The Supreme Court, Civil Rights and Civil Dissonance*

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Because it has the power to affect broad currents of American thought and behavior, the Supreme Court must of necessity operate with some consciousness of the social effects of its determinations. The synthesizing of precedent and the interpretation of statutes and of the Constitution are of course the stuff of day-to-day decision-making. But such considerations as the capacity of legal pronouncements to teach certain principles, the power of the courts to compel desirable conduct, and the possibility that particular rulings will reinforce or weaken obedience to the law can, in appropriate cases, exercise considerable influence upon Court determinations.

Such considerations, to be sure, seldom manifest themselves on the surface of decisions in which they play a role. The Justices themselves —or some of them—may not be aware of certain unarticulated premises underlying their decisions in a given case or line of cases. In addition, the popular belief that social policy should not be weighed in deciding particular cases contributes to judicial reticence to acknowledge such considerations. More important, perhaps, there is frequently no need to articulate important policies behind a decision if the Justices choose not to do so. Much of the Court's policy-making is accomplished by simple grant and denial of certiorari, grounds for which are rarely set forth no matter how conventional they may be. Furthermore, what is *not* said is sometimes fully as important to the effect of a decision as what is explicitly stated. Since these policy considerations either operate *sub rosa* or influence only what is left out of an opinion, they normally cannot be perceived by studying a single Court decision. Their existence must be inferred from patterns of decision over a period of years, by comparison and contrast of the Court's varying treatments of related lines of cases.

The civil rights movement has given rise to a number of important

* This article is based on the 1966 Meiklejohn Lecture at Brown University. The reader should note that I have been counsel in many of the cases cited herein, which has perhaps given some insight at the risk of impairing vision in other respects.

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lines of Supreme Court decisions which illustrate the influence of such unarticulated policy considerations. Two of these—the school desegregation and protest demonstration cases—have recently completed phases of development. The school cases have passed from a period in which the Court limited itself to the enunciation of general principles of educational equality, to one in which the Court has shown an increasing willingness to involve itself in details of desegregation plans. The pattern followed by the protest cases has been nearly the opposite. From a period of detailed review of sit-in convictions, accompanied almost invariably by reversal on narrow grounds, the Court has progressed to a point where it frequently leaves the last word to the states in protest demonstration cases, sometimes affirming with broad pronouncements on public order and property rights.

These changing patterns of Court decision have paralleled other legal and social developments. In the school desegregation area passage of the Civil Rights Act of 1964,[1] made possible in significant degree by the demonstrations which were part of the heritage of *Brown v. Board of Education*,[2] has resulted in the supplementing of private-suit enforcement of desegregation by federal enforcement under Title VI of the Act. In the protest demonstration area the last eight years have seen a progression from the nonviolent 1960 Greensboro sit-ins through the Selma march of 1965 to a period of widespread social protest. In recent years civil rights protests have been joined in national prominence by other demonstrations such as those against the war in Viet Nam, or the student uprisings at Berkeley and Columbia. During the same period the country has been shocked by the summer riots which have wracked our cities. And although the early civil rights demonstrations and much of the protest which has succeeded them have differed in participants, purposes, methods and legality, there has been an easy tendency to lump together the growing civil dissonance[3] as a single phenomenon.

1. 42 U.S.C. § 2000a *et seq.* (1964); *see* 45 C.F.R. 80 *et seq.* (1967).
2. 374 U.S. 483 (1954).
3. My meaning is more clearly expressed by the term "civil dissonance" than by the more common "civil disobedience." Civil disobedience connotes illegal conduct pursued out of political motives, but much protest that has been called "civilly disobedient," even by the actors themselves, has in fact been legal. Violation of a local law which is in conflict with the Constitution or federal law (*e.g.*, freedom rides) is not civilly disobedient, because the Constitution validates the conduct in question: the local law is invalid. Moreover, action giving rise to test case litigation ought not to be viewed as civil disobedience. Those engaged in lunch counter sit-ins, for example, even if they had not been ultimately upheld by the courts and Congress, arguably believed that they had a Fourteenth Amendment right to sit-in. At least three Justices of the Supreme Court agreed with them. Bell v. Maryland, 378 U.S. 226, 286 (1964). On the other hand, I would define blocking the Triboro Bridge as "civil disobedience." I would also so define some of the

It is not fortuitous that the school desegregation and sit-in lines of decision have developed as they have. I suggest that the patterns of social development outlined above are interrelated with one another; that there are connections between the early school decision rhetoric, the sit-in demonstrations, the early reversals of sit-in convictions, the Civil Rights Act, the spreading civil dissonance and the Court's recent tendency to let protest convictions stand. I suggest, furthermore, that those connections can perhaps best be understood in terms of the Court's—and the law's—role as a teacher.

On the one hand the Court can teach by the direct advocacy of ideas, by the eloquent and forceful declaration of principles it holds dear. On the other it can "teach" by approving or condemning certain conduct. In either case the ultimate goal is the encouragement of desired forms of thought and behavior. The school desegregation cases were in this sense far more than enforceable judgments. Indeed for almost ten years enforcement was perhaps their least important aspect. The opinions proclaimed for the first time from the summit of one of the three branches of the federal government the immorality as well as the illegality of segregation. The early protest decisions were also more than simply enforceable judgments. In ultimate effect they were intimately related to the school decisions, protecting a movement that was forcefully teaching the American people the same lessons that the school decisions had abstractly taught.

I. The Teaching of the School Desegregation Cases

Brown v. Board of Education[4] proved to be the Declaration of Independence of its day. Together with the other school desegregation cases[5] it profoundly affected national thinking and has served as the principal ideological engine of today's civil rights movement.[6] With-

recent rioting, although the political motivation has usually been unarticulated. In some cases there may be disagreement over whether motivation is political and whether conduct is legal, illegal, or reasonably viewed as test case material. But that is inevitable in making legal and moral judgments. To complicate matters further, clearly illegal conduct may be condoned by a jury which has the last word on whether to convict or not. *E.g.*, although clearly guilty, Peter Zenger was acquitted. It is fruitless to debate whether the actor in such a case has been civilly disobedient or not.

4. 374 U.S 483 (1954.)

5. Bolling v. Sharpe, 347 U.S. 497 (1954); Brown v. Board of Education (Brown II), 349 U.S. 294 (1955).

6. Although this result was one of the Supreme Court's great achievements, the charge is still sometimes made that the Court transgressed its proper function by making a "political" decision, one which did more than adjudicate rights of particular litigants. The extrajudicial consequences, it has been suggested, demonstrate that the decision rested on forbidden considerations. But other decisions also have had immense public

out announcing any radically new ideas, it nevertheless helped to crystallize a national commitment to eradicate racial inequality.[7] To a nation which had recently fought a war against Nazism and its doctrines of racial inferiority, to a nation whose regional, educational and social barriers were being threatened and in some cases breached and overthrown by advances in communication and transportation, to a nation whose Negroes, together with its other citizens, had begun to enjoy the benefits of a higher level of prosperity and to hunger for more, the Court said that this is not a nation which may sort out people on the basis of race.

Thus *Brown* forcefully and authoritatively proclaimed an ideal. But the decision, because it was a decision of the Court, had a force that ordinary speech cannot have. While ordinary speech cannot require a response, a lawyer could put the *Brown* holding into the machinery of the legal process and bring about confrontations demanding some sort of answers. In Atlanta, Birmingham, Nashville, Little Rock, New Orleans—indeed in every large and medium-size city in the South as well as in more than a hundred rural counties, lawyers filed suits requesting the enforcement of rights assured or suggested by the Brown decision. The resulting discussion among lawyers, judges, academics and leading private citizens—through press, radio, television

consequences. Anthony Lewis's GIDEON'S TRUMPET (1964) tells how Gideon v. Wainwright, 372 U.S. 335 (1963), which established the right to counsel in state criminal cases, spurred an entire national legal aid movement. It is too early to know all the political ramifications, but the reapportionment cases probably will have comparable effect. So will the line of cases following Escobedo v. Illinois, 378 U.S. 478 (1964). *See* Miranda v. Arizona, 384 U.S. 436 (1966); Johnson v. New Jersey, 384 U.S. 719 (1966). That a Supreme Court decision pervasively affects society is hardly unusual or discrediting.

It should be noted that the school cases from Missouri *ex rel.* Gaines v. Canada, 305 U.S. 477 (1938), through Sipuel v. Board of Regents, 332 U.S. 631 (1948), Sweatt v. Painter, 339 U.S. 629 (1950), McLaurin v. Oklahoma State Regents, 339 U.S. 637 (1950), and then on to Brown v. Board of Educ., 347 U.S. 483 (1954), were a carefully considered and cautiously developed line of precedents. A lawyer from another planet reading the 1950 *McLaurin* decision, holding that a Negro teacher attending graduate school was treated unequally by being separated because of his race in a classroom, library and cafeteria attended by white classmates, would have readily anticipated *Brown*, which held that segregating *his* students was just as unequal. The only inequality McLaurin suffered, after all, was segregation: segregation was thus held unequal per se in 1950. Moreover, the opinion decried the consequences of segregated education of teachers because of the effect it would have on pupils. This was only a hint of what was to come, but a broad one.

7. In retrospect, some hint that the country was getting ready to adopt higher standards of equality appeared in the 1947 Report of President Truman's Committee on Civil Rights. PRESIDENT'S COMMITTEE ON CIVIL RIGHTS, REPORT: TO SECURE THESE RIGHTS (1947). Though it had no force of law, and although Congress and the President did not significantly embrace its suggestions until 1964, this report called for integrating all aspects of public life, extending the franchise on a full and equal basis, abolishing the poll tax, withholding federal funds from institutions that segregate, ending segregation in the District of Columbia (which was as segregated in 1948 as Jackson, Mississippi, in 1964), enacting a national Fair Employment Practices Act, abolishing segregation in the armed forces, and so forth. For the Committee's recommendations, see *id.* 151-78.

and direct confrontation—made important breaches in the class, ethnic and other barriers which belie the popular image of America as one great "melting pot." Lawsuits created a dialogue between leaders of the Negro and white communities. The legal process drew both sides into a single arena and made them deal with well-defined issues. In addition, suits stimulated informal discussions between the parties that until then had been taboo. Desegregation, though often limited and sometimes of token nature, introduced new living experiences to private citizens and public officials as well.

The stimulation of this great national dialogue was for many years, however, the extent of the Supreme Court's involvement in the school desegregation struggle. While repeatedly and unequivocally asserting as a general proposition that school boards must desegregate and must do so promptly, the Court refrained from involving itself in the details of the implementation process and until recently has assumed jurisdiction only on occasions when a large issue of principle was at stake.

The second *Brown* opinion[8] was the first opportunity for the Court to discuss implementation. As in the earlier decision, the Court confined itself to laying down general principles. Despite the abuse that has been heaped on the opinion's "deliberate speed" formula, however, the Court did state the basic requirements of school desegregation in unequivocal terms. Hostility was ruled out as a ground for delay; the entire *system* had to be desegregated; only practical administrative considerations could justify anything less. If school boards had followed the lead of *Brown II*, the nation's schools would have been desegregated in a few years. Whatever blame is assignable to the 1955 opinion for the slow pace that actually followed must be charged to its tone, which in the context of the widespread assumption that desegregation would have to be accomplished instantaneously was taken by many school boards to indicate judicial reluctance to upset the status quo.

Between 1955 and 1958, the year of the Little Rock case,[9] the Court did not discuss school segregation at all. It merely declined to review cases.[10] The Little Rock case was an occasion for reaffirmation of prin-

8. Brown v. Board of Educ. (Brown II), 349 U.S. 294 (1955).

9. Cooper v. Aaron, 358 U.S. 1 (1958).

10. Cases in which plaintiffs petitioned: Hood v. Board of Trustees, 352 U.S. 870 (1956), *denying cert. to* 232 F.2d 626 (4th Cir. 1956) (holding that exhaustion of state remedies was required prior to consideration of a school desegregation suit by the federal courts); Carson v. Warlick, 353 U.S. 910 (1957), *denying cert. to* 238 F.2d 724 (4th Cir. 1956) (holding that exhaustion of remedies under the North Carolina pupil placement act was required); De Febio v. County School Bd., 357 U.S. 218 (1958), *denying cert. to and dismissing appeal from* 199 Va. 511, 100 S.E.2d 760 (1957) (upholding the validity of the Virginia pupil placement act) (appeal treated as petition for writ of certiorari); Slade v.

ciple. The Court not only endorsed the substantive portions of *Brown*, but took the unique step of asserting that each and every member of the Court, including those Justices who had ascended to the bench following *Brown*, agreed in "unanimously reaffirm[ing]"[11] the earlier opinion. Nothing less was required to demonstrate that the political opposition to *Brown* would not move the Court to retract or modify it. Again the opinion was notable chiefly for its broad-brushed enunciation of principle. It began with the stern warning that "[a]s this case reaches us it raises questions of the highest importance to the maintenance of our federal system of government."[12] The Court reviewed at some length and in somewhat more specific terms the standards established by *Brown II*, reasserting the need for expedition in desegregating. Almost nothing, however, was said about the details or method of desegregation in Little Rock, nor about its pace. The case is still in the courts.[13]

From 1958 to 1963, with few exceptions, the Court continued to refuse to review school cases, whether brought up by plaintiffs or by defendant school boards. The exceptional cases it did review followed the established pattern of emphasizing principle and avoiding the specifics of implementation.[14] One of those exceptions, *Goss v. Board of Education*,[15] struck down a transfer plan which allowed children in a

Board of Educ., 357 U.S. 906 (1958), *denying cert. to* 252 F.2d 291 (4th Cir. 1958) (upholding plan which provided for gradual admission to grades which were not then overcrowded and complete integration by 1963).

Cases in which the School Board petitioned: Rippy v. Brown, 352 U.S. 878 (1956), *denying cert. to* 233 F.2d 796 (5th Cir. 1956); Rawdon v. Jackson, 352 U.S. 925 (1956), *denying cert. to* 235 F.2d 93 (5th Cir. 1956); School Bd. of Charlottesville v. Allen, 353 U.S. 910 (1957), *denying cert. to* 240 F.2d 59 (4th Cir. 1956); County School Bd. v. Thompson, 353 U.S. 911 (1957), *denying cert. to* 240 F.2d 59 (4th Cir. 1956); Orleans Parish School Bd. v. Bush, 354 U.S. 921 (1957), *denying cert. to* 242 F.2d 156 (5th Cir. 1957); School Bd. v. Atkins, 355 U.S. 855 (1957), *denying cert. to* 246 F.2d 325 (4th Cir. 1957); County School Bd. of Prince Edward County v. Allen, 355 U.S. 953 (1958), *denying cert. to* 249 F.2d 462 (4th Cir. 1957); County School Bd. v. Thompson, 356 U.S. 958 (1958), *denying cert to* 252 F.2d 929 (4th Cir. 1957).

11. Cooper v. Aaron, 358 U.S. 1, 19 (1958).

12. *Id.* at 4.

13. Clark v. Board of Educ., 374 F.2d 569 (8th Cir. 1967).

14. A minor exception to this rule was the per curiam opinion in Shuttlesworth v. Birmingham Bd. of Educ., 358 U.S. 101, *aff'g with reservations* 162 F. Supp. 372, 384 (N.D. Ala. 1958), which came to the Court on appeal from a judgment refusing to hold Alabama's pupil assignment law unconstitutional on its face. The judgment below was affirmed, but with qualifications reserving the right to review the law in operation that would permit the issues to be relitigated another day.

It should be noted that if the case had come up on certiorari, the same attitude would have been expressed by denial of certiorari. No one doubted that pupil assignment was designed to maintain segregation. Nevertheless, the Supreme Court continued to deny certiorari in cases which required exhaustion of the remedies provided by state pupil placement acts. Covington v. Edwards, 361 U.S. 840 (1959), *denying cert. to* 264 F.2d 780 (4th Cir. 1959); Holt v. Raleigh City Bd. of Educ., 361 U.S. 818 (1959), *denying cert. to* 265 F.2d 95 (4th Cir. 1959).

15. 373 U.S. 683 (1963), *reversing in part and remanding* 301 F.2d 164 (6th Cir. 1962).

racial minority in a school to transfer out. The decision reflected not so much a concern with the details of implementation as a desire to invalidate a blatantly racial scheme, one that openly employed race as a standard for school assignment.[16]

Goss also spoke powerfully about the long delay in effective desegregation following *Brown*. "[N]ine years after the first *Brown* decision," it declared, "the context in which we must interpret and apply this language [of *Brown* II] to plans for desegregation has been significantly altered. Compare *Watson v. Memphis* . . . ."[17] *Watson*, it is interesting to note, was not a school case at all, but dealt with parks. That the Court should have chosen such a setting for a pronouncement on changing school desegregation standards[18] was, however, quite in keeping with its emphasis on principles rather than specifics of school integration.[19]

Previously, however, the Court had refused to decide whether a twelve year grade-at-a-time plan was too slow in Kelley v. Board of Educ., 361 U.S. 924 (1959), *denying cert. to* 270 F.2d 209 (6th Cir. 1959), and denied certiorari in that case to review whether those parts of the plan which "explicitly recognized race as an absolute ground for the transfer of students between schools, thereby perpetuating rather than limiting racial discrimination," were valid. The Chief Justice and Justices Brennan and Douglas dissented. On the other hand, the Court refused to hear cases in which school boards tried to overturn integration orders. *E.g.*, Buchanan v. Evans, 358 U.S. 836 (1958), *denying cert. to* 256 F.2d 688 (3d Cir. 1958); County School Bd. of Prince Edward County v. Allen, 360 U.S. 923 (1959), *refusing to stay application of* Duckworth v. James, 267 F.2d 224 (4th Cir. 1959); Ennis v. Evans, 364 U.S. 933 (1961), *denying cert. to* 281 F.2d 385 (3d Cir. 1960); Board of Educ. v. Taylor, 368 U.S. 940 (1961), *denying cert. to* 294 F.2d 36 (2d Cir. 1961); Board of School Comm'rs v. Davis, 375 U.S. 894 (1963), *denying cert. to* 322 F.2d 356 (5th Cir. 1963). The New Orleans litigation was vast and in its early phases also involved the fundamental issue of resistance or obedience. *See* Orleans Parish School Bd. v. Bush, 365 U.S. 569 (1961), 364 U.S. 500 (1960).

16. It is significant that in a companion case, Maxwell v. County Bd. of Educ., the Court limited its grant of certiorari to the same racial transfer question, ignoring the issue of whether the named plaintiffs in *Maxwell* should have been admitted to formerly all-white schools even though the plan had not yet reached their grade and never would include them. 371 U.S. 811 (1962).

17. 373 U.S. 683, 689, *citing* Watson v. Memphis, 373 U.S. 526 (1963).

18. "[W]e cannot ignore the passage of a substantial period of time since the original declaration of the manifest unconstitutionality of racial practices such as are here challenged, the repeated and numerous decisions giving notice of such illegality, and the many intervening opportunities heretofore available to attain the equality of treatment which the Fourteenth Amendment commands the States to achieve . . . . Given the extended time which has elapsed, it is far from clear that the mandate of the second *Brown* decision requiring that desegregation proceed with 'all deliberate speed' would today be fully satisfied by types of plans or programs for desegregation of public educational facilities which eight years ago might have been deemed sufficient." 373 U.S. at 529-30.

19. The *Watson* language was requoted in Calhoun v. Latimer, 377 U.S. 263, 264-65 (1965), the Atlanta school case of the 1964 term. *Calhoun* epitomizes the approach the Court had been taking towards the school desegregation problem. The record in the case presented detailed evidence supporting the appellant's contention that the Atlanta school board was not desegregating as required by law. The Board alleged in the Supreme Court that certain events had occurred following disposition of the case below. Instead of deciding on the original record or considering supervening allegations of fact (on

The Civil Rights Act of 1964 marked a watershed in the Court's treatment of school desegregation cases. In the 1965 term three school cases were decided. Two of them, *Bradley v. School Board* and *Gilliam v. School Board*,[20] marked a limited departure from the earlier pattern of decisions. They held that plaintiffs were entitled to hearings on the impact of teacher segregation on the desegregation process, adding, in the style of *Goss, Calhoun* and *Watson*, that "[d]elays in desegregation of school systems are no longer tolerable."[21] *Gilliam* also refused to discuss a gerrymandering question raised in the petition for certiorari.

The third decision, however, manifested a distinct change in the Court's willingness to grapple with details of enforcement in school cases. *Rogers v. Paul*,[22] after quoting the *Bradley* principle that "[d]elays in desegregating public school systems are no longer tolerable," ordered prompt admission of Negro children to a high school from which they had been excluded because the district's gradual desegregation plan had not reached their grades:

> Pending the desegregation of the public high schools of Fort Smith according to a general plan consistent with this principle, petitioner and those similarly situated shall be allowed immediate transfer to the high school that has the more extensive curriculum and from which they are excluded because of their race.[23]

The extent of the Court's willingness to involve itself in the details of enforcement is still unclear. Until very recently *Rogers* was as far as the Court had gone. In May of this year, however, three further decisions[24] examined whether certain "freedom-of-choice" plans fulfilled the Boards "affirmative duty to take whatever steps might be necessary to convert [the state-imposed dual school system] to a unitary system in which racial discrimination would be eliminated root and branch."[25] *Green, Monroe* and *Raney* all emphasized that they were striking down the challenged plans *as applied*, not in the abstract, and *Green* and *Raney* took the further step of suggesting specifically that

which there had been no trial), the Court sent the case back for appraisal of the Board of Education's new resolution on pupil transfer in the light of *Watson* and the newly announced attitude of urgency.

20. 382 U.S. 103 (1965) (companion cases).
21. *Id.* at 105.
22. 382 U.S. 198 (1965).
23. *Id.* at 199-200.
24. Green v. County School Bd., 36 U.S.L.W. 4476 (U.S. May 27, 1968); Monroe v. Board of Comm'rs., 36 U.S.L.W. 4480 (U.S. May 27, 1968); Raney v. Board of Educ., 36 U.S.L.W. 4483 (U.S. May 27, 1968).
25. Green v. County School Bd. 36 U.S.L.W. at 4478.

geographical zoning might serve as the basis for acceptable plans. The Court has clearly moved away from its pre-Civil Rights Act role as an exponent of guiding principles alone to a more active involvement in the particulars of school desegregation.

II. Protecting the Protester

The role played by the Supreme Court in the sit-in cases produced by the civil rights demonstrations of the early 1960's was precisely the reverse of its approach in the school cases. Between 1961 and 1965 the Court passed on the merits of more that 30 sit-in prosecutions for entering upon or refusing to leave privately owned public accommodations—usually restaurants—which excluded or segregated Negroes. Demonstrators were typically prosecuted for trespass, breach of the peace and similar crimes, and were defended on the grounds that the state was suppressing free speech and enforcing racial discrimination in violation of the First and Fourteenth Amendments. The protestors won virtually all of their cases in the Supreme Court. Almost invariably, however, the Court's decisions rested on the narrowest possible grounds, without reaching the basic constitutional issues involved.[26]

The pattern of decision is highly unusual if the cases are viewed in isolation as so many trespass, breach of the peace, disorderly conduct and weight of evidence cases. It is unheard of for the Supreme Court, which can decide only a relatively small number of cases each term, to repeatedly take up such apparently minor matters. Viewed in the context of race relations in the United States, however, the Court's constant involvement can be understood as reflecting concern that a nonviolent movement, struggling toward the same goals that the Court itself had urged more abstractly on the nation in the early school desegregation decisions, should not be worn down by petty prosecutions.

What might be called the first sit-in case, *Boynton v. Virginia*,[27]

26. The civil rights movement has, of course, made a great deal of basic free speech law. New York Times v. Sullivan, 376 U.S. 254 (1964), went a long way toward recognizing the absolute right of freedom of the press against libel claims. NAACP v. Button, 371 U.S. 415 (1963), asserted the principle that a civil rights association has the right to induce members of the public to participate in litigation asserting their civil rights notwithstanding local rules forbidding lawyers to solicit clients. And in NAACP v. Alabama, 357 U.S. 449 (1958), the Court, announcing important principles of the right of free association, upheld the NAACP when it refused to reveal its membership lists to the State of Alabama, asserting that to do so would expose its members to reprisal. But there have been few such clear-cut doctrinal declarations in cases passing on the activist aspect of the protest movement.

27. 364 U.S. 454 (1960).

actually stemmed from a 1959 incident. Certiorari was granted in February 1960 about a month after the sit-ins burst upon the nation. Boynton was not a demonstrator. In the course of a trip home to Alabama, he requested service at the white lunch counter of a Richmond bus terminal after finding that the colored one was fully occupied, and was convicted of trespass for refusing to leave when ordered to do so by the manager. Important constitutional questions were involved. Did the Fourteenth Amendment permit the state to enforce by trespass prosecution a segregation rule of a private restaurant manager? Had the manager's interference with Boynton's journey burdened interstate commerce in violation of the Interstate Commerce Clause of the Constitution?

The Court avoided both questions. Instead, Justice Black's opinion held—although the parties had not argued the issue—that the Interstate Commerce Act, which prohibits discrimination by motor carriers, covers restaurant service offered as an integral part of a carrier's service during a bus trip. This search for the narrow ground and avoidance of general pronouncement, so unlike the school case implementation decisions, typified the jurisprudence of protest decisions in years to come.

In 1961 the Court decided the first three sit-in cases to arise out of actual demonstrations, *Garner v. Louisiana, Briscoe v. Louisiana* and *Hoston v. Louisiana.*[28] Plaintiffs argued that there was no evidence to sustain their convictions, that they were engaged in constitutionally protected free speech, and that they enjoyed Fourteenth Amendment immunity from prosecution for violating segregation rules of private managers of public accommodations. The Court reversed on the ground that the record contained no evidence that defendants had disturbed the peace, a decision of little or no meaning in doctrinal terms. But to the young people in the movement it suggested that courts would protect them. The movement was encouraged.

In 1963 the Court decided another series of sit-in cases. These arose in Greenville,[29] Birmingham,[30] Durham[31] and New Orleans.[32] Greenville, Birmingham and Durham had city ordinances requiring racial segregation in public accommodations. The Court again declined to pass upon broad First and Fourteenth Amendment claims, but held

28. 368 U.S. 157 (1961) (companion cases).
29. Peterson v. City of Greenville, 373 U.S. 244 (1963).
30. Gober v. City of Birmingham, 373 U.S. 374 (1963).
31. Avent v. North Carolina, 373 U.S. 375 (1963).
32. Lombard v. Louisiana, 373 U.S. 267 (1963).

that the segregation complained of was not private discrimination, because segregation at lunch counters was required by ordinance in those cities. The convictions were therefore invalid under the Equal Protection Clause as enforcement of governmentally required discrimination.[33] New Orleans had no city ordinance requiring segregation, but the mayor and police chief had publicly declared that sit-in demonstrations would not be tolerated. The Court treated this as equivalent to an ordinance requiring segregation and reversed. Once more, a series of decisions on limited grounds made no great new constitutional doctrine but nevertheless protected the demonstrators.[34]

The following June the Supreme Court reversed eleven sit-in convictions on a wide variety of grounds. In *Griffin v. Maryland*[35] an amusement park employee who also was a deputy sheriff had ordered Negroes to leave the premises; after they refused they were arrested and convicted. The Court held that although the park was private property, an individual vested with state authority had participated in delivering the order to stay off the premises, which constituted sufficient state action to invalidate the convictions. In *Barr v. City of Columbia*[36] the Court found no evidence to sustain convictions for breach of the peace. Since the record showed that the demonstrators had been peaceful, conviction denied them due process of law. *Bouie v. City of Columbia*[37] held that a South Carolina trespass statute had been applied to demonstrators in violation of the Fourteenth Amendment, because under prior South Carolina decisions the law covered only initial entry on premises after notice to stay off, and not a refusal to leave after having come on with permission. The convictions were thus unconstitutional because they were based on a retroactive interpretation of the law which did not give fair warning of what conduct was prohibited. *Robinson v. Florida*,[38] decided the same day, held that Florida Board of Health regulations requiring segregated toilets in

33. In the Durham case the segregation ordinance was not in the record of the case and the state argued that it could not be considered as a ground for invalidating the conviction. The Court nevertheless vacated that judgment as well and sent it back to the Supreme Court of North Carolina for reconsideration in light of the Greenville and Birmingham decisions.

34. Shortly thereafter the Court, without oral argument, vacated judgments of conviction in five demonstration cases and asked Virginia to consider whether the Greenville case affected them. Randolph v. Virginia, 374 U.S. 97 (1963); Henry v. Virginia, 374 U.S. 98 (1963); Thompson v. Virginia, 374 U.S. 99 (1963); Wood v. Virginia, 374 U.S. 100 (1963); Daniels v. Virginia, 374 U.S. 500 (1963). No important legal principles were articulated. Indeed, the cases were disposed of by asking questions, not by giving answers.

35. 378 U.S. 130 (1964).

36. 378 U.S. 146 (1964).

37. 378 U.S. 347 (1964).

38. 378 U.S. 153 (1964).

restaurants were like the segregation ordinances in Greenville, Durham and Birmingham. Indirectly, they compelled segregation because they required integrated restaurants to have two sets of rest rooms. Appellants' trespass convictions were therefore held to reflect a state policy of encouraging segregated restaurants, and to be a violation of the Equal Protection Clause. Other cases from Virginia,[39] North Carolina,[40] South Carolina[41] and Maryland[42] were vacated for reconsideration in the light of the preceding decisions.

Throughout this period the vagueness doctrine, which weaves pervasively through free speech law, was employed by the Court as another limited ground of disposition in demonstration cases. The requirement that laws be precise enough so that local officials cannot distort them to suppress unpopular views found frequent application in cases involving common law breach of the peace and similar amorphous offenses. In *Edwards v. South Carolina*[43] the Court reversed a series of convictions for peaceful assembly and parading on the statehouse grounds; it held that the common law breach of the peace doctrine under which defendants had been convicted was so general and vague that it allowed unconstitutional infringement of their First Amendments rights.[44]

Bell v. Maryland,[45] decided on June 22, 1964, marked the beginning of the end for prosecutions of sit-in demonstrators. After the Maryland Court of Appeals had affirmed the conviction, but while the case was still pending on writ of certiorari before the Supreme Court, Maryland passed its own state civil rights, law, making it unlawful for restaurants to deny service to any person because of his race. Noting the new state

39. Green v. Virginia, 378 U.S. 550 (1964); Harris v. Virginia, 378 U.S. 552 (1964).
40. Williams v. North Carolina, 378 U.S. 548 (1964); Fox v. North Carolina, 378 U.S. 587 (1964).
41. Mitchell v. City of Charleston, 378 U.S. 551 (1964).
42. Drews v. Maryland, 378 U.S. 547 (1964).
43. 372 U.S. 229 (1963).
44. In October 1963 the Court reversed another South Carolina judgment, Fields v. South Carolina, 375 U.S. 44 (1963), involving a similar demonstration and vacated another involving like facts, Henry v. City of Rock Hill, 375 U.S. 6 (1963), for reconsideration. Both rulings were summary, based upon the briefs without argument, and both cited *Edwards*. When the Supreme Court of South Carolina reaffirmed *Henry*, the Court, again upon briefs and without argument, reversed and finally disposed of the case, holding that the law petitioners had violated was vague and that the state may not make criminal the peaceful expression of unpopular views. 376 U.S. 776 (1964). A conviction of Negroes for disturbing the peace by playing basketball in a white park—the game also could be regarded as a protest against segregation in the park—was reversed in Wright v. Georgia, 373 U.S. 284 (1963). The breach of the peace statute, it was held, did not give adequate notice that playing in the park was a crime. *See also* Cox v. Louisiana, 379 U.S. 536, 552, 558 (convictions for breach of the peace and obstructing public passages reversed).
45. 378 U.S. 226 (1964).

law, the Court pointed to the ancient common law doctrine of "abatement," which states that if the reason for punishment ceases while a case is still in the courts, punishment ought not to be inflicted. Since it thought that the Maryland courts might apply such a rule to the *Bell* case, the Court sent the case back for reconsideration. The Court was also aware that Congress was less than two weeks from passing a national public accommodations act, Title II of the Civil Rights Act of 1964. It did not take much imagination to predict that the federal law might similarly affect convictions all over the country.

Indeed the principal argument of defendants in *Hamm v. City of Rock Hill* and *Lupper v. Arkansas*,[46] cases decided in December of the same year, was that the 1964 Civil Rights Act abated sit-in convictions based on acts which could not have been prosecuted if performed after the passage of the statute. The Supreme Court agreed and held the convictions abated. The law the sit-inners had helped to create protected them. Today occasional pre-1964 sit-in cases continue to be decided in the lower courts, usually being disposed of on the basis of abatement.[47]

Thus in contrast to the pattern of decision in the school desegregation cases, the sit-in decisions were characterized by wholesale granting of certiorari and by studious avoidance of the broad constitutional issues underlying the details of particular cases.[48] The ad hoc character of the decisions, however, did not interfere with consistent results. In case after case a majority of the Court consistently upheld the protesters. The petitioners whose convictions were overturned were, to be

46. 379 U.S. 306 (1964) (companion cases).

47. All demonstration cases, of course, were not sit-ins; the civil rights protest movement has had an almost infinite variety. Freedom rides—sitting in parts of buses reserved for members of another race or occupying racially proscribed parts of terminals—gave rise to another well-publicized category of cases also disposed of on limited grounds. The Alabama freedom ride prosecutions were concluded by a brief Supreme Court order in early 1965 citing the *Boynton* case. Abernathy v. Alabama, 380 U.S. 447 (1965). The Mississippi prosecutions ended in a terse order shortly thereafter citing the *Boynton* case and the Alabama cases. Thomas v. Mississippi, 380 U.S. 529 (1965). The Interstate Commerce Act controlled both decisions. Constitutional issues of freedom of speech, equal protection of the laws and the scope of the Commerce Clause were not discussed. In another bus terminal case the Supreme Court reversed an assault conviction of the Rev. Fred Shuttlesworth, holding that Alabama had denied him due process of law by affirming his conviction on grounds other than those for which he had been prosecuted. Shuttlesworth v. City of Birmingham, 376 U.S. 339 (1964). The Court rejected Alabama's argument that Shuttlesworth had not properly appealed through the Alabama courts because he had used the wrong size paper.

48. Only concurring and dissenting opinions discussed such issues as whether the Equal Protection Clause forbids states to punish persons who violate a private property owner's rules limiting the use of his property on the basis of race, or whether the First Amendment issues involved in the right to speak on another's property all relate to the right to be there in the first place.

sure, often model defendants. Their demonstrations had invariably been nonviolent; they pointed up extreme injustice by emphasizing, for example, the unfairness of segregated lunch counters in stores which did not object in the least to selling merchandise to anyone who could pay; the demonstrators usually had no way of securing desegregation through the courts, and even where that was in theory possible, litigation would have been lengthy and expensive. Congress and state legislatures were, at the outset of the demonstration movement, unresponsive, and state officials were frequently unnecessarily ruthless in policing and prosecuting the demonstrators. When these factors combined, many of the rules of law that protect defendants in criminal cases, secure equality to victims of racial discrimination, and protect speech seemed to operate at maximum potential.

Nevertheless, considerations militating against approval of many of the protests were never far beneath the surface. The possibility of violence lurked in many situations. Various Justices in dissents expressed disquiet about the physical encounters that even peaceful protestors might provoke by their demonstrations.[49] In addition, the concept of private property—which in the sit-in cases, of course, begged the question of whether there is a property right under the Fourteenth Amendment to exclude Negroes from privately owned public places—exerts a powerful emotional influence. And the two considerations—fear of violence and attachment to property rights—reinforce one another because some individuals are quick to employ violence to protect their property. Finally, there was the uneasy feeling that the protestors' exhortation to disobey unjust, or even unconstitutional, laws would encourage disobedience of law in general.[50]

Thus when, as the demonstrations filled out their first half decade, nonviolent civil rights demonstrations were joined by more violent forms of protest and by protests ranging far beyond civil rights, it was not surprising that a reaction set in. Nor was it surprising that the outbreak of urban rioting—unconnected to the civil rights movement except that both were fueled by the same injustices—should be uncritically lumped with the other forms of civil dissonance.

As early as 1964 the Supreme Court allowed some of the more dis-

49. Nor was the majority of the Court altogether free of such concerns. Edwards v. South Carolina, 372 U.S. 229 (1963), although it could have, did not overrule Feiner v. New York, 340 U.S. 315 (1951), which had upheld conviction of a speaker for "disorderly conduct" because he was threatened with attack for what he said. Though *Feiner* was seriously disabled by the manner in which it was distinguished, it was left alive, perhaps to survive and exert influence another day.

50. *See* Marshall, *The Protest Movement and the Law*, 51 VA. L. REV. 785 (1965).

sonant demonstration convictions to stand by denial of certiorari, dismissal of appeal or summary affirmance, even though their facts might have brought them under cases discussed earlier, in which convictions were reversed for procedural failings or vagueness. In *Ford v. Tennessee*[51] the defendants were reported to have run down the aisle of a segregated church and seated themselves despite a request to stay in the rear; in *Jones v. Georgia*[52] the defendant was reported to have acted raucously in and about a church; in *Diamond v. Louisiana*[53] the defendant was said to have led a demonstration through the halls of a school. In all these cases the Court allowed the convictions to stand.[54]

Between 1964 and 1967 the public protest cases coming to the Court less frequently involved protest against racial discrimination and more often involved disorder. And the Court's refusals to review convictions proliferated.[55] When the Court did grant certiorari, its opinions increasingly manifested the concern that earlier dissents had displayed,

51. 377 U.S. 994 (1964).
52. 379 U.S. 935 (1964).
53. 376 U.S. 201 (1964) (cert. dismissed as improvidently granted).
54. During argument of *Diamond* Justice Black pointed out by a question that defendant was arguing for reversal on the ground that he was being prosecuted unfairly, not that his conduct had been lawful. The Court, following argument, dismissed the writ as having been improvidently granted, neither reversing nor affirming, perhaps indicating that it did not want even implicitly to place its stamp of approval on the defendant's conduct, although it also did not want to condone the state's method of proceeding.
55. *See* Burbridge v. California, 386 U.S. 1030 (1967) (denying cert.) (unlawful assembly and disturbing the peace; sit-in at bank to protest employment discrimination); Callender v. New York, 386 U.S. 779 (1967), *denying cert. to and dismissing appeal from* 18 N.Y.2d 621, 219 N.E.2d 287, 272 N.Y.S.2d 772 (1966) (disorderly conduct; defendant was attempting to arrest the Mayor of the City of New York); Turner v. New York, 386 U.S. 773 (1967) (dismissing cert. as improvidently granted) (defendant arrested for disturbing peace by participating in anti-war demonstration in Duffy Square, New York City); Savio v. California, 388 U.S. 460 (1967) (appeal dismissed and cert. denied) (Berkeley demonstration cases; trespass and resisting arrest); Gray v. California, 382 U.S. 989 (1966) (cert. denied) (defendants convicted for picketing bakery counter inside supermarket to protest alleged racial discrimination); Penn v. New York, 383 U.S. 969 (1966), *denying cert. to* 16 N.Y.2d 581, 208 N.E.2d 789, 260 N.Y.S.2d 847, *aff'g mem.* 48 Misc. 2d 634, 265 N.Y.S.2d 155 (1964) (disorderly conduct conviction for blocking construction vehicles in protest against alleged discrimination in construction industry); Smith v. New Jersey, 385 U.S. 838 (1966), *denying cert. to* 46 N.J. 510, 218 A.2d 147 (disorderly conduct conviction for demonstration at city council meeting); Baer v. New York, 384 U.S. 154 (1966) (appeal dismissed) (disorderly conduct conviction for refusing to leave police station when asked to in anticipation of racial violence); Martin v. New York, 382 U.S. 828 (1965) (cert. denied) (defendants refused to leave board room after conclusion of municipal school board meeting).

The Court did not turn thumbs down on all demonstration petitioners during this latter period, but the exceptions were few. Klopfer v. North Carolina, 386 U.S. 213 (1967), involved an anachronism, a classic lunch counter sit-in situation in which the Court reversed a ruling that after a *nolle* the prosecutor can reinstitute suit. The issue, which was atypical, involved the constitutional guarantee of speedy trial; in Mason v. Biloxi, 386 U.S. 370 (1966), *rev'g* 184 So. 2d 113 (1966), the Court reversed a conviction for trespass on a beach that had been constructed with federal funds.

implicitly and explicitly, towards the rising level of dissonance in the country.

In 1965, in *Wells v. Reynolds*,[56] the Court affirmed without opinion a district court's refusal to enjoin prosecution of civil rights workers under companion statutes, one of which had previously been held unconstitutional in *Herndon v. Lowry*.[57] The trial court had held that constitutional defenses could and should be raised in state court criminal proceedings, although paradoxically it exercised jurisdiction by ordering a reduction in bond. One would have thought that the jurisdictional question—independent of the merits—was disposed of by *Dombrowski v. Pfister*,[58] which had held six months earlier that federal courts had jurisdiction over not dissimilar claims in an action for injunction. Perhaps the difference was that *Dombrowski* involved restraining a prosecution under the Louisiana Subversive Activities and Communist Control Law—there was no question of overt conduct in the streets. In *Wells*, however, the trial court opinion recited that the march, out of which the prosecution grew, "was attended by considerable commotion, and before reaching the announced destination bottles, stones and bricks were being hurled, plate glass windows in business establishments were being knocked out, citizens were being threatened and the peace and security of the entire area through which the procession was passing was being disrupted."[59] The opinion conceded that "[t]here is no evidence that the Plaintiffs Wells and Harris committed any of these acts of violence but it is clear that the acts were being committed by those marching with them or by sympathizers accompanying the marchers."[60] In any event there was no Supreme Court opinion, although Justice Brennan, who had written the *Dombrowski* opinion, and Justices Douglas and Fortas dissented.

Conspicuous among refusals to hear was the five-to-four dismissal of certiorari as improvidently granted in *NAACP v. Overstreet*[61] the following year. The case posed the issue whether Georgia courts could make the national organization liable for acts committed by a local branch. The dissenters observed: "Although the record does not contain any evidence of misconduct on the part of the Branch's members or officers, the picketing apparently attracted substantial crowds.

56. 382 U.S. 39, *aff'g* Wells v. Hand, 238 F. Supp. 779 (M.D. Ga. 1965).
57. 301 U.S. 242 (1937).
58. 380 U.S. 479 (1965).
59. Wells v. Hand, 238 F. Supp. 779, 782 (M.D. Ga. 1965).
60. *Id.*
61. 384 U.S. 118 (1966).

There were incidents involving the intimidation of customers, blocking of sidewalks, and scattered incidents of violence."[62]

In 1967 the Court, in *McLaurin v. Greenville*,[63] made a similar silent disposition, denying certiorari[64] in the case of a group of civil rights workers who made speeches on the Greenville courthouse steps and were prosecuted under a state statute identical to the one the Court had previously struck down in *Cox v. Louisiana*[65] as unconstitutionally vague on its face. The Mississippi Supreme Court's decision observed that "there was a clear and present danger of a riot or disturbance of court then in session . . ."[66] and held the case to be controlled by *Feiner v. New York*.[67] It is difficult to put aside the feeling that if the case had come up three or four years earlier with *Edwards v. South Carolina*, *Fields v. South Carolina* or *Henry v. City of Rock Hill*,[68] it would have been difficult to distinguish among them and the judgment would have been reversed. And during the October 1966 Term, a majority for the first time by affirmance of convictions turned its face against civil rights demonstrators in two important cases, *Adderley v. Florida*[69] and *Walker v. City of Birmingham*.[70]

The earlier dissenting view which achieved majority status in *Adderley* and *Walker* was fostered by Justice Black. In *Bell v. Maryland*, in an opinion joined by Justices Harlan and White, he closed with a dramatic statement of the dangers he saw inherent in group demonstrations. Experience shows, he thought, that property owners are frequently stirred to violence when their property is forcibly invaded or occupied by others. Nor can reasoned debate and the settlement of acrimonious disputes be carried on in an atmosphere of violence. As a result mass demonstrations are actually counterproductive, leading to outright conflict and rule by the strongest, rather than to persuasion and amelioration of the protestors' plight.[71]

Similarly in *Cox v. Louisiana*, a street demonstration case, Justice Black referred in dissent to "2,000 or more people who stood right across the street from the courthouse and jail,"[72] and to the "intimida-

62. *Id.* at 119. The majority's dismissal, of course, was not an affirmance.
63. 385 U.S. 1011 (1967).
64. The Chief Justice and Justices Douglas and Brennan dissented from the denial.
65. 379 U.S. 536 (1965).
66. 187 So. 2d 854, 859 (1966).
67. 340 U.S. 315 (1951).
68. *See* p. 1531 *supra*.
69. 385 U.S. 39 (1966).
70. 388 U.S. 307 (1967).
71. 378 U.S. at 346.
72. 379 U.S. at 582.

tion and dangers that inhere in huge gatherings at courthouse doors and jail doors."[73] He concluded:

> 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. And the crowds that press in the streets for noble goals today can be supplanted tomorrow by street mobs pressuring the courts for precisely opposite ends.[74]

The *Cox* dissent, in which Justice Black was joined by Justices Clark, White and Harlan, was the prelude to the formation of a new majority on street demonstrations.

Adderley, in which Justices Black, Clark, Harlan, Stewart and White constituted the majority, involved a charge of trespass arising out of a protest against the arrest of students who were imprisoned at the Tallahassee, Florida, jail. On its facts the case was much like *Edwards* (in which Justice Stewart had written the opinion with only Justice Clark dissenting) except that the demonstration took place on jail property, not statehouse grounds, and defendants were charged under a trespass statute, not with common law breach of the peace. These were the articulated differences. But the most significant distinction may very well be that *Adderley* was decided in November 1966 at a time when the dissonance of demonstrations of all sorts had reached a new high. Justice Black's *Adderley* majority opinion went to great lengths to emphasize the impromptu and disorganized nature of the protest, the size of the crowd, and the demonstrators' interference with passage to and from the jail. Analogizing the state's interest in protection of jail property to the power of a private owner of property to preserve it for any nondiscriminatory use to which it is lawfully dedicated, the opinion denied that the demonstrators had any constitutional right to enter or remain on jailhouse grounds for purposes of demonstration.[75]

During the same term of the Court, *Walker v. City of Birmingham*[76] (in which Justice Stewart wrote the opinion for the same majority as in *Adderley*) upheld the contempt conviction of the Reverend Martin

73. *Id.* at 583.
74. *Id.* at 584.
75. Justice Black's analogy to the power of a private owner of property, as Justice Douglas pointed out in dissent, ignored that fact that the rights of assembly and petition for redress of grievances do not run to private proprietors, but do restrain the state in its dealings with its citizens. 385 U.S. at 52. The inappropriate reference to private property was apparently an attempt to inject into the majority opinion one of the central themes of the sit-in dissents.
76. 388 U.S. 307 (1967).

Luther King, Jr., and others for having violated an injunction forbidding the celebrated Good Friday and Easter Sunday Birmingham marches that were crucial to the demonstrations which led to passage of the 1964 Civil Rights Act. Some of the tone and language of the *Walker* opinion is reminiscent of demonstration case dissents several years earlier. The Alabama court held that petitioners owed obedience to the injunction and should have moved to dissolve it before disobeying it, even though it may have been unconstitutional. The Supreme Court declined to pass on the validity of the injunction, holding that the only question before it was whether the court order had in fact been disobeyed. The entire sense of the opinion is to value order and orderly judicial procedure over speech, even if that speech is suppressed in violation of the First and Fourteenth Amendments:

> The rule of law that Alabama followed in this case reflects a belief that in the fair administration of justice no man can be judge in his own case, however exalted his station, however righteous his motives, and irrespective of his race, color, politics, or religion. This Court cannot hold that the petitioners were constitutionally free to ignore all the procedures of the law and carry their battle to the streets. One may sympathize with the petitioners' impatient commitment to their cause. But respect for judicial process is a small price to pay for the civilizing hand of law, which alone can give abiding meaning to constitutional freedom.[77]

Justice Brennan, in dissent, made no effort to conceal his belief that the majority's overriding concern with public order had warped its perception of the issues involved.

> We cannot permit fears of "riots" and "civil disobedience" generated by slogans like "Black Power" to divert our attention from what is here at stake—not violence or the right of the State to control its streets and sidewalks, but the insulation from attack of ex parte orders and legislation upon which they are based even when patently impermissible prior restraints on the exercise of the First Amendment rights . . . .[78]

But precisely such fears *were* diverting the Court's attention, and many of its decisions against demonstrators reflect the effects of its concern.

III. Conclusion

The early school decisions with their attention to principles and avoidance of specifics, principally served the purposes of educating the

77. *Id.* at 320-21.
78. *Id.* at 349.

country and making clear that defiance could not succeed, rather than of compelling action by particular parties. Ultimately, of course, *Brown* implied a power to compel change; it would have been useless as a national guide if that were not so. But no move was made by the Court toward implementation of the kind found repeatedly in the reapportionment cases, to mention only one example.[79]

Several reasons may be suggested for the Court's reluctance to grapple with detail in the school cases. The Court was, in the early cases, chiefly setting standards for the lower courts, where the great bulk of litigation went on. Apart from the uninviting prospect of repeated involvement in the intricacies of school desegregation, it may be that the Court spoke in generalities and avoided details because its determinations could be of only limited utility in the overall desegregation process. The principal reason for the slow pace of school desegregation before 1964 was not, after all, inattention to detail or the "deliberate speed" formula. Rather, it was the failure of most deep southern districts to do anything at all. The typical district would start desegregation only if sued. Since the 1964 Civil Rights Act had not yet been passed, there was no authority in the federal government to bring suit and no administrative mechanism to compel change; and the resources to bring private suit were limited. The NAACP Legal Defense and Educational Fund, which has brought virtually all of the nongovernmental southern school desegregation cases, has been able to handle about 300 cases since 1954, but there are approximately 3,000 districts which might have been sued. All these factors in combination meant that prior to 1964 not only would implementation by Court decision have had to proceed on a strictly case-by-case basis, but only a small fraction of the South's segregated school districts could have been affected. As a practical matter, therefore, the Court chose to exert its influence through strong moral leadership.

With the passage of the 1964 Civil Rights Act and the vesting of authority to implement *Brown* in HEW and the Justice Department,

79. As Director-Counsel of the NAACP Legal Defense and Educational Fund and a partisan in the school desegregation struggle, I feel that the detachment which typified 1955-1965, and which persists to a degree that is not yet clear, was unfortunate. The principles involved in desegregation and the vigor with which they are advanced inhere in details, *e.g.*, whether a plan should take twelve years, or less; whether plaintiffs should be afforded desegregated education even though they are not within grades covered by a plan their lawsuit wins; whether a school district is gerrymandered; and so forth. The Court cannot pass on all details of all plans, but it might recognize that in the sum of details reside the larger principles it espouses. Those whose task it is to fight segregation hope that Rogers v. Paul, 382 U.S. 198 (1965), and the recent "freedom of choice" decisions, *see* note 24 *supra*, show a new disposition to take such grounds.

however, the practical significance of a Supreme Court school desegregation decision changed considerably.[80] Uniformity became possible for the first time. Since it was now far less likely that a district would be compelled to comply while its neighbors remained in violation, one incentive to delay desegregation in hopes of escaping altogether was removed. Most important, HEW enforces guidelines embodying a distillation of judicial opinion.[81] To the extent that the Court upgrades specific standards, they are then capable of widespread enforcement by an agency with potentially large staff and appropriations, although the funding and vigor of the HEW enforcement staff are subject to political considerations.[82] In addition the Department of Justice, aided by the investigative power of the Federal Bureau of Investigation, has begun to take a more active part in school desegregation.[83] The role of private suits in the school area is changing back to what it was before *Brown,* to innovating and pushing forward in situations where government for one reason or another does not.[84]

Another consideration which may have inclined the Court to avoid involvement in a multitude of school desegregation cases was that until the Civil Rights Act was passed the country had not yet shown that it endorsed the position taken by the Supreme Court in the first school cases. President Eisenhower, for one, explicitly refused to approve of them. While all civil liberties decisions are by definition to some degree unpopular—there would be little need for judicial relief if political remedies were readily available—the *Brown* decision, especially in some parts of the country, was more unpopular than most. It

80. *See generally* U.S. COMMISSION ON CIVIL RIGHTS, REPORT ON SOUTHERN SCHOOL DESEGREGATION 1966-67 (1967). Justice Jackson recognized the utility of administrative enforcement and some of the limitations of private suit during the argument of the early school cases when he said from the bench: "It means that private litigation will result in every school district in order to get effective enforcement, and that is why, I suppose, this separate but equal doctrine has never really been enforced, because many disadvantaged people cannot afford these lawsuits. But the judicial remedy means just that, does it not, lawsuit after lawsuit? . . . [T]hat is why in some cases it has been necessary to set up something like the SEC to enforce individual rights in security transactions, and the Interstate Commerce Commission." Transcript of Argument, the School Segregation Cases, Dec. 8, 1953, at 169.

81. *See* Comment, *The Courts, HEW and Southern School Desegregation,* 77 YALE L.J. 321 & *passim* (1967). *See also* 2 T. EMERSON, D. HABER & N. DORSEN, POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES 1300-32 (student ed. 1967).

82. N.Y. Times, Oct. 23, 1966, § 4, at 9, col. 3 (letter to the editor by Jack Greenberg).

83. "Since passage of the Act, participation by the Civil Rights Division of the Department of Justice in school segregation litigation has reached major proportions." U.S. COMMISSION ON CIVIL RIGHTS, REPORT ON SOUTHERN SCHOOL DESEGREGATION 1966-67 (1967). *See also* Comment, *supra* note 81.

84. For example, the three cases decided in May of this year, *see* note 24 *supra,* as well as those handed down in the 1965 term, *see* p. 1527 *supra,* were brought by the Legal Defense Fund.

affected a large part of the nation, invited opposition by powerful southern politicians, and brought down a storm of invective on the Court. Negroes at the time of *Brown* were substantially disenfranchised in the region it affected most. And the Court came close to suffering, through Congressional legislation, heavy damage to its jurisdiction.[85] After its courageous and difficult initial steps it would be surprising if the Court had undercut its effectiveness by openly acknowledging a hesitancy to plunge deeper into such heavy weather. On the other hand it would be surprising if, in addition to other factors that affect decision-making, consequences for the Court as an institution did not play some part. The Court's limiting of its role in the early school desegregation cases to enunciation of fundamental principles may well have reflected its estimation of the most effective and prudent course open to it. Once passage of the Civil Rights Act of 1964 signalled that the rest of the country had at last caught up, however, the Court could feel free to involve itself more intimately in necessary implementation.

In contrast to its approach in the school suits, in the protest demonstration area the Court did not shy away from repeatedly weighing the particulars of complex fact situations. It did this, moreover, in a style unlike that of the school suits by normally avoiding expansive constitutional pronouncements. This had, to begin with, the effect of leaving the Court's options open for later cases, in which it refused to review the claims of petitioners in other kinds of demonstrations. It was one thing to refuse to hear narrow evidentiary arguments or claims concerning procedure or vagueness; it would have been quite another to refuse for any length of time to hear cases involving recently delimited First or Fourteenth Amendment rights.

In part, cases may have gone off so narrowly because general propositions governing the right to demonstrate cannot be stated as simply as general propositions governing the right to desegregated education. Whether there is a Fourteenth Amendment right to sit in a privately owned public restaurant, or a Commerce Clause immunity from arrest for trespass at a bus terminal lunch counter, is a far more complex and difficult question than those raised by the post-*Brown* school cases. Avoidance has been a natural response.

But if that is the case, why did the Court grant review at all? Ordinarily the Court does not review minor criminal cases involving limited issues. Indeed, most defendants convicted of trespass, breach of the

85. *See generally* CONGRESSIONAL QUARTERLY SERVICE, CONGRESS AND THE NATION, 1945-1964, at 1442 (1965).

peace and similar crimes simply pay their small fines or serve their brief sentences and let the matter drop. Certainly the Court, having once decided the narrow issues to which it confined itself, would not have ruled on them repeatedly if something more were not involved, if the cases had not been "important" in the sense that merits granting of review. The fact that the cases came up in such volume at all was of course in one sense an index of importance. But precisely what is required to move the Court to grant certiorari is a difficult question, the answer to which varies from case to case.

> The existence of admittedly "serious legal questions" may not be sufficient. . . . Importance is a relative factor, dependent upon the type of issue involved, the way in which it was decided below, the status of the law on the matter, the correctness of the decision below, and the nature and number of persons who may be affected by the case. . . . The concept of importance relates to the importance of the issues "to the public as distinguished from" importance to the particular "parties" involved.[86]

It is in this realm of significance to the public of the issues raised that the true importance of the sit-in cases lay. Apart from their consequences for particular defendants and for the civil rights movement, the reversals meant something for the education of the country. The Court has long recognized the "chilling" effect of pending criminal prosecutions on speech.[87] One might analogously describe the Court's repeated reversals of protest demonstration convictions as having a "thawing" effect.

The cumulative effect of the sit-in reversals no doubt was to encourage the demonstrators to continue their activities, even though the articulated bases of decision were closely limited. While it may have been coincidence that the Court agreed to review *Boynton*[88] shortly after the sit-ins began, the thawing effect of *Garner*[89] could not have been explained away so easily. The unbroken string of reversals of subsequent years—because they were reversals and not because of what the opinions said or did not say on large constitutional questions—had similar consequences. Demonstrators were less likely to be intimidated by fear of conviction. Those who otherwise might have remained in jail were free to protest elsewhere. The consistent reversals gave an implicit stamp of approval to the cause espoused by the demon-

86. R. STERN & E. GRESSMAN, SUPREME COURT PRACTICE 136-37 (3d ed. 1962).
87. Dombrowski v. Pfister, 380 U.S. 479, 487 (1965).
88. *See* p. 1528 *supra.*
89. *See* p. 1529 *supra.*

strators and allowed them to work toward realization of ideals embraced by the Court itself in *Brown*.[90]

Less certain is the relationship between the Court's recent pattern of disposition of protest cases and the increased dissonance of public protest generally. But the coincidence suggests that the affirmance of convictions and general indisposition to grant review in demonstration cases may be an effort to retard or undo supposed effects of the earlier thaw and to allow the states to reimpose a freeze. Refusals to review, as in *Diamond, Jones, Ford* and *Overstreet*, or affirmance, as in *Wells, Adderley* and *Walker*, have had the effect of leaving civil rights prosecutions in the hands of state authorities. Consistent refusal to review the non-civil rights protests has had the same effect.

If recent Court decisions in the civil rights area have been in part a reaction to the rising tide of civil dissonance on other fronts, the question remains whether such a reaction is either logical or likely to produce the desired results. No one, of course, can be sure of the causal relationships among the various forms of protest. Whether the nonviolent civil rights demonstrations that were legal or intended to be tests of legality led to those which went clearly beyond legal bounds is a question which must be left to the social psychologists. The relationships between civil rights protests and public demonstrations on other issues, such as student-university relationships or the war in Viet Nam, is again something about which we cannot be sure. But it is hard to believe that if there had been no Birmingham or Selma we would have avoided Berkeley and Columbia or the recent confrontation at the Pentagon.

Even if we assume that legal protest contributed to wider dissonance and civil disobedience, will curtailing the scope of legal protest turn the clock back? Is this a two-way or a one-way street? More importantly, will judicial reluctance or refusal to upset convictions based on irregular modes of prosecution promote public tranquillity, or will it

90. This is not to say that the cases reversing demonstration convictions were wrongly decided for the sake of promoting social ends. As the Court held, there *was* a failure of evidence in *Garner;* in *Edwards* the common law doctrine of breach of the peace *was* vague; the Interstate Commerce Act *was* violated in *Abernathy*, Maryland *had* passed a statute that might have affected the judgments in *Bell*, and so forth. In addition, it should be pointed out that counsel for petitioners, besides arguing the free speech and equal protection issues, regularly presented their cases on the assumption that the Justices, or some of them, might be persuaded to rule for the petitioners if given an option which permitted reversal on narrow, non-Fourteenth Amendment grounds. But the suggestion by counsel of limited grounds for reversal was not always necessary. It is noteworthy that although petitioner did not argue the abatement ground for reversal in *Bell v. Maryland*, the Court adopted it anyway. The briefs of counsel are summarized in 12 L. Ed. 2d 1335-36.

instead weaken respect for law and law enforcement? Whatever the answers to these questions, there would seem to be no evidence now that but for the recent reining in, there would have been more disturbances and violence.

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