960, when four African American students from the Agricultural and Technical College in Greensboro, North Carolina, sat down at the lunch counter of their local Woolworth store and asked to be served. The Greensboro Woolworth's, like most department stores in the South, had a policy of serving only whites at the lunch counter. Refused service, the four students sat quietly in their seats until closing. The following morning the students returned to the lunch counter, this time with sixteen friends. Again they were refused service, and again they remained until the restaurant closed. The students were back the next day, this time occupying nearly all the forty seats at the Woolworth's counter. By the end of the week an estimated 200 students had taken part in the Greensboro protests. The protests attracted the attention of white youth, who began their own counter-protests. The scene at the Woolworth's on Saturday included white teenagers waving Confederate flags and taunting the black college students sitting at the lunch counter. The police emptied the store after the store manager received

a bomb threat. When the store reopened on Monday, the lunch counter remained closed. At this point city leaders persuaded the students to call a moratorium on their protests.⁸

Greensboro was not the first place African Americans had protested discriminatory service policies in restaurants by staging peaceful “sit-in” demonstrations. There had been scattered lunch counter sit-in protests in Chicago and Washington, DC in the 1940s.⁹ In the late 1950s, the Miami chapter of the Congress of Racial Equality (CORE) organized a sit-in that led to the desegregation of a lunch counter.¹⁰ The sit-in in Greensboro was not even the first student-led lunch counter demonstration. In the late 1950s, NAACP youth chapter members in various Midwestern locales had organized a series of sit-in demonstrations.¹¹ However, what separated the Greensboro protests from all that came before was what followed.

First, the sit-ins spread to other North Carolina cities. On February 8, students sat in at lunch counters in Durham and Winston-Salem; the next day there were protests in Charlotte and Raleigh.¹² On February 11, Hampton, Virginia, became the first city outside North Carolina to join the movement.¹³ The following day, the student demonstrations extended farther into the South, when some 100 protesters took part in a demonstration in Rock Hill, South Carolina. The sit-ins were now national news: the *New York Times* put the Rock Hill protest on its front page.¹⁴ Nashville, Tennessee, soon joined the movement, as did Tallahassee, Florida. Both cities had student groups that had been carefully planning their own

8. The standard historical accounts of the Greensboro sit-ins are Miles Wolff, *Lunch at the 5 & 10* (1970; rev. ed., Chicago: Ivan Dee, 1990); and Chafe, *Civilities and Civil Rights*. Valuable contemporaneous accounts include “Sitdown Leader Persists in Goal,” *New York Times*, March 26, 1960, 10; Michael Walzer, “A Cup of Coffee and a Seat,” *Dissent* 7 (1960): 111–20; and Pollitt, “Dime Store Demonstrations,” 317–37.

9. Lizabeth Cohen, *A Consumers’ Republic: The Politics of Mass Consumption in Postwar America* (New York: Knopf, 2003), 98–99; L.F. Palmer, Jr., “‘Movement’ Guided by Non-Violence,” *Chicago Defender*, March 24, 1960, 11; and August Meier and Elliot Rudwick, *CORE: A Study of the Civil Rights Movement, 1942–1968* (New York: Oxford University Press, 1973), 3–14.

10. Meier and Rudwick, *CORE*, 91, 102.

11. Ronald Walters, “The Great Plains Sit-In Movement, 1958–1960,” *Great Plains Quarterly* 16 (1996): 85–94; Morris, *Origins of the Civil Rights Movement*, 188–94; and “1958 Sit-Ins Were Successful,” *New York Amsterdam News*, February 27, 1960, 2.

12. “N.C. Lunch Counter Bias Protest Spreads,” *Atlanta Daily World*, February 10, 1960, 1; and “Negroes Extend Sitdown Protests,” *New York Times*, February 10, 1960, 21.

13. “NAACP Upholds Store Picketing,” *New York Times*, February 12, 1960, 15.

14. Claude Sitton, “Negroes’ Protest Spreads in South,” *New York Times*, February 13, 1960, 1, 6.

sit-in protests months before the one in Greensboro.¹⁵ On being arrested and convicted, Nashville and Tallahassee protesters chose to serve jail sentences rather than pay a fine.¹⁶ On February 25, African American students in Montgomery, Alabama, sat-in at a courthouse cafeteria, leading to harsh reprisals from state and local officials.¹⁷

By the end of February, thirty cities in seven states had had sit-in demonstrations.¹⁸ A month later, the count reached eleven states and forty-eight cities.¹⁹ By the end of the spring, sit-ins had taken place in all thirteen Southern states and, according to one estimate, involved approximately 50,000 protesters.²⁰ Greensboro “started a brush fire,” one contemporary observer wrote, “which in the brief period of two months has assumed the proportions of an unquenchable conflagration.”²¹ What had begun as a bold act of frustration by four college students turned into a full-fledged protest movement. Greensboro had set in motion an escalating series of events that would move a nation.

The student sit-in movement of 1960 was transformative on a number of levels. It reshaped and reinvigorated the struggle for racial equality. The sit-ins marked a new phase of the Civil Rights Movement, one in which mass participatory direct-action protest would become the leading edge of the movement’s demand for social and political change. This new phase was led by activists who were younger, less patient, and less willing to compromise than the older generation of civil rights activists. It elevated the role of women in the Civil Rights Movement. In contrast to the

15. “Rebuffed in Nashville,” *New York Times*, February 14, 1960, 30; “Demonstrations in Nashville,” *New York Times*, February 21, 1960, 57; Patricia Stephens, “Tallahassee: Through Jail to Freedom,” in *Sit-Ins: The Students Report*, ed. Jim Peck (New York: Congress of Racial Equality, 1960), 2–4; and Lewis M. Killian, “Organization, Rationality and Spontaneity in the Civil Rights Movement,” *American Sociological Review* 49 (1984): 770–83, at 777.

16. “Nashville Seizes 75 in Race Clash,” *New York Times*, February 28, 1960, 51; “76 Students Choose Jail in Racial Row,” *Chicago Tribune*, March 2, 1960, 5; Stephens, “Tallahassee,” 4; and “Eight Negroes Chose Jail in Sitdown Case,” *Chicago Tribune*, March 19, 1960, 12.

17. “Sitdown Staged in Alabama Shop,” *New York Times*, February 26, 1960, 8.

18. James H. Laue, *Direct Action and Desegregation, 1960–1962: Toward a Theory of Rationalization of Protest* (Brooklyn: Carlson, 1989), 76.

19. “The South: Youth Will be Served,” *Time*, March 21, 1960.

20. Laue, *Direct Action and Desegregation*, 77; see also *ibid.*, 329–34. By the one-year anniversary of the first sit-in, there had been demonstrations in more than 100 cities across the South. *Ibid.*, 88. For a recent analysis of the factors that contributed to the rapid spread of the sit-ins, see Kenneth T. Andrews and Michael Biggs, “The Dynamics of Protest Diffusion: Movement Organizations, Social Networks, and News Media in the 1960 Sit-Ins,” *American Sociological Review* 71 (2006): 752–77.

21. Charles H. Thompson, “Desegregation Pushed Off Dead Center,” *Journal of Negro Education* 29 (1960): 107–11, at 107.

male-dominated established civil rights organizations, the decentralized mass protest movement offered opportunities for women not only to participate but often to also assume leadership roles. The sit-in movement also led to the creation of a vibrant new civil rights organization, the Student Nonviolent Coordinating Committee (SNCC), which grew out of an April 1960 meeting of student protest leaders.²² SNCC's challenge to the established ways of civil rights reform and the established civil rights organizations initiated a cycle of tensions, breaks, and alliances between the youth activists and the older generation—with Martin Luther King, Jr., often operating as an intermediary between the two sides—that continued into the 1960s.²³

The sit-in movement also transformed segregation practices. Soon after the protests began, students began to see tangible results, as a growing number of restaurants desegregated in the face of the protests. These early victories were sometimes the product of an individual restaurant owner's decision, and sometimes the product of negotiated city-wide agreements among local officials and business leaders. Although these victories were more a steady trickle than the wave of reform that the students were hoping for, and although they were limited to the upper South and border states, at the time, many understood them to be remarkable achievements for the movement. "Buried in the reams of copy about the southern sit-ins," noted a CORE newsletter in April 1960, "is the fact that since the protest movement started, over 100 lunch counters and eating places in various parts of the south have started to serve everybody regardless of color."²⁴ The first city to desegregate its lunch counters in reaction to sit-in demonstrations was San Antonio, Texas, which did so on March 15.²⁵ The Nashville movement saw its breakthrough in May when, after several rounds of protests and negotiations, a number of restaurants abandoned their segregation policies, an event that earned front page coverage in Northern newspapers.²⁶ In the weeks following, Winston-Salem and Salisbury, North Carolina, also adopted negotiated desegregation plans,

22. See Carson, *In Struggle*, chap. 2.

23. On generational divides within the African American activist community during the civil rights era, the essential work is Brown-Nagin, *Courage to Dissent*.

24. *CORE-lator*, April 1960, 1; see also Wright, "The Sit-In Movement," 448 ("[I]n the majority of instances capitulation [to the students' demand for service] came peacefully, almost gracefully.")

25. "Both Races Accept Move by 5 Stores," *New York Times*, March 20, 1960, 1; and "Freeze & Thaw," *Time*, March 28, 1960; see also "Galveston Takes Integration Step," *New York Times*, April 6, 1960, 27.

26. "Negroes Win Dining Rights in Nashville," *Chicago Tribune*, May 11, 1960, A1; "Nashville Integrates Six Lunch Counters," *New York Times*, May 11, 1960, 1; and "Sit-Ins Win In Tennessee," *New York Amsterdam News*, May 14, 1960, 1. See also "Settlement in Nashville," *Time*, May 23, 1960.

and by the end of June most of the chain store lunch counters in northern Virginia had desegregated.²⁷ Greensboro's breakthrough came in July.²⁸ By the end of the summer of 1960, through a combination of private initiative and local policy, twenty-seven Southern cities had responded to the protest movement by desegregating their lunch counters.²⁹

Finally, the student sit-in movement transformed the agenda of the national civil rights debate. From the 1940s through the 1950s, the focus of the major civil rights organizations had been on voting rights and educational equality; workplace discrimination was also a significant issue, although less prominent in the 1950s than it had been in the 1940s.³⁰ Racial discrimination in privately owned public accommodations was far from the top of the civil rights agenda. The sit-ins changed this. The protests sparked a national debate over the legality and morality of discrimination in public accommodations, one that would only increase in volume and intensity in the coming years. A right to nondiscriminatory access to lunch counters and hotels, regardless of whether they were publicly or privately owned, now had a place, alongside school desegregation, voting rights, and workplace rights, as the central goals of the movement. When John F. Kennedy gave his breakthrough civil rights address in June 1963, in which he declared civil rights a moral issue, he described the "right to be served in facilities which are open to the public" as an "elemental right," comparable to education and voting.³¹ The resolution of the legal issues raised by the sit-ins, suggested one legal scholar, would be more significant than *Brown*.³² "The whole Nation has to face the issue," Justice William O. Douglas wrote in 1964. "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 . . . consumes the public attention."³³ The elevation of

27. Claude Sitton, "Stores in South Prosper with Integrated Counters," *New York Times*, June 6, 1960, 1; Susanna McBee, "Most Eating Places Drop Racial Bar," *Washington Post*, June 25, 1960, A11; and "The South: Let 'Em Eat," *Time*, June 6, 1960.

28. "Sit-Ins Victorious Where They Began," *New York Times*, July 26, 1960, 1.

29. "Lunch Counter Pressure Cracks South," *Chicago Defender*, August 20, 1960, 20.

30. Risa L. Goluboff, *The Lost Promise of Civil Rights* (Cambridge, MA: Harvard University Press, 2007); and Sophia Z. Lee, "Hotspots in a Cold War: The NAACP's Postwar Workplace Constitutionalism," *Law and History Review* 26 (2008): 327–78.

31. 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*, The American Presidency Project, <http://www.presidency.ucsb.edu/ws/?pid=9271> (accessed 15 May 2013).

32. Lewis, "The Sit-In Cases," 101.

33. *Bell v. Maryland*, 378 U.S. 226, 243 (1964) (Douglas, J., concurring).

equal treatment in privately operated public accommodations to the top of the civil rights agenda was largely the product of events set in motion by the four Greensboro students on that February afternoon.

When it came to access to public accommodations, LDF lawyers never won the constitutional breakthrough in the Supreme Court that they had hoped for. However, the litigation that emerged from the sit-ins did result in a string of important legal victories on narrower grounds.³⁴ Legislatures also responded. Although the Deep South remained intransigent, elsewhere authorities passed public accommodations laws and strengthened enforcement of existing ones. By 1964, a majority of the nation lived under state or local laws requiring nondiscriminatory access to public accommodation.³⁵ Then, with Title II of the 1964 Civil Rights Act, nondiscrimination in public accommodations became national policy. What in the spring of 1960 had been the most volatile civil rights issues of the day would become, within a matter of years, a broadly accepted norm of conduct for the nation.³⁶

II. Legal Uncertainty, the Shadow of *Brown*, and the State Action Doctrine

Close attention to the courts not only as a forum for civil rights contestation, but also as an object of contestation, allows us to better understand the ways that judicial doctrine of the Supreme Court affected the course of the sit-in movement. In particular, attention to this dynamic offers a fresh perspective on an issue that has been of much interest to legal historians in recent years: the connection between the Supreme Court, particularly its *Brown* decision, and the civil rights movement.

34. See, e.g., *Bell v. Maryland*, 378 U.S. 226 (1964); *Bowie v. City of Columbia*, 378 U.S. 347 (1964); *Barr v. City of Columbia*, 378 U.S. 146 (1964); *Robinson v. Florida*, 378 U.S. 153 (1964); *Gober v. City of Birmingham*, 373 U.S. 374 (1963); *Avent v. North Carolina*, 373 U.S. 375 (1963); *Shuttlesworth v. Birmingham*, 373 U.S. 262 (1963); *Lombard v. Louisiana*, 373 U.S. 267 (1963); *Peterson v. Greenville*, 373 U.S. 244 (1963); *Taylor v. Louisiana*, 370 U.S. 154 (1962); and *Garner v. Louisiana*, 368 U.S. 157 (1961).

35. *Bell v. Maryland*, 378 U.S. 226, 284 (1964) (Douglas, J., concurring) (appendix listing state public accommodations laws); "Survey Shows Rights Laws Now Cover 65% of Nation," *Washington Post*, December 26, 1963, A17; and William E. Blundell, "30 States, Some Cities Bar Discrimination in Public Accommodations," *Wall Street Journal*, October 22, 1963, 1, 14.

36. The implementation of Title II exceeded expectations from the start. Alexander M. Bickel, "What Has Been Done is Prologue," *New Republic*, January 9, 1965, 16–17; Peter Millones, "Negroes in South Test Rights Act; Resistance Light," *New York Times*, July 4, 1964, 1; John Herbers, "Whites Say Compliance Has Been Achieved with Little Strife," *New York Times*, January 24, 1965, 1; and Clay Risen, *The Bill of the Century: The Epic Battle for the Civil Rights Act* (New York: Bloomsbury Press, 2014), 244–49.

The long-held assumption, readily found in popular historical accounts and legal scholarship, was that *Brown* catalyzed a wave of social protest, from the Montgomery Bus Boycotts to the sit-ins and Freedom Rides to the epic confrontations in Birmingham and Selma.³⁷ This interpretation has always had its critics. Academic historians have generally resisted such grandiose portrayals of *Brown*'s impact. With bottom-up social history the methodology of choice within the profession in the late 1970s and 1980s, particularly among scholars of African American history and the civil rights movement, historians tended to view with skepticism the idea that elite-level politics and formal legal change were central factors in the lives of everyday people.³⁸ Conventional wisdom among legal academics, however, was quite different. The rightness of *Brown*, not only as a matter of morality and law, but also as an affirmation of the critical role of the courts in promoting social change, remained a central tenet of the modern legal academy.³⁹

Beginning in the 1990s, political scientist Gerald Rosenberg and legal historian Michael Klarman published several books and articles that sought to upend the then-dominant assumption within the legal academy regarding *Brown*'s impact. In his 1991 book *The Hollow Hope: Can Courts Bring About Social Change?*, Rosenberg concluded that *Brown* accomplished remarkably little, either directly or indirectly.⁴⁰ Klarman also emphasized the lack of evidence that *Brown* directly led to any civil rights breakthroughs, whether measured in terms of public opinion, racial practices, or movement organization. *Brown*'s greatest effect on the course of the movement, he argued, was indirect: it mobilized the white South to resist desegregation at all costs. Klarman described a "backlash" dynamic by which a radicalized Southern political atmosphere led to the bloody and highly publicized confrontations in Birmingham, Selma, and elsewhere, which ultimately led to increased support in the North for civil rights and transformative

37. See, for example, Robert L. Carter, "The Warren Court and Desegregation," *Michigan Law Review* 67 (1968): 237–48, at 246–47; J. Harvie Wilkinson III, *From Brown to Bakke: The Supreme Court and School Integration: 1954–1978* (New York: Oxford University Press, 1979), 3; Morton J. Horowitz, *The Warren Court and the Pursuit of Justice* (New York: Hill and Wang, 1998), 15.

38. See Kenneth W. Mack, "Bringing the Law Back into the History of the Civil Rights Movement," *Law and History Review* 27 (2009): 657–69, at 657–58; and Goluboff, "New Civil Rights History," 2319.

39. See, generally, Laura Kalman, *The Strange Career of Legal Liberalism* (New Haven: Yale University Press, 1996).

40. Gerald N. Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (Chicago: University of Chicago Press, 1991), 39–169.

national legislation such as the Civil Rights Act of 1964 and the Voting Rights Act of 1965.⁴¹

With regard to the possible linkage between *Brown* and the student sit-in movement, Rosenberg offered a brief discussion in which he claimed that there is no record of the members of the Greensboro Four discussing *Brown* or the Supreme Court.⁴² (Rosenberg was incorrect on this point. Contemporaneous interviews indicate that the four students did discuss *Brown* and the school desegregation struggle as they planned their protest.⁴³) Noting that there were other sit-in protests prior to 1960, Rosenberg argued that “the fact that the movement caught on only in 1960, six full years after *Brown*, does not offer much evidence for the indirect-effects thesis.”⁴⁴ Similarly, Klarman concluded that the 6-year gap between *Brown* and the student movement “suggests that any . . . connection must be indirect and convoluted. . . . The outbreak of direct-action protest can be explained independently of *Brown*.”⁴⁵

Critics have challenged Rosenberg and Klarman in two ways. One has been to locate evidence that, they argue, demonstrates *Brown*’s direct influence in inspiring civil rights activism.⁴⁶ The other has been to critique them for asking the wrong kinds of questions about judicial impact and social protest movements. This critique challenges the value of these kinds of inquiries into judicial impact, relying as they do on a top-down model of law’s influence. These critics believe that a better approach is to focus

41. Michael J. Klarman, *From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality* (New York: Oxford University Press, 2004), 344–442; Michael J. Klarman, “*Brown*, Racial Change, and the Civil Rights Movement,” *Virginia Law Review* 80 (1994): 7–150; Michael J. Klarman, “*Brown v. Board of Education*: Facts and Political Correctness,” *Virginia Law Review* 80 (1994): 185–99; and Michael J. Klarman, “How *Brown* Changed Race Relations: The Backlash Thesis,” *Journal of American History* 81 (1994): 81–118.

42. Rosenberg, *Hollow Hope*, 140.

43. Fredric Solomon and Jacob R. Fishman, “Youth and Social Action: II. Action and Identity Formation in the First Student Demonstration,” *Journal of Social Issues* 20 (1964): 37; and Jacob R. Fishman and Fredric Solomon, “Youth and Social Action: 1. Perspectives on the Sit-In Movement,” *American Journal of Orthopsychiatry* 33 (1963): 874–75.

44. Rosenberg, *Hollow Hope*, 141.

45. Klarman, *From Jim Crow to Civil Rights*, 374.

46. See, for example, David J. Garrow, “‘Happy’ Birthday, *Brown v. Board of Education*’s Fiftieth Anniversary and the New Critics of Supreme Court Muscularity,” *Virginia Law Review* 90 (2004): 693–729, at 712–20; David J. Garrow, “Hopelessly Hollow History: Devaluing of *Brown v. Board of Education*,” *Virginia Law Review* 80 (1994): 151–60; Mark Tushnet, “The Significance of *Brown v. Board of Education*,” *Virginia Law Review* 80 (1994): 173–84; and Michael W. McCann, “Reform Litigation on Trial,” *Law and Social Inquiry* 17 (1992): 715–43, at 735–46.

on the ways in which activists mobilize around their own conceptions of their legal rights.⁴⁷ The central concern of sociolegal scholars doing this kind of work is less whether formal legal change produces social change and more the way in which law functions within different institutional and social settings. The focus is on, as Michael McCann put it, the way that legal rights “‘work’ as cultural conventions in social practice.”⁴⁸

The approach I adopt in this article, with its focus on the expectations that various actors placed on the courts, integrates the distinct concerns motivating grassroots examinations of rights consciousness and top-down studies of judicial impact.⁴⁹ Legal mobilization scholars are right to emphasize the varied ways that extrajudicial actors responded to law beyond mere compliance with legal dictates. However, at least in the case of the sit-ins, an exclusive focus on the legal consciousness of the participants misses critical parts of the story. “Law in the books,” particularly assessments of what the Supreme Court had done, and was likely to do in the near future, was of considerable interest to many involved in the sit-ins.⁵⁰ This was evident

47. See, for example, David A. Schultz, ed., *Leveraging the Law: Using the Courts to Achieve Social Change* (New York: Peter Lang, 1998); and McCann, “Reform Litigation on Trial.”

48. Michael W. McCann, *Rights at Work: Pay Equity Reform and the Politics of Legal Mobilizations* (Chicago: University of Chicago Press, 1994), 278. See also Stuart A. Scheingold, *The Politics of Rights: Lawyers, Public Policy, and Political Change* (New Haven: Yale University Press, 1974), 5 (critiquing the “myth of rights” and its search for “a direct linking of litigation, rights, and remedies with social change”); and McCann, “Reform Litigation,” 733 (describing a “bottom-up, dispute-centered approach” to studying law that “emphasizes that judicially articulated legal norms take a life of their own as they are deployed in practical social action”). A recent generation of legal historians who have written about the Civil Rights Movement have employed analogous approaches to law and social change, decentering formal legal institutions and examining the ways in which diverse actors in diverse settings use the authority of law and rights claims. Outstanding examples include Brown–Nagin, *Courage to Dissent*; Goluboff, *Lost Promise of Civil Rights*; Lee, “Hotspots in a Cold War”; Kenneth W. Mack, “Law and Mass Politics in the Making of the Civil Rights Lawyer, 1931–1941,” *Journal of American History* 93 (2006): 37–62; and Kenneth W. Mack, “Rethinking Civil Rights Lawyering and Politics in the Era Before Brown,” *Yale Law Journal* 115 (2005): 256–354. See generally Goluboff, “New Civil Rights History.”

49. For a similar approach, see Christopher Coleman, Laurence D. Nee, and Leonard S. Rubinowitz, “Social Movements and Social Change Litigation: Synergy in the Montgomery Bus Protest,” *Law & Social Inquiry* 30 (2005): 663–737 (arguing that the Montgomery Bus Boycotts’ achievements are best understood as the product of the “synergy” of protest and court action).

50. For an examination of the prominent place of the debate over the *Brown*’s impact in the legal consciousness of the extrajudicial actors involved in the sit-in movement, see Christopher W. Schmidt, “Conceptions of Law in the Civil Rights Movement,” *UC Irvine Law Review* 1 (2011): 101–36. For a critical assessment of *Brown*’s effects on discourses

particularly when activists, businesspeople, politicians, and commentators, as well as lawyers, assessed the costs and benefits of using the courts. Attention to the causal connections between law in its formal, institutional manifestations, and social change—the issue at the core of judicial impact studies—is a critical component of the legal history of the sit-ins.

The sit-in movement offers a powerful example of the oftentimes subtle and unpredictable ways in which changes in formal law—even a rather technical area of law such as the Fourteenth Amendment’s state action doctrine—can create opportunities for grassroots social reform movements. The very indeterminacy of the reach of the Equal Protection Clause in the context of the sit-ins, as a matter of elite legal discourse as well as more general public understanding, played a role in the development and eventual success of this particular episode of social activism.

The students launched their sit-in protests at a historical moment in which the most fundamental of questions raised by the protests—whether these students had a right to service under the Fourteenth Amendment and whether restaurant owners could call upon the law to enforce segregation policy—was unsettled as a matter of both constitutional doctrine and the legal consciousness of the relevant actors on the ground. “This is a situation in which there are written in our statute books no words to which either side can turn for either guidance or support or comfort,” wrote the editors of the *Raleigh Times*.⁵¹ Although privately owned eating establishments had generally been assumed to have discretion as to whom to serve, the sit-ins were undermining this assumption, explained a widely noted report by the Southern Regional Council. The demonstrators’ legal rights, the report concluded, were “cloudy.”⁵²

The Supreme Court in the 1940s and 1950s launched two doctrinal revolutions involving its interpretation of the Fourteenth Amendment.⁵³ One involved the *scope* of the Amendment’s application. This entailed a reconsideration of the limits of the Fourteenth Amendment’s “state action” requirement. In its narrowest form, the state action doctrine is quite straightforward: the Fourteenth Amendment restricts government, not private individuals. The text of the Amendment is relatively clear on this question,⁵⁴ and the seminal articulation of the state action doctrine, the

about racial inequality, see Charles M. Payne, “‘The Whole World is Southern!’ *Brown v. Board* and the Mystification of Race,” *Journal of American History* 91 (2004): 83–91.

51. “Two Wrongs Can’t Make a Right,” *Raleigh Times*, February 11, 1960.

52. “South Is Warned of Time of Change,” *New York Times*, February 28, 1960, 46.

53. On developments in the state action doctrine during this period, see, generally, Schmidt, “Sit-Ins and the State Action Doctrine.”

54. Section One of the Fourteenth Amendment reads in relevant part: “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of

1883 *Civil Rights Cases*, outlined the basic public–private dichotomy on which the doctrine was based.⁵⁵ “[C]ivil rights, such as are guaranteed by the Constitution against State aggression, cannot be impaired by the wrongful acts of individuals, unsupported by State authority in the shape of laws, customs, or judicial or executive proceedings. The wrongful act of an individual is simply a private wrong”⁵⁶ The Court has never abandoned this basic principle. However, beginning in the 1940s, the Court steadily expanded the definition of state action to incorporate more and more activity previously assigned to the private sphere, thereby expanding the reach of the Fourteenth Amendment.⁵⁷

The other, more famous Fourteenth Amendment revolution of the period involved the *meaning* of the equal protection requirement. The focal point of this line of cases was *Brown* and the Court’s rejection of the *Plessy v. Ferguson* doctrine under which state-sanctioned segregation had been deemed to satisfy the equal protection requirement as long as equal facilities were available.⁵⁸

In the aftermath of *Brown*, these two lines of equal protection doctrine appeared to be converging. The Supreme Court extended the *Brown* anti-discrimination requirement to a growing list of state-controlled public facilities, while also gradually expanding the reach of the equal protection clause into the private sphere. It would seem that a restaurant that opened its doors to all but refused to allow blacks to sit at the counter might represent the point at which these two lines of doctrine met.

Much of the reason for the confusion surrounding the legal rights at play in the sit-ins was the complicated nature of the sit-ins as a matter of law. If the facility at issue was publicly owned and operated, the law was clear: After *Brown* and the per curiam decisions that soon followed, extending *Brown*’s mandate to public beaches, golf courses, buses, and other publicly controlled facilities, segregation in public facilities was considered to violate

the United States; *nor shall any State* deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” (emphasis added).

55. *Civil Rights Cases*, 109 U.S. 3 (1883) (striking down the public accommodations provisions of the Civil Rights Act of 1875). Earlier decisions referenced the essence of the state action doctrine, *Virginia v. Rives*, 100 U.S. 313, 318 (1879); and *United States v. Cruikshank*, 92 U.S. 542, 554–55 (1875), but the *Civil Rights Cases* was the Supreme Court’s first extended analysis.

56. *Civil Rights Cases*, 109 U.S. at 17.

57. See, for example, *Smith v. Allwright*, 321 U.S. 649 (1944); *Marsh v. Alabama*, 326 U.S. 501 (1946); *Shelley v. Kraemer*, 334 U.S. 1 (1948); *Terry v. Adams*, 345 U.S. 461 (1953); and *Barrows v. Jackson*, 346 U.S. 249 (1953).

58. *Plessy v. Ferguson*, 163 U.S. 537 (1896).

the constitutional requirement of equal protection.⁵⁹ Similarly, if state or local law required the private lunch counter to segregate, the same reasoning applied: the law constituted state action, the Fourteenth Amendment applied, and the segregation policy was unconstitutional. Outside the South, many states and localities had public accommodation laws that made discrimination in certain privately operated establishments illegal. In this case, the ostensibly “private” discriminatory choice would be prohibited by statute, and the constitutional issue would not need to be reached.⁶⁰

As a matter of law, a difficult situation arose when the owner of a privately operated public accommodation that was not required by state law either to segregate or not to segregate chose to discriminate. Could one claim that the “private” decision to discriminate constituted an equal protection violation? The civil rights claim in this case would rely on the argument that when a privately operated public accommodation opens its doors to all comers and provides a basic service to the community, it in effect functions as a state actor.⁶¹

Another legal wrinkle was the possibility of a constitutional challenge not to the owner’s discriminatory choice, but to the involvement of the state in enforcing that choice. Even if there were no constitutional limitation to a private business owner’s choice of whom to serve, there could be a constitutional problem when, faced with an African American refusing to leave the establishment after being denied service, the owner called the police. Although the police were acting under a facially neutral trespassing or disorderly conduct statute, and although they were enforcing a private choice, the arrest and subsequent prosecution were obviously actions of

59. *New Orleans City Park Improvement Ass’n v. Detiege*, 358 U.S. 54 (1958) (per curiam); *Gayle v. Browder*, 352 U.S. 903 (1956); *Holmes v. City of Atlanta*, 350 U.S. 879 (1955) (per curiam); and *Mayor and City Council of Baltimore v. Dawson*, 350 U.S. 877 (1955) (per curiam).

60. Even here there was the possibility of an extra layer of legal complication. Defenders of segregated public accommodations regularly asserted that private business owners should be constitutionally protected against being compelled to serve on a nondiscriminatory basis. These claims referenced a variety of textual bases—due process, takings, even the Thirteenth Amendment’s protection against involuntary servitude. Such challenges to public accommodation legislation were never recognized in federal court, but they did feature prominently in public and legislative debate over public accommodations policy. See Christopher W. Schmidt, “Defending the Right to Discriminate: The Libertarian Challenge to the Civil Rights Movement,” in *Signposts: New Directions in Southern Legal History*, ed. Sally Hadden and Patricia Minter (Athens: University of Georgia Press, 2013), 417–46.

61. The most relevant precedent for this claim was *Marsh v. Alabama*, 326 U.S. 501 (1946), in which the Court held that for purposes of the First Amendment a private “company town” could be treated as a state actor. Justice Black’s opinion included a sweeping assertion of the “constitutional rights” that constrain a private actor who “opens up his property for use by the public in general.” *Ibid.*, 506.

the state. But under the circumstances would this deployment of state power be constrained by the requirements of the equal protection clause?⁶²

The uncertain status of the state action doctrine in 1960 was reflected in the academic critiques of the doctrine and the spectrum of predictions about which way the Supreme Court was likely to rule in the sit-in cases.⁶³ Yet for those not versed in the nuances of Fourteenth Amendment law, *Brown* was more influential than the state action doctrine in shaping their understanding of the sit-ins as a constitutional issue. In public discourse, opposing views on the constitutional status of racial discrimination in public accommodations were usually framed as a debate over the scope of the *Brown* decision.

Brown—and, particularly, the series of subsequent per curiam decisions—convinced many observers that the logic of *Brown* applied to all public accommodations, whether publicly or privately operated. In 1960, as a product of the NAACP's litigation campaign, *Brown*, and the Little Rock Crisis, the issue of racial equality and segregation had become first and foremost a constitutional concern. When President Eisenhower

62. The critical precedent here is *Shelley v. Kraemer*, 334 U.S. 1 (1948), in which the Court held that judicial enforcement of private agreements to refuse to sell property to African Americans violated the equal protection clause. Although reaffirming the basic state action requirement, Chief Justice Vinson's opinion for the unanimous court suggested a dramatically expanded conception of the scope of state action. Some civil rights lawyers and legal scholars saw *Shelley* as a harbinger of the demise of the state action doctrine, at least in its traditional form. See Richard G. Huber, "Revolution in Private Law?" *South Carolina Law Quarterly* 6 (1953): 8–31; William R. Ming, Jr., "Racial Restrictions and the Fourteenth Amendment: The Restrictive Covenant Cases," *University of Chicago Law Review* 16 (1949): 203–38; "The Disintegration of a Concept—State Action Under the 14th and 15th Amendments," *University of Pennsylvania Law Review* 96 (1948): 402–14; and Osmond K. Fraenkel, "The Federal Civil Rights Laws," *Minnesota Law Review* 31 (1947): 301–27.

63. See, for example, Robert L. Hale, "Rights Under the Fourteenth and Fifteenth Amendments Against Injuries Inflicted by Private Individuals," *Law Guild Review* 6 (1946): 627–39; Alexander H. Pekelis, *Law and Social Action* (Ithaca: Cornell University Press, 1950), 91–127; J.D. Hyman, "Segregation and the Fourteenth Amendment," *Vanderbilt Law Review* 4 (1951): 555–73; Robert L. Hale, *Freedom Through Law: Public Control of Private Governing Power* (New York: Columbia University Press, 1952); Elias Clark, "Charitable Trusts, the Fourteenth Amendment, and the Will of Stephen Girard," *Yale Law Journal* 66 (1957): 979–1015; Harold W. Horowitz, "The Misleading Search for 'State Action' Under the Fourteenth Amendment," *Southern California Law Review* 30 (1957): 208–21; Glenn Abernathy, "Expansion of the State Action Concept Under the Fourteenth Amendment," *Cornell Law Quarterly* 43 (1958): 375–418; Jack Greenberg, *Race Relations and American Law* (New York: Columbia University Press, 1959), 60–61; Roger Paul Peters, "Civil Rights and State Non-Action," *Notre Dame Law Review* 34 (1959): 303–34; Thomas P. Lewis, "The Meaning of State Action," *Columbia Law Review* 60 (1960): 1083–1123.

was asked about the protests, he expressed support for the students' cause and immediately started talking (admittedly, in a rather confused way) about constitutional rights.⁶⁴ A white Southern minister expressed his support for the sit-in protests by noting "the Negroes now confront us with the Constitution in one hand and the Bible in the other."⁶⁵ Others sought to place the sit-ins alongside school desegregation.⁶⁶ Similar patterns emerged in the South. Following the first mass arrest of protesters in Raleigh, North Carolina, the local paper wrote, "the picket line now extends from the dime stores to the United States Supreme Court and beyond that to national and world opinion."⁶⁷ The 6 year experience with school integration set the stage for many Americans to quickly turn the sit-ins into a constitutional issue to which the logic of *Brown's* desegregation mandate seemed to apply.

With all this in mind, the seemingly straightforward question of whether a sit-in protest was legally permissible became a kind of civil rights Rorschach Test. The instability of state action doctrine in the early 1960s meant that any effort at an objective reading of state action invariably turned into either a prediction of where the Court was heading or an argument for what the doctrine should be. Some believed that the students had a valid claim to nondiscriminatory service as a matter of morality, but that they had no right, as a matter of constitutional law, to service in privately owned public accommodations.⁶⁸ Some argued that in participating in the sit-ins, the students were breaking no laws.⁶⁹ Some argued that even if

64. Dwight D. Eisenhower, "The President's News Conference," May 11, 1960, The American Presidency Project, <http://www.presidency.ucsb.edu/ws/?pid=11778> (accessed 15 May 2013).

65. Pollitt, "Dime Store Demonstrations," 320 (quoting *Durham Morning Herald*, February 11, 1960).

66. For example, delegates of the White House Conference on Children and Youth issued a petition of support for the students that began with an approving reference to *Brown*, then moved to a declaration of "full support for the Southern Negro students in their fight for freedom," and concluded with a call for "full and immediate implementation" of school desegregation. Petition in support of Sit-down protests in South, March 31, 1960, NAACP Papers (microfilm), Part 21, Reel 21, Frame 691.

67. Pollitt, "Dime Store Demonstrations," 319 (quoting *News and Observer* (Raleigh, NC), March 16, 1960, 8).

68. See, for example, "Lunch Counter Demonstrations: State Action and the Fourteenth Amendment," *Virginia Law Review* 47 (1961): 105–121, at 121; Florida Governor LeRoy Collins's radio and television address, March 20, 1960, quoted in "NAACP Report on the Student Protest Movement After Two Months", NAACP Papers, Part 21, Reel 21, Frame 576; and "Needed: A 'Just and Honorable' Answer," *Greensboro Daily News*, February 8, 1960, 6.

69. Following the arrest of twenty-seven Fisk University students in Nashville in the early weeks of the movement, for example, the university's president issued a statement: "From all I have been able to learn, they have broken no law by the means they have employed thus

they were breaking state laws, these laws were either facially unconstitutional (in the case of segregation statutes still on the books) or, in the case of trespassing or disorderly conduct statutes, they could not be relied upon to protect private racial discrimination.⁷⁰ And even if the law was against the students at the time of the sit-ins, some believed that if the issue got to the Supreme Court the justices would, one way or another, strike down segregation in public accommodations as a violation of the Fourteenth Amendment.⁷¹ “[I]n this field, the law is an evolving thing,” wrote a *Washington Post* reporter as the sit-ins spread across the South. “An assertion that would have been laughed out of court 20 years ago may be an established right today after a long step-by-step process of fashioning a new rule. The courts may not rule today that Negroes have a right to eat beside white persons in private stores. They might rule so three or five or 10 years from now after taking it a piece at a time.”⁷² The Court in the two decades leading up to the sit-ins had gradually undermined what had been a relatively predictable legal doctrine, leaving open the legal question at the heart of the sit-ins and allowing for, even encouraging, competing extrajudicial claims. As for the basic legal questions involved

far, and they have not only conducted themselves peacefully, but with poise and dignity.” Stephen J. Wright, “The New Negro in the South,” in *The New Negro*, ed. Mathew H. Ahmann (Notre Dame, IN: Fides, 1961), 17. See also Louis Lautier, “Says King ‘Muffed’ Leadership Chance,” *Baltimore Afro-American*, May 7, 1960 (“[A]ny of the 62 lawyers who met with Thurgood Marshall, director counsel of the NAACP Legal Defense and Educational Fund, Inc., which is undertaking the legal defense of approximately 1,500 students who have been arrested, could have informed Dr. King that there is nothing illegal in a student’s peaceably and orderly taking a seat at a lunch counter in a variety store and ordering a hamburger.”), quoted in Interview on *Meet the Press*, April 17, 1960, reprinted in Clayborne Carson, ed., *The Papers of Martin Luther King, Jr.*, vol. 5 (Berkeley: University of California Press, 1992), 431 n. 9 (hereafter *King Papers*). King also made the claim that sit-in protesters broke no laws. See Draft, Statement to Judge James E. Webb after Arrest at Rich’s Department Store, October 19, 1960, in *King Papers* 5:522.

70. American Civil Liberties Union (ACLU) News Release, February 11, 1960, American Civil Liberties Union Records and Publications, 1917–1975 (microfilm), Reel 15; “41 Arrested in Lunch Counter Bias Protests,” *Atlanta Daily World*, February 13, 1960, 1 (CORE leaders making this argument); William J. Kenealy, “The Legality of the Sit-Ins,” in *The New Negro*, 81; Thompson, “Desegregation Pushed Off Dead Center,” 109; and “We’ll Pay Your Fines!” *New York Amsterdam News*, March 5, 1960, 9 (Marion A. Wright of the Southern Regional Council arguing that “businesses which are operated by virtue of state charters should serve any and everyone. The Fourteenth Amendment binds them to do so.”).

71. See, for example, James Feron, “N.A.A.C.P. Plans Student Defense,” *New York Times*, March 18, 1960, 23 (Thurgood Marshall describing the students’ actions as “legal and right” and expressing confidence that the Supreme Court would come to the same conclusion).

72. Richard L. Lyons, “Lunch ‘Sitdown’ a Legal Puzzler,” *Washington Post*, March 27, 1960, E5.

in the sit-ins, all those involved were confronting a constitutional landscape that was far from stable.

The uncertain nature of the constitutional claim inherent in the sit-in protests bolstered the case for those who championed the students' cause. It allowed for the promulgation of the argument that the claim for nondiscriminatory service was the next logical step in the path toward fulfilling the meaning of the Fourteenth Amendment in completing the constitutional process begun in *Brown*. As a matter of legal doctrine, this was contestable. As a matter of public discussion over civil rights in the wake of *Brown* and in the optimistic atmosphere encompassing the sit-ins, it resonated. What might appear to be a relatively narrow question of constitutional doctrine thus helped to define the spectrum of choices available to activists, businesspeople, local officials, and lawyers as they all struggled to come to terms with the consequences of the sit-in protests.

III. The Role of the Courts in the Sit-In Movement: Two Perspectives

This section presents two perspectives on the sit-in movement in its opening months. One is the perspective of the students who planned and launched the sit-ins, and then struggled to explain what they were all about and to maintain control of their movement. The other is that of the lawyers in the NAACP national office and LDF, whose initial skepticism toward the protests soon changed into qualified support for the students and their actions. Although these two groups struggled toward a common goal, they held sharply differing views about the role the courts should play in achieving that goal.

A. The Students

One of the defining characteristics of the students who were on the front lines of the first wave of lunch counter sit-ins in the winter and spring of 1960 was their skepticism, even antagonism, toward litigation as a pathway to racial justice. They distanced themselves from the NAACP's civil rights project, portraying civil rights lawyers as out of touch with their own concerns. They saw the courts as something to be avoided, not because they might lose in court, but because even if they won, they were skeptical that real change would follow. This was the ironic lesson that the great legal victory in *Brown*, which six years later had yet to produce significant results in Southern schools, had taught the sit-in generation.⁷³

73. Brown–Nagin emphasizes student “dissatisfaction with court-based strategies pursued by NAACP lawyers” as a key factor in launching the sit-in protests in Atlanta and elsewhere. *Courage to Dissent*, 134.

The anger and frustration that moved the students in early 1960 was aimed at not only the white defenders of Jim Crow, but also those who insisted the freedom struggle was best fought through formal channels of legal reform. "The older Negro looked only to the courts for help," complained Rodney Powell, a student leader.⁷⁴ James Lawson, an organizer of the Nashville movement, directly attacked the civil rights establishment: "The legal redress, the civil-rights redress, are far too slow for the demands of our time. The sit-in is a break with the accepted tradition of change, of legislation and the courts."⁷⁵ "This movement is not only against segregation," he explained. "It's against Uncle Tom Negroes, against the N.A.A.C.P.'s over-reliance on the courts; and against the futile middle class technique of sending letters to the centers of power."⁷⁶ Lawson derided the NAACP as "a fund-raising agency, a legal agency" that had "by and large neglected the major resource that we have—a disciplined, free people who would be able to work unanimously to implement the ideals of justice and freedom."⁷⁷ In an influential article on the first weeks of the sit-ins, Michael Walzer reported: "None of the leaders I spoke to were interested in test cases; nor was there any general agreement to stop the sitdowns or the picketing once the question of integration at the lunch counters was taken up by the courts. That the legal work of the NAACP was important, everyone agreed; but this, I was told over and over again, was more important. Everyone seemed to feel a deep need finally to act in the name of all the theories of equality."⁷⁸ The very identity of the first wave of sit-in protesters formed in opposition to court-focused approaches to civil rights.

The students' critique of the NAACP and its tactics was also a generational critique. Many participants saw the sit-ins as a way to send a message of impatience, even defiance, to their elders. "[W]here Negroes have stood or got in the way of the mushrooming movement," reported the *Amsterdam News*, "the Negro students and their leaders have not hesitated to lash out at them as they lashed out at whites who have barred their way."⁷⁹ Much of the motivation for the protests emerged from frustration toward leaders within the African American community, with what the students saw as a too-easy acceptance of Jim Crow by their parents and

74. David Halberstam, "A Good City Gone Ugly," *Reporter* (Nashville), March 31, 1960, reprinted in *Reporting Civil Rights: American Journalism, 1941–1963*, vol. 1 (New York: Library of America, 2003), 443.

75. *Ibid.*, 441.

76. Nat Hentoff, "A Peaceful Army," *Commonweal*, June 10, 1960, 275.

77. Claude Sitton, "Negro Criticizes N.A.A.C.P. Tactics," *New York Times*, April 17, 1960, 32.

78. Walzer, "A Cup of Coffee and a Seat" 116–17.

79. "Showdown," *New York Amsterdam News*, May 7, 1960, 1.

grandparents, with too strong a faith in painfully slow courtroom battles by established civil rights figures. “[M]any of our adults have been complacent and fearful,” said Ezell Blair, Jr., one of the Greensboro Four, “and it is time for someone to wake up and change the situation and we decided to start here.”⁸⁰ Some recognized that the older generation’s hesitancy to embrace this kind of reform had much to do with their vulnerability to economic retaliation, although not all were so understanding.⁸¹ “Our adults are too worried about security to do anything,” complained a female student at North Carolina College. “They are too afraid of their jobs.”⁸² Others went so far as to describe Jim Crow as having “brainwashed” their parents into a state of “complacency” and fearfulness.⁸³ “Mamma, I love you,” an arrested protester told her mother when she came to bail her daughter out of jail. “But I am not free. And I’m not free because your generation didn’t act. But I want my children to be free. That’s why I’ll stay in jail.”⁸⁴ The sit-in tactic was at once an expression of frustration with the older generation and their approach to civil rights and with the continued injustices of life in Jim Crow America.

Rather than focusing on changing particular laws, the students spoke of drawing attention to offensive practices that were designed to subjugate and humiliate African Americans. When asked to put into words what moved them to action, they talked about the importance of human dignity and first-class citizenship. Although courts can be a powerful forum for demanding recognition of dignitary claims, the students favored what they considered to be a more direct approach, one that would not require a translation of their grievances into a formal legal or constitutional claim. They did not want their claim to dignity and first-class citizenship rights to rely on the slow and uncertain process of judicial legitimation. This was why the physical act of resistance was so central to the sit-ins. The sit-in tactic would allow them not only to put forth a public plea for equal, dignified treatment, but, by sitting down at a “whites-only” lunch counter, to *enact* an alternative social practice in which the students had already assumed for themselves the place of dignity and respect to which they

80. “A&T Students Campaign To End Dime Store Bias,” *Chicago Defender*, February 13, 1960, 11.

81. L.F. Palmer, Jr., “Violence Fails to Halt ‘Sit-In,’” *Chicago Defender*, March 23, 1960, 9; “A Passive Insister: Ezell Blair Jr.,” *New York Times*, March 26, 1960, 10; and Chafe, *Civilities and Civil Rights*, 94.

82. L.F. Palmer, Jr., “Uprising for Freedom,” *Chicago Defender*, March 22, 1960, 9.

83. Walzer, “A Cup of Coffee and a Seat,” 119.

84. Lerone Bennett Jr., “What Sit-Downs Mean to America,” *Ebony*, June 1960, 35–40, at 40; see also “The Revolt of the Negro Youth,” *Ebony*, May 1960, 36–42.

were entitled: what Thoreau called “the performance of right.”⁸⁵ “The idea,” one participant explained (in a letter written from a Florida jail), “was to demonstrate the reality of eating together without coercion, contamination or cohabitation.”⁸⁶ For the students, a courtroom battle, even if victorious, would never allow for this kind of statement.

The very decision to focus their protests on lunch counter discrimination derived from a concern with personal respect more than with the formal legal constraints of the Jim Crow South. In 1960, there were countless areas of racial oppression that the students might have targeted: Southern schools and public transportation were still largely segregated; African Americans still faced systematic disfranchisement throughout the South; the criminal justice system was notoriously biased against blacks. Practically any of these options would have given the students stronger, clearer legal justifications than an assault on privately owned lunch counters.⁸⁷ These options would also have had the benefit of joining ongoing campaigns by established civil rights organizations. Put another way, if the students had asked lawyers and civil rights leaders for guidance prior to initiating their protests, they would not have been advised to challenge privately owned lunch counters.⁸⁸

85. Henry David Thoreau, “Resistance to Civil Government” (1849), reprinted in *Thoreau: Political Writings*, ed. Nancy L. Rosenblum (Cambridge: Cambridge University Press, 1996), 8. In his classic 1983 article “Nomos and Narrative,” Robert Cover captured this theme: “[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.” Robert Cover, “Foreword: Nomos and Narrative,” *Harvard Law Review* 97 (1983): 4–68, at 21 (footnote omitted).

86. Patricia Stephens, “Tallahassee: Through Jail to Freedom,” in *Sit-Ins: The Students Report*, ed. Jim Peck (New York: Congress of Racial Equality, 1960), 2.

87. For example, the 1961 Freedom Rides, although raising hard questions of strategy and personal safety, had the benefit of having clearly defined federal law on the side of the protesters. The Supreme Court had issued a long line of decisions on the issue at the heart of the Freedom Rides: the right to unsegregated service on interstate transportation. *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); and *Boydton v. Virginia*, 364 U.S. 454 (1960). Unlike the sit-ins, the Freedom Rides were directly in response to a Supreme Court decision. A precursor to the Freedom Rides, the 1947 Journey of Reconciliation was designed specifically to test the *Morgan* decision, and the Freedom Rides were planned in response to *Boydton*. See Raymond Arsenault, *Freedom Rides: 1961 and the Struggle for Racial Justice* (New York: Oxford University Press, 2006), 92–93.

88. Charles H. Thompson, editor of the *Journal of Negro Education*, observed: “[I]f the students had discussed their proposed action with the NAACP high command, they would have been advised against doing so at this time; certainly they would have been advised not to precipitate so many different cases in so many different places at the same time.” Thompson, “Desegregation Pushed Off Dead Center,” 110.

However, discriminatory treatment at lunch counters exacted a particularly abrasive psychic cost for many African Americans. "Sitting at a lunch counter may seem like a small thing to some," explained one participant, "but the right to do so is so inextricably bound up with the American idea of equality for all."⁸⁹ Time and again, black students across the South spoke of the humiliation of being served at the sales counter of a department store while being prohibited from that very same store's lunch counter.⁹⁰ Martin Luther King, Jr., captured the depth of injustice contained within such a seemingly prosaic issue when he wrote of the "tragic inconveniences" of lunch counter segregation.⁹¹ It was the raw, personal experience of exclusion from department store lunch counters, not any assessment of the potential receptivity of the judiciary to their claim right of equal access, and certainly not any visions of a *Brown*-like victory in the Supreme Court, that pulled the student protesters toward this particular target. They were moved by their understanding of their rights under the Constitution. In demanding that these businesses stop their racially discriminatory policies, their claim was, in part, a claim about the meaning of the law. But it was a legal claim whose rightness would not turn on the approval of civil rights lawyer or judges.

Not only did the students tend to describe the harm of exclusion from lunch counters in terms that failed to align neatly with the doctrinal language of equal protection precedents, they also articulated the very goals of the protests in ways designed to differentiate their work from that of civil rights lawyers. Some emphasized the inherent value in taking part in this kind of protest. The organizers of the Nashville movement, led by James Lawson, who had traveled to India and studied Gandhi's protest techniques and theories, viewed the sit-in as an act of self-purification and self-actualization.⁹² Diane Nash spoke of the need to create "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." They called this the "redemptive" or

89. Major Johns, "Baton Rouge: Higher Education—Southern Style," in Peck, *Sit-Ins: The Students Report*, 13.

90. See, for example, "Negroes in South in Store Sitdown," *New York Times*, February 3, 1960, 22; "Explains Student Sitdown Strike," *Chicago Defender*, February 4, 1960, 3; Merrill Proudfoot, *Diary of a Sit-In* (Chapel Hill: University of North Carolina Press, 1962), 14; Vincent D. Fort, "The Atlanta Sit-In Movement, 1960–1961: An Oral Study," in *Atlanta, Georgia, 1960–1961: Sit-Ins and Student Activism*, ed. David J. Garrow (Brooklyn: Carlson, 1989), 126–27.

91. Martin Luther King, Jr., "The Burning Truth in the South," *Progressive* 24 (1960), in *King Papers* 5:449.

92. See Halberstam, *The Children*, 25–50.

“beloved” community.⁹³ King was both reflecting what the students were already doing and helping to shape their own understanding of their actions when he proclaimed, in his electrifying address to the protesters in Durham, North Carolina, in the early weeks of the movement, “To suffer in a righteous cause is to grow to our humanity’s full stature.”⁹⁴ From this perspective, any formal legal changes were secondary; the primary goal was the promotion of a sense of personal and group empowerment. The act of protest could be an end unto itself. Even if not schooled in the philosophy of nonviolence, participants often cited the emotional component of the entire experience. “It was a great feeling,” John Lewis recalled when describing the first time he sat down at a lunch counter and was refused service.⁹⁵ Walzer wrote that he “asked every student I met what the first day of the sitdown had been like on his campus. The answer was always the same: ‘It was like a fever. Everyone wanted to go. We were so happy.’” “[T]hese new forms of political activity,” Walzer concluded, “were a kind of self-testing and proving.”⁹⁶

The students’ effort to keep lawyers and legal doctrine out of the picture was at once bold and conciliatory. It was only through subsequent discussions with civil rights leaders, business leaders, and local public officials that the Greensboro students came to better understand the legal landscape surrounding their protests. In a public statement issued several weeks after the first sit-in, the leaders of the Greensboro movement acknowledged these newly discovered complications. Their initial goal was clear and direct: “The demonstrations at the lunch counters were inspired by the desire to make known, in peaceable fashion, the fact that we are suffering a moral wrong.” This publicizing goal “has been accomplished with encouraging response.” They recognized, however, that there were legal obstacles: specifically state and local laws. As a result of the protest and subsequent negotiations with local officials, they learned “that the law of our community and of our state does not prohibit a continuation of these conditions” of segregation. At the same time, the law “does disapprove of the method used to publicize it.” Fearing that their violation of property laws risked drawing attention away from their primary goal of highlighting the fundamental moral wrong of racial discrimination, they reiterated their request

93. Diane Nash, “Inside the Sit-ins and Freedom Rides: Testimony of a Southern Student,” in *The New Negro*, 44. See also Carson, *In Struggle*, 23–24.

94. Martin Luther King, Jr., “A Creative Protest” (speech to student protesters in Durham, NC), February 16, 1960, in *King Papers*, 5:369.

95. Oral History Interview with John Lewis, November 20, 1973, Interview A-0073. Southern Oral History Program Collection (#4007), <http://docsouth.unc.edu/sohp/A-0073/A-0073.html> (accessed 15 May 2013).

96. Walzer, “A Cup of Coffee and a Seat,” 114, 120.

for “consideration and cooperation.” Their statement concluded with a call to deal with the issue in the way that they felt most comfortable with: without the interference of official legal institutions. “Our case, then, is before the reasonable local bar of public opinion, and we solicit its judgment.”⁹⁷

This approach reflected the distinctive agenda of the students. By resisting the reduction of their efforts into a formal legal claim and by putting their faith into protest and negotiation, they might lose the leverage of a judicially cognizable constitutional claim, but they gained something that was, to them, considerably more valuable: the ability to maintain control over the course of their challenge. They did not need to hand their protest over to the lawyers, as judicial appeals or other direct challenges to existing laws would necessitate. They were asserting their own understanding of their actions, which, although perhaps too moderate and lacking in clearly defined long-term goals for some, had the irreplaceable attribute of being all their own.

To now turn the sit-ins into a legal claim whose legitimacy depended upon recognition in the courts would seem to go against what the students and their supporters saw as the most innovative and valuable aspect of the protest. However, this was precisely what the lawyers in the NAACP’s national office hoped to do.

B. The Lawyers

First Impressions. For the civil rights lawyers in the NAACP’s national office and LDF, the student protests sparked a moment of re-evaluation.⁹⁸ It

97. “A&T Students Drop Sitdown Protests: Plan Negotiations,” *Greensboro Record*, February 21, 1960.

98. It is important to acknowledge divisions within the NAACP. The NAACP was never monolithic. Considerable intraorganizational variation could be found on a number of levels: national office versus local branches; Southern versus Northern; rural versus urban; leaders versus rank-and-file members. See, for example, Kevern Verney and Lee Sartain, eds., *Long is the Way and Hard: One Hundred Years of the NAACP* (Fayetteville: University of Arkansas Press, 2009); and Patricia Sullivan, *Lift Every Voice: The NAACP and the Making of the Civil Rights Movement* (New York: New Press, 2009). Furthermore, there was the division between the NAACP and LDF. LDF was formed in 1940 as a formally independent, tax-exempt litigation arm of the NAACP. In 1957, in order to preserve its tax-exempt status, LDF became completely independent of the NAACP. Mark V. Tushnet, *Making Civil Rights Law: Thurgood Marshall and the Supreme Court, 1936–1961* (New York: Oxford University Press, 1994), 310–11. For an account of the relations between the NAACP and LDF, which became increasingly tense in the 1960s, see Jack Greenberg, *Crusaders in the Courts: How a Dedicated Band of Lawyers Fought for the Civil Rights Revolution* (New York: Basic Books, 1994). With regard to the sit-ins in the spring of 1960, it is particularly important to distinguish between the NAACP on the national and on the local level. The following discussion focuses on the national office, and

was, in the words of an internal memorandum, “a period of soul-searching, of testing, of weighing in the balance.”⁹⁹ The new wave of protests threatened their work, as it seemed to give strength to “[t]he many ill-informed hints from outside that we may have outlived our usefulness.”¹⁰⁰ As they organized for their upcoming annual convention, NAACP leaders struggled to figure out the best approach to dealing with the new wave of protests. NAACP General Counsel Robert L. Carter worried, “Unless we have . . . control [over the sit-ins], we cannot gain too much concentrating on sit-ins except a ‘me too’ to [CORE] and [the Southern Christian Leadership Conference].”¹⁰¹ In these internal discussions, NAACP Program Director James Farmer was particularly blunt in his assessment: “Doubtless the sit-ins will creep into every discussion, as they should, but we cannot appear to be overwhelmed by their impact. . . . I seriously doubt that we should publicly air our confusion and uncertainties on this subject. . . . In the meantime, I think we must maintain the posture of knowing precisely where we are going, while at the same time speeding up our efforts through ‘inner circle’ discussions to find out where we really want to go.”¹⁰²

Recognizing the sit-ins as both a threat and an opportunity for the NAACP, the leaders in the organization’s national office went on the offensive. They parried attacks about the NAACP’s viability as a leading force in the Civil Rights Movement. “We need to amplify our public image,” a staff memorandum explained, “from the NAACP as purely a ‘legal’ agency to the NAACP as a multi-weapon action organization.” “The road to both these objectives is via special focus on the sit-downs, the upsurge of spirit among Negro young people, and the approaches to use of economic power, the ‘expanded racial defense policy.’”¹⁰³ At every opportunity, the NAACP

particularly on the lawyers in the national office (under the leadership of NAACP General Counsel Robert Carter) and LDF (under Thurgood Marshall), where initial skepticism toward the sit-ins was most pronounced. Local NAACP branch leaders, in contrast, were generally more supportive of the students. The Greensboro chapter quickly endorsed the protest and promised legal assistance if needed. When the national NAACP was slow to support the Greensboro students, George Simkins, the head of the Greensboro NAACP chapter, turned to CORE’s national office for help. Chafe, *Civilities and Civil Rights*, 84.

99. John Morsell, Memorandum for Staff Discussion, May 2, 1960, NAACP Papers, Part III, Series A, Box 308, Folder: “Staff, Farmer, James, Memoranda, 1960–61,” Manuscripts Division, Library of Congress, Washington, D.C.

100. Ibid. See also Michael Walzer, “The Politics of the New Negro,” *Dissent* 7 (1960): 235–43, at 238 (“Equipped to win legal decisions, the Association seems unready—there are exceptions of course—to sponsor local action.”); and Greenberg, *Crusaders in the Courts*, 269.

101. Robert L. Carter to John Morsell, May 5, 1960, NAACP Papers, III-A-308, Folder: “Staff, Farmer, James, Memoranda, 1960–61.”

102. James Farmer to John Morsell, May 6, 1960, *ibid.*

103. Morsell, Memorandum for Staff Discussion.

publicized that their branches had been behind sit-in efforts that predated Greensboro, and played up the association's role in the new wave of sit-ins.¹⁰⁴ Publicity material highlighted the fact that several of the Greensboro Four had been members of NAACP youth chapters and that Herbert L. Wright, the NAACP youth secretary, "kept in close touch with the situation."¹⁰⁵ NAACP leaders also emphasized the connections between their achievements in the Supreme Court and the current burst of protests, arguing that without *Brown*, the sit-ins would never have happened. "If the Supreme Court had not signaled the end of separate schools in its 1954 decision, today's young people might not have had the confidence for their broad assault against segregation," wrote the LDF President Allan Knight Chalmers in a letter to the editor of the *New York Times*.¹⁰⁶

As a result of the sit-ins, the lawyers in the NAACP's LDF faced their own moment of soul-searching. "The students took everybody by surprise," Thurgood Marshall confessed.¹⁰⁷ When the protests began, the LDF lawyers were absorbed in the struggle to implement *Brown*. After the elation of the Supreme Court victory in 1954, the work of the civil rights lawyers had devolved into a frustrating form of trench warfare. Emboldened by the emergence of an organized resistance to *Brown*, Southern states blocked desegregation with legal delays interspersed with occasional token efforts at integration. In an effort to run the NAACP out of business, Southern

104. As one NAACP report explained, the wave of sit-ins "marked the continuation of similar activity which started in Wichita and Oklahoma City in 1958. . . . In both cities, the victories were won by NAACP youth councils composed of high school and elementary youth." The memorandum also noted a "sitdown" in St. Louis in February 1959, in which the NAACP represented the arrested students and was able to integrate a previously segregated restaurant. Special Report on Sitdowns, NAACP Branch Department, n.d., NAACP Papers (microfilm), Part 21, Reel 22, Frame 69. See also Robert C. Weaver, "The NAACP Today," *Journal of Negro Education* 29 (1960): 421–25, at 421 ("The sit-in is not a new tactic for the NAACP.").

105. Herbert L. Wright, memorandum to Roy Wilkins, Re: Report on Sit-Down Protests, March 2, 1960, NAACP Papers, III-A-290, Folder: "Sit-Ins, North Carolina, 1960–61"; and "Role of the NAACP in the 'Sit-ins,'" May 1960, *ibid*.

106. "Sit-In Protests Hailed" (letter to the editor), *New York Times*, April 26, 1960, 36. See also Annual Report of the General Counsel, January 1961, NAACP Papers (microfilm), Part 22, Reel 22, Frame 410 ("The Association's legal victories . . . made inevitable the aggressive expressions of discontent with the status quo which resulted in the sit-ins, boycotts and mass Negro protest against social injustice . . .").

107. "NAACP Sits Down With the 'Sit-Inners,'" *New York Amsterdam News*, March 26, 1960, 24; see also Constance Baker Motley, *Equal Justice Under Law* (New York: Farrar, Straus, & Giroux, 1998), 131 ("To say that the students' boldness sent shock waves throughout the organized civil rights community is an understatement. . . . Stunned by the daring and lack of preparation of the students, neither the NAACP nor LDF initially offered legal assistance. We, like everybody else, had been caught off guard.").

state governments sought to publicize its membership lists and prosecute civil rights lawyers for supposed violations of legal ethics rules. Much of the time and effort of the LDF lawyers in the post-*Brown* period was focused on defending their legal work from these challenges.¹⁰⁸

By early 1960, much of the optimism that had accompanied the *Brown* victory had been drained out of the NAACP lawyers. "In light of the present status of the law, no speedy or immediate resolution of the school segregation problem can be forecast," Robert Carter informed the 1960 annual meeting, which took place several weeks before the first Greensboro sit-in.¹⁰⁹ While the lawyers predicted that Little Rock-type instances of direct confrontation and school closings were in the past (a premature prediction, as it turned out), they had come to accept that the current agenda would be dominated by stalling maneuvers and nominal integration efforts; "a lot of fast play around second base," as Marshall put it.¹¹⁰ "I consider the [school desegregation] lawsuits as a holding action, a way of getting things open so that they can operate," Marshall explained, in a statement that captured the dramatically chastened vision of the NAACP lawyers toward the ability of the federal courts to end Jim Crow. "[T]he final solution will only be when the Negro takes his position in the community, voting and otherwise," he concluded.¹¹¹ Therefore, in a sense, the sit-ins gave Marshall what he wanted. The students were certainly asserting their position in their community. The only problem was that, from Marshall's perspective, the students had latched onto the wrong issue.

Although the legal team sought to create out of the sit-ins a systematic challenge to discrimination in public accommodations, they realized that, unlike with school desegregation litigation, they had little control over the unfolding of this issue.¹¹² Marshall was generally a skeptic of direct action protest and an outspoken opponent of civil disobedience.¹¹³ As a dedicated anticommunist, he, like many white liberals of the day, often dismissed public protest actions as tactically ill-advised; even if the protests

108. See Greenberg, *Crusaders in the Courts*, 217–21; and Klarman, *From Jim Crow to Civil Rights*, 335–39.

109. Report of Robert L. Carter, General Counsel, Annual Meeting, NAACP, January 4, 1960, NAACP Papers (microfilm), Part 22, Reel 22, Frame 402.

110. Wayne Phillips, "School Integration Has Passed Its Crisis, Negro Leader Says," *New York Times*, January 3, 1960, 1.

111. *Ibid.*

112. Greenberg, *Crusaders in the Courts*, 277.

113. Juan Williams, *Thurgood Marshall: American Revolutionary* (New York: Times Books, 1998), 241, 245–52; Tushnet, *Making Civil Rights Law*, 301–13; "The Reminiscences of Thurgood Marshall," in *Thurgood Marshall: His Speeches, Writings, Arguments, Opinions, and Reminiscences*, ed. Mark V. Tushnet (Chicago: Lawrence Hill, 2001), 471; and Motley, *Equal Justice Under Law*, 152.

had no direct linkages to leftist organizations, they were vulnerable to accusations of these kinds of linkages.¹¹⁴ The students, he believed, were simply heading in the wrong direction.

In addition to his skepticism of direct action protest as a tool of social reform, Marshall's reading of the relevant legal doctrine made him doubt that the students had a viable constitutional claim. Upon learning what was happening (when the sit-ins began he was in London, helping to draft a new constitution for Kenya), Marshall called a staff meeting.¹¹⁵ As recalled by Derrick Bell, then a young LDF lawyer, he "stormed around the room proclaiming in a voice that could be heard across Columbus Circle that he did not care what anyone said, he was not going to represent a bunch of crazy colored students who violated the sacred property rights of white folks by going in their stores or lunch counters and refusing to leave when ordered to do so."¹¹⁶ (LDF attorney Constance Baker Motley worried Marshall might have a stroke.¹¹⁷) Recognizing the limitations of equal protection law, as currently defined in the courts, he emphasized that this was a completely different situation than if the protests had taken place in publicly owned facilities. He told his staff: "I don't want any of you trying to defend so-called protestors who are really trespassing on private property—unless you can come up with some powerful arguments that I know you can't because they don't exist."¹¹⁸

Marshall quickly changed his tune, however. It is likely that he never truly believed that the students' legal claims were as weak as he made them out to be. His closest advisors had seen this kind of performance before: Prior to committing himself to a course of legal strategy, Marshall would give his best possible case against that course of action. He relied on his staff to argue with him, to challenge him. In embracing the opposition's argument, he and his colleagues would have a better understanding

114. On the anticommunist stance of Marshall and the NAACP national office, see, for example, Brown-Nagin, *Courage to Dissent*, 185–86.

115. Mary L. Dudziak, "Working Toward Democracy: Thurgood Marshall and the Constitution of Kenya," *Duke Law Journal* 56 (2006): 721–80.

116. Derrick Bell, "An Epistolary Exploration for a Thurgood Marshall Biography," *Harvard Blackletter Law Journal* 6 (1989): 51–67, at 55.

117. Motley, *Equal Justice Under Law*, 149.

118. Bell, "Epistolary Exploration," 55. On Marshall's commitment to the protection of private property rights, see Dudziak, "Working Toward Democracy," 724. LDF staff attorney Constance Baker Motley recalled that only she and James Nabrit, Jr., felt that the students might have a viable legal claim, although she also noted, "We did not have a clue in 1960 as to a successful legal theory to end discrimination in places of public accommodation." Motley, *Equal Justice Under Law*, 132, 149.

of what they were up against.¹¹⁹ Regardless of where Marshall started, he and his fellow LDF lawyers soon became leading proponents of the argument that the students had a claim based not only on the immorality of segregation in public accommodations, but also on its unconstitutionality. The evolving, uncertain status of Fourteenth Amendment doctrine at this time allowed the lawyers to make this tactically savvy adjustment. Marshall had offered a fair assessment of the existing precedent when he dismissed the possibility that the students had a valid constitutional claim for equal service. And he was now offering a reasonable advocate's assessment of the legal landscape in defending this same constitutional claim.

In March, Marshall and his staff convened a conference of civil rights lawyers to look at the legal issues behind the sit-ins. As he told reporters, "Those boys and girls didn't check the law when they sat down on those stools. Now we're going to have to check the law."¹²⁰ Even before the lawyers met, Marshall began adopting a dramatically different perspective toward the sit-ins.¹²¹ Abandoning his initial skepticism, he now characterized them as "legal and right," and, when asked whether the NAACP intended to take the issue all the way to the Supreme Court, he responded, "We wouldn't bother with it unless we did."¹²² In the weeks leading up to the conference, he discussed the possibility of making a free expression argument on the students' behalf, and discussions with lawyers at the conference gave him a newfound faith in using the sit-ins as a vehicle for making an equal protection claim.¹²³ The enthusiasm with which the oftentimes tactically cautious civil rights leader took to these ambitious constitutional claims reflected the powerful impact that the sit-ins had

119. Bell, "Epistolary Exploration," 55–56; Tushnet, *Making Civil Rights Law*, 40, 310; and Greenberg, *Crusaders in the Courts*, 273.

120. James Feron, "N.A.A.C.P. Plans Student Defense," *New York Times*, March 18, 1960, 23.

121. The NAACP came out in support of the sit-ins before the LDF lawyers. In early March, NAACP Executive Director Roy Wilkins held a press conference in which he announced: "We support 100% what these young people are doing, whether they are NAACP youths or not. We've sent lawyers to [t]hem, paid fines and will continue to support them in any way we can." "We'll Pay Your Fines!" *New York Amsterdam News*, March 5, 1960, 9.

122. Feron, "N.A.A.C.P. Plans Student Defense," 23.

123. "NAACP Sits Down," 1, 24; see also "Lawyers Agree on Plan for Defense of 1,000 Arrested in South," *New York Times*, March 20, 1960, 1, 46 ("The lawyers are in agreement that use of public force either in the form of arrest by the police or conviction by the courts is in truth state enforcement of private discrimination and is in violation of the Fourteenth Amendment."); "Lauds Negro Students," *New York Times*, April 4, 1960, 33 (Thurgood Marshall telling group in Greensboro, North Carolina, that a business that caters to the public is not private property. "If the owners say they are private, Mr. Marshall said, the Negro should 'make it private—close it up.'").

had on Marshall and others in the national office of the NAACP. “This situation has made all of us reassess ourselves,” he admitted.¹²⁴

Points of Division: Test Cases and the “Jail, No Bail” Debate. The parameters of the lawyers’ reassessment were limited, however. For Marshall and his colleagues, the sit-ins led to a broadening of the horizons of viable constitutional argumentation, but not to a reconsideration of the role of the NAACP—and of the courts—in the Civil Rights Movement. The NAACP lawyers came to the sit-ins with already formed ideas about the way in which civil rights reform should take place. They had had the experience of *Brown*, which showed that carefully planned litigation could overturn even the most seemingly entrenched of constitutional interpretations, and the status of the constitutional issue at the heart of the sit-ins was far from well entrenched after two decades of judicial qualifications and academic attacks. They understood their victory in *Gayle v. Browder* as having played a critical role in securing victory for the Montgomery Bus Boycott.¹²⁵ With the students mobilizing themselves as an alternative to the NAACP’s court-centered approach to racial progress, it was no surprise that when the NAACP lawyers arrived to offer their help and advice to the students, the lawyers and the students would have sharply different views on the situation.

Two points of tactical contention between the lawyers and the students emerged in the early stages of the sit-in movement. One was over the relationship between the protests and the test cases the NAACP hoped to create. The other was a debate over the “jail, no bail” policy advocated by many of the students.

Although Thurgood Marshall and other NAACP lawyers publicly supported the protesters and represented them in court, they disappointed the students (or perhaps confirmed their distrust of the NAACP) when they suggested that as the sit-ins had made their point—and given the lawyers plenty of test cases with which to work—that they should stop the protests. “[T]here has been confusion about the purposes of these activities,” explained a NAACP memorandum.

If the aim is to test the law, then the threshold question is what is gained by the large numbers of people being arrested and involved in appeals in the

124. “NAACP Sits Down,” 24.

125. *Gayle v. Browder* 352 U.S. 903 (1956). On the legal history of the bus boycott, see Randall Kennedy, “Martin Luther King’s Constitution: A Legal History of the Montgomery Bus Boycott,” *Yale Law Journal* 98 (1989): 999–1067; Robert Jerome Glennon, “The Role of Law in the Civil Rights Movement: The Montgomery Bus Boycott, 1955–1957,” *Law and History Review* 9 (1991): 59–112; and Coleman, et al., “Social Movements and Social Change Litigation.”

courts? The financial burden of furnishing bond to keep these people out of jail and the costs of appealing hundreds of such cases through the courts is enormous. . . . Whatever the merits of the mass action technique, when it requires that kind of financial outlay, its virtues must be closely examined. . . . [O]ne does not need hundreds of cases and appeals to test the validity of a particular law. One or two is usually sufficient.¹²⁶

The money that was being used to bail out arrested protesters, the memorandum noted, could be put to better use.¹²⁷ The cost of representing the hundreds, soon thousands, of arrested students was starting to add up.¹²⁸ This memorandum captures a fundamental divide between the NAACP's national leadership and the protesters. The NAACP assumed that the aim of the protests was to change the law. But on this point the students would take issue. This might be one of the aims of the protest, or it might be a beneficial secondary effect of the protest, but it was not their only purpose. The students certainly did not see themselves as doing nothing more than providing test cases for lawyers.

In their effort to justify their own involvement in the sit-ins, NAACP lawyers sought to redefine the goals of the protests. NAACP strategy memos on the sit-ins repeatedly referenced the importance of "ultimate success" in the sit-in battle. Activists must never forget the "main objective" of the protests, and they must always keep in mind the "long run" aims, none of which would be achieved without "a carefully planned and continuous attack."¹²⁹ The assumption was that the end goal of the protest was the judicial recognition of the constitutional rights of the protesters. "The only way we will be able to successfully break down the practices of segregation and discrimination and undermine the legal support of these practices through the law is by the process of having such laws and

126. Untitled, undated memorandum, NAACP Papers (microfilm), Part 22, Reel 3, Frames 374–75.

127. *Ibid.* See also *ibid.*, Frame 376 ("If the objective is to dramatize the illegalities and to disrupt the social order, then the people who participate should refuse legal help and engage in this activity only with the idea of staying in jail.")

128. Langston Hughes, *Fight for Freedom: The Story of the NAACP* (New York: Norton, 1962), 183–84. This financial strain was soon lessened somewhat by the flow of contributions that came into the LDF offices in support of the protests. As a result of the sit-ins and then the Freedom Rides in 1961, the number of contributors to LDF shot up. Its annual income went from \$361,000 in 1959, to \$500,000 in 1960 and \$586,000 in 1961. Greenberg, *Crusaders in the Courts*, 292. Despite growing contention and competition among civil rights organizations, during the early 1960s "the NAACP was more active and successful than ever before." August Meier and John Bracey, "The NAACP as a Reform Movement, 1909–1965," *Journal of Southern History* 59 (1993): 3–30, at 27.

129. "NAACP Position on Jail, No Bail," NAACP Papers, III-A-289, Folder: "Sit-Ins, General, 1960."

ordinances declared unconstitutional.”¹³⁰ When Thurgood Marshall spoke to the Greensboro students, he warned them not to settle for “token integration.”¹³¹ Marshall’s assumption was clear: a negotiated resolution would never be as strong or as lasting as a legally enforceable mandate from a court. As NAACP ally Charles Thompson explained, the students should recognize the benefits of accepting the “leadership” of established organizations. “The need now is for a long-range reappraisal of this ‘sit-down’ movement which would eventuate in a more comprehensive and articulate statement of objectives and strategy, and provide an opportunity for an exchange of views by our grass-roots leadership.”¹³² “As far as [Marshall] was concerned,” complained one student activist after a conversation with the legendary civil rights lawyer, “it was all going to be settled in the courtroom.”¹³³

This is not to say that NAACP officials failed to appreciate the unique value of the student protests. They just felt that at some point their protests must give way to formal, justiciable legal claims: protesters must eventually yield to lawyers. This perspective was captured in an NAACP report that surveyed the first two months of the student protests. The report divided the sit-ins into three “aspects.” The first, described as the “essential nature” of the protest, had nothing to do with law or state power; it was simply “an appeal of one segment of the citizenry to another.”¹³⁴ This was the protest from the students’ perspective, but this approach could last only as long as Southern whites refused to call on the police, because once this happened, the protest would be transformed (the second “aspect”). “[T]he issue now is no longer between citizens, but has become a struggle between Negro citizens and state power.”¹³⁵ This then opened the door for the third and final “aspect” of the sit-ins, which occurred when the NAACP came in to offer “a systematic program of legal defense of the demonstrators.”¹³⁶ The goal of this line of attack was to “seek a re-definition of the legal duties and rights of property owners in the conduct of their business.”¹³⁷ Although the sit-ins “began as an issue of community relations,” they “may well end as a question of legal rights and

130. *Ibid.*

131. Chafe, *Civilities and Civil Rights*, 93.

132. Thompson, “Desegregation Pushed Off Dead Center,” 111.

133. Morris, *Origins of the Civil Rights Movement*, 317 n. 64.

134. “NAACP Report on the Student Protest Movement After Two Months,” n.d., NAACP Papers (microfilm), Part 21, Reel 21, Frame 571.

135. *Ibid.*

136. *Ibid.*

137. *Ibid.*, Frame 572.

privileges.”¹³⁸ For the civil rights lawyers, this third stage, the point at which the NAACP’s leadership became essential, was the logical culmination of the protest. It was “inevitable.”¹³⁹

The divergent agendas of the students and the lawyers were even more starkly reflected in the debate over how the arrested students should deal with the legal system: whether they should pay bail and thereby avoid spending time in jail while their cases were being heard, and whether they should choose a jail sentence rather than pay a fine after conviction. The civil rights lawyers felt that the students charged with trespass or disorderly conduct should plead not guilty, pay bail, and appeal the conviction. They were being unjustly prosecuted, and there was a clear legal remedy for this. But the students had another option: to refuse bail and, as their cases worked their way through the system, to remain in jail as a way of drawing further attention to the injustice of the situation. Inspired by Martin Luther King’s urging them to adopt this “jail, no bail” strategy, students envisioned filling up the jails and prisons with protesters and thereby elevating their moral challenge to the Southern system of racial oppression.¹⁴⁰ At the meeting of student activists in Raleigh, North Carolina, in April 1960, one of the proposals considered was to refuse to post bail for any arrested protesters. This would help solidify black community, mobilize public opinion, and weaken opposition “by showing that a threat of arrest cannot deter us.”¹⁴¹

Next to the commitment and bravery required for a black youth (or white integrationist) to choose to go to a Southern jail or prison, the NAACP’s argument for why they should accept bail was uninspiring in its practicality. According to the lawyers, the “jail, no bail” tactic—and its correlative “jail, no fine” and “no appeal” tactics—was, at best, unnecessarily risky; at worst, it was counterproductive to the movement’s goals. By accepting their convictions and serving out their sentences, not only did the students earn a criminal record, but, more significantly for the NAACP, they gave up their ability to appeal their convictions and thereby challenge the legal rules that made Jim Crow possible. Again, the divide over what the sit-ins were trying to accomplish was made stark. “If the objective is

138. Ibid.

139. Ibid.

140. King, “A Creative Protest.” [speech to student protesters in Durham, NC], Feb. 16, 1960, in *King Papers*, 5:369. King’s vision of using the courtrooms and jails as a rallying tool for the movement was informed by his experience in the Montgomery Bus Boycotts. See Kennedy, “Martin Luther King’s Constitution,” 1029, 1064–65.

141. Records from Raleigh Conference, Summary of Conclusions of Workshop on “Legalism,” Student Nonviolent Coordinating Committee Papers, 1959–1972 (microfilm), Reel 1, Frame 7.

to dramatize the illegalities and to disrupt the social order,” a NAACP memorandum explained, then there was really no role for the lawyers: “the people who participate should refuse legal help and engage in this activity only with the idea of staying in jail.”¹⁴² But this was not the best path, because it failed to appreciate the “long run” goals of the movement, which were best served by following “the Association’s basic policy and philosophy.” The students must always “know exactly what their rights are”: a requirement that NAACP officials could facilitate. “The NAACP firmly believes that every citizen has the constitutional right to enjoy on the same basis as any other citizen the facilities of any public place, business, or any other profit enterprise which offers its services to the public. To obtain these rights we must carry on a carefully planned and continuous attack.”¹⁴³

To achieve these ends, it was believed that the students must not get caught up in symbolic gestures that, in the eyes of the lawyers, did nothing to advance the cause of civil rights. “[I]t is the firm belief of the NAACP that you should plead *not guilty* to the charges and accept bail,” the national office explained to the students. “We realize that remaining in jail has moral and ethical implications not to be discounted, yet there is a grave danger that the individual, by his failure, neglect, or refusal to fight a criminal charge levied against him and through accepting a jail sentence in lieu thereof, will *defeat* his main purpose and thus render ineffectual our overall legal attack on this spiteful, vicious system.”¹⁴⁴ Upon arrest, student leaders should “immediately contact their NAACP lawyers and follow the advice of counsel. In this way we will be better able to direct our efforts toward our main objective, that of crushing an outmoded system, and thus also avoid stigmatizing our youth with criminal records, the efficacy of which is extremely doubtful.”¹⁴⁵

Like their call for the students to stop protesting and allow the lawyers to take over, the NAACP’s attack on the “jail, no bail” strategy disappointed many of the protesters and served to widen the gap between the students and the lawyers. John Lewis, one of the leaders of the Nashville group, recalled hearing Marshall counseling the students to stay out of jail and allow the NAACP to challenge the legality of their arrests. “It was clear to me that evening,” Lewis wrote, “that Thurgood Marshall, along with so

142. “NAACP Position on Jail, No Bail,” n.d., NAACP Papers, III-A-289, Folder: “Sit-Ins, General, 1960, June–Nov.”

143. *Ibid.*

144. *Ibid.*

145. *Ibid.* See also Thompson, “Desegregation Pushed Off Dead Center,” 110 (“While [the jail, no bail] tactic has some publicity value, the disadvantages so outweigh the advantages, in my opinion, that it probably should not be employed.”).

many of his generation, just did not understand the essence of what we, the younger blacks of America, were doing.”¹⁴⁶

Despite the divide between the students and the lawyers when it came to their visions of civil rights activism, as the sit-in movement unfolded throughout the spring of 1960, the two groups settled into a functional alliance. Unified by the recognition of their common enemy, Jim Crow, and bolstered by the contagious atmosphere of excitement and possibility surrounding the students in the early months of the movement, both students and lawyers generally sought to tamp down potential flashpoints of ideological division. The NAACP publicly supported the protesters and offered legal and financial assistance when the students were arrested. The national office issued instructions for local NAACP branches about recommended tactics to best prepare the legal challenge, and they traveled to the South to teach the students about their constitutional rights and how they could most effectively contribute to a legal attack on segregated public accommodations. LDF lawyers represented arrested students in court or they assisted local lawyers. Enough students allowed the lawyers to appeal their convictions, setting in motion the first step in a constitutional challenge to segregated public accommodations. The students continued to protest, the lawyers continued to represent the arrested students, and both advanced the cause of racial equality as best they knew how.¹⁴⁷ It seemed, on some level at least, to be a mutually beneficial situation: “a turbulent but workable marriage,” in sociologist Aldon Morris’s apt description.¹⁴⁸

146. John Lewis with Michael D’Orso, *Walking with the Wind: A Memoir of the Movement* (New York: Simon and Schuster, 1998), 113–14.

147. Once past the initial trial stage, the litigation was largely out of the hands—and sometimes out of the minds—of the student protesters. Robert Mack Bell, the lead defendant in the most important of the sit-in cases, *Bell v. Maryland*, 378 U.S. 226 (1964), was not even following his case when it reached the United States Supreme Court. Peter Irons, *The Courage of Their Convictions: Sixteen Americans who Fought Their Way to the Supreme Court* (New York: Free Press, 1988), 141–52.

148. Morris, *Origins of the Civil Rights Movement*, 39; see also Roy Wilkins, memorandum to NAACP Branch Officers, April 1960, NAACP Papers, III-A-289, Folder: “Sit-Ins, General, 1961–64.” (“This job requires youth and enthusiasm. It also requires age and experience. It requires praying and preaching. It also requires legal activity in court. It requires both old and the new It demands proper caution as well as quiet courage. Close cooperation between all groups is a ‘must.’”). See generally Brown–Nagin, *Courage to Dissent*, chap. 7.

IV. The Debate Over the Courts and the Emergence of a Social Movement

Disagreement over the role of the courts affected the development of the sit-in movement in at least three ways. 1) The students' antilitigation mindset gave them a powerful and distinctive movement identity. This helped energize the protest campaign. It also steered the students toward tactics that created opportunities for repeatable, small-scale victories, a critical factor in sustaining the movement's momentum. 2) The students' skepticism toward litigation helped attract outside support. Supporters ranged from Southern moderates who felt court-centered remedies to be too divisive, to established civil rights activists who saw in the sit-in movement an opportunity to challenge the NAACP. The students' rejection of litigation-focused strategies of civil rights reform also bolstered their claims to be engaged in a movement that was organic and spontaneous, which helped immunize them against potentially damaging accusations that they were controlled by "outside" interests. 3) Disagreement over the costs and benefits of turning to the courts divided the students' opponents. Restaurant operators often wanted to avoid involving the police, whereas white Southern politicians saw arrest and prosecution as the best way to quell the disturbances.

Taken as a whole, contestation over the role of the courts in the sit-in movement resulted in opportunities, alliances, and divisions that ultimately strengthened the students' cause.

A. Winning without the Courts

Considering that the desegregation of public accommodations would become so central to the Civil Rights Movement in the early 1960s—between 1960 and 1964, when Congress effectively resolved the issue with Title II of the Civil Rights Act, it was arguably *the* central issue on the national civil rights agenda¹⁴⁹—it is striking how little attention this aspect of Jim Crow received from formal civil rights organizations before the wave of student-led sit-ins in the spring of 1960. Although there was a long tradition of African American resistance to all forms of discrimination in the public sphere, including facilities that were privately operated but ostensibly open to the general public, prior to 1960 the major civil rights organizations did not see privately owned public accommodations,

149. See, for example, *Bell v. Maryland*, 378 U.S. 226, 244–45 (1964) (Justice Douglas noting that the sit-ins involve “a question that is basic to our way of life and fundamental to our constitutional scheme” and that “[n]o question preoccupies the country more than this one”).

particularly those in the South, as a viable target for their limited resources. Much of this had to do with the particularities of civil rights activism in the 1950s. CORE, the organization best suited in terms of temperament and interest to organizing a frontal challenge to discrimination in public accommodations, had been largely marginalized as a civil rights force in the 1950s.¹⁵⁰ The Southern Christian Leadership Conference (SCLC), which Martin Luther King Jr. and a group of black ministers had created in 1957 following the successful Montgomery Bus Boycott, was still searching for an agenda; by 1960 their attention was centered largely on voting rights.¹⁵¹ The NAACP national office was concerned with implementing *Brown* and federal voting rights legislation and showed little interest in leading a charge against discrimination in privately owned public accommodations. The fact that LDF lawyers thought the students' constitutional claim to be a long shot in court only reinforced the organization's relative lack of interest on behalf of the NAACP's central office.¹⁵² A combination of tactical differences and a reading of the legal landscape therefore steered the dominant civil rights organization of the day toward voting and school litigation, leaving public accommodations a largely unoccupied field for civil rights activity.

This relative absence of attention proved valuable to the development of the sit-in movement, because it allowed the students to pursue their goals largely outside the shadow of national civil rights groups. As detailed previously, the students were able to emphasize to themselves and to the world that their movement was organic, spontaneous, and independent.¹⁵³ Simply by their choice of

150. Meier and Rudwick, *CORE*, 31–33, 61–71.

151. David J. Garrow, *Bearing the Cross: Martin Luther King, Jr., and the Southern Christian Leadership Conference* (New York: Morrow, 1986), 83–125; Taylor Branch, *Parting the Waters: America in the King Years, 1954–1963* (New York: Simon & Schuster, 1988), 206–71.

152. On this count, the national office and the local branches displayed some difference of opinion. NAACP national leaders reprimanded the local branches that helped organize sit-in protests in Oklahoma City and Wichita in the late 1950s. By 1960, however, after the national office had thrown its support behind the sit-in movement, its leaders changed course and publicly celebrated the early Midwest protests as the true beginning of the sit-in movement. Meier and Rudwick, *CORE*, 31–33, 61–71; Morris, *Origins of the Civil Rights Movement*, 125; “Role of the NAACP”; and Roy Wilkins, *Standing Fast: The Autobiography of Roy Wilkins* (New York: Viking, 1982), 259–60.

153. See, for example, “Complicated Hospitality,” *Time*, February 22, 1960. Student protesters could be almost playful in insisting on the lack of central organization behind the protests. Following the initiation of the carefully orchestrated sit-ins in Atlanta, which simultaneously targeted ten establishments, protesters insisted to reporters that “they just happened to be in the area at the time and decided to stop in for a bite to eat.” “Jail 77 Youths Over Ga. Demonstrations,” *Chicago Defender*, March 16, 1960, A3. For an insightful analysis of student self-representation of the sit-in movement as spontaneous and uncoordinated, see Polletta, “It Was Like a Fever” The sit-in movement in fact drew on

targets and tactics, they could portray themselves as standing up not only against second-class citizenship but also against the older generation of civil rights reformers who were preoccupied with other issues (discrimination in voting, education, employment) and other tactics (litigation and lobbying).

By resisting NAACP entreaties to transform their protest into a formal legal claim to be contested in the courts, the students set up opportunities for small-scale, tangible achievements. Often the students' explanations of their actions were disarmingly obvious and direct. When asked about what exactly they hoped to get out of their protests, a common answer was quite simple: they wanted the lunch counter operator, the person standing in front of them, to let them sit down and be served. "We don't want brotherhood," one protester announced, "we just want a cup of coffee—sitting down."¹⁵⁴ Or, as a leader of the Charlotte sit-ins explained, "All I want is to come in and place my order and be served and leave a tip if I feel like it."¹⁵⁵ The "students have found something that is down to earth, has human appeal, and brings visible results," James Robinson, executive secretary of CORE explained.¹⁵⁶ Tangible, realizable goals—forcing a lunch counter to shut down, perhaps even pressuring a lunch counter manager to serve the protesters—had a tremendous advantage in that they held the possibility of immediate attainment. The movement offered students what one supporter described as "the sweet experience of success."¹⁵⁷ Defining their goals in this way empowered the students. Although restaurant operators generally resisted students' demands to desegregate, many temporarily shut down in the face of the protests, an act that showed the students the power of their concerted actions. When the Greensboro protests led to the first lunch counter closing of the movement, cheers erupted from the students and, in a premature burst of enthusiasm, they started shouting "It's all over."¹⁵⁸ The students soon achieved more substantial victories as some restaurant owners, under pressure from the protest movement, abandoned their segregation policy. The possibility of these

existing organizational networks within the African American community, although the extent of this reliance has been a point of some scholarly debate. Compare Morris, *Origins of the Civil Rights Movement*, with Killian, "Organization, Rationality and Spontaneity." *American Sociological Review* 49 (1984): 770–83.

154. Walzer, "A Cup of Coffee and a Seat," 112.

155. "Negroes Extend Sitdown Protest," *New York Times*, February 10, 1960, 21.

156. Hentoff, "A Peaceful Army," 277.

157. Leslie Dunbar, "Reflection on the Latest Reform of the South," *Phylon* 22 (1961): 249–57, at 249.

158. "Negro Protest Lead to Store Closing," *New York Times*, February 7, 1960, 35; "Sitdown Leader Persists in Goal," *New York Times*, March 26, 1960, 10.

moments of accomplishment was critical in giving momentum to the sit-in movement in those critical opening months in the spring of 1960.¹⁵⁹

In sum, the absence of organized civil rights activism in the sphere of public accommodations allowed the students in the opening months of the protest movement to frame their actions in a way that bolstered the sense among participants that theirs was a distinctive and independent movement. Protesters took aim at targets that offered the possibility of short-term victories, a vital component for sustaining movement momentum. One of the most powerful aspects of the sit-in movement was that it created opportunities for engagement and tangible achievement on so many different levels.

B. Outside Support

For such a fundamental and assertive challenge to the racial order in much of the nation, the lunch counter sit-ins received impressive support from around the nation. There were many reasons why people might approve of the sit-ins. The dignified act of courage required from those on the front lines of the movement was surely a predominant factor. Alongside the powerful protest imagery of the sit-ins,¹⁶⁰ the students' rejection of legalistic remedies also contributed to the support they received. The sit-ins responded to the desire many Americans felt for a new path forward on the race question, one centered on sacrifice and moral suasion rather than adversarial litigation and court orders.

The students were far from alone in their frustration with the NAACP and litigation-based reform strategies. By 1960, with the NAACP's school desegregation campaign largely stalled, many civil rights proponents were eager to embrace alternative approaches to bringing down Jim Crow. The NAACP had always had its critics on the left, and the slow progress of the implementation of *Brown* strengthened their voices. Those who viewed the NAACP as elitist and overly cautious embraced the sit-in movement as a way to attack the NAACP and its commitment to litigation and lobbying as the primary tools of racial change. In a widely discussed *Harper's* article, African American journalist Louis Lomax praised the students for displacing the "Negro leadership class"—most notably the NAACP

159. In a study of the factors that differentiated students who took part in protests in the early 1960s from those who did not, sociologist Michael Biggs found that protesters were significantly more optimistic about the potential for racial progress. Michael Biggs, "Who Joined the Sit-ins and Why: Southern Black Students in the Early 1960s," *Mobilization: An International Journal* 11 (2006): 321–36.

160. See Elizabeth Abel, *Signs of the Times: The Visual Politics of Jim Crow* (Berkeley: University of California Press, 2010), 251–91.

—as “the prime mover of the Negro’s social revolt.”¹⁶¹ He lauded the students’ accomplishments: “The demonstrators have shifted the desegregation battle from the courtroom to the market place, and have shifted the main issue to one of individual dignity, rather than civil rights. Not that civil rights are unimportant—but, as these students believe, once the dignity of the Negro individual is admitted, the debate over his right to vote, attend public schools, or hold a job for which he is qualified becomes academic.”¹⁶² The sit-ins, Howard Zinn, then a young professor at Spelman College, approvingly noted, “cracked the wall of legalism in the structure of the desegregation strategy.”¹⁶³

The sit-ins created a flashpoint in the already tense relationship between the NAACP and Martin Luther King Jr.’s SCLC.¹⁶⁴ Just as the students took inspiration from King and the Montgomery Bus Boycott, King saw in the student movement confirmation of his own commitment to direct-action protest and tactics based on moral persuasion, as well as further evidence of his skepticism toward what he saw as the NAACP’s excessive legalism.¹⁶⁵ NAACP leaders suspected that much of the public criticism of the organization—such as Lawson’s uncompromising attack on the NAACP at a meeting of student activists in April or Lomax’s article—could be traced back to the SCLC; therefore, King found himself trying to mend bridges with the NAACP.¹⁶⁶ In private, however, King and his inner circle were scathing in their criticism of the NAACP’s tactics in dealing with the sit-ins. King accused the NAACP of trying to “sabotage our humble efforts.”¹⁶⁷ Stanley Levison, one of King’s closest advisors, wrote to King that the students “are demonstrating the bankruptcy of the

161. Louis E. Lomax, “The Negro Revolt Against ‘The Negro Leaders,’” *Harpers*, June 1960, 41–48, at 41.

162. *Ibid.*, 42. See also Hentoff, “A Peaceful Army,” 275–78; Bennett, “What Sit-Downs Mean”; and Walzer, “The Politics of the New Negro,” 238.

163. Howard Zinn, “Finishing School for Pickets,” *Nation*, August 6, 1960, 72.

164. Tensions between the NAACP and the SCLC predated the sit-ins. In 1959, for example, NAACP official John Brooks attacked the SCLC in an internal report: “They hold emotional mass and prayer meetings, take up money and do nothing on the civil rights front.” Quoted in Manfred Berg, *“The Ticket to Freedom”: The NAACP and the Struggle for Black Political Integration* (Gainesville: University Press of Florida, 2005), 168. At the same time, both the NAACP and SCLC sought to avoid the public perception of conflict between the organizations. On the background of the tense alliance between the SCLC and the NAACP, see *ibid.*, 168–72; Morris, *Origins of the Civil Rights Movement*, 120–28; and Wilkins, *Standing Fast*, 237–38.

165. See, for example, King, “A Creative Protest”; King, “Burning Truth in the South,” *Progressive* 24 (1960). On King’s vision of the law and its relation to social change, see Schmidt, “Conceptions of Law,” 662–67.

166. Garrow, *Bearing the Cross*, 134, 137–38; and Branch, *Parting the Waters*, 297–99.

167. King to Jackie Robinson, June 19, 1960, in *King Papers*, 5:578.

policy of relying upon the courts and legislation to achieve real results.” Levison attacked Thurgood Marshall for “saying that the first stage of demonstrations should be ended and a new one in the courts now [is] to be developed.” The leaders of the NAACP “want to give a tranquilizer or pacifier to the whole movement and send the people back to their ordinary preoccupations. More and more they are revealing themselves as gradualists in reality while they pretend to be uncompromising and firm.” If the NAACP failed to adopt new policies, Levinson concluded, its “influence will sharply diminish and the true forces of struggle will move into effective leadership.”¹⁶⁸ Although King and his allies would have embraced the student movement regardless, tensions with the NAACP heightened the fervor with which they celebrated not only the students’ cause, but also their critique of litigation-centered reform.¹⁶⁹

It was not only those who might be considered to the left of the NAACP who used the sit-ins to launch a critique of the NAACP and its approach to civil rights. Although some civil rights moderates and Southern liberals attacked the protests as unnecessarily disruptive or confrontational,¹⁷⁰ others praised the students for turning attention from legal compulsion to moral persuasion and negotiation. Whereas King, Lawson, and Lomax felt that the sit-ins demonstrated that litigation-centered strategies were too slow, too cautious, and too reliant on elite leadership, moderates used the protests as an opportunity to criticize litigation as unnecessarily divisive. A lesson of the backlash against *Brown*, some suggested, was that litigation might not be effective in creating the conditions of lasting social progress. “The sit-ins were, without question, productive of the most change,” noted Ralph McGill, editor of the *Atlanta Constitution*. “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

168. Stanley D. Levison to Martin Luther King, Jr., March 1960, in *King Papers*, 5:382. See also Hentoff, “A Peaceful Army,” 278 (quoting an unnamed “lieutenant of King” who declared that the courts were “secondary to direct action by the masses” and attacked the NAACP for “urg[ing] the students to call off the demonstrations and rely entirely on the courts.”).

169. Once the SNCC was formed at the April meeting of student activists, this group too became a target of NAACP suspicion, a feeling that was reciprocated on the part of the students. See, for example, Roy Wilkins to Kivie Kaplan, April 24, 1961, NAACP Papers, III-A-289, Folder: “Sit-Ins, General, 1961–64” (accusing SNCC leaders of “doing their best to downgrade the NAACP, to lure its young people and to set up a new, rival organization”).

170. See, for example, Hodding Carter, “The Young Negro is a New Negro,” *New York Times Magazine*, May 1, 1960, 11, 117–119.

on the schools in 1954 had done this. . . . The central moral problem was enlarged.”¹⁷¹

Similarly, leaders of the Southern Regional Council (SRC), a prominent voice of Southern liberalism and a strong supporter of the sit-ins, were adamant that it would be best for all if the issue stayed out of the courtroom. By “appeal[ing] to conscience and self-interest instead of law,” a SRC report explained, the students brought a much-needed new approach to the problem of racial discrimination. “They have argued on the basis of moral right and supported that argument with economic pressure. By their action they have given the South an excellent opportunity to settle one facet of a broad problem by negotiation and good will instead of court order.”¹⁷² The report recognized that the protests targeted not only the white South, but also the judicial route to reform, adding that it was in the interest of both the students and Southern whites to avoid “a new rash of time and money-consuming law suits.”¹⁷³ If law enforcement remained neutral in the confrontation, everyone could stay out of the courts, and the controversy could be resolved “through mediation and opinion leadership.”¹⁷⁴ Such a resolution, working through “economic pressures and civic sense of responsibility,” “would quite likely be a better settlement than one hammered out through litigation in already over-burdened courts.”¹⁷⁵ On the other hand, “Southern white citizens will have only themselves to blame if they are faced with a new rash of time and money consuming law suits.”¹⁷⁶

A central goal of the SRC was to keep the issue from being dominated by the NAACP. “Almost from the beginning the sit-ins have been referred to as a ‘movement,’” noted SRC leader Leslie Dunbar. “No one ever speaks of the ‘school desegregation movement.’”¹⁷⁷ The sit-in movement, he noted, “has led a number of voices to proclaim that Negroes are shifting their main hopes from the courtroom to direct action, and that henceforth undaunted youths and not graying lawyers will lead.”¹⁷⁸ By aligning itself

171. Ralph McGill, *The South and the Southerner* (Boston: Little, Brown, 1963), 16–17.

172. Margaret Price, “Toward a Solution of the Sit-In Controversy” (Southern Regional Council report), May 31, 1960, 1, NAACP Papers, III-A-289, Folder: “Sit-Ins, General, 1959, 1960, Jan–May.”

173. *Ibid.*

174. Southern Regional Council, “Postscript to Special Report of February 25: The Student Protest Movement, Winter 1960,” March 14, 1960, NAACP Papers, III-A-289. Folder: “Sit-Ins, General”, 1959, 1960, Jan–May.

175. *Ibid.*

176. Price, “Toward a Solution.”

177. Dunbar, “Reflection on the Latest Reform of the South,” 255.

178. *Ibid.*, 252. Dunbar challenged this characterization of the protests, however. “Instead of saying, as so many have, that the sit-ins represent a new strategy, would it not be more

with the students and against litigation as a tool of reform, the SRC, like other civil rights proponents who were also competing with the NAACP for attention and resources, sought to retain a place of relevance in the rapidly changing world of the Civil Rights Movement.

Furthermore, the relative inattention of the NAACP's national office to lunch counters and other public accommodations prior to the sit-ins served to largely immunize the students against accusations that opponents always trotted out in an effort to discredit civil rights protests in the South: that local activists were just puppets of "outside" operators, professional agitators regularly assumed to be linked to the Communist Party. This was a standard line of attack by the white South against the NAACP after *Brown*. And it was occasionally voiced in response to the sit-ins. For example, when ex-President Harry S. Truman denounced the sit-ins, he questioned whether they were being coordinated by Communists.¹⁷⁹ Segregationist die-hards predictably made similar remarks, attempting to link the movement to national civil rights organizations (CORE being a popular target), to Communists, or to unidentified "left-wing" organizers.¹⁸⁰ However, these attacks struck only glancing blows on the sit-in movement. The students regularly emphasized the decentralized nature of their movement. The sit-ins "are not part of a plan and were undertaken independently," one student leader explained early in the early weeks of the movement. "We did not consult with groups or individuals at the other schools. There is no organization behind us." (A *New York Times* story noted that this same student leader had recently testified before the House Committee on Un-American Activities about his work refuting Communist "anti-American propaganda.")¹⁸¹ NAACP Executive Director Roy Wilkins played up the independence of

reasonable to regard them as opening up a new front? Instead of announcing that the sit-ins mean a downgrading of the courtroom struggle, would it not be more reasonable to recognize that litigation is not an effective means for desegregating lunch counters, and that sit-ins are not an effective means for desegregating schools?" *Ibid.*, 252–53. However, he also suggested that the sit-in model, based as it was on "a beneficial tonic" of "direct confrontation of people and issue," might serve as an alternative to a formal antidiscrimination policy. *Ibid.*, 254–55.

179. Clayton Knowles, "Truman Believes Reds Lead Sit-Ins," *New York Times*, April 19, 1960, 21.

180. See, for example, Harold C. Fleming, "The Price of a Cup of Coffee," *Reporter*, May 12, 1960, pp. 25–26, at 25 (quoting comments by Senator Richard B. Russell and Georgia Governor Ernest Vandiver); Kevin Kruse, *White Flight: Atlanta and the Making of Modern Conservatism* (Princeton: Princeton University Press, 2005), 181–82; and J. Mills Thornton, *Dividing Lines: Municipal Politics and the Struggle for Civil Rights in Montgomery, Birmingham, and Selma* (Tuscaloosa: University of Alabama Press, 2002), 113–14.

181. "Negroes Extend Sitdown Protest," *New York Times*, February 10, 1960, 21. On anticommunist commitments among sit-in leaders, see also Carson, *In Struggle*, 13.

the students in an attempt to protect them from accusations that they might be under Communist influence. "Remember, these students want to run their own show; they don't want any advice from Moscow," he explained.¹⁸² The NAACP also worked to keep Communists away from the sit-ins. A memorandum from the national office to NAACP local branches warned: "Other elements, including Communists and related groups, undoubtedly will try to 'muscle in.' . . . Every reasonable and firm effort should be used to prevent such an intrusion."¹⁸³ The mainstream press largely portrayed the sit-ins as a grassroots, locally produced, student-led event.¹⁸⁴ Looking back on the protest movement, *New York Times* reporter Anthony Lewis explained, "These brave students ended . . . the possibility of anyone taking seriously the South's traditional claim that its Negroes were contented—outside agitators were causing all the trouble."¹⁸⁵

In this way, the students' skeptical attitude toward the courts and litigation created a public image of their movement that helped attract potential allies around the nation.

C. *Dividing the Opposition*

An important recent trend in Civil Rights Movement scholarship has been to replace portrayals of the Movement's opponents as a monolithic, united front with historical accounts that capture the considerable divergences and antagonisms among those who defended Jim Crow. Today, we have an understanding of the opponents of civil rights that is more nuanced and more attentive to the divisions within their ranks.¹⁸⁶ The history of the sit-ins offers a particularly sharp example of the divided nature of Jim Crow's defenders. In this case, a key point of division was the same issue that brought the students and the NAACP into conflict: the role of the courts

182. "Will Negroes Win in South?" *U.S. News & World Report*, March 14, 1960, 41–45, at 45. See also Killian, "Organization, Rationality and Spontaneity," 782.

183. "Suggested Protest Procedures" (NAACP National Office memorandum), n.d. (Spring 1960), NAACP Papers, III-A-289, Folder: "Sit-In Branches, 1960."

184. See, for example, Helen Fuller, "'We Are All So Happy,'" *New Republic*, April 25, 1960, 13–16.

185. Anthony Lewis, "Since the Supreme Court Spoke," *New York Times Magazine*, May 10, 1964, 92.

186. See, for example, Thornton, *Dividing Lines*; David L. Chappell, *A Stone of Hope: Prophetic Religion and the Death of Jim Crow* (Chapel Hill: University of North Carolina Press, 2004); Kruse, *White Flight*; Anders Walker, *The Ghost of Jim Crow: How Southern Moderates Used Brown v. Board of Education to Stall Civil Rights* (New York: Oxford University Press, 2009); and Jason Morgan Ward, *Defending White Democracy: The Making of a Segregationist Movement & the Remaking of Racial Politics, 1936–1965* (Chapel Hill: University of North Carolina Press, 2011).

in dealing with the sit-in protests. Whether they defended segregation directly or indirectly as reflecting the choices of their constituents or customers, the protests threatened the interests of businesspeople and politicians alike. Their common goal was to defuse the situation. But here they, like the students and lawyers, arrived at quite different conclusions as to the best path. The owners generally sought to avoid or minimize reliance on the law, whereas Southern officials urged them to pursue legal remedies.

The Lunch Counter Operators. With local college students having transformed his beloved Greensboro Woolworth's into ground zero of the civil rights movement, the store manager, Clarence L. Harris, sat down to explain his situation in a seven-page handwritten letter to his state's governor. His first order of business was to make sure Governor Luther Hodges appreciated what kind of company he was a part of: "Never in all the years with this company have I heard a statement received or given an order of an act that was unethical." He also pointed out the considerable role of the Woolworth's chain in North Carolina's economy and the valuable service the store provided by offering affordable, quality merchandise to the lower and middle class. With regard to the demands of the sit-ins, the dollars and cents simply did not add up, he insisted. Less than 5% of his sales were to African Americans. "To integrate our lunch dept. would mean the loss of white trade to gain very little colored trade." At the same time, the current situation was unsustainable: the protests were bleeding away his profits. As to his position on the rightness or wrongness of segregation, Harris was coy with the segregationist governor. "From a moral point of view... we won't argue from that... The only basis for our stand is that we will not breach the custom—when other restaurants serve we would Actually we are fighting a battle for the white people who still want to eat with white people and its costing us."¹⁸⁷

Harris' approach to the issue was broadly representative of how many lunch counter operators confronted the sit-ins. They were businesspeople first and foremost.¹⁸⁸ They wanted to make a profit and viewed themselves as catering to their clients' preferences, not dictating them. They felt they were a target of opportunity in someone else's battle. As a contributor to a chain store industry newsletter described the situation, "Until a higher

187. C.L. Harris to Governor Hodges, February 29, 1960, Governor's Papers: Luther Hartwell Hodges, North Carolina State Archives, Raleigh, North Carolina, General Correspondence, 1960, Box 523, Folder: "Segregation—'Sit Down' Situations, A-F."

188. On the gradual, fitful elevation of economic imperatives over racial ones among white Southern businesspeople during the civil rights era, see Elizabeth Jacoway and David R. Colburn, eds., *Southern Businessmen and Desegregation* (Baton Rouge: Louisiana State University Press, 1982).

judgment is reached, variety chain stores may continue to be helpless hostages of a conflict they did not create and are powerless to avert.”¹⁸⁹

The lunch counter operators’ general resistance to calling upon the law to deal with the sit-ins reflected their effort to maintain this posture of perceived neutrality. After the students refused to leave his lunch counter, Harris went to the police to explore his options. The police told him that he could have them arrested for trespassing. This was not what he wanted; he just wanted them to leave.¹⁹⁰ “They can just sit there,” he told reporters. “It’s nothing to me.”¹⁹¹ In his letter to the governor, Harris echoed the position that the governor and his attorney general had been energetically promoting regarding the state of the law. “As a legal issue,” he wrote, “a firm has the right to choose its customers and to choose what it sells to them, just the same manner the customer has the same privilege of choosing.” But, he added, he chose not to “embarrass” the students by having them arrested.¹⁹² Harris was not necessarily opposed to any use of law enforcement to deal with the sit-ins. In his letter to the governor he indicated that he would welcome police action to deal with “mob” situations.¹⁹³ But he was not willing to rely upon the formal processes of law if he had to take the initiative. He did not want to bear this kind of direct responsibility for propping up the fading edifice of Jim Crow. His attitude toward the role of the courts in dealing with the protest was not particularly ideological. Nor was it motivated by his assessment of the legal options available to him, because he believed that the law was on his side if he chose to call upon it. Rather, his position was pragmatic and economic, with, perhaps, a touch of humanity.

Harris was not alone in his hesitancy to call the law in to deal with the sit-in protests. Although many students were arrested, prosecuted, and often fined or sentenced to jail, the overwhelming majority of those who participated in the sit-ins were not. Students were refused service, lunch counters were shut down, but the role of the police, more often than not, was to observe and wait for something to happen that would require them to intervene. During the first wave of the Greensboro protest, for example, no students were arrested. Most proprietors, in Greensboro and elsewhere, simply wanted the protests to go away. They wanted to make

189. Ben Gordon, “The Hostages,” *Chain Store Age*, April 1960 [excerpted and distributed on stationery of North Carolina Chain Store Council], Hodges Papers, General Correspondence, 1960, Box 523, Folder: “Segregation—‘Sit Down’ Situations.” See also Kruse, *White Flight*, 182–83 (describing response of Atlanta businesspeople to the sit-ins).

190. Wolff, *Lunch at the Five and Ten*, 16.

191. “Negroes in South in Store Sitdown,” *New York Times*, February 3, 1960, 22.

192. Harris to Hodges, February 29, 1960.

193. *Ibid.*

money, and the sit-ins were preventing them from doing that. Sending potential paying customers off to jail was not good business, a point that the business owners regularly made when asked why they were unwilling to call the police and have the protesters charged with trespassing on private property.¹⁹⁴ Many assumed (or hoped) that the sit-ins were nothing more than a college prank (“of the ‘panty-raid’ variety”) that would soon blow over.¹⁹⁵ When faced with a group of protesters who refused to leave, the most common response by restaurant operators was to shut down their lunch counters. In some instances, the operators tried more creative tactics, such as converting lunch counters to sales counters and removing all the stools from the lunch counters.¹⁹⁶

When student protesters were arrested, they were generally not charged with violating segregation laws. Although some states and localities had laws requiring segregation in restaurants, most had no such laws.¹⁹⁷ The city council in Montgomery, Alabama, for example, responded to the outbreak of sit-ins by repealing its restaurant segregation ordinance and strengthening its disorderly conduct ordinance.¹⁹⁸ Where segregation laws remained on the books, they were rarely used as the basis for prosecuting lunch counter protesters.¹⁹⁹ After *Brown* and the per curiam rulings

194. See, for example, “Memorandum on conversation between Governor [Luther H. Hodges] and Mr. Harvin, President of Rose’s Stores, Henderson,” March 10, 1960, Hodges Papers, General Correspondence, 1960, Box 523, Folder: “Segregation—‘Sit Down’ Situations.”

195. Walzer, “A Cup of Coffee and a Seat,” 117; Claude Sitton, “Negro Sitdowns Stir Fear of Wider Unrest in South,” *New York Times*, February 15, 1960, 1.

196. “Lunch Counter Protest Spreads,” *Chicago Defender*, February 11, 1960, A2; “N.C. Stores Close Down Counters,” *Greensboro Record*, February 10, 1960; “Student ‘Sitdown’ Protest Spreads to Virginia, Tenn.,” *Chicago Defender*, February 16, 1960, 1; “Sit-Down Strike Here Closes Lunch Counters,” *Raleigh Times*, February 10, 1960; “Lunch Counters Here Close in Face of Negroes Seeking Service,” *Raleigh Times*, February 11, 1960; and “Sitdown Scene Peaceful; Lunch Counters Closed,” *News and Observer* (Raleigh, NC), February 12, 1960. In correspondence with Roy Wilkins in 1963, the vice president of Woolworth’s proudly noted that “Woolworth’s has not caused the arrest of a single ‘sit in’ demonstrator and our local managers have treated them with dignity and respect.” E.F. Harrigan to Roy Wilkins, May 28, 1963, NAACP Papers, III-A-289, Folder: “Sit-Ins, General, 1961–64.”

197. *State v. Clyburn*, 247 N.C. 455, 101 S.E.2d 295 (1958); *State v. Avent*, 253 N.C. 580, 118 S.E. 2d 47 (1961); Greenberg, *Race Relations and American Law*, 112 (“Relatively little of the inequality that exists [in access to public accommodations] is required by statute.”); and *ibid.*, 374 (listing state-level “Recreation Segregation Statutes” on the books in 1959, some of which cover privately operated public accommodations).

198. *Nesmith v. Alford*, 318 F.2d 110, 119 (5th Cir. 1963).

199. For example, when reviewing a trespassing prosecution of Durham sit-in protesters, the North Carolina Supreme Court made no mention of the city’s ordinance requiring segregation in eating establishments. *State v. Avent*, 253 N.C. 580, 586, 118 S.E.2d 47, 51

that followed, such laws were unquestionably unconstitutional, and any convictions based on them would be summarily overturned on appeal. The students' request for service, in itself, did not break any official policy that the state was willing to enforce. And as these states did not have antidiscrimination statutes, restaurant operators who refused to serve black patrons were also not breaking any state law. Therefore, at that critical moment when the students took their seats at the lunch counter and asked to be served, the students' actions were neither prohibited nor protected as a matter of official, positive law. Engagement of the state legal apparatus required private initiative. In most situations, as long as the situation remained orderly, the police would wait for the restaurant operator to request their help. Only then would they arrest any demonstrators, typically on charges of disorderly conduct, disturbing the peace, or trespass.

During the first week of protests, as the movement spread across several North Carolina cities, police kept a close eye on the demonstrations, but, as the Associated Press reported, "there was no violence or incidents that required their attention."²⁰⁰ "We will answer requests for service [from restaurant owners] as they come in," explained a Raleigh, North Carolina, police chief. "But we have no part of this unless there is a violation of the law."²⁰¹ Private business owners were to bear the responsibility for calling upon power of the state to maintain Jim Crow. This was a burden that, by the spring of 1960, many, perhaps most, lunch counter operators, regardless of their personal beliefs on segregation, were not enthusiastic to shoulder.

Southern Officials. North Carolina Governor Luther Hodges sought to distinguish his position on civil rights from the more defiant defenses of Jim Crow embraced by many white Southern officials. Alabama Governor Eugene Patterson, for example, publicly demanded the expulsion of all protesters from Alabama State College, and then led a purge of the school's faculty.²⁰² Birmingham Police Commissioner Bull Connor declared that he would treat any sit-in as a "breach of the peace" and that his department would "not permit organized, planned and deliberate efforts to foment violence and interfere with the rights of others."²⁰³ Georgia Governor Ernest Vandiver attacked the "mass violations of State law and

(1961); *Peterson v. City of Greenville*, 373 U.S. 244, 257–58 (1963) (drawing attention to Durham ordinance).

200. "Negroes Extend Sitdown Protest," *New York Times*, February 10, 1960, 21.

201. "Sit-Down Strike Here Closes Lunch Counters," *Raleigh Times*, February 10, 1960.

202. "Sitdown Staged in Alabama Shop," *New York Times*, February 26, 1960, 8; and Thornton, *Dividing Lines*, 113–15.

203. "Bomb Scare Ends Sitdown in Store," *New York Times*, February 27, 1960, 20.

private property rights” as “subversive in nature.” When Atlanta students tried to integrate the cafeteria in the state capitol building, he personally ordered them arrested.²⁰⁴ Louisiana Governor Earl K. Long denounced the protests as the work of “some radical outfit” and suggested that if the demonstrators “want to do any real good they should return to their native Africa.”²⁰⁵ The North Carolina governor avoided these kinds of aggressively prosegregationist statements.

This is not to say that Hodges was an integrationist. His private correspondences made his sympathies clear. The sit-ins were “‘gang’ demonstration[s]” that “would do no one any good and would in fact harm those involved and as well as the community itself.”²⁰⁶ But in public Hodges sought to chart a more considered, moderate approach to defending his state’s racial practices than the hardline approach of many other Southern governors.²⁰⁷ When the sit-ins arrived, he was careful to avoid any public statements supporting segregation in privately operated facilities. His position was to remain officially agnostic on the matter of lunch counter segregation, but to give a full-throated defense of the need to protect against lawlessness and disorder. However orderly the sit-ins might appear, he explained in his first statement on the protests, they could, at any moment, “degenerate into a serious threat both to bi-racial good will and public order.” He also accused civil rights activists of hypocrisy: “It is both illogical and dangerous for those who insist on meticulous obedience to the law as the courts interpret it, where segregation is banned, to resort themselves to unlawful measures calculated to speed up acceptance of the philosophy of racial integration.” This was not a question of free speech because this right did not extend to “trespass on private property.”²⁰⁸ As he explained in a correspondence with the Woolworth’s president: “Irrespective of either the legal or moral pronouncements which might be presented in support of one view or another . . . [d]isorder in connection with lunch counter demonstrations should stop—now.”²⁰⁹

Absent violent confrontation, however, which was something protesters sought to avoid, the state had limited power to do anything about the

204. “500 Arrested in 1-Day Segregation Protests,” *Washington Post*, March 16, 1960, C12; and Brown–Nagin, *Courage to Dissent*, 149–150.

205. “9 Students Arrested,” *New York Times*, March 30, 1960, 25.

206. Luther H. Hodges to C.L. Harris, March 2, 1960, Hodges Papers, General Correspondence, 1960, Box 523, Folder: “Segregation—‘Sit Down’ Situations, A–F.”

207. See, generally, Chafe, *Civilities and Civil Rights*; and Walker, *Ghost of Jim Crow*.

208. Hodges Statement on Sit-ins, Hodges Papers, General Correspondence, 1960, Box 523, Folder: “Segregation—‘Sit Down’ Situations.”

209. Luther H. Hodges to R.C. Kirkwood, March 24, 1960, Hodges Papers, General Correspondence, 1960, Box 523, Folder: “Segregation—‘Sit Down’ Situations, G–Z.”

protests. Hodges, therefore, was in something of a bind. He needed private businesspeople to make the first move, but they were generally unwilling to do so. Hodges felt that their refusal to take a strong stand against the protests only heightened the explosive nature of the situation. To allow a “jostling crowd to congregate, and then to close the facility or the store just before the situation physically explodes, and then to reopen the facility again in a few days and go through the same routine,” he warned the Woolworth’s president, was a recipe for chaos.²¹⁰ The best way to head off potential disorder, Hodges insisted, was through private initiative on the part of the targeted businesses. “It is my belief that if your company and the other companies involved continue to follow the course you have up to now, the situation will worsen,” he wrote to the Woolworth’s regional manager.²¹¹ Call in the police, Hodges urged in letters and phone calls with the lunch counter operators. “[S]tand on your legal rights to operate as you choose.”²¹² To resolve the situation, the owners must “confront this problem directly, frankly and courageously.”²¹³ They must be clear in their policy and call upon the law to enforce that policy. “[W]e do have laws in North Carolina to enable the private owner to handle such situations,” he told C.L. Harris.²¹⁴ As Hodges’ administrative assistant explained to one constituent, “It is the Governor’s view that if the Negro citizens have a legal right to integrated service at lunch counters, the issue should be resolved in the courts.”²¹⁵

In his communications with various chain store managers, Hodges even went so far as to offer a draft statement that the lunch counter chains could release to clarify their positions. It read in part:

At the beginning of these demonstrations, we elected not to bring trespass charges in against any persons, notwithstanding the fact that in all of the states in question the laws have clearly given us this legal right. . . . It is now clearly evident that the situation has progressed to the point that reason and proper concern for recognized legal rights are receiving little or no

210. *Ibid.*

211. Luther H. Hodges to C.M. Purdy, March 24, 1960, Hodges Papers, General Correspondence, 1960, Box 523, Folder: “Segregation—‘Sit Down’ Situations, G–Z.”

212. Hodges to Purdy, March 24, 1960, *Ibid.*

213. Hodges to Kirkwood, March 24, 1960. As Hodges’s assistant euphemistically framed the situation, the chain stores “were not facing up to the matter as positively as they really should.” REG [Robert E. Giles] to Governor [Luther H. Hodges], Mar. 8, 1960, Hodges Papers, General Correspondence, 1960, Box 523, Folder: “Segregation—‘Sit Down’ Situations.”

214. Hodges to Harris, March 2, 1960.

215. Robert E. Giles to William C. Allred, Jr., March 18, 1960, Hodges Papers, General Correspondence, 1960, Box 523, Folder: “Segregation—‘Sit Down’ Situations, A–F.”

consideration. . . . We believe that the Nation itself is entitled to see an end to the disorder, and to see that whatever questions remain to be settled shall be settled in a civilized manner and in accordance with law.²¹⁶

The draft statement included an assertion that, absent “an authoritative declaration of law [to the] contrary,” the owners “have the legal right, as a private business, to elect to operate lunch counter facilities on a racially integrated basis or a racially segregated basis.”²¹⁷

Hodges’ position was not fully representative of how Southern officials approached the protests, however. In South Carolina, Alabama, and elsewhere in the Deep South, the first wave of sit-ins brought a quicker and often more violent response by local whites, and this created the opening for a state-initiated crackdown on the protests. For some state officials, just the threat of disorder was enough to arrest protesters.²¹⁸

Florida Governor Leroy Collins took an approach that distinguished him from both Hodges and the hardliners of the Deep South. Collins, hardly a consistent supporter of desegregation and a sharp critic of the students’ tactics, made national news when he openly expressed his support for the cause driving the sit-ins.²¹⁹ “[W]e’ve got the moral rights and we’ve got the principles of brotherhood that are involved in these issues,” he declared in a televised address on March 20, 1960. The practice of excluding blacks from lunch counters, while inviting them to all other sections of department stores, was “unfair and morally wrong.” Collins broke with Hodges in his attitude toward the advisability of judicial remedies to the issue. Although “a merchant has the legal right to select the patrons he serves,” he argued, “we are foolish if we just think about resolving this thing on a legal basis.”²²⁰ Local officials in the upper South often echoed Collins’ effort to chart a more conciliatory approach, searching for ways to diffuse the issue while minimizing legal action against the students. This was the path the Greensboro mayor chose to follow, for example. When his city appeared on the verge of major racial confrontation following a bomb scare that closed downtown lunch counters, he issued a statement calling on “the leadership of the Negro students and the business concerns

216. Untitled draft of statement on sit-ins by Woolworth’s, n.d., [labeled “not used”], Hodges Papers, General Correspondence, 1960, Box 522, Folder: “Segregation—Lunch Counters (Negro) 1960.”

217. Ibid. An excerpt of this draft was included in Hodges to Kirkwood, March 24, 1960.

218. Resulting convictions were generally overturned in federal court. See, for example, *Garner v. Louisiana*, 368 U.S. 157 (1961).

219. On Collins’ efforts to prevent implementation of *Brown*, see Walker, *Ghost of Jim Crow*, chap. 3.

220. Quoted in “NAACP Report of the Student Protest Movement.” NAACP Papers (microfilm), Part 21, Reel 21, Frame 576.

involved to place the public interest above personal considerations, even to the extent of foregoing, for a while, individual rights and financial interest, if by doing so a peaceful solution can be evolved.”²²¹

A similar desire for dealing with the issue without resort to direct involvement of the law could be found among some moderate Southern newspaper editors. Even though the editors of the *Winston-Salem Sentinel* believed that a proprietor “has the legal right to serve or refuse any customer,” they felt that “arrests for trespass are not the answer to the lunch counter protest.” The best solution, the paper concluded, was for the lunch counters to voluntarily desegregate.²²² Or, as the *Greensboro Daily News* put it, “The spirit of the law is more important than the letter.”²²³ The introduction of the law, in the form of police and criminal prosecutions, would undermine efforts of Southern localities to control the course of change. As the *Raleigh News & Observer* explained following the first arrest of the sit-in movement: “It was possible until the arrests of yesterday that the Negro protests might have petered out. It was still possible that some patchwork of compromise of limited painfulness might have been arranged. A few cups of coffee might have settled this matter in North Carolina. The price may be much greater in terms of Southern customs and Southern lawyers in the United States Supreme Court toward which this case is now clearly headed.”²²⁴

For Southern moderates, the fall of Jim Crow, a social transformation they recognized as inevitable, would be less traumatic, less controversial, and would entail less federal involvement (and other forms of “outside interference”) if it were accomplished by private initiative, rather than legal mandates. It is important to note that the moderate’s critique of litigation was not necessarily an acceptance of integration. Moderates intended their alternatives to defiant segregationism to be a way for whites in power to maintain more control over the process of reform, and thereby to limit the overall scope of change. As Tomiko Brown-Nagin has written in the context of Atlanta, “the rhetoric and reality of racial moderation” could be used “as a device to demobilize and moderate the civil rights

221. “Needed: A ‘Just and Honorable’ Answer,” *Greensboro Daily News*, February 8, 1960, 6.

222. “When Lunch Counters Reopen, They Should Serve All Customers,” *Winston-Salem Sentinel*, March 17, 1960, quoted in “NAACP Report of the Student Protest Movement.” NAACP Papers (microfilm), Part 21, Reel 21, Frame 576.

223. “Needed: ‘A Just and Honorable’ Answer.” *Greensboro Daily News*, February 8, 1960, 6.

224. “Making It Their Business,” *News & Observer* (Raleigh, NC), February 13, 1960.

movement.”²²⁵ It was this kind of moderate concession that the NAACP national branch lawyers warned of when they insisted that a constitutional victory in the courts was only way to ensure real change. And it was this kind of moderate effort to defuse the rising tensions of the protest movement that King famously warned of in his “Letter from a Birmingham Jail.”²²⁶

Governor Hodges disagreed. From his perspective, the use of law enforcement and the courts was the best way to achieve his desired ends: to maintain order in North Carolina’s communities, while also propping up segregationist racial practices he believed that a majority of his constituents wanted. Segregationists were accustomed to relying on state courts to serve their interests, to protect property rights, and to protect social order. After *Brown* and subsequent decisions extending its reasoning to all government operated facilities, segregationists saw their last best hope in barricading themselves behind the public–private divide.²²⁷ They started private all-white “segregation academies” and they shut down municipal swimming pools and golf courses. When the sit-ins arrived, they insisted that public accommodations were nothing like public schools, pools, and golf courses, because they were privately operated. If this defense of segregation in public accommodations were to fail, whether by “an authoritative declaration of law” declaring such practices unconstitutional, or by statute, or by the voluntary adoption of new business practices, there was, in Hodges’ view, clearly a right and a wrong way of going about it. The sit-ins were the wrong way. As the students were not listening to his calls to stop their protests, he had to rely on the lunch counter operators to defend their private property rights by calling upon the law. But, to the North Carolina governor’s frustration, the lunch counter operators refused to do what he wanted them to do.

When it came to views on the role of the courts, the sit-ins therefore led to some strange bedfellows. Ironically, racist Southern officials and LDF lawyers were in agreement that their interests were best served if they could steer the confrontation into a formal legal arena. What they hoped to get out of the courts was another matter, however. White Southern leaders saw legal prosecution and punishment as the best way to demonstrate the authority of the existing power structure and suppress the uprising in their midst. LDF lawyers saw courtroom fights over the meaning of the

225. Brown–Nagin, *Courage to Dissent*, 248; On racial moderation as a tool of civil rights obstructionism, see generally Walker, *Ghost of Jim Crow*.

226. Martin Luther King, Jr., *Why We Can’t Wait* (New York: Harper & Row, 1963; Signet, 2000), 64–84.

227. See Kruse, *White Flight*, 178–179; Schmidt, “Defending the Right to Discriminate.”

Constitution as a battleground where they had won before and where they could win again. In contrast, student protesters and many lunch counter operators agreed that their own deeply opposed interests were best served by keeping the issue away from the courts. The students were concerned with losing control of their protest movement and skeptical of the potential for translating courtroom victories into on-the-ground social change. The business operators were primarily concerned about the public relations costs of sending students off to jail. These convergences and divisions over the courts helped shape the course of the sit-in movement. The students and the civil rights lawyers had their tensions, but they were able to settle into their uneasy but functional alliance. The divisions among their opponents proved more consequential, however.

There was nothing approaching a unified Southern white position on the sit-ins. The white South was divided not only over how high a price they were willing to pay to preserve segregation, but also over whether legal prosecution of the protesters was worth the costs involved. The students were the ultimate beneficiaries of these divisions.²²⁸ An editorial in a Shaw University student publication found some wry humor in the situation: "This new show of spirit on the Negroes' part is not being met with total resistance but with dissention among their enemies and with loyalty and aid from here-to-fore unknown supporters. If the white man needs proof that he is disunified he needs only to look at the list of people backing the student protesters. For this disunity we thank him."²²⁹

Conclusion

The history of the transformative opening months of the sit-in movement demonstrates that the Civil Rights Movement was a struggle not only against the laws and practices that divided the races, but also over the role of lawyers and legal institutions in challenging these laws and practices. Courts were not just a venue in which civil rights contestation played out. They were also an object of civil rights contestation.

Attention to the expectations different groups had for the courts allows for a fuller account of law's role in the sit-ins. This approach offers a coherent way to bring a wider array of historical actors into the story. People on all sides of the civil rights struggle and from all walks of life—students, established civil rights leaders, lawyers, newspaper editors, business owners, elected officials, and judges—debated the costs and benefits of using

228. See, for example, "Revolt of the Negro Youth," 38.

229. "Justifiable Recalcitrance," *Shaw Journal*, March–April 1960, 4.

the courts to resolve the escalating national crisis over racial discrimination in privately owned public accommodations. The result was a complex and sometimes surprising array of divisions and convergences on the question of the role of the courts. These divisions and convergences shaped the course of the sit-in movement. They helped make the movement's remarkable achievements possible.

Placing expectations of the courts at the center of the story also offers historians a vehicle for charting the ways law and perceptions of law shaped the sit-in movement at different levels in the hierarchy of formal legal authority, from the students who came to their protests with only a vague idea of the complicated legal issues their protests raised, to the civil rights lawyers who sought to negotiate their understanding of the law with their commitment to advancing the movement, to the Supreme Court justices who struggled to locate the doctrine that would capture the appropriate judicially enforceable boundaries of the Constitution's equal protection requirement. Law was made and remade at each these levels.

More than just illuminating the distinctive concerns that operated at these different levels of authority, however, attention to the ways in which the courts operated as objects of civil rights contestation allows for a better understanding of the connections among these levels of legal authority. Whether grassroots reform activists looked to the courts or attempted to work around the courts, they were responding to a legal landscape created, in large part, by judges and lawyers. Although the linkages are often complex, formal legal developments—including the proclamations of the Supreme Court—can play a role in shaping the course of social protest activity, just as these protest activities can set in motion legal claims that shape the course of formal legal developments. The history of the sit-ins suggests that contestation over the courts offers a particularly useful focal point for moving toward a more synthetic legal history of the Civil Rights Movement.