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## Why the 1960 Lunch Counter Sit-Ins Worked: A Case Study of Law and Social Movement Mobilization

Christopher W. Schmidt\*

### INTRODUCTION

In this Article I present the student lunch counter sit-in movement of 1960 as a case study of effective social movement mobilization. Among the various factors that contributed to the success of the sit-ins, I focus on one in particular: the law. By focusing on law's distinctive role in shaping the course of the protest movement and channeling reform efforts in ways that ultimately bolstered the students' challenge to racial discrimination at southern lunch counters, I hope to raise some more general insights into the complex and sometimes surprising role of law in social movement mobilization.<sup>1</sup>

Before venturing any further, I want to briefly elaborate on my use of the term "law." I rely on a conception of law that is intentionally broad, drawn from law-and-society scholars, rather than the narrower conception favored by legal academics. When I say that law merits more attention in our accounts of the sit-in movement, I mean more than simply considering whether existing law was on the side of the reformers or whether the courts sided with the protesters. Although these questions were obviously important, at times critically so, they do not encompass the totality of ways in which law affected the course of this particular protest movement. A narrow conception of law fails to explain, for instance, why for at least a decade after *Brown v. Board of Education*,<sup>2</sup> when the law, as pronounced by the Supreme Court, was clear that state-mandated segregation in public schools violated the Constitution, schools remained segregated throughout the South,<sup>3</sup> while the sit-ins achieved remarkable breakthroughs even when most courts rejected the claim that the Constitution prohibited operators of private businesses from discriminating based on race.<sup>4</sup> To work through these and related puzzles, I turn to a socio-legal conception of law that captures other ways in which law influenced the civil rights movement.

Specifically, I focus on two ways in which legal dynamics played a key role in the sit-in movement. One was through what socio-legal scholars have described as

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1 This article discusses themes I explore in more depth in CHRISTOPHER W. SCHMIDT, *THE SIT-INS: PROTEST AND LEGAL CHANGE IN THE CIVIL RIGHTS ERA* (forthcoming 2018).

2 347 U.S. 483 (1954).

3 See GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 49–52 (1991).

4 See generally Christopher W. Schmidt, *The Sit-ins and the State Action Doctrine*, 18 WM. & MARY BILL RTS. J. 767 (2010).

legal consciousness,<sup>5</sup> meaning, for my purposes, the assumptions non-lawyers had about the law and legal institutions. Although at the time of the sit-ins lawyers recognized that the courts had never recognized the students' claimed right to nondiscriminatory service in a privately-operated eating facility that catered to the general public, the protesters themselves and many Americans believed that either the Constitution did recognize this kind of claim or that it should. This faith in the legitimacy of the students' claim, not only as a matter of morality but also as a matter of legality, created critical support for the student protests.

The other way in which law bolstered the effectiveness of the sit-ins was by structuring the opportunities for relevant actors to mobilize both for and against the students' cause.<sup>6</sup> The distinctive legal issues raised by the sit-ins ultimately operated to support the sit-in movement. They bolstered student mobilization efforts. They helped attract outside support for the movement. And they helped divide the opposition.

In the following pages, I begin with an overview of the 1960 lunch counter sit-in movement and the legal issues the protests raised. I then examine the ways in which the distinctive legal issues raised by the sit-ins contributed, in sometimes unexpected ways, to their success. I conclude with some thoughts on what the sit-in movement might offer for understanding the role of law in the successes and failures of other movements more generally.

## I. THE SIT-INS: HISTORY

The sit-in movement began on the afternoon of Monday, February 1, 1960, when four African American students from the Agricultural and Technical College in Greensboro, North Carolina, sat down at the lunch counter of their local Woolworth store and asked to be served.<sup>7</sup> The Greensboro Woolworth, like most department stores in the South, had a policy of serving only whites at the lunch counter. Refused service, the four students sat quietly in their seats until closing. The following morning the students returned to the lunch counter, this time with sixteen friends.

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5 See, e.g., PATRICIA EWICK & SUSAN S. SILBEY, THE COMMON PLACE OF LAW: STORIES FROM EVERYDAY LIFE 29–30 (1998); SALLY ENGLE MERRY, GETTING JUSTICE AND GETTING EVEN: LEGAL CONSCIOUSNESS AMONG WORKING-CLASS AMERICANS 1 (1990); Laura Beth Nielsen, *Situating Legal Consciousness: Experience and Attitudes of Ordinary Citizens About Law and Street Harassment*, 34 L. & SOC'Y. REV. 1055, 1055 (2000); Austin Sarat, ". . . The Law Is All Over": Power, Resistance and the Legal Consciousness of the Welfare Poor, 2 YALE J.L. & HUMANITIES 342, 343–44 (1990); Susan S. Silbey, *After Legal Consciousness*, 1 ANN. REV. L. & SOC. SCI. 323, 356 (2005).

6 See, e.g., MICHAEL W. McCANN, RIGHTS AT WORK: PAY EQUITY REFORM AND THE POLITICS OF LEGAL MOBILIZATION (1994); Thomas M. Keck, *Beyond Backlash: Assessing the Impact of Judicial Decisions on LGBT Rights*, 43 L. & SOC'Y REV. 151, 159 (2009); Michael W. McCann, *Reform Litigation on Trial*, 17 L. & SOC. INQUIRY 715 (1992); Doug NeJaime, *Winning Through Losing*, 96 IOWA L. REV. 941 (2011).

7 The summary of the Greensboro sit-ins in this paragraph draws on the following sources: WILLIAM H. CHAFE, CIVILITIES AND CIVIL RIGHTS: GREENSBORO, NORTH CAROLINA, AND THE BLACK STRUGGLE FOR FREEDOM 79–101 (1980); MILES WOLFF, LUNCH AT THE 5 & 10 (rev. ed., 1990); Daniel H. Pollitt, *Dime Store Demonstrations: Events and Legal Problems of the First Sixty Days*, 1960 DUKE L.J. 315, 317–37; Michael Walzer, *A Cup of Coffee and a Seat*, 7 DISSENT 111 (Spring 1960).

Again they were refused service, and again they remained seated in silent protest. The students were back the next day—this time occupying nearly all the forty seats at the Woolworth’s counter. By the end of the week, an estimated two hundred students had taken part in the Greensboro protests. The protests attracted the attention of white youths, who began their own counter-protests. The scene at the Woolworth’s on Saturday included white teenagers waving Confederate flags and taunting the Black college students sitting at the lunch counter. The police emptied the store after the store manager received a bomb threat. When the store reopened two days later, the lunch counter remained closed. At this point, city leaders persuaded the students to call a moratorium on their protests.

Greensboro was not the first time African Americans protested discriminatory service policies in restaurants by staging peaceful “sit-in” demonstrations. In the 1940s, the Congress of Racial Equality (CORE), a newly formed interracial organization committed to nonviolent protest, led restaurant sit-ins in Chicago.<sup>8</sup> Over the course of the 1950s, CORE organized sit-ins in cities in the North as well as the upper South; in 1959, it organized a series of sit-ins in Miami.<sup>9</sup> The NAACP Youth Council launched a lunch counter sit-in campaign in the late 1950s that began in Oklahoma City and spread to cities across the Midwest.<sup>10</sup>

Yet these earlier protests were largely localized and short-lived affairs. The 1960 Greensboro protests sparked a larger protest movement.

The sit-ins were first picked up by African American college and high school students in other North Carolina cities.<sup>11</sup> On February 8, students sat in at lunch counters in Durham and Winston-Salem; the next day there were protests in Charlotte and Raleigh. On February 11, Hampton, Virginia, became the first city outside North Carolina to join the movement. The following day, the student demonstrations extended further into the South when some 100 protesters took part in a demonstration in Rock Hill, South Carolina. The sit-ins were now national news: the *New York Times* put the Rock Hill protest on its front page.<sup>12</sup> Students in Nashville, Tennessee, soon joined the movement, as did students in Tallahassee, Florida. Both cities had student groups that had been carefully planning their own sit-in protests months before Greensboro. Upon being arrested and convicted, Nashville and Tallahassee protesters found a new way to expand their protest: they chose to serve jail sentences rather than paying a fine.

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8 AUGUST MEIER & ELLIOT RUDWICK, CORE: A STUDY IN THE CIVIL RIGHTS MOVEMENT 1942–1968, at 3–14 (1973).

9 *Id.* at 91, 102.

10 See THOMAS L. BYNUM, NAACP YOUTH AND THE FIGHT FOR BLACK FREEDOM, 1936–1965, at 95–99 (2013); GRETCHEN CASSEL EICK, DISSIDENT IN WICHITA: THE CIVIL RIGHTS MOVEMENT IN THE MIDWEST, 1954–72, at 1–11 (2001); ALDON D. MORRIS, THE ORIGINS OF THE CIVIL RIGHTS MOVEMENT: BLACK COMMUNITIES ORGANIZING FOR CHANGE 188–94 (1984); Ronald Walters, *The Great Plains Sit-In Movement, 1958–1960*, 16 GREAT PLAINS Q. 85 (Spring 1996).

11 The material in this paragraph is drawn from SCHMIDT, *supra* note 1, at ch. 1.

12 Claude Sitton, *Negroes’ Protest Spreads in South*, N.Y. TIMES, Feb. 13, 1960, at 1, 6.

By the end of February, thirty cities in seven states had sit-in demonstrations.<sup>13</sup> By the end of the spring, sit-ins had taken place in all thirteen southern states and, according to one estimate, involved some 50,000 protesters.<sup>14</sup> What had begun as a bold act of frustration by four college students turned into a full-fledged protest movement. Greensboro had set in motion an escalating series of events that would move a nation.

Soon after the protests began, students began to see tangible results as a growing number of restaurants desegregated in the face of the protests.<sup>15</sup> These early victories were sometimes the product of an individual restaurant owner's decision and sometimes the product of negotiated city-wide agreements among local officials and business leaders. By the end of the spring, lunch counters in eleven cities had begun to desegregate under pressure from sit-in protests.<sup>16</sup> Although these victories were more a steady trickle than the wave of reform the students were hoping for, and although they did not penetrate into the Deep South, they were generally understood to be a remarkable achievement for a movement that seemingly sprang out of nowhere. "Buried in the reams of copy about the southern sit-ins," noted a Congress of Racial Equality newsletter in April 1960, "is the fact that since the protest movement started, over 100 lunch counters and eating places in various parts of the South have started to serve everybody regardless of color."<sup>17</sup> Victories over racial discrimination attracted attention, gave the protests an air of achievement, and pulled more and more people into the movement. The summer of 1960 saw a number of new additions to the list of cities that had desegregated their lunch counters in response to the protests—bringing the total to twenty-seven<sup>18</sup>—as operators of targeted stores took advantage of the slowing or cessation of protests when school was not in session to make changes as inconspicuously as possible.<sup>19</sup> "No store in the South which has opened its lunch counters to Negroes has reported a loss of business," one widely publicized report noted.<sup>20</sup> "Managers have reported business as usual or noted an increase . . . . Negroes have not congregated to demonstrate a victory. . . . White customers have observed the change calmly for the most part . . . ."<sup>21</sup>

The student sit-in movement of 1960 reshaped and reinvigorated the struggle for racial equality. The sit-ins marked a new phase of the civil rights movement, one in which mass participatory direct-action protest would become the leading edge of the movement's demand for social and political change. This new phase was led by

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13 JAMES H. LAUE, *DIRECT ACTION AND DESEGREGATION, 1960–1962: TOWARD A THEORY OF RATIONALIZATION OF PROTEST* 76 (1989).

14 *Id.* at 77.

15 See SCHMIDT, *supra* note 1, at ch. 1.

16 See LAUE, *supra* note 13, at 77; NORTH CAROLINA COUNCIL ON HUMAN RELATIONS, *A FOLLOW-UP REPORT ON THE STUDENT PROTEST MOVEMENT AFTER TWO MONTHS* 2–4.

17 Editorial, *CORE Members Arrested*, CORE-LATOR, Apr. 1960, at 1.

18 *Lunch Counter Pressure Cracks South*, CHI. DEFENDER, Aug. 20, 1960, at 20.

19 See LAUE, *supra* note 13, at 88.

20 Margaret Price, *Why Some Areas Solve 'Sit-Ins,'* CHI. DEFENDER, July 2, 1960, at 8.

21 *Id.*

activists who were younger, less patient, and less willing to compromise than the older generation of civil rights activists.<sup>22</sup> The sit-in movement elevated the role of women in the civil rights movement. In contrast to the male-dominated, established civil rights organizations, the decentralized mass protest movement offered opportunities for women not only to participate but often to assume leadership roles. The sit-in movement also led to the creation of an influential new civil rights organization, the Student Nonviolent Coordinating Committee (SNCC), which grew out of an April 1960 meeting of student protest leaders.<sup>23</sup> SNCC's challenge to the established ways of civil rights reform and the established civil rights organizations initiated a cycle of tensions, breaks, and alliances between the youth activists and the older generation—with Martin Luther King, Jr., often operating as an intermediary between the two sides—that continued into the 1960s.<sup>24</sup>

The student sit-in movement also transformed the agenda of the national civil rights debate. Prior to 1960, racial discrimination in privately-owned public accommodations was far from the top of the agenda of most civil rights organizations. The sit-ins changed this. The protests sparked a national debate over the legality and morality of discrimination in public accommodations—one that would only increase in volume and intensity in the coming years. A right to nondiscriminatory access to lunch counters and hotels, regardless of whether they were publicly or privately owned, now had a place alongside school desegregation, voting rights, and workplace rights as the central goals of the larger civil rights movement.<sup>25</sup>

## II. THE SIT-INS: THE LEGAL ISSUES

A claimed right to nondiscriminatory service at a lunch counter raised legal questions that were distinct in significant and consequential ways from other major targets of the civil rights movement. Following the Supreme Court's 1954 school desegregation decision in *Brown v. Board of Education*,<sup>26</sup> a ruling the Court in short order extended to all public facilities,<sup>27</sup> the primary thrust of civil rights activity was a demand for enforcement of the law. In the face of southern state defiance of *Brown*, lawyers and activists demanded federal enforcement of the law of the land. The Freedom Rides of 1961 sought to test a Supreme Court ruling that interpreted federal

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22 See, e.g., MORRIS, *supra* note 10, at 188–94.

23 See CLAYBORNE CARSON, *IN STRUGGLE: SNCC AND THE BLACK AWAKENING OF THE 1960S*, 19–30 (2d. ed. 1995).

24 See, e.g., TOMIKO BROWN-NAGIN, *COURAGE TO DISSENT: ATLANTA AND THE LONG HISTORY OF THE CIVIL RIGHTS MOVEMENT* 133–74 (2011).

25 See generally SCHMIDT, *supra* note 1, at ch. 3.

26 347 U.S. 483 (1954).

27 *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. 903 (1956) (buses); *Holmes v. City of Atlanta*, 350 U.S. 879 (1955) (per curiam) (golf courses); *Mayor and City Council of Baltimore v. Dawson*, 350 U.S. 877 (1955) (per curiam) (beaches).

law to require the desegregation of interstate travel facilities.<sup>28</sup> Voting rights campaigns targeted southern practices that defied federal constitutional and statutory law.<sup>29</sup> The sit-ins were different.

Prior to the Civil Rights Act of 1964, no federal law regulated service in public accommodations. The key question in 1960 was whether the Constitution limited the ability of lunch counter operators to racially discriminate. The targeted lunch counters were privately owned, and according to longstanding constitutional doctrine, the Fourteenth Amendment required only “state actors” to follow the racial nondiscrimination requirements of the Equal Protection Clause.<sup>30</sup> Lunch counter operators, unlike others whose racially discriminatory decisions were targeted by civil rights activists, such as school board members or voting registrars, were not employees of the state. Yet these lunch counters purported to serve the general public. Indeed, most were located in department stores that allowed African American customers to purchase items elsewhere in the store and many allowed African Americans to order food—as long as they did not sit at the “whites-only” lunch counter. The line between “private” discrimination and state-sanctioned discrimination became blurrier still when the lunch counter operator called upon the police to press trespassing charges against African American protesters who sat at their lunch counters and refused to leave when denied service.<sup>31</sup>

When it came to access to public accommodations, civil rights lawyers never won the constitutional breakthrough in the Supreme Court they had hoped for.<sup>32</sup> Yet the litigation that emerged from the sit-ins did result in a string of important legal victories on narrower grounds.<sup>33</sup> Legislatures also responded. Although the Deep South remained intransigent, authorities elsewhere passed public accommodations laws and strengthened enforcement of existing ones. By 1964, a majority of the nation lived under state or local laws requiring nondiscriminatory access to public

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28 See generally RAYMOND ARSENAULT, *FREEDOM RIDES: 1961 AND THE STRUGGLE FOR RACIAL JUSTICE* (2006).

29 See, e.g., RICHARD M. VALELLY, *THE TWO RECONSTRUCTIONS: THE STRUGGLE FOR BLACK ENFRANCHISEMENT* 173–98 (2004).

30 See *The Civil Rights Cases*, 109 U.S. 3, 25–26 (1883); Christopher W. Schmidt, *On Doctrinal Confusion: The Case of the State Action Doctrine*, 2016 *BYU L. REV.* 575, 584–93 (2016).

31 When sit-in protesters were arrested and prosecuted, the state was obviously involved. A constitutional question for the courts, then, was whether the state violated the Equal Protection Clause of the Fourteenth Amendment when it enforced a law that does not discriminate on its face, such as an anti-trespassing statute, if that law was being used by a non-state actor for racially discriminatory purposes. The seminal case in which this kind of enforcement question was raised was *Shelley v. Kraemer*, 334 U.S. 1 (1948).

32 For an analysis of this issue, see SCHMIDT, *supra* note 1, at ch. 5; Schmidt, *supra* note 4.

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

accommodation.<sup>34</sup> Then, with Title II of the 1964 Civil Rights Act,<sup>35</sup> non-discrimination in public accommodations became national policy. What, in the spring of 1960, had been the most volatile civil rights issues of the day would become, within a matter of years, a broadly accepted norm of conduct for the nation.<sup>36</sup>

### III. WHY DID THE SIT-INS WORK?

The goal of this article is to show the law's critical role in making the sit-ins such an effective social movement. Before demonstrating this point, however, it is important to recognize that many of the reasons the sit-ins spread so quickly were not directly traceable to legal dynamics.

Key to the diffusion of the sit-ins, for instance, was the nature of the protest action, which was easily communicated and replicated. The genius of the lunch counter sit-in was its simplicity. As a protest tactic, it was straightforward and easily replicated. The clear and powerful message the protesters sought to convey could be conveyed through nothing more than an image. A photograph of a group of well-dressed African American college students sitting unserved at a lunch counter said it all.<sup>37</sup> A key strength of the movement was what sociologist Doug McAdam describes as the "accessibility" of the protest tactic.<sup>38</sup> Unlike, say, a bus boycott or an effort to desegregate a school, a sit-in could be launched by a small group anywhere there was a segregated lunch counter.<sup>39</sup>

The tactic of the sit-in protests allowed for an immediate sense of accomplishment for the students. Many different outcomes could be seen as an achievement. Being part of this new, defiant movement was an achievement. Simply creating student-run organizations that would strategize and coordinate sit-in protests might be cited as a "gain" for the movement. According to one observer, the sit-in "Workshop" not only trained students on the mechanism of a lunch counter protest, it also functioned as a "cohesive, morale-building mechanism which served to infuse an ideology into the Negro student participants."<sup>40</sup> Students even saw going to jail as a critically important experience for the individual protester and for the

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34 See *Bell*, 378 U.S. at 284 (Douglas, J., concurring) (listing the contemporary state public accommodations laws at the time of the case); William E. Blundell, *30 States, Some Cities Bar Discrimination in Public Accommodations*, WALL ST. J., Oct. 22, 1963, at 1, 14; *Survey Shows Rights Laws Now Cover 65% of Nation*, WASH. POST, Dec. 26, 1963, at A17.

35 Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. § 2000(a)).

36 On the largely successful implementation of Title II, see CLAY RISEN, *THE BILL OF THE CENTURY: THE EPIC BATTLE FOR THE CIVIL RIGHTS ACT* 245-49 (2014); Alexander M. Bickel, *What Has Been Done is Prologue*, 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.

37 See, e.g., *A Brief history of the Sit-In Movement*, TIME, [http://content.time.com/time/photogallery/0,29307,1957689\\_2030666,00.html](http://content.time.com/time/photogallery/0,29307,1957689_2030666,00.html) (last visited Apr. 8, 2017).

38 Doug McAdam, *Tactical Innovation and the Pace of Insurgency*, 48 AM. SOC. REV. 735, 743 (1983).

39 See ANTHONY OBERSCHALL, *SOCIAL MOVEMENTS: IDEOLOGIES, INTERESTS, AND IDENTITIES* 226-28 (1993).

40 Martin Oppenheimer, *The Southern Student Movement: Year 1*, 33 J. NEGRO EDUC. 396, 399 (1964).

larger movement.<sup>41</sup> The students transformed the very response that segregationists saw as their greatest weapon against the protesters—the police officer, the paddy wagon, the jail cell—into a victory for the protesters.

Also key were the channels of communication—such as churches, racial justice organizations, and colleges—by which news of the protests spread.<sup>42</sup>

But alongside these factors, law also played a key role, which has not been fully appreciated in histories of the sit-ins. In the following section I identify several ways in which the law functioned to strengthen the sit-in movement.

### A. *An Open Field*

The legal situation in 1960 shaped the students' choice of target. Racial discrimination at lunch counters and other public accommodations, although integral to the civil rights movement in the years after the sit-ins, was not a central concern for racial justice groups prior to 1960. In part this was because civil rights lawyers saw other targets as more vulnerable to legal challenge. They recognized the distinctively difficult legal dilemmas raised by privately operated businesses that served the public and focused their energies elsewhere. Few of the students appreciated the concerns about constitutional doctrine that steered civil rights organizations away from challenging discriminatory lunch counter service in the South. What they knew was that this was an offensive practice and no one seemed to be doing anything about it. Among the students themselves and among outside sympathizers, the sit-ins resonated in large part because it was clear that this was the students' protest, which was not being orchestrated by far away civil rights strategists or radical ideologues.<sup>43</sup>

Thus, one of the great strengths of the sit-in movement was that it targeted a realm of racial injustice that, at the time, was basically not on the agendas of the major civil rights organizations. The students found an issue that they could claim as their own. They were not simply joining a battle that the older generation of civil rights activists were already waging. They were striking out on their own, finding new points of vulnerability in the edifice of Jim Crow and locating new targets that resonated with their particular concerns and that aligned with their particular sources of strength. To the surprise of participants and observers of the sit-in movement, lunch counters proved to be a powerfully resonant platform for protest activities and, often, a target that was ripe for desegregation breakthroughs. As the sit-ins took off, established civil rights organizations quickly moved challenges to segregation in public accommodations to the top of their reform agendas.<sup>44</sup>

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41 See Christopher W. Schmidt, *Divided by Law: The Sit-Ins and the Role of the Courts in the Civil Rights Movement*, 33 L. & HIST. REV. 93, 127–29 (2015).

42 On the “diffusion” of the sit-in movement across the South, see MORRIS, *supra* note 10, at 188–215; OBERSCHALL, *supra* note 39, at 225–28; McAdam, *supra* note 38; Kenneth T. Andrews & Michael Biggs, *The Dynamics of Protest Diffusion: Movement Organizations, Social Networks, and News Media in the 1960 Sit-Ins*, 71 AM. SOC. REV. 752 (2006).

43 See Schmidt, *supra* note 41, at 137–38 (discussing accusations that the sit-in movement was orchestrated by Communists and why they failed to gain much traction).

44 *Id.* at 101–02.

## B. Attracting External Support

### 1. Civil Rights Lawyers

At the start of the sit-ins, the students benefited from having the NAACP focused on issues other than lunch counters. Once the movement got underway, however, they benefited from having respected civil rights lawyers proclaiming the students' cause constitutionally justified. These statements further entrenched the idea, already assumed among many civil rights sympathizers, that lunch counters were a logical next step in the battle to give full meaning to the Fourteenth Amendment. Even for those students who feared the co-opting of their cause by civil rights lawyers, being told that they had the law—and assumedly the Supreme Court—behind them surely did not hurt. Having the NAACP on their side could only bolster the legitimacy of the students' cause in the public eye.

The NAACP's embrace of the student movement also had tangible benefits. Funding was essential to the continued survival of the sit-in movement. For all the attention and controversy over the "jail, no bail" protest tactic, most arrested protesters had no interest in sitting in jail if it could be avoided and were thankful when there were funds to pay bail and fines. "[T]he N.A.A.C.P continues to have the loyalty of most students, who admit that after they dash ahead they often have to ask the N.A.A.C.P for legal help," explained one journalist after spending time with the protesters.<sup>45</sup> The NAACP was the best positioned among the civil rights organizations to assume the role of providing financial and legal assistance to the student movement. In late June, the NAACP reported that it was participating in the legal defense of 1,763 students who had been arrested for taking part in the demonstrations and that it had paid more than \$44,000 in fines and put up \$100,000 in bail on their behalf.<sup>46</sup>

### 2. NAACP Critics

The sit-ins responded to the desire many Americans felt for a new path forward on the race question, one centered on sacrifice and moral suasion rather than adversarial litigation and court orders. The students were far from alone in their frustration with the NAACP and litigation-based reform strategies. By 1960, with the NAACP's school desegregation campaign largely stalled, many civil rights proponents were eager to embrace alternative approaches to bringing down Jim Crow. The NAACP had always had its critics on the left, and the slow progress of the implementation of *Brown* strengthened their voices. Those who viewed the NAACP as elitist and overly cautious embraced the sit-in movement as a way to attack the NAACP and its commitment to litigation and lobbying as the primary tools of racial

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45 Ben H. Bagdikian, *Negro Youth's New March on Dixie*, SATURDAY EVENING POST, Sept. 8, 1962, at 18.

46 Elsie Carper, *Youths in Rally for Civil Rights*, WASH. POST, TIMES HERALD, June 23, 1960, at B9.

change.<sup>47</sup> In a widely-discussed article in *Harper's Magazine*, African American journalist Louis E. Lomax praised the students for displacing the “Negro leadership class”—most notably the NAACP—as “the prime mover of the Negro’s social revolt.”<sup>48</sup>

For Martin Luther King Jr., the sit-ins demonstrated that the tactics of non-violent, direct-action protest could actually work. King described the sit-ins as “following the same philosophy and techniques as the Montgomery bus boycotts”—the 1955–56 protest campaign that King organized, which first brought the young Black minister to the nation’s attention—and suggested that the sit-ins had provided “the answer to how we can meet delaying tactics that come through litigation.”<sup>49</sup> In describing the value of nonviolent protest, King posed the rhetorical question, “Does this bring results?”<sup>50</sup> His first piece of evidence to demonstrate the efficacy of “creative protest” was the sit-ins: “In less than a year, lunch counters have been integrated in more than 142 cities of the Deep South, and this was done without a single court suit.”<sup>51</sup>

Racial moderates—individuals and groups who generally supported the anti-discrimination goals of the civil rights movement but counseled tactical caution in achieving these goals—also used the sit-ins to launch a critique of the NAACP and its approach to civil rights. Although some moderates believed the sit-in protest unnecessarily confrontational and disruptive,<sup>52</sup> many others praised the students for showing the potential of moral persuasion and negotiation as an alternative to litigation battles. Whereas dedicated racial justice activists like King felt the sit-ins showed that litigation-centered strategies were too slow, too cautious, and too reliant on elite leadership, moderates used the protests as an opportunity to criticize litigation as unnecessarily divisive. They argued that the backlash against *Brown* and the failure to desegregate southern schools showed the limits of court victories that face widespread social opposition. “No argument in a court of law could have dramatized the immorality and irrationality of such a custom as did the sit-ins,” wrote *Atlanta Constitution* editor Ralph McGill.<sup>53</sup> “Not even the Supreme Court decision on the schools in 1954 had done this. . . . The central moral problem was enlarged.”<sup>54</sup> “[T]he approach in Christian charity and love of neighbor, is the only

47 See, e.g., Howard Zinn, *Finishing School for Pickets*, NATION, Aug. 6, 1960, at 71–73; Nat Hentoff, *A Peaceful Army*, COMMONWEAL, June 10, 1960, 275.

48 Louis E. Lomax, *The Negro Revolt Against “The Negro Leader”*, HARPER’S MAG., June 1, 1960, at 41.

49 *King Looks to Georgia Cafe Push*, ATL. CONST., Feb. 23, 1960, at 7.

50 Martin Luther King, Jr., *The American Dream*, in A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS AND SPEECHES OF MARTIN LUTHER KING, JR. 214 (James M. Washington, ed., 1986).

51 *Id.* See also Claude Sitton, *Dr. King Favors Buyers’ Boycott*, N.Y. TIMES, Apr. 16, 1960, at 15 (praising students for “moving away from tactics which are suitable merely for gradual and long-term change”); Martin Luther King, Jr., *The Burning Truth in the South*, PROGRESSIVE, May 1960, at 8. On King’s vision of the law and its relation to social change, see Christopher W. Schmidt, *Conceptions of Law in the Civil Rights Movement*, 1 U.C. IRVINE L. REV. 641, 662–67 (2011). On King’s relationship with lawyers, see generally Leonard S. Rubinowitz, Michelle Shaw & Michal Crowder, *A “Notorious Litigant” and “Frequent of Jails”: Martin Luther King, Jr., His Lawyers, and the Legal System*, 10 NW. J. L. & SOC. POL’Y 494 (2016).

52 See, e.g., Hodding Carter, *The Young Negro is a New Negro*, N.Y. TIMES MAG., May 1, 1960, at 11.

53 RALPH MCGILL, THE SOUTH AND THE SOUTHERNER 17 (1963).

54 *Id.*

answer,” explained Father Ernest L. Unterkoeffer of Richmond, Virginia, in a radio discussion of the sit-ins; “Laws will not solve our problems.”<sup>55</sup>

Leaders of the Southern Regional Council, a prominent voice of southern liberalism and a strong supporter of the sit-ins, shared this skepticism toward litigation and top-down legal change. By “appeal[ing] to conscience and self-interest instead of law,” the students brought a desperately needed, fresh approach to the problem of racial discrimination, one SRC report explained.<sup>56</sup> “They have argued on the basis of moral right and supported that argument with economic pressure. By their action they have given the South an excellent opportunity to settle one facet of a broad problem by negotiation and good will instead of court order.”<sup>57</sup> A resolution brought about by “economic pressures and civic sense of responsibility . . . would quite likely be a better settlement than one hammered out through litigation in already over-burdened courts.”<sup>58</sup> Judicial proclamations were limited in their ability to change hearts and minds, these racial moderates insisted. Protests—at least certain kinds of protests, like the lunch counter sit-ins—may be more effective at changing views.

### 3. Mainstream Political Figures

The experience of *Brown v. Board of Education* and the national struggle over the meaning of the Constitution’s principle of equal protection that followed encouraged many Americans, in what seemed an almost instinctive move, to see the sit-ins as a constitutional issue. The six-year experience with school desegregation as a constitutional issue allowed for this 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.<sup>59</sup>

In explaining *Brown’s* role in defining the issues of concern and the terms of debate for the sit-ins, particularly relevant are the rulings that followed *Brown* in which the Court, in terse, unsigned “per curiam” decisions, extended the

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55 *Protestant-Jewish-Roman Catholic Conversation on the Sit-Ins*, PRESBYTERIAN OUTLOOK, Mar. 21, 1960, at 6.

56 MARGARET PRICE, S. REGIONAL COUNCIL REPORT, TOWARD A SOLUTION OF THE SIT-IN CONTROVERSY, May 31, 1960, NAACP Papers (on file with the Library of Congress, Manuscript Division, Part III, Series A, Container 289, Folder: “Sit-Ins, General, 1959, 1960, Jan-May”).

57 *Id.*

58 S. REGIONAL COUNCIL, POSTSCRIPT TO SPECIAL REPORT OF FEBRUARY 25: THE STUDENT PROTEST MOVEMENT, WINTER 1960, Mar. 14, 1960, NAACP Papers (on file with the Library of Congress, Manuscript Division, Part III, Series A, Container 289, Folder: “Sit-Ins, General, 1959, 1960, Jan-May”).

59 Editorial, *Negro Protests*, COMMONWEAL, Apr. 1, 1960, at 4. See also L.F. Palmer, Jr., *Uprising for Freedom*, CHI. DEFENDER, Mar. 22, 1960, at 9, 11 (defining as a goal of the movement letting “the world know that young Negro America is ‘sick and tired’ of waiting for the rights which the U.S. Constitution guarantees ALL citizens.”); *Ministers Reaffirm Appeal to Reason*, ATLANTA. CONST., Mar. 12, 1960, at 4 (white Atlanta ministers praising the students for embracing “the spirit of our Constitution”).

constitutional prohibition of segregation to public parks, auditoriums, golf courses, beaches, and buses.<sup>60</sup> By the time of the sit-ins, the Court's 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 public accommodations whose purpose was to serve the general public. As the sit-ins spread across the South, conservative *New York Times* columnist Arthur Krock apprehensively wrote, "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."<sup>61</sup>

These developments convinced many observers that the principle animating *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 months and years following the sit-ins. One of the most influential proponents of this position was King, who urged the student protesters to see the sit-ins as the logical extension of the school segregation struggle. He echoed the famous words of Chief Justice Warren's *Brown* opinion when he told the students that "[s]eparate facilities, *whether in eating places or public schools*, are inherently unequal."<sup>62</sup> When one of his interviewers noted during a March 1960 appearance on NBC's Sunday morning news show *Meet the Press* that "there have been court decisions saying that a storekeeper can select his customers," King insisted that *Brown* meant "that segregation is wrong even in lunch counters and public places because that decision said in substance that segregation generates a feeling of inferiority within the segregated and, thereby, it breaches the equal protection clause of the Fourteenth Amendment."<sup>63</sup> He added hopefully, "I'm sure that if we follow this through in this area the same thing will follow."<sup>64</sup>

While such statements by leading civil rights advocates are best understood as claims for a reformed vision of justice bolstered by an aspirational claim on the Constitution, the striking point is that the implication of these kinds of statements—

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60 See VALELLY, *supra* note 29.

61 Arthur Krock, *The Issue of 'Rights' in the Southern Sit-Ins*, N.Y. TIMES, Mar. 22, 1960, at 36.

62 Martin Luther King, Jr., *A Creative Protest* (Feb. 16, 1960), in 5 THE PAPERS OF MARTIN LUTHER KING, JR. 368 (Clayborne Carson et al. eds., 1992) [hereinafter King Papers] (emphasis added); *Brown v. Board of Educ.*, 347 U.S. 483, 495 (1954) ("Separate educational facilities are inherently unequal.").

63 Interview on "Meet the Press" (Apr. 17, 1960), in 5 KING PAPERS, *supra* note 62, at 430–33.

64 *Id.*

that the Fourteenth Amendment protected the students' actions—echoed throughout the discussions of the sit-ins. And they often came from unexpected quarters.

When asked about the sit-ins at a press conference, President Eisenhower, not generally recognized as a strong ally of the cause of civil rights, seemed to assume the students had the Constitution on their side. He noted that demonstrations, if orderly and seeking to support the rights of equality, were constitutional and that “[m]y own understanding is that when an establishment belongs to the public, opened under public charter and so on, that equal fights are involved.”<sup>65</sup> His 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 notoriously reluctant to publicly endorse *Brown* was inclined to not only express support for the students but to view the issue as implicating basic constitutional principles.

The assumption that the lunch counter sit-ins involved a valid constitutional claim was also encouraged by the fact that students did not just target privately operated public accommodations. Students sat-in at government-operated facilities, such as courthouse cafeterias<sup>66</sup> or public libraries,<sup>67</sup> where existing judicial doctrine unquestionably protected their claimed right to non-discriminatory treatment. Lawyers versed in the state action doctrine recognized a sit-in at a courthouse cafeteria and a sit-in at a Woolworth lunch counter as raising distinct legal claims. To protesters and most observers, however, the distinction was less clear.

Whether knowingly or not, sit-in movement participants worked an incredibly powerful trick: by juxtaposing an aspirational constitutional claim—the right to nondiscriminatory access to a privately operated business that served the public—alongside judicially recognized constitutional claims—such as the right to nondiscriminatory access to state-operated facilities—they leveraged the latter to strengthen the former. The sit-in movement offered, in effect, a familiar lawyer’s technique: argument by analogy. Movement activists took what was, as a matter of constitutional doctrine, a significant gap between two quite different legal claims and reframed it, as a matter of public discourse, into the same basic issue.

This trend toward treating racial discrimination in public accommodations as a constitutional issue only strengthened in the following years. In February 1963, President Kennedy gave an address 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

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65 Dwight D. Eisenhower, *The President's News Conference*, THE AMERICAN PRESIDENCY PROJECT (Mar. 16, 1960), <http://www.presidency.ucsb.edu/ws/index.php?pid=12157>.

66 See, e.g., *Sitdown Staged in Alabama Shop*, N.Y. TIMES, Feb. 26, 1960, at 8 (describing Montgomery sit-ins at courthouse cafeteria); see also *77 Negroes Arrested In Student Sitdowns at 10 Eating Places Here*, ATLANTA CONST., Mar. 16, 1960, at 1 (describing Atlanta sit-ins at cafeterias in various government buildings).

67 See, e.g., Cynthia G. Fleming, “We Shall Overcome”: *Tennessee and the Civil Rights Movement*, 54 TENN. HIST. Q. 230, 243 (1995) (describing Memphis library sit-ins).

restaurants, hotels, theaters, recreational areas and other public accommodations and facilities.”<sup>68</sup> 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” was an “elementary right,” comparable to education and voting.<sup>69</sup> “We are confronted primarily with a moral issue,” he explained. “It is as old as the scriptures and is as clear as the American Constitution.”<sup>70</sup> The public accommodations provision of the proposed civil rights bill, he asserted in the following month, would protect “the basic constitutional rights of an individual to be treated as a free and equal human being.”<sup>71</sup>

Although Congress primarily relied on the Commerce Clause in passing the Civil Rights Act of 1964,<sup>72</sup> and although the Supreme Court upheld the public accommodations provision of the law on that basis,<sup>73</sup> many at the time believed the Fourteenth Amendment empowered Congress to desegregate public accommodations.<sup>74</sup> The law “has a simple purpose,” explained Senator Hubert Humphrey on the floor of the Senate. “That purpose is to give fellow citizens—Negroes—the same rights and opportunities that white people take for granted. This is no more than what was preached by the prophets, and by Christ Himself. It is no more than what our Constitution guarantees.”<sup>75</sup> Upon signing the Civil Rights Act into law, President Lyndon Johnson said of the “unequal treatment” that the law targeted, “Our Constitution, the foundation of our Republic, forbids it. The principles of our freedom forbid it. Morality forbids it. And the law I will sign tonight forbids it.”<sup>76</sup>

As a claim pressed upon national opinion and the political branches of government, the students’ actions offered, in effect, 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 delineated these acts as “private” or not.

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68 John F. Kennedy, *Special Message to the Congress on Civil Rights*, THE AMERICAN PRESIDENCY PROJECT (Feb. 28, 1963), <http://www.presidency.ucsb.edu/ws/?pid=9581>.

69 John F. Kennedy, *Radio and Television Report to the American People on Civil Rights*, THE AMERICAN PRESIDENCY PROJECT (June 11, 1963), <http://www.presidency.ucsb.edu/ws/?pid=9271>.

70 *Id.*

71 RISEN, *supra* note 36, at 93.

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

73 *Katzenbach v. McClung*, 379 U.S. 294 (1964); *Heart of Atlanta v. United States*, 379 U.S. 241 (1964).

74 See Schmidt, *supra* note 4, at 809–17.

75 110 CONG. REC. 6553 (1964).

76 Lyndon B. Johnson, *Radio and Television Remarks Upon Signing the Civil Rights Bill*, THE AMERICAN PRESIDENCY PROJECT (July 2, 1964), <http://www.presidency.ucsb.edu/ws/?pid=26361>.

### C. Dividing Opposition

The contested legal issues also contributed to divisions among defenders of segregation. Those who stood opposed to the students' claims differed on the strength of their commitment to segregation, on the lengths they were willing to go to protect segregation, and on the role that the police and courts should play in this struggle.

Divisions among southern whites were particularly consequential in the sit-in movement because of the distinctive legal issues involved. In other episodes in the civil rights struggle, law often operated to minimize divisions among segregationists. This was the case with the backlash against *Brown*, for example. State leaders who led the opposition against *Brown* effectively minimized divisions on school desegregation among white southerners by a legal maneuver: they removed power from localities and consolidated authority to the state level, where the segregationist cause could be more carefully strategized and managed.<sup>77</sup> Ultimately a relatively small number of leaders—leaders who saw political advantage in defending segregation—controlled the white South's stand against school desegregation.<sup>78</sup>

This kind of legal option was unavailable when it came to the sit-ins. The sit-ins targeted not state institutions but thousands of private businesses. These businesses decided whom to serve; they decided whether to press charges against sit-in protesters. The legal factor that made the constitutional claim of the sit-in protesters such a challenge to existing equal protection doctrine in the courts—the fact that these were private businesses—also made mobilizing in opposition to the sit-ins much more difficult.

A related way in which legal factors amplified divisions among white southerners was what might be described as a misalignment between incentives and authority.<sup>79</sup> Because official state segregation policy was no longer constitutionally permissible after *Brown*, store managers were the ones who needed to start the legal process. Private business owners were to bear the responsibility for calling upon the law to maintain Jim Crow. This was a burden that, by the spring of 1960, many, perhaps most, lunch counter operators, regardless of their personal beliefs on segregation, were not enthusiastic to shoulder.

Lunch counter operators were businessmen first and foremost. They wanted to make a profit, and they viewed themselves as catering to their clients' preferences, not dictating them. The store managers faced a classic collective action problem: if others integrated, then a store manager would fall into line, thankful, in many cases, to simply have the controversy resolved; but no single store wanted to be the first to integrate.<sup>80</sup>

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77 See ANDERS WALKER, *THE GHOST OF JIM CROW: HOW SOUTHERN MODERATES USED BROWN V. BOARD OF EDUCATION TO STALL CIVIL RIGHTS* (2009); NUMAN V. BARTLEY, *THE RISE OF MASSIVE RESISTANCE: RACE AND POLITICS IN THE SOUTH DURING THE 1950'S* 74–75 (1969).

78 See WALKER, *supra* note 77; see generally CHAFE, *supra* note 7.

79 For a fuller discussion of this theme, see SCHMIDT, *supra* note 1, at ch. 4.

80 See GAVIN WRIGHT, *SHARING THE PRIZE: THE ECONOMICS OF THE CIVIL RIGHTS REVOLUTION IN THE AMERICAN SOUTH* 74–104 (2013).

While many students were arrested, prosecuted, and often fined or sent to jail, the overwhelming majority of those who participated in the sit-ins were not.<sup>81</sup> When faced with a group of protesters who refused to leave, the most common response by restaurant operators was to shut down their lunch counters.<sup>82</sup> Most business operators simply wanted the protests to go away. They wanted to make money, and the sit-ins were preventing them from doing that. Sending potential paying customers off to jail was not good business, a point that the business owners regularly made when asked why they were unwilling to call the police and have the protesters charged with trespassing on private property. Many assumed (or hoped) the sit-ins were nothing more than a college prank that would soon blow over.<sup>83</sup>

White local political leaders in urban areas of the upper South and in major cities throughout the rest of the South had their own incentives to consider. They lived in communities where African Americans voted in significant numbers and where the growing Black middle class held economic sway through both Black-owned businesses and Black patronage of white businesses.<sup>84</sup> White political leaders also sought to portray their communities as more progressive on racial issues, so as to better attract coveted economic investment from outside the South.<sup>85</sup> As a result, local leaders usually searched for a conciliatory approach to the sit-ins. Whether they expressed their support for one side or the other, mayors urged negotiation and compromise as a way to deal with the issue and put an end to the protests. Mayors were limited, however, in their authority to deal with the situation. Like many lunch counter operators, they too felt a sense of helplessness in the face of the sit-ins. They could not force the students to stop; they could not force the businesses to desegregate; and they could not force the counter-protesters to stay home. When faced with the pressure from demonstrators on the one side and their business community on the other, mayors often shifted responsibility (and blame) by creating committees of leading local citizens, usually including African American leaders, who were charged with studying and resolving the issue.<sup>86</sup>

In contrast, those who most wanted to use the law to crack down on the students—police and state-level officials—were often disabled by legal constraints from doing so. From the perspective of the police, the law that they were empowered to enforce was agnostic when it came to racial discrimination in public accommodations. Although many southern states and localities still had segregation laws on the books, the police rarely tried to enforce them. In light of *Brown* and subsequent Supreme Court rulings striking down government-compelled segregation beyond public schools, even the most biased southern judge would have trouble in

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81 See, e.g., *S.S. Kresge Says Its Southern Stores Don't File 'Sit-In' Complaints*, WALL ST. J., May 16, 1960, at 9.

82 Schmidt, *supra* note 43, at 132–33.

83 Walzer, *supra* note 7, at 111, 117; Claude Sitton, *Negro Sitdowns Stir Fear of Wider Unrest in South*, N.Y. TIMES, Feb. 15, 1960, at 1.

84 See, e.g., *It Happened in Nashville*, REPORTER, May 26, 1960, at 2–4.

85 See, e.g., CHAFE, *supra* note 7.

86 See, e.g., David Halberstam, *A Good City Gone Ugly*, REPORTER, Mar. 31, 1960, at 17.

1960 trying to enforce a law requiring racial discrimination in eating facilities. Although civil rights opponents sometimes referenced segregation laws to threaten protesters,<sup>87</sup> no sit-in protester (as far as I know) was charged with violating a segregation statute. Since there were no legal requirements in any southern state that lunch counters refrain from racial discrimination, as there were in many northern states and localities that were covered by public accommodations laws, the choice of whether to segregate or not was left to the business operators. Unless a protester created a public disturbance (and they carefully avoided behavior that would risk this), police had to follow their lead.

In the end, the police seemed to want what the lunch counter operators wanted: someone in authority to do something. The sit-ins led to volatile confrontations, and the police felt helpless watching them unfold day after day.<sup>88</sup> Even if police would have liked to have acted to end the protests, their legal authority limited their ability to do so. Unlike the store operators, they had the incentives to act to diffuse these volatile situations. But short of a public disturbance, the operators held the authority to initiate the legal process.

State-level politicians tended to be quicker and harsher in their condemnation of the sit-in movement than their local counterparts. Whereas elected officials in cities in the upper South often depended on the Black vote, this was much less the case when it came to state-level politicians, many of whom were elected with aggressive pro-segregationist platforms. For example, Georgia Governor Vandiver, who had come to office with promises of unwavering support for segregation and was elected on the strength of the rural vote<sup>89</sup> (which held disproportionate sway over state-wide elections in the South because of the severe malapportionment in electoral districts<sup>90</sup>), denounced the statement of student leaders in Atlanta in support of the sit-ins as “calculated to breed dissatisfaction, discontent, discord, and evil.”<sup>91</sup> Vandiver personally ordered the arrest of the Atlanta students who targeted the state capitol cafeteria<sup>92</sup> and then issued a statement that described “these mass violations of State law and private property rights” as “subversive in character.”<sup>93</sup> Louisiana Governor Earl K. Long denounced the protests as the work of “some radical outfit” and suggested that if the demonstrators “want to do any real good they should return to their native Africa.”<sup>94</sup> In North Carolina, Governor Luther Hodges went on a letter-

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87 See, e.g., Susanna McBee, *More Dining Places Drop Racial Bars*, WASH. POST, June 24, 1960, at A1.

88 See, e.g., WOLFF, *supra* note 7, at 43.

89 See C. Eric Lincoln, *The Strategy of a Sit-In*, REPORTER, Jan. 5, 1961, at 20.

90 See MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY* 415 (2004) (discussing state legislative malapportionment as a contributing factor to racial extremism in the civil rights era).

91 *Vandiver’s Statement on Student Ad*, ATLANTA CONST., Mar. 10, 1960, at 15.

92 John Britton, *Students Bound Over to a Higher Court After Food Service Appeal*, ATLANTA DAILY WORLD, Mar. 16, 1960, at 1; see also *77 Negroes Arrested In Student Sitdowns at 10 Eating Places Here*, ATLANTA CONST., Mar. 16, 1960, at 1.

93 *State Probe In Sitdowns Ordered*, ATLANTA CONST., Mar. 17, 1960, at 14.

94 *9 Students Arrested*, N.Y. TIMES, Mar. 30, 1960, at 25.

writing campaign urging the operators of lunch counters targeted by the sit-ins to press trespassing charges against the protesters.<sup>95</sup>

As the sit-ins spread across the South, southern state legislatures pushed new criminal trespass laws to deal with the protests.<sup>96</sup> These new trespass laws still required private initiative to set the legal process in motion, however. Police would only make an arrest after being contacted by the business manager and having the manager, in the presence of the police officer, indicate his refusal to serve the patron. State officials were “helpless” to enforce the law if store managers chose not to go through the necessary steps, complained the frustrated Georgia Attorney General, Eugene Cook, after Atlanta merchants and protesters negotiated a desegregation agreement in early 1961.<sup>97</sup> Since the students were not listening to their calls to stop their protests, state-level officials had to rely on the lunch counter operators to defend their private property rights by calling upon the law. But, to the frustration of many a southern governor, the lunch counter operators refused to do what they wanted them to do.

In the case of the sit-ins, law amplified underlying divisions among defenders of segregation, ultimately benefiting the movement. The misalignment of authority and incentives among those who stood opposed to the sit-ins created a situation in which the protests would explode across the South.

### CONCLUSION: LESSONS FROM THE SIT-INS

The history of the 1960 sit-in movement may offer some guidance to better understand how social justice activists can leverage law to advance their causes.

One obvious lesson of the sit-ins is the surprising potential of legal uncertainty for social movement mobilization.<sup>98</sup> Lawyers interested in social reform work generally assess the strength of a cause based on the strength of the underlying legal claim. Hence, in 1960, civil rights lawyers were focused largely on implementing school desegregation and pursuing voting rights, two issues in which the law clearly was behind the cause of racial justice. The lawyer’s relative inattention to racial discrimination in public accommodations was based in their belief that the state action doctrine presented a significant, perhaps insuperable, obstacle to constitutional claims in this area. As I have described above, this legalistic assessment functioned as an invitation to the incipient student protest movement. The student protesters aimed their energies at a target that was in certain ways a fresh one, its vulnerabilities uncertain. Sympathizers lauded the creative tactics of the movement, praising the students for charting a new course toward racial equality.

Thus, the sit-ins show that in social movement mobilization the law matters, but not always in obvious or predictable ways. A strong legal claim (a claim that is

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95 Schmidt, *supra* note 41, at 142–45.

96 See, e.g., *Legal Aspects of the Sit-In Movement*, 5 RACE REL. L. REP. 935, 939 (1960).

97 *Police Get Rule Giving Business Expelling Power*, ATLANTA DAILY WORLD, Feb. 24, 1960, at 1; see also *Atlanta Stores Agree to End Lunch Counter Segregation*, N.Y. HERALD TRIB., Mar. 8, 1961, at 17.

98 I offer a more general, doctrine-focused take on this theme in SCHMIDT, *supra* note 1.

likely or even sure to win in court) does not necessarily make for an effective focal point for movement mobilization. It may be irrelevant. Or it may actually operate in ways that undermine movement mobilization. (For example, the NAACP's 1954 Supreme Court victory in *Brown* might have actually diverted the attention of some civil rights reformers away from grassroots activism for a time,<sup>99</sup> contributing to the stalled situation that the sit-in protesters lashed out against in 1960.) Weak or uncertain legal claims can create opportunities. They can steer other activists in ways that create openings for new movement activism. They can encourage novel, less legalistic tactics. Under the right circumstances, legal uncertainty can be a good thing for social movement mobilization.<sup>100</sup>

Because the legal issues were so fluid in the case of the sit-ins, civil rights lawyers were able to overcome their initial skepticism and join the battle the students had initiated. Civil rights lawyers declared at every turn that the students' cause was based on a valid constitutional claim. For lawyers versed in constitutional doctrine, this claim was a call on the courts to reconsider the boundaries of the state action doctrine as it had been defined by longstanding precedent. Sympathizers of the student movement who were unfamiliar with these doctrinal complexities made much the same claim, although they more often assumed it was not a request to dramatically change existing law but simply a reaffirmation of the change the Supreme Court had already announced in *Brown*. Although wrong on the doctrinal details, this assertion that the students had not just a moral right but also a constitutional right to nondiscriminatory access to public accommodations elevated the issue, placing it alongside issues in which the courts were more open to accepting that racial nondiscrimination was indeed a constitutional mandate, such as public education and voting. Although the student movement never won its constitutional claim in the Supreme Court, the inclusion of a public accommodation provision in the landmark 1964 Civil Rights Act was understood by many at the time—and still today—to be an affirmation that the Constitution was indeed on the side of the sit-in protesters. The uncertain nature of the law surrounding the sit-ins allowed for a delicate dance with and against the law. In the end, this dance benefited the protesters and their cause.

Another potential lesson from the sit-ins are the benefits of multiple paths for recognizing rights. For all its simplicity as an act of social protest, the sit-ins were a remarkably complex challenge to an array of private actors and public institutions, ranging from the local manager of a lunch counter to the justices of the United States Supreme Court. Challenging private and public actors can be disabling—it can allow for too many ways to oppose movement goals. But it also allows for different mechanisms of pressure to be applied. In the early 1960s, racial discrimination in public accommodations was challenged through direct-action protest, boycotts, constitutional litigation, and legislation (local, state, and federal). One set of arguments operated in the litigation context; another in the legislative arena; and another in the economic realm. In the case of the sit-ins, constitutional litigation was

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99 KLARMAN, *supra* note 90, at 377–81.

100 See Schmidt, *supra* note 30.

ultimately a dead end; the legislative approach was successful, although it took time to make it happen at the federal level. The economic pressure approach was successful in the near term in places where legislative reform was not feasible.

Finally, another lesson that can be extracted from this history of the sit-in movement is the benefit of opportunities for clear victories, even small ones. Campaigns for legal change are often quite ambitious. It is worth thinking of ways in which non-lawyers can participate—and can achieve something—in ways that are complementary to the larger litigation and lobbying efforts. The sit-ins gave student protesters this opportunity. As described above, there were many ways in which the protesters could achieve the satisfaction of victories. Even when these victories were small or symbolic—the temporary closing of a lunch counter, say—they were the kinds of achievements that energized the movement. Victories, however small, got them back out the next day and the day after that. Initially, civil rights lawyers were resistant to this element of the sit-ins.<sup>101</sup> Thurgood Marshall himself at one point suggested to student protesters that since they had made their point and given the NAACP Legal Defense Fund their test cases they could stop their protests.<sup>102</sup> Yet eventually, they too came to recognize the synergy between the protest movement and their own litigation-centered efforts.

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101 See Schmidt, *supra* note 41, at 122.

102 *Id.* at 128–29.