# LITIGATING AGAINST THE CIVIL RIGHTS MOVEMENT

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## INTRODUCTION

Legal scholars have long been fascinated by the use of litigation as a tool for social change. We have many excellent books and articles examining litigation campaigns designed to break the nation away from entrenched legal norms, to upset the status quo. The school desegregation campaign of the National Association for the Advancement of Colored People in the 1940s and 1950s,[1] the gender equity litigation of the 1970s and 1980s,[2] recent efforts of conservative public interest lawyers to roll back various forms of government regulation,[3] the ongoing campaign for same-sex marriage[4]—these and other legal reform efforts have received extensive scholarly attention.

Scholars have given relatively less attention to the use of litigation as a tool to *oppose* social change. This topic deserves more careful consideration. Litigation campaigns waged in defense of a threatened status quo are distinctive in certain ways from campaigns designed to topple settled law or established political practices.[5]

Social change litigation generally serves as a vanguard operation. Litigation campaigns can serve to rally support for an incipient movement, elevating the salience of an issue and framing the contested issue in terms of generally accepted legal

1. *See, e.g.*, FROM THE GRASSROOTS TO THE SUPREME COURT: *BROWN V. BOARD OF EDUCATION* AND AMERICAN DEMOCRACY (Peter F. Lau ed., 2004); MARK V. TUSHNET, MAKING CIVIL RIGHTS LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1936–1961 (1994); GENNA RAE MCNEIL, GROUNDWORK: CHARLES HAMILTON HOUSTON AND THE STRUGGLE FOR CIVIL RIGHTS (1983); RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF *BROWN V. BOARD OF EDUCATION* AND BLACK AMERICA'S STRUGGLE FOR EQUALITY (1975).

2. *See, e.g.*, SERENA MAYERI, REASONING FROM RACE: FEMINISM, LAW, AND THE CIVIL RIGHTS REVOLUTION (2011); MICHAEL W. MCCANN, RIGHTS AT WORK: PAY EQUITY REFORM AND THE POLITICS OF LEGAL MOBILIZATION (1994).

3. *See, e.g.*, ADAM WINKLER, GUNFIGHT: THE BATTLE OVER THE RIGHT TO BEAR ARMS IN AMERICA (2011); ANN SOUTHWORTH, LAWYERS OF THE RIGHT: PROFESSIONALIZING THE CONSERVATIVE COALITION (2008).

4. *See, e.g.*, JO BECKER, FORCING THE SPRING: INSIDE THE FIGHT FOR MARRIAGE EQUALITY (2014); MICHAEL J. KLARMAN, FROM THE CLOSET TO THE ALTAR: COURTS, BACKLASH, AND THE STRUGGLE FOR SAME-SEX MARRIAGE (2013).

5. Admittedly, this distinction may be a thin one. Reform advocates often seek to enhance the legitimacy of their claims by framing them in conservative terms, particularly in the judicial arena. Opponents of reform sometimes adopt the mentality and tactics of an insurgent movement. Some legal disputes simply do not divide neatly, with advocates of change on the one side and the defenders of the status quo on the other. Yet it is fair to say that in most significant legal disputes one can readily distinguish the forces of reform from their opposition.

principles. In the courtroom, social change lawyers ask judges to lead the way, to act when representative institutions remain committed to the existing state of affairs. Effective advocacy condemns the injustices of politically entrenched norms while assuaging judicial concerns about the risks of court-led innovation.

Litigation against social change functions differently. In the early stages of a legal reform battle, the litigation is primarily reactive. As reform advocates press the issue in the courts, their opponents protect the fortress of the legal status quo. Lawyers ask courts to stand as bulwarks of legal continuity and tradition in the face of political upheaval, as protectors of stability and order in the face of social unrest. But at some point, the tide turns, the fortress begins to fall, the forces of change gain the upper hand, and litigation against social change turns into a rearguard action. For defenders of a fading status quo, litigation may provide a unique set of resources. It can serve to delay change and to limit its effects. It can be used to undermine the efforts of those pushing for social change. Rearguard litigation often takes on characteristics associated with early-stage social change litigation: it serves to mobilize supporters, create alliances, and reframe the terms of the struggle.

This Article offers a case study of the role of litigation in one of the most prominent battles against social change in modern American history: the campaign of southern whites to oppose the civil rights movement. Through the 1950s and 1960s, as the black freedom struggle gained strength, segregationists litigated on behalf of their cause frequently, aggressively, and often with a remarkable sense of optimism for what they hoped to achieve. A commitment to litigation was a notably resilient theme of the civil rights resistance campaign.

An exploration of the litigation campaign against the civil rights movement illuminates not only an under-studied part of the movement's legal history, but also the particular value of litigation for social movements whose primary goal is to thwart or slow broader political and legal changes. This history, I suggest at the conclusion of the Article, may provide insights into the legal battles being waged in our own day. One obvious analogue is the unfolding campaign for gay rights. As opponents of gay rights desperately look for ways to block what

has become an unstoppable legal and social transformation, they have relied on rearguard litigation efforts to delay and limit the scope of their defeat. Apart from gay marriage, however, the most successful legal reform campaigns of the past generation have been aligned with ideologically conservative causes.[6] For this reason, a better understanding of the dynamics of litigating campaigns aimed at thwarting social change might be of use to today's liberals, whose recent courtroom battles have been primarily designed to protect a fracturing legal status quo against conservative challenge.

The Article proceeds as follows. Part I describes and categorizes the varieties of segregationist litigation. It discusses how litigation served Jim Crow's defenders in different ways, sometimes operating to suppress civil rights activity, sometimes operating to preserve Jim Crow laws and practices. Disaggregating their litigation efforts in this way allows for a more precise analysis of what segregationists hoped to achieve through the courts. Part II describes the persistent faith segregationists retained in the courts as an ally in their cause. The next two parts explain the reasons for this faith in litigation. Part III describes how segregationists found ways to win in court. Although defending a way of life that was losing on the national political stage and in the court of public opinion, segregationists had considerable success in the courtroom, even in the United States Supreme Court. Part IV explains the value segregationists found in litigating even when they lost in court. It considers the potential benefits of litigation as a tool of movement mobilization—benefits that transcended the outcome of particular court battles. Part V explores the effect litigation had on the ways segregationists defended their cause. Litigation success demands accepting the constraints imposed by the language and norms of acceptable legal argumentation. This constraining effect operated to weaken the defense of white supremacy while also transforming racial conservatism into a more effective weapon against further civil rights gains. The Conclusion considers the

6. *See, e.g.*, Shelby Cnty. v. Holder, 133 S. Ct. 2612 (2013) (striking down key provision of the Voting Rights Act of 1965); Citizens United v. FEC, 558 U.S. 310 (2010) (striking down key provision of Bipartisan Campaign Reform Act of 2002); District of Columbia v. Heller, 554 U.S. 570 (2008) (striking down handgun ban in Washington, D.C.); Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007) (striking down local school desegregation plans).

insights the litigation campaign against the civil rights movement may offer the legal disputes of our day.

## I. DEFENDING JIM CROW IN THE COURTS

Explaining the litigation campaign against the civil rights movement and analyzing its effects requires an understanding of the different ways in which segregationists used litigation to serve their cause. This Part offers a brief overview and categorization of the varieties of segregationist litigation.

Segregationist litigation generally fell into one of three categories. There was litigation as an offensive tactic: when segregationists used the courts to lash out at the civil rights movement and to undermine civil rights activism. There was litigation as a primary line of defense: when segregationists went to court to fend off efforts of civil rights lawyers to convince judges to expand legal rights for African Americans. And there was litigation as a secondary line of defense: when segregationists were unable to block passage of civil rights legislation, they turned to the courts as their last hope. Segregationists used these different forms of litigation to serve different goals—goals that included, but were not limited to, courtroom victories. The following sections describe each mode of litigation in turn.

### *A. Using the Courts to Attack the Civil Rights Movement*

Defenders of segregation used the courts as an offensive weapon when they initiated litigation in order to undermine civil rights activity.

This form of offensive litigation was most commonly initiated by southern state or local authorities. When police arrested civil rights protesters for violating some provision of the criminal code, prosecutors almost invariably won convictions in southern courtrooms.[7] There were a seemingly

7. *See, e.g.*, TOMIKO BROWN-NAGIN, COURAGE TO DISSENT: ATLANTA AND THE LONG HISTORY OF THE CIVIL RIGHTS MOVEMENT 234–42 (2011) (describing criminal prosecution of civil rights protesters in Atlanta).

The sheer number of civil rights protesters who were prosecuted for their activities is reflected by the following fact: by the mid-1960s, the NAACP Legal Defense Fund had represented some 17,000 demonstrators who had appealed their convictions. JACK GREENBERG, CRUSADERS IN THE COURTS: HOW A DEDICATED BAND OF LAWYERS FOUGHT FOR THE CIVIL RIGHTS REVOLUTION 304

endless variety of laws used in these criminal prosecutions: disturbing the peace,[8] marching without a permit,[9] violating picket[10] or boycott[11] laws, trespassing on property (both public[12] and private[13]), criminal libel,[14] conspiracy.[15] Other examples of offensive litigation designed to undermine civil rights activity included the prosecution of the NAACP for refusal to disclose its membership rolls as required by state law;[16] the prosecution of civil rights attorneys for legal ethics violations;[17] the use of minor traffic ordinance violations as a

(1994).

8. *See, e.g.*, Wright v. Georgia, 373 U.S. 284 (1963); Edwards v. South Carolina, 372 U.S. 229 (1963); Taylor v. Louisiana, 370 U.S. 154 (1962) (per curiam); Abernathy v. State, 155 So. 2d 586 (Ala. Ct. App. 1962), *rev'd*, 380 U.S. 447 (1965); Garner v. Louisiana, 368 U.S. 157 (1961).

9. *See, e.g.*, Shuttlesworth v. City of Birmingham, 394 U.S. 147, 148–50 (1969).

10. *See, e.g.*, Cox v. Louisiana, 379 U.S. 559, 560 (1965).

11. *See, e.g.*, Robert Jerome Glennon, *The Role of Law in the Civil Rights Movement: The Montgomery Bus Boycott, 1955-1957*, 9 L. & HIST. REV. 59, 71–73 (1991) (describing the effort by Montgomery officials to use an anti-boycott law against Martin Luther King Jr. and others involved in the bus boycott).

12. *See, e.g.*, Adderley v. Florida, 385 U.S. 39 (1966); Brown v. Louisiana, 383 U.S. 131 (1966).

13. *See, e.g.*, Bell v. Maryland, 378 U.S. 226 (1964); Lombard v. Louisiana, 373 U.S. 267 (1963); Peterson v. City of Greenville, 373 U.S. 244 (1963). *See generally* Christopher W. Schmidt, *Divided by Law: The Sit-Ins and the Role of the Courts in the Civil Rights Movement*, 33 LAW & HIST. REV. 93 (2015) [hereinafter Schmidt, *Divided by Law*].

14. Following the publication of the civil rights fundraising advertisement that would lead to the decision in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), Alabama's Secretary of State warned, "each person whose name appears in the advertisement should have a warrant issued for them. And if they ever come to Alabama, they should be arrested for falsifying the State of Alabama with lies." *King Backers Ignore Ala. Arrest Threats*, CHI. DAILY DEFENDER, Apr. 13, 1960, at 20. Later that year a grand jury in Bessemer, Alabama, indicted *New York Times* reporter Harrison E. Salisbury for criminal libel because of his stories about white supremacy in the Birmingham region. *Alabama Indicts Times Reporter*, N.Y. TIMES, Sept. 7, 1960, at 27. The case never went to trial. John Herbers, *Libel Actions Ask Millions in South*, N.Y. TIMES, Apr. 4, 1964, at 12.

15. *See, e.g.*, Elsie Carper, *Rights-Ad Signers Face Georgia Law Test*, WASH. POST, Apr. 26, 1960, at A24 (detailing an account of Atlanta students charged with conspiracy to violate state trespass and illegal assembly laws); *'Freedom Ride' Conviction Upset*, WASH. POST, Mar. 7, 1963, at A2 (noting Reverend Fred Shuttlesworth's conviction on charges of conspiring to breach the peace for his role in the Freedom Rides was overturned on appeal).

16. *See,* e.g., Bates v. City of Little Rock, 361 U.S. 516 (1960); Harrison v. NAACP, 360 U.S. 167 (1959); NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449 (1958); *see also* NUMAN V. BARTLEY, THE RISE OF MASSIVE RESISTANCE: RACE AND POLITICS IN THE SOUTH DURING THE 1950'S, at 212–24 (1969); Walter F. Murphy, *The South Counterattacks: The Anti-NAACP Laws*, 12 W. POL. Q. 371 (1959).

17. *See* NAACP v. Button, 371 U.S. 415, 423–26 (1963); TAYLOR BRANCH,

way to undermine the carpools used during the Montgomery Bus Boycotts;[18] and Alabama's prosecution of Martin Luther King, Jr., on charges of tax evasion.[19]

Private law actions were another way segregationists used the courts to attack civil rights activism. Southerners filed libel suits against northern newspapers based on their coverage of the civil rights movement.[20] In Albany, Georgia, a white grocery store owner filed a civil suit against a group of African American protesters, accusing them of participating in an illegal boycott after they picketed his store in protest over the store owner's service on a jury that had acquitted a white sheriff who had killed a black man in his custody.[21] In St. Petersburg, Florida, the owner of a department store was able to secure an injunction in state court against the NAACP, which had organized a boycott to protest the store's segregated lunch counter and refusal to hire more African American employees.[22]

In short, defenders of segregation drew upon much of the civil and criminal code in their effort to undermine civil rights activity.

### *B. Using the Courts as a Primary Line of Defense Against the Civil Rights Movement*

Defenders of segregation used the courts as a primary line of defense when faced with court-based challenges to the racial status quo. The civil rights movement used litigation as a weapon against Jim Crow, and its defenders made the courts a central battleground of their defense. This was, most famously,

PARTING THE WATERS: AMERICA IN THE KING YEARS 1954–63, at 168 (1988) (describing Montgomery's attempted prosecution of civil rights attorney Fred Gray during the bus boycotts); TUSHNET, *supra* note 1, at 272–74 (describing use of legal ethics regulations as an anti-civil rights tool across the South during the late 1950s).

18. Christopher Coleman, Laurence D. Nee & Leonard S. Rubinowitz, *Social Movements and Social-Change Litigation: Synergy in the Montgomery Bus Protest*, 30 L. & SOC. INQUIRY 663, 679 (2005).

19. *See* BRANCH, *supra* note 17, at 276–77.

20. *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964); Christopher W. Schmidt, New York Times Co. v. Sullivan *and the Legal Attack on the Civil Rights Movement*, 66 ALA. L. REV. 293 (2014) [hereinafter Schmidt, *Legal Attack*].

21. BRANCH, *supra* note 17, at 731–32.

22. NAACP v. Webb's City, Inc., 152 So. 2d 179 (Fla. Dist. Ct. App. 1963), *vacated*, 376 U.S. 190 (1964).

the posture of the school desegregation cases.[23] The battle was primarily a courtroom battle, and segregationist lawyers defended their cause, arguing to preserve the legal status quo.[24] After they lost in *Brown*, segregationist lawyers turned their attention to delaying and limiting the scope of court-ordered desegregation plans.[25] The courtroom remained a primary forum in which the school desegregation issue played out.

Under the categorization scheme offered in this Article, some litigation battles were both offensive and defensive. Consider, for example, the court battles that arose from the lunch counter sit-ins.[26] The sit-in cases began when southern police officers arrested lunch counter protestors, typically on charges of trespass or disorderly conduct.[27] When business owners proved reluctant to press charges against protesting students, local and state government officials sometimes stepped in, urging them to initiate prosecutions.[28] Southern politicians believed that a commitment to the rule of law, enforced through the formal legal process, was the best way to show they retained control over a protest situation that was spinning out of control. The white judges in the local courts that tried the cases almost invariably ruled against the civil rights activists, giving local and state authorities an opportunity to declare victory for the forces of law and order.[29] Defenders of the racial status quo claimed successful prosecutions demonstrated that business owners had a legal "right" to discriminate.[30]

23. Brown v. Bd. of Educ., 349 U.S. 294 (1955); Brown v. Bd. of Educ., 347 U.S. 483 (1954). The cases involving the exclusion of black voters from primary elections, *Smith v. Allwright*, 321 U.S. 649 (1944) and *Terry v. Adams*, 345 U.S. 461 (1953), were also prominent examples of this kind of segregationist litigation as a primary line of defense.

24. Prior to *Smith*, existing doctrine held that party primaries, as private events, were not constrained by the requirements of the Fourteenth and Fifteenth Amendments. Grovey v. Townsend, 295 U.S. 45, 55 (1935). Prior to *Brown*, existing doctrine held that racial segregation of public facilities, such as public schools, did not violate the Fourteenth Amendment. Gong Lum v. Rice, 275 U.S. 78, 87 (1927); Plessy v. Ferguson, 163 U.S. 537, 552 (1896).

25. *See infra* Part III.B.

26. This discussion of the sit-ins draws on Schmidt, *Divided by Law*, *supra* note 13.

27. *Id.* at 140–42.

28. *Id.* at 142–47.

29. *See, e.g.*, *id.* at 143–44.

30. For example, in a brief filed in a Georgia Supreme Court appeal of

Yet when civil rights attorneys arrived on the scene they transformed the legal dynamic, forcing segregationist lawyers into a defensive posture. Attorneys for the arrested protesters challenged the sit-in prosecutions as violations of the protesters' right to equal protection of the laws under the Fourteenth Amendment.[31] From the perspective of the segregationists, what had been an offensive litigation campaign against civil rights protesters now became a defensive litigation campaign against a doctrinal claim that threatened to transform southern racial practices. As in the school desegregation cases, lawyers for the southern states argued for the values of legal stability and precedent[32] and warned of the risks of doctrinal innovation.[33]

There is no mystery as to why segregationists used litigation as a primary line of defense against the civil rights movement. They had no real choice and nothing to lose. Standing up for the doctrinal status quo was not always a winning position, but in a legal system premised on deference to past decisions, it was a presumptively defensible ground. Even when the Supreme Court proved willing to change existing law in response to the demands of the civil rights movement, segregationist lawyers were often successful in delaying change or in arguing for more limited change.[34]

### *C. Using the Courts as a Secondary Line of Defense Against the Civil Rights Movement*

Finally, segregationists used litigation as a secondary line of defense against the civil rights movement. This tactic

trespass convictions of sit-in protesters, Georgia Attorney General Eugene Cook argued that "[e]very man has the right to labor or to refuse labor for another, and he may base such refusal on any grounds he may choose, and even on more [sic] whim, prejudice or malice." *Cook Argues That Sit-Ins Create Type of Servitude*, ATLANTA DAILY WORLD, Nov. 10, 1960, at 8. *See generally* Christopher W. Schmidt, *Defending the Right to Discriminate: The Libertarian Challenge to the Civil Rights Movement*, *in* SIGNPOSTS: NEW DIRECTIONS IN SOUTHERN LEGAL HISTORY 417–47 (Sally Hadden & Patricia Minter eds., 2013).

31. Schmidt, *Divided by Law*, *supra* note 13, at 118–29.

32. Segregationist lawyers relied on the *Civil Rights Cases*, 109 U.S. 3 (1883), which they cited as establishing that the Equal Protection Clause only applies to state actors.

33. *See, e.g.*, Charles J. Bloch, *A Second Tragic Era—The Role of the Lawyer in It*, 24 ALA. LAW. 386 (1963) (attacking the Supreme Court for abandoning settled precedents).

34. *See infra* Part II.

involved court-based challenges to civil rights legislation. Since southern states were not passing civil rights policy during this period, this form of segregationist litigation targeted federal legislation. In these cases, the primary line of segregationist defense was not in the courtroom but in Congress, where southern Representatives and Senators made their stand against proposed civil rights bills.[35] When this line was breached, first with the Civil Rights Act of 1957, then again in 1960, 1964, and 1965, civil rights opponents took to the courts.[36]

The segregationist commitment to this kind of litigation is not as obvious as it was in the previously described categories. Litigating against civil rights activism had immediate payoffs for segregationists, and segregationist lawyers had considerable success in delaying or limiting judicially initiated reforms. The goal of constitutional challenges to federal civil rights laws was less clear, however. The possibility of victory in the Supreme Court was vanishingly small in these cases, while the probability of another embarrassing defeat was high.[37] Yet litigate the segregationists did. Southern lawyers wrote lengthy, impassioned legal briefs,[38] while the Southern press

35. *See generally* KEITH M. FINLEY, DELAYING THE DREAM: SOUTHERN SENATORS AND THE FIGHT AGAINST CIVIL RIGHTS, 1938–1965 (2008).

36. *See* South Carolina v. Katzenbach, 383 U.S. 301 (1966) (rejecting South Carolina challenge to Voting Rights Act of 1965); Katzenbach v. McClung, 379 U.S. 294 (1964) (rejecting challenge to Title II of the 1964 Civil Rights Act); Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964) (same); United States v. Manning, 215 F. Supp. 272 (W.D. La. 1963) (rejecting Louisiana challenge to Civil Rights Act of 1960); United States v. Raines, 172 F. Supp. 552 (M.D. Ga. 1959), *rev'd*, 362 U.S. 17 (1960); United States v. McElveen, 177 F. Supp. 355 (E.D. La. 1959); Larche v. Hannah, 177 F. Supp. 816, 819–21 (W.D. La. 1959), *rev'd* 363 U.S. 420, 452 (1960).

Not all cases were initiated by challengers to the law. In some cases, the U.S. government initiated enforcement action in the courts, at which point civil rights opponents moved to dismiss the lawsuit based on a claim that the federal law was unconstitutional. *See, e.g.*, *Raines*, 172 F. Supp 552; *McElveen*, 177 F. Supp. 355; *Larche*, 177 F. Supp. 816.

37. For example, after hearing a constitutional challenge to the Civil Rights Act of 1957, federal district court judge J. Skelly Wright described the claim as "obviously without merit," *McElveen*, 177 F. Supp. at 357, and concluded his opinion with the following chastising lines: "The United States has made the solemn charge that these defendants have committed such an offense. Instead of challenging the constitutionality of the Civil Rights Act of 1957, these defendants should be searching their souls to see if this charge is well founded." *Id.* at 360.

38. Notable examples include: Brief of the State of North Carolina at 47–48, Avent v. North Carolina, 373 U.S. 375 (1963) (No. 11) ("[W]hat the petitioners demand in this case goes much further towards the abridgement of property and

and segregationist politicians drew attention to the cases working their way through the courts.[39] The question, then, is why? What did the defenders of white supremacy feel they stood to gain by launching these long-shot challenges to federal civil rights law?

## II. THE SEGREGATIONIST FAITH IN LITIGATION

There is something quixotic, even pitiful, about Jim Crow's last stand in the courts. Consider, for example, the aging John W. Davis, one of the leading advocates of his day, hired by South Carolina to defend its racially segregated schools, who concluded his Supreme Court oral argument in *Brown v. Board of Education*[40] with an impassioned plea on behalf of tradition. "[S]omewhere, sometime," he told the justices, "to every principle comes a moment of repose when it has been so often announced, so confidently relied upon, so long continued, that it passes the limits of judicial discretion and disturbance."[41] He left the courtroom confident that he was going to win the case.[42] He lost, 9-0.[43]

Or consider Moreton Rolleston, the Georgia lawyer and owner of the Heart of Atlanta Motel, who challenged the 1964 Civil Rights Act, arguing his own case all the way to the Supreme Court.[44] He attempted to persuade the justices not

indeed towards the socialization of property than anyone has ever thought proper since this Nation secured its independence in the American Revolution. . . . The logic of petitioners in this case, if sustained, will not leave any place where people of the same tastes, affinities, congenialities and race can meet together in a club, in the home, or any other place of assembly because all of these places are to some extent regulated by the state."); Brief on Behalf of the Commonwealth of Virginia Amicus Curiae at 46, South Carolina v. Katzenbach, 383 U.S. 301 (1966) (No. 22) ("Ambitious of result but reckless of means, Congress has enacted legislation which is utterly without constitutional foundation and destitute of judicial support.").

39. *See, e.g.*, RICHARD C. CORTNER, CIVIL RIGHTS AND PUBLIC ACCOMMODATIONS: THE HEART OF ATLANTA MOTEL AND MCCLUNG CASES 85, 186 (2001) (describing southern press and political attention to constitutional challenge to the Civil Rights Act of 1964).

40. Brown v. Bd. of Educ., 347 U.S. 483 (1954).

41. ARGUMENT: THE ORAL ARGUMENT BEFORE THE SUPREME COURT IN BROWN V. BOARD OF EDUCATION OF TOPEKA, 1952–1955, at 215 (Leon Friedman ed., 1969).

42. WILLIAM H. HARBAUGH, LAWYER'S LAWYER: THE LIFE OF JOHN W. DAVIS 506–07 (1973).

43. *Brown*, 347 U.S. 483.

44. Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964).

only that the Civil Rights Act exceeded Congress's enumerated powers, but that requiring the owner of a hotel or restaurant to serve customers on a non-racially discriminatory basis violated the Thirteenth Amendment's prohibition on involuntary servitude.[45] The Justices listened to his Thirteenth Amendment argument without comment.[46] Two months later, the Court unanimously upheld the Civil Rights Act.[47]

Despite these and many other conspicuous defeats, segregationists retained a striking faith in litigation. When faced with a growing national commitment to civil rights policy, they hoped to find refuge in the courts. "I intend to take my stand on the side of law," declared North Carolina Attorney General Malcolm Seawell in 1958, as he sought to differentiate his state's court-centered resistance campaign from the more defiant, extralegal resistance campaigns being waged elsewhere in the South.[48] Segregationists initiated lawsuits and filed amicus briefs, all the while expressing great hopes for the outcomes of their courtroom battles. Rolleston was so intent on being the first to challenge the Civil Rights Act that he rushed to the courthouse with his paperwork as soon as the bill was signed; when he found the courthouse closed, he tracked down the federal district court clerk at home.[49] On the day the Civil Rights Act was signed into law, the executive director of the Mississippi Innkeepers Association told a *Wall Street Journal* reporter to expect "a great many test cases starting in Mississippi that will go all the way to the United States Supreme Court."[50] Segregationists retained a faith in the courts, renewed time and time again despite repeated defeats.

This enthusiasm and optimism for fighting battles in the

45. Jurisdictional Statement and Brief at 8, 14, 51–58, *Heart of Atlanta*, 379 U.S. 241 (No. 515).

46. Oral Argument, October 5, 1964, *Heart of Atlanta*, 379 U.S. 241 (No. 515), *in* 60 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 554–57 (Philip B. Kurland & Gerhard Casper eds., 1975).

47. *Heart of Atlanta*, 379 U.S. 241.

48. *Faubus School Policy Hit in North Carolina*, WASH. POST, Oct. 4, 1958, at A7.

49. CORTNER, *supra* note 39, at 35.

50. James C. Tanner, *Civil Rights Test: Negroes in South Ready Immediate, Broad Drive To Try Out New Law*, WALL ST. J., July 2, 1964, at 1; *see also id.* ("If there's one certainty on the effect of the [Civil Rights Act], it's that it promises to unleash a flood of legal actions in Southern courts—from whites as well as Negroes.").

federal courts was particularly striking considering the low opinion that so many segregationists had of the federal courts, especially the Supreme Court. *Brown* generated an outpouring of attacks on the Court and the justices. "The hooves of a roughshod Court have trampled over a dozen areas of law that once were thought inviolate," wrote southern editor James Kilpatrick in the aftermath of *Brown*.[51] Alabama Governor George Wallace complained that the only people who won before the Supreme Court were "duly and lawfully convicted criminals, communists, atheists and clients of the NAACP."[52] He declared the federal courts "the greatest single threat to individual freedom and liberty in the United States today."[53]

Why invest all this time and effort in making such impassioned arguments to a judicial system that over the course of the civil rights movement dealt the segregationist South such resounding public defeats?[54] What did civil rights opponents feel they stood to gain by their continued dedication to litigation? The next two Parts attempt to answer these questions.

## III. FINDING THE RIGHT COURT AND THE RIGHT CLAIM

The segregationist commitment to litigation can be

51. James J. Kilpatrick, *School Integration—Four Years After: The South vs. the High Court's 1954 Ruling*, 15 HUM. EVENTS, May 12, 1958, at 4.

52. DAN T. CARTER, THE POLITICS OF RAGE: GEORGE WALLACE, THE ORIGINS OF THE NEW CONSERVATISM, AND THE TRANSFORMATION OF AMERICAN POLITICS 162 (1995).

53. George Wallace, Governor Ala., The Civil Rights Movement: Fraud, Sham, and Hoax (July 4, 1964), *available at* http://xtf.lib.virginia.edu/xtf/view?docId=modern_english/uvaGenText/tei/WalCivi.xml;brand=default, *archived at* http://perma.cc/29TN-HCDE.

54. Political scientist Richard A. Brisbin has identified two basic forms of resistance to a dominant legal regime: an "inside" resistance strategy, in which resisters "act[] through legal institutions to voice challenges to the interpretation or application of law"; and an "outside" resistance strategy, in which resisters draw on "moral, religious, or cultural arguments" in order to "seek emancipation from legality and, often, an exit from the regime that devised the law." Richard A. Brisbin, Jr., *Resistance to Legality*, 6 ANN. REV. L. & SOC. SCI. 25, 30–31 (2010). Framed in these terms, my question would be why the dominant thread of segregationist resistance to the emerging civil rights regime adopted an "insider" strategy. Although there was certainly a powerful strain of "outsider" resistance to the civil rights movement—found, for example, in the rhetoric of defiance against federal authority or the extralegal violence of the KKK—mainstream leaders of the segregationist movement of the 1960s sought to push these tactics to the fringes and make their case using "insider" tactics. Prominent among these tactics was the funneling of civil rights disputes into the courts.

attributed to several factors. Later in the Article, I examine the ways in which losses in the courtroom were not always losses for the larger segregationist movement. Segregationists, that is, found advantages in pursuing litigation even when the actual outcomes went against them.[55] In this Part, I focus on the areas of litigation in which segregationists actually found ways to win courtroom battles. Defenders of Jim Crow did not always lose, even before the Supreme Court. Even when they ultimately lost in the Supreme Court, segregationists scored some significant victories in lower federal courts where southern judges were often sympathetic to their cause.

Segregationist success in the courtroom can be attributed to both institutional and doctrinal factors. As an institutional matter, America's two-level, decentralized judiciary provided critically important opportunities for Jim Crow's attorneys. The ideological diversity of the American judicial system—not only between state courts and federal courts, but also within the federal system—meant that segregationists could often find judges sympathetic to their cause, even when pursuing claims that would ultimately be rejected on appeal. Cases that lost in federal courts often won in state courts;[56] cases that lost in the United States Supreme Court sometimes won in the lower federal courts.[57] Criminal convictions of civil rights protesters in southern local and state courts were often overturned on appeal in federal court, but not all were appealed and the appeals took time. Civil rights protesters often had trouble finding lawyers who were willing to take their cases, while there was never a shortage of segregationist prosecutors.[58] Defenders of segregation could achieve their more immediate

55. *Infra* Part IV.

56. *E.g.*, N.Y. Times Co. v. Sullivan, 144 So. 2d 25, 49–52 (Ala. 1962) (upholding $500,000 award in libel suit), *rev'd*, 376 U.S. 254 (1964); Alabama v. NAACP, 91 So. 2d 214, 220 (Ala. 1956) (upholding contempt conviction against NAACP for refusing to reveal membership rolls), *rev'd*, 357 U.S. 449 (1958); State v. Avent, 118 S.E.2d 47, 58 (N.C. 1961) (upholding trespassing conviction for restaurant sit-in), *vacated*, 373 U.S. 375 (1963); NAACP v. Harrison, 116 S.E.2d 55 (Va. 1960), *rev'd sub nom*. NAACP v. Button, 371 U. S. 415 (1963).

57. *See generally* Griffin v. Bd. of Supervisors of Prince Edward Cnty., 322 F.2d 332 (4th Cir. 1963), *rev'd sub nom*. Griffin v. Cnty. Sch. Bd. of Prince Edward Cnty., 377 U.S. 218 (1964); McClung v. Katzenbach, 233 F. Supp. 815 (N.D. Ala. 1964), *rev'd*, 379 U.S. 294 (1964); *see also* Stell v. Savannah-Chatham Cnty. Bd. of Educ., 220 F. Supp. 667 (S.D. Ga. 1963), *rev.'d*, 333 F.2d 55 (5th Cir. 1964).

58. *See generally* Daniel H. Pollitt, *Counsel for the Unpopular Cause: The Hazard of Being Undone*, 43 N.C. L. REV. 9 (1964); Claude Sitton, *Legal Aid Scarce in Rights Battle*, N.Y. TIMES, Oct. 30, 1961, at 1.

goals of intimidating civil rights activism and stretching thin the resources of civil rights organizations with a successful prosecution at trial even when they eventually lost on appeal.

As a doctrinal matter, not all the legal claims advanced by segregationists were long-shot, lost-cause arguments. Indeed, they often advanced legal claims that had a strong grounding in existing constitutional doctrine. The segregationist defeat in *Brown v. Board of Education* required the Court to abandon a reading of the Equal Protection Clause that had stood for over half a century.[59] Other doctrinal innovations of the civil rights era included the creation of a right to association under the First Amendment, which the Court used to strike down southern efforts to expose the membership rolls of local NAACP branches;[60] the expansion of the state action doctrine in the sit-in cases;[61] the recognition that certain forms of public interest litigation may be protected under the First Amendment;[62] and the introduction of new constitutional constraints on longstanding libel law doctrine in *New York Times Co. v. Sullivan*.[63] When southern lawyers took these cases to court, they were justified in feeling they had the law on their side. It was only at the end of the process that the Supreme Court told them they were wrong.

There were also cases in which the Supreme Court never proved the segregationists wrong. Segregationist lawyers successfully fought off bold constitutional challenges to existing law in the sit-in cases.[64] By the late 1960s, as some of the Justices became increasingly concerned with the tactics of civil

59. Gong Lum v. Rice, 275 U.S. 78, 94 (1927); Plessy v. Ferguson, 163 U.S. 537, 544–45 (1896).

60. NAACP v. Alabama, 357 U.S. 449, 460 (1958).

61. *E.g.*, Lombard v. Louisiana, 373 U.S. 267, 273–74 (1963); Peterson v. City of Greenville, 373 U.S. 244, 247–48 (1963); Burton v. Wilmington Parking Auth., 365 U.S. 715, 726 (1961); *see also* Christopher W. Schmidt, *The Sit-ins and the State Action Doctrine*, 18 WM. & MARY BILL RTS. J. 767, 791–95 (2010) (discussing the doctrinal innovations of the sit-in cases) [hereinafter Schmidt, *Sit-ins and the State Action Doctrine*].

62. NAACP v. Button, 371 U.S. 415, 432–33 (1963).

63. 376 U.S. 254, 268 (1964); *see* Harry Kalven, Jr., *The* New York Times *Case: A Note on "The Central Meaning of the First Amendment*,*"* 1964 SUP. CT. REV. 191, 196–97 ("Alabama did not create any special rules of law for these defendants. It simply applied the existing principles of the law of libel. . . . It is important to stress that the Alabama decision was not simply a sham.").

64. *See* Schmidt, *Sit-ins and the State Action Doctrine*, *supra* note 61, at 781–802.

rights protesters,[65] the track record of southern states in civil rights cases in the Supreme Court improved.[66] Despite embracing the lost cause of defending Jim Crow, some of the legal claims segregationists advanced survived the civil rights era largely intact.

All of this is to say that not all segregationists believed they were fighting for a lost cause. Particularly, early on in the civil rights era there was reason for segregationists to believe that some courts were on their side. Despite conspicuous defeats, segregationists had their share of courtroom victories.

### *A. Demobilizing the Civil Rights Movement*

Although the major civil rights litigation battles of the period were waged in federal courts, segregationist lawyers spent much of their time in local and state courts, where they generally obtained the outcomes they wanted. Criminal prosecutions as well as private law actions against civil rights activists and their allies relied on state court judges and all-white jury members who saw themselves as part of the segregationist cause. White southern judges were, for the most part, perfectly willing to convict sit-in protesters of violating trespass or disorderly conduct laws, often supplementing their verdicts with chastising comments about the protesters and their choice of protest tactics.[67] In Montgomery, Commissioner L.B. Sullivan's libel suit trial against the *New York Times* was heard before a judge who was an outspoken defender of the segregationist cause and an all-white jury whose names were published in the local paper.[68] When the Supreme Court held that segregated courtrooms violated the Fourteenth

65. Christopher W. Schmidt, *Hugo Black's Civil Rights Movement*, *in* TRANSFORMATIONS IN AMERICAN LEGAL HISTORY 246, 246–66 (Daniel W. Hamilton & Alfred L. Brophy eds., 2009); Jack Greenberg, *The Supreme Court, Civil Rights and Civil Dissonance*, 77 YALE L.J. 1520, 1533–38 (1968).

66. *See generally* Walker v. City of Birmingham, 388 U.S. 307 (1967); Adderley v. Florida, 385 U.S. 39 (1966).

67. *See, e.g.*, *Orders Ga. Probe of Sit-Ins*, CHI. DAILY DEFENDER, Jan. 12, 1961, at 10 (discussing Georgia state judge's criticism of sit-in protesters in charge to grand jury).

68. Judge Walter B. Jones once declared that "the XIV Amendment has no standing whatever in this Court, it is a pariah and an outcast." Walter B. Jones, *Judge Jones on Court Room Segregation*, 22 ALA. LAW. 190, 191 (1961). *See generally* Schmidt, *Legal Attack*, *supra* note 20, at 317–19 (describing evidence of racial discrimination at the trial).

Amendment, one Mississippi judge was unimpressed. "We'll continue to run our courtrooms like we have—until we are invaded," he declared.[69]

The horizon was generally short-term: intimidate protesters, get them off the streets, force them to pay fines or undergo jail-time, and force civil rights groups to invest time and effort defending these charges. When these state court decisions were appealed to the federal courts, they were often overturned.[70] Litigation here was in large part a stalling tactic. As a South Carolina hotel manager told a reporter in February 1960, "You know and I know that desegregation is coming—but not tomorrow."[71] Moderate segregationists recognized that desegregation was going to happen, but they wanted change to come on their own terms—through negotiation and political compromise, not through demands backed by street protests.[72] Thus, even when the federal courts reversed these convictions on appeal, these tactics generally served their purpose.

### *B. School Desegregation*

Litigation involving school desegregation—what I have categorized as litigation as a primary line of defense for the segregationist cause—also demonstrates the ability of segregationists to locate relatively stronger claims and more sympathetic courts. Although in the years immediately following *Brown*, the "massive resistance" movement—premised on open defiance of the federal courts—swept across the South, adherents of a more moderate form of segregationist resistance remained influential. They believed that segregation could be more effectively preserved by working within the courts and the legal landscape created by *Brown*. North

69. *Defied in Mississippi*, N.Y. TIMES, Apr. 30, 1963, at 22 (quoting Circuit Judge M.M. McGowan of Jackson, Mississippi).

70. *See, e.g.*, Brown v. Louisiana, 383 U.S. 131 (1966); Cox v. Louisiana, 379 U.S. 559 (1965); N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964); Edwards v. South Carolina, 372 U.S. 229 (1963); Garner v. Louisiana, 368 U.S. 157 (1961).

71. Claude Sitton, *Negroes Press for Faster Desegregation*, N.Y. TIMES, Feb. 21, 1960, at E3.

72. *See, e.g.*, Elsie Carper, *Rights–Ad Signers Face Georgia Law Test*, WASH. POST, Apr. 26, 1960, at A24 (Atlanta Mayor William Hartsfield condemning sit-in protests and urging that civil rights disputes be resolved by judicial and political action); *Private Issue, Public Duty*, TAMPA TRIB., Mar. 2, 1960, at 12 (Florida Governor LeRoy Collins stating, "the lunch counter of a private store is a poor rostrum from which to demand equal rights").

Carolina Attorney General Malcolm Seawell offered a typical expression of this sentiment in a 1958 speech: "We must not be swayed by extremists on either side. We must, in good faith, take that middle-course, which will under law, save us."[73] This kind of legalist commitment extended into the Deep South, with Mississippi Governor J.P. Coleman making clear that the divide between extreme and moderate segregationists was a matter of means, not ends: "[W]hile there is no magic remedy for the Supreme Court decision there are multiple means and methods, all perfectly legal, by which we can and will defeat integration of the races in our state."[74]

Litigation was the centerpiece of the resistance strategy of Seawell, Coleman, and other moderate segregationists.[75] "[W]e concluded then that we could never win the legal battle defending segregation," recalled John Patterson of his time as Alabama's attorney general in the years following *Brown*.[76] "[T]he best for us to do would be to never admit that, of course, but to fight a delaying action in the courts."[77] The goal was to "avoid having a decision made in court, if possible, at all costs, anticipating that the decision would be against us . . . in hopes that we could buy a number of years of time for the people to become adjusted to this thing gradually and peaceably."[78] Civil rights advocates would "have to take us on, on a broad front, in a multitude of cases."[79] Southern states would make motions toward some compliance with *Brown*, adopting gradualist or token integration plans.[80] The NAACP would then file lawsuits

73. *Faubus School Policy Hit in North Carolina*, WASH. POST, Oct. 4, 1958, at A7.

74. ANDERS WALKER, THE GHOST OF JIM CROW: HOW SOUTHERN MODERATES USED *BROWN V. BOARD OF EDUCATION* TO STALL CIVIL RIGHTS 26 (2009).

75. *See generally id.*

76. HOWELL RAINES, MY SOUL IS RESTED: MOVEMENT DAYS IN THE DEEP SOUTH REMEMBERED 345 n.** (1977); *see also id.* at 345 (5th Circuit Judge Elbert Tuttle noting that segregationists pursued litigation "different from most types of litigation where no lawyer will recommend to a client that he litigate over something that's already been definitively decided by the Supreme Court of the United States . . . . So they continued . . . year after year, they would litigate, rather than just recognizing what the law was and comply with it. This is unusual in litigation, because most lawyers don't like to spend their time litigating over a lost cause.").

77. *Id.* at 345 n.**.

78. *Id.*

79. *Id.*

80. *See, e.g.*, Covington v. Edwards, 264 F.2d 780 (4th Cir. 1959) (upholding North Carolina pupil placement policy).

challenging these plans as constitutionally insufficient.[81] Segregationist lawyers then had their platform: they could claim acceptance of *Brown* while urging the courts to take a cautious path in implementing the decision.

This tactic yielded impressive courtroom results for segregationists. They secured a partial victory in *Brown II*, when the Supreme Court rested the responsibility for desegregation on the lower federal courts and offered only vague guidelines ("with all deliberate speed") as to timing.[82] Segregationists were then able to convince various federal district judges (some of whom were sympathetic to the segregationist cause) to delay desegregation or to accept minimalist desegregation plans that had little effect on the racial composition of southern schools.[83] Even the district court judges not aligned with the segregationists emphasized the need for change to be gradual[84]—a point southern lawyers exploited through what NAACP lawyer Jack Greenberg would describe as "an interminable hegira of litigation from court to court."[85] In Louisiana, Greenberg wrote, "'segregation forever' translated into 'litigation forever.'"[86]

In *Shuttlesworth v. Birmingham*,[87] segregationists were even able to secure a victory in the Supreme Court when the Justices affirmed, in a brief unsigned opinion, a federal district court decision to uphold Alabama's "pupil placement" plan.[88] Alabama had repealed its school segregation law and replaced it with a plan giving authority to local officials to make school assignments based on a long list of non-racial factors. These

81. *See, e.g.*, *id.*

82. Brown v. Bd. of Educ., 349 U.S. 294, 301 (1955).

83. *See* MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 356 (2004) ("*Brown II* . . . was hardly an order to do anything. Its indeterminacy invited judges to delay and evade, which they were inclined to do anyway.").

84. *See, e.g.*, Bush v. Orleans Parish Sch. Bd., 138 F. Supp. 337, 341–42 (E.D. La., 1956) (opinion of J. Skelly Wright) ("The problems attendant desegregation in the deep South are considerably more serious than generally appreciated in some sections of our country. The problem of changing a people's mores, particularly those with an emotional overlay, is not to be taken lightly. It is a problem which will require the utmost patience, understanding, generosity and forbearance from all of us, of whatever race.").

85. GREENBERG, *supra* note 7, at 247.

86. *Id.* at 245.

87. Shuttlesworth v. Birmingham Bd. of Educ., 358 U.S. 101 (1958).

88. Shuttlesworth v. Birmingham Bd. of Educ., 162 F. Supp. 372 (N.D. Ala. 1958).

factors included: "the effect of the admission of new pupils upon established or proposed academic programs;" "the scholastic aptitude and relative intelligence or mental energy or ability of the pupil;" "the possibility or threat of friction or disorder among pupils . . . ;" "home environment;" and "the moral conduct, health and personal standards of the pupil"[89]—factors that in practice could be (and were) easily used as proxies for racial discrimination.[90] These plans proliferated across the South in the late 1950s.[91]

For defenders of segregation, these litigation tactics served their purpose remarkably well.[92] "If school integration in the South were to continue at its 1959 rate," wrote one commentator in 1960, "it would take four thousand years for all Southern Negro children to achieve their right to equal educational opportunity."[93] By the early 1960s, frustrated NAACP lawyers were talking about desegregation litigation as a form of trench warfare.[94] "In light of the present status of the law, no speedy or immediate resolution of the school segregation problem can be forecast," stated Robert Carter at the 1960 annual NAACP meeting.[95] As late as 1964, only 1.2 percent of African American children in the South attended desegregated schools.[96]

The lesson of *Brown* for the white South was thus a mixed and even contradictory one. *Brown* dissolved any illusions that John W. Davis and defenders of segregation might have had that the Supreme Court was on their side. *Brown* was "a clear abuse of judicial power," declared a 1956 statement, soon to be known as the "Southern Manifesto," signed by almost all southern members of Congress.[97] Yet the Court's general

89. *Id.* at 382.

90. *See* WALKER, *supra* note 74, at 39–43.

91. *See Shuttlesworth*, 162 F. Supp. at 379 (noting ten states had passed pupil placement laws); *see also* Ralph Lee Smith, *The South's Pupil Placement Laws: Newest Weapon Against Integration*, COMMENT., Oct. 1, 1960, at 326, *available at* https://www.commentarymagazine.com/article/the-souths-pupil-placement-lawsnewest-weapon-against-integration, *archived at* https://perma.cc/ ZM2M-YUJT (describing pupil placement laws as "now clearly emerging as the South's major weapon in maintaining school segregation").

92. KLARMAN, *supra* note 83, at 357–63; GREENBERG, *supra* note 7, at 251–54.

93. Smith, *supra* note 91, at 326.

94. GREENBERG, *supra* note 7, at ch. 18 ("Trench Warfare").

95. Schmidt, *Divided by Law*, *supra* note 13, at 121.

96. GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 52 (2d ed. 2008).

97. 84 CONG. REC. 4460 (1956).

reluctance to aggressively enforce *Brown* in the following decade showed that the Warren Court was not nearly as antagonistic to the white South's interests as their post-*Brown* lamentations indicated.[98] As long as *Brown* resisters eschewed the rhetoric of open defiance and operated within a generously defined spectrum of compliance with *Brown*, the Supreme Court stayed on the sidelines. The lower federal courts that were charged with the responsibility of overseeing implementation typically accepted minimalist desegregation plans. For all the explosive denunciatory rhetoric against the Supreme Court, segregationists learned how to make litigation in the federal judiciary work to their advantage in the school desegregation battle—for a time at least.[99]

### *C. The Sit-In Cases*

Perhaps the most notable non-defeat (not quite a victory) for segregationists in the courts came in the sit-in cases.[100] The key constitutional issue in these cases involved the reach of the Equal Protection Clause of the Fourteenth Amendment into the realm of activity by non-state actors—"the 'state action' dragon," as NAACP attorney Jack Greenberg put it.[101] Specifically, the question was whether the Fourteenth Amendment prohibited private business owners who ran lunch counters, restaurants, hotels, or other public accommodations from racially discriminating against their customers.[102] Alternately, if the Constitution did not constrain the actions of these proprietors directly, did it limit the use of state authority to effectuate their racially discriminatory policies? Could the

98. The one major exception was *Cooper v. Aaron*, 358 U.S. 1 (1958) (condemning southern state efforts to defy the *Brown* decision).

99. In 1964 the Supreme Court began to gradually demand more of desegregation plans. *See, e.g.*, Griffin v. Cnty. Sch. Bd. of Prince Edward Cnty., 377 U.S. 218 (1964) (holding that the closing of schools in order to evade desegregation order violated the Equal Protection Clause). By 1968, the Court adopted a much more result-oriented test for compliance with *Brown*. Green v. Cnty. Sch. Bd. of New Kent Cnty., 391 U.S. 430 (1968) (holding that a freedom of choice plan was not a sufficient remedy unless it produces actual desegregation of schools).

100. For a detailed examination of the sit-in cases and the difficulties they posed for the Warren Court, see Schmidt, *Sit-ins and the State Action Doctrine*, *supra* note 61.

101. GREENBERG, *supra* note 7, at 262, 307.

102. *See, e.g.*, Brief of the State of North Carolina at 3, Avent v. North Carolina, 373 U.S. 375 (1963) (No. 11) (summarizing constitutional questions).

lunch counter operator call the police when African American protesters refused to leave after being denied service? Could the state prosecute lunch counter sit-in protesters on charges of trespass or disorderly conduct?[103]

The Supreme Court never resolved these difficult questions. Civil rights lawyers never got the landmark constitutional decision they wanted.[104] The Supreme Court found ways to overturn the convictions of sit-in protesters, but on narrow, fact-intensive grounds—insufficient evidence to support the conviction,[105] the existence of a segregation law,[106] an expression of support for segregation by a public official.[107] Although southern states lost every sit-in case they argued in the Supreme Court, they won in their defense of the state action doctrine. Enough of the justices accepted their warnings that too broad an application of the equal protection clause into the private sphere opened a Pandora's Box that was better left sealed.[108] Justice Black, joined by Justices Harlan and White, wrote a dissent in *Bell v. Maryland* that condemned protesters for trampling the property rights of store owners.[109] His words

103. *See, e.g.*, *id.* For a fuller summary of the legal issues at play in the sit-in cases, see Schmidt, *Divided by Law*, *supra* note 13, at 102–12; *Legal Aspects of the Sit-In Movement,* 5 RACE REL. L. REP. 935 (1960).

104. For expressions of NAACP lawyers' frustration with the Court in the sit-in cases, see Robert L. Carter, *The Warren Court and Desegregation*, 67 MICH. L. REV. 237, 240–41 (1968); GREENBERG, *supra* note 7, at 306–17.

The civil rights lawyers came closer than they ever knew, however. For a time in the spring of 1964, while deliberating on the case of *Bell v. Maryland*, 378 U.S. 226 (1964), there were five justices who were willing to join what would have been a transformative decision overturning a trespass conviction in a sit-in case squarely on equal protection grounds. Schmidt, *Sit-ins and the State Action Doctrine, supra* note 61, at 796. This majority dissolved, however, and in the end only three Justices held that the conviction violated the Fourteenth Amendment. *Bell*, 378 U.S. at 242 (Douglas, J., concurring); *id.* at 286 (Goldberg, J., concurring). On the behind-the-scenes story in *Bell*, see Schmidt, *Sit-ins and the State Action Doctrine, supra* note 61, at 795–98; BRUCE ACKERMAN, THE CIVIL RIGHTS REVOLUTION 143–49 (2014).

105. Garner v. Louisiana, 368 U.S. 157 (1961); Barr v. City of Columbia, 378 U.S. 146 (1964).

106. Peterson v. City of Greenville, 373 U.S. 244 (1963); Robinson v. Florida, 378 U.S. 153 (1964).

107. Lombard v. Louisiana, 373 U.S. 267 (1963).

108. I examine in more depth the Court's hesitancy in the sit-in cases in Schmidt, *Sit-ins and the State Action Doctrine*, *supra* note 61, at 791–802.

109. *Bell*, 378 U.S. at 327–28 (Black, J., dissenting) ("It would betray our whole plan for a tranquil and orderly society 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 . . . . None of our past cases justifies reading the Fourteenth

would feature prominently in segregationist arguments for years to come.[110] One might say that in the sit-in cases, the segregationists lost all the battles but never lost the war. It was only when Congress took over the issue, with the passage of Title II of the Civil Rights Act of 1964, prohibiting racial discrimination in most public accommodations, that the issue was truly lost for the segregationist South.[111]

### *D. Challenging the Civil Rights Acts*

Although it is hard to imagine that many segregationists truly thought they had a chance of winning litigation challenges to the civil rights laws that Congress passed during the civil rights era, one could always find someone who confidently predicted that the Supreme Court would come to their rescue.[112] Perhaps some even believed it—delusions ran strong among the most fervent segregationists.[113]

Not surprisingly, segregationist delusions ran strongest in the "closed society"[114] of Mississippi. Louis W. Hollis, executive

Amendment in a way that might well 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.").

110. *See, e.g.*, VA. COMM'N CONSTITUTIONAL GOV'T, THE RIGHT NOT TO LISTEN 22–23 (1964) (concluding a defense of property rights against civil rights protest activism with two pages of quotations from Black's *Bell* dissent); *see also* William McGaffin, *Can Private Restaurants Segregate?*, BOSTON GLOBE, May 26, 1963, at 34 (noting that after his dissent in a 1963 Supreme Court decision in a sit-in case, Justice Harlan "may have become the most widely quoted public figure among Southern diehards since the days of Jefferson Davis and Robert E. Lee").

111. *See* Hamm v. City of Little Rock, 379 U.S. 306 (1964) (holding that Title II of the 1964 Civil Rights Act abated all pending convictions of sit-in protesters).

112. *See, e.g.*, MATTHEW LASSITER, THE SILENT MAJORITY: SUBURBAN POLITICS IN THE SUNBELT SOUTH 24 (2006) (quoting Arkansas Governor Orval Faubus in 1959 saying, "The whole South can keep fighting. We can make the Supreme Court reverse its decision [in *Brown*]."); KLARMAN, *supra* note 83, at 415–17 (describing various examples of white southerners who believed *Brown* could be successfully defied and nullified); JAMES W. ELY, JR., THE CRISIS OF CONSERVATIVE VIRGINIA: THE BYRD ORGANIZATION AND THE POLITICS OF MASSIVE RESISTANCE 61 (1976) (quoting various Virginia segregationists predicting in 1957 that the Court might overturn *Brown*).

113. *See, e.g.*, ELY, *supra* note 112, at 87 (quoting James Kilpatrick privately confessing that prior to the Court's ruling in *Cooper v. Aaron*, 358 U.S. 1 (1958), "I had foolishly permitted myself to build up a hope that the Supreme Court would seek some conciliatory way out of the mess it had made."). *But see id.* at 62 (quoting Ex-Virginia Governor Lindsay Almond, who had suggested in a 1957 campaign that the Court might overturn *Brown*, stating in a 1970 interview, "I never had any hope we could ultimately prevail in negating the Supreme Court.").

114. *See* JAMES W. SILVER, MISSISSIPPI: THE CLOSED SOCIETY 6 (1964)

director of the national office of the Citizens Council of America, a white supremacist organization based in Jackson, Mississippi, claimed that "[m]ost businessmen" believed the Court would strike down the Civil Rights Act, and that until it did, the business community was going to defy the law, just as they had defied *Brown*.[115] A white Mississippian who wrote to Justice Hugo Black—the one member of the Court from the Deep South—after the passage of the Civil Rights Act, captured the mix of despair and faith that characterized the attitude of many segregationists toward the federal courts. It was, he wrote,

> probably too much to hope that the Supreme Court in view of its past ideological decisions, the protection of communists and criminals, the outlawing of God in our institutions and other crazy decisions, will declare this vicious law unconstitutional. But we hope that the Court will at last realize its legal function and strike down the terrible and un-American provisions of this iniquitous measure.[116]

Segregationists dreamed of a Supreme Court that was very different from the one over which Earl Warren presided. They dreamed of a Court that would serve as a bulwark against

(describing white Mississippi as dedicated to the "all-pervading doctrine" of "white supremacy" fueled by "a never-ceasing propagation of the 'true faith'" and "a constantly reiterated demand for loyalty to the united front, requiring that non-conformists and dissenters from the code be silenced, or, in a crisis, driven from the community").

115. Tanner, *supra* note 50.

This prediction of defiance proved quite wrong. Despite white southern opposition to the Civil Rights Act, particularly to its public accommodations provision, *see, e.g.*, Louis Harris, *Harris Survey: Public Opinion High for Civil Rights Bill*, L.A. TIMES, Apr. 27, 1964, at 5 (reporting that 69 percent of white southerners surveyed opposed public accommodations provision), the response across the South was one of massive compliance, *see* John Herbers, *Whites Say Compliance Has Been Achieved with Little Strife*, N.Y. TIMES, Jan. 24, 1965, at 1; CLAY RISEN, THE BILL OF THE CENTURY: THE EPIC BATTLE FOR THE CIVIL RIGHTS ACT 244–49 (2014). There were only isolated pockets of resistance and subterfuge. *See, e.g.*, JASON SOKOL, THERE GOES MY EVERYTHING: WHITE SOUTHERNERS IN THE AGE OF CIVIL RIGHTS, 1945–1975, at 182–87 (2006) (describing restaurant owner Lester Maddox's defiant refusal to desegregate); Katzenbach v. Jack Sabin's Private Club, 265 F. Supp. 90, 92–94 (E.D. La. 1967) (describing restaurant owner's transparent effort to declare his restaurant a private whites-only club to qualify for the private-club coverage exemption in Civil Rights Act).

116. CORTNER, *supra* note 39, at 58.

national majorities driven by self-serving special interests that were running roughshod over the white South. They wanted a Court that would be a guardian of constitutional principles inherited from past generations. "For the better part of two centuries this Court has stood as the ultimate citadel in the protection of individual liberty and private property," noted Ollie McClung's lawyer in his brief to the Supreme Court.[117] But the Warren Court was not about to place liberty and property rights in the way of the desperately needed policy reforms of the civil rights era.

Hopes also might have been stoked by the fact that even in these lost-cause litigation challenges against federal civil rights laws, civil rights opponents occasionally won in lower federal courts. Segregationist lawyers in Georgia won the first round of their challenge to key provisions of the Civil Rights Act of 1957.[118] In this case, the United States Justice Department initiated legal proceedings under the 1957 law against several Georgia registrars for depriving African Americans of the right to vote.[119] In their defense, lawyers for the registrars challenged the constitutionality of the civil rights law.[120] Their primary claim was that the law was not limited to regulating discriminatory action by the state, but also applied to private action, and thus was beyond Congress's enforcement power under the Fifteenth Amendment.[121] Federal district court Judge T. Hoyt Davis accepted this claim in his ruling on April 1959.[122] The Justice Department appealed the decision to the Supreme Court and the Court unanimously reversed the district court in early 1960.[123]

A more prominent segregationist court victory came from Alabama in a challenge to the 1964 Civil Rights Act. The Birmingham Restaurant Association sought to challenge the law's public accommodations provision and was advised by a local lawyer that the group's best chance at success would be to identify a restaurant that operated with as limited a relation to

117. *See* Brief for Appellees at 30, Katzenbach v. McClung, 379 U.S. 294 (1964) (No. 543), 1964 WL 72714.

118. United States v. Raines, 172 F. Supp. 552, 562 (M.D. Ga. 1959), *rev'd*, 362 U.S. 17 (1960).

119. *U.S. Alabama Suit Asks Negro Voting*, N.Y. TIMES, Feb. 7, 1959, at 1.

120. *Raines*, 172 F. Supp. at 554.

121. *Id.*

122. *Id.* at 562.

123. *See* United States v. Raines, 362 U.S. 17 (1960).

interstate commerce as possible.[124] This approach gave challengers the strongest case to argue that the public accommodations provision was beyond Congress's authority to regulate under its commerce power. The group of restaurant owners settled on Ollie's Barbeque, a Birmingham restaurant that served an almost exclusively white, local clientele.[125] The restaurant owner, Ollie McClung, Sr., was committed to keeping it that way.[126] "I didn't feel the Lord felt we should change our method of doing business," he explained.[127] McClung's legal challenge was heard by a special three-judge federal district court consisting of three Alabama judges with little sympathy for the civil rights cause.[128] They ruled in favor of McClung, declaring the public accommodations provision of the Civil Rights Act unconstitutional.[129] "Of course, we express no opinion as to the wisdom of the legislation and confine our consideration to the constitutionality of the provisions with which we are concerned," the court explained.[130] It then went on to declare that to read the Commerce Clause so broadly as to cover a restaurant such as Ollie's Barbeque would put the "rights of the individual to liberty and property . . . in dire peril."[131]

This federal courtroom victory offered a rallying point for the embattled defenders of segregation, and Alabama newspapers praised the ruling.[132] George Wallace, who was speaking in Milwaukee, Wisconsin, at the time, drew applause from his audience when he said that they all, northerners and southerners, were against "the federal government telling a private businessman who he can and cannot serve."[133] It was, he stated, time to repeal the Civil Rights Act and restore "constitutional government."[134] Courtroom victories thus

124. *See* CORTNER, *supra* note 39, at 64–65.
125. *Id.* at 65.
126. *Id.* at 66.
127. *Id.* See generally Michael Durham, *The Right to Refuse Service, in* 2 REPORTING CIVIL RIGHTS: AMERICAN JOURNALISM 1963–1973, at 251–54 (2003), for further discussion on McClung's history.
128. *See* CORTNER, *supra* note 39, at 72.
129. McClung v. Katzenbach, 233 F. Supp. 815, 821 (N.D. Ala.), *rev'd*, 379 U.S. 294 (1964).
130. *Id.*
131. *Id.* at 825.
132. CORTNER, *supra* note 39, at 85.
133. *Id.*
134. *Id.*

provided additional ammunition for those who were challenging civil rights laws in the political arena.[135]

## IV. THE SECONDARY BENEFITS OF LITIGATION

Although segregationists had courtroom victories, as discussed in the previous Part, in the major litigation battles of the civil rights era they suffered high profile defeats. They lost frequently, and they lost big, especially when they reached the Supreme Court.[136] And in some cases, particularly the challenges to federal civil rights law, it is unlikely that many segregationists actually believed the Supreme Court would rule in their favor.[137] So why were segregationist interests so dedicated to these lost-cause litigation battles?

In this Part, I explain how litigation benefited the segregationist cause in ways that transcended the actual outcome of the legal dispute. While securing courtroom victories was one goal of segregationist litigation efforts, it was not the only one. Indeed, in the end, goals other than courtroom victories were as important, and, I argue, perhaps more important. These secondary effects of segregationist litigation are particularly important in explaining the segregationist faith in the courts. There was, in other words, something gained, even when they lost. Legal scholar Douglas NeJaime

135. Coming in the midst of a presidential election, the district court ruling also bolstered supporters of Republican Candidate Barry Goldwater, who had voted against the Civil Rights Act because of his constitutional concerns with the law. *See*, *e.g.*, *A Court Sides With Sen. Goldwater*, CHI. TRIB., Sept. 18, 1964, at 12 ("[A] court of standing has affirmed Sen. Goldwater's view of the dubious constitutionality of the public accommodations law, demonstrating that he is by no means alone in his assessment of the law.").

136. Highlights of this long list include Green v. Cnty. Sch. Bd. of New Kent Cnty., 391 U.S. 430 (1968); South Carolina v. Katzenbach, 383 U.S. 301 (1966) (rejecting South Carolina challenge to Voting Rights Act of 1965); Katzenbach v. McClung, 379 U.S. 294 (1964) (rejecting challenge to Title II of the 1964 Civil Rights Act); Griffin v. Cnty. Sch. Bd. of Prince Edward Cnty., 377 U.S. 218 (1964); United States v. Raines, 362 U.S. 17 (1960) (rejecting challenge to the Civil Rights Act of 1957); Cooper v. Aaron, 358 U.S. 1 (1958); Brown v. Bd. of Educ., 349 U.S. 294 (1955); Brown v. Bd. of Educ., 347 U.S. 483 (1954); Willis v. Pickrick Rest., 231 F. Supp. 396 (N.D. Ga. 1964) (same); United States v. Manning, 215 F. Supp. 272 (W.D. La. 1963) (rejecting challenge to the Civil Rights Act of 1960).

137. *See generally, e.g.*, *Few Surprised in South at Public Access Ruling*, WASH. POST, Dec. 15, 1964, at A8 (describing lack of Southern surprise in Court's *McClung* ruling); *Southerners Gloomily Agree Segregation Is Lost Cause*, CHI. DAILY DEFENDER, Dec. 16, 1964, at 12 (summarizing general consensus that no legal arguments remained to challenge desegregation).

has written about "winning through losing": losing in court can actually strengthen social movements.[138] It would be too strong to say that segregationists were able to "win through losing" in court—by the early 1960s Jim Crow was mortally wounded, and the best its defenders could do was limit their losses. But we do see an analogous dynamic at play: losing in court had certain benefits outside the courts. In this Part, I explore three categories of secondary benefits that litigation gave the segregationist cause: statement making, coalition building, and signaling a commitment to the legal process.

### *A. Making a Statement*

Some of the lost-cause litigation pursued by segregationists might be compared to George Wallace standing at the entrance to the University of Alabama in 1963 when federal officials arrived to escort the school's first African American student onto the campus.[139] "It is not defiance for defiance sake, but for the purpose of raising basic and fundamental constitutional questions," he declared to the television cameras.[140] His point made, he then stepped aside. "The Governor played out his little act, then bowed to the inevitable," described one reporter.[141] Wallace wanted to make his point, and this scene of defiance gave him a powerful platform from which to do so. When asked why he had given up on "interposition" and other forms of direct defiance as the best tactic for preserving segregation, James Kilpatrick explained that the new challenge for the South was "propaganda, publicity, and education."[142] The courtroom, like Wallace's schoolhouse door, provided an opportunity to articulate and defend the segregationist position.

One cannot read North Carolina's amicus brief in *McClung*[143] without feeling that its authors, state Attorney

138. Douglas NeJaime, *Winning Through Losing*, 96 IOWA L. REV. 941 (2011).

139. CARTER, *supra* note 52, at 133–55.

140. *Text of Proclamation by Gov. Wallace*, N.Y. TIMES, June 12, 1963, at 20; *see also id.* ("It is the right of every citizen, however humble he may be, through chosen officials of representative government to stand courageously against whatever he believes to be the exercise of power beyond the constitutional rights conferred upon our Federal Government.").

141. *President Warns of 'Revolution': Wallace Fails to Bar Negroes from Alabama University*, BALTIMORE SUN, June 12, 1963, at 1.

142. WALKER, *supra* note 74, at 119.

143. Amicus Curiae Brief of the State of North Carolina, Katzenbach v.

General T. W. Bruton and Deputy Attorney General Ralph Moody, were more interested in denouncing the Civil Rights Act than in actually persuading the justices of the Supreme Court. Not only did the brief include the kind of barely veiled racialist sentiment that, by the mid-1960s, was increasingly rare in the sphere of federal litigation,[144] but the majority of the short brief was dedicated to an attempted demonstration of how the civil rights law was the embodiment of Marxist dreams.[145] This was not a brief designed to win over Supreme Court justices. It was a brief designed to make a political statement.

Since litigation offered these kinds of opportunities to make political statements, losses were not all bad for segregationists. Indeed, there was a unique value to these losses. A significant litigation loss, particularly one before the Supreme Court, simply gave segregationists another opportunity to lament that the entire federal government, including the courts, had abandoned basic constitutional principles. In response to *Brown*, the Montgomery Citizens' Council announced: "Now is the time for every right thinking white person in Alabama and America to answer the Supreme Court by joining the Citizens Council in their fight for right with all the might at our command."[146] When the Supreme Court ruled against him, Moreton Rolleston declared to reporters that it was "a sad day for the cause of individual freedom."[147] Senator Richard Russell of Georgia said he was not surprised by the ruling upholding the Civil Rights Act, since the Court "seems to be dedicated to destroying the state as an establishment of government."[148] Thus, even when defenders of Jim Crow lost in court, they would take advantage of the opportunity, drawing attention to what they viewed as venerable but underappreciated constitutional principles—

McClung, 379 U.S. 294 (1964) (No. 543), 1964 WL 72712.

144. *Id.* at 3 ("[T]he Commerce Clause [was not] designed to . . . prohibit the social groupings and classes which are naturally created and molded by personal inclination.").

145. *Id.* at 7–9.

146. *Everybody's Wrong But Us*, ST. RIGHTS ADVOCATE, Nov. 25, 1956, at 4.

147. *'Socialistic State' Foreseen*, N.Y. TIMES, Dec. 15, 1964, at 48.

148. *Southerners Gloomily Agree Segregation Is Lost Cause*, CHI. DAILY DEFENDER, Dec. 16, 1964, at 12; *see also* KEVIN M. KRUSE, WHITE FLIGHT: ATLANTA AND THE MAKING OF MODERN CONSERVATISM 224–29 (2005) (describing how segregationist restaurant owner Lester Maddox used his federal prosecution for violating the Civil Rights Act to advance his political career).

principles that might, over time, gain adherents and maybe, they hoped, even create a new constitutional norm.[149]

Furthermore, losing high profile litigation gave segregationists another opportunity to chastise the federal courts and federal judges. They could frame their campaign as a populist one—standing up for popular constitutional commitments against the oppressive hand of out-of-touch elite judges.[150] This move—embracing the Constitution while condemning the Supreme Court's interpretation of the Constitution[151]—was fundamental to the segregationist cause. It allowed segregationists to simultaneously embrace constitutional litigation and a robust practice of extrajudicial constitutionalism.[152]

### *B. Building Coalitions*

Litigation is not only an instrument for resolving claims but also a way to elevate the relative salience of legal argumentation over alternative lines of argumentation, such as moral, religious, or policy claims. Litigation—and legal argumentation generally—had the potential to bring together white southerners who had little in common aside from some level of opposition to the dramatic changes demanded by civil rights proponents.

Constitutional discourse in particular can support movement mobilization primarily through its legitimating

149. *See, e.g.*, ELY, *supra* note 112, at 203 (quoting James J. Kilpatrick in a letter dated February 3, 1959: "One of these days, I believe that those of us who have fought integration will be vindicated, but that day probably is a long way in the distance."). Kilpatrick was one of the leading advocates of moving the defense of segregation away from the moral issue and explicit discussions of race, and toward the constitutional principles of states' rights and individual liberty. *See, e.g.*, WALKER, *supra* note 74, at 117–18.

150. *See, e.g.*, ELY, *supra* note 112, at 87 (quoting RICHMOND NEWS LEADER, Sept. 30, 1958, following the Supreme Court's ruling in *Cooper v. Aaron*, 358 U.S. 1 (1958): "So long as the Court is left free to pervert the Constitution, and to twist its meaning into shapeless wax, the American ideal of stable government under written law will not be a living truth, but a living lie.").

151. The classic expression of this position was in the 1956 Southern Manifesto. *See Declaration of Constitutional Principles*, 102 CONG. REC. 4460 (1956) (denouncing *Brown* as an "unwarranted exercise of power by the Court, contrary to the Constitution").

152. For a particularly explicit expression of segregationist commitment to extrajudicial constitutionalism, see Sam J. Ervin, Jr., *The United States Congress and Civil Rights Legislation*, 42 N.C. L. REV. 3, 3–4 (1963).

function.[153] Reframing a policy claim as a constitutional claim is an effort to bolster that claim by grounding it in a shared body of fundamental principles. This legitimating function can have the effect of framing contested issues so as to encourage coalition building, an essential component of movement mobilization.

The white South's turn to the Constitution was an effort to bolster the legitimacy of Jim Crow practices at a time when Americans, including growing numbers of white southerners, were increasingly critiquing these practices as archaic, problematic, and immoral.[154] Constitutionalism had the benefit of shifting the lines of discussion from outdated theories of physiological and cultural differences between the races to an ostensibly higher plane of discourse: the language of constitutional principles.

As a tool of opposition to the civil rights movement, litigation supported coalition-building efforts in two ways: as a way to try to unite an oftentimes fractious white South around the segregationist cause; and as a way to attract potential allies among conservatives outside the South.

### 1. Building a Southern Coalition

One example of the way litigation advanced coalition building within the South is found in the history behind *New York Times Co. v. Sullivan*.[155] The libel-law litigation offensive against the New York Times helped unite disparate factions in white Montgomery society.[156] Class was a powerful divider in much of the white South.[157] By the middle decades of the twentieth century, white supremacy alone was an increasingly tenuous adhesive for white southern society.[158] "What would be

153. *See generally* JACK M. BALKIN, CONSTITUTIONAL REDEMPTION: POLITICAL FAITH IN AN UNJUST WORLD (2011).

154. *See, e.g.*, Donald R. Matthews & James W. Prothro, *Southern Racial Attitudes: Conflict, Awareness, and Political Change*, 344 ANN. AM. ACAD. POL. & SOC. SCI. 108 (1962); George Gallup, *76 Pct. in South See End of Segregation*, WASH. POST, Feb 14, 1961, at A5.

155. 376 U.S. 254 (1964).

156. I examine this dynamic in more detail in Schmidt, *Legal Attack*, *supra* note 20, at 310–13.

157. *See, e.g.*, DAVID L. CHAPPELL, A STONE OF HOPE: PROPHETIC RELIGION AND THE DEATH OF JIM CROW 176–78 (2004) (noting insufficient scholarly understanding of class divisions among segregationists).

158. *See, e.g.*, *id.* at 154–55 ("It turns out that thoughtful segregationists feared

classed as the old white supremacist movement has no place," explained the leader of the Mississippi Citizens' Council. "It is too narrow."[159] These divisions hindered the anti-civil rights movement even in segregationist hotbeds, such as Montgomery, where they created a wedge between the relatively moderate society elites, such as Harvard-educated lawyer Merton Roland Nachman or *Montgomery Advertiser* editor Grover Hall, and the more openly defiant leaders favored by working class whites, such as city commissioner L.B. Sullivan.[160] Yet frustration with what they saw as unfair northern media coverage of the white South worked to unite these groups. Nachman and Hall helped get Sullivan's libel suit off the ground, and Nachman argued the case all the way to the Supreme Court.[161]

Although there was a great deal of division within the white South as to the best way to resist the civil rights movement, there was little division around the basic proposition that federal civil rights policy trampled state autonomy and individual rights.[162] Constitutional litigation offered additional value as a way to publicize themes that had the potential to expand the ranks of the movement within the white South, inspiring coalitions within the segregationist movement. Framing the segregationist movement in constitutional terms effectively broadened the issue.

other white southerners as much as they feared the civil rights movement or the federal government . . . . They never doubted that they had most white southerners on their side . . . . The question was how to stir the majority to militant and effective action without sacrificing order and respectability."); *id.* at 177 ("Racism might have unified contending factions of white folk in periodic election campaigns, but it was not enough to gird them for the sustained challenge of the civil rights movement."); JOSEPH CRESPINO, IN SEARCH OF ANOTHER COUNTRY: MISSISSIPPI AND THE CONSERVATIVE COUNTERREVOLUTION 23 (2007) (describing the efforts of the leaders of the Mississippi Citizens' Council to separate themselves from the KKK, which they associated "with lower-class violence and lawlessness").

159. CRESPINO, *supra* note 158, at 50 (quoting Mississippi Citizen Counsel leader William J. Simmons).

160. KERMIT L. HALL & MELVIN I. UROFSKY, *NEW YORK TIMES V. SULLIVAN*: CIVIL RIGHTS, LIBEL LAW, AND THE FREE PRESS 24–25, 43–44 (2011).

161. Schmidt, *Legal Attack*, *supra* note 20, at 311–13.

162. *See, e.g.*, Harris, *supra* note 115 (69 percent of white southerners surveyed opposed public accommodations provision of the Civil Rights Act).

### 2. Building a National Coalition

Constitutionalism also offered the possibility of coalition building with conservatives outside the South. For those who sought to create a national majority to stand up against the civil rights movement, a primary goal was to identify the constitutional principles that could create common ground with citizens outside the South who harbored (or potentially harbored) libertarian and localist sentiments.[163] Under this approach, segregationists did not directly defend Jim Crow as a social policy, but rather as the secondary byproduct of a constitutionally protected *choice*.[164] This theme tied together the individual rights and states' rights approaches to segregationist constitutionalism—not necessarily the defense of the end-policy itself, but a defense of a prior point in the policy-making process. It was, that is, a line of argument that placed the right to choose before the outcome of the choice itself.[165]

This argument was sometimes advanced through a states' rights frame. When, for example, Alabama governor George Wallace went to the North, competing in the Wisconsin Democratic primary in 1964, he told his audience: "I am an Alabama segregationist . . . not a Wisconsin segregationist. If Wisconsin believes in integration, that is Wisconsin's business, not mine. . . . [T]he central government in Washington has no right to tell either Alabama or Wisconsin what to do."[166]

163. *See, e.g.*, George Lewis, *Virginia's Northern Strategy: Southern Segregationists and the Route to National Conservatism,* 72 J. S. HIST. 111, 113–14 (2006).

164. *See, e.g.*, VA. COMM'N ON CONSTITUTIONAL GOV'T, CIVIL RIGHTS AND LEGAL WRONGS 11 (1963), *available at* https://archive.org/stream/CivilRightsAndLegalWrongsACriticalCommentaryUponThePresidents/CRLW#page/n0/mode/2up, *archived at* https://perma.cc/287T-A7CB ("We do not propose to defend racial discrimination. We do defend, with all the power at our command, the citizen's right to discriminate. . . . This right is vital to the American system. If this be destroyed, the whole basis of individual liberty is destroyed.").

165. For example, in describing his opposition to Title II of the 1964 Civil Rights Act, Ollie McClung explained, "The Lord gives people a choice. . . . And I feel that the people in this country should have the same choice and control over their businesses. I would become an agent of the Government [under this act]. It would be the people serving the Government instead of the Government serving the people." *Birmingham Cafe Bows to Decision*, N.Y. TIMES, Dec. 17, 1964, at 46. At trial, McClung explained, "I would refuse to serve a Negro as well as a drunken man or a profane man or anyone else who would affect my business." *Cafe Owner Tells Plight*, N.Y. TIMES, Sept. 3, 1964, at 18.

166. JOSEPH E. LOWNDES, FROM THE NEW DEAL TO THE NEW RIGHT: RACE AND THE SOUTHERN ORIGINS OF MODERN CONSERVATISM 84–85 (2008).

Segregationists embraced the language of individual liberties because it provided a more politically acceptable way to resist civil rights, shifting the discussion of civil rights from a question of white supremacy versus equality toward a question of liberty versus equality.[167] James Kilpatrick wrote of his desire to raise the white southern cause "above the sometimes sordid level of race and segregation."[168] The constitutional challenge to civil rights laws had "nothing to do with race or color," argued a columnist for the *Birmingham News,* "but may have all too much to do with civil rights and individual freedom in the years to come."[169]

### *C. Signaling a Faith in Courts and Law*

During the civil rights era, most southern political leaders felt challenged from two sides on the race issue. On one side were the civil rights activists—those sitting at lunch counters and marching in the streets, those advocating aggressive federal civil rights interventions. On the other side were the uncompromising white supremacists—the KKK-types who were attacking civil rights protesters, dynamiting the homes of movement leaders, and setting off bombs in black churches.[170] In the face of these challenges to their authority, "moderate" white southern leaders sought to forge a strategy that would avoid outright defiance to civil rights, accept certain limited reforms, and, most importantly, minimize the threat of federal intervention.[171] One way in which they sought to achieve this

167. *See, e.g.*, R. Carter Pittman, *Equality Versus Liberty: The Eternal Conflict*, 46 A.B.A. J. 873 (1960).

168. Joseph J. Thorndike, *"The Sometimes Sordid Level of Race and Segregation": James J. Kilpatrick and the Virginia Campaign against* Brown*, in* THE MODERATES' DILEMMA: MASSIVE RESISTANCE TO SCHOOL DESEGREGATION IN VIRGINIA 52 (Matthew D. Lassiter & Andrew B. Lewis eds., 1998).

169. SOKOL, *supra* note 115, at 225 (2006).

170. *See, e.g.*, KLARMAN, *supra* note 83, at 421–42 (summarizing violent resistance to desegregation and the resulting increase in national support for civil rights); *see generally* CLIVE WEBB, RABBLE ROUSERS: THE AMERICAN FAR RIGHT IN THE CIVIL RIGHTS ERA (2010).

171. "A central irony in the situation in which the South now finds itself is the fact that the refusal of its lawyers and its judges to fulfill their plain responsibilities has been the principal cause of the intervention from outside against which the South so vigorously protests. So long as disregard of national law rules the southern scene, national power must make itself directly felt." *Separate Statement of Commissioner Erwin N. Griswold*, *in* U.S. COMM'N ON CIVIL RIGHTS, LAW ENFORCEMENT: A REPORT ON EQUAL PROTECTION IN THE SOUTH 184

was to declare their faith in the legal process. The race issue, they argued, could not be resolved with protests or with violence; it must be met with law. The editors of the *Atlanta Constitution* in 1958 declared that their paper "stands by the law and the courts," and they chastised the nation's lawyers for being "derelict in [their] duty . . . in not standing forthright in defense of our Supreme Court and all lesser courts."[172] "The courts and legislative halls, rather than the streets, must be the places where differences are reconciled and individual rights ultimately protected," declared Virginian Lewis F. Powell, President of the American Bar Association in 1965,[173] a sentiment that Justice Black voiced with growing fervency throughout the 1960s.[174] "Let the courts decide" became a common refrain among white southerners in the civil rights era.[175]

Litigation could thus deliver political benefits. Southern officials sought to show their white constituents that they were standing up against the disruptive tactics of civil rights protesters. They also showed a national audience that they were committed to the legal process over the extralegal tactics of segregationist extremists. And they attempted to move debate from a losing hand—the morality of segregation—to what they hoped would be a more solid foundation—the rule of law.[176]

(1965). *See generally* WALKER, *supra* note 74; Justin Driver, *Supremacies and the Southern Manifesto*, 92 TEX. L. REV. 1053, 1079–1100 (2014); Lewis, *supra* note 163.

172. Thomas S. Lawson Jr., *Public Criticism of the Courts By Lawyers: A Problem in Legal Ethics*, 15 ALA. L. REV. 461, 463 (1962) (quoting *Our Laws, Courts Must Be Upheld*, ATL. CONST., Feb. 21, 1958).

173. Lewis F. Powell, Jr., *The State of the Legal Profession*, 90 ANN. REP. A.B.A. 391, 403 (1965).

174. *See, e.g.*, Bell v. Maryland, 378 U.S. 226, 346 (1964) (Black, J., dissenting) ("[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."). *See generally* Schmidt, *supra* note 65, at 246–66.

175. *See, e.g.*, Anders Walker, *A Lawyer Looks at Civil Disobedience: Why Lewis F. Powell, Jr., Divorced Diversity from Affirmative Action*, 86 U. COLO. L. REV. 1229 (2015) (describing Powell's reliance on this approach).

176. *See, e.g.*, Lewis F. Powell, Jr., *A Lawyer Looks at Civil Disobedience*, 23 WASH. & LEE L. REV. 205, 205–06 (1966) ("[L]awyers, of all people, must retain a wholesome degree of rational attachment in face of emotional causes, however

In North Carolina, for instance, the Governor Luther Hodges encouraged lunch counter proprietors to press charges against protesters. Regardless of the ultimate legality of these arrests,[177] he wanted to demonstrate that the police were in control of the situation.[178] Hodges refrained from expressing a public position on whether the lunch counters should desegregate while denouncing lawlessness and disorder. He warned that even ostensibly peaceful sit-ins risked "degenerat[ing] into a serious threat both to bi-racial good will and public order."[179] He suggested civil rights activists were being inconsistent in their commitment to the legal process, "It is both illogical and dangerous for those who insist on meticulous obedience to the law as the courts interpret it, where segregation is banned, to resort themselves to unlawful measures calculated to speed up acceptance of the philosophy of racial integration."[180]

Arrest and a quick conviction, Governor Hodges believed, would serve this purpose, and he and his attorney general privately urged individual business owners to press charges against the protesters.[181] A draft statement the governor circulated to business owners so that they could explain their decision to call in the police included the following language: "We believe that the Nation itself is entitled to see an end to the disorder, and to see that whatever questions remain to be settled shall be settled in a civilized manner and in accordance with law."[182]

Hodges' faith in the courts went beyond simply getting the

appealing. . . . I would like . . . to disassociate civil disobedience from civil rights and consider the doctrine solely on its merits.").

177. At the time of the protests, the legal question was contested. *See* Schmidt, *Divided By Law*, *supra* note 13, at 106–12.

178. *Id.* at 142–45 (discussing Governor Hodges and his attorney general's efforts to encourage business owners to press charges against sit-in protesters).

179. Luther Hartwell Hodges, Governor N.C., Statement on Sit-ins (n.d.) (on file with author).

180. *Id.*

181. Correspondence from Robert E. Giles, Administrative Assistant, to William C. Allred, Jr. (Mar. 18, 1960) (on file with author); Correspondence from Luther H. Hodges, Governor N.C., to C.M. Purdy, Reg'l Manager Woolworth's (Mar. 24, 1960) (on file with author); Correspondence from Luther H. Hodges, Governor N.C., to R.C. Kirkwood, President Woolworth's (Mar. 24, 1960) (on file with author); Correspondence from Luther H. Hodges, Governor N.C., to C.L. Harris (Mar. 2, 1960) (on file with author).

182. Untitled Draft of Statement on Sit-ins by Woolworth's at 3 (1960) (on file with author).

students off the streets and discouraging future protests. He also argued that the courts, rather than the streets, were the best place for this issue to be resolved. "The Governor's main concern," explained his administrative aid in a letter to a concerned citizen,

> is really the problem of law and order. . . . [T]he Negro students have made their point and that nothing is to be gained by continuing mass demonstrations . . . . It is the Governor's view that if the Negro citizens have a legal right to integrated service at lunch counters, the issue should be resolved in the courts.[183]

On this particular legal question, Hodges felt the segregationists had a winning argument when the issue got to the courts. "According to my information," Hodges explained to a Chicagoan who wrote to criticize his handling of the sit-ins,

> the courts have always held that a private business may operate as the owner sees fit so far as refusing to serve particular customers, and the federal courts have traditionally held that the Fourteenth Amendment—as a legal matter—is not applicable to private persons but rather to state and local governments.[184]

Other moderate segregationists echoed Hodges' belief that when it came to the sit-ins the courts were their allies.[185]

Getting these volatile issues into the courtroom could

183. Correspondence from Robert E. Giles to Professor Robert H. Bohlke (Apr. 14, 1960) (on file with author).

184. Correspondence from Luther H. Hodges, Governor N.C., to Truman E. Banks (Mar. 18, 1960) (on file with author); *see also id.* ("Under the decisions of both federal and state courts as they are known at this time, it appears that a private store has the legal right to operate on either an integrated or segregated basis, just as any individual has the legal right to determine whom he will invite into his home.").

185. Leaders of the Virginia Commission on Constitutional Government were so confident that existing doctrine squarely supported the prosecution of lunch counter sit-in protesters that in response to the sit-ins they issued a pamphlet that simply reprinted two court decisions. VA. COMM'N CONSTITUTIONAL GOV'T, RACE AND THE RESTAURANT: TWO OPINION PIECES (1960). The commission's chairman David J. Mays explained that the "obvious illegality of the Negro lunch counter sit downs" meant that the protesters' actions were "self-defeating" since they had "turned from the federal courts to extra—and illegal—actions." Lewis, *supra* note 163, at 120–21.

sometimes produce winning arguments. Indeed, opponents of the civil rights movement had some of their greatest litigation successes in cases involving the regulation of civil rights protests. The first time the Supreme Court upheld a state conviction of civil rights demonstrators during the civil rights movement came in *Adderley v. Florida*,[186] a case in which the justices upheld a trespassing conviction for a demonstration outside a county jail.[187] In the protest cases, civil rights opponents found an ally in Justice Black. In a series of dissents, then in several majority opinions, the justice from Alabama insisted that the government had a primary responsibility to protect against public disorder.[188] "Experience demonstrates that it is not a far step from what to many seems the earnest, honest, patriotic, kind-spirited multitude of today, to the fanatical, threatening, lawless mob of tomorrow," he wrote in one dissent.[189]

The segregationists' embrace of litigation, even when the odds seemed so powerfully stacked against their cause, reflected a penchant for legalism that became increasingly powerful within the broader segregationist movement over the course of the civil rights era.

As the civil rights movement progressed, defenders of segregation relied less and less on blunt claims of white supremacy and increasingly on legalistic arguments. Consider, for example, a television exchange between civil rights lawyer Leonard Holt and James Kilpatrick in April 1960 that occurred as the sit-in movement was taking off across the South.[190] In response to Kilpatrick's attack on the sit-ins as a violation of the property rights of business owners,[191] Holt said he wanted "to direct our attention away from the purely legal aspects of

186. 385 U.S. 39 (1966).

187. Prior to *Adderley*, the Court overturned convictions in protester cases, but in closely divided opinions. *See* Brown v. Louisiana, 383 U.S. 131 (1966) (overturning the conviction of five African Americans who took part in a peaceful sit-in protest in a public library); Cox v. Louisiana, 379 U.S. 536 (1965) (overturning the conviction, under an anti-picketing statute, of the leader of a civil rights protest that took place outside a courthouse).

188. *Adderley*, 385 U.S. 39 (opinion by Black, J.); *Brown*, 383 U.S. at 151 (Black, J., dissenting); Cox v. Louisiana, 379 U.S. 536, 575 (1965) (Black, J., concurring in part and dissenting in part); Bell v. Maryland, 378 U.S. 226, 318 (1964) (Black, J., dissenting).

189. *Cox*, 379 U.S. at 584. *See generally* Schmidt, *supra* note 65.

190. The exchange is recounted in WALKER, *supra* note 74, at 117–18.

191. *Id.* at 117.

this."[192] The issue was really about students "seeking dignity, or longing for freedom," he explained.[193] Kilpatrick kept trying to return the issue to his preferred grounds. Why not rely on "the process of law?" he asked Holt.[194] Kilpatrick's point was echoed in 1962 by Charles J. Bloch, a former president of the Georgia Bar Association and a dedicated defender of racial segregation.[195] In a speech attacking the civil rights movement, Bloch declared that "this great question which confronts us today is purely a political, legal question. . . . It has nothing whatsoever to do with morality"—or, he added, with "religion" or "spirituality."[196]

192. *Id.* at 118.

193. *Id.*

194. *Id.*

195. Bloch argued a constitutional challenge to the Civil Rights Act of 1957, winning in a federal district court in Georgia before losing in the Supreme Court. United States v. Raines, 172 F. Supp. 552 (M.D. Ga. 1959), *rev'd*, 362 U.S. 17 (1960).

196. Charles J. Bloch, *Boycotts and Race Relations in Macon, Georgia*, WSB-TV (Feb. 1962), *available at* http://dlg.galileo.usg.edu/crdl/id:ugabma_wsbn_40681, *archived at* http://perma.cc/E2Z2-MC9B. Bloch elaborated on these themes in a 1963 lecture he delivered in Tuscaloosa, Alabama:

> The *primary* role of the lawyer should be to demonstrate that our present domestic situation is the result of the sweeping aside by the courts of those fundamental legal principles which were guaranteeing safety and justice for all, and substituting for those fundamental legal principles rules of conduct thought necessary to comply with demands being made by certain segments of our society. . . .
>
> We should not merely as lawyers of the South—but as American lawyers—lawyers devoted to constitutional government, make demands of our own—demands that the provisions of the Constitution of the United States be obeyed and not tortured and twisted by any branch of the government for the purpose of perpetuating in office any individual or group of individuals.
>
> If demands are followed by demonstrations which are calculated to provoke violence, *it should be our role as lawyers to teach that protection to person and property is the paramount duty of government, and shall be impartial and complete.*
>
> It should be our role not only to teach that doctrine but to demonstrate that the courts of the land—Federal and State—have the power to invoke and implement that doctrine.

Bloch, *supra* note 33, at 390, 400.

Not all dedicated segregationists agreed with Bloch's strategy of placing the law and legal principles at the forefront of their battle. For example, Carleton Putnam, author of the white supremacist manifesto RACE AND REASON: A YANKEE

This effort to mark a dichotomy between law and morality became increasingly common among segregationists over the course of the civil rights movement. The reason for this tactic is not hard to identify. The "moral" case for segregation was losing support—even in the white South.[197] Turning to venerable constitutional principles was a tactical move made by a side with a losing hand. The core of their case, they insisted, was a legal, rather than moral, principle. Adherents of this new model of racial conservatism adopted a quasi-judicial posture. They sought to disaggregate their substantive beliefs on race relations from their commitment to constitutional principles and to the legal process—to differentiate the "moral" question from the "legal" one. The battle, they argued, was primarily one of legal principle. It was a battle for states' rights, for local autonomy, for individual choice;[198] and it was a battle for the rule of law.[199] This new racial conservatism in the South could more effectively engage conservatives elsewhere. The white South's efforts to defend segregation in court contributed to the emergence of this new, more legalistic discourse.

## V. CHASTENING THE SEGREGATIONIST CAUSE

This Part offers a general assessment of the consequences of the segregationist commitment to litigation as a primary tool of opposition to the civil rights movement.

A great deal of scholarship has shown how litigation channels moral or emotional claims into different, more legalistic registers.[200] Litigation can only imperfectly capture

VIEW (1961), argued that the constitutional arguments were not winners and that the South had to defend itself on moral grounds. CHAPPELL, *supra* note 157, at 170–71; JOHN P. JACKSON, JR., SCIENCE FOR SEGREGATION: RACE, LAW, AND THE CASE AGAINST BROWN V. BOARD OF EDUCATION 119–20 (2005); Mary Ellen Maatman, *Speaking Truth to Memory: Lawyers and Resistance to the End of White Supremacy*, 50 HOWARD L.J. 1, 68–70 (2006).

197. *See supra* note 115 (citing public opinion polls).

198. *See, e.g.*, VA. COMM'N ON CONSTITUTIONAL GOV'T, *supra* note 110 ("We do not propose to defend racial discrimination. We do defend, with all the power at our command, the citizen's right to discriminate. However shocking the proposition may sound at first impression, we submit that under one name or another, this is what the Constitution, in part at least, is all about.").

199. *See, e.g.*, Charles J. Bloch, *We Who Love the Law*, 24 ALA. LAW. 58 (1963).

200. *See, e.g.*, Catherine Albiston, *The Dark Side of Litigation as a Social Movement Strategy*, 96 IOWA L. REV. BULL. 61, 74–77 (2011).

the deep commitments and emotion of a social cause. Bold moral dilemmas are transformed into technical legalisms. The campaign for racial equality becomes, in the hands of lawyers and courts, a rule prohibiting discrimination by state actors.[201] A campaign for welfare rights never gets more than limited procedural protections when taken to the courts.[202] A campaign for women's reproductive rights becomes repackaged into a narrow doctrinal privacy framework.[203] "We may well be unaware," writes Jack Balkin, "of how much the increasing formalisms, the gradual encrustations of constitutional language, hedge and limit our imaginations, obscure our understanding rather than illuminate it."[204]

The chastening effect of legalistic discourse is regularly cited as one of the *costs* of litigation.

The case study of the litigation campaign against the civil rights movement raises the possibility that the chastening effects of litigation might also have some benefits. For there are some social movements that *need* chastening. By constantly taking their cases to court—and more generally declaring their cause fundamentally a legal rather than moral issue—segregationists transformed their cause (or at least the public face of their cause). Engaging in constitutional contestation—inside and outside the courts—encouraged segregationists to advance their cause in ways that relied on constitutional principles rather than racist discourse.[205] Furthermore,

201. *See, e.g.*, RISA L. GOLUBOFF, THE LOST PROMISE OF CIVIL RIGHTS 238–70 (2007); Risa Goluboff, *Lawyers, Law, and the New Civil Rights History*, 126 HARV. L. REV. 2312, 2322–27 (2013).

202. *See, e.g.*, William E. Forbath, *Constitutional Welfare Rights: A History, Critique and Reconstruction*, 69 FORDHAM L. REV. 1821 (2001); William E. Forbath, *Caste, Class, and Equal Citizenship*, 98 MICH. L. REV. 1 (1999).

203. *See, e.g.*, Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to* Roe v. Wade, 63 N.C. L. REV. 375 (1985).

204. BALKIN, *supra* note 153, at 128.

205. *See, e.g.*, Brief of the Plaintiff, South Carolina v. Katzenbach, 383 U.S. 301 (1966) (No. 22), 1965 WL 130083 at *3 ("For the most part this action does not challenge the validity of these sections which prohibit the unlawful conduct and authorize judicial remedies to prevent its occurrence."); Oral Argument, South Carolina v. Katzenbach, 383 U.S. 301 (1966) (No. 22) (remarks of David W. Robinson, representing South Carolina), *available at* http://www.oyez.org/cases/1960-1969/1965/1965_22_orig, *archived at* http://perma.cc/7RVR-5ZX4 ("[W]e do not here challenge the purpose of this Act. We believe that every man, white or black, who possesses the reasonable qualifications prescribed by a State, should be permitted to vote. We further believe that Congress has a duty to enforce the prohibition against the infringement of that right.").

There were exceptions to this, of course. Plenty of openly racist sentiment

litigation channeled segregationist constitutionalism away from its most defiant forms—the claims of interposition and nullification that came out of southern legislatures in the years following *Brown*.[206] "Lawsuits created a dialogue between leaders of the Negro and white communities," explained NAACP lawyer Jack Greenberg in reference to school desegregation litigation.[207] "The legal process drew both sides into a single arena and made them deal with well-defined issues."[208] By embracing the courts and legalistic arguments, segregationism was chastened.

This development was a significant concession on the part of the segregationist movement. The substantive case in favor of legally enforcing white supremacy was resigned, thankfully, to the margins of the public civil rights debate. On the substance of the matter, Jim Crow was in retreat. The best its defenders could offer was an indirect defense, taking a last stand on principles of federalism and individual liberty.[209] This development was, on balance, a significant victory for the cause of civil rights.

Yet in the defeat of de jure white supremacy also lay the seeds of later defeats for civil rights advocates. By developing

made its way into segregationist litigation, even before the nation's highest court. *See, e.g.*, Brief for State of N.C. as Amicus Curiae, Katzenbach v. McClung, 379 U.S. 294 (1964) (No. 543), 1964 WL 72712 at *3 ("[H]owever desirable the social objectives to be achieved regulation under the Commerce Clause cannot be the constitutional basis of every form of equality that minority groups may think desirable nor was the Commerce Clause designed to destroy the individualism of the citizens of a state nor to prohibit the social groupings and classes which are naturally created and molded by personal inclination.").

206. *See, e.g.*, Bush v. Orleans Parish Sch. Bd., 188 F. Supp. 916, 926 (E.D. La. 1960) (noting that most southern states resisted relying on legislative interposition resolutions in post-*Brown* school desegregation litigation).

207. Jack Greenberg, *The Supreme Court, Civil Rights and Civil Dissonance*, 77 YALE L.J. 1520, 1524 (1968).

208. *Id.*

209. One might analogize this development of the civil rights era to the more recent debate over same-sex marriage. With the substantive case against same-sex marriage (i.e., that it is simply wrong as a matter of morality, tradition, religion, etc.) consigned to the margins of public debate, opponents are left standing on the failing grounds of legalisms. They tell federal judges that precedent is on their side, that federalism principles require leaving the issue to the states, that this is a matter best dealt with by legislatures rather than courts. A secondary line of defense against this change is also forming based on principles of religious liberty. *See, e.g.*, Elane Photography, LLC v. Willock, 309 P.3d 53 (N.M. 2013) (for-profit photography business owned by a husband and wife refused to photograph a lesbian couple's commitment ceremony based on the religious beliefs of the company's owners), *cert. denied*, 134 S. Ct. 1787 (2014).

ostensibly race-neutral constitutional arguments with which to defend the racial status quo, segregationists conceded some things, while gaining others. The move charted here—the segregationist embrace of race-neutral constitutional arguments—was first and foremost a strategic move. Although white southern minds began to change during this period, simply because the focus shifted from defending the values of white supremacy to defending the values of states' rights and limited government, the change did not necessarily indicate a lessening commitment to Jim Crow values. The turn to litigation and legalism was often a very deliberate effort to locate a better, more modern way to defend the racial status quo.[210]

Unreconstructed racists carefully avoided discussing race while pronouncing their undying allegiance to constitutional values—in public at least. By offering arguments that were more palatable to mainstream American society in the civil rights era (and beyond), segregationists also hoped to carve out a common ground on which northern and southern conservatives might meet and join forces. George Wallace could win votes in Wisconsin by assuring his audience that he was not advocating for or against segregation, but for the constitutional right for a state to choose its racial practices.[211] Barry Goldwater could win the votes of the South by coupling expressions of personal opposition to segregation with his argument for why the Civil Rights Act was unconstitutional.[212]

Thus, out of the ashes of Jim Crow arose a new version of racial conservatism.[213] This new racial conservatism abandoned legally mandated segregation and pushed aside

210. *See, e.g.*, Thorndike, *supra* note 168, at 52 (describing James Kilpatrick's self-conscious use of legal arguments as an alternative to explicit discussion of race and segregation).

211. *See supra* note 166 and accompanying text (discussing Wallace's campaign speech in Wisconsin).

212. Barry Goldwater, *Passage of New Laws Cannot Alone End Racial Discrimination*, L.A. TIMES, June 27, 1963, at A5 ("I believe deeply in integration. But I believe that it must be brought about in accordance with our Constitution and the fundamental concepts of freedom."); Clay Gowran, *Dixie Troop Use Hit By Goldwater*, CHI. TRIBUNE, Oct. 6, 1962, at A19 (Goldwater stating he was "unalterably opposed" to racial segregation); Charles Mohr, *Goldwater Turns to Rights Issue*, N.Y. TIMES, Oct. 17, 1964, at 16 ("I don't like segregation. But I don't like the Constitution kicked around either."); *Text of Goldwater Speech on Rights*, N.Y. TIMES, June 19, 1964, at 18 (explaining his decision to vote against the Civil Rights Act).

213. *See generally* KRUSE, *supra* note 148.

blunt defenses of racial hierarchies, replacing them with formally race-neutral arguments for states' rights and individual liberty. As opposition to *Brown* became no longer politically viable, racial conservatives embraced a particular reading of *Brown*, one based in the principle of colorblind constitutionalism.[214] And litigation was a primary arena in which this new racial conservatism took shape and demonstrated its potential. Even as they lost case after case, the lawyers fighting segregation's courtroom battles were helping to move the white South—and the nation—toward a new legal paradigm. They would give conservatives—including conservative judges—a powerful set of tools to limit the scope of certain social reform measures. The effect of these ostensibly race-neutral constitutional arguments placed limits on government efforts to uproot the stubborn persistence of a racially stratified American society.

Litigation against the civil rights movement helped to chasten white supremacy. But these litigation battles also helped cultivate new obstacles to achieving a more racially just society.

## CONCLUSION

Why study litigation designed to block or slow social change, particularly a social change so obviously right and necessary as the interment of Jim Crow? One justification is historiographical. Our understanding of the civil rights era is impoverished when we refuse to take the losing side seriously. The monolithic caricatures of the defenders of segregation too often found in scholarship on the civil rights movement hinder a proper assessment of the achievements as well as the failures of the black freedom struggle. A recent generation of political and social historians has begun the project of painting a fuller picture of segregationism and racial conservatism during the

214. *See generally* Christopher W. Schmidt, Brown *and the Colorblind Constitution*, 94 CORNELL L. REV. 203 (2008); Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over* Brown, 117 HARV. L. REV. 1470 (2004). One particularly clear example of an abrupt shift from support for de jure segregation to a professed commitment to colorblind constitutionalism in the late civil rights era was the U.S. Senator from North Carolina, Sam Ervin. *See* KARL E. CAMPBELL, SENATOR SAM ERVIN, LAST OF THE FOUNDING FATHERS 158–60 (2007); SAM ERVIN, PRESERVING THE CONSTITUTION: THE AUTOBIOGRAPHY OF SAM ERVIN 141–49, 178–79 (1984).

civil rights era.[215] "[W]hite resistance to desegregation," writes Kevin Kruse, "was never as immobile or monolithic as its practitioners and chroniclers would have us believe. Indeed, segregationists could be incredibly innovative in the strategies and tactics they used to confront the civil rights movement."[216] This Article is an effort to bring this same sort of analytical rigor to the legal history of those who stood opposed to the civil rights movement.[217] Just as a good legal advocate must understand the arguments of the other side, a good historian must understand those who stood opposed to social change as well as those who fought for it.

A study of the rearguard litigation campaign of the segregationists may also provide general insights into the uses of litigation as a tool for thwarting social change. A few observations suggest themselves. One is that the ways in which litigation advances the cause of those fighting to protect a legal status quo are often quite similar to the ways in which litigation advances the cause of reform movements. Segregationist lawyers found ways to score small victories, even as the American judicial system became increasingly unwelcome to their cause. They took advantage of the diversity of pathways into and through the American legal system. They found courts that were sympathetic to their cause—southern state courts, of course, but also lower federal courts in the South. They were eclectic in their selection of legal claims. While many of the segregationist claims were nonstarters in federal court, others were viable, and some were winning arguments, even in the Supreme Court.

The rearguard litigation campaign in defense of segregation also took advantage of the secondary benefits of litigation. Segregationists often found value in litigation efforts even when they knew the likely outcome of the cases was going to be unfavorable. Litigation gave segregationists a forum for

215. *See, e.g.*, CRESPINO, *supra* note 158; KRUSE, *supra* note 148; LASSITER, *supra* note 112; SOKOL, *supra* note 115; JASON MORGAN WARD, DEFENDING WHITE DEMOCRACY: THE MAKING OF A SEGREGATIONIST MOVEMENT & THE REMAKING OF RACIAL POLITICS, 1936–1965 (2011); Lewis, *supra* note 163.

216. KRUSE, *supra* note 148, at 7.

217. Recent works that have moved us down this path include Kevin M. Kruse, *The Fight for "Freedom of Association": Segregationist Rights and Resistance in Atlanta*, *in* MASSIVE RESISTANCE: SOUTHERN OPPOSITION TO THE SECOND RECONSTRUCTION (Clive Webb ed., 2005); WALKER, *supra* note 74; Driver, *supra* note 171.

drawing attention to their preferred constitutional principles; it created a platform for coalition building within the South as well as between the South and other regions of the country; and it provided an opportunity to highlight a commitment to legalism and courts, which proved a particularly valuable weapon as the civil rights movement became more dedicated to confrontation and extralegal tactics for advancing segregationist claims. Litigation's benefits beyond simply winning court cases is a common theme in scholarship on social reform litigation campaigns.[218]

There is, then, much that is familiar in the ways in which opponents of social change use litigation. But there are also some distinctive qualities to these litigation efforts. For one, the trajectory of development of litigation tactics differs from social change campaigns. For a successful social change litigation campaign, the creative litigation tactics of the vanguard stage—the search for friendly judicial forums and viable legal arguments, the use of litigation to mobilize supporters and sharpen amorphous issues—eventually give way to the more traditional litigation tactics of winning big cases and enforcing judgments. For a litigation campaign committed to protecting a fading legal principle, the most creative uses of litigation come in the desperate end-stages, when litigation becomes a rearguard operation. When there is no longer the possibility of winning on the core issues, small victories and secondary benefits take center stage. Litigating against social change thus offers a mirror image of the more well-known dynamics of social change litigation.

The litigation campaign against the civil rights movement demonstrates other ways in which litigation aimed at thwarting social change differs from social reform litigation. Litigation as a tactic of delay obviously serves defenders of the legal status quo but not its challengers. The use of litigation as a weapon to attack reform advocates requires a certain degree of control and influence in the legal system, something more likely to be true of those defending the status quo than those challenging it. Also, the rhetoric of legal argumentation differs. Opponents of social change call upon the courts to serve as bulwarks against the winds of change; reformers call upon the courts to recognize a legal principle that society's majoritarian

218. *See, e.g.*, MCCANN, *supra* note 2; NeJaime, *supra* note 138.

institutions are failing to recognize. Opponents make their stand on the wisdom of legal tradition and the value of longstanding legal expectations; reformers, on the expanding conception of justice.

For those today fighting battles to change the law, a better understanding of the ways in which their opposition defends the legal status quo will surely be valuable. This is particularly true with regard to end-stage legal battles—that point when a defense of the old norm has been, for all intents and purposes, lost, but the battle lingers on. Yet at this stage, when the forces of reform seem to have taken the day, there are still important victories and losses. This was the battle against segregation by the 1960s.

Today, we can see an imperfect but instructive analogue in the struggle for marriage equality. At the time of this writing, the Supreme Court seems poised to strike down same-sex marriage bans across the nation as a violation of the Fourteenth Amendment. The forces of opposition are reduced to a rearguard action—one that bears similarities to segregationist litigation in the 1960s. They are rallying behind their sporadic legal victories. They are turning from a direct defense of prohibitions on same-sex marriage to a defense of broader principles involving who should decide this issue—states rather than the federal government, legislatures rather than the courts. The most recent wave of opposition to gay rights has sought to reframe the terms of debate to focus on the rights of those who oppose homosexuality, arguing that certain nondiscrimination requirements violate their expressive freedom and religious liberty.[219] This libertarian "right to discriminate" argument offers yet another echo of the 1960s battle against the civil rights movement.[220]

Finally, though it is surely ironic and perhaps distasteful to say so, close study of segregationist litigation might be of particular use to liberals today. Conservative legal advocates have learned from the civil rights lawyers of past generations.[221] Similarly, those who are today dedicated to

219. *See, e.g.*, Elane Photography, LLC v. Willock, 309 P.3d 53 (N.M. 2013), *cert. denied*, 134 S. Ct. 1787 (2014); *see generally* SAME SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS (Douglas Laycock, Anthony R. Picarello, Jr. & Robin Fretwell Wilson eds., 2008); Paul Horwitz, *The* Hobby Lobby *Moment*, 128 HARV. L. REV. 154 (2014).

220. *See* Schmidt, *supra* note 30.

221. *See, e.g.*, ANN SOUTHWORTH, LAWYERS OF THE RIGHT: PROFESSIONALIZING

liberal legal advocacy might learn from the experience of Jim Crow's defenders. Gay rights aside, modern liberal legal advocacy has become largely a battle against constitutional change.[222] It is a battle to salvage the constitutional jurisprudence of past Courts.[223] Liberals defend the landmark legislation and the doctrinal innovations established during the civil rights era against conservatives who argue that remedies of the past do not serve today's needs.[224] For any legal advocate whose primary goal is to place obstacles in the way of unwanted constitutional change, it is worth considering how the litigation campaign against the civil rights movement was able to achieve what it did.

Although litigation is limited as a bulwark against the tide of historical change, it can be uniquely valuable for defenders of the status quo. It offers an alternative forum in which to resolve disputes and delay change. And it provides opportunities to reframe losing political arguments in ways that speak to future generations. Segregationists, for better and for worse, demonstrated the value of litigating against social change.

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THE CONSERVATIVE COALITION 8–40 (2008) (describing the formation of a conservative public interest law network, which arose in part due to the successes of liberal public interest lawyers); ADAM WINKLER, GUNFIGHT: THE BATTLE OVER THE RIGHT TO BEAR ARMS IN AMERICA 48, 90–91 (2011) (describing the influence of the NAACP Legal Defense Fund on conservative legal advocacy groups).

222. This is not to say, of course, that liberal or progressive constitutionalists have abandoned legal reform projects. *See, e.g.*, THE CONSTITUTION IN 2020 (Jack M. Balkin & Reva Siegel eds., 2009).

223. *See, e.g.*, Citizens United v. FEC, 558 U.S. 310, 393 (2010) (Stevens, J., dissenting). The constitutional challenge to the Affordable Care Act, Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012), also fits here. The heart of the case involved a debate over the constitutional legacy of the New Deal, specifically the scope of congressional commerce power. Those who believed the federal law was not authorized under the Commerce Clause argued for a narrower reading of the New Deal precedents. Some even suggested that the case gave the Court an opportunity to roll back these precedents. Those who believed the ACA was authorized under the commerce power argued that their position better captured the constitutional achievements of the New Deal era.

224. *See, e.g.*, Schuette v. Coal. to Defend Affirmative Action, 134 S. Ct. 1623, 1651 (2014) (Sotomayor, J., dissenting); Shelby Cnty. v. Holder, 133 S.Ct. 2612, 2632 (2013) (Ginsburg, J., dissenting). Bruce Ackerman frames his latest book, THE CIVIL RIGHTS REVOLUTION (2014), around the basic point: the landmark statutes of the civil rights era should be understood as having changed the meaning of the Constitution, and it is the job of current generations to defend this new meaning—at least until a new "authentic expression of popular sovereignty" arrives. *Id.* at 62. He titled his concluding chapter, discussing recent advances for racial conservatism, "Betrayal." *Id.* at 311–40.