William & Mary Bill of Rights Journal

Volume 18 | Issue 3 Article 6

The Sit-Ins and the State Action Doctrine

Christopher W. Schmidt

THE SIT-INS AND THE STATE ACTION DOCTRINE

Christopher W. Schmidt*

ABSTRACT

By taking their seats at "whites only" lunch counters across the South in the spring of 1960, African American students not only launched a dramatic new stage in the civil rights movement, they also sparked a national reconsideration of the scope of the constitutional equal protection requirement. The critical constitutional question raised by the sit-in movement was whether the Fourteenth Amendment, which after *Brown v. Board of Education*[1] prohibited racial segregation in schools and other state-operated facilities, applied to privately owned accommodations open to the general public. From the perspective of the student protesters, the lunch counter operators, and most of the American public, the question of whether the nondiscriminatory logic of *Brown* should apply to public accommodations involved a consideration of the role of public accommodations in social life, the dignitary costs of exclusion, and the values served by the protection of private choice and associational rights within the commercial sphere. From the perspective of lawyers, judges, and lawmakers, the relevant question centered on a doctrinal issue that had been under considerable pressure in the two decades preceding the sit-ins: the "state action" requirement of the Fourteenth Amendment. At the time of the sit-ins, many assumed that resolution of the issue demanded a reconsideration of the state action doctrine. Yet, when given the opportunity, neither the Supreme Court, in a series of cases arising from the sit-in protests, nor Congress, in framing the public accommodations provision of the Civil Rights Act of 1964, took this path. As a matter of official constitutional interpretation, the state action doctrine survived the civil rights movement, modified somewhat but retaining the same basic form it had when the Court first defined it in the late nineteenth

* Assistant Professor, Chicago-Kent College of Law; Visiting Scholar, American Bar Foundation. B.A. 1996, Dartmouth College; M.A. 2000, Ph.D. 2004, Harvard University; J.D. 2007, Harvard Law School. For helping to inspire this work and offering invaluable guidance along the way, I thank Robert Post and Reva Siegel. For their thoughtful comments and suggestions on various versions of this Article, many thanks to Mary Dudziak, Richard Fallon, Jon Gould, Joanna Grisinger, Sarah Harding, Michael Klarman, Sophia Lee, Sanford Levinson, Kate Masur, Serena Mayeri, Lucy Salyer, James Sparrow, Norman Spaulding, Kristen Stilt, Allison Brownell Tirres, and the participants of the Public Law and Legal History Workshops at Harvard Law School, the Northeast Regional Law and Society Meeting Junior Scholar Session, the Chicago Legal History Seminar, the Law and Humanities Junior Scholars Workshop, and faculty workshops at Chicago-Kent, Cornell, Duke, University of California, Irvine, UCLA, and University of Chicago.

[1] 347 U.S. 483 (1954).

century. In this Article, I explain why the sit-in movement, which proved remarkably successful at changing attitudes, practices, and statutes, ultimately failed to change constitutional law. My analysis of the resilience of the state action doctrine draws on recent scholarship on extrajudicial constitutionalism, even as it challenges some of the premises that underlie this scholarship.

INTRODUCTION

When African American students sat down at segregated lunch counters across the South in the spring of 1960, they presented a profound challenge to the custom and law of white supremacy. It would be hard to imagine a form of protest that more powerfully demonstrated the flagrant and perverse injustice of the Jim Crow South. Here were well dressed students carrying schoolbooks and Bibles, quietly seated at lunch counters—many located in department stores that welcomed black customers to purchase anything in the store, including food, as long as they did not take a seat in the restaurant—and all they were asking for was a cup of coffee. The moral lines of this scene were only sharpened when the demonstrations attracted audiences of angry white youths shouting epithets at the unmoved protesters, spitting at them, dumping food and drinks on their heads, throwing them to the ground, and beating them.[2]

[2] On the student sit-in movement of 1960, see generally WILLIAM H. CHAFE, CIVILITIES AND CIVIL RIGHTS: GREENSBORO, NORTH CAROLINA, AND THE BLACK STRUGGLE FOR FREEDOM 98–141 (1980); MARTIN OPPENHEIMER, THE SIT-IN MOVEMENT OF 1960 (1989) (*reprint of* Ph.D. dissertation, University of Pennsylvania, 1963); HARVARD SITKOFF, THE

The sit-ins were surely one of the most successful episodes of civil disobedience in modern American history. As the protests spread, shutting down restaurants, sending hundreds of students to jail, and sparking sympathy boycotts in the North, they forced the nation to pay attention. With heroic simplicity, the protests made obvious the injustice of discrimination in public accommodations and put to rest lingering assumptions that African Americans in the South were satisfied with the existing system of race relations or with token reforms. They stirred a national outpouring of support for the basic cause of equal access to public accommodations.[3] In response to the protests, local businesses voluntarily desegregated and hundreds of cities and many states passed public accommodations statutes.[4] And, in an event that even the most idealistic civil rights advocate in 1960 would scarcely have thought possible, in the face of a rapidly expanding protest movement in Birmingham and across the South, Congress passed Title II of the Civil Rights Act of 1964,[5] prohibiting racial discrimination in nearly all places of public service.

The dramatic accomplishments of the sit-in movement had unmistakable implications for the ways in which Americans understood the meaning of their Constitution. The national debate stirred by the students' challenge to exclusion from public accommodations, taking place in the midst of the struggle to come to terms with the Supreme Court's reinterpretation of the Fourteenth Amendment in *Brown v. Board of Education*,[6] treated the issue as a constitutional dilemma. By 1960, the Court, through a series of per curiam decisions that extended *Brown* beyond schools, had made clear that the constitutional nondiscrimination requirement prohibited segregation of state-operated facilities.[7] The sit-in protests pressed upon the nation, with an urgency and sincerity of purpose that could not be captured in a traditional legal challenge, the question of whether *Brown*'s equality mandate applied to privately-owned facilities that opened their doors to the general public. The controversy

---

STRUGGLE FOR BLACK EQUALITY, 1954–1992, at 61–87 (rev. ed. 1993); MILES WOLFF, LUNCH AT THE FIVE AND TEN: THE GREENSBORO SIT-INS (1970); Daniel H. Pollitt, *Dime Store Demonstrations: Events and Legal Problems of First Sixty Days*, 1960 DUKE L.J. 315, 317–37.

[3] *See, e.g.*, JAMES H. LAUE, DIRECT ACTION AND DESEGREGATION, 1960–1962: TOWARD A THEORY OF THE RATIONALIZATION OF PROTEST 91–95 (1989) (*reprint of* Ph.D. dissertation, Harvard University, 1968); SITKOFF, *supra* note 2, at 79–81; Pollitt, *supra* note 2, at 319–22; *THE SOUTH: A Universal Effort*, TIME, May 2, 1960, at 14.

[4] *See* OPPENHEIMER, *supra* note 2, at 179; Pollitt, *supra* note 2, at 322–23.

[5] 42 U.S.C. § 2000a (2006).

[6] 347 U.S. 483.

[7] *See, e.g.*, New Orleans City Park Improvement Ass'n v. Detiege, 358 U.S. 54 (1958) (per curiam) (parks); Gayle v. Browder, 352 U.S. 950 (1956) (per curium) (buses); Holmes v. City of Atlanta, 350 U.S. 879 (1955) (per curiam) (municipal golf courses); Mayor and City Council of Baltimore v. Dawson, 350 U.S. 877 (1955) (per curiam) (public beaches); Muir v. Louisville Park Theatrical Ass'n, 347 U.S. 971 (1954) (per curiam) (public auditoriums). For an examination of the background of these cases, see Dennis J. Hutchinson, *Unanimity and Desegregation: Decisionmaking in the Supreme Court, 1948–1958*, 68 GEO. L.J. 1, 51, 60–73 (1979).

surrounding the sit-ins was pervasively engaged with the Constitution, as all sides claimed to be acting in accordance with constitutional values.[8] And the eventual successes of the sit-ins, many concluded, provided the basis for a new understanding of the constitutional equality principle, one that undermined legalistic distinctions between official and private actors and gave greater recognition to the centrality of human dignity in the struggle for racial equality. The sit-ins exemplified the ways in which a social movement could effectively transform popular understandings of the Constitution.

Despite their achievement in reframing the nature of public accommodations and the responsibility of government to ensure nondiscriminatory access, the sit-ins failed to accomplish what many commentators, scholars, and public officials assumed was their logical constitutional consequence: reframing, as a matter of positive constitutional law, the scope of the Fourteenth Amendment. When given the opportunity, neither the Supreme Court nor Congress translated the emergent popular understanding of the reach of constitutional equality principles into an officially sanctioned reinterpretation of the meaning of the Equal Protection Clause. The sit-ins were one of the most generative social protest events of modern American history, sparking a new and remarkably effective stage of the modern black freedom struggle, contributing to changes in the law and customs relating to public accommodations discrimination that were nothing short of revolutionary. They left little mark, however, on the area of constitutional law they seemed destined to reshape.

The constitutional issue at the heart of the sit-ins was the "state action" requirement of the Equal Protection Clause of the Fourteenth Amendment. The state action doctrine limits the amendment's application to state actors, thereby excluding actions of private individuals. Historically, this doctrine has proven particularly responsive to extra-judicial attitudes toward the permissible scope of federal power, the appropriate line between public responsibility and private choice, and basic ideas of justice. The solidification of the doctrine in the late nineteenth century was of a piece with the national abandonment of Reconstruction, just as the gradual undermining of the traditional contours of the state action doctrine in the 1940s and 1950s was largely a product of the rising tide of the civil rights movement.[9] For this reason, the resilience of the state action doctrine in the early 1960s is striking: the sit-ins (and subsequent civil rights protests) achieved such transformative success in re-centering public conceptions of the reach of national equality norms into the private commercial sphere, yet they did relatively little to revise official interpretations of the state action requirement.

This Article describes the challenge to the state action doctrine during the height of the civil rights movement. It does so by focusing on two critical episodes—one in the Supreme Court, the other in Congress. In the years following the sit-ins, the Supreme Court Justices evaluated a series of appeals deriving from prosecutions of sit-in protesters. The sit-in cases were the great aberration of the Warren Court. At

---

[8] *See infra* Part I.A.

[9] *See infra* Part I.C.

a time when the Justices confidently reworked one constitutional doctrine after another, often in response to the moral challenges of the civil rights movement and often in the face of considerable public resistance, they broke pattern in these cases.[10] Between 1961 and 1963, the Court found ways to side with the students, overturning trespassing and breach-of-peace convictions on narrow, fact-based grounds, while avoiding the looming constitutional issue.[11] But in the fall of 1963, when another minimalist opinion appeared impossible, a majority of the Court, led by Justice Hugo Black, was prepared to explicitly reject the students' constitutional claim and hold that the Constitution did *not* require racially equal access to public accommodations (despite the fact that at this point federal public accommodations legislation appeared unlikely to pass).[12] This outcome was only averted when, in the spring of 1964, with the Senate poised to finally overcome a Southern filibuster and pass the landmark Civil Rights Act, Justice Black's majority dissolved.[13] A fractured Court issued what was, in effect, another narrow opinion, with no majority to resolve the state action issue one way or the other.[14]

The Supreme Court's unwillingness to revise the state action doctrine in the sit-in cases derived from two factors. First, the doctrinal difficulties and institutional concerns inherent in expanding the scope of the Fourteenth Amendment's application clearly played a limiting function in the sit-in cases. This was particularly evident among those Justices who appeared most willing to decide in favor of the students on their constitutional claim.[15] Yet the critical motivating factor for Justice Black did not appear to be the doctrinal necessity of the state action limitation. Rather, he was moved by a broader, more systemic concern: the threat of civil disobedience to the legal system. For Justice Black, and likely some of his allies in the sit-in cases, growing anxiety with the possibility of extra-legal social protest as a viable pathway to

---

[10] For the Supreme Court to apply the constitutional antidiscrimination norm to public accommodations would not necessarily require a major overhaul of existing doctrine and it would not have been a dramatic departure from the ambitious course the Warren Court was already charting in the area of civil rights. It certainly would be nothing so doctrinally and institutionally innovative as the school desegregation or reapportionment decisions. Reynolds v. Sims, 377 U.S. 533 (1964); Baker v. Carr, 369 U.S. 186 (1962); Brown v. Bd. of Educ., 347 U.S. 83 (1954). By late 1963, deciding the sit-in cases on constitutional grounds would not have been nearly as controversial as, say, the Court's 1962 ruling striking down school prayer. Engel v. Vitale, 370 U.S. 421 (1962); *see also* LUCAS A. POWE, JR., THE WARREN COURT AND AMERICAN POLITICS 187–90 (2000) (describing the reaction to *Engel*). Similar comparisons might be made between the sit-in cases and the Warren Court's transformative rulings, in response to the needs of the civil rights movement, in the areas of criminal procedure, free speech, and federal courts. *See, e.g.*, *id.* at 235, 412–44 *passim*, 307–10 (discussing various Warren Court rulings).

[11] *See infra* Part II.B.

[12] *Id.*

[13] *Id.*

[14] Bell v. Maryland, 378 U.S. 226 (1964).

[15] *See infra* Part II.B.

constitutional reinterpretation, as much as concern with doctrinal complexities, ultimately limited his support for reconsidering the state action doctrine. Ironically, then, it was the very success of the sit-ins and the waves of direct action demonstrations they inspired as a social protest movement that led at least some of the Justices to rally around the traditional state action doctrine. Thus, concerns with protecting the rule of law in the face of a society that seemed pulled in increasingly lawless directions played a central role in preventing the doctrinal shift that many assumed the Court was destined to make.[16]

The other key episode in the story of the sit-ins and the state action doctrine took place in Congress. With considerable guidance from the Kennedy administration, civil rights supporters in Congress began in 1963 to press for a federal public accommodations law—eventually codified as Title II of the Civil Rights Act of 1964.[17] In attempting to locate the appropriate source of congressional power to pass such a law, they too debated the consequences of reconsidering the state action limitation of the Fourteenth Amendment. And they too considered not only doctrinal complexities, but more systemic concerns, particularly Congress's relation to the Court in matters of constitutional interpretation. Although early in the deliberations over Title II advocates were divided over whether the law should be based on the congressional power to regulate interstate commerce or the Fourteenth Amendment, the Commerce Clause justification ultimately won out as the primary basis for the legislation.[18] Congress framed the legislation so that its coverage derived largely from the relationship of hotels and restaurants to interstate commerce, with congressional enforcement power under the Fourteenth Amendment relegated to a supplementary role.[19] The Supreme Court upheld Title II on these grounds, refusing to evaluate the alternative Fourteenth Amendment rationale, to which most of the Justices felt Congress had not committed itself.[20]

The failure of congressional proponents of the Fourteenth Amendment route demonstrates the considerable difficulties involved in congressional assertions of constitutional interpretive authority on matters of individual rights, even at a moment in history that appeared particularly auspicious for such a development. There was a supportive Supreme Court that was actually looking for Congress to act on the public accommodations issue, there were strong majorities for the legislation in both houses of Congress, and the American people widely recognized nondiscriminatory access to public accommodations as a problem of constitutional dimension and the general cause of the civil rights movement as both morally just and socially urgent.[21]

---

[16] *See infra* Part II.C.

[17] 42 U.S.C. § 2000a (2006).

[18] *See infra* Parts III.B. and III.C.

[19] *See* 42 U.S.C. § 2000a (relying on the Commerce Clause power of Congress for jurisdiction in regulating business).

[20] *See* Katzenbach v. McClung, 379 U.S. 294, 304 (1964); Heart of Atlanta v. United States, 379 U.S. 241, 261 (1964).

[21] *See infra* Part III.E.

But even under these promising circumstances, congressional efforts to independently interpret the meaning of the Fourteenth Amendment remained tentative and limited. Political and strategic concerns hindered a full weighing of the merits of the options.[22] And, most importantly, in its deliberation on Title II, Congress never fully accepted a position as a coequal branch on matters of constitutional interpretation.[23] Neither the legislators nor the Justice Department officials who advised them ever escaped from deferential analyses of judicial precedent and prognostications of what the Supreme Court was likely to do.

This Article has several goals. First, I address some surprising gaps in the historical scholarship. For such a significant event in constitutional history, studies of the sit-ins have been surprisingly limited, failing to explore at much length the legal issues the protests raised.[24] The history of Title II and the constitutional debates

---

[22] *Id.*

[23] *Id.*

[24] Compare, for example, the scholarship on the Montgomery Bus Boycotts. This topic has earned three lengthy legal-historical articles. Christopher Coleman, Laurence D. Nee & Leonard S. Rubinowitz, *Social Movements and Social-Change Litigation: Synergy in the Montgomery Bus Protest*, 30 LAW & SOC. INQUIRY 663 (2005); Robert Jerome Glennon, *The Role of Law in the Civil Rights Movement: The Montgomery Bus Boycott, 1955–1957*, 9 LAW & HIST. REV. 59 (1991); Randall Kennedy, *Martin Luther King's Constitution: A Legal History of the Montgomery Bus Boycott*, 98 YALE L.J. 999 (1989). These are in addition to countless historical accounts in monographs and biographies of Martin Luther King, Jr. Another comparable protest movement from the early civil rights era, the Freedom Rides, has recently received an exhaustive historical account. RAYMOND ARSENAULT, FREEDOM RIDERS: 1961 AND THE STRUGGLE FOR RACIAL JUSTICE (2006).

The sit-ins, which raised much more fundamental legal and constitutional questions than either the Montgomery Bus Boycotts or the Freedom Rides, have received remarkably little attention from legal scholars since the 1960s. Most studies of the legal issues raised by the sit-ins appeared contemporaneously with the civil rights movement. LAUE, *supra* note 3; OPPENHEIMER, *supra* note 2; HOWARD ZINN, SNCC: THE NEW ABOLITIONISTS (1964); Martin Oppenheimer, *The Southern Student Movement: Year I*, 33 J. NEGRO EDUC. 396, 397 (1964); Pollitt, *supra* note 2. Scholarship on the Supreme Court's consideration of the sit-in cases also peaked in the 1960s. *See, e.g.*, ARCHIBALD COX, THE WARREN COURT: CONSTITUTIONAL DECISION AS AN INSTRUMENT OF REFORM 31–41 (1968); Joel B. Grossman, *A Model for Judicial Policy Analysis: The Supreme Court and the Sit-In Cases*, *in* FRONTIERS OF JUDICIAL RESEARCH 405 (Joel B. Grossman & Joseph Tanenhaus eds., 1969); Charles L. Black, Jr., *The Problem of the Compatibility of Civil Disobedience with American Institutions of Government*, 43 TEX. L. REV. 492 (1965); Jack Greenberg, *The Supreme Court, Civil Rights and Civil Dissonance*, 77 YALE L.J. 1520 (1968); Thomas P. Lewis, *The Sit-In Cases: Great Expectations*, 1963 SUP. CT. REV. 101; Burke Marshall, *The Protest Movement and the Law*, 51 VA. L. REV. 785 (1965); Monrad G. Paulsen, *The Sit-In Cases of 1964: "But Answer Came There None,"* 1964 SUP. CT. REV. 137; John Silard, *A Constitutional Forecast: Demise of the "State Action" Limit on the Equal Protection Guarantee*, 66 COLUM. L. REV. 855 (1966). Since the 1960s, several accounts of the internal dynamics of the Court in the sit-in cases have been published. Michael Klarman, *An Interpretive History of Modern Equal Protection*, 90 MICH. L. REV. 213, 291–95 (1991); Brad Ervin, Note, *Result or Reason: The Supreme Court*

surrounding its passage similarly lacks comprehensive analysis. Much of the best scholarship on Title II and the Fourteenth Amendment was written in the 1960s,[25] and more recent considerations of the constitutional debate behind Title II have been relatively brief.[26] The most thorough analyses of the debate over the 1964 Civil Rights Act center on passage of Title VII, the employment discrimination provision, a far more active provision today than Title II.[27]

Second, I seek to write constitutional history in a way that draws on the analytical tools that have emerged from recent scholarship on the Constitution "outside the Courts." One of the most valuable insights offered by studies of extrajudicial constitutionalism has been the emphasis on the ways in which constitutional meaning emerges from the interaction of groups and institutions situated in distinct social contexts and responding to different institutional responsibilities—between, for example, courts and political branches, lawyers and movement activists. It is in these points of intersection that we can see the crucial moments of recognition, the flow of alternative constitutional norms between society and its courts (and back again), the reconciliation of the formal language of the law and evolving social norms (and vice versa).[28]

---

and the Sit-In Cases, 93 VA. L. REV. 181 (2007); McKenzie Webster, Note, *The Warren Court's Struggle With the Sit-In Cases and the Constitutionality of Segregation in Places of Public Accommodation*s, 17 J.L. & POL. 373 (2001). Historians who have written on the sit-ins have largely ignored the constitutional ramifications of the protests, focusing instead on local studies, see, e.g., CHAFE, *supra* note 2, at 79–101; DAVID HALBERSTAM, THE CHILDREN (1998); and movement organization and mobilization studies, see, e.g., CLAYBORNE CARSON, IN STRUGGLE: SNCC AND THE BLACK AWAKENING OF THE 1960S, at 9–18 (1981); ALDON D. MORRIS, THE ORIGINS OF THE CIVIL RIGHTS MOVEMENT: BLACK COMMUNITIES ORGANIZING FOR CHANGE 188–215 (1984).

[25] The best account of the constitutional debate over Title II is found in DONALD G. MORGAN, CONGRESS AND THE CONSTITUTION: A STUDY OF RESPONSIBILITY 292–330 (1966).

[26] *See, e.g.*, HUGH DAVIS GRAHAM, THE CIVIL RIGHTS ERA: ORIGINS AND DEVELOPMENT OF NATIONAL POLICY, 1960–1972, at 79–81, 87–93 (1990); Robert C. Post & Reva B. Siegel, *Equal Protection by Law: Federal Antidiscrimination Legislation After* Morrison *and* Kimel, 110 YALE L.J. 441, 494–99 (2000). *But see* Joel K. Goldstein, *Constitutional Dialogue and the Civil Rights Act of 1964*, 49 ST. LOUIS U. L.J. 1095 (2005) (examining the framing of Title II at some length).

[27] *See, e.g.*, GRAHAM, *supra* note 26, at 83–87, 94–99; Daniel B. Rodriguez & Barry R. Weingast, *The Positive Political Theory of Legislative History: New Perspectives on the 1964 Civil Rights Act and Its Interpretation*, 151 U. PA. L. REV. 1417 (2003). General histories of the Civil Rights Act of 1964 include: DANIEL M. BERMAN, A BILL BECOMES A LAW: CONGRESS ENACTS CIVIL RIGHTS LEGISLATION (2d ed. 1966); NICK KOTZ, JUDGMENT DAYS: LYNDON BAINES JOHNSON, MARTIN LUTHER KING JR., AND THE LAWS THAT CHANGED AMERICA (2005); ROBERT D. LOEVY, TO END ALL SEGREGATION: THE POLITICS OF THE PASSAGE OF THE CIVIL RIGHTS ACT OF 1964 (1990); ROBERT MANN, THE WALLS OF JERICHO: LYNDON JOHNSON, HUBERT HUMPHREY, RICHARD RUSSELL, AND THE STRUGGLE FOR CIVIL RIGHTS (1996); CHARLES WHALEN & BARBARA WHALEN, THE LONGEST DEBATE: A LEGISLATIVE HISTORY OF THE 1964 CIVIL RIGHTS ACT (1985).

[28] "[B]oth judicial supremacy and popular constitutionalism each contribute indispensable benefits to the American constitutional polity. They are in fact dialectically interconnected

The sit-in movement offers a rich case study to explore these dynamics of constitutional development. Here was an event, initiated with minimal strategic planning and with little intention of making a claim of constitutional reconstruction, that sparked a debate on the scope of the constitutional equal protection principle that took place in the streets, in the courts, and in Congress.

Yet the ultimate failure, both in the Court and in Congress, of those who argued that the confrontation with private racial discrimination required a reconsideration of the state action limitation also offers a case study in the limitations of extrajudicial constitutionalism. Consequently, my examination of the sit-ins and the state action doctrine both draws on and critiques scholarship on constitutional development outside the courts. In practice, the dialogue between judicial and nonjudicial actors that is at the heart of a robust constitutional system can prove difficult to achieve, even when the relevant parties are in basic agreement on the policy outcome. The sit-in protesters relied on a method to express their disapproval of Jim Crow public accommodations—civil disobedience—that, while effective as a tactic of social protest, alienated certain Justices on the Court. Meanwhile, in Congress, those who framed the federal public accommodations law chose, for reasons both institutional and political, to accept judicial precedent as controlling, even when a majority of the Court was willing to recognize congressional authority to redefine, independently from the Court, the boundaries of the state action doctrine. The fate of the constitutional claims that emerged from the sit-ins demonstrates the challenges of creating alternative interpretations of the Constitution outside the courts that not only respond to the political and ideological needs of the extrajudicial actors but also offer a compelling case that can move the courts. The difficulty of balancing these divergent goals was a critical reason for the resilience of the state action doctrine during the civil rights movement.

This Article proceeds in three main sections. Part I focuses on the achievements of the sit-in movement on the level of popular constitutionalism. This Section explores the effect of the sit-ins on discussions taking place outside the courts on the moral, legal, and constitutional status of racial discrimination in public accommodations; the responsiveness of the state action doctrine to evolving social norms; and

---

and have long coexisted." Robert Post & Reva Siegel, *Popular Constitutionalism, Departmentalism, and Judicial Supremacy*, 92 CAL. L. REV. 1027, 1029 (2004) (footnote omitted). Other works within the large and growing literature on popular constitutional understanding, social movements, and the courts that I have found particularly useful include: LOUIS FISHER, CONSTITUTIONAL DIALOGUES: INTERPRETATION AS POLITICAL PROCESS (1988); Jack M. Balkin & Reva B. Siegel, *Principles, Practices, and Social Movements*, 154 U. PA. L. REV. 927 (2006); Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577 (1993); Hendrik Hartog, *The Constitution of Aspiration and "The Rights That Belong to Us All,"* 74 J. AM. HIST. 1013 (1987); Robert C. Post, *Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4 (2003); Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the de facto ERA*, 94 CAL. L. REV. 1323 (2006); Reva B. Siegel, *Text in Context: Gender and the Constitution from a Social Movement Perspective*, 150 U. PA. L. REV. 297 (2001).

the relationship between *Brown* and the sit-ins. Parts II and III examine efforts to extend this constitutional dialogue by pressing the claims that had proved so powerful in the realm of popular constitutionalism back upon official government institutions. Part II explores the Supreme Court's treatment of the sit-in cases and the ultimate unwillingness of a majority of the Justices to accept the constitutional claim of the sit-in protesters. Part III looks at the debate over whether the Fourteenth Amendment supplies congressional authority to pass a public accommodations law. In my conclusion I consider the consequences of this history for state action and Section 5 jurisprudence, and, more generally, for the value and limitations of a dialogic model of constitutional development.

I. THE SIT-INS AS A CONSTITUTIONAL CHALLENGE

The students who launched the sit-in movement, beginning with the four Greensboro A&T freshmen who sat down at a downtown Woolworth's on February 1, 1960,[29] were not concerned with the doctrinal complexities of the state action doctrine. Indeed, they did not see themselves as making a constitutional claim—at least not one that required judicial recognition. In fact, the motivations for the first generation of sit-in protesters in the spring of 1960 pointed in the exact opposite direction: they wanted to stake a claim for equal treatment and respect that would not have to be settled in the courtroom.[30] They feared that once their protests were turned into a formal legal claim, they would lose control over the direction of the protests to the lawyers, and the very point of the protest—which concerned the opportunity to *enact* their dignitary claim, not just petition for its recognition—would be compromised.[31]

When the students discussed their motivations for participating in the sit-ins, they talked remarkably little about the courts as a forum for positive change. James Lawson, the fearless, uncompromising leader of the Nashville movement, attacked the civil rights establishment: "The legal redress, the civil-rights redress, are far too slow for the demands of the time. The sit-in is a break with the accepted tradition of change, of legislation and the courts."[32] 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."[33] "None of the [student] leaders I spoke to were interested in test cases," Michael Walzer reported in an influential account of the opening months of the movement.[34] "That the legal work of the NAACP was

---

[29] *See* WOLFF, *supra* note 2, at 11–12.

[30] *See, e.g.*, *id.* at 31–39.

[31] *See, e.g.*, Pollitt, *supra* note 2, at 317–19.

[32] David Halberstam, *"A Good City Gone Ugly,"* REPORTER (Nashville, Tenn.), Mar. 31, 1960, *reprinted in* 1 REPORTING CIVIL RIGHTS: AMERICAN JOURNALISM 1941–1963, at 441 (2003).

[33] Claude Sitton, *Negro Criticizes N.A.A.C.P. Tactics*, N.Y. TIMES, Apr. 17, 1960, at 32.

[34] Michael Walzer, *A Cup of Coffee and a Seat*, 7 DISSENT 111, 117 (1960).

important, everyone agreed; but this, I was told over and over again, was more important."[35] The very identity of the first wave of sit-in protesters formed in opposition to court-focused approaches to civil rights.

Intentions of the first generation of student protesters notwithstanding, the lunch counter protests quickly came to be understood as having a constitutional dimension, to be evaluated both inside and outside the courts. Defenders of segregation referenced the constitutional distinction between public facilities (such as schools) and privately-owned public accommodations.[36] Some segregationists even claimed lunch counter discrimination was constitutionally protected, under some general reference to the rights of liberty, property, or freedom of association.[37] On the other side, lawyers from civil rights organizations such as the NAACP quickly arrived on the scene of the demonstrations, seeking to appeal protester convictions in order to establish Fourteenth Amendment test cases. But it was not just the civil rights lawyers who transformed the protests into a platform for constitutional reconstruction. The historical moment in which the sit-ins took place ensured that the protests would be understood as raising not just a moral or legal but a constitutional claim. Most importantly, the shadow of *Brown v. Board of Education* shaped how the nation perceived the sit-ins. The uncertain status of the state action doctrine in 1960, reflected in the spectrum of predictions about which way the Court was likely to rule in the sit-in cases, extended beyond court decisions and law school commentary. *Brown*—and particularly the series of per curiam decisions that followed, extending *Brown*'s desegregation mandate to public beaches, golf courses, buses, and other publicly controlled facilities[38]—convinced many observers that the logic of *Brown* applied to all facilities that open their doors to the public, even those privately owned. At the time of the sit-ins, both allies and opponents of the civil rights movement understood the lunch counter protests as an issue to be resolved through a struggle over the meaning of the Constitution.

A. Civil Disobedience as a Constitutional Claim

The idea of civil disobedience as a constitutional claim is at once controversial and banal. The concept undoubtedly carries with it deeply subversive connotations. Yet to consider civil disobedience as a potential technique of constitutional claim-making, one must first reject the assumption that civil disobedience represents a

---

[35] *Id.*

[36] *See, e.g.*, *Movement By Negroes Growing*; *No Service Given Students*, GREENSBORO DAILY NEWS, Feb. 4, 1960, at B1 (describing the reaction of North Carolina Attorney General Malcolm Seawell to sit-ins).

[37] *See, e.g.*, State v. Avent, 118 S.E.2d 47, 53 (N.C. 1961) (upholding trespassing conviction for restaurant sit-in) ("The right of property is a fundamental, natural, inherent, and inalienable right. It is not ex gratia from the legislature, but ex debito from the Constitution.").

[38] *See supra* note 7.

categorical abandonment of law and constitutionalism. The United States, as practically every American proponent of the value of civil disobedience has pointed out, was born of collective law-breaking.[39] Advocates of civil disobedience during the civil rights movement frequently emphasized its long American heritage.[40]

Although the term "civil disobedience" may be used loosely to cover acts that are in fact subversive of the legal system, political and legal theorists have offered more rigorous definitions that emphasize the constructive role of civil disobedience in the legal system. John Rawls, for example, defined civil disobedience as "a public, nonviolent, conscientious yet political act contrary to law usually done with the aim of bringing about a change in the law or policies of the government."[41] Robert Cover's definition—"[t]he decision to act in accord with an understanding of the law validated by the actor's own community but repudiated by the officialdom of the state"[42]—highlights the cultural roots of the protesters' alternative vision of the law, thereby emphasizing the "jurisgenerative" capacity of civil disobedience.[43] A protest community can generate an alternative vision of the law that, through an act of civil disobedience, is placed in conflict with the existing legal system. Out of this conflict, new legal norms can emerge. "In law," observed Paul A. Freund, "creativity is a product of the tension between heresy and heritage."[44]

The key point, then, is that civil disobedience can be an act of respect for the basic institutions of a society. Judge Frank Johnson once described civil disobedience as "a *procedure* for challenging law or policy."[45] This paradoxical idea—respecting the law by breaking a law—was exemplified by the version of civil disobedience practiced by Martin Luther King, Jr., and the sit-in protesters.[46] King's advocacy of breaking laws "open[ly], loving[ly]," only makes sense, Stephen Carter has noted, "if one first accepts the essential justness of the state."[47] "[T]he individual who disobeys the law, whose conscience tells him it is unjust and who is willing to accept the penalty

---

[39] *See, e.g.*, *Interview on "Meet the Press,"* Apr. 17, 1960, *in* 5 THE PAPERS OF MARTIN LUTHER KING, JR. 431 (Clayborne Carson ed., 2005) [hereinafter KING PAPERS].

[40] *See, e.g.*, *id.*; Morris Keeton, *The Morality of Civil Disobedience*, 43 TEX. L. REV. 507, 507 (1965).

[41] JOHN RAWLS, A THEORY OF JUSTICE 364 (1971). For his definition of civil disobedience, Rawls relied on Hugo A. Bedau, *On Civil Disobedience*, 58 J. PHIL. 653, 661 (1961). RAWLS, *supra* at 364 n.19.

[42] Robert M. Cover, *Foreword:* Nomos *and Narrative*, 97 HARV. L. REV. 4, 46 (1983).

[43] *Id.* at 11.

[44] Paul A. Freund, *Civil Rights and the Limits of Law*, 14 BUFF. L. REV. 199, 207 (1964). Recent extrapolations on this theme include Daniel Markovits, *Democratic Disobedience*, 114 YALE L.J. 1897 (2005); Eduardo Moisés Peñalver & Sonia K. Katyal, *Property Outlaws*, 155 U. PA. L. REV. 1095 (2007).

[45] Frank M. Johnson, Jr., *Civil Disobedience and the Law*, 20 U. FLA. L. REV. 267, 269 (1968).

[46] *See*, *e.g.*, KING PAPERS, *supra* note 39, at 431.

[47] STEPHEN L. CARTER, INTEGRITY 182 (1996); *see also id.* at 184 ("Conversely, a society that could not be moved by nonviolent protest was not really a just one.").

by staying in jail until that law is altered," King explained, "is expressing at the moment the very highest respect for law."[48] The belief that an open act of disobedience can cause change is, at bottom, a statement of faith in the existing legal order.

B. State Action as a Normative Concept

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,[49] and the seminal articulation of the state action doctrine, the 1883 *Civil Rights Cases*,[50] embraced the basic public-private dichotomy on which the doctrine was based. "[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 . . . ."[51] The Court has never abandoned this basic principle. Chief Justice Vinson wrote over a half-century later in *Shelley v. Kraemer*:

> Since the decision of this Court in the *Civil Rights Cases*, . . . the principle has become firmly embedded in our constitutional law that the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful.[52]

The Court has reiterated this basic point ever since.

As the legal realists emphasized decades before the civil rights era, however, in modern society there is no unproblematic, neutral manner by which the line between the public and private spheres can be drawn.[53] The modern regulatory state that emerged in the New Deal put these realists' insights into effect; and a centerpiece of

---

[48] Martin Luther King, Jr., *Love, Law, and Civil Disobedience*, NEW SOUTH, Dec. 1961, *reprinted in* A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS OF MARTIN LUTHER KING, JR. 43, 49 (James Melvin Washington ed., 1986).

[49] U.S. CONST. amend. XIV, § 1 ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of 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.").

[50] 109 U.S. 3 (1883).

[51] *Id.* at 17.

[52] 334 U.S. 1, 13 (1948).

[53] *See, e.g.*, Morris R. Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8, 8–11 (1927); Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470, 470–72 (1923); Louis L. Jaffe, *Law Making by Private Groups*, 51 HARV. L. REV. 201 (1937).

the Supreme Court's constitutional "revolution" of the New Deal era was a rejection of a formalist reliance on a strict public-private divide.[54] The public-private distinction on which the state action doctrine relies is incomprehensible without a recognition of the socially constructed nature of the distinction. This, in turn, depends upon assumptions regarding the relative importance of nondiscrimination in certain activities and societal expectations of the appropriate scope of government responsibility to confront discriminatory action.[55]

In other words, state action is essentially a normative concept. In practically any situation that would arise as a site of significant social contestation, state involvement of some sort can be located.[56] Far from comparing the factual situation of a case to some predetermined standard of official responsibility for nominally private action, difficult state action cases in which the Court finds the requisite official involvement end up being exercises in, as Charles Black put it, "noting and clarifying yet another of the wonderfully variegated ways in which the Briarean state can put its hundred hands on life."[57] State action might be found in state support or encouragement of private choice;[58] the involvement of police or the courts in enforcing private decisions;[59] licensing or regulatory schemes;[60] the existence of durable customs that can be traced to prior or ongoing state action;[61] the recognition that nominally private action is

---

[54] For a lucid overview of this point, see LOUIS MICHAEL SEIDMAN & MARK V. TUSHNET, REMNANTS OF BELIEF: CONTEMPORARY CONSTITUTIONAL ISSUES 49–71 (1996).

[55] Michael Klarman offers the useful analogy between state action and the legal concept of causation, both of which rely upon "judgments [that] reflect culturally contingent background assumptions about the world. . . . Whether one deems government to be morally responsible for a situation involving race depends on one's general view of the state's proper role and one's particular views on race." MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 138–39 (2004); *see also* Cass R. Sunstein, Lochner*'s Legacy*, 87 COLUM. L. REV. 873, 888 (1987) ("[T]he search for state action can [b]e made coherent only against a background normative theory of the legitimate or normal activities of government.").

[56] Charles L. Black, Jr., *The Supreme Court, 1966 Term—Foreword: "State Action," Equal Protection, and California's Proposition 14*, 81 HARV. L. REV. 69, 84–91 (1967).

[57] *Id.* at 89.

[58] *See, e.g.*, Reitman v. Mulkey, 387 U.S. 369, 371 (1967); Burton v. Wilmington Parking Auth., 365 U.S. 715, 715–17 (1961); Smith v. Allwright, 321 U.S. 649, 649–53 (1944).

[59] *See, e.g.*, N.Y. Times Co. v. Sullivan, 376 U.S. 254, 265 (1964); Barrows v. Jackson, 346 U.S. 249, 260 (1953); Shelley v. Kraemer, 334 U.S. 1, 23 (1948); Am. Fed'n of Labor v. Swing, 312 U.S. 321, 325–26 (1941); Brief for Petitioners at 22–25, Barr v. Columbia, 378 U.S. 146 (1964) (Nos. 9, 10, 12) [hereinafter *Barr* Petitioners Brief].

[60] *See, e.g.*, Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 184–90 (1972) (Brennan, J., dissenting); Garner v. Louisiana, 368 U.S. 157, 181–85 (1961) (Douglas, J., concurring); Civil Rights Cases, 109 U.S. 3, 58–59 (1883) (Harlan, J., dissenting).

[61] *See, e.g.*, Adickes v. S.H. Kress & Co., 398 U.S. 144, 190–203 (1970) (Brennan, J., concurring in part and dissenting in part); Bell v. Maryland, 378 U.S. 226, 304 (1964) (Goldberg, J., concurring); Garner v. Louisiana, 368 U.S. 157, 178–81 (1961) (Douglas, J., concurring);

serving a particularly public function[62] or affecting a public interest;[63] or the acknowledgment that when the state has the capacity to act, the absence of state involvement is itself a choice—is itself a form of state "action."[64] The critical analysis then centers on the nature of state involvement and the relative value of the claimed right— judgments that draw on generally held norms and expectations. For this reason, the state action doctrine has always been particularly responsive to social and cultural transformations.

C. The State of the State Action Doctrine, 1960

The unavoidable normativity of the state action requirement has meant that the historical development of the doctrine has mirrored evolving social norms and expectations of government responsibilities. In the context of civil rights, the state action doctrine has been particularly responsive to changes in popular attitudes toward the responsibility of government to ensure equal protection of the law. It was within the context of a national retreat from the project of Reconstruction that the traditional state action doctrine was first given form, most definitively in the 1883 *Civil Rights Cases*.[65] Generations later, the strength of the moral claim of civil rights for African Americans in the middle decades of the twentieth century brought the first sustained judicial reconsideration of the state action doctrine since its inception in the late nineteenth century.

For the two decades preceding the sit-in cases, the Court steadily expanded its definition of state action, sometimes in potentially quite radical ways, to cover more and more acts that had previously been relegated to the private sphere. Indeed, during the 1940s, the Court appeared to be pressing more aggressively against the premises of the *Civil Rights Cases* than against *Plessy v. Ferguson*[66] and the separate-but-equal doctrine.[67] One of the most consequential civil rights decisions of the pre-*Brown* period was *Smith v. Allwright*,[68] in which the Court struck down the all-white primary. This case, decided in 1944, overruled a precedent of strikingly recent vintage: just nine years earlier, in *Grovey v. Townsend*,[69] the Court had unanimously rejected

---

Supplemental Brief for the United States as Amicus Curiae, *Bell*, 378 U.S.226 (No. 12); *Barr* Petitioners Brief, *supra* note 59, at 25–33.

[62] *See, e.g.*, Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc. 391 U.S. 308 (1968); Evans v. Newton, 382 U.S. 296 (1966); Marsh v. Alabama, 326 U.S. 501 (1946).

[63] *See, e.g.*, *Bell*, 378 U.S. at 314 n.33 (Goldberg, J., concurring); *id.* at 255 (Douglas, J., concurring); *Garner*, 368 U.S. at 181–85 (Douglas, J., concurring); *Civil Rights Cases*, 109 U.S. at 37–43 (Harlan, J., dissenting).

[64] *See, e.g.*, Burton v. Wilmington Parking Auth., 365 U.S. 715, 725 (1961); *Barr* Petitioners Brief, *supra* note 59, at 33–48.

[65] 109 U.S. 3.

[66] 163 U.S. 537 (1896).

[67] *See* RISA L. GOLUBOFF, THE LOST PROMISE OF CIVIL RIGHTS 43 (2007).

[68] 321 U.S. 649 (1944).

[69] 295 U.S. 45 (1935).

a challenge to a "white primary" on the basis that the primary was run by a political party, which was not a state actor under the Fourteenth or Fifteenth Amendments.[70] The Court's about-face on the state action question came in a 8-1 ruling that emphasized the extent of state involvement in the primary process, including various requirements and oversight processes.[71] At times, the language of the opinion seemed to go beyond a narrow "state entanglement" rationale, suggesting that the state bore a general responsibility for the electoral process even in the absence of specific regulations.[72]

Another important line of development in the state action doctrine during this period came in Justice Black's 1946 decision in *Marsh v. Alabama*.[73] This case involved a private "company town" that the Court held was a public entity for purposes of the First Amendment.[74] Because it had assumed all the functions of a traditional municipality, it therefore took on the additional constitutional responsibilities.[75] Black's opinion for the Court drew on his aggressive New Deal sensibilities, emphasizing the limitations of private property rights and the responsibilities that accompany involvement in the economic sphere: "Ownership does not always mean absolute dominion. The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it."[76] These words would feature prominently in the constitutional arguments of the civil rights lawyers in the sit-in cases.[77]

The most potentially transformative state action decision in the pre-*Brown* period was the 1948 restrictive covenant decision, *Shelley v. Kraemer*.[78] In *Shelley* the Court held that judicial enforcement of private agreements to refuse to sell property to African Americans violated the Equal Protection Clause.[79] While reaffirming the basic state action requirement, Chief Justice Vinson's opinion for the unanimous Court dramatically expanded the scope of state action. "We have no doubt that there has been state action in these cases in the full and complete sense of the phrase," wrote Vinson.[80] "It is clear that but for the active intervention of the state courts, supported by the full panoply of state power, petitioners would have been free to occupy

---

[70] *Id.* at 55.

[71] 321 U.S. at 660.

[72] *Id.* at 664.

[73] 326 U.S. 501 (1946).

[74] *See id.* at 509–10.

[75] *Id.* at 506–08.

[76] *Id.* at 506.

[77] *See, e.g.*, Brief for Petitioners at 32, Peterson v. City of Greenville, 373 U.S. 244 (1963) (No. 71). Justice Black's fellow Justices in the sit-in cases also threw his words back at him in their opinions. *See, e.g.*, Bell v. Maryland, 378 U.S. 226, 314 (1964) (Goldberg, J., concurring); Tom Clark, Draft Opinion in Bell v. Maryland 11 (June 11, 1964) (unpublished opinion, on file with Library of Congress, Manuscript Division, Papers of Earl Warren, Box 512).

[78] 334 U.S. 1 (1948).

[79] *See id.* at 23.

[80] *Id.* at 19.

the properties in question without restraint."[81] In this circumstance at least, state enforcement of private discriminatory behavior constituted state action under the Fourteenth Amendment: "State action, as that phrase is understood for the purposes of the Fourteenth Amendment, refers to exertions of state power in all forms."[82]

As one scholar after another has noted, it is hard to know what to make of *Shelley*; it is, as Philip Kurland wryly put it, "constitutional law's *Finnegan's Wake*."[83] Logically, the idea that judicial enforcement of a private agreement constitutes state action effectively destroys the concept of state action altogether. "That the action of the state court is action of the state . . . is, of course, entirely obvious," wrote Herbert Wechsler in a famous critique of *Shelley*.[84] "What is not obvious, and is the crucial step, is that the state may properly be charged with discrimination when it does no more than give effect to an agreement that the individual involved is, by hypothesis, entirely free to make."[85] To this crucial question, Wechsler lamented, the Court offered little guidance.[86] While there have been many subsequent scholarly efforts to reconstruct (or rewrite) the rationale of *Shelley*,[87] the decision itself offers little doctrinal insight. And, more significantly, the Court never embraced the far-reaching implications of *Shelley*.[88] Just two years later it denied certiorari in a case in which the New York Court of Appeals found no state action in a racial discrimination claim against a private housing developer, even though the developer had received extensive state support in the form of land condemnation, street closings, and a twenty-five-year tax exemption.[89] In non-race cases in particular, the Supreme Court quickly

---

[81] *Id.*

[82] *Id.* at 20.

[83] Philip B. Kurland, *Foreword: "Equal in Origin and Equal in Title to the Legislative and Executive Branches of the Government*," 78 HARV. L. REV. 143, 148 (1964); *see also* HENRY J. FRIENDLY, THE *DARTMOUTH COLLEGE CASE* AND THE PUBLIC-PRIVATE PENUMBRA 14 (1969) ("Almost no one disagrees with the result of *Shelley v. Kraemer*; yet despite the quantity and quality of scholarly writing, the attempt to extract a satisfying general principle for it has run into the gravest difficulties and seems to lead inescapably into the great blue yonder.").

[84] Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 29 (1959) (citation omitted).

[85] *Id.*

[86] *See id.* at 29–31.

[87] *See, e.g.*, LAURENCE H. TRIBE, CONSTITUTIONAL CHOICES 259–66 (1985); David Haber, Faculty Comment, *Notes on the Limits of* Shelley v. Kraemer, 18 RUTGERS L. REV. 811 (1964); Louis Henkin, Shelley v. Kraemer*: Notes for a Revised Opinion*, 110 U. PA. L. REV. 473 (1962); Mark D. Rosen, *Was* Shelley v. Kraemer *Incorrectly Decided? Some New Answers*, 95 CAL. L. REV. 451 (2007); Mark Tushnet, Shelley v. Kraemer *and Theories of Equality*, 33 N.Y.L. SCH. L. REV. 383 (1988).

[88] *See* Rosen, *supra* note 87, at 462–66 (describing the Court's application of *Shelley*).

[89] Dorsey v. Stuyvesant Town Corp., 87 N.E.2d 541 (N.Y. 1949), *cert. denied*, 339 U.S. 981 (1950).

reasserted a traditional, limited conception of state action.[90] *Shelley* turned out to be a singular case—it is best understood as a court putting aside doctrinal complexities in order to attack an immoral and socially destructive practice.[91] Yet, at the time, some civil rights lawyers and legal scholars saw the decision as a harbinger of the demise of the state action doctrine.[92] While the central argument pressed by the Justice Department lawyers in *Shelley* was that judicial enforcement of restrictive covenants constituted state action, they also rejected the idea that the state action requirement of the Fourteenth Amendment, as traditionally defined, was settled law.[93] One could find ample support for this point in law reviews in the years following *Shelley*.[94]

The moderate expansion of the reach of the Fourteenth Amendment through these state action cases attracted considerable attention from scholars. Some suggested that the Court had fundamentally destabilized state action doctrine through its recent decisions and therefore they had little idea what to expect next.[95] Some scholars urged the Court to go much farther down the path it had suggested in cases such as *Shelley* and *Marsh*. In a frequently cited 1957 law review article, Harold W. Horowitz argued for a radical broadening of the concept of state action, concluding that when the state places a private discriminator's interest to be free of interference in the balance with the right to racially equal treatment, it has already become involved—the choice itself constitutes state action.[96] This approach relied on the essential insight of the legal realists, that with the opportunity for action comes responsibility for not acting.[97] Horowitz's article was just one of many state action critiques published in the years leading up to the sit-in movement.[98]

---

[90] *See, e.g.*, Black v. Cutter Laboratories, 351 U.S. 292, 299–300 (1956) (no state action in judicial enforcement of a private contract).

[91] *See* KLARMAN, *supra* note 55, at 216.

[92] *See id.* at 261–64.

[93] Brief for the United States as Amicus Curiae at 49 n. 28, 50–51, Shelley v. Kraemer, 334 U.S. 1 (1948) (No. 72).

[94] *See* Osmond K. Fraenkel, *The Federal Civil Rights Laws*, 31 MINN. L. REV. 301, 320 (1947); Richard G. Huber, *Revolution in Private Law?*, 6 S.C. L.Q. 8 (1953); William R. Ming, Jr., *Racial Restrictions and the Fourteenth Amendment: The Restrictive Covenant Cases*, 16 U. CHI. L. REV. 203 (1949); Donald M. Cahen, Comment, *The Impact of* Shelley v. Kraemer *on the State Action Concept*, 44 CAL. L. REV. 718 (1956); John A. Huston, Comment, *Constitutional Law—State Court Enforcement of Race Restrictive Covenants as State Action within Scope of Fourteenth Amendment*, 45 MICH. L. REV. 733 (1947); Note, *The Disintegration of a Concept—State Action Under the 14th and 15th Amendments*, 96 U. PA. L. REV. 402 (1948).

[95] *See, e.g.*, Elias Clark, *Charitable Trusts, the Fourteenth Amendment, and the Will of Stephen Girard*, 66 YALE L.J. 979, 982–83 (1957); Louis H. Pollak, *Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler*, 108 U. PA. L. REV. 1, 18 (1959).

[96] Harold W. Horowitz, *The Misleading Search for "State Action" Under the Fourteenth Amendment*, 30 S. CAL. L. REV. 208, 220–21 (1957).

[97] *See id.*

[98] *See* JACK GREENBERG, RACE RELATIONS AND AMERICAN LAW 60–61 (1959); Glenn Abernathy, *Expansion of the State Action Concept Under the Fourteenth Amendment*, 43

Thus, while existing case law appeared against the students,[99] those sympathetic to the interests of the civil rights movement saw hope in the relative fluidity of state action doctrine during this period and the trend of the Court toward supporting increasing federal intervention into Jim Crow laws and practices.[100] "[I]n this field, the law is an evolving thing," wrote a *Washington Post* reporter.[101]

> 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 so rule three or five or 10 years from now after taking it a piece at a time.[102]

The instability of the state action doctrine in the early 1960s meant 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. Those who were critical of the students' cause tended to reject their constitutional claim.[103] A more moderate view was often to recognize the students' claim as raising a moral or policy question, but to argue that they had no right, as a matter of constitutional law, to service in privately-owned public accommodations.[104] And those who

---

CORNELL L.Q. 375 (1958); Robert L. Hale, *Rights Under the Fourteenth and Fifteenth Amendments Against Injuries Inflicted by Private Individuals*, 6 LAW. GUILD REV. 627 (1946); J.D. Hyman, *Segregation and the Fourteenth Amendment*, 4 VAND. L. REV. 555, 569–71 (1951); Thomas P. Lewis, *The Meaning of State Action*, 60 COLUM. L. REV. 1083 (1960).

[99] *See, e.g.*, Williams v. Howard Johnson's Rest., 268 F.2d 845 (4th Cir. 1959); State v. Clyburn, 101 S.E.2d 295 (N.C. 1958); *see also* GREENBERG, *supra* note 98, at 11; Note, *Lunch Counter Demonstrations: State Action and the Fourteenth Amendment*, 47 VA. L. REV. 105, 119 (1961).

[100] Writing in 1961, William W. Van Alstyne and Kenneth L. Karst noted the Court-created "climate of uncertainty" on the limits of state action. "The state action cases, at least since *Smith v. Allwright*, have fulfilled Holmes' prophecy: 'Certainty generally is illusion, and repose is not the destiny of man.'" William W. Van Alstyne & Kenneth L. Karst, *State Action*, 14 STAN. L. REV. 3, 58 (1961) (footnotes omitted); *see also* Lewis, *supra* note 98, at 1121 ("The contexts of these problems so far have varied enough that one line of cases provides hardly a clue about the disposition of another."); Pollitt, *supra* note 2, at 351 ("Less clear—indeed, highly uncertain—is the right of a state to apply its trespass laws against Negros who remain in a privately-operated dime store after being told to leave. The law on this point is open.").

[101] Richard L. Lyons, *Lunch 'Sitdown' a Legal Puzzler*, WASH. POST, Mar. 27, 1960, at E5.

[102] *Id.*

[103] *See, e.g.*, *Lunch Counter Demonstrations*, *supra* note 99, at 108, 113–14.

[104] *See, e.g.*, *id.* at 121 ("The changes which the Negroes seek must ultimately come from the moral, spiritual, economic and political elements of society; there is at present no judicial relief."); *Needed: A "Just And Honorable" Answer*, GREENSBORO DAILY NEWS, Feb. 8, 1960, at 6 ("There ought to be dining facilities available in the downtown area for all who care to

expressed the strongest sympathy for the students' cause regularly predicted that they would triumph on their constitutional claims.[105]

Thus, in 1960 the legal basis of the sit-ins was deeply contested, the product of instability inherent in the state action concept itself and shifting judicial interpretations of state action in the middle decades of the twentieth century. It was this background of constitutional ambiguity that allowed the sit-ins to prove such a powerful challenge not only to the customs and laws of the Jim Crow South, but also to the meaning of the Fourteenth Amendment. The demonstrations constituted a potentially transformative intervention in an ongoing dialogue between the courts and society on the constitutionality of certain forms of private discrimination.

D. Public Accommodations and the "Logic" of Brown[106]

At the time of the sit-ins, the trend of the Supreme Court's state action decisions led many observers with legal expertise to wonder whether the days of the state action doctrine, as traditionally understood, were numbered.[107] But for those less versed in the nuances of constitutional doctrine, the decisions that came most readily to mind were the school desegregation cases. Lawyers and legal scholars recognized that as a matter of constitutional law a substantial doctrinal leap was necessary to get from *Brown*, dealing with unquestionable state actors (schools), to a constitutional holding prohibiting discrimination in privately-owned public accommodations.[108] But in the popular discourse surrounding the sit-ins, the belief was commonplace that the public accommodation problem could be dealt with through the same constitutional principle as the school segregation problem.[109] Increased attention to the impact of the school desegregation decisions on popular constitutional expectations offers an additional angle on understanding *Brown*'s relation to the direct action phase of the civil rights movement.

---

patronize them. In such circumstances the moral considerations often speak more loudly than the legal. The spirit of the law is more important than the letter.").

[105] *See, e.g.*, William J. Kenealy, *The Legality of the Sit-Ins*, *in* THE NEW NEGRO 63, 81 (Mathew H. Ahmann ed., 1961); Chas. H. Thompson, *Desegregation Pushed Off Dead Center*, 29 J. NEGRO EDUC. 107, 109 (1960); James Feron, *N.A.A.C.P. Plans Student Defense*, N.Y. TIMES, Mar. 18, 1960, at 23 (comments of Thurgood Marshall); *N.A.A.C.P. Tells Students 'We'll Pay Your Fines!'; Students Come Here for Sitdown Advice*, N.Y. AMSTERDAM NEWS, Mar. 5, 1960, at 9 (comments of Marion A. Wright); News Release, American Civil Liberties Union (Feb. 11, 1960) (American Civil Liberties Union Records and Publications, 1917–1975, Reel 15).

[106] *See* Bell v. Maryland, 378 U.S. 226, 316 (1964) (Goldberg, J., concurring) ("[T]he logic of *Brown v. Board of Education* . . . requires that petitioners' claim be sustained." (citation omitted)).

[107] *See supra* notes 66–98 and accompanying text.

[108] *See, e.g.*, GREENBERG, *supra* note 98, at 11.

[109] *See infra* notes 120–33 and accompanying text.

Scholars have recently challenged traditional assumptions that *Brown* provided the spark that ignited the civil rights movement.[110] For decades after *Brown*, the standard approach has been to describe *Brown* as making possible the protests of the civil rights movement.[111] Beginning in the 1990s, revisionists challenged these claims that *Brown* did much to inspire the civil rights movement. Gerald Rosenberg has argued that *Brown* had minimal effect on the civil rights movement.[112] Michael Klarman has argued that the decision's most significant effects were indirect: the decision mobilized the white South to resist segregation at all costs, leading to the bloody and highly publicized confrontations in Birmingham, Selma, and elsewhere, which in turn led to increased support in the North for civil rights and transformative legislation such as the Civil Rights Act of 1964 and the Voting Rights Act of 1965.[113]

With regard to the sit-ins, the evidence suggests that the traditional claims that *Brown* served as some kind of inspiration for the students is very much overblown—on this basic point the revisionists are largely right. When discussing what moved them to take action, the students did not talk about the Supreme Court or even Thurgood Marshall and the NAACP's litigation efforts.[114] As Howard Zinn noted in his contemporaneous history of the student activists, "[t]o these young people, the Supreme Court decision of 1954 was a childhood memory."[115]

Yet *Brown* affected the students in other ways. Most obviously, it raised expectations for change that failed to materialize—the students acted out of a mixture of inspiration and frustration. Many of the students cited the experience of the students at Little Rock in 1957 as deeply influential for them (the Greensboro Four were about the same age as the nine black students who desegregated Little Rock's Central High School).[116] And many referenced frustration with the glacial pace of school desegregation in the South as motivation for their audacious and innovative challenge.[117]

---

[110] *See, e.g.*, David E. Bernstein & Illya Somin, *Judicial Power and Civil Rights Reconsidered*, 114 YALE L.J. 591, 593–94 (2004).

[111] *See, e.g.*, J. HARVIE WILKINSON III, FROM *BROWN* TO *BAKKE*: THE SUPREME COURT AND SCHOOL INTEGRATION: 1954–1978, at 3 (1979) (describing *Brown* as having "sired the [civil rights] movement"); Greenberg, *supra* note 24, at 1522 (*Brown* "profoundly affected national thinking and has served as the principal ideological engine of today's civil rights movement.").

[112] *See* GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? pt. 1 (1991); Gerald N. Rosenberg, Commentary, Brown *Is Dead! Long Live* Brown*!: The Endless Attempt To Canonize a Case*, 80 VA. L. REV. 161 (1994).

[113] KLARMAN, *supra* note 55, at ch.7; Michael J. Klarman, Brown, *Racial Change, and the Civil Rights Movement*, 80 VA. L. REV. 7 (1994); Michael J. Klarman, Brown v. Board of Education: *Facts and Political Correctness*, 80 VA. L. REV. 185 (1994); Michael J. Klarman, *How* Brown *Changed Race Relations: The Backlash Thesis*, 81 J. AM. HIST. 81 (1994).

[114] *See supra* notes 32–35 and accompanying text.

[115] ZINN, *supra* note 24, at 18.

[116] *See, e.g.*, VOICES OF FREEDOM: AN ORAL HISTORY OF THE CIVIL RIGHTS MOVEMENT FROM THE 1950S THROUGH THE 1980S, at 56 (Henry Hampton & Steve Fayer eds., 1990).

[117] *Id.*; CHAFE, *supra* note 2, at 72–81; Pollitt, *supra* note 2, at 319; James McBride Dabbs, *Dime Stores and Dignity*, NATION, Apr. 2, 1960, at 289; Claude Sitton, *Negro Sitdowns Stir Fear of Wider Unrest in South*, N.Y. TIMES, Feb. 15, 1960, at 1.

Furthermore, the school desegregation decisions played a critical role in shaping the way the nation understood the significance of the sit-ins. *Brown* helped define the issues of concern and the terms of debate for the sit-ins. Particularly relevant was the series of per curiam decisions that, following *Brown*, extended the constitutional desegregation requirement beyond schools to public parks, auditoriums, golf courses, beaches, and buses.[118] By 1960, the refutation of the separate-but-equal principle had moved beyond schools into all areas of public life that fell under direct state control. The question for many civil rights supporters, then, was whether this trend would eventually encompass restaurants and hotels and other facilities that, while privately owned, opened their doors to the general public.[119]

These developments convinced many observers that the "logic" of *Brown* applied to public accommodations. A generation of shifts in constitutional doctrine by the Supreme Court had destabilized any comfortable assumptions about the reach of the constitutional prohibition of racial discrimination, thereby giving an opening in the public discourse in which the claim embodied by the students in their sit-in protests could be understood as a viable challenge to existing conceptions of the limits of the Equal Protection Clause—that is, a challenge to traditional conceptions of state action.

The application of the *Brown* principle to public accommodations was commonplace in the early 1960s. For example, when Martin Luther King, Jr., spoke to the student participants in the sit-in movement, he described the challenge they faced as the logical extension of the school segregation struggle. "Separate facilities, whether in eating places or public schools, are inherently unequal," he told the students, echoing the famous words of Warren's *Brown* opinion.[120] While such a statement by a leading civil rights advocate is best understood as a claim for a reformed vision of justice, informed by the constitutional equality principle, the striking point is that the implication of King's statement, that the Fourteenth Amendment protected the students' actions, was echoed throughout the discussions of the sit-ins—often from unexpected quarters.

Consider the words of President Eisenhower soon after the sit-ins spread across the South. Responding to a question about the protests at a press conference, he noted that "[my] own understanding is that when an establishment belongs to the public, opened under public charter and so on, equal rights are involved."[121] He added that

---

[118] See cases cited *supra* note 7; *see also* Anthony Lewis, *Court Broadens Desegregation: Bus Ruling Points Up Fact that Issue Is Wider Than Schools*, N.Y. TIMES, Dec. 11, 1960, at E6.

[119] *See, e.g.*, *id.*; Arthur Krock, *The Issue of 'Rights' in the Southern Sit-Ins*, N.Y. TIMES, Mar. 22, 1960, at 36 ("The grounds of the 1954 ruling [in *Brown*] are so broad that the court might find room for a decision that, regardless of damaged private-property values, police protection could not be given the discriminatory lunch rooms when the sit-in protests were peacefully registered.").

[120] Martin Luther King, Jr., *"A Creative Protest,"* Feb. 16, 1960, *in* 5 KING PAPERS, *supra* note 39, at 367, 368; Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954) ("Separate educational facilities are inherently unequal.").

[121] Dwight D. Eisenhower, The President's News Conference, 1960 PUB. PAPERS 293, 302 (Mar. 16, 1960).

> demonstrations . . . marching in the streets, or any other kind of peaceful assembly that is trying to show what the aspirations and the desires of a people are . . . as long as they are in orderly fashion, are not only constitutional, they have been recognized in our country as proper since we have been founded.[122]

Later that spring, he made another effort to explain his position on the constitutional status of the sit-ins. "[W]e have a responsibility in helping to enforce or seeing that the constitutional rights guaranteed are not violated," he stated, before wavering and claiming uncertainty about the constitutional status of these protests.[123] Eisenhower's public comments highlight the fact that the constitutional claims raised by the sit-ins were, at minimum, viable in public discourse. The students had effectively destabilized any certainty that the *Brown* decision did not logically entail the desegregation of restaurants. Even a President who was notoriously reluctant to endorse *Brown*[124] was inclined to view the issue as raising basic constitutional issues—and to side with the students.

Despite considerable discomfort with direct action protests as a tactic for reform, the protesters garnered a remarkable level of sympathy and support throughout the nation. "By the end of the first month," noted an approving observer, "the sit-ins had made firm their roots in popular support."[125] Presidential candidate John F. Kennedy praised the sit-ins, declaring, "'[i]t is in the American tradition to stand up for one's rights—even if the new way to stand up for one's rights is to sit down'"; and he called for "'equal access to the voting booth, to the schoolroom, to jobs, to housing and to public facilities, including lunch rooms.'"[126] Eleanor Roosevelt publicly backed the sit-ins,[127] and both the Republican and Democratic Party platforms in 1960 included expressions of support for the protests.[128] Arguing before the Supreme Court in a 1960 case unrelated to the sit-in movement but raising analogous constitutional claims, Solicitor General J. Lee Rankin urged the Court to revise its state action doctrine to protect against racially discriminatory treatment in all public accommodations.[129] The

---

[122] *Id.*

[123] Dwight D. Eisenhower, The President's News Conference, 1960 PUB. PAPERS 403, 413 (May 11, 1960).

[124] *See, e.g.*, EMMET JOHN HUGHES, THE ORDEAL OF POWER: A POLITICAL MEMOIR OF THE EISENHOWER YEARS 201–02 (1963).

[125] Leslie W. Dunbar, *Reflections on the Latest Reform of the South*, 22 PHYLON 249, 250 (1961); *see also supra* note 3.

[126] Anthony Lewis, *Kennedy Salutes Negroes' Sit-Ins*, N.Y. TIMES, June 25, 1960, at 13.

[127] *"Sit-Ins" Are Supported*, N.Y. TIMES, Mar. 23, 1960, at 18.

[128] *See* John T. Woolley & Gerhard Peters, *Democratic Party Platform of 1960*, The American Presidency Project, *available at* http://www.presidency.ucsb.edu/ws/index.php?pid=29602; Woolley & Peters, *Republican Party Platform of 1960*, *supra*, *available at* http://www.presidency.ucsb.edu/ws/index.php?pid=25839.

[129] Brief for the United States as Amicus Curiae, at 16–27, Boynton v. Virginia, 364 U.S. 454 (1960) (No. 7).

following year, Attorney General Robert Kennedy publicly backed the students' cause and privately backed their constitutional claim.[130] The six-year experience with school integration as a constitutional issue allowed for this sort of intuitive transformation of the sit-ins into a constitutional issue to which the logic of *Brown*'s desegregation principle seemed to apply. "It seems clear that this 'lunch counter movement' will become a historic milestone in the American Negro's efforts to win the rights of citizenship which are guaranteed him by the Constitution," declared *Commonweal* magazine.[131]

This trend accelerated in the following years. President Kennedy gave an address in February 1963 in which he said: "No act is more contrary to the spirit of our democracy and Constitution—or more rightfully resented by a Negro citizen who seeks only equal treatment—than the barring of that citizen from restaurants, hotels, theatres, recreational areas and other public accommodations and facilities."[132] Later that spring, in announcing his support for federal civil rights legislation, Kennedy declared the "right to be served in facilities which are open to the public" to be an "elementary" right and one of "the privileges of being American," comparable to education and voting.[133]

> If an American, because his skin is dark, cannot eat lunch in a restaurant open to the public, if he cannot send his children to the best public school available, if he cannot vote for the public officials who represent him, if, in short, he cannot enjoy the full and free life which all of us want, then who among us would be content to have the color of his skin changed and stand in his place?[134]

Thus, in numerous public forums, the constitutional claims raised by the sit-in protesters were embraced. As a claim pressed upon national opinion and the political branches of government, the students' actions, in effect, offered a persuasive reinterpretation of the scope of the equal protection of the law. By protesting at privately-owned lunch counters, at municipal pools, in bus terminals, in the libraries, and in other publicly-owned places, and by arguing that segregation in all these places raised the same fundamental concerns about dignity and citizenship, the protesters were making a case to the larger society that the principle of equal protection entailed a government responsibility to stand on the side of those combating the most egregious manifestations of Jim Crow, regardless of whether existing constitutional doctrine

---

[130] KEN GORMLEY, ARCHIBALD COX: CONSCIENCE OF A NATION 156 (1997).

[131] WOLFF, *supra* note 2, at 66.

[132] John F. Kennedy, Special Message to the Congress on Civil Rights, 1963 PUB. PAPERS 221, 228 (Feb. 28, 1963).

[133] John F. Kennedy, Radio and Television Report to the American People on Civil Rights, 1963 PUB. PAPERS 468, 470 (June 11, 1963).

[134] *Id.* at 469.

delineated these acts as "private" or not. The stage was set, it seemed, for an official reconsideration of the state action doctrine.

II. THE SIT-IN CASES IN THE SUPREME COURT

"The Court is our greatest educational institution," explained Alexander Bickel in the spring of 1963.[135]

> It may bring a question up to the forefront of public consciousness, reduce it, and play with it—sort of a cat and mouse game, perhaps—until there comes a moment of inarticulable judgment, of political feel, not at all different from the sense of timing that other political officers have, when the time seems ripe for a final adjudication. And the Court will then act.[136]

Only in the sit-in cases, even when the time was surely "ripe" by the Warren Court's typical standards, when the cultural work of the civil rights movement was well underway and its achievement unmistakable, the Court still refused to act. In one of the most striking developments of the Warren Court era, the Court ducked, repeatedly, a major civil rights issue that was winning widespread public support. An informal agreement emerged among the Justices (save for Justice Douglas) that minimalist holdings were best in these cases, at least for a time.[137] Chief Justice Warren explained the strategy as "tak[ing] these cases step by step, not reaching the final question until much experience had been had."[138] The Court would overturn convictions of the sit-in protesters, but on narrow grounds, reserving the difficult state action question.[139]

The puzzle is, then, why the Court never decided the constitutional question, even when public opinion had clearly swung behind the basic rightness of the equality principle put forth by the sit-ins. By the time the Court faced *Bell v. Maryland*, a majority of the nation lived under state or local laws requiring nondiscriminatory access to public accommodation.[140] In June 1963, approval for the proposed federal civil rights legislation was at about the same level—approximately 50%—as approval for school

---

[135] *The Proper Role of the United States Supreme Court in Civil Liberties Cases*, 10 WAYNE L. REV. 457, 477 (1964) (transcript of panel remarks).

[136] *Id.*

[137] *See supra* Part II.A.

[138] THE SUPREME COURT IN CONFERENCE (1940–1985): THE PRIVATE DISCUSSIONS BEHIND NEARLY 300 SUPREME COURT DECISIONS 718 (Del Dickson ed., 2001) [hereinafter IN CONFERENCE].

[139] *See supra* Part II.A.

[140] Bell v. Maryland, 378 U.S. 226, 284 (1964) (Douglas, J., concurring) (appendix listing state public accommodations laws); William E. Blundell, *30 States, Some Cities Bar Discrimination in Public Accommodations*, WALL ST. J., Oct. 22, 1963, at 1; *Survey Shows Rights Laws Now Cover 65% of Nation*, WASH. POST, Dec. 26, 1963, at A17.

desegregation had been in 1956.[141] In the coming months, approval for the Civil Rights Act increased steadily; after the passage of the bill in the House in February 1964, approval was at 68%.[142] Despite this transformation taking place outside the Court, by late 1963, when a majority of the Court felt compelled it was time to face the constitutional issue squarely, a majority stood poised to reassert the Court's commitment to the state action doctrine and to decide in favor of the claims of the discriminating lunch counter operators.[143]

Why they did so has traditionally been explained by pointing to two factors. First, it is often assumed that the Court would have found a way to decide in favor of the protesters, perhaps confronting the constitutional issue in the process, if Congress had not stepped in with Title II of the 1964 Civil Rights Act.[144] Second, many legal scholars have emphasized the doctrinal and institutional difficulties that would have been raised in expanding state action to encompass public accommodations, and attribute the resilience of the state action doctrine to this factor.[145] The following account of the sit-in cases does not refute either of these factors. Each played an important role in the outcome of the issue. But they fail to capture the whole story. While it is likely that the pending federal civil rights bill helped dissolve a late-forming majority to decide the constitutional issue in *Bell* in favor of the protesters, this explanation only captures the closing weeks of the term; between October 1963 and the mid-spring of 1964, a majority of the Justices were ready to reject the protesters' constitutional claim, even when it was uncertain that federal public accommodations legislation would pass. And while doctrinal and institutional constraints undoubtedly contributed to the hesitancy of some Justices to accept the state action arguments put forth by the NAACP lawyers, this factor fails to capture the thinking of Justice Black, the person who more than anyone else on the Court shaped the terms of debate in the sit-in cases.

A. From Burton *to* Bell

The Court's first confrontations with the sit-in cases laid the foundations for a subsequent transformation of state action. Although the facts of the first cases allowed for relatively limited holdings, their reasoning and language were potentially expansive. *Burton v. Wilmington Parking Authority*[146] involved racial discrimination in a privately run restaurant located in a space leased from the city. The Court located

---

[141] WHALEN & WHALEN, *supra* note 27, at 155; Herbert H. Hyman & Paul B. Sheatsley, *Attitudes toward Desegregation*, 195 SCI. AM. 35, 38 (1956).

[142] WHALEN & WHALEN, *supra* note 27, at 155; *see also How Whites Feel about Negroes: A Painful American Dilemma*, NEWSWEEK, Oct. 21, 1963, at 45 (finding 79% white support for equal access to restaurants).

[143] *See infra* Part II.B.

[144] *See, e.g.*, ALEXANDER M. BICKEL, POLITICS AND THE WARREN COURT 170 (1965).

[145] *See, e.g.*, *id.* at 170; COX, *supra* note 24, at 31–41; Paul Freund, *New Vistas in Constitutional Law*, 112 U. PA. L. REV. 631, 641 (1964).

[146] 365 U.S. 715 (1961).

the necessary state involvement in the nominally private discriminatory choice to satisfy the state action requirement of the Fourteenth Amendment.[147] The analysis in the majority opinion, written by Justice Tom Clark, relied upon what was essentially a context-driven balancing test to evaluate whether there was the necessary state entanglement with private action to constitute state action. The test for when "nonobvious involvement of the State in private conduct" can violate the Equal Protection Clause requires "sifting facts and weighing circumstances."[148] Clark then went further—potentially much further—by recognizing state "inaction" in the face of private discrimination as an element in finding state action,[149] a reference with dramatic implications. In suggesting the existence of affirmative government obligations under the Equal Protection Clause, Clark opened the door to a radical reworking of government's constitutional responsibilities.[150]

Burton was not technically a sit-in case; the case derived from an unplanned, isolated event that occurred in 1958. The first case that arose out of the student sit-in movement of 1960 to reach the Court was *Garner v. Louisiana*.[151] Chief Justice Warren was initially inclined to decide the constitutional issues in favor of the protesters, holding the students' actions were protected under both the First and Fourteenth Amendments.[152] Frankfurter prevailed on him to issue a more limited opinion. In a letter to the Chief Justice, Frankfurter explained that the sit-in cases

> go to the very heart of constitutional views regarding state-federal relations, the rights of the individual against the coercive power of the State. . . . [T]hey should be disposed of on the narrowest allowable grounds. . . . I would make of this a little case, precisely for the reason that we are all fully conscious of the fact that it is just the beginning of a long story.[153]

He preferred to "creep along rather than be general," Frankfurter told the Justices.[154] Warren eventually agreed that, at this point, narrower holdings were preferable.[155]

---

[147] *See id.* at 717–18.

[148] *Id.* at 722.

[149] *Id.* at 725.

[150] Laurence Tribe notes that *Burton* "remains the high-water mark in a tide of state action doctrine that has since been almost constantly at ebb." TRIBE, *supra* note 87, at 251.

[151] 368 U.S. 157 (1961).

[152] BERNARD SCHWARTZ, SUPER CHIEF: EARL WARREN AND HIS SUPREME COURT—A JUDICIAL BIOGRAPHY 402–04 (1983).

[153] Letter from Felix Frankfurter to Earl Warren (Dec. 4, 1961) (on file with Library of Congress, Manuscript Division, Papers of Earl Warren , Box 600).

[154] IN CONFERENCE, *supra* note 138, at 708.

[155] Letter from Earl Warren to Felix Frankfurter (Dec. 6, 1961) (on file with Library of Congress, Manuscript Division, Papers of Earl Warren , Box 600); *see also Garner*, 368 U.S. at 163.

Douglas, unaffected by Frankfurter's concerns, forged ahead in his concurrence and decided the Fourteenth Amendment issue. He put forth a variety of rationales for locating state action. He offered sweeping rhetorical assertions: "[T]he police are supposed to be on the side of the Constitution, not on the side of discrimination."[156] He staked out a broad claim for reconceptualizing the constitutional status of public accommodations: "Restaurants, whether in a drugstore, department store, or bus terminal, are a part of the public life of most of our communities. Though they are private enterprises, they are public facilities in which the States may not enforce a policy of racial segregation."[157] He argued the *Shelley* rationale that judicial enforcement constituted state action,[158] and he sought to include pervasive community customs and practices as a form of state action.[159] In a more closely reasoned section of his concurrence, he argued that the fact that state and local governments granted licenses to restaurants implicated the state in their discriminatory practices.[160] Subsequent efforts to reconsider the state action requirement, both in the courts and in Congress, frequently used the various claims Douglas presented in *Garner* as a basis for debate.

In some ways, *Burton* and *Garner* would prove to be the furthest the Court would go toward recognizing the students' actions as constitutionally protected. The Court would continue to find ways to overturn the convictions of the protesters without deciding the Fourteenth Amendment issue.[161] Yet the way in which the Justices went about avoiding the constitutional question is revealing. It demonstrated the Court's unwillingness to directly confront the students' challenge to traditional, legalistic definitions of public and private space or their emphasis on human dignity as a component of the constitutional analysis of equal protection. Rather, the Court focused on reforming southern states, pressuring them to abide by the rule of law as established in *Brown*.

The sit-in cases gave the Court the opportunity to continue the work of the school segregation cases. The Justices avoided the difficult constitutional question behind the sit-ins by focusing on misbehavior by Southern state actors—actions that defied the Court's *Brown* mandate. They used the sit-in cases to create incentives for the southern states to get rid of any hint of official segregation. They would overturn any conviction, even if based on an ostensibly private discriminatory choice, if the state had on the books a law requiring segregated public accommodations. The mere presence of a segregation ordinance was enough—even when the prosecution at issue was not based on that ordinance and there was no evidence that the law influenced the proprietor's decision to discriminate.[162] If there were no segregation laws on

---

[156] *Garner*, 368 U.S. at 177 (Douglas, J., concurring).
[157] *Id.*
[158] *See id.* at 178.
[159] *See id.* at 178–81.
[160] *See id.* at 181–85.
[161] *See* COX, *supra* note 24, at 32–35.
[162] *See* Peterson v. City of Greenville, 373 U.S. 244 (1963).

the books, any expressed support for segregated public accommodations by local officials would do the job.[163] Official action in support of segregation, rather than the student demand for service, became the illegality that needed to be countered; the proper path toward restoring order was to get the state out of the business of directly supporting segregation.

These cases have often been explained as an effort by the Supreme Court Justices to balance their sympathy for the protesters with concerns about the doctrinal and institutional implications of ruling in their favor on constitutional grounds.[164] A recognition of the basic unjustness of the protesters' convictions played a role in these cases, to be sure, but the text of the opinions and the internal history of the Court's deliberations indicate that the path of decision-making is better explained by a focus not on the protesters, but on the *states*. Support for the protesters was incidental to the central message of the sit-in cases, which was directed at state officials. This message was simple: stop defying *Brown*. Thus, the sit-in cases were as much the progeny of *Cooper v. Aaron*,[165] a ruling that denounced defiance of the Supreme Court, as state action cases such as *Shelley v. Kraemer*[166] or *Marsh v. Alabama*.[167] In *Cooper*, the Court dedicated itself to attacking official segregation policy even when the state made efforts to hide its role: "[T]he prohibitions of the Fourteenth Amendment extend to all action of the State denying equal protection of the laws . . . whatever the guise in which it is taken . . . ."[168] By the early 1960s, the logic of *Brown*, both doctrinally and culturally, had come to stand for the position that state-supported segregation was unconstitutional, including efforts to cloak official segregation policy as private action. The sit-in cases gave the Court an opportunity to pressure the states to abandon laws and official practices that supported segregation.

B. Bell v. Maryland

The Justices' exclusive focus on official state action made *Bell v. Maryland*,[169] first considered in the fall of 1963, particularly challenging. Here the state as a bad actor was less evident. Indeed, since the students had been arrested, Maryland had passed a public accommodations law.[170] The Justices could no longer divert attention from the possible illegality of the protests through their hunt for more fundamental illegality by the state. In *Bell* it appeared that the Justices finally had a sit-in case in which there was no way to avoid the constitutional issue.

---

[163] *See* Lombard v. Louisiana, 373 U.S. 267 (1963).

[164] *See, e.g.*, POWE, *supra* note 10, at 227; Freund, *supra* note 145, at 644; Greenberg, *supra* note 24, at 1528.

[165] 358 U.S. 1 (1958).

[166] 334 U.S. 1 (1948).

[167] 326 U.S. 501 (1946).

[168] *Cooper*, 358 U.S. at 17.

[169] 378 U.S. 226 (1964).

[170] *Id.* at 230.

Yet the Court ducked once again. Avoidance of the constitutional issue here required a novel argument, put forth by Justice Brennan, that the passage of state and local public accommodations laws following the demonstrators' convictions was grounds for reversal. The sit-ins "would not be a crime today,"[171] he wrote in the controlling opinion, and therefore it would be unjust to allow the convictions to stand. Although six Justices wanted the constitutional issue resolved, they split evenly on whether to side with the claims of the demonstrators or the restaurant owners, making Brennan's end run around the constitutional issue the opinion of the Court, and leaving existing state action doctrine largely intact.[172]

Prior to Brennan's discovery of a nonconstitutional basis for the decision, the Justices were prepared to face the constitutional issue—and to rule against the protesters.[173] In the fall of 1963 the Court divided 5-4 on the constitutional question, with Black taking on the drafting of the majority opinion (joined by Clark, Harlan, Stewart, and White), affirming the convictions and reasserting the principle that the Fourteenth Amendment does not apply to private discrimination and that a restaurant owner's policy of whom to serve was a private choice. As late as March 1964, Justice Clark was assuring Justice Goldberg that Black's majority was "absolutely solid and indestructible."[174] Yet by late spring Black had lost his majority, largely because Brennan was able to locate his more limited grounds for overturning the convictions and because he was able to convince Clark and Stewart that upholding the convictions would hurt the pending federal civil rights legislation.[175] The closing months of the term brought rapidly shifting alliances of the Justices in *Bell*; for a brief time in June, it even appeared that Justice Clark would write an opinion of the Court deciding the constitutional issue in favor of the protesters.[176] The final decision, handed down on June 22, 1964, just weeks before passage of the 1964 Civil Rights Act, came to no such resolutions.[177] Clark and Stewart joined Brennan's opinion, disposing of the

---

[171] *Id.*

[172] *See id.* at 228.

[173] William J. Brennan, Opinions xiii (October Term 1963) (memorandum prepared by Justice Brennan and law clerks) (on file with Library of Congress, Manuscript Division, Papers of William J. Brennan, Box II: 6, Folder 6) [hereinafter *Brennan Memo*].

[174] *Id.* at xvi.

[175] HUGO L. BLACK & ELIZABETH BLACK, MR. JUSTICE AND MRS. BLACK 112 (1986); IN CONFERENCE, *supra* note 138, at 722 (comments of Justice Goldberg); ROGER K. NEWMAN, HUGO BLACK: A BIOGRAPHY 546 (1994) (quoting from interview with Justice Brennan); *Brennan Memo*, *supra* note 173, at xiv, xvi.

[176] *See* Clark, *supra* note 77.

[177] *See* Bell v. Maryland, 378 U.S. 226 (1964). On the same day the Court decided *Bell*, it also reversed convictions in three other sit-in cases on narrow grounds. Bouie v. City of Columbia, 378 U.S. 347 (1964) (overturning trespassing conviction on due process grounds); Robinson v. Florida, 378 U.S. 153 (1964) (trespassing charge overturned based on existence of state regulation requiring segregated restrooms in public accommodations); Barr v. City of Columbia, 378 U.S. 146 (1964) (disturbing the peace conviction overturned for lack of evidence).

case without reaching the merits of the constitutional claim;[178] White and Harlan joined Black's opinion finding no state action;[179] and Warren, Goldberg, and Douglas all expressed a willingness to find racial discrimination in public accommodations a violation of the Equal Protection Clause.[180]

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

The concurrences by Douglas and Goldberg, in which they argued that the right to nondiscriminatory service in public accommodations was constitutionally protected, laid out the terms of the problem. "The whole Nation has to face the issue," Douglas wrote.[181]

> Congress is conscientiously considering it; some municipalities have had to make it their first order of concern; law enforcement officials are deeply implicated, North as well as South; the question is at the root of demonstrations, unrest, riots, and violence in various areas. The issue in other words consumes the public attention. Yet we stand mute, avoiding decision of the basic issue by an obvious pretense.[182]

Douglas expressed as much concern with preserving order and law as his more conservative colleagues: "When we default, as we do today, the prestige of law in the life of the Nation is weakened."[183]

Goldberg also positioned himself as attacking lawlessness. A state should not be permitted to abridge the constitutional right of nondiscriminatory access to places

---

[178] *Bell*, 378 U.S. at 128.
[179] *Id.* at 318 (Black, J., dissenting).
[180] *Id.* at 242 (Goldberg, J., concurring).
[181] *Id.* at 243 (Douglas, J., concurring).
[182] *Id.*
[183] *Id.* at 245.

of public accommodations by "legitimating a proprietor's attempt at self-help" through enforcement of trespassing laws.[184] He quoted from *Cooper v. Aaron*, noting that "law and order are not . . . to be preserved by depriving the Negro . . . of [his] constitutional rights,"[185] and challenged Black's dire warning of the need to protect property rights in the name of preserving order. "Of course every member of this Court agrees that law and order must prevail; the question is whether the weight and protective strength of law and order will be cast in favor of the claims of the proprietors or in favor of the claims of petitioners."[186]

In his long, impassioned dissent, Black argued that the Fourteenth Amendment does not apply to choices made by restaurant owners "in the absence of some cooperative state action or compulsion."[187] "It would betray our whole plan for a tranquil and orderly society," Black asserted, "to say that a citizen, because of his personal prejudices, habits, attitudes, or beliefs, is cast outside the law's protection and cannot call for the aid of officers sworn to uphold the law and preserve the peace."[188] Reading the Fourteenth Amendment to require business owners to serve blacks would "severely handicap a State's efforts to maintain a peaceful and orderly society."[189] To prohibit trespassing prosecutions in these cases would "penalize citizens who are law-abiding enough to call upon the law and its officers for protection instead of using their own physical strength or dangerous weapons to preserve their rights."[190] The protection of public order, Black concluded, was the primary goal of government.

> [T]he Constitution does not confer upon any group the right to substitute rule by force for rule by law. Force leads to violence, violence to mob conflicts, and these to rule by the strongest groups with control of the most deadly weapons. . . . At times the rule of law seems too slow to some for the settlement of their grievances. But it is the plan our Nation has chosen to preserve both "Liberty" and equality for all. On that plan we have put our trust and staked our future. This constitutional rule of law has served us well. Maryland's trespass law does not depart from it. Nor shall we.[191]

C. Civil Disobedience and the Supreme Court

As Black's paean to "peaceful and orderly society" in his *Bell* dissent indicates, one factor in the ultimate failure of the constitutional claim put forth by the students

---

[184] *Id.* at 311 (Goldberg, J., concurring).
[185] *Id.* (quoting Cooper v. Aaron, 358 U.S. 1, 16 (1958)).
[186] *Id.* at 312.
[187] *Id.* at 326 (Black, J., dissenting).
[188] *Id.* at 327–28.
[189] *Id.* at 327.
[190] *Id.* at 328.
[191] *Id.* at 346.

in the sit-in cases was a discomfort with civil disobedience. The concerns the Justices had with extrajudicial methods of resistance were more pervasive and systematic and gained strength earlier than scholars have generally appreciated. The Warren Court's hesitancy on the sit-in cases was not just a visceral reaction to street demonstrations. It was also a product of disappointment with the turn away from the courts that the demonstrations embodied. The Court was moved not only by a commitment to racial equality, but also by a concern, less well recognized, with the destabilization costs of extralegal social reform tactics.

Within the Supreme Court, no one was more antagonistic toward civil disobedience than Justice Black.[192] Black was the critical figure among the Justices who stood opposed to the basic constitutional claim of the protesters. His powerful and passionate statements on the basic issues at stake defined the terms of the debate within the Court. For Black, the issue was first and foremost a question of protecting the rule of law. "Physical protest never appealed to Black," writes his biographer.[193] "Direct action, such as sit-ins, intentionally violated society's necessity to maintain order, he felt. Public disorder threatened the fabric of democracy."[194] In conference discussions, Black referenced the need to protect the associational rights of private citizens as a basic tenet of an orderly society. In his files relating to the October Term 1963 sit-in cases, he kept a collection of newspaper clippings filled with stories of the escalating tensions resulting from efforts to integrate public accommodations.[195] One story told of the owner of a Maryland restaurant who, with the aid of several friends, "hurled" a dozen civil rights demonstrators from his restaurant; the police, who were watching this private ejection from the street, promptly arrested the protesters for disorderly conduct.[196] Another article in Black's clippings file told of a Florida hotel manager who poured acid into the hotel pool in order to force "integrationists" out of the water. When the protesters were driven from the water, "club-swinging policemen rained blows on the heads, backs, and shoulders of the Negroes."[197] Yet another story described the growth of "anti-white gangs" in Harlem, including ominous references

---

[192] *See* Christopher Schmidt, *Hugo Black's Civil Rights Movement*, *in* TRANSFORMATIONS IN AMERICAN LEGAL HISTORY: ESSAYS IN HONOR OF PROFESSOR MORTON J. HORWITZ 246–66 (Daniel W. Hamilton & Alfred L. Brophy eds., 2009).

[193] NEWMAN, *supra* note 175, at 542.

[194] *Id.*

[195] Hugo L. Black, Conference Notes (undated) (on file with Library of Congress, Manuscript Division, Papers of Hugo L. Black, Box 376).

[196] Stephens Broening, *Negro Demonstrators Thrown Out By Annapolis Restaurant Owners*, WASH. POST, Mar. 3, 1964, at A1 (on file with Library of Congress, Manuscript Division, Papers of Hugo L. Black, Box 376); *Pickets Back at Annapolis After Talks*, EVENING STAR, Mar. 3, 1964, at A1 (on file with Library of Congress, Manuscript Division, Papers of Hugo L. Black, Box 376).

[197] *See The Acid Test*, EVENING STAR, June 19, 1964, at A1 (on file with Library of Congress, Manuscript Division, Papers of Hugo L. Black, Box 376); *Police Club Negroes in Motel Pool*, WASH. POST, June 19, 1964, at A2 (on file with Library of Congress, Manuscript Division, Papers of Hugo L. Black, Box 376).

to the training of black youths in martial arts.[198] In his opinions, Justice Black returned again and again to his belief that liberties ultimately suffer when protesters take to the streets rather than rely on the courts to protect their rights. "[M]inority groups, I venture to suggest, are the ones who always have suffered and always will suffer most when street multitudes are allowed to substitute their pressures for the less glamorous but more dependable and temperate processes of the law," Black wrote in a 1965 dissent.[199] A year later, Black wrote in an opinion for the Court: "[T]he crowd moved by noble ideals today can become the mob ruled by hate and passion and greed and violence tomorrow."[200]

When faced with the sit-in cases, Black embraced a narrow definition of state action as a source of social order and legal predictability. In so doing, he turned his back on earlier decisions in which he challenged a narrow conception of state action. His opinion in *Marsh v. Alabama* included sweeping language about the need to subordinate private property interests to constitutionally defined public interests when property is used in a particularly public manner.[201] He joined the Court's opinion in *Shelley*,[202] he wrote a sweeping majority opinion in *Terry v. Adams*[203] (a decision extending the white primary decision of *Smith v. Allwright*),[204] and he signed on to Justice Douglas's dissent in *Black v. Cutter Laboratories*, a 1956 case in which the Court distinguished *Shelley* and refused to find state action when a court enforced a private employment contract that, had it been with the state, would have raised due process and First Amendment concerns.[205] Similarly, Black had no apparent difficulty with the extension of *Shelley* in another First Amendment case, *New York Times v. Sullivan*,[206] decided the same term as *Bell v. Maryland*, in which the Court had found state action in judicial enforcement of libel law.[207] Black simply saw state action differently when he confronted the issue in the context of civil rights protests.

Black was not alone in his antagonistic attitude toward extralegal protest actions. Prior to signing on to Black's *Bell* dissent, Justice White drafted a brief dissent in which he warned that treating a state trespass conviction derived from a private

---

[198] Junius Griffin, *Harlem: The Tension Underneath*, N.Y. TIMES, May 29, 1964, at 1 (on file with Library of Congress, Manuscript Division, Papers of Hugo L. Black, Box 376).

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

[200] Brown v. Louisiana, 383 U.S. 131, 168 (1966) (Black, J., dissenting). *See generally* Schmidt, *supra* note 192 (discussing Black's opinions in civil rights cases).

[201] 326 U.S. 501, 506 (1946).

[202] Black also joined the Court's extension of *Shelley* in *Barrows v. Jackson*, 346 U.S. 249 (1953), and he was prepared to do the same in *Rice v. Sioux City Memorial Park Cemetery, Inc*., 349 U.S. 70 (1955), a case in which the Court was divided. *See* IN CONFERENCE, *supra* note 138, at 703.

[203] 345 U.S. 461 (1953).

[204] 321 U.S. 649 (1944).

[205] 351 U.S. 292 (1956).

[206] 376 U.S. 254 (1964).

[207] *Id.* at 265.

discriminatory choice as impermissible state action "would be nothing short of an invitation to private warfare and a complete negation of the central peace-keeping function of the State."[208] Along with Justice Harlan, who also joined Black's dissent, Justices Black and White constituted a solid bloc of Justices whose instinctive reaction against direct-action protest likely contributed to their staunch opposition to using the sit-in cases as a platform for a reconsideration of the state action doctrine.

Although Black's unwillingness to extend judicial protection to those excluded from public accommodations might be explained in terms of the limits of judicial competence, this was generally not the way he justified his position either in conference or in his opinions.[209] Rather, he emphasized the risks of lawless behavior by protesters and the need for courts to strictly enforce property rights.[210] For Black, the critical difference between the courts and legislatures with regard to the sit-ins might have been that courts confer retrospective approval for past behavior, while a legislature makes a new legal standard that is typically applied prospectively. For a court to rule that the actions of the sit-in demonstrators were in fact constitutionally protected might allow, indeed encourage, future lawbreaking whenever a legal standard was ambiguous or strongly contested.

This problem of the retroactive approval of civil disobedience came to the forefront in *Hamm v. City of Rock Hill*,[211] the last of the sit-in cases. In a 5-4 decision, the Court held that the passage of Title II of the 1964 Civil Rights Act abated all pending convictions of sit-in protesters.[212] Despite congressional silence on the effect of Title II on pending appeals, the majority found grounds for applying it retrospectively.[213] Through the mechanism of statutory interpretation, the Justices, in effect, used the legislature as a laundering mechanism for getting rid of thousands of sit-in appeals. Justice Clark's opinion for the majority noted that "the law generally condemns self-help," but the new federal law created a right that immunizes from prosecution "nonforcible attempts to gain admittance to or remain in establishments covered by the Act."[214] "The great purpose of the civil rights legislation was to obliterate the effect of a distressing chapter of our history. . . . The peaceful conduct for which

---

[208] Justice Byron R. White, Draft Dissent, Bell v. Maryland 1 (June 17, 1964) (unpublished opinion) (on file with Library of Congress, Manuscript Division, Papers of Earl Warren, Box 512).

[209] For example, a reference to the ability of legislatures to "draw lines" and "create such exceptions as legislators think wise," Bell v. Maryland, 378 U.S. 226, 345 (1964), was only added late in the drafting process. Circulations, *in* THE DELIBERATIONS OF THE JUSTICES IN DECIDING THE SIT-IN CASES OF JUNE 22, 1964, at 32, 36 (A.E. Dick Howard & John G. Kester eds., 1964) (on file with Library of Congress, Manuscript Division, Papers of Hugo L. Black, Box 376).

[210] *Bell*, 378 U.S. at 326–28, 346 (Black, J., dissenting).

[211] 379 U.S. 306 (1964).

[212] *Id.* at 317.

[213] *Id.* at 316.

[214] *Id.* at 311.

petitioners were prosecuted was on behalf of a principle since embodied in the law of the land."[215]

Black would have none of this. "[O]ne of the chief purposes of the 1964 Civil Rights Act," he wrote in dissent, "was to take such disputes [over access to public accommodations] out of the streets and restaurants and into the courts . . . ."[216] Justice White was similarly outraged at the Court's acceptance of civil disobedience. "Whether persons or groups should engage in nonviolent disobedience to laws with which they disagree perhaps defies any categorical answer for the guidance of every individual in every circumstance. But whether a court should give it wholesale sanction is a wholly different question which calls for only one answer."[217]

The Court of the late 1960s would show less tolerance for civil rights protest than it had in the early years of the civil rights movement.[218] Yet the sit-in cases demonstrate that ever-present concerns with civil disobedience affected the Court's evaluation of constitutional issues that ultimately went well beyond free speech rights for protests. After some initial ground-laying in the 1961 cases, it seemed the more the Court engaged with the issue, the less disposed some of the Justices were toward the Fourteenth Amendment claim of the protesters. Those Justices who felt most committed to using the Constitution to uproot private discriminatory practices failed to offer their more skeptical colleagues a persuasive defense of the protesters' cause, preferring instead to work within the doctrinal framework of existing state action doctrine, in which they sniffed out any hint of state complicity in segregation and then argued that this involvement justified the application of the Fourteenth Amendment. This approach fit well with the work the Court already had been doing in *Brown* and *Cooper*, but it resulted in a striking disconnect between the Court's definition of the reach of equal protection rights and an emerging societal recognition of the centrality of desegregated public accommodations to the civil rights project.

III. THE CIVIL RIGHTS ACT OF 1964 AND CONGRESSIONAL INTERPRETATION OF THE FOURTEENTH AMENDMENT

In addition to the Supreme Court's confrontation with the sit-in cases, the other critical episode in the story of the sit-ins and state action doctrine took place in Congress. With considerable guidance from the Kennedy administration's Justice

---

[215] *Id.* at 315–16.

[216] *Id.* at 318–19 (Black, J., dissenting).

[217] *Id.* at 328 (White, J., dissenting). On the legal shortcomings of *Hamm*, see POWE, *supra* note 10, at 237 (describing *Hamm* as "a free shot at justice unencumbered by technicalities—such as constitutional power").

[218] *See* Walker v. Birmingham, 388 U.S. 307, 321 (1967) ("[R]espect for the judicial process is a small price to pay for the civilizing hand of law, which alone can give abiding meaning to constitutional freedom."); Adderley v. Florida, 385 U.S. 39 (1966) (upholding trespassing conviction for protest outside county jail).

Department, congressional civil rights advocates began in 1963 to press for a federal public accommodations law. In attempting to locate the appropriate source of congressional power to pass such a law, they joined the Supreme Court in debating the consequences of reconsidering the state action limitation of the Fourteenth Amendment. And just as the Court's consideration of the state action doctrine revolved around not only doctrinal complexities but also broader concerns about the relationship of the Court to extrajudicial efforts at legal change, congressional consideration of the state action doctrine moved back and forth between the technical legal issues at stake and broader social and political concerns. Doctrinal issues received considerable attention from the legal experts involved with the drafting process. Yet the outcome of the debate over the constitutional basis of the federal public accommodations law ultimately turned on concerns that had little to do with constitutional analysis of the Fourteenth Amendment. Partisan politics and legislative strategy injected limitations on congressional consideration of the merits of pressing for a new vision of the coverage of the Equal Protection Clause. Systemic and institutional factors also made their presence felt. Of particular concern to members of Congress as they debated the constitutional basis for the public accommodations law was the role of Congress in relation to the Court in matters of constitutional interpretation.

As this Part demonstrates, executive and legislative efforts to reconsider the scope of the Fourteenth Amendment were always constrained by the shadow of the Court's state action doctrine. With the white South mobilized in resistance to *Brown*, and the campaign of massive resistance calling into question not only the school desegregation decision but the entire authority of the Supreme Court, civil rights supporters found themselves defending not only the cause of civil rights but the principle of judicial interpretive supremacy. Southern resistance to *Brown* turned the finality of the Court's interpretation of the Constitution into a critical fault line for the civil rights movement. Therefore it was far from an auspicious time for bold proclamations of legislative interpretive autonomy, even if expressed in support of the civil rights cause. Ironically, there was a supportive Supreme Court that was actually looking for Congress to act on the public accommodations issue—and appeared willing to grant considerable latitude, under Section 5 of the Fourteenth Amendment, for Congress to offer its own reading of the scope of the Fourteenth Amendment.

A. The Supreme Court and Section 5

As described in Part II, throughout their deliberations in the sit-in cases the Justices remained sharply divided on the basic state action question: whether, as a self-enforcing right, to be recognized in the courts, the Fourteenth Amendment protected against discrimination in privately-owned public accommodations. Yet a majority—perhaps even all—of the Justices expressed a willingness to recognize congressional power to regulate public accommodations through Section 5 of the

Fourteenth Amendment, the section that empowers Congress to enforce the provisions of the amendment "by appropriate legislation."[219] The willingness of even those Justices who would eventually come out strongly against a broad Section 5 power (most notably, Justice John Marshall Harlan) to accept congressional interpretative latitude over the contours of the state action doctrine has not yet been sufficiently recognized in Warren Court scholarship.

For those Justices who concluded that proprietors of public accommodations were state actors for purposes of the Equal Protection Clause,[220] congressional enforcement in this area was straightforward: there was no question that Congress, under Section 5 of the Fourteenth Amendment, had the power to enforce a judicially recognized equal protection right. But for those Justices who aligned themselves with Justice Black and refused to extend the Fourteenth Amendment to cover public accommodations discrimination, the Section 5 question posed considerable difficulty. As a result, this group of Justices considered, apparently for the first time in a sustained manner, a doctrinally transformative approach to congressional power to enforce the Fourteenth Amendment: they began to make the case for the Court extending to Congress some measure of interpretive latitude in defining state action under its Section 5 enforcement powers. In other words, even those who affirmed the principle of state action as defined in the *Civil Rights Cases* challenged that decision's holding with regard to congressional power and public accommodations. Among themselves at least—for only hints of this would reach published Court opinions—they recognized that a congressional definition of state action (under Section 5) might go beyond a judicial definition (under Section 1). The confrontation with state action in the years between 1960 and 1964 revealed the Court's first serious effort to come to terms with the role of Congress in protecting civil rights in an era when most had come to look to the Court as the primary actor in this field.

The idea of decoupling Section 1 and Section 5, while little theorized at this point, was not without precedent. The groundwork for such a broad understanding of Section 5 powers had been laid out a decade earlier, in the context of school desegregation. During deliberations in *Brown v. Board of Education*, several Justices had demonstrated a willingness (at times even an enthusiasm) to recognize congressional Section 5 power to define the Fourteenth Amendment in ways that diverged from existing Supreme Court precedent. The pragmatic element here was obvious. As they struggled with the constitutionality of school segregation, the Justices clearly would have preferred for Congress to demonstrate some initiative on the problem. As Justice Jackson observed to the NAACP lawyers during oral arguments: "I suppose that realistically the reason this case is here was that action couldn't be obtained from Congress."[221] Several Justices openly expressed a willingness to allow Congress to

---

[219] U.S. CONST. amend. XIV, § 5.

[220] For most of October Term 1963, this included Chief Justice Warren and Justices Brennan, Douglas, and Goldberg.

[221] ARGUMENT: THE ORAL ARGUMENT BEFORE THE SUPREME COURT IN BROWN V. BOARD OF EDUCATION OF TOPEKA, 1952–1955, at 244 (Leon Friedman ed., 1969).

take the lead, through its Section 5 powers, in redefining equal protection to prohibit segregated education.[222] Of course, it was obvious to all involved that Congress was not about to do so. After all, recent sessions of Congress were not even able to pass anti-lynching legislation because of the stranglehold Southern senators had over the passage of any civil rights legislation.[223] Yet the fact that Congress had the *power* to desegregate schools under its Section 5 powers, even if the Court had not yet explicitly overruled *Plessy*, seemed to be generally accepted, not only within the Court, but among the leading legal scholars of the day.[224] As the Justices on the *Brown* Court recognized, a broad reading of the Section 5 power had a strong grounding in the original intentions of the Fourteenth Amendment's framers.[225]

In short, the under-examined assumption of the *Brown* Court was that there could be an allowable gap between Section 5 and Section 1, which could have two possible consequences for the Court's equal protection jurisprudence. Either the Court would be willing to recognize and accept this gap, perhaps under a kind of "necessary and proper" reading of Section 5.[226] Or (more likely) the Court would *follow* Congress in redefining the meaning of the Equal Protection Clause—that is, the congressional interpretation of equal protection would then be adopted by the Court as a self-enforcing constitutional right.[227]

After *Brown* came down, critics of the decision often pointed to Section 5 in claiming that the issue should have been dealt with by Congress, not the Court.[228]

---

[222] In questions to the litigants in calling for reargument of the case in 1953, the Court asked for briefing on the question of whether "future Congresses might, in the exercise of their power under Section 5 of the Amendment, abolish" school segregation, even if such an action might conflict with the original understanding of the amendment. Brown v. Bd. of Educ., 345 U.S. 972, 972 (1953); *see also* ARGUMENT, *supra* note 221, at 94, 103 (Frankfurter comments); *id.* at 103 (Reed comments).

[223] *See, e.g.*, POWE, *supra* note 10, at 47; Michael J. Klarman, *Court, Congress, and Civil Rights*, *in* CONGRESS AND THE CONSTITUTION 178–80 (Neal Devins & Keith E. Whittington eds., 2005).

[224] *See, e.g.*, LEARNED HAND, THE BILL OF RIGHTS 54–55 (1958); Paul A. Freund, *Storm over the American Supreme Court*, 21 MOD. L. REV. 345, 351 (1958); Wechsler, *supra* note 84, at 32.

[225] *See, e.g.*, ROBERT J. HARRIS, THE QUEST FOR EQUALITY: THE CONSTITUTION, CONGRESS AND THE SUPREME COURT 33–56 (1960); WILLIAM E. NELSON, THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE 142–47 (1988); Eugene Gressman, *The Unhappy History of Civil Rights Legislation*, 50 MICH. L. REV. 1323, 1329–33 (1952).

[226] *See* ARGUMENT, *supra* note 221, at 94, 103 (Frankfurter comments); *id.* at 103 (Reed comments).

[227] This was the approach that Jackson seemed to favor, as evident in his unpublished draft concurrence in *Brown*. Robert H. Jackson, Memorandum 11 (Mar. 15, 1954) (on file with Library of Congress, Manuscript Division, Papers of Robert H. Jackson, Box 184) (describing Section 5 as "mak[ing] provision for giving effect from time to time to the changes of conditions and public opinion always to be anticipated in a developing society").

[228] *See, e.g.*, Declaration of Constitution Principles [the "Southern Manifesto"], 102 CONG. REC. 4460 (Mar. 12, 1956); Ray Forrester, *The Supreme Court and the Rule of Law*, 4 S. TEX. L.J. 107, 119 (1959).

Defenders of *Brown* countered that while the framers of the Fourteenth Amendment assumed a more powerful role for Congress, historical experience had demonstrated the need for judicial leadership on the protection of constitutional rights.[229]

The same assumptions toward Section 5 that emerged in *Brown* deliberations reappeared in the early 1960s in the Court's confrontation with public accommodations discrimination. As with the school desegregation issue, the Justices would have preferred congressional action on this contentious and constitutionally difficult issue. Justice Black emerged as not only the staunchest defender of the state action doctrine as a Section 1 question, but also the most outspoken proponent of the constitutional validity of federal public accommodations legislation under Section 5. In conference discussion on the sit-in cases of the 1962 Term, he noted, "I would have no difficulty in sustaining a state law or a federal law under the Fourteenth Amendment (despite the *Civil Rights Cases*) that would prevent racial discrimination and require a retailer to serve all people."[230] In his dissent in *Bell v. Maryland*, where he denounced the tactics of the sit-in protesters and rejected their Fourteenth Amendment claim, he repeatedly referenced congressional Section 5 power to prohibit discrimination in public accommodations.[231]

Black's Section 5 position appeared to have the support of other Justices who, like Black, ultimately rejected the Fourteenth Amendment claim of the lunch counter protesters. The most surprising of these supporters was surely Justice John Marshall Harlan. Harlan would emerge in the following years as the staunchest critic of the concept of decoupling Section 5 from Section 1.[232] Yet, initially at least, he suggested that he would, if necessary, consider upholding Title II under the Fourteenth Amendment. Although in the sit-in cases he argued that Section 1 did not apply to privately-owned public accommodations, there are indications that he did not see this interpretation as necessarily limiting congressional power under the Fourteenth Amendment. For example, Harlan was insistent that Black's opinion in *Bell* make no unnecessary reference to congressional authority—that it focus on defending the traditional state action doctrine under Section 1, without addressing its possibilities

---

[229] *See, e.g.*, Charles Fairman, *The Supreme Court, 1955 Term—Foreword: The Attack on the Segregation Cases*, 70 HARV. L. REV. 83, 85 (1956); Freund, *supra* note 224, at 351; Willard Hurst, *The Role of History*, *in* SUPREME COURT AND SUPREME LAW 55, 60 (E. Cahn ed., 1954).

[230] IN CONFERENCE, *supra* note 138, at 712; *see also id.* at 720. At one point Black told his colleagues that he would be willing to overrule the *Civil Rights Cases*—presumably referring to its Section 5 holding rather than its definition of the state action doctrine as applied to judicially enforceable (i.e., Section 1) rights. Earl Warren, Conference Notes (undated) (on file with Library of Congress, Manuscript Division, Papers of Earl Warren, Box 510).

[231] Bell v. Maryland, 378 U.S. 226, 331, 343, 345 (1964) (Black, J., dissenting); *see also id.* at 326 (referring to Section 5 as an example of an "other section[ ]" that has scope beyond Section 1).

[232] *See* Oregon v. Mitchell, 400 U.S. 112, 204–05 (1970) (separate opinion of Harlan); Katzenbach v. Morgan, 384 U.S. 641, 669–70 (1966) (Harlan, J., dissenting).

under Section 5.[233] And, later in 1964, when the Court reviewed the constitutionality of Title II, Harlan repeatedly emphasized that Congress had accepted a specifically *judicial* (i.e., Section 1) definition of state action, rather than attempting to create its own definition—and it was for this reason that the proper basis for the law was the commerce power and the Fourteenth Amendment question need not be decided upon.[234]

Justice Douglas's approach to Section 5 was shamelessly opportunistic. He adjusted his views of Section 5 according to the leverage it could bring for his preferred interpretation of Section 1. When he sought to sway his brethren to his position on the constitutional claim of the sit-in protesters, he emphasized the need to have a tight linkage between Section 1 and Section 5. He wrote in an October 21, 1963, memorandum:

> Apart from the Commerce Clause, Congress has no power to legislate in this field if there is no state action in the meaning of the Fourteenth Amendment . . . . [I]f we hold that restaurants and other businesses serving the public cannot discriminate against people on account of race, Congress can 'enforce' that construction of the Fourteenth Amendment. But if we hold that this kind of discrimination is beyond the purview of the Fourteenth Amendment there is nothing for Congress to 'enforce' and the Civil Rights Cases are vindicated.[235]

Later that term, however, when Justice Douglas recognized that he lacked the votes for this Section 1 position, he took quite a different line, accepting the Section 1–Section 5 decoupling he had recently rejected. "Congress by reason of § 5 has some leeway to define what due process requires in protection of federally protected rights. Moreover, Congress has authority to define what is 'state' action within the meaning of the Fourteenth Amendment in order to protect federal rights against dilution."[236]

Justice Brennan also struggled with the relationship between the Court's handling of the sit-in cases and the constitutional basis for the public accommodations legislation that Congress was considering. In a note to Justice Douglas, Brennan sought to make sense of the novel situation in which the Court found itself, with a

---

[233] *See* IN CONFERENCE, *supra* note 138, at 720 & n.211 (Justice Harlan's comments).

[234] *See infra* Part III.D.

[235] William O. Douglas, Memorandum to the Conference (Oct. 21, 1963) (on file with Library of Congress, Manuscript Division, Papers of William O. Douglas, Box 1315); *see also* William O. Douglas, Draft Dissent in Robinson v. Florida (Mar. 11, 1964) (unpublished opinion) (on file with Library of Congress, Manuscript Division, Papers of William O. Douglas, Box 1314).

[236] William O. Douglas, Draft Dissent in Bell v. Maryland (Mar. 24, 1964) (unpublished opinion) (on file with Library of Congress, Manuscript Division, Papers of William O. Douglas, Box 1314).

Congress that appeared poised to press ahead of the Court on a major civil rights issue. His words captured the Supreme Court's emerging Section 5 doctrine as it was taking shape:

> [I]s it 'enforcing' legislation if the Court holds that section 1 does not protect the Negroes right to service but rather the owner's right to exclude them? What then does Congress 'enforce'? [May] Congress . . . under section 5 erase a right this Court holds is protected by section 1? I ask, not because I am opposed to the result, but because I don't know.[237]

When the Justices discussed the sit-in cases in conference, Brennan again raised this concern.[238] In the coming years, Brennan would emerge as one of the leading articulators of a broad Section 5 power.[239]

By the time members of Congress seriously started to consider the constitutional basis for a federal public accommodations law, a Court sharply divided on the question of state action under Section 1 appeared to be moving toward agreement on recognizing some level of congressional latitude in defining state action under Section 5. Thus, in framing Title II, congressional supporters of the Fourteenth Amendment route had two possible paths. One centered on Section 1: Congress could evaluate the proper scope of the state action doctrine in applying the protections of the Equal Protection Clause, focusing on judicial precedent, or perhaps hoping to persuade the Court to reconsider its existing definition of Section 1 state action.[240] The other centered on Section 5: Congress could recognize that congressional interpretation of state action under its enforcement provision might vary in some way from judicial interpretation of state action under Section 1.[241] Drawing on the intentions of the framers of the Fourteenth Amendment, and perhaps acknowledging the differing institutional competencies of Congress and the courts, Congress might recognize a gap between judicial and congressional constitutional interpretation of state action.

This second route, however, hardly had a presence in the legislative history of Title II. The discussion would center predominantly around precedent and prognostication—what the Court had done and what the Court was likely to do in the near future. Ironically, at the very moment when the Court was willing to hand over interpretive authority to Congress on this crucial question of the scope of the state action doctrine of the Fourteenth Amendment, most members of Congress were eager to reassert the interpretive authority of the courts. In part, this deferential attitude can

---

[237] Letter from William J. Brennan to William O. Douglas (on file with Library of Congress, Manuscript Division, Papers of William O. Douglas, Box 1315).

[238] Circulations, *supra* note 209, at 4.

[239] *See, e.g.*, Katzenbach v. Morgan, 384 U.S. 641 (1966).

[240] *See supra* notes 233–34 and accompanying text.

[241] *See supra* note 236 and accompanying text.

be attributed to the fact that the Court's evolving position on this question was largely hidden from view, only to be partially revealed in the divided *Bell* opinion (which was handed down well after the Commerce Clause rationale for Title II had won the day in Congress). But it also had to do with the specific political dynamics surrounding the passage of the Civil Rights Act. And, more generally, it reflected challenges inherent in congressional constitutional interpretation. The following two sections explore these factors.

B. The Kennedy Administration and the Fourteenth Amendment

When the sit-ins first spread across the South in 1960, the possibility of a federal public accommodations law was, in the words of one observer, "so remote that a discussion of it [was] largely academic."[242] Not only was the constitutional foundation for such a law unclear, but the very idea of a federal nondiscrimination requirement in public accommodations was both highly controversial and, considering Southern control of the Senate, unlikely to pass. As late as February 1963, when President Kennedy called on Congress to pass comprehensive civil rights legislation, he referenced the need for federal intervention in the areas of voting rights and school desegregation, but his discussion of the problem of public accommodations discrimination, while describing the issue as one of constitutional dimension and of the highest moral importance, failed to identify much of a federal role in the issue.[243] After noting the ongoing efforts against discrimination in interstate transportation and on federal property, he concluded with a call for action by state and local government and private initiative.[244] It was not until the Birmingham campaign in the spring of 1963, when dramatic protests and mass jailings attracted national headlines and dominated nightly newscasts, that the Kennedy administration and Congress began to explore federal law as the ultimate solution to the public accommodations dilemma. "A new climate of national opinion was created on the streets of Birmingham," observed Alexander Bickel.[245] Ultimately, these pressures would help create the necessary national support that would result in the passage of the Civil Rights Act in the following year. Yet in the late spring of 1963, when the administration first introduced a major public accommodations bill, there was much urgency but not much optimism that the legislation would make it through the Senate.[246]

Top administration officials were divided over whether to even include a public accommodations provision when the Kennedy administration began drafting a new civil rights bill in May and June of 1963. Attorney General Robert Kennedy, along

---

[242] Earl Lawrence Carl, *Reflections on the "Sit-Ins,"* 46 CORNELL L.Q. 444, 455 (1961).

[243] John F. Kennedy, Special Message to the Congress on Civil Rights, 1963 PUB. PAPERS 221 (Feb. 28, 1963).

[244] *Id.* at 230.

[245] Alexander M. Bickel, *After a Civil Rights Act*, NEW REPUBLIC, May 9, 1964, at 11.

[246] *See* GRAHAM, *supra* note 26, at 76, 78–79.

with Nicholas Katzenbach, the Deputy Attorney General, and Burke Marshall, the Assistant Attorney General for the Civil Rights Division, favored addressing the issue, while several senior presidential aides opposed it as too risky.[247] The escalating crisis in Birmingham pressured the Kennedy administration to squarely address discrimination in public accommodations. Once the administration committed itself to what would become Title II, the debate turned to how to justify congressional power in this area.

Between May 1963 and the middle of the following fall, the constitutional basis for Title II was debated in Congress, the Justice Department, and the press. This was the critical period when the competing lines of arguments developed and, ultimately, when the Commerce Clause argument emerged as the primary basis for the law. By the time the House brought the bill to the floor in early 1964, the public accommodations bill was framed and generally understood to be based primarily on the commerce power, with the Section 5 power reserved as a secondary justification.[248] When the Senate debated the Civil Rights Act for eighty-one days in the spring of 1964, there was little dispute over the constitutional foundation for Title II.[249] The triumph of the Commerce Clause rationale was the product of a concerted campaign, led by constitutional lawyers in the Justice Department, academia and, eventually, by the Attorney General, who came to embrace this rationale with particular energy. They were motivated by a variety of concerns–constitutional principles and a concern with protecting the integrity of the federal judiciary, but also partisan politics and legislative tactics.

Initially, two factors favored the Fourteenth Amendment approach. First was the common sense factor: the Fourteenth Amendment was designed to deal with the legacy of slavery and racial inequality, the Commerce Clause was not. Advocates of Section 5 attacked the Commerce Clause rationale as involving something disingenuous, an avoidance of the basic issue—particularly when the Fourteenth Amendment seemed the more appropriate basis for such a law. As Senator John Sherman Cooper told the Senate Commerce Committee: "If there is a right to the equal use of accommodations held out to the public, it is a right of citizenship and a constitutional right under the 14th Amendment. It has nothing to do with whether a business is in interstate commerce."[250] "If a Federal ban on such businesses as stores, restaurants [etc.] is to be enacted, it should rest on the obviously most relevant source of national power,

---

[247] *Id.* at 76.

[248] Civil Rights Act of 1964, Pub. L. No. 88-352, § 201(b), 78 Stat. 241 (codified at 42 U.S.C. §2000a (2006)) ("Each of the following establishments which serves the public is a place of public accommodation within the meaning of this title if its operations affect commerce, or if discrimination or segregation by it is supported by State action . . . ."). Title II includes a broad definition of when the operations of an establishment "affect commerce," *id.* § 201(c), while adopting a traditional, narrow definition of when a discrimination by an establishment is "supported by State action," *id.* § 201(d).

[249] *See* MORGAN, *supra* note 25, at 295.

[250] E.W. Kenworthy, *Cooper Questions Rights Bill Basis*, N.Y. TIMES, July 4, 1963, at 38.

the 14th Amendment, rather than the tenuously related Commerce Clause," asserted Stanford Law professor Gerald Gunther in a letter to the Justice Department.[251] "The proposed end-run . . . not only reflects a questionable evaluation of the relative difficulties presented by the two constitutional provisions; but also, and more importantly, suggests an inclination toward disingenuousness, cynicism and trickery as to constitutional principles [by the] Law Department of the United States."[252] Some in the press agreed. While the Commerce Clause may be appropriate for "a river and harbor bill," when "logrolling and adjustment," were acceptable, the *Washington Post* lectured, it was not appropriate when "basic human rights are at issue."[253] To many, it simply made sense that such a foundational civil right would be handled under the constitutional equal protection provision. This was the provision on which school desegregation was based, and most civil rights supporters saw desegregation in public accommodations as a natural extension of the attack on segregated schools and other public facilities, such as parks and beaches.

The second factor that had the potential to bolster the case for the Fourteenth Amendment rationale was the partisan valence of the respective constitutional clauses. Democrats tended to be more enthusiastic about the commerce power, which harkened back to their party's achievements in the New Deal. The Kennedy administration pressed this rationale, in part, as a way to solidify support within its own party.[254] In contrast, Republicans were often less enthusiastic about the expansive scope of the modern commerce power. They were more likely to look to the Fourteenth Amendment, a legacy of the party of Lincoln. Republicans "had always resisted the broad application of the commerce clause to social and economic legislation," noted Joseph Rauh, vice-chairman of Americans for Democratic Action and a leading lobbyist for the legislation, recalling the party's constitutional resistance to FDR's New Deal legislation.[255] Furthermore, they "looked back with pride to the adoption of the Fourteenth Amendment by a Republican Congress."[256] It was this Republican identification with the Fourteenth Amendment that, in part, motivated the administration, early in the debate over the framing of Title II, to emphasize both constitutional bases for the law as a way to attract both Democratic and Republican support.[257]

---

[251] Arthur Krock, *When Justices and Law Professors Disagree*, N.Y. TIMES, July 16, 1963, at 30.

[252] *Id.*

[253] *"Practical" Rights Bill*, WASH. POST, July 10, 1963, at A16; *see also* Arthur Krock, *Rights Bill Strategy; Sidestepping of the 14th Amendment In Kennedy Proposal Examined*, N.Y. TIMES, June 30, 1963, at B9; Krock, *supra* note 251.

[254] *See* Joseph L. Rauh, Jr., *The Role of the Leadership Conference on Civil Rights in the Civil Rights Struggle of 1963–1964*, *in* THE CIVIL RIGHTS ACT OF 1964: THE PASSAGE OF THE LAW THAT ENDED RACIAL SEGREGATION 49, 57 (Robert D. Loevy ed., 1997).

[255] *Id.*; *see also* Anthony Lewis, *Kennedy Presses G.O.P. to Support Civil Rights Drive*, N.Y. TIMES, June 14, 1963, at 1, 18; Cabell Phillips, *Russell Charges Socialism in Bill*, N.Y. TIMES, Aug. 12, 1963, at 12.

[256] Rauh, *supra* note 254, at 57.

[257] GORMLEY, *supra* note 130, at 189.

During the early stages of the framing of Title II, it appeared that these factors would ensure the prominence of the Fourteenth Amendment basis. Both President Kennedy and Attorney General Kennedy initially assumed that the public accommodations law would be grounded in the Fourteenth Amendment.[258] Yet after a brief initial period of political assessment and legal research, administration support soon shifted toward the commerce power. The administration never abandoned Section 5 but, by the fall of 1963, it clearly regarded it as a secondary constitutional basis for congressional action.

The growing reliance on the Commerce Clause was the product of a number of factors. For one, the most basic pragmatic considerations of legislative strategy played a role. The Senate Commerce Committee was a far friendlier place in which to discuss the proposed legislation than the Senate Judiciary Committee, which was chaired by arch-segregationist James Eastland of Mississippi and was known as the "graveyard of civil rights legislation."[259] Senator Warren Magnuson of Washington, a supporter of the civil rights bill, chaired the predominantly liberal Commerce Committee.[260] (In the House there was no such concern: the House Judiciary Committee was chaired by Emanuel Celler, a strong civil rights proponent).[261] So framing the legislation as a regulation of interstate commerce justified sending it directly to the Commerce Committee, thereby avoiding Eastland's committee.

But these legislative obstacles had a limited effect on the ultimate outcome of the constitutional debate. The gradual but steady undermining of the Kennedy brothers' initial assumption that the law would derive from the Fourteenth Amendment started with discussions with legal experts in the Justice Department and in academia. Burke Marshall, in a May 20, 1963, memorandum outlining the upcoming legislative battle over federal civil rights legislation and urging reliance on the Commerce Clause, emphasized that the *Civil Rights Cases* were still good law and predicted that the Supreme Court was going to reject the raising of the Fourteenth Amendment claim in the pending sit-in cases.[262] Solicitor General Cox had been struggling with the state action doctrine in his arguments before the Supreme Court in the sit-in cases, attempting to balance the administration's official posture of opposition to racially discriminatory practices with his instinctively cautious approach to the development of constitutional doctrine.[263] As the administration's public accommodations law took shape, Cox urged deference to existing Court doctrine. He feared that pushing the Court to expand the state action doctrine was unwise as constitutional doctrine and

---

[258] *See id.* at 156.

[259] WHALEN & WHALEN, *supra* note 27, at 4.

[260] GRAHAM, *supra* note 26, at 90.

[261] *Id.* at 89.

[262] Burke Marshall, *Legislative Possibilities*, May 20, 1963, *in* 13 SECURING THE ENACTMENT OF CIVIL RIGHTS LEGISLATION: CIVIL RIGHTS ACT OF 1964, at 26–27 (Michal R. Belknap ed., 1991) [hereinafter SECURING THE ENACTMENT].

[263] GORMLEY, *supra* note 130, at 156–59; *see also* VICTOR S. NAVASKY, KENNEDY JUSTICE 280–81 (1971).

that it would threaten the legitimacy of the federal judiciary.[264] As he recalled, "here my philosophy about the role of judges and the prestige of the Court, the legitimacy of the Court's decisions, did play an important part."[265] Cox, a specialist in labor law, was confident that the commerce power was fully adequate for the new law.[266] He could easily make this case before the Court, and he was confident they would have no trouble upholding such a law on Commerce Clause grounds.[267]

The administration's position was also strongly influenced by the recommendations of Harvard Law School professor Paul A. Freund, a regular legal adviser to the Kennedy administration. Freund's crucial contribution was to frame the Commerce Clause approach as more limited than the Fourteenth Amendment approach. "[A]ny decision overruling the *Civil Rights Cases* has implications for judicial power and duty that transcend the immediate controversy," he warned in a brief submitted to the Senate Commerce Committee, expressing a concern for protecting the Court similar to Cox's.[268] The Commerce Clause "is primarily a grant of legislative power to Congress, which can be exercised in large or small measure, flexibly, pragmatically, tentatively, progressively, while guaranteed rights, if they are declared to be conferred by the Constitution, are not to be granted or withheld in fragments."[269] Freund's critical assumption here was that the coverage of Section 1 and Section 5 was coterminous: "[I]t is necessary to arrive at some conception of the range of rights which an overruling of the *Civil Rights Cases* would create for the courts and the Congress to enforce."[270]

But later in his brief Freund referenced the idea of decoupling congressional power under Section 5 from the judicial definition of the substantive right in Section 1. He suggested that Section 5 might be treated in a way analogous to the Commerce Clause: as a general grant of legislative power, the scope of which would be largely defined by the policy evaluation of the Congress, taking heed of both constitutional principle and the pragmatic application of federal policy.[271]

> If the Court is to be persuaded to overrule the *Civil Rights Cases*, the most effective approach would be to emphasize the power conferred by section 5 of the amendment on Congress, and to draw as wide a gap as possible between this and the self-executing, judicially enforced prohibitions of section 1.[272]

---

[264] GORMLEY, *supra* note 130, at 156–59.

[265] *Id.* at 189.

[266] *Id.*

[267] *Id.*

[268] *A Bill to Eliminate Discrimination in Public Accommodations Affecting Interstate Commerce: Hearing on S. 1732 Before the S. Commerce Comm.*, 88th Cong., 1183, 1187 (1963) [hereinafter *Hearings*] (brief of Professor Paul A. Freund).

[269] *Id.*

[270] *Id.*

[271] *Id.* at 1189.

[272] *Id.*

Yet this approach also posed potential risks for the Court, Freund warned. For pursuing this path would make "the responsibility on Congress . . . all the greater to think through the implications of its action for constitutional claims that are not precisely those recognized in the bill but in principle may be comparable."[273] Freund's tentative suggestion on this point was never picked up by the bill's Justice Department advocates. But his larger argument—that the Commerce Clause was not only the stronger foundation for Title II, but also the more desirable for its pragmatic and readily delineated qualities—was.

These influential opinions helped move Attorney General Kennedy to become a powerful advocate in the congressional debates for basing Title II predominantly on the Commerce Clause. But his acceptance of the Commerce Clause rationale stemmed more from pragmatic concerns than constitutional analysis. Upon introduction of the bill, the official administration position was that both the Fourteenth Amendment and commerce power would be relied upon. President Kennedy, in his June 19 message to Congress calling for passage of the sweeping civil rights bill, highlighted both constitutional bases for Title II.[274] The Attorney General made the same point in his presentations to congressional committees.[275] As the Title II debate evolved, Robert Kennedy would continue to assert his personal opinion the Section 5 basis was sufficient, and would be upheld in the Supreme Court, yet he would increasingly emphasize that the administration stood squarely behind the Commerce Clause and that Section 5 was best treated as a secondary justification.[276] He repeatedly asserted not only that the Supreme Court would have little trouble approving of the constitutionality of Title II under the Commerce Clause.[277] Furthermore, picking up Freund's critical contribution to the discussion, he argued that the Commerce Clause framework added desirable constraint on to the scope of the law.[278] In his appeal to moderates in Congress, Kennedy emphasized this limiting argument as a major selling point for the Commerce Clause.[279] In the end, the Kennedy administration's constitutional arguments, shaped by the Attorney General's strategic concerns, proved persuasive in Congress.

C. The Fourteenth Amendment in Congress

The most committed proponents of resting Title II squarely on the Fourteenth Amendment's enforcement power came from an eclectic group of strong civil rights

---

[273] *Id.*

[274] *See, e.g.*, John F. Kennedy, Special Message to the Congress on Civil Rights and Job Opportunities, 1963 PUB. PAPERS 483, 485–86 (June 19, 1963).

[275] *Hearings*, *supra* note 268, at 23.

[276] *Id.* at 26, 28, 74, 78.

[277] *Id.* at 23, 73.

[278] *Id.* at 57–60, 74.

[279] *Id.*

liberals in Congress. On May 8, prior to the administration drafting its own bill, House Judiciary chairman Emanuel Celler, Democrat from New York and an early proponent of civil rights legislation, started hearings on public accommodations legislation, with discussion focused primarily on congressional power under Section 5.[280] On May 23, 1963, the day after President Kennedy announced at a news conference that he was considering broader civil rights legislation,[281] Senators John Sherman Cooper, Republican from Kentucky, and Thomas J. Dodd, Democrat from Connecticut, introduced legislation that would rely on Section 5 rather than the commerce power and would have broad application, covering all businesses that operated under state or local licensing.[282] Then, in early June, John Lindsay, a leader of civil rights supporters among Republican House members, introduced a civil rights bill that included a public accommodations provision based on the Fourteenth Amendment.[283] Lindsay and other liberal Republican supporters of civil rights reform argued that the appropriate basis for the law was the Fourteenth Amendment.[284] They also argued, in a direct reversal of the argument Freund would press on the Justice Department, that resting a public accommodations law on Section 5 offered more limited coverage for the law than a Commerce Clause justification.[285]

The debate between the dueling rationales for Title II came to a head in the fall of 1963, when liberal House members sought to expand Title II's coverage under a Section 5 rationale. In September 1963, in the midst of the outcry over the Birmingham church bombing that killed four African American children, Robert W. Kastenmeier, a Democratic congressman from Wisconsin, proposed a bold extension of Title II.[286] His version drew on Section 5 to cover not only public accommodations but also private schools, law firms, and medical associations, with the requisite state action located in the licensing of these businesses.[287] In the process of defending his proposal, Kastenmeier denounced the strategic nature of the administration's bill, which prohibited discrimination in restaurants and hotels while allowing it in "barber shops, beauty parlors, many other places of recreation and participation sports, unless such

---

[280] *See* MORGAN, *supra* note 25, at 299.

[281] John F. Kennedy, The President's News Conference, 1963 PUB. PAPERS 418, 423 (May 22, 1963).

[282] *2 Senators Propose Desegregation Bill*, N.Y. TIMES, May 23, 1963, at 21.

[283] GRAHAM, *supra* note 26, at 88–89.

[284] *Id.* at 89.

[285] *See Hearings*, *supra* note 268, at 66–70; MORGAN, *supra* note 25, at 299–300. On the question of which of the two options would give the more expansive coverage, Erwin Griswold, Dean of Harvard Law School, responded: "I think both of them are strong and embracing. I think that the commerce clause reaches a little further in some ways. I think the 14th amendment reaches a little further in other ways." *Hearings*, *supra* note 268, at 776 (remarks of Erwin Griswold). Amidst the frequent posturing, positioning, and hyperbole that characterized the congressional debate over the constitutional basis for Title II, Griswold's response, almost anticlimactic in its common sense simplicity, was exceptional.

[286] WHALEN & WHALEN, *supra* note 27, at 34–35.

[287] *Id.* at 34–37.

places serve food."[288] Kastenmeier's bill posed a serious threat to the administration's effort to carefully orchestrate the drafting of the civil rights legislation. Celler supported it, believing that bringing a stronger bill out of committee would create a better bargaining position, and the inevitable compromises that would be needed to pass the bill would still result in a strong civil rights law.[289]

Fearing such an expansion would sink the bill, the administration launched a counter-campaign, the centerpiece of which was the case for the Commerce Clause as the basis for Title II, particularly what they argued would be the limiting effect this approach would have on the bill's coverage. In October 1963, Robert Kennedy again testified before the House Judiciary Committee and then gave a press conference where he criticized efforts to expand Title II's coverage.[290] The proposed expansion would bring under the ambit of the law "all kinds of businesses . . . private hospitals, and private schools, and every kind of business conceivable, lawyers, doctors, and everything. I think that is dangerous."[291] He then made the connection between this complication and the constitutional basis for the law—a connection that would become the centerpiece of the administration's position.

> If a private businessman has a company and he has some employees, and you pass Title II, and he wants to fire some of his employees, under the Fourteenth Amendment he has been an instrument of the State, as this was passed, and he has been made an instrument of the State, and is the employee entitled to due process? What if he promotes somebody? Does he have the right to due process? What if the religious school wants to read the Bible? The Bible cases were brought under the Fourteenth Amendment. Does he have power and authority and the right to do all of that?[292]

Burke Marshall then added that the reliance on the Fourteenth Amendment "is not simply an expansion of" the administration proposal, but "an entirely new concept of the Constitutional reach of the Department of Justice in Federal powers."[293] At this point Kennedy declared: "It is more power than I want, and more power than anybody should have, in my judgment, under our system of government."[294]

---

[288] H.R. REP. No. 88-914, at 39–42 (1963); Additional Majority Views of Hon. Robert W. Kastenmeier, *reprinted in* THE CIVIL RIGHTS ACT OF 1964: TEXT, ANALYSIS, LEGISLATIVE HISTORY 174 (1964).

[289] WHALEN & WHALEN, *supra* note 27, at 37.

[290] Press Conference of Attorney General Robert F. Kennedy (Oct. 15, 1963), *in* 13 SECURING THE ENACTMENT, *supra* note 262, at 88.

[291] *Id.*

[292] *Id.*

[293] *Id.* at 90.

[294] *Id.*

Following the press conference, the Attorney General wrote a memorandum to the President in which he suggested that the sweeping coverage pressed by the Fourteenth Amendment advocates "is probably unconstitutional and in any event brings under federal control for some purposes such business establishments as lawyers' offices, doctors' offices, and other licensed establishments. It should be deleted."[295] Title II, he emphasized, should focus on hotels, theaters, places of amusement, places that serve food, and gas stations.[296] Reliance on the Fourteenth Amendment was appropriate only where there was unquestionable state action, such as in application to places in which state law required segregation.[297] The Attorney General had strategically abandoned the faith he had displayed earlier toward the Fourteenth Amendment (and toward the Supreme Court's willingness to accept this approach). His letter to the President showed him revising his constitutional interpretation to align with his legislative strategy.

The administration was successful in its campaign to fight the expanded version of Title II by highlighting the limiting role of the Commerce Clause. Robert Kennedy and the Justice Department worked with Celler and William McCulloch, the senior Republican on the House Judiciary Committee, to find an acceptable middle ground—one that would address the reservations of congressional moderates while maintaining the protections necessary for effective civil rights reform. The Commerce Clause rationale for Title II, framed by the administration as the less far-reaching approach, became a central tool for attracting these moderates. The alternative Section 5-based bill was soon abandoned, and by the end of 1963, supporters of the bill set their stock predominantly on the Commerce Clause rationale,[298] with Section 5 remaining to cover any facilities affected by official state segregation policy and also as a secondary rationale for other public accommodations.[299]

By the opening of 1964, with the constitutional basis of Title II largely settled, the debate turned toward getting the bill through Congress. The House passed the omnibus civil rights bill, including Title II, on February 10, 1964, in a vote of 290–130.[300] After a lengthy filibuster, the Senate did the same on June 19, in a vote of 73-27.[301] With President Johnson's signature, the Civil Rights Act of 1964 became law on July 2.[302]

---

[295] Memorandum for the President from the Attorney General (Oct. 23, 1963), *in* 13 SECURING THE ENACTMENT, *supra* note 262, at 97.

[296] *Id.*

[297] *Id.*

[298] MORGAN, *supra* note 25, at 327.

[299] Title II applies to a public accommodation "if its operations affect commerce, or if discrimination or segregation by it is supported by State action." 42 U.S.C. § 2000a(b) (2006).

[300] WHALEN & WHALEN, *supra* note 27, at 121.

[301] *Id.* at 215.

[302] *Id.* at 228.

D. Title II in the Supreme Court

The constitutionality of Title II was immediately challenged, and before the year ended, the Supreme Court upheld it as a legitimate exercise of the commerce power.[303] The Court reserved the question, however, of the validity of Section 5 of the Fourteenth Amendment as a basis for the law. While recognizing that the legislative history drew on both rationales,[304] the Court found it unnecessary to evaluate the Section 5 claim. "This is not to say that the remaining authority upon which it acted was not adequate, a question upon which we do not pass, but merely that since the commerce power is sufficient for our decision here we have considered it alone."[305]

One factor discouraging a square ruling on Section 5 was the forceful arguments of Solicitor General Cox, who, in defending the constitutionality of Title II before the Court, urged the Justices to ignore the Fourteenth Amendment.[306] In his brief Cox wrote:

> [T]he government has proceeded throughout this litigation upon the theory that the constitutionality of Title II, as applied to appellant, may be sustained under the commerce clause without reference to the additional power conferred by Section 5 of the Fourteenth Amendment. We stake our case here upon the same theory. The decision in the *Civil Rights Cases* . . . is therefore irrelevant.[307]

When discussion turned to Section 5 during oral arguments, an exasperated Justice Harlan interjected: "[I]t is perfectly clear that the Government . . . is arguing only that the Act is constitutional and is arguing the constitutional commerce clause power. That's all we've got. This other argument may be interesting, but it isn't germane to this lawsuit."[308] In oral arguments Cox reiterated the government's intention to rest

---

[303] Katzenbach v. McClung, 379 U.S. 294, 299 (1964) (finding Title II applies to establishments serving food when a substantial portion of that food has crossed state lines); Heart of Atlanta Motel v. United States, 379 U.S. 241, 253–58 (1964) (holding Title II to be a proper exercise of the commerce power when applied to a public accommodation serving interstate travelers).

[304] *Heart of Atlanta*, 379 U.S. at 249.

[305] *Id.* at 250.

[306] Brief for Appellees at 15, *Heart of Atlanta*, 379 U.S. 241(No. 515).

[307] *Id. But see also id.* at 16 n.11 ("We also wish to point out that in stressing the commerce power in the instant brief—a power which we believe to be clearly and completely dispositive of the case—we imply no suggestion that the Act may not be sustained as an exercise of the power conferred by Section 5 of the Fourteenth Amendment.").

[308] Transcript of Oral Argument, *Heart of Atlanta*, 379 U.S. 241 (No. 515), *reprinted in* 60 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 552 (Philip B. Kurland & Gerhard Casper eds., 1975) [hereinafter *Heart of Atlanta* Oral Argument].

exclusively on the commerce power that he had outlined in his brief.[309] The problem of public accommodations discrimination is "a commercial problem of grave national significance," he told the Court.[310] Even when Justice Goldberg suggested that it was also a moral problem, Cox continued to present the law as concerned primarily with the effects on interstate commerce that resulted from public accommodations discrimination and the resulting protests.[311] When Goldberg asked whether the Justices could still consider the Section 5 basis for the law, Cox allowed that they could but reiterated that this path was unnecessary.[312]

Cox's case proved persuasive with the Justices. "We should not concern ourselves with the Fourteenth Amendment," Warren stated in the Justices' conference.[313] Black told his colleagues, "I would prefer to go on the Fourteenth Amendment, but I think that Congress limited the act to the commerce clause. Otherwise, I would be for overruling the *Civil Rights Cases*."[314] Most surprisingly, considering his later attacks on his colleagues' efforts to recognize a Section 5 power than went beyond Section 1 limitations defined by the Court, Harlan rejected the Fourteenth Amendment basis for Title II, but did so in a way that distinguished between the congressional adoption of the Court's state action standard and a congressional effort to define the standard for itself. Harlan told the Justices in conference discussions on *Heart of Atlanta* and *McClung* that Congress did not take upon itself an independent definition of state action; rather, "Congress, by use of 'state action,' has adopted the *Civil Rights Cases* and has used it in the judicial sense of the term."[315] It was, Harlan argued, because the legislation accepted the traditional state action definition that the Fourteenth Amendment alone was not a sufficient basis for Title II.[316] Here Harlan was elaborating on a point he made during oral arguments, when he noted:

> [T]he Civil War amendments . . . provided that the Federal power to deal with local state action with reference to discrimination is limited to discrimination that is applied to state action; and, for whatever it is worth, Congress in this bill seems to have accepted that view of the *Civil Rights Cases* in the judicial construction that is put on state action by the courts.[317]

These comments suggested the possibility that Congress held some interpretive authority under Section 5, but that it had not chosen to exercise it in passing Title II.

---

[309] *Id.* at 561.
[310] *Id.*
[311] *Id.* at 561–62.
[312] *Id.* at 563.
[313] IN CONFERENCE, *supra* note 138, at 726.
[314] *Id.* at 727.
[315] *Id.*
[316] *See id.*
[317] *Heart of Atlanta* Oral Argument, *supra* note 308, at 573.

Brennan agreed, noting in conference discussion that in Congress "the 'state action' definition followed the *Civil Rights Cases*, and that these cases must go on the commerce clause."[318]

Only Douglas and Goldberg insisted that the Section 5 issue needed to be faced. "The legislative history shows confusion on the Fourteenth Amendment issue," Goldberg noted.[319] "It utilized §5 as they thought §5 might be read, no matter how broadly."[320] In other words, Goldberg seemed to understand Congress as having relied on the Court's definition of state action, rather than making its own definition. Justices Douglas and Goldberg found authority for the new law in both the Commerce Clause and Section 5 of the Fourteenth Amendment.[321] In his *Heart of Atlanta* concurrence, Black emphasized that his *Bell* dissent did not pass judgment on the scope of Section 5 power, and that he agreed with the opinion of the Court that this question should not be faced in these cases.[322]

E. Legislative Constitutionalism in the Shadow of the Supreme Court

In some ways, the historical context surrounding the framing of Title II seemed particularly auspicious for a strong assertion of congressional interpretive authority on the scope of the Fourteenth Amendment. Especially relevant was the Court's eagerness for the legislative branch to share responsibility in dealing with public accommodations discrimination; most, perhaps all, of the Justices were willing to recognize congressional interpretive latitude under Section 5 on the state action question.[323] Yet even under these circumstances, the Title II debate in Congress never escaped the shadow of judicial doctrine. Even the boldest assertions of the role of Congress in helping to define the meaning of the Fourteenth Amendment were framed as more of a petition to the Court than a constitutional interpretation with independent validity.[324]

---

[318] IN CONFERENCE, *supra* note 138, at 728.

[319] *Id.* at 728.

[320] *Id.*

[321] Heart of Atlanta Motel v. United States, 379 U.S. 241, 286–91 (Douglas, J., concurring); *id.* at 291–93 (Goldberg, J., concurring).

[322] *Id.* at 278–79 (Black, J., concurring). In subsequent cases Black reiterated his belief in judicial deference to congressional authority to enforce the Reconstruction Amendments. *See* Harper v. Va. Bd. of Elections, 383 U.S. 663, 678–79 (1966) (Black, J., dissenting); South Carolina v. Katzenbach, 383 U.S. 301, 355 (1966) (Black, J., concurring and dissenting). According to Justice Brennan's account, Black declined Chief Justice Warren's invitation to write the opinion of the Court in *Katzenbach v. Morgan*, "stating that his views as to the far-reaching scope of §5 power would not obtain the support of the majority." William J. Brennan, Opinions xxxiv (October Term 1965) (memorandum prepared by Justice Brennan and law clerks) (on file with Library of Congress, Papers of William J. Brennan, Box II:6, Folder 8).

[323] *See supra* Part III.A.

[324] The Title II debate provides a powerful case study of the phenomenon Mark Tushnet has termed "judicial overhang" of congressional constitutional deliberation. MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS 57–65 (1999). For alternative accounts

The inability of Congress to put forth a stronger claim under Section 5 for interpretative authority of the Constitution has several explanations. First, this was a difficult time for any challenge to judicial interpretive supremacy on behalf of civil rights. The Title II debate took place in the shadow not only of judicial doctrine but of massive resistance. For this reason it is perhaps not surprising that the strongest claims for independent interpretive authority came from segregationist and conservative opponents of the legislation. Those who stood opposed to the law recognized they were fighting an unpopular and likely losing battle. On the basic policy question—the need for an antidiscrimination policy in public accommodations—they had pretty much lost the fight before debate began. The sit-ins, although controversial as a tactic for reform, represented a cause that by the early 1960s was widely recognized as just. Thus, opponents put their hopes in the Constitution. They made pleas for Congress to embrace its responsibility as guardians of the federal system and reject Title II because it violated constitutional principles of states' rights. They put a good deal of energy in the long-shot argument that Title II violated some constitutional liberty protection of property owners. These arguments faired somewhat better in the halls of Congress, where they were at least given ample airtime, than in the courts, where they were summarily dismissed.[325] Because they were such a stretch from a doctrinal perspective, they necessitated a posture of interpretive independence from the courts in making them. The few times in which members of Congress spoke of constitutional text and principles without direct reference to Supreme Court doctrine were in these passionate, if tendentious, arguments that a federal requirement of nondiscriminatory access to stores, restaurants, and hotels violated basic principles of federalism or individual property and privacy rights.[326]

TAKING THE CONSTITUTION AWAY FROM THE COURTS 57–65 (1999). For alternative accounts that see the Title II debate as an example of relatively independent legislative constitutionalism, see MORGAN, *supra* note 25, at 324–30; Louis Fisher, *Constitutional Interpretation by Members of Congress*, 63 N.C. L. REV. 707, 744 (1985); Goldstein, *supra* note 26; *see also* Robert C. Post & Reva B. Siegel, *Protecting the Constitution from the People: Juricentric Restrictions on Section Five Power*, 78 IND. L.J. 1, 3 (2003) (describing civil rights legislation of the 1960s as establishing "the possibility of a lively and consequential dialogue between the Court's legal interpretation of the Constitution and the constitutional ideals democratically embraced by the nation").

[325] *See, e.g.*, *Heart of Atlanta*, 379 U.S. at 261; *see also* 2 STATUTORY HISTORY OF THE UNITED STATES: CIVIL RIGHTS 1121, 1129, 1304 (Bernard Schwartz ed., 1970) [hereinafter STATUTORY HISTORY]; Post & Siegel, *supra* note 26, at 492 n.241.

[326] See, for example, Senator Goldwater's June 18, 1964 statement opposing the Civil Rights Act. He opened: "There have been few, if any, occasions when the searching of my conscience and the re-examination of my views of our constitutional system have played a greater part in the determination of my vote than they have on this occasion." He went on to warn of the dangers of a Congress that "ignore[s] the Constitution and the fundamental concepts of our governmental system" and to attack Titles II and VII of the bill, in general terms, as going beyond congressional regulatory power and infringing on powers reserved to the states. *Text of Goldwater Speech on Rights*, *reprinted in* N.Y. TIMES, June 19, 1964, at 18; *see also* MORGAN, *supra* note 25, at 326–27.

Yet more often than not, segregationists joined their opponents in resting their constitutional arguments on the authority of the Supreme Court. This was particularly ironic, considering the segregationists' defiant attitude toward the Court in an era of massive resistance. Although the Court had proved itself anything but a friend of the segregationist South in recent years, some saw promise in the Court's unwillingness to take on the constitutional issue at the heart of the sit-in cases.[327] Simply being able to cite the long-lasting precedent of the *Civil Rights Cases* gave some legitimacy to their failing claims. Thus, the debate over the constitutional foundation of Title II was remarkably free of challenges to judicial authority,[328] even by those who in recent years had enthusiastically denounced the Court as being under control of radicals and Communists.

To counter this argument that the *Civil Rights Cases* still controlled, supporters of the civil rights bill were not about to challenge the authority of the Court. In an era of massive resistance to school desegregation, the Southern Manifesto, and the Supreme Court's sweeping declaration of interpretive supremacy over the Constitution in *Cooper v. Aaron* (1958),[329] the authority of the Court was all but synonymous with the cause of racial justice.[330] Rather than directly challenging the validity of the *Civil Rights Cases* or the state action doctrine, Title II supporters had two possible paths. They could argue that the Court—and the nation—had changed significantly since the nineteenth century so that the Court was likely to reconsider its holding in the *Civil Rights Cases*.[331] For example, Senator Paul Douglas of Illinois, framed his support for the legislation in the following terms: "We are not overruling the Court. We are giving the Court the opportunity to reverse itself in accordance with changing views of the very meaning of the 14th amendment and of the commerce clause."[332] Or they could take the other path, which by the fall of 1963 had become the default option: look to the Commerce Clause as the basis for the public accommodations bill.[333]

In the debate over Title II, it proved a rare moment when a member of Congress claimed to be acting on a direct relationship with the Constitution, as opposed to

---

[327] In a survey of members of the 86th Congress in 1959, Morgan found among Southern congressmen overwhelming disapproval (94%) of the statement that Congress should generally "pass constitutional questions along to the court rather than form its own considered judgment on them." In Congress as a whole, disapproval was 73%. MORGAN, *supra* note 25, at 336. A more nuanced version of the question revealed even greater regional variation, with a clearer margin of increased support for an independent interpretative posture coming from Southern members of Congress. *Id.* at 373–74.

[328] *See id.* at 324–25.

[329] 358 U.S. 1 (1958).

[330] MORGAN, *supra* note 25, at 297.

[331] *See, e.g.*, S. REP. NO. 88-872, at 23 (1963) (remarks of Attorney General Kennedy); *Id.* at 12; 2 STATUTORY HISTORY, *supra* note 325, at 1295–96 (remarks of Senator Kennedy); *see also* Post & Siegel, *supra* note 26, at 447 n.22.

[332] 110 CONG. REC. 13, 923 (1964).

[333] *See supra* Parts III.B and III.C.

viewing it predominantly through the lens of Supreme Court doctrine. In the end, Congress, in adopting a general attitude of deference to judicial interpretative finality, passed up an opportunity to directly assert a Section 5 power that a majority of the Court seemed willing to grant. Congress denied itself an opportunity to join rather than follow the Supreme Court in the project of interpreting the Constitution.

CONCLUSION

The survival of the state action doctrine, in roughly its traditional form, had relatively little direct consequences for the fates of the sit-in protesters or their demand for racially nondiscriminatory access to public accommodations. Although the constitutional challenge to the state action doctrine failed, the sit-ins, on the terms that were most important to the protesters themselves, were a stunning success. Indeed, the essential resolution of the public accommodations issue must be judged as one of the greatest achievements of the civil rights movement. What was one of the most controversial civil rights issues of the day became, by the end of the 1960s, a broadly accepted norm of conduct for the nation. The readiness with which Title II, the most contentious part of the Civil Rights Act of 1964 at the time of its passage, was implemented surprised many.[334] Title II became, in remarkably short order, an accepted part of federal civil rights law, with nothing like the ongoing debates that have marked struggles to desegregate education or rid the workplace of racial discrimination.

Ultimately, the federal government responded to the problem of private racial discrimination primarily through various statutory remedies, with the Fourteenth Amendment playing only a supporting role. In addition to Title II, Congress passed major civil rights legislation targeted at discrimination in employment (Title VII of the Civil Rights Act of 1964),[335] and housing (Civil Rights Act of 1968).[336] Beginning in 1968, the Supreme Court revitalized the Civil Rights Act of 1866 as the basis for a sweeping federal remedy against discrimination in making contracts and transferring property in the private sphere. The Court held that the modern descendants of the 1866 Act—42 U.S.C. §1981 and §1982—drew in part on the authority of the enforcement clause of the Thirteenth Amendment, which has no state action requirement.[337] As a result of the civil rights movement, protection against overt racial

---

[334] The implementation of Title II exceeded most expectations from the start. *See, e.g.*, Alexander M. Bickel, *What Has Been Done Is Prologue: Carrying Out the Civil Rights Act*, NEW REPUBLIC, Jan. 9, 1965, at 16–17; John Herbers, *Whites Say Compliance Has Been Achieved With Little Strife*, N.Y. TIMES, Jan. 24, 1965, at 1; Peter Millones, *Negroes in South Test Rights Act; Resistance Light*, N.Y. TIMES, July 4, 1964, at 1. *But see also* Joseph William Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 NW. U. L. REV. 1283 (1996) (describing lingering gaps in public accommodations protections).

[335] 42 U.S.C. § 2000e (2006).

[336] 42 U.S.C. §§ 3601–3639 (2006).

[337] *See* Runyon v. McCrary, 427 U.S. 160 (1976); Johnson v. Ry. Express Agency, Inc., 421 U.S. 454 (1975); Sullivan v. Little Hunting Park, Inc., 396 U.S. 229 (1969); Jones v. Alfred H.

discrimination in certain spheres of private life has come to be recognized as a basic right of American citizenship, and federal civil rights law has reflected this new social norm.

With Congress accepting responsibility to protect individuals against certain forms of private discrimination, the dynamic of discussion on the state action doctrine shifted. If not for federal legislative action, it is hard to imagine the Supreme Court continuing to refuse to use the Fourteenth Amendment as the basis for challenging segregated restaurants and hotels. Whether such a holding would have been used as an opportunity for a fundamental reconsideration of the state action doctrine is another issue. As it was, after the sit-in cases and Title II had been played out, the Court had additional opportunities to revisit the state action requirement in the context of private racial discrimination, yet the majority of the Court continued to accept the basic functioning of the state action doctrine.[338] For most constitutional claims where state involvement is non-obvious, the decision to identify or not to identify state action continues to function as the critical threshold question.

The resilience of state action during the civil rights era highlights a contradiction at the heart of the doctrine when considered as a socio-legal phenomenon. Since judicial conceptions of state action have historically tracked shifting extrajudicial norms of social justice and government responsibility, the very concept is unsustainable without baseline assumptions about the proper role of government in regulating private action.[339] When a nominally private action becomes so offensive to prevailing conceptions of right and wrong, the courts are more likely to identify some form of state responsibility or involvement in that private action. Yet the evolving social norms behind the shifting limits of state action have another consequence, which can work to remove pressure on the courts to expand state action. Legislatures also respond to the emergence of a new social consensus. In the 1960s the Court's confrontation with state action took place in parallel with a dramatic expansion of public accommodation legislation, on the local, state, and federal levels. These developments ultimately relieved demands on the Court to respond through revisiting the limits of state action. The expansion of state action is therefore often in a race of sorts with the spread of statutory remedies—a race the courts have generally been happy to concede.[340]

Mayer Co., 392 U.S. 409 (1968). Prior to 1968, the courts had read a state action limitation into the statutory descendants of the Civil Rights Act of 1866, effectively making the coverage of § 1981 and § 1982 coterminous with the Equal Protection Clause. *See* George Rutherglen, *The Improbable History of Section 1981: Clio Still Bemused and Confused*, 2003 SUP. CT. REV. 303, 322–30.

[338] *See, e.g.*, Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972); Reitman v. Mulkey, 387 U.S. 369 (1967); Evans v. Newton, 382 U.S. 296 (1966). In the post-civil rights movement era, the most significant state action cases involved procedural due process claims. *See, e.g.*, Flagg Bros. v. Brooks, 436 U.S. 149 (1978); Jackson v. Metro. Edison Co., 419 U.S. 345 (1974).

[339] *See* Post & Siegel, *supra* note 26, at 513.

[340] *Cf.* Tushnet, *supra* note 87, at 404–06 (suggesting ways in which the state action doctrine can serve to protect majoritarian decision-making).

But here is the tension at the heart of the state action doctrine. Definitions of state action depend on basic assumptions about government responsibility—about, in essence, the expected, normal functioning of government. A critical point at which this can be measured is the existence of positive law relating to the issue. Thus, the prevalence of public accommodations law is a central way in which a court can assert that government has or should have a general responsibility to protect against discrimination in public accommodations.[341] But at the same time, public accommodations laws offer the courts a reason to avoid the difficult state action issue. Hence the ultimate non-resolution of the constitutional claim of the sit-in protesters. The most dramatic shifts in state action doctrine occur when social norms shift without concurrent shifts in statutory remedies.[342] Between 1960 and 1963 it appeared a similar dynamic would result in another, perhaps more fundamental, shift in state action doctrine. This Article has sought to explain the reasons this did not come to pass.

Despite the achievements of the sit-ins and the civil rights movement in creating new expectations of government responsibility to protect against private discrimination, the resilience of the state action doctrine has had more readily identified consequences in terms of constitutional law. Many in the early 1960s considered the sit-ins a fundamental challenge to existing constitutional interpretation. The sit-ins presented the "most crucial" legal issue since *Brown*, one law professor argued, the resolution of which "may have more far-reaching implications and greater consequences than even the *School Segregation Cases*."[343] Justice Goldberg, in a private conference of the Justices in late 1963, declared the sit-in cases presented "the most serious problem before the Court in recent years."[344] "No question preoccupies the country more than this one," Justice William O. Douglas wrote in *Bell*.[345] The problem of state action, Charles Black wrote in 1967, "is the most important problem in American law. We cannot think about it too much; we ought to talk about it until we settle on a view both conceptually and functionally right."[346]

Neither the Supreme Court nor Congress has ever offered much to clarify what Professor Black labeled the "conceptual disaster area"[347] of state action doctrine. If

---

[341] In the sit-in cases, those who supported the protesters' constitutional claim often emphasized the prevalence of state and local public accommodations laws. *See, e.g.*, Bell v. Maryland, 378 U.S. 226, 284 (1964) (Douglas, J., concurring) (appendix listing state public accommodations laws); Clark, *supra* note 95, at 7–8 (noting state and local public accommodation laws).

[342] This describes the background for the white primary and restrictive covenant decisions of the 1940s.

[343] Lewis, *supra* note 24, at 101; *see also* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 179 (1962) (the sit-ins present "a momentous constitutional issue"); Paulsen, *supra* note 24, at 137 (the state action issue is "one of this nation's most troublesome constitutional questions").

[344] IN CONFERENCE, *supra* note 138, at 721.

[345] *Bell*, 378 U.S. at 244 (Douglas, J., concurring).

[346] Black, *supra* note 56, at 70.

[347] *Id.* at 95.

anything, the challenges of the civil rights era only brought to the foreground the basic instability of the idea of state action and the stark public-private divide upon which it relies. Yet intense interest in the subject would sharply decline in the decades following the 1960s,[348] as both Congress and the Court turned to other legal bases for the most ambitious forays into the sphere of private discriminatory conduct. Today most scholars agree that the state action doctrine hardly constitutes the proudest pages of the American constitutional tradition.[349] Although constitutional law is filled with anachronisms and conceptually confused doctrines, state action stands out. The history of the sit-in cases and the Title II debate help explain why this is so. When the Court and Congress had the opportunity to reconsider the state action doctrine, to make it more responsive to the demands of the civil rights era, neither institution was willing to do so. As a result, one of the most important questions of American constitutionalism—namely, how far constitutionally protected rights reach into American society—is still inextricably tied to the *Civil Rights Cases* of 1883, a Supreme Court decision from an era in which the Court and most of American society had fundamentally different views about questions of federalism and civil rights.[350] In turning to the commerce power as the primary basis for Title II, Congress passed up an opportunity to more directly align the reach of the Fourteenth Amendment with the rapidly developing nondiscrimination norm within the private economic sphere. And the Warren Court's inability to reconsider the state action doctrine in the light of the social, cultural, and political transformations of the civil rights movement must be seen as one of the most surprising developments in an era marked by such whole-scale legal transformation in the name of racial equality.

Perhaps the most lasting constitutional legacy of the history of the sit-ins and state action derives from the Title II story. With regard to federal public accommodations law, the triumph of the commerce power rationale over the equal protection rationale had little significance. It is unlikely that a Section 5 approach would have resulted in

---

[348] Erwin Chemerinsky, *Rethinking State Action*, 80 NW. U. L. REV. 503, 503 (1985). The most interesting work of late on state action has been in the field of comparative constitutional law. *See, e.g.*, Stephen Gardbaum, *The "Horizontal Effect" of Constitutional Rights*, 102 MICH. L. REV. 387 (2003).

[349] "Modern commentary on state action has been almost unrelievedly negative." SEIDMAN & TUSHNET, *supra* note 54, at 207; *see also* Chemerinsky, *supra* note 348; Henry J. Friendly, *The Public-Private Penumbra—Fourteen Years Later*, 130 U. PA. L. REV. 1289, 1290 (1982). *But see* SEIDMAN & TUSHNET, *supra* note 54, at 71 ("The confusion [of state action opinions] is not the product of sloppy reasoning or unprincipled manipulation of doctrine. It is rooted in the fundamental difficulty in thinking about constitutional law in the legal culture we have inherited from the legal realists and the New Deal."); TRIBE, *supra* note 87 (arguing that state action doctrine can be rationalized).

[350] *See, e.g.*, Black, *supra* note 56, at 70 (referring to *Plessy* and the *Civil Rights Cases* as "fraternal twins"); Arthur Kinoy, *The Constitutional Right of Negro Freedom*, 21 RUTGERS L. REV. 387, 415 (1967) (State action "is a continuing doctrinal anachronism."); Post & Siegel, *supra* note 26, at 486 (arguing that the civil rights movement made the *Civil Rights Cases* "obsolete").

a stronger law coming out of Congress,[351] and the Supreme Court upheld the law under an extremely broad reading of the commerce power.[352] As a matter of Section 5 jurisprudence, however, the consequences of the commerce power triumph have assumed renewed importance in recent years.

The favoring of the Commerce Clause over the Section 5 rationale in Congress—a choice the Court essentially ratified in its decisions upholding Title II—proved only a temporary setback for the principle that Congress had some level of independent interpretive authority under Section 5. Chief Justice Warren wrote in a decision rejecting a challenge to the Voting Rights Act of 1965, with regard to the enforcement clause of the Fifteenth Amendment (containing language identical to Section 5 of the Fourteenth Amendment), that "[t]he basic test to be applied in a case involving § 2 of the Fifteenth Amendment is the same as in all cases concerning the express powers of Congress with relation to the reserved powers of the States,"[353] i.e., the same deferential review used in commerce power cases. In *Katzenbach v. Morgan*,[354] the Court recognized an allowable gap between a judicially enforceable ("self-executing") Fourteenth Amendment right and an allowable congressional remedy under Section 5.[355] For a time, it appeared as if the Court had accepted the path, suggested but not followed in the public accommodations controversy, of allowing Congress some latitude in defining the meaning of the Fourteenth Amendment.[356]

Unlike the avoided Section 5 basis for Title II, however, *Morgan* was an ambiguous concession from a divided Court on a relatively minor piece of legislation.[357] The Court never expanded upon its implications and recently has been intent on limiting it. Just four years after *Morgan*, the Court held in a sharply divided opinion that Congress exceeded its authority under the Fourteenth Amendment when it sought to lower the voting age in state elections.[358] In the following decades, the *Morgan* model of Section 5 had an uneasy existence, seemingly inviting limited congressional latitude in determining the proper methods of enforcing Fourteenth Amendment rights.[359] More recently, in *City of Boerne v. Flores*,[360] the Court has sought to protect its

---

[351] The need to attract moderate Republicans to the bill effectively put a limit on the scope of coverage for Title II (as well as other provisions of the bill, particularly Title VII, covering employment discrimination). *See generally* GRAHAM, *supra* note 26; Rodriguez & Weingast, *supra* note 27.

[352] *See* Katzenbach v. McClung, 379 U.S. 294 (1964).

[353] South Carolina v. Katzenbach, 383 U.S. 301, 326 (1966).

[354] 384 U.S. 641 (1966).

[355] *Id.* at 650–51.

[356] *See, e.g.*, COX, *supra* note 24, at 55; Post & Siegel, *supra* note 26, at 501.

[357] *Morgan* involved the power of Congress to prohibit New York's literacy requirement as a precondition for voting. Voting Rights Act of 1965, Pub. L. No. 89-110, § 4(e), 79 Stat. 437 (1965).

[358] Oregon v. Mitchell, 400 U.S. 112 (1970).

[359] *See* Post & Siegel, *supra* note 324, at 35.

[360] 521 U.S. 507 (1997).

interpretive authority over the Fourteenth Amendment, requiring that any effort at congressional enforcement under Section 5 be "congruent and proportional" to the Court's definition of the constitutional right.[361]

It is worth considering the alternative path for Section 5 doctrine that might have emerged if Congress had squarely placed Title II under the Fourteenth Amendment and if the Court had upheld it on these grounds.[362] In *Morgan* the Section 5 issue had to do with the allowable gap between a judicially defined constitutional right (the right to vote) and congressionally defined remedies to protect this right. In contrast, to have upheld Title II on Fourteenth Amendment grounds, the Court would have to accept that Congress had Section 5 authority to expand the scope of the right itself, by altering the boundaries of the state action limitation on the Equal Protection Clause. Such a ruling would have required a rationale that would have been different from the right-remedy discussion that emerged out of *Morgan*, which the Court used as the basis for limiting Congress's Section 5 discretion in *Boerne*.[363]

***

If there ever was an opportunity to fundamentally reshape the state action doctrine, it came in the federal government's confrontation with public accommodations discrimination in the years following the sit-in movement. The doctrinal groundwork was in place, the underlying cause at issue supported in national opinion. Many assumed at the time that resolution of the issue demanded a reconsideration of the state action doctrine. Yet, when given the opportunity, neither the Supreme Court nor Congress took this path.

At the heart of the story of the sit-ins and the state action doctrine are a series of ironies: the very tactic of civil disobedience that contributed to the sit-in protests' achievements as a social and cultural challenge limited their success in the Supreme Court; and the bold responsibility the Court adopted for protecting civil rights in *Brown* actually hindered congressional efforts at constitutional interpretation in the Title II debate. As a matter of popular constitutional understanding, the sit-ins were transformative. As a matter of Fourteenth Amendment doctrine, they proved a dead end. This disconnect between extrajudicial and judicial understandings of the Constitution—between constitutional culture and constitutional law—should complicate our understanding of the ways in which popular and legislative constitutionalism work in practice. An appreciation of extrajudicial constitutionalism is necessary, Robert Post explains, "because the legitimacy of constitutional law depends in part upon what

---

[361] *Id.* at 520.

[362] Bruce Ackerman has gone so far as to write, "[I]f the Justices had overruled the *Civil Rights Cases* in 1964, *Heart of Atlanta Motel* and *McClung* would have eclipsed *Brown* in the modern constitutional canon." Bruce Ackerman, *The Living Constitution*, 120 HARV. L. REV. 1737, 1779 (2007).

[363] *See City of Boerne*, 521 U.S. at 527–28.

extrajudicial actors explicitly believe about the Constitution."[364] Social movements that contribute to a shift in constitutional culture exert pressure on official interpretations of the Constitution, often resulting in new doctrine;[365] in general, this was the dynamic of the civil rights movement. But as this Article explains, certain forms of extrajudicial constitutional pressure, no matter how powerful in the realm of constitutional culture, may be limited in moving the courts. At times, they may even have the unintended consequence of threatening the dialogue between the Court and the nation that is the lifeblood of a robust constitutional tradition. An effective act of civil disobedience has the unique potential of sowing the seeds of a constitutional controversy, driving a wedge between a society that is moved by the sincerity and moral force of the protest to reconsider basic constitutional principles and a judiciary whose recognition of this claim is obscured by a hesitancy to legitimate a challenge to the judicial process and the rule of law. The persuasive force of the constitutional claim raised by the sit-ins demonstrates the power of social protest movement pressures to instigate a penetrating national dialogue on the meaning of the Constitution, even as the resilience of the state action doctrine shows the challenges of making this dialogue an effective tool of official constitutional re-interpretation.

---

[364] Post, *supra* note 28, at 9.

[365] *See, e.g.*, Post & Siegel, *supra* note 26, at 513.