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**ABF Scholar is First to Examine
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Movement in New Book**

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Improving the understanding of law is critical to The American Bar Foundation’s (ABF) research mission. ABF Faculty Fellow, Christopher Schmidt, shows how law can illuminate our understanding of American history in his new book, *The Sit-Ins: Protest and Legal Change in the Civil Rights Era*, the first book to examine the iconic lunch counter civil rights ‘sit-in’ movement of 1960 from the unique perspective of a legal historian.

On February 1, 1960, four African-American college students — Ezell Blair Jr., Franklin McCain, Joseph McNeil and David Richmond — entered a Woolworth retail store in downtown Greensboro, North Carolina. They browsed for several minutes, purchased some items, and then sat down at the lunch counter.

“I’m sorry,” said the waitress. “We don’t serve colored in here.”

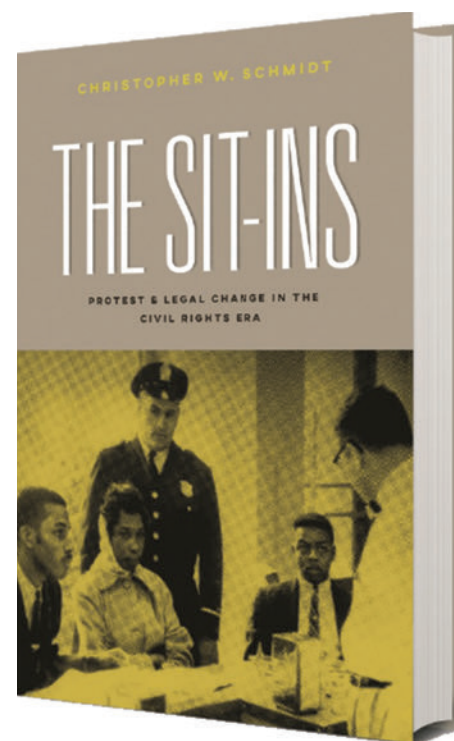
The men stayed on their stools and remained seated until the lunch counter closed several hours later.

The single, bold action of these four young men sparked a wave of “sit-in” protests at “whites-only” lunch counters across the Jim Crow South in the spring and winter of 1960. These sit-ins, led by African-American college students, became a national

movement that inspired thousands of Americans across the country to march, picket, and boycott against the indignities of racial inequities in the South. They also ignited a national debate over the Constitution’s requirement that states provide equal protection of the laws at a critical moment during the civil rights era.

“These students are not struggling for themselves alone,” Martin Luther King Jr. wrote. “They are seeking to save the soul of America...One day historians will record this student movement as one of the most significant epics of our heritage.”

American Bar Foundation (ABF) Faculty Fellow Christopher Schmidt’s *The Sit-Ins: Protest and Legal Change in the Civil Rights Era* is the first book-length study



to examine this iconic moment in civil rights history.

Told from Schmidt’s unique perspective as a legal historian, *The Sit-Ins* highlights the legal dilemmas that were central to the 1960 sit-in movement but have been traditionally missed by historical accounts and offers new insights into the relationship between social change and the law. Schmidt, a professor of law and associate dean for faculty development at Chicago-Kent College of Law, revises our understanding of why the sit-in movement happened and how it influenced American society and constitutional law. “One of my goals in this book is to showcase the way attention to law — including some rather thorny questions of constitutional doctrine — can illuminate our understanding of American history,” Schmidt explains.

The book centers on the basic constitutional question raised by the sit-in protests: whether racial discrimination in public accommodations (private businesses that serve the general public) violated the Fourteenth Amendment’s requirement of equal protection of the laws. Schmidt examines how this claim fared



African-Americans picket in front of the F.W. Woolworth store in Atlantic City, N.J. on March 19, 1960, protesting against the chain’s policy of segregating its lunch counters in the south. (AP Photo)

in various social contexts and institutional settings by devoting each of the book’s six chapters to a different group that played a role in the history of the sit-ins: students, civil rights lawyers, outside supporters, opponents, judges, and lawmakers. From these different perspectives, he traces the legal history of the sit-in movement, from the first protests in Greensboro to the movement’s ultimate victory with the passage of the landmark Civil Rights Act of 1964, which outlawed racial discrimination in public accommodations. Overall, *The Sit-*

Ins provides a powerful case study of constitutional development in modern America.

Civil Rights Lawyers and the Challenge of the Sit-Ins

One of Schmidt’s central arguments in *The Sit-Ins* is that what made the sit-in movement distinct from other major protest campaigns of the civil rights era — such as the fight for equal voting rights or an end to school segregation — was the unique and contested legal questions it raised. The sit-ins posed particularly difficult challenges for the lawyers

who were working in the national office of the National Association for the Advancement of Colored People (NAACP) and the NAACP Legal Defense Fund (LDF). The second chapter of *The Sit-Ins* centers on these lawyers and the role they played in the legal history of the sit-in movement. This chapter features now legendary civil rights lawyers like Thurgood Marshall (Chief Counsel of the LDF at the time of the sit-in movement and later the first African-American appointed to the Supreme Court), Robert L. Carter (General Counsel of the NAACP and later a federal judge), and Jack Greenberg (who succeeded Marshall as LDF Chief Counsel in 1961).

Schmidt begins the second chapter by outlining the legal and political landscape these lawyers faced at



African-American activists picket outside Rich's department store on Oct. 19, 1960, protesting against segregated eating facilities at one of its lunch counters in Atlanta, Ga. The activists who had taken seats inside the store were arrested. (AP Photo)

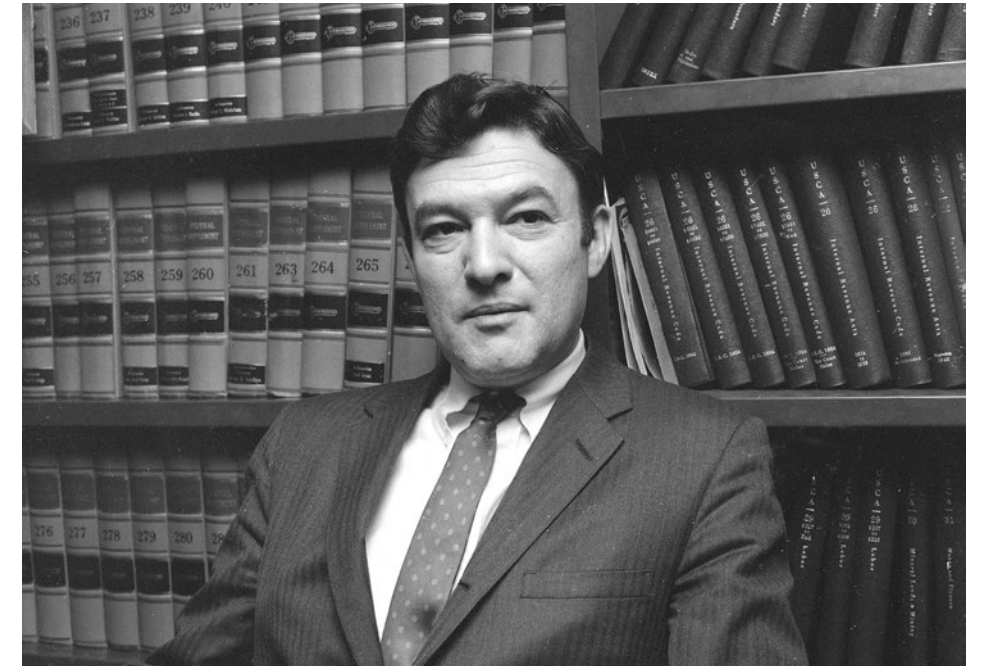
the time of the sit-in movement. At the beginning of 1960, the NAACP lawyers were focused primarily on the issue of school

desegregation. The landmark 1954 Supreme Court ruling in *Brown v. Board of Education*, striking down state-mandated segregation in public schools, was a triumphant moment for the NAACP, the product of decades of careful litigation strategy. In the years following, their work focused primarily on implementing the school desegregation ruling. By early 1960, optimism generated by the victory in *Brown* was wearing thin, however, as the lawyers faced off with a massive resistance campaign by white segregationists. Southern politicians stalled school integration efforts with a mix of open defiance and litigation and attacked NAACP lawyers by prosecuting them for violating state legal ethics laws. At the time of the sit-in protests, their inability to translate the *Brown* victory into racial change in the South

had left the lawyers frustrated and dispirited.

As the sit-ins started to gain momentum in the spring of 1960, many of the NAACP lawyers were initially skeptical of the protests. They first had to come to terms with the spontaneous, disorganized nature of a social protest movement that attempted to distance itself from the carefully choreographed civil rights litigation strategy that they had pioneered in previous decades. Marshall and some of his colleagues felt that the new wave of protests threatened their work. They worried the sit-ins gave ammunition to their critics within the civil rights movement who believed the NAACP had lost its place at the forefront of the struggle for racial justice. Schmidt explains that “both the lawyers and students wanted desegregation, and both felt that what was happening at these lunch counters was morally apprehensible, but they had different views about, one, whether this was a priority that they should put at the top of their list, and two, about the methods of how they should achieve it.”

The lawyers also struggled to locate legal arguments that would protect the students from prosecution for taking part in the sit-in protests. “The basic question” the sit-ins raised, Schmidt writes, “was whether a private business that purported to serve the general public was engaged in a public service of such an essential nature that the



Jack Greenberg, National Association for the Advancement of Colored People (NAACP) director-counsel of the Legal Defense and Educational Fund, is pictured at a news conference in New York on Oct. 31, 1969. (AP Photo/Allen Green)

Constitution did not permit it to practice racial restrictions in its service policy.” The NAACP lawyers had to navigate the obstacle of the Fourteenth Amendment’s “state action” requirement, which limited application of the amendment to the actions of government officials, placing private actors beyond its reach.

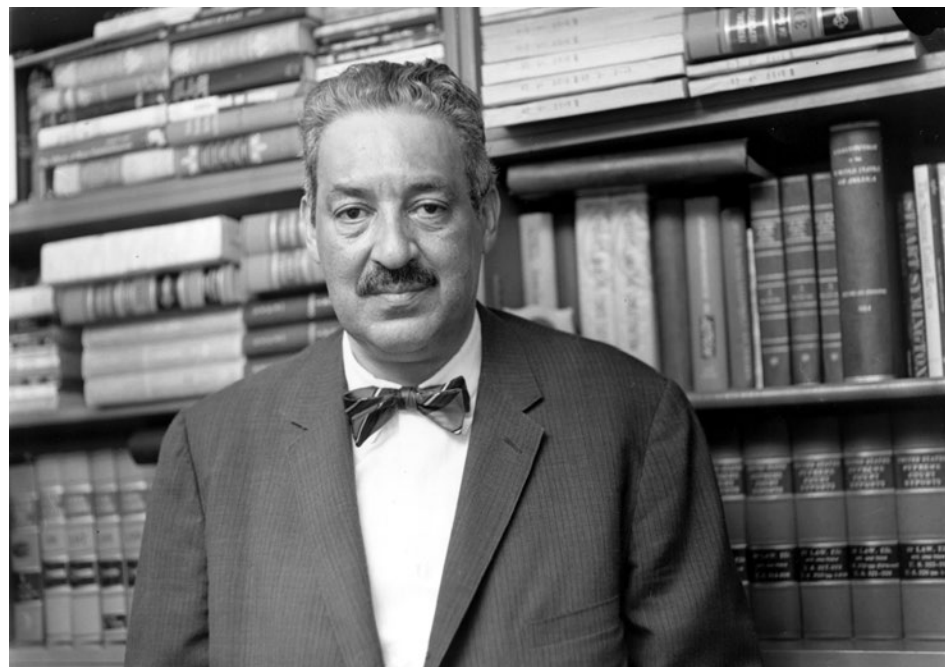
A Tense But Functional Relationship

After a period of initial uncertainty, the lawyers were able to craft a constitutional claim designed to back up the student protests. They argued that even though lunch counter operators were private actors, the equal protection clause still prohibited them from operating in a racially discriminatory manner, either because of the public nature of

their businesses or because of the state’s role in enforcing this “private” discriminatory choice.

NAACP lawyers advanced an ambitious legal argument on behalf of the sit-in protests: that the students had a valid claim to nondiscriminatory treatment in privately-operated, public accommodations and that this claim, beyond being morally just, was grounded in the Constitution’s equal protection clause. In public statements and courtroom arguments on behalf of protesters who had been arrested, the lawyers argued that lunch counter discrimination, or at the very least, state enforcement of such discrimination, was forbidden by the Constitution.

In support of their argument, the lawyers relied on two Supreme Court precedents: *Marsh v.*



Thurgood Marshall, former counsel for the National Association for the Advancement of Colored People (NAACP) Legal Defense and Education Fund, is seen in his residence in New York on Sept. 11, 1962 after the Senate confirmation of his year-old nomination to the 2nd U.S. Circuit Court of America. Since Oct. 23, 1961, Marshall had been serving under a recess appointment. (AP Photo)



African-Americans participate in a sit-in demonstration at the “white only” section of a Woolworth retail store in Atlanta for the second day in a row on Oct. 20, 1960. As soon as the demonstration began, the counter was closed. W.O. McClain, manager of the Woolworth store, can be seen talking to a spectator in the back (second from right). (AP Photo/Horace Cort)



African-American students, including John Hardy (left) and Curtis Murphy, participate in a sit-in demonstration at the lunch counter of a Walgreen's drugstore on Fifth Ave. and Arcade in downtown Nashville on Feb. 20, 1960. As they attempted to get served, a closed sign went up immediately. (The Tennessean/Jimmy Ellis)

Alabama (1946) and *Shelley v. Kraemer* (1948). In *Marsh*, the Court held that the more a private property owner opens his land to the general public, the more he must recognize the rights of those who use that property. Based on this precedent, the lawyers argued that the initial invitation into a department or retail store (like the Woolworth store in Greensboro) converted the private business into a public space and equal protection of the laws applied. In *Shelley*, the court ruled unconstitutional judicial enforcement of racially restrictive covenants. Drawing on this precedent, the civil rights lawyers argued that when a lunch counter operator calls the police to arrest and prosecute protesters, this had the effect of transforming a manager's private choice to discriminate into an unconstitutional “state action.” Both the *Marsh*- and *Shelley*-based arguments used to defend the sit-ins demonstrated how interpretation of the meaning of Fourteenth Amendment state action doctrine had expanded in previous decades, even as most lawyers, judges and scholars understood the importance of upholding the distinction between the public and private sphere of American society under the Constitution.

“It’s a difficult question about whether, in fact, what the students were doing was protected by the Fourteenth Amendment. There are so many instances in the civil rights movement in which you

have clear constitutional violations because of segregation, and it’s just a question about when the federal government is going to enforce clear law against people who are defying clear law,” Schmidt explains. “The sit-ins were a different story. The law was unclear, and it remained unclear.”

The civil rights lawyers and the student activists soon settled into a tense but functional relationship. “They’re not quite working in close alliance,” Schmidt explains. “The students didn’t have a lot of faith in litigation, and the lawyers didn’t believe continuous protests were necessarily the answer. But they found a way to live with and benefit from each other.” While divisions between the lawyers and protesters remained — specifically concerning the choice

of some protesters to refuse bail and remain in jail to amplify the message of their protests, and the lawyers’ belief that litigation was the best way to achieve lasting social change — the lawyers and the protesters formed a mutually beneficial alliance. From proclaiming their public support of the protesters to providing financial and legal assistance to those arrested, the lawyers created an important role for themselves in supporting the students’ cause.

The First Legal History of Its Kind

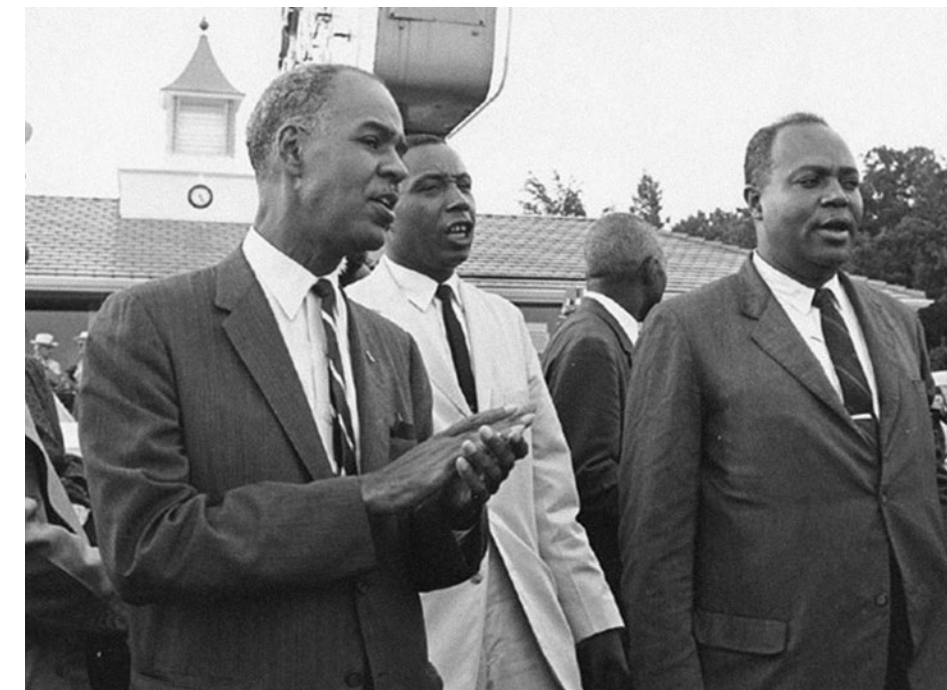
The Sit-Ins took almost ten years for Schmidt to write. As a student at Harvard Law School, he was intrigued by cases he came across in his Constitutional Law course involving appeals of students who had been involved in lunch counter

sit-in protests and decided to write his third-year seminar paper on the topic. As Schmidt began his research, he was surprised to learn that no one had written a book on the sit-ins. His seminar paper turned into a series of prize-winning academic articles, which eventually became the basis for his book. In researching the book, Schmidt relied on contemporaneous sources, including newspaper accounts, periodicals, speeches, interviews, and archival material.

Schmidt received his J.D. from Harvard Law School, his Ph.D. and M.A. from Harvard University, and his B.A. from Dartmouth College. He teaches in the areas of constitutional law, legal history, comparative constitutional law, and sports law. Much of his research has focused on how constitutional claims emerge and develop outside the courts and the effect of these extrajudicial claims on legal doctrine.

Schmidt has recently published opinion pieces in *The Washington Post* and *USA Today*, focusing on what made the sit-ins so effective and the parallels between the student protesters of 1960 and today’s student-led gun-control movement.

For more information about *The Sit-Ins: Protest and Legal Change in the Civil Rights Era*, published by the University of Chicago Press, visit the book’s website: <https://thesitins.com>.



Roy Wilkins (left), executive director of the NAACP, is pictured with Floyd McKissick, a Durham attorney, and James Farmer (right), national director of the Congress of Racial Equality, protesting segregation at Durham’s Howard Johnson’s Restaurant on August 12, 1962. (The Herald-Sun/Harold Moore)

The American Bar Foundation (ABF) is pleased to reprint chapter two of *The Sit-Ins: Protest and Legal Change in the Civil Rights Era: ‘The Lawyers.’*

This situation has made all of us reassess ourselves.

— THURGOOD MARSHALL, MARCH 1960¹

“There is a collision of two philosophies in the current efforts to end segregation in the South,” warned Clarence Mitchell, director of the NAACP’s Washington bureau. It was mid-April 1960 and Mitchell was explaining to NAACP executive secretary Roy Wilkins how the sit-in movement had transformed the landscape of civil rights reform. The students protesting at lunch counters across the South and the leaders of the nation’s oldest and most influential civil rights organization were united in their commitment to ridding the nation of the stain of racial segregation. But they had quite different ideas about how this would be best accomplished.²

NAACP leaders did not oppose protest activity. They recognized the importance of publicity and economic pressure in creating the conditions necessary for racial progress. No one questioned the bravery of the students and the

idealism that moved them. But as the first waves of sit-in protests spread across the South, awakening a generation of young African American activists, a cloud of unease and skepticism hung over the New York City headquarters of the NAACP and the NAACP Legal Defense Fund (LDF), the organization’s legal arm. The NAACP’s leaders believed that for all the attention gained and passions aroused, the protests risked being of limited actual effect because they were not a part of a strategized, coordinated reform agenda. They also worried that the bold actions of these students risked pushing their own work to the sidelines. No one felt these concerns more than the NAACP lawyers.³

To the lawyers who worked at the NAACP’s national office and at LDF, the sit-in movement was not just a remarkable demonstration of dignified defiance. It was also a threat. The students who led and joined this new movement challenged, in ways both explicit and implicit, basic assumptions the lawyers held about the nature of civil rights reform. The civil rights lawyers sought to make sense of this dramatic departure from the litigation strategy they had famously

pioneered over the previous decades. The lawyers knew how to take on Jim Crow in the courts. But now they struggled to define a role for themselves in this new rapidly unfolding drama.

This chapter examines the sit-ins from the perspective of the NAACP lawyers. I focus on lawyers in the national office (under the leadership of NAACP general counsel Robert L. Carter) and in LDF (under Thurgood Marshall), most of whom were initially skeptical toward the student movement — both of the strategy the students chose and of the legal merits of their claimed right. (In contrast, NAACP local branch leaders, some of whom were lawyers, generally supported the students from the start.) Yet Marshall and his colleagues soon came to reconsider their legal assessment and to see the sit-ins as an opportunity to revitalize their own work.⁴

By transforming the students’ protest into a constitutional litigation campaign with the primary goal of winning test cases in federal court, these lawyers sought to remake the students’ challenge into a more traditional civil rights claim, an approach they believed

was the best way to ensure lasting reform. This chapter shows the first of several efforts to translate the students’ constitutional claim into a new form and a new language. What began as a dramatic public act of nonviolent sacrifice and solidarity also became, in the hands of these skilled lawyers, an ambitious legal argument, one designed to persuade judges to reassess the meaning of the Constitution.

Civil Rights Lawyering, January 1960

Frustration. If there was one word to describe the atmosphere in the New York City offices of LDF, this was it. Before the explosion of the sit-in movement, Thurgood Marshall and his fellow LDF lawyers were frustrated — at how effective the obstructionist tactics of the defenders of school segregation were proving, even after the victory in *Brown v. Board of Education* in 1954; at the failure of the African American community to rally around the implementation battle; and at the inability for clear legal victories to translate into racial change.

Just a few years earlier, the atmosphere among the LDF lawyers had been hopeful, even celebratory. *Brown* marked a dramatic culmination of a litigation campaign decades in the making. Having persuaded a unanimous Court to abandon over half a century of contrary precedent and to reinterpret the Fourteenth Amendment’s equal protection

clause to prohibit states from requiring racial segregation in public schools, the lawyers felt a new day was dawning. They had not only won over the Supreme Court; they had also gained the support of presidential administrations from both major political parties — Truman’s Justice Department filed an amicus curiae (“friend of the court”) brief supporting LDF’s position when *Brown* was first argued before the Supreme Court in 1952; Eisenhower’s Justice Department did the same when the case was reargued the following year. Although there was the expected outcry from whites in the Deep South, in the rest of the nation reaction to the opinion tended to fall within a spectrum that ran from grudging acceptance to celebration. The ruling was an “inevitability,” wrote the editors of *Life*. The Court had simply “kept pace with educational and social progress.” Under the title “Emancipation,” a *Washington Post* editorial explained: “The decision will prove, we are sure — whatever transient difficulties it may create and whatever irritations it may arouse — a profoundly healthy and healing one. It will serve — and speedily — to close an ancient wound too long allowed to fester.”⁵

The period immediately following *Brown* was filled with optimism for LDF lawyers. In September 1955, *Time* put Thurgood Marshall on its cover. The accompanying article described “the astounding progress of racial desegregation” that *Brown*

had set in motion. And although Marshall did not get the immediate desegregation with strict timetables that he asked for in *Brown II*, the implementation decision the Supreme Court issued in 1955, he still believed the Court had given the lawyers the tools they needed to bring down Jim Crow schools. In a private conversation, he declared: “The more I think about it, I think it’s a damned good decision! ... [T]he laws have got to yield! They’ve got to yield to the Constitution.” “We’ve got the other side licked,” Marshall proclaimed in early 1956. “It’s just a matter of time.” In the aftermath of the *Brown* decisions, Marshall’s optimism was more the rule than the exception among the decision’s supporters.⁶

This hopefulness dissolved in following years as segregationists rallied behind a last-ditch defense of Jim Crow and as racist demagoguery came to define southern politics. The magnitude of the gathering storm of southern white resistance was clear by early 1956. In March, practically all southern members of Congress (including a number who had initially counseled moderation in response to *Brown*) put their names on a statement, soon to be known as the “Southern Manifesto,” denouncing *Brown* as “a clear abuse of judicial power.” The Southern Manifesto’s goal, wrote *New York Times* reporter Anthony Lewis, was “to make defiance of the Supreme Court and the Constitution socially acceptable in the South

— to give resistance to the law the approval of the Southern Establishment.” In February 1956 a young black woman named Autherine Lucy, backed by a court order the LDF lawyers had secured, attempted to enroll at the University of Alabama. White mobs instigated several days of violence, and the university responded by suspending Lucy. After more rounds of legal challenges, Lucy decided she had had enough and chose to drop her challenge. The entire experience was “traumatizing” for the lawyers, LDF lawyer Jack Greenberg recalled. Thurgood Marshall wondered whether they should just stop pursuing desegregation cases in the Deep South. Even if the courts could be convinced to issue strong desegregation rulings, dedicated white resistance seemed an insuperable obstacle to implementation.⁷

Whites in the Deep South blocked any school desegregation in the years immediately following *Brown*; in the Upper South, the best that LDF achieved was token compliance. The segregationists won “the first round in the battle for compliance,” conceded an African American congressman in the spring of 1957.⁸

To make matters worse, NAACP branches throughout the South were in a fight for their own survival. In an effort to run the civil rights organization out of business, southern state governments sought to publicize their membership lists,

a transparent strategy to expose NAACP members to intimidation and retribution. They also prosecuted civil rights lawyers for supposed violations of legal ethics rules. Much of the time and effort of the LDF lawyers in the post-*Brown* period focused on defending their legal work from these challenges.⁹

By early 1960, much of the LDF lawyers’ optimism that had accompanied the *Brown* victory had dissipated. “In light of the present status of the law, no speedy or immediate resolution of the school segregation problem can be forecast,” Robert Carter informed NAACP members several weeks before the first Greensboro sit-in. The lawyers had come to accept that the current agenda would be dominated by stalling maneuvers and nominal integration efforts — “a lot of fast play around second base,” as Marshall put it. School “integration is not even considered a serious possibility” in the Deep South, the *New York Times* reported in January 1960. “I consider the [school desegregation] lawsuits as a holding action,” Marshall explained, in a statement that captured the dramatically chastened vision of the NAACP lawyers toward the ability of the federal courts to end Jim Crow. “The final solution will only be when the Negro takes his position in the community, voting and otherwise.”¹⁰

So, in a sense, the sit-ins gave Marshall what he wanted. The students were certainly asserting their position in their community.

The problem was that, from Marshall’s perspective, the students were using the wrong tactics and they had latched on to the wrong issue.

The Lawyers Confront the Sit-ins

“The students took everybody by surprise,” Marshall confessed. The student protests sparked a moment of reevaluation for the lawyers in the NAACP’s national offices. It was, in the words of an internal memorandum, “a period of soul-searching, of testing, of weighing in the balance.” The new wave of protests threatened their work. It seemed to give strength to “the many ill-informed hints from outside that we may have outlived our usefulness.” In a widely discussed *Harper’s* article, African American journalist Louis Lomax declared publicly what many at the NAACP were discussing privately: The sit-ins were “proof” that the NAACP “was no longer the prime mover of the Negro’s social revolt.”¹¹

NAACP leaders struggled to figure out the best approach to dealing with the new wave of protests. “Unless we have...control” over the sit-ins, worried Robert Carter, “we cannot gain too much concentrating on sit-ins except a ‘me too’ to” other civil rights organizations that were more in tune with the protesters, such as CORE and SCLC. In these internal discussions, NAACP program director James Farmer was particularly blunt in his assessment:

Doubtless the sit-ins will creep into every discussion, as they should, but we cannot appear to be overwhelmed by their impact. ... I seriously doubt that we should publicly air our confusion and uncertainties on this subject. ... In the meantime, I think we must maintain the posture of knowing precisely where we are going, while at the same time speeding up our efforts through “inner circle” discussions to find out where we really want to go.¹²

Although the lawyers sought to create out of the sit-ins a systematic challenge to public accommodations discrimination, they realized that, unlike school desegregation litigation, they had little control over the unfolding of this civil rights campaign. “The legal questions and sequence of cases were being determined by students and prosecutors,” Jack Greenberg recalled. “It was nearly impossible to make a plan that we could follow closely.” Marshall had a record of skepticism toward direct-action protest and civil disobedience. Furthermore, as a dedicated anti-communist, he (like many white liberals of the day) generally dismissed public protest actions as tactically ill-advised. Even if the protests had no direct linkages to leftist organizations, they were vulnerable to accusations of radical infiltration. The students, he believed, were simply heading in the wrong direction. At a time

when he was struggling with the daunting challenge of convincing the South to obey the new law of the land as defined by *Brown*, Marshall feared tactics that involved breaking laws “would devastate and undermine the progress that had been made.”¹³

Marshall’s uncertainty, even antagonism, toward the sit-ins was more than a lawyer’s skepticism toward social protest as a tool for legal change, however. Marshall also had reservations about whether, in demanding nondiscriminatory service at these lunch counters, the students were on the right side of the law. His reading of the relevant legal doctrine made him doubt that the students had a viable constitutional claim.

When the sit-in movement began, Marshall was in London, where he was helping to draft a new constitution for Kenya. Upon returning home and learning what was happening, he immediately called a staff meeting. As recalled by Derrick Bell, a young LDF lawyer, Marshall “stormed around the room proclaiming in a voice that could be heard across Columbus Circle that he did not care what anyone said, he was not going to represent a bunch of crazy colored students who violated the sacred property rights of white folks by going in their stores or lunch counters and refusing to leave when ordered to do so.” (LDF attorney Constance Baker Motley, who also witnessed Marshall’s performance, worried

that her boss might have a stroke.) Recognizing the limitations of existing equal protection doctrine, Marshall emphasized that, as a legal matter, targeting privately owned lunch counters was a completely different situation than if the protests had taken place in publicly owned facilities. “I don’t want any of you trying to defend so-called protestors who are really trespassing on private property — unless you can come up with some powerful arguments that I know you can’t because they don’t exist,” he told his staff.¹⁴

At a time when the efforts of the civil rights lawyers aimed to highlight the importance of the rule of law in the face of southern state defiance of the Supreme Court’s school desegregation decision, not to mention continued disregard of procedural protections for blacks in the criminal justice system and pervasive violations of the right to vote, the students’ lunch counter protests seriously complicated matters. As a matter of morality and human decency, the question was as clear-cut as possible. As a matter of law, however, the lawyers recognized that in many cases the students’ actions were not protected — at least not by existing judicial interpretations of the Fourteenth Amendment. If the students wanted to press this admittedly ambiguous area of constitutional law, then there were better ways to do so, perhaps by challenging public accommodations

that had a more direct linkage to the state, such as segregated lunch counters in public buildings, or segregation in accommodations that leased their space from the state. A further complication arose from the fact that if the sit-ins were considered acts of civil disobedience, the students were actually breaking the wrong laws. As a matter of strategy as well as moral principle, it is one thing to refuse to obey an unjust law, such as a segregation statute, but it is quite another to break a law that is essentially neutral on its face, such as a trespassing statute, just because the effect of that law is to protect an unjust practice. Also, from a more pragmatic perspective, the lunch counter sit-ins took on what many considered a sacred cow of American law: property rights.¹⁵

Marshall quickly changed his tune. In fact, he probably never truly believed the students' legal claims were as weak as he made them out to be. Those who had been working with him had seen this kind of performance before. Before he was willing to commit to any legal strategy, Marshall liked to give his best possible case against it. He then relied on his staff to argue with him, to challenge him. It was a classic lawyer's tool: master your opponents' arguments so as to better diffuse them. The lawyers had their own version of the bull sessions that the Greensboro Four had in their dormitory at A&T. Like the students, they talked and

argued, eventually convincing each other and themselves of what they needed to do. They knew they had to try to get out ahead of this issue. And the only way they could do this was to develop a legal strategy. LDF lawyers became leading proponents of the argument that the students had a claim based not only on the immorality of segregation in public accommodations, but also on its unconstitutionality. It was a strategy that was just as ambitious, just as much of a challenge to the legal status quo, as the strategy that NAACP lawyers put together thirty years earlier when they turned their attention to school desegregation.¹⁶

The evolving, still uncertain status of Fourteenth Amendment doctrine at this time allowed the LDF lawyers to make this tactically savvy about-face. When Marshall had dismissed the possibility that the students had a valid constitutional claim for equal service, he had offered a fair assessment of the existing precedent. And now, in defending this same constitutional claim, he was offering a reasonable advocate's assessment of the possibility of changing that precedent.¹⁷

In mid-March, Marshall and his staff convened a conference at Howard University of sixty-two civil rights lawyers to look at the legal issues behind the sit-ins. "Those boys and girls didn't check the law when they sat down on those stools," he told reporters. "Now we're going to have to check the

law." Even before the lawyers met, Marshall had begun adopting a dramatically different perspective toward the sit-ins. Abandoning his initial skepticism, he now characterized them as "legal and right." When asked whether the NAACP intended to take the issue all the way to the Supreme Court, he responded, "We wouldn't bother with it unless we did." In the weeks leading up to the conference, he discussed the possibility of making a free expression argument on the students' behalf, and discussions with lawyers at the conference gave him a newfound faith in using the sit-ins as a vehicle for making an equal protection claim. After the three-day legal strategy meeting, Marshall declared, "We're pulling out all the stops. We're really in it." He promptly headed to North Carolina, where he assured NAACP members, "We are going to give to these young people the best legal defense available to them."¹⁸

Marshall offered two variations on the constitutional argument he would use on behalf of the students. One was more limited and context-specific: that the initial invitation into the department store effectively converted the private business into a public space in which the requirements of the equal protection clause applied. "Once a Negro, or any other law abiding person[,] has been admitted to a store to buy pins and needles," Marshall explained, "he has the right to buy everything in the store."

This line of argument drew upon the constitutional reasoning expressed in *Marsh v. Alabama*, the 1946 decision in which the Supreme Court held that a privately owned company town that, for all intents and purposes, looked and acted like a regular town was subject to the restrictions of the First Amendment and therefore could not prohibit sidewalk solicitation. As the Court wrote in *Marsh*: "The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it" — powerful language that LDF lawyers cited at every opportunity in their defense of the sit-in protesters. The basic question was whether a private business that purported to serve the general public was engaged in a public service of such an essential nature that the Constitution did not permit it to practice racial restrictions in its service policy.¹⁹

The other prong of Marshall's equal protection argument found clearer support in Supreme Court precedent, but it raised even more fundamental difficulties about the boundaries of the state action doctrine. It sought to extend the controversial and enigmatic precedent of *Shelley v. Kraemer*, in which the Court held unconstitutional judicial enforcement of racially restrictive covenants. Under this theory, it was not the business owner's

choice to discriminate that violated the Fourteenth Amendment, but the introduction of the power of the state to enforce that private choice, in the form of the arrest and prosecution of protesters. Pervasive state involvement in sit-in prosecutions was obvious, Marshall told the NAACP meeting in North Carolina following the lawyers' strategy session, and the slew of arrests for participating in the sit-ins "once again" showed "the full strength of the state government, paid for by white and black taxes, arrayed against young people solely because of their race and color." The constitutional violation that flowed from this fact was clear, Marshall explained. Whether the state expresses its authority "when the police are called in to prevent the Negro being served" or by enforcing "a state law [that] prohibits the Negro from getting equal service," in either case, "the 14th amendment is violated."²⁰

When it came to persuading federal judges, each of these lines of argument for extending the state action doctrine had its particular challenges. The *Marsh*-based argument raised difficult line-drawing questions. Judges who might be sympathetic to the students' claim still need to be convinced that the reasoning for their decision made sense when applied to analogous situations in other contexts. No one argued that all private businesses that served the public should fall under the full

force of constitutional restrictions. Certain private businesses, however, did more than just serve the public. They provided highly valuable, perhaps even essential public services; people relied upon them; they played a government-like role in public life. The critical question was whether lunch counters — or, more generally, eating facilities — fell into this category.

The *Shelley*-based argument raised its own line-drawing problems. Sure, police and court involvement constituted the action of the government, and these actions must align with *Brown*'s nondiscrimination requirement, but did this mean that courts had to inquire into the motivation of private actors who called on the police to enforce race-neutral laws, such as a trespass law, to ensure that government was not involved in racial discrimination? If the answer was yes, does the same reasoning apply to private actors who infringe on speech rights? What if a private club called on the police to remove someone who was unwelcome because of his skin color? What about a host of a dinner party in her home? "If a state could not enforce private discrimination in a restaurant by arresting trespassers, could it enforce it in private clubs? Or private homes?" asked a late February *New York Times* article previewing possible judicial approaches to the sit-ins. "If a Negro walked into a

club that excluded Negroes from membership, and he refused to leave, could the club call the police to remove him? Or would that be unconstitutional?" The problem with walking down the *Shelley* path was that its logic risked exploding the distinction between the public and private realms that most lawyers, judges, and scholars assumed was essential to the proper functioning of constitutional rights.²¹

Marshall was fully aware of these challenges. As much as anyone in LDF, he kept insisting that they be taken seriously. Yet the enthusiasm with which the generally cautious civil rights leader took to these ambitious constitutional claims on behalf of the students reflected the powerful impact the sit-ins had on Marshall and others in the national office of the NAACP. "This situation," he admitted, "has made all of us reassess ourselves."²²

Points of Division

The parameters of the lawyers' reassessment were limited, however. For Marshall and his colleagues, the sit-in movement broadened their horizons of viable constitutional argumentation, but it did not inspire a reconsideration of the role of the NAACP in the civil rights movement. The LDF lawyers came to the sit-ins with already formed ideas about the way in which civil rights reform should take place. They had the experience of *Brown*, which showed that carefully planned

litigation could overturn even the most seemingly entrenched of constitutional interpretations — and the status of the constitutional issue at the heart of the sit-ins was far from well entrenched after two decades of Supreme Court decisions expanding the meaning of state action under the Fourteenth Amendment. They understood their litigation efforts as having played a critical role in securing victory for the Montgomery bus boycott. (LDF lawyers won a constitutional challenge to Montgomery's bus segregation policy at the Supreme Court at just the moment when the boycott appeared on the verge of crumbling. "All that walking for nothing!" was Thurgood Marshall's response after the Court issued its ruling. "They could just as well have waited while the bus case went up through the courts, without all the work and worry of the boycott.") With the students mobilizing themselves as an alternative to the NAACP's court-centered approach to racial progress, it was no surprise that when the NAACP lawyers arrived to offer their help and advice to the students, the lawyers and the students would have sharply different views about the situation.²³

In the early stages of the sit-in movement, the lawyers and the students struggled to reconcile their different views on two tactical issues. One was over the relationship between the protests and the test cases the NAACP

hoped to create. The other was a debate over the "jail, no bail" policy advocated by many of the students.

Protests and Test Cases

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

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

The money that was being used to bail out arrested protesters, the memorandum noted, could

be put to better use. The cost of representing the hundreds, soon thousands, of arrested students was starting to add up. This memorandum captures a fundamental divide between the NAACP's national leadership and the protesters. The NAACP assumed that the aim of the protests was to change the law. But on this point the students would take issue. This might be one of the aims of the protest, or it might be a beneficial secondary effect of the protest, but it was not their only purpose. The students certainly did not see themselves as simply providing test cases for lawyers.²⁴

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

declared unconstitutional." "As far as [Marshall] was concerned," complained one student activist after a conversation with the legendary civil rights lawyer, "it was all going to be settled in the courtroom."²⁵

Sometimes the students followed the counsel of the lawyers. This was what happened in Atlanta. Within days of the first Greensboro sit-ins, students at Atlanta's six black colleges were planning their own demonstrations. Yet over a month passed before anything happened, as student leaders followed the advice of older black community leaders to focus their energies on negotiation and litigation. After weeks of false starts, delays, and bickering among factions within the civil rights community, Atlanta's sit-in movement began on March 15. But here again, Atlanta's movement retained a distinctly lawyerly character. Rather than targeting national chain stores, student leaders followed the lawyers' advice that they focus their protests on publicly owned facilities or facilities that were involved in interstate transportation (and thus subject to federal nondiscrimination rules). Police responded to the coordinated sit-in demonstrations at cafeterias in the capitol, the country courthouse, city hall, and several bus terminals and train stations by arresting seventy-seven demonstrators and charging them under the state's new anti-trespassing law. The day after

the mass arrests, at a meeting of fourteen hundred students, Donald Hollowell, one of the lawyers representing the arrested students, advised the students to stop their protests until they get a "final judgment" in the pending court cases. The students took his advice and called a halt to further sit-in demonstrations until the protesters had their trials. An organized lunch counter sit-in campaign would not return to Atlanta until the following fall. CORE's executive director lamented the Atlanta students' willingness to "transfer[] the action to the legal phase" of the reform project.²⁶

Civil rights lawyers did not necessarily fail to appreciate the unique value of the student protests. They just felt that, at some point, their protests must give way to formal legal claims: protesters must eventually yield to lawyers.

The "Jail, No Bail" Debate

The divergent agendas of the students and the lawyers were even more starkly reflected in the debate over how the arrested students should deal with the legal system — whether they should pay bail and thereby avoid spending time in jail while their cases were being heard and whether they should choose a jail term rather than paying a fine after conviction. The civil rights lawyers felt the students should plead not guilty to charges of disorderly conduct or trespass, pay bail, and appeal the conviction. They

were being unjustly prosecuted, and there was a clear legal remedy for this. But the students had another option: although they would plead not guilty, they would then refuse bail and remain in jail as a way of drawing further attention to the injustice of the situation. “Let us not fear going to jail,” declared Martin Luther King Jr. in a February 1960 speech to student protesters in Durham, North Carolina. “If the officials threaten to arrest us for standing up for our rights, we must answer by saying that we are willing and prepared to fill up the jails of the South. Maybe it will take this willingness to stay in jail to arouse the dozing conscience of our nation.” “When groups of people are willing to sit in jail,” explained CORE leader James Robinson, who, like King, was a dedicated proponent of this tactic, “their very presence there does put pressure on the community to consider searchingly how much they really want to impose segregation — to consider how thoroughly persons must reject segregation in order to willingly accept jail in preference to failing to make an attack on the system.”²⁷

“Jail, no bail” became a new mantra for the student movement. The students envisioned filling up the jails with protesters and thereby elevating their moral challenge to the southern system of racial oppression. At the meeting of student activists in Raleigh, North Carolina, in April 1960, after

listening to King encourage the students to “consider training a group of volunteers who willingly go to jail rather than pay bail or fines,” the students issued a statement urging protesters to do just that. The announcement of this recommendation was met with overwhelming enthusiasm from those in attendance. Inspired by King’s speech, on April 21 Greensboro students refused to leave a lunch counter and were arrested — the only arrest of the Greensboro lunch counter sit-in campaign. This “jail, no bail” approach, its advocates believed, would help solidify the black community, mobilize public opinion, and weaken opposition “by showing that a threat of arrest cannot deter us.” “As this movement grows,” noted Robinson, “it is conceivable that refusal to pay bail and fines may be essential to its success.”²⁸

Sitting in jail when given an opportunity to walk free “is a strange concept to a lawyer who is concerned about getting his client out of jail as soon as possible,” Robinson explained. Next to the commitment and bravery required for a black youth (or white integrationist) to choose to remain in a southern jail, the NAACP’s counter-arguments were uninspiring in their practicality. According to the lawyers, the “jail, no bail” tactic — and its correlative “prison, no fine” and “no appeal” tactics — was, at best, unnecessarily risky; at worst, it was counterproductive to the

movement’s goals. By accepting their convictions and serving out their sentences, not only did the students earn a criminal record, but, more significantly for the NAACP, they gave up an opportunity to challenge the legal rules that made Jim Crow possible. Again, the divide over what the sit-ins were trying to accomplish was made stark. “If the objective is to dramatize the illegalities and to disrupt the social order,” a NAACP memorandum explained, then there was really no role for the lawyers: “the people who participate should refuse legal help and engage in this activity only with the idea of staying in jail.” But this was not the best path, for it failed to appreciate the “long run” goals of the movement, which were best served by following “the Association’s basic policy and philosophy.” The students must always “know exactly what their rights are” — a requirement that NAACP officials could facilitate. “The NAACP firmly believes that every citizen has the constitutional right to enjoy on the same basis as any other citizen the facilities of any public place, business, or any other profit enterprise which offers its services to the public. To obtain these rights we must carry on a carefully planned and continuous attack.”²⁹

To achieve these ends, the students must not get caught up in symbolic gestures that, in the eyes of the lawyers, did nothing to advance the cause of civil rights. “It is the firm

belief of the NAACP that you should plead *not guilty* to the charges and accept bail,” the national office explained to the students. “We realize that remaining in jail has moral and ethical implications not to be discounted, yet there is a grave danger that the individual, by his failure, neglect, or refusal to fight a criminal charge levied against him and through accepting a jail sentence in lieu thereof, will defeat his main purpose and thus render ineffectual our overall legal attack on this spiteful, vicious system.” Upon arrest, student leaders should “immediately contact their NAACP lawyers and follow the advice of counsel. In this way we will be better able to direct our efforts toward our main objective, that of crushing an outmoded system, and thus also avoid stigmatizing our youth with criminal records, the efficacy of which is extremely doubtful.”³⁰

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

not understand the essence of what we, the younger blacks of America, were doing.”³¹

“A Turbulent but Workable Marriage”

Despite the divide between the students and the lawyers when it came to their visions of civil rights activism, as the sit-in movement unfolded throughout the spring of 1960, the two groups settled into a functional alliance. “In something so enormous as the task of ending racial segregation,” Clarence Mitchell concluded in his April 1960 report to Roy Wilkins, “there is a great deal of room for many workers and ideas.” “We know that shock troops are necessary,” Wilkins would later explain. “We also know that solid basic legal moves are necessary if there is to be a foundation for other action.” The NAACP lawyers laid essential groundwork for the students, he insisted. “Once the legal status and constitutional rights were established, the battle to enjoy them follows as night the day.”³²

Recognizing the sit-ins as both a threat and an opportunity for the NAACP, the leaders in the organization’s national office went on the offensive. In late February, Wilkins announced, “Negro college students in their fights have the 100 per cent backing of the NAACP,” and he praised the sit-ins as “legitimate expressions of citizens in a democracy.” NAACP leaders swept aside their initial

skepticism and launched a public relations campaign in which they insisted the NAACP was a key force behind the sit-ins. “We need to amplify our public image,” a staff memorandum explained, “from the NAACP as purely a ‘legal’ agency to the NAACP as a multi-weapon action organization.” At every opportunity, the NAACP publicized that its branches had been behind sit-in efforts that predated Greensboro and played up the association’s role in the new wave of sit-ins. As one NAACP report explained, the wave of sit-ins “marked the continuation of similar activity which started in Wichita and Oklahoma City in 1958. ... In both cities, the victories were won by NAACP youth councils composed of high school and elementary youth.” The memorandum also noted a February 1959 “sitdown” in St. Louis, in which the NAACP represented the arrested students and was able to integrate a previously segregated restaurant. Publicity material highlighted the fact that several of the Greensboro Four had been members of NAACP youth chapters and that the NAACP youth secretary “kept in close touch with the situation.” (What the NAACP did not mention was that when the Greensboro Four had made an effort to reach out to their national office before they began their protest, they received no response.)³³

NAACP leaders also emphasized the connections between their

achievements in the Supreme Court and the current burst of protests, arguing that NAACP courtroom victories “made inevitable the aggressive expressions of discontent with the status quo which resulted in the sit-ins, boycotts and mass Negro protest against social injustice. ...” “If the Supreme Court had not signaled the end of separate schools in its 1954 decision,” wrote LDF president Allan Knight Chalmers in a letter to the *New York Times*, “today’s young people might not have had the confidence for their broad assault against segregation.”³⁴

On March 16, the NAACP declared a new “racial self-defense policy,” the centerpiece of which was a national boycott, organized by local chapters, of all chain stores that operated segregated lunch counters in the South. “We always have used persuasion through various means of political and economic pressure,” Wilkins explained, “but now we are going to use it much more intensively than in the past because the membership has become restless over the slow pace of the civil rights proceedings.”³⁵

At the start of the sit-ins, the students benefited from having the NAACP focused on issues other than lunch counters. Now, with the movement under way, they benefited from having respected LDF lawyers proclaiming the students’ cause constitutionally justified. Once Marshall became convinced that the students had

a viable constitutional claim, he and his colleagues declared at every turn that the students’ cause was justified as a matter of law. It was, in sociologist Aldon Morris’s apt description, “a turbulent but workable marriage.” These statements further entrenched the idea, already assumed among many civil rights sympathizers, that lunch counters were a logical next step in the battle to realize the full meaning of the Fourteenth Amendment. Even for those students who feared that the civil rights lawyers might co-opt their cause, being told that they had the law — and ultimately the Supreme Court — behind them surely did not hurt.

The NAACP’s embrace of the student movement also had tangible benefits. Funding was essential to the continued survival of the sit-in movement. For all the attention and controversy over the “jail, no bail” protest tactic, not all arrested protesters were interested in sitting in jail. Many thankfully accepted the legal and financial assistance the NAACP offered. “The N.A.A.C.P. continues to have the loyalty of most students, who admit that after they dash ahead they often have to ask the N.A.A.C.P. for legal help,” explained one journalist after spending time with the protesters. As legal historian Tomiko Brown-Nagin writes, “Activists, clever and restless, modulated their attitudes toward civil rights lawyers and court-centered activities as circumstances dictated.” The

NAACP was the best positioned among the civil rights organizations to assume the role of financially supporting the student movement. The organization made an effort to tone down potential friction with the students. By the summer of 1960, NAACP lawyers estimated that they were participating in the legal defense of between 1,500 and 1,750 protesters, all at considerable expense.³⁶

This was a relationship in which each side needed the other. Moreover, those who supported the larger civil rights agenda needed the relationship to work. “Instead of saying, as so many have, that the sit-ins represent a new strategy, would it not be more reasonable to regard them as opening up a new front?” asked Leslie Dunbar of the Southern Regional Council. “Instead of announcing that the sit-ins mean a downgrading of the courtroom struggle, would it not be more reasonable to recognize that litigation is not an effective means for desegregating lunch counters, and that sit-ins are not an effective means for desegregating schools?”³⁷

Even CORE’s James Robinson, a frequent critic of civil rights lawyers, accepted the value of an effective alliance of lawyers and activists. In a memorandum prepared for a meeting of civil rights groups in June 1960, he noted that the involvement of civil rights lawyers in the sit-in movement has led to some “confusion.” It “has left the

movement somewhere between the usual legal method and the nonviolent direct action procedure.” “Both techniques should be used,” Robinson urged, “but I believe that they should be consciously used, and never confused.” Pointing to the Atlanta example, where he saw student deference to legal advice as having stymied protest mobilization, he expressed concern that civil rights leaders should not allow “the legal method” to displace direct action. “The two methods are supplementary, not contradictory,” Robinson insisted. On this point, CORE and the NAACP agreed. “This job requires youth and enthusiasm,” Wilkins explained in a letter to NAACP local branch officers. “It also requires age and experience. It requires praying and preaching. It also requires legal activity in court. It requires both old and the new.”³⁸

Unified by the recognition of their common enemy of Jim Crow, bolstered by the contagious atmosphere of excitement and possibility surrounding the students in the early months of the movement, both students and lawyers generally sought to tamp down potential flashpoints of ideological division. The NAACP publicly supported the protesters and offered legal and financial assistance when the students were arrested. The national office issued instructions for local NAACP branches on recommended tactics to best prepare the legal challenge,

and LDF lawyers worked with local lawyers and traveled to the South to teach the students about their constitutional rights and how they could most effectively contribute to a legal attack on segregated public accommodations. LDF lawyers represented arrested students in court or they assisted local lawyers. Enough students allowed the lawyers to appeal their convictions, setting in motion the first step in a constitutional challenge to segregated public accommodations. Both the students and the lawyers advanced the cause of racial equality as best they knew how.³⁹

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BACK COVER PHOTO: *John Lewis (right), a student at American Baptist Theological Seminary, talks to reporters at the city jail in Nashville on March 25, 1960 after being arrested for participating in a sit-in demonstration at the downtown Moon-McGrath drugstore lunch counter. O.D. Hunt (left) and Dennis Gregory Foote (center), students from Tennessee A&I State University who were also arrested, are pictured. (The Tennessean/Jimmy Ellis)*

FRONT COVER PHOTO: *A group of white youths surround Dion Diamond, a student at Howard University in Washington, D.C., during a sit-in demonstration at a drug store in Arlington, Virginia on June 9, 1960. (AP Photo)*

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