

NEW YORK TIMES V. SULLIVAN AND THE LEGAL ATTACK ON THE CIVIL RIGHTS MOVEMENT

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ABSTRACT

This Article places *New York Times v. Sullivan* into the context of the legal counteroffensive that defenders of racial segregation waged against the Civil Rights Movement.

Montgomery Commissioner L.B. Sullivan's libel suit against the *New York Times* and four African-American preachers was just one of many instances of white Southerners using ostensibly race-neutral laws to counter the growing strength of the black freedom struggle. By 1960, when Sullivan filed his suit, this basic tactic—the race-conscious deployment of race-neutral law—was rapidly replacing explicitly racially discriminatory laws as the legal weapon of choice for defenders of white supremacy. I examine why libel law and other race-neutral laws became such critical resources for civil rights opponents, and I assess their impact. For the Warren Court, these legalistic tactics presented a challenge. The unanimous *Sullivan* ruling notwithstanding, the Court regularly divided when given an opportunity to assess the use of race-neutral laws to counter the Civil Rights Movement. For defenders of segregation, the legal counteroffensive had benefits as a tool of movement mobilization. For civil rights activists, the legal attack made its mark, as it forced them to divert resources into defensive litigation battles. In the end, however, these tactics had only limited success in their primary goal of disarming the Civil Rights Movement.

INTRODUCTION

One of the most striking aspects of the white Southern resistance to the Civil Rights Movement was the substantial faith its leaders had in the law. In the 1950s and 1960s, when defenders of racial segregation saw their way of life being challenged by the growing strength of the black freedom struggle, they regularly turned to lawyers and courts to fight off the threat of change. To be sure, the attack on the Civil Rights Movement contained a good deal of lawlessness—the intimidation, the beatings, even the murders of those who dared to challenge the norms and practices of white supremacy.¹ Horrific acts of savagery never left the scene. But the South's political leaders recognized extralegal suppression of civil rights activism as a major liability in their efforts to turn back the Civil Rights Movement, threatening as they did to turn public opinion against the segregationist

1. See, e.g., MICHAL R. BELKNAP, *FEDERAL LAW AND SOUTHERN ORDER: RACIAL VIOLENCE AND CONSTITUTIONAL CONFLICT IN THE POST-BROWN SOUTH* (1995).

cause and justifying further federal intervention.² Segregationist leaders increasingly urged the use of formal processes of the law as an alternative to brutality and lawlessness.

Law, of course, has always played a role in the maintenance of white supremacy in the United States. Yet the kinds of laws that whites relied upon to serve this end shifted over the course of the Civil Rights Movement. For much of our nation's history, the primary legal tools for protecting racial hierarchy were the bluntest and harshest ones: the laws of slavery, the southern Black Codes of early Reconstruction, and the segregation and disfranchisement laws of the Jim Crow era. And in the 1940s and 1950s, when faced with the rising threat of civil rights reform, segregationists relied primarily on explicit, direct legal defenses of Jim Crow. They waged a massive resistance campaign denouncing and defying *Brown* and proclaiming the need for race-conscious policy.³

By the late 1950s and early 1960s, however, the tactic of defending legalized segregation on its own terms had largely run its course. Legally mandating racial segregation and other forms of overt racial discrimination was rapidly becoming a lost cause. The Supreme Court expanded its *Brown* ruling's condemnation of separate-but-equal policy beyond the schools into all realms of state activity.⁴ In Congress, defenders of racial segregation were a diminishing minority.⁵ And, in the eyes of most Americans, racial discrimination as a formal state policy was no longer tolerable. For those dedicated to blocking or limiting the impact of the Civil Rights Movement, a new approach was needed.

Unlike the legal battles segregationists waged in the 1940s and 1950s, this new legal attack on the Civil Rights Movement relied on laws that said nothing about race. These were laws regulating disorderly conduct, trespass, disturbing the peace, and defamation. Even tax law became a weapon against the Civil Rights Movement. As the Movement gained momentum, segregationists used these and other race-neutral laws to target civil rights activists and their allies. The race-conscious use of race-neutral law became Jim Crow's front line of defense.

This was the historical context out of which the landmark 1964 Supreme Court decision in *New York Times v. Sullivan*⁶ emerged. One of

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

3. See MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY* 385–442 (2004).

4. See *Johnson v. Virginia*, 373 U.S. 61, 62 (1963) (per curiam) (“[I]t is no longer open to question that a State may not constitutionally require segregation of public facilities.”).

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

6. 376 U.S. 254 (1964).

my primary goals in this Article is to situate Montgomery Commissioner L.B. Sullivan's libel suit against the *New York Times* and four African-American preachers within the context of white Southerners' broader legal counteroffensive against the Civil Rights Movement, particularly their growing reliance on race-neutral laws to advance their race-conscious agenda.

In addition to situating Sullivan's libel suit in its historical context, I use *Sullivan* as a case study for evaluating the impact of the white South's legal attack on the Civil Rights Movement. I consider these consequences in three overlapping contexts. First, I examine the ways in which libel suits helped unite the segregationist countermovement. Although little appreciated in the scholarly literature on the Civil Rights Movement or on the *Sullivan* case, increased reliance on libel law and other race-neutral laws had important movement mobilization benefits for those who stood opposed to civil rights reforms.

Second, I examine the doctrinal challenges the Warren Court faced when called upon to assess the constitutionality of southern efforts to undermine the Civil Rights Movement through the use of race-neutral laws. The unanimous *Sullivan* ruling was something of an aberration. As a general matter, the Warren Court was deeply divided on the legal issues raised by the segregationist use of race-neutral laws to counter the Civil Rights Movement.

And third, I consider the effects of the legal counteroffensive on civil rights activity. Here, the legal attack on the Civil Rights Movement clearly made its mark. It forced civil rights activists to divert time and resources into defensive litigation battles. Yet, ultimately, the legal attack on the Civil Rights Movement had only limited success in the primary goal of its segregationist supporters, which was to suppress civil rights activism. Even the libel-law challenge that led to the landmark *Sullivan* decision failed in its intended goal of diverting Northern press attention from white suppression of civil rights activity. The failures of the legal attack on the Civil Rights Movement can be partly attributed to the intervention of the Supreme Court, but I argue that one needs to be careful not to overstate the case here. Just as it took more than the Supreme Court alone to move the South toward desegregation,⁷ Court decisions alone could not diffuse the Southern attack on the Civil Rights Movement. The failure of the segregationist legal attack on the Movement was primarily attributable to the strength of the Civil Rights Movement and only secondarily attributable to the saving interventions of the Supreme Court. Despite commonplace assertions that the Supreme Court's dramatic decision in *Sullivan* saved the

7. See KLARMAN, *supra* note 3, at 344–442; GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 39–169 (1991).

Civil Rights Movement, libel suits had already proven largely ineffective in silencing press coverage of the Movement.

I divide this Article into two Parts. Part I examines the varied legal weapons the white South used against the Civil Rights Movement. Specifically, I identify the major categories of race-neutral laws that became central to the legal attack on the Civil Rights Movement. Part II assesses the impact of these counterattacks. I examine which tactics worked, which did not, and why. I consider how the growing reliance of defenders of segregation on these race-neutral laws served as a mobilizing tool for the countermovement, the difficulties the legal attack on the Civil Rights Movement posed for the Supreme Court, and the effects of this attack on civil rights activism.

I. THE TOOLS OF THE LEGAL COUNTERATTACK

In its early stages, the counteroffensive against the Civil Rights Movement advanced explicitly race-conscious policies. Southern whites defended de jure segregation policy on the grounds of constitutional principle, policy, religion, or whatever other justifications the segregationist imagination could muster. This kind of direct defense of segregation could be found, for example, in the legal arguments put forward by the states as they defended themselves in the school desegregation lawsuits that led to *Brown*.⁸ It was also the premise driving the “massive resistance” campaign against *Brown* in the mid-to-late 1950s, as the South sought to continue to enforce its segregation policy after the federal courts had made it clear that such laws violated the Constitution.⁹ This defiant, direct defense of racial segregation lived on well into the 1960s. No one personified this approach more than Alabama Governor George Wallace, the man who, in 1963, drew his “line in the dust” and pronounced his commitment to stand up for “segregation now . . . segregation tomorrow . . . segregation forever.”¹⁰

But as the Civil Rights Movement gained strength, the defenders of segregation shifted their legal tactics. Segregationist leaders increasingly came to see direct legal methods, such as racial segregation laws and other forms of explicit legalized discrimination, as ineffective and costly. “We can’t preserve segregation by defying the federal government,” warned Mississippi Governor J.P. Coleman in 1955. “We must do it by legal

8. See MARK V. TUSHNET, *MAKING CIVIL RIGHTS LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1936–1961*, at 156–61 (1994).

9. KLARMAN, *supra* note 3, at 349–63.

10. George Wallace, Governor of Ala., Inaugural Address in Montgomery, Alabama, at 2 (Jan. 14, 1963), *available at* <http://digital.archives.alabama.gov/cdm/singleitem/collection/voices/id/2952/rec/5>.

means.”¹¹ Indirect, race-neutral legal methods became the preferred tactic for the defenders of white supremacy.¹²

Of course, the distinction I am emphasizing between direct and indirect legal defenses of white supremacy—between race-conscious and race-neutral tactics, in our contemporary terminology—was not always clear. The legal tools by which the public officials and lawyers in the white South mobilized against the Civil Rights Movement should be considered on a spectrum, ranging from segregation laws on one end to long-standing, uncontroversial laws such as trespass and libel on the other end. In between these two poles were a seemingly endless variety of legal tools with varying degrees of race consciousness: some relying on racial proxies to avoid direct reference to race, some specially made for the purpose of undermining the Civil Rights Movement, and some modified or repurposed toward this end. As a general trend, over the course of the civil rights struggle, defenders of white supremacy came to rely less and less on the most direct, race-conscious laws. The legal attack on the Civil Rights Movement was increasingly waged with weapons residing at the more race-neutral end of the spectrum.

For those who saw defiance of *Brown* as a hopeless or unwise approach, more indirect tactics seemed the better way to defeat desegregation, or at least to minimize its effects. Rather than enforcing an official state policy of segregation and racial discrimination, this approach relied on ostensibly race-neutral laws in order to attack the proponents of civil rights reform.

Although I categorize these legal weapons used against the Civil Rights Movement as “race-neutral” in order to distinguish them from the direct defenses of de jure racial discrimination, there was, of course, a great deal of race consciousness in the ways in which segregationists deployed these race-neutral legal tools. Segregationists, in other words, were using race-neutral laws to advance their race-conscious agenda.

11. WALKER, *supra* note 2, at 12.

12. A third category of legal defense of white supremacy, which I do not focus on here, included legal arguments made in opposition to civil rights policy. While the focus of this Article is on *offensive* tactics white Southerners adopted against the Civil Rights Movement, these were more purely *defensive* legal tactics, reacting to legal reforms of the Civil Rights Era. They included arguments, often on constitutional grounds, based on the values of local control and federalism, *see, e.g.*, Declaration of Constitutional Principles, 84th Cong., 102 CONG. REC. 4460 (1956) (the “Southern Manifesto”), and individual rights claims, *see, e.g.*, Christopher W. Schmidt, *Defending the Right to Discriminate: The Libertarian Challenge to the Civil Rights Movement*, in SIGNPOSTS: NEW DIRECTIONS IN SOUTHERN LEGAL HISTORY (Sally Hadden & Patricia Minter eds., 2013).

A. *The Tools of the Legal Counterattack: An Overview*

What follows is a brief overview of some of the tactics of indirect legal resistance to the Civil Rights Movement.

1. *Exposure*

After *Brown*, several Southern states sought to put the NAACP out of business. The tactic here was simple and often quite effective: force the NAACP to disclose its membership rolls and then let the tried-and-true processes of white intimidation and retribution take over. This tactic was facilitated by omnipresent segregationist accusations that the NAACP was a subversive organization infiltrated by, and perhaps even run by, Communists and other brands of radicals.¹³ The legal tools by which Southern leaders started this process were varied. Demands for compelled disclosures might come through corporate and lobbyist registration requirements, state taxing requirements, legislative investigations into suspected subversive activities, or laws requiring public school teachers to identify the organizations to which they belonged.¹⁴

In Mississippi, the state legislature passed a law in 1956 requiring public school teachers to list all organizations that they had been involved in over the past five years, a transparent effort to expose black teachers who were involved with the NAACP.¹⁵ In 1958, the legislature launched an investigation into the NAACP on suspicion of being a Communist front organization.¹⁶ Louisiana used its Subversive Activities and Communist Control Law to attack not only the NAACP¹⁷ but also the Southern Conference Educational Fund, a pro-civil rights organization.¹⁸ Virginia passed a special registration requirement for organizations involved in civil rights activity.¹⁹ In 1957, Little Rock, Arkansas, amended its occupation license tax policy to require, upon official demand, membership lists of a

13. See KLARMAN, *supra* note 3, at 382–83; NUMAN V. BARTLEY, *THE RISE OF MASSIVE RESISTANCE: RACE AND POLITICS IN THE SOUTH DURING THE 1950'S*, at 185–89 (1969).

14. See KLARMAN, *supra* note 3, at 383; BARTLEY, *supra* note 13, at 214–15; Walter F. Murphy, *The South Counterattacks: The Anti-NAACP Laws*, 12 W. POL. Q. 371 (1959).

15. See JOSEPH CRESPINO, *IN SEARCH OF ANOTHER COUNTRY: MISSISSIPPI AND THE CONSERVATIVE COUNTERREVOLUTION* 54 (2007).

16. See *id.* at 54–56.

17. See BARTLEY, *supra* note 13, at 187; TUSHNET, *supra* note 8, at 290.

18. See *Dombrowski v. Pfister*, 380 U.S. 479 (1965) (granting injunction against prosecution of the civil rights group on First Amendment grounds).

19. See *NAACP v. Patty*, 159 F. Supp. 503, 511 (E.D. Va. 1958) (summarizing registration requirements passed at special session of the Virginia legislature in 1956), *vacated sub nom.* *Harrison v. NAACP*, 360 U.S. 167 (1959).

registered organization.²⁰ In refusing to submit to this requirement, the local NAACP branch issued the following statement: “We base this refusal on the anti-NAACP climate in this state. It is our good faith and belief that the public disclosure of the names of our members and contributors might lead to their harassment, economic reprisals, and even bodily harm.”²¹

No state was more aggressive in attacking civil rights advocates through these kinds of exposure tactics than Alabama. State Attorney General John Patterson accused the NAACP of failing to properly register as a business operating within Alabama.²² He convinced Judge Walter Jones—an ardent segregationist who would later hear the trial in the *Sullivan* case—to issue a temporary restraining order against the NAACP.²³ After the NAACP attempted to register in the state, Judge Jones demanded that the NAACP release its membership rolls.²⁴ “I intend to deal the NAACP . . . a mortal blow from which they shall never recover,” the judge declared.²⁵ The NAACP was basically out of operation in Alabama from 1956 to 1964.²⁶ Arkansas and Louisiana employed similar tactics.²⁷

2. *Professional Regulation*

Various Southern states attacked the NAACP under cover of regulating the legal profession. In 1956, the Virginia legislature passed a series of laws prohibiting lawyers from encouraging litigation or soliciting clients.²⁸ Although drafted without explicit reference to civil rights, race, or the NAACP, these “barratry,” “champerty,” and “maintenance” statutes were transparent efforts to undermine the NAACP’s agenda of enforcing school desegregation through court orders. When the Supreme Court considered a challenge to Virginia’s use of these laws against the NAACP, Justice Hugo Black, in discussing the cases with the other Justices, described the laws as “part of a scheme to defeat” *Brown*.²⁹ “Sooner or later, we will have to grapple with these problems in those terms,” he said, adding that “[t]he NAACP is finished if this law stands.”³⁰

20. See *Bates v. Little Rock*, 361 U.S. 516, 517 (1960).

21. *Id.* at 520.

22. See TUSHNET, *supra* note 8, at 283.

23. See *id.*

24. See *id.*

25. *Id.*

26. See KLARMAN, *supra* note 3, at 383.

27. See TUSHNET, *supra* note 8, at 283–84.

28. See *NAACP v. Button*, 371 U.S. 415, 423–26 (1963).

29. THE SUPREME COURT IN CONFERENCE (1940–1985): THE PRIVATE DISCUSSIONS BEHIND NEARLY 300 SUPREME COURT DECISIONS, at 317 (Del Dickson ed., 2001).

30. *Id.* For further context on the Supreme Court’s deliberation in *Button*, see TUSHNET, *supra* note 8, at 276–82.

Although Virginia was the most aggressive in using legal ethics as a legal cudgel against the NAACP, other states, including Georgia, Mississippi, and South Carolina, also expanded their regulation of the legal profession in the wake of *Brown* in efforts to undermine the work of the NAACP.³¹ In 1956, a Texas judge issued an injunction against the NAACP for violations of professional legal ethics.³² NAACP attorney Robert Carter would later estimate that the NAACP was involved in some twenty-five cases across the South involving state efforts to attack the organization through legal ethics regulations.³³

3. *Student Discipline*

Since so many leading activists in the civil rights struggle were young people—many of whom were still in high school or college—defenders of the racial status quo used student discipline as a tool of social control aimed at quelling civil rights activity. In the wake of *Brown*, South Carolina targeted activism within its black colleges, forcing student expulsions and faculty purges.³⁴ In response to a 1960 sit-in protest in Montgomery, Alabama, Governor Patterson ordered Alabama State's college's board of trustees to expel nine students who had taken part and to place twenty others on probation.³⁵ The board complied.³⁶ As the sit-in movement spread across the South, the Tennessee Board of Education issued disciplinary guidelines for students in state universities that included the requirement that college presidents “dismiss promptly any student . . . who shall, in the future, be arrested and convicted on charges involving personal misconduct.”³⁷ Following their arrest for taking part in the Freedom Rides in 1961, thirteen African-American students at Tennessee Agricultural and Industrial State University were expelled under these guidelines.³⁸ The sit-ins also led to student expulsion from Southern University in Louisiana and

31. See TUSHNET, *supra* note 8, at 274.

32. See *id.* at 272–73. Although the Texas state attorney general's pursuit of the NAACP was motivated by his animosity toward the civil rights group, in this instance a local NAACP lawyer had clearly violated the state's prohibition on providing financial support for clients. See *id.* at 273. As Mark Tushnet explains, “Unfortunately for the NAACP and the LDF, much of what their lawyers did resembled . . . classical [professional] ethical violations.” *Id.* at 274.

33. ROBERT L. CARTER, *A MATTER OF LAW: A MEMOIR OF STRUGGLE IN THE CAUSE OF EQUAL RIGHTS* 158 (2005).

34. See BARTLEY, *supra* note 13, at 230–32.

35. See J. MILLS THORNTON III, *DIVIDING LINES: MUNICIPAL POLITICS AND THE STRUGGLE FOR CIVIL RIGHTS IN MONTGOMERY, BIRMINGHAM, AND SELMA* 30 (2002); Julius Duscha, *School Ousts 9 Negroes; Students Vote to Strike*, WASH. POST, Mar. 3, 1960, at D5.

36. See *Dixon v. Ala. State Bd. of Educ.*, 294 F.2d 150, 151 (5th Cir. 1961); *Knight v. State Bd. of Educ.*, 200 F. Supp. 174, 176 (M.D. Tenn. 1961).

37. *Knight*, 200 F. Supp. at 176 (quoting the board's disciplinary guidelines).

38. See *id.*

Vanderbilt University in Tennessee.³⁹ In Mississippi, student protests led to the firing of a college president and dismissal of a student council president.⁴⁰

4. *Regulating Demonstrations*

Segregationists also used the law to prevent or discourage various forms of civil rights protests. For example, on March 5, 1960, in advance of a major planned protest in Montgomery, L.B. Sullivan issued a typical statement declaring that “[i]f the Negroes persist in flaunting their arrogance and defiance by congregating at the Capitol Sunday the police will have no alternative but to take whatever action that might be necessary to disperse them.”⁴¹ Police crackdowns on protest activist, in Montgomery and elsewhere, included arrest on various charges. When demonstrators marched without permits or having been refused permits, civil rights leaders found themselves in court for having organized illegal street protests.⁴² Police also brought disorderly conduct charges against protesters when their actions led to violent confrontations with segregationists (typically instigated by the segregationists themselves).⁴³ In some instances, police found the mere act of challenging racial norms—such as taking a seat at a whites-only lunch counter—grounds for charges of disorderly conduct.⁴⁴

5. *Tax Prosecutions*

Another tactic in the legal attack on the Civil Rights Movement was to charge the Movement’s leaders and organizations with violating tax law. Southern state legislatures targeted the NAACP for inquiries related to tax payments.⁴⁵ Most famously, Alabama went after Martin Luther King on tax evasion charges.⁴⁶ In early 1960, Governor John Patterson ordered the state revenue authorities to charge King with tax evasion and perjury related to the filing of his tax forms. Alabama prosecutors claimed he had used

39. See Daniel H. Pollitt, *Dime Store Demonstrations: Events and Legal Problems of First Sixty Days*, 1960 DUKE L.J. 315, 347.

40. See BARTLEY, *supra* note 13, at 233.

41. L.B. Sullivan, Montgomery Pub. Safety Comm’r, Statement (Mar. 5, 1960), available at <http://digital.archives.alabama.gov/cdm/singleitem/collection/voices/id/3445/rec/7>.

42. See, e.g., *Shuttlesworth v. Birmingham*, 394 U.S. 147, 149 (1969).

43. See, e.g., TAYLOR BRANCH, *PARTING THE WATERS: AMERICA IN THE KING YEARS, 1954–63*, at 278–79 (1988).

44. See, e.g., *Garner v. Louisiana*, 368 U.S. 157, 160 (1961).

45. See BARTLEY, *supra* note 13, at 213.

46. See BRANCH, *supra* note 43, at 276–77.

money from his civil rights organization, the Southern Christian Leadership Conference (SCLC), for his personal use and not reporting it on his tax returns.⁴⁷ A committee formed to defend King against these charges put out a memorandum asking, “What is the purpose of this indictment?” The answer:

It seeks to harrass [sic] Dr. King and to discredit him and deprive him of his freedom of action in the movement for freedom of all Negroes. It has no other real purpose. This is but one in a long series of outrageous actions by the Dixiecrats to victimize, cripple, and to murder Dr. King. He has been arrested five times on trumped-up charges. His home has been bombed. His life has been threatened countless times.⁴⁸

This transparent (if ultimately unsuccessful) effort to attack King and undermine the civil rights cause was the catalyst for the fundraising advertisement that set the *Sullivan* case in motion.⁴⁹

6. *Protecting Private Property*

In response to the student lunch counter sit-in movement of 1960, segregationists turned to trespass law.⁵⁰ By the time of the sit-ins, most Southern jurisdictions had either repealed or were no longer enforcing official segregation policy as applied to public accommodations.⁵¹ So the core legal issue of the sit-ins, defenders of segregation argued, was not state support of racial discrimination, but state support of the property rights of private business enterprises. The racially discriminatory choice was not being made by the government, but by private individuals, and therefore was not constrained by the non-discrimination requirement of the Fourteenth Amendment. Luther Hodges, the governor of North Carolina,

47. See THORNTON, *supra* note 35, at 117–18, 615 n.147.

48. Statement on the Indictment of Martin Luther King, Jr., Comm. to Defend Martin Luther King, Jr. (Mar. 3, 1960), available at <http://www.thekingcenter.org/archive/document/statement-indictment-mlk>.

49. On March 19, 1960, the *New York Times* ran an editorial in support of King and the civil rights cause. Editorial, *Amendment XV*, N.Y. TIMES, Mar. 19, 1960, at 20. It concluded with a call to Congress to “heed their rising voices, for they will be heard.” *Id.* This phrase served as the title of the March 29 advertisement that the Committee to Defend Martin Luther King ran to raise money for King’s legal defense. The advertisement did its job, the lawyers did their job, and, to the surprise of many, an all-white Alabama jury acquitted King of the perjury and tax evasion charges. See BRANCH, *supra* note 43, at 289.

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

51. *Id.*

had a draft statement prepared for business owners who ran segregated lunch counters. It included the following language:

At the beginning of these demonstrations, we elected not to bring trespass charges in against any persons, notwithstanding the fact that in all of the states in question the laws have clearly given us this legal right. . . . We believe that the Nation itself is entitled to see an end to the disorder, and to see that whatever questions remain to be settled shall be settled in a civilized manner and in accordance with law.⁵²

Here we have yet another example of segregationists attempting to find constitutional shelter by relying on racially neutral laws in their effort to advance a race-conscious defense of Jim Crow.

7. *Quieting the Opposition*

And then there was the tactic at issue in *Sullivan*: the effort to use the law to quiet the voices of the opposition.

Frustration with Northern press coverage of the South was a central element of the segregationist psyche during the Civil Rights Movement. In the aftermath of *Brown*, South Carolina journalist Thomas R. Waring complained that “the metropolitan press almost without exception has abandoned fair and objective reporting of the race story. For facts it frequently substitutes propaganda.”⁵³ Ross R. Barnett, the arch-segregationist governor of Mississippi, was so exercised about what he saw as the “distorted and unfair treatment” of the sit-ins by the national media that he tried to get his fellow Southern governors to join him in demanding an opportunity on all major media outlets to present “the other side of the story—our side—to the American public.”⁵⁴ Prior to initiating his lawsuit against the *New York Times*, Commissioner Sullivan issued a statement condemning the “prejudiced Northern press” and “their program of racial strife and exploitation for financial gain and spectacular distorted news

52. *Id.* (quoting Untitled draft of statement on sit-ins by Woolworth’s, n.d., [labeled “not used”], Governor’s Papers: Luther Hartwell Hodges, General Correspondence, 1960, Box 522, Folder: “Segregation—Lunch Counters (Negro) 1960,” North Carolina State Archives, Raleigh, North Carolina).

53. Thomas R. Waring, *The Southern Case Against Desegregation*, HARPER’S MAGAZINE, Jan. 1956, at 39, 39. *See also Personal and Otherwise: Man Here Wants to Be Heard*, HARPER’S MAGAZINE, Jan. 1956, at 22, 22 (noting that Southern segregationists “believe—with some reason—that they have been denied a hearing in the national press”).

54. Ross R. Barnett to Luther H. Hodges, Apr. 18, 1960, Governor’s Papers: Luther Hartwell Hodges, General Correspondence, 1960, Box 523, Folder: “Segregation—‘Sit Down’ Situations, A-F,” North Carolina State Archives, Raleigh, North Carolina.

coverage.”⁵⁵ Sullivan’s libel suit was a response to what segregationists saw as a major problem for their cause.

The Sullivan suit was just one of several libel suits based on the same *New York Times* fundraising advertisement. Alabama Governor John Patterson filed a suit against the *Times* for \$1 million;⁵⁶ Montgomery Mayor Earl James, City Commissioner Frank Parks, and former City Commissioner Clyde Sellers filed suits for \$500,000 each.⁵⁷ By the time the *Sullivan* case made it to the Supreme Court, the *James* case was pending on motion for new trial after a verdict of \$500,000.⁵⁸ The *Patterson*, *Parks*, and *Sellers* cases—in which the damages demanded totaled \$2 million—never reached trial.⁵⁹ The *New York Times* successfully had the cases removed to federal court, only to have the Fifth Circuit Court of Appeals reverse the removal order; at the time of the *Sullivan* trial, the appeals court ruling was under petition for certiorari in the U.S. Supreme Court.⁶⁰

Segregationists launched several other libel suits in an effort to counter the rising tide of civil rights activity. A sheriff in Alabama sued the publisher of *Ladies Home Journal* for \$3 million based on an article it ran by Lillian Hellman about police brutality during civil rights demonstrations in 1963.⁶¹ CBS was being sued for \$1.5 million for a news program on voting disfranchisement in Montgomery.⁶² Harrison Salisbury and the *Times* were being sued for a page-one article Salisbury wrote in April 1960 about race relations in Birmingham.⁶³ Salisbury’s assessment of the situation was blunt:

Every channel of communication, every medium of mutual interest, every reasoned approach, every inch of middle ground has been fragmented by the emotional dynamite of racism, reinforced

55. L.B. Sullivan, Montgomery Pub. Safety Comm’r, Statement (Mar. 5, 1960), available at <http://digital.archives.alabama.gov/cdm/singleitem/collection/voices/id/3445/rec/7>. See also JAMES W. ELY, JR., *THE CRISIS OF CONSERVATIVE VIRGINIA: THE BYRD ORGANIZATION AND THE POLITICS OF MASSIVE RESISTANCE* 99 (1976) (describing complaints from Virginia’s segregationist leaders about anti-Southern bias in Northern press).

56. See ANTHONY LEWIS, *MAKE NO LAW: THE SULLIVAN CASE AND THE FIRST AMENDMENT* 13 (1991).

57. See *id.*

58. See *id.* at 35.

59. See *id.* at 35–45.

60. See *Parks v. New York Times*, 195 F. Supp. 919, 925 (M.D. Ala. 1961); *Parks v. New York Times*, 308 F.2d 474, 481 (5th Cir. 1962); Petition for Writ of Certiorari, *New York Times v. Parks*, 376 U.S. 949 (1964) (No. 52).

61. See KERMIT L. HALL & MELVIN I. UROFSKY, *NEW YORK TIMES V. SULLIVAN: CIVIL RIGHTS, LIBEL LAW, AND THE FREE PRESS* 85 (2011).

62. See *id.*

63. Harrison E. Salisbury, *Fear and Hatred Grip Birmingham*, N.Y. TIMES, Apr. 12, 1960, at 1.

by the whip, the razor, the gun, the bomb, the torch, the club, the knife, the mob, the police and many branches of the state's apparatus.⁶⁴

"[N]either blacks nor whites talk freely" in Birmingham, he wrote.⁶⁵ "Telephones are tapped . . . [M]ail has been intercepted and opened. . . . The spy [has] become a fact of life."⁶⁶ (The *Times* editors did cut a paragraph in which Salisbury compared Birmingham to "Moscow in the Stalin days" and Germany under Hitler.)⁶⁷ The *Birmingham News* reprinted Salisbury's story under the headline "*New York Times* Slanders Our City—Can This Be Birmingham?"⁶⁸ The paper's editors described the story as "maliciously bigoted, noxiously false, viciously distorted."⁶⁹ Lawsuits followed in short order. All three of the Birmingham city commissioners, along with the Birmingham city detective, sued Salisbury and the *Times*.⁷⁰ Officials from Bessemer County, a rural area outside Birmingham, which Salisbury portrayed as even more oppressive than Birmingham, filed their own libel suits.⁷¹ In addition to the civil suits, Salisbury was indicted, in September 1960, on forty-two counts of criminal libel.⁷²

Those who were pursuing these libel suits and those who were supporting their efforts were hardly trying to hide what they were doing. Following the verdict in the *Sullivan* trial, the *Alabama Journal* expressed its hopes that the half-million-dollar award would cause the Northern press "to make a re-survey of their habit of permitting anything detrimental to the South and its people to appear in their columns."⁷³ The *Montgomery Advertiser* ran an article about all the pending libel suits under the headline "State Finds Formidable Legal Club to Swing at Out-of-State Press."⁷⁴ The content of the article was as unsubtle as its title: "State and city authorities have found a formidable legal bludgeon to swing at out-of-state newspapers whose reporters cover racial incidents in Alabama."⁷⁵

64. *Id.*

65. *Id.*

66. *Id.*

67. HARRISON E. SALISBURY, WITHOUT FAVOR OR FEAR: AN UNCOMPROMISING LOOK AT THE *NEW YORK TIMES* 381 (1980).

68. *Id.* at 233.

69. *Id.*

70. Brief of the American Civil Liberties Union and the New York Civil Liberties Union as Amici Curiae at 6, *New York Times v. Sullivan*, 376 U.S. 254 (1964) (Nos. 39 & 40) [hereinafter *ACLU Brief*] (citing Record of the Case).

71. *Id.*

72. *Id.*

73. HALL & UROFSKY, *supra* note 61, at 84.

74. *Id.*

75. See *ACLU Brief*, *supra* note 70, at 6.

B. “Race-Neutral” Laws and the Legal Attack on the Civil Rights Movement

One way to understand how race-conscious discrimination intersected with these formally race-neutral legal tools is to consider where in the legal decision-making process the racially discriminatory choice was located. For direct legal defenses of Jim Crow, the choice to discriminate was at the highest level. Through the promulgation of race-conscious policy, lawmaking bodies commit themselves to racial discrimination. In passing a segregation requirement, the state legislature or city council made the formal decision to discriminate.

Moving along my aforementioned spectrum toward more indirect tactics of the legal counterattack on the Civil Rights Movement—toward, that is, more formally race-neutral legal tools—we can see that the locus of racially discriminatory choice has moved from the level of lawmaking to the level of enforcement. Race-neutral policy empowered state actors, through the granting of discretion, to enforce the policy in a racially discriminatory manner. Here we find the unequal enforcement of the criminal justice system, such as charging Martin Luther King with minor traffic violations or prosecuting him for perjury related to tax returns, or the prosecution of peaceful civil rights activists on charges of disorderly conduct. The shift toward these more indirect methods was often quite conscious. Across the South, for example, city councils and state legislatures, responded to the outbreak of sit-ins by strengthening legal regulations that could be used to quell the protests, such as disorderly conduct or trespass regulations.⁷⁶

Finally, at the far end of the spectrum, we find the state enforcement of race-neutral policy in which the racially discriminatory choice was left to a private actor. In these cases, the locus of discretion passed (as a formal matter, at least) from state to private initiative. One clear example of this was the use of trespass law, which required a business proprietor to choose to press charges, as a tool for enforcing racial discrimination in privately owned public accommodations.⁷⁷

76. See, e.g., *Senate Plows Into Last Days Passes 2 Segregation Bills*, ATLANTA CONSTITUTION, Feb. 19, 1960, at 1, 12 (“The words ‘integration’ and ‘segregation’ were not used in discussions of the bills, although it was pretty clear that they were intended as reinforcements to the state’s anti-integration armor.” The sponsor of the bill explained: “Some suggestion has been made that the law might be used in connection with some of our present problems and perhaps it might be. But basically it’s a good law to protect your property.”); *Nesmith v. Alford*, 318 F.2d 110, 119 (5th Cir. 1963) (describing how in response to the sit-in movement the city council in Montgomery, Alabama, repealed its restaurant segregation ordinance and strengthened its disorderly conduct ordinance).

77. See Schmidt, *supra* note 50.

The use of libel suits to attack critics of white supremacy falls around the middle of this spectrum. On the one hand, like a trespassing charge by a lunch counter operator, these lawsuits were private law actions; the government itself was not a party to the suit. The suits were not official, government-sanctioned, or government-funded actions. (Although in many instances there was clear government involvement behind the scenes.⁷⁸) On the other hand, the initiators of the libel suits were, in most cases, not private actors but public officials. They were suing ostensibly to defend their personal reputation, but that reputation had been challenged because of their role in defending the state's white supremacist policies. When the issue got to the Supreme Court, the fact that the plaintiffs were public officials who were being criticized for their public actions would be a critical factor in the outcome of the case.⁷⁹

Framing the legal tools of the counterattack against the Civil Rights Movement in terms of this spectrum illuminates its central underlying legal logic. It allows us to see a trend over the course of the Civil Rights Movement: defenders of the racial status quo responded to unfavorable court opinions and changing national attitudes toward flagrant racial discrimination, by increasingly relying on race-neutral tactics. The more direct—i.e., the more flagrantly race-conscious—the attack, the easier it was for the federal courts to place themselves on the side of the Civil Rights Movement because racially discriminatory choice squarely resided in official state policy. The most resounding Supreme Court defeats for segregationists came in cases where the racial animus behind the prosecution of civil rights activists was most transparent, such as in Alabama's passage of laws designed specifically to attack the NAACP.⁸⁰ In contrast, in those cases where the legal tools were more long-standing and not designed for the task of attacking the Civil Rights Movement, the Supreme Court often struggled to locate doctrinal rationales that would turn back the attack.⁸¹ In cases such as *Sullivan*, in which a legal attack with a tool from the more race-neutral end of the spectrum nonetheless resulted in a sweeping defeat for the segregationist cause, a major transformation of existing constitutional doctrine was required.

In the next Part, I consider in more detail the impact of the legal attack on the Civil Rights Movement, including the difficulties it posed for the courts.

78. See *infra* notes 167–170 and accompanying text.

79. *Sullivan*, at 282.

80. See, e.g., *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 467 (1958).

81. See, e.g., *Bell v. Maryland*, 378 U.S. 226 (1964).

II. ASSESSMENT

Did the legal attack on the Civil Rights Movement work? In short, no. The Civil Rights Movement succeeded, even thrived for a time. Jim Crow was expunged from the land. White supremacy, at least in its most virulent, bluntest forms, was ended. In retrospect, the defenders of segregation's efforts to use the law to undermine the work of civil rights activists appear more a desperate last stand than a real threat to a revolution whose time had come.

But this is telling only half the story. A more adequate answer to this question requires considerably more nuance and more attention to detail and variability. For some of the legal attacks were quite effective, at least in the short term. Others were less so. In this Part, I use the libel-law challenge to the Civil Rights Movement as a case study to examine the impact of this kind of race-conscious use of race-neutral laws. I consider the issue on three levels: first, the impact on the movement to defend Jim Crow; second, the fate of these legal attacks in the Supreme Court; and third, their impact on civil rights activity.

A. *Mobilizing the Segregation Movement*

My approach to *Sullivan* assumes that the campaign to oppose the Civil Rights Movement, like the Movement itself, is best understood as, in part, an instance of what sociolegal scholars call legal mobilization.⁸² Law, that is, served as a focal point in bringing together the segregationist movement. I consider in particular the way segregationist litigation served to unite and energize their efforts. The court-based challenge to the Civil Rights Movement helped serve two goals that are critical to effective movement mobilization: it created opportunities for intermediate, small-scale victories, and it offered opportunities for building alliances within the movement.

1. *Small Victories*

Any effective social movement requires both big goals and small, more achievable goals. For those mobilizing against the Civil Rights Movement, the big goal was to kill the movement and to defend the white supremacist

82. See generally CHARLES R. EPP, *THE RIGHTS REVOLUTION: LAWYERS, ACTIVISTS, AND SUPREME COURTS IN COMPARATIVE PERSPECTIVE* 3, 17–20 (1998); MICHAEL W. MCCANN, *RIGHTS AT WORK: PAY EQUITY REFORM AND THE POLITICS OF LEGAL MOBILIZATION* 58 (1994); Paul Burstein, *Legal Mobilization as a Social Movement Tactic: The Struggle for Equal Employment Opportunity*, 96 AM. J. SOC. 1201 (1991); Frances Kahn Zemans, *Legal Mobilization: The Neglected Role of Law in the Political System*, 77 AM. POL. SCI. REV. 690 (1983).

practices that had defined the South for generations. By the late 1950s and early 1960s, this was a rapidly falling star. It was the dream of racial demagogues like George Wallace and Bull Connor;⁸³ it was not a realistic goal around which to mobilize a broad-based social movement. But there were countless smaller battles to be won, and these smaller victories served an important role in rallying the troops, in demonstrating the power of white resistance even as the larger verdict of history was becoming clearer and clearer.

The *Sullivan* case shows this dynamic in action. Southern white proponents of these libel suits saw them as a demonstration of defiance. They produced immediate results, calling to account the arrogant Northern press; in the case of *Sullivan*, forcing them to admit their mistakes; and exposing some less-than-flattering internal practices of the great *New York Times*. The Southern press touted the victory at trial in November 1960 as a major breakthrough, as a possible new line of defense against the surging forces of the Civil Rights Movement.⁸⁴ When the Alabama Supreme Court upheld the *Sullivan* verdict in August 1962,⁸⁵ civil right opponents had another victory to celebrate. The Supreme Court did not overturn the libel verdict until some four years after L.B. Sullivan first launched his suit, and during this time, segregationists had plenty of opportunity to declare that the courts had found truth to be on their side.

2. *Building Alliances*

More indirect approaches to defending white supremacy also had the potential of creating powerful alliances across ideological and class lines that divided the white South. Although elites in Southern society had long been complicit with the lynch-law tactics white Southerners used to police the boundaries of Jim Crow, many viewed the most blatant exercises of lawlessness as largely the weapon of the disempowered, the lower class. These elites sought to distance themselves from people like Montgomery Police Commissioner Bull Connor, who famously declared “Damn the law—down here we make our own law.”⁸⁶ Massive resistance to school desegregation too was a blunt tool. It was, explained legal historian Anders Walker, the favored policy of “less sophisticated voters” who were unable to recognize the benefits of a less confrontational approach.⁸⁷ These openly defiant tactics were often disfavored by the powerful, the wealthy, the

83. See Wallace, *supra* note 10; Salisbury, *supra* note 63.

84. HALL & UROFSKY, *supra* note 61, at 84.

85. *New York Times Co. v. Sullivan*, 144 So. 2d 25, 52 (Ala. 1962), *rev'd* 376 U.S. 254 (1964).

86. Salisbury, *supra* note 63.

87. See WALKER, *supra* note 2, at 44–45 (2009).

educated in the white South, particularly when every act of violence increased the risk of federal intervention.⁸⁸ The use of the legal process as a primary mechanism for attacking the Civil Rights Movement created the possibility of alliances between diehard segregationists and more moderate defenders of Jim Crow, an alliance that often crossed class lines.

The history of the *Sullivan* case shows how this tactic allowed for some powerful alliances to form among the oftentimes fractious white Southerners. Consider, for example, Merton Roland Nachman, the lawyer who was instrumental in launching Sullivan libel suit and who argued it before the Supreme Court. A native Alabaman and graduate of Harvard College and Law School, Nachman served as Alabama's assistant attorney general in the early 1950s before going into private practice.⁸⁹ Nachman was no hardcore segregationist. He identified with the more moderate segregationist position, one that sought to stand up against both civil rights activists and diehard segregationism.⁹⁰ In the 1948 presidential election he sided with President Truman against Strom Thurmond when Thurmond led a Southern revolt against the President.⁹¹ According to one historical account, he "held L.B. Sullivan and the other city commissioners in contempt for their race demagoguery and their connections to lower-class whites on the east side."⁹²

The other person who played an integral role in advancing Sullivan's suit was Grover Hall, the editor of the *Montgomery Advertiser*. Among white supporters of segregation during this time, Hall was a moderate.⁹³ His father had won a Pulitzer Prize for editorials against the Klan. During the Montgomery Bus Boycott, Hall had urged a moderate path⁹⁴—a choice that lost his paper advertising and subscription revenues⁹⁵ but earned him the praise of none other than Martin Luther King, Jr., who wrote Hall a letter in 1957 praising him for his paper's coverage of the civil rights struggle.⁹⁶ When L.B. Sullivan allowed the KKK free reign to attack a civil rights demonstration, Hall denounced the violence and the police complicity in the attacks in the pages of the *Advertiser*.⁹⁷ Like Nachman,

88. On the class and ideological divisions among white Southerners during the civil rights struggle, see generally CRESPIANO, *supra* note 15.

89. See HALL & UROFSKY, *supra* note 61, at 24–25.

90. See *id.* at 25.

91. See *id.*

92. *Id.* at 43–44.

93. See *id.* at 28–29.

94. See *id.* at 29.

95. See *id.*

96. See Letter from Martin Luther King, Jr. and Assocs. to Grover Hall, Editor, *Montgomery Advertiser* (Jan. 11, 1957), available at <http://www.thekingcenter.org/archive/document/letter-mlk-and-associates-mr-grover-hall>.

97. See HALL & UROFSKY, *supra* note 61, at 14.

Hall disliked Sullivan, seeing him as a representative of lower-class white segregationists, rather than the more refined version that he felt he represented.⁹⁸

But Hall, like Nachman, disliked the way the Northern press represented race relations in the South. The “Heed Their Rising Voices” advertisement in the *Times* enraged him. He rattled off an editorial in the *Advertiser* denouncing the ad as filled with “[l]ies . . . and possibly willful ones on the part of the fund-raising novelist who wrote those lines to prey on the credulity, self-righteousness and misinformation of northern citizens.”⁹⁹ The turn to libel law was not a stretch for these people who saw it as a critical tool for protecting individual honor.¹⁰⁰ Nachman in particular had experience with libel suits that predated his involvement with *Sullivan*. In 1957, he had represented three Montgomery city commissioners in a \$750,000 libel suit against a New York City magazine that had published an exposé on prostitution and gambling in Montgomery.¹⁰¹ In 1958, he won a suit against *Jet* magazine for an error-ridden article written about a black Montgomery citizen.¹⁰²

Thus, one point of convergence for many varieties of segregationism was condemnation of Northern media coverage of the South. When George Wallace went on NBC’s *Meet the Press* in 1963, he emphasized two points in particular: the racial situation in the South was not as bad as Northerners assumed, and the racial situation in the North was worse than Northerners realized.¹⁰³ “The people of this country have been victimized by the press,” he declared.¹⁰⁴ Accompanying Wallace during his trip north for his national media debut was none other than Grover Hall.¹⁰⁵ These two defenders of Southern segregation, one a relative moderate, the other an uncompromising firebrand, had found common ground by turning their antipathy toward what they saw as the North’s skewed press coverage of the South.

Those who supported segregation but not the defiant, violent stance of the most hardcore segregationists were willing to commit themselves to a Southern attack on northern criticism of the South. The libel suit against the *New York Times* served to unite Nachman, Hall, and other members of the

98. See *id.* at 29, 43–44.

99. HALL & UROFSKY, *supra* note 61, at 29 (quoting Editorial, MONTGOMERY ADVERTISER, Apr. 7, 1960); see also *Alabamians Assail Ad Backing Dr. King*, N.Y. TIMES, Apr. 8, 1960.

100. This is a central theme of HALL & UROFSKY, *supra* note 61.

101. See HALL & UROFSKY, *supra* note 61, at 25–26.

102. See *id.* at 25–26.

103. See GENE ROBERTS & HANK KLIBANOFF, THE RACE BEAT: THE PRESS, THE CIVIL RIGHTS STRUGGLE, AND THE AWAKENING OF A NATION 327–28 (2006).

104. *Id.* at 327.

105. See *id.* at 326.

white moderate segregationist elite in Montgomery with L.B. Sullivan and his allies. Libel law litigation thus provided movement mobilization benefits for the segregationist cause.

B. On Appeal—The Legal Challenge in the Federal Courts

The legal attack on the Civil Rights Movement had a mixed record in the federal courts. In the Supreme Court, the segregationists who sought to weaken the Civil Rights Movement through deploying race-neutral law faced a skeptical Supreme Court. The Justices understood these legal attacks for what they were—efforts to undermine the very civil rights cause to which the Court had so dramatically committed itself in *Brown*. The Justices understood that to attack civil rights activists, and particularly NAACP, whose primary mission in these years was to implement *Brown*, was not much different than attacking the Supreme Court (something segregationists did with enthusiasm following *Brown*). All of this is to say that when the legal attacks on the Civil Rights Movement made their way to the Supreme Court, the Justices were predisposed to come to the aid of those who were struggling to advance the cause of civil rights. Despite this fact, some of the cases that emerged out of the white South's legal campaign against the Civil Rights Movement proved difficult for the Court to resolve.

The Court struggled with these cases because the segregationists defended their use of these race-neutral laws on grounds other than white supremacy. Generally speaking, the more distant the legal tool was from a direct defense of Jim Crow—that is the more race-neutral the tool—the better chance it had of surviving legal challenge in the federal courts. In line with the *Brown* decision, direct defense of segregation was squarely rejected in the federal courts, and eventually in the court of public opinion. Although attempted defiance of school desegregation mandates was a difficult political issue, as a legal issue it was easy for the Court.¹⁰⁶ Alabama's efforts to kill off the NAACP similarly failed in federal court, although it proved a somewhat harder case.¹⁰⁷ But those tactics that were furthest from direct defenses of segregation, such as the use of trespass or libel law, posed more difficult issues for the Justices.

The cases arising out of the legal attack on the Civil Rights Movement thus produced some of the most challenging legal dilemmas for lawyers and Supreme Court Justices who sought to identify neutral principles of law to resolve these cases. Even when sympathies ran toward the cause of

106. See *Cooper v. Aaron*, 358 U.S. 1 (1958); see generally KLARMAN, *supra* note 3, at 328–29.

107. *NAACP v. Alabama*, 357 U.S. 449 (1958)

racial justice, the Justices struggled to locate the appropriate legal reasoning to apply to the cases. As Justice Harlan wrote in one of the cases the Supreme Court faced arising out of Virginia's effort to prosecute the NAACP on charges of violating ethics: "No member of this Court would disagree that the validity of state action claimed to infringe rights assured by the Fourteenth Amendment is to be judged by the same basic constitutional standards whether or not racial problems are involved."¹⁰⁸ Or, as legal scholar Harry Kalven wrote about the *Sullivan* case:

One problem among the many that the Court faces in cases of this kind is attributable to the fact that it cannot, like the man in the street, simply state the result that it likes. There may be compelling reasons for decision that it cannot offer publicly without jeopardizing its role and image as a court. The "hard" cases of constitutional law demand high judicial statesmanship.¹⁰⁹

The challenge, then, was to locate the appropriate legal standards.

The Justices had a variety of doctrinal paths they could follow in order to turn back the segregationist efforts to attack the Civil Rights Movement. In the following Subparts, I will use the legal arguments the defendants' lawyers used in the *Sullivan* case in order to explore these options.

1. *Equal Protection I—Racial Bias in Society*

One approach, which the lawyers defending the four ministers in *Sullivan* pressed on the Justices, was to argue that racial bias was so pervasive in Alabama society that there was nothing race-neutral about the use of a libel suit against civil rights proponents and their allies.¹¹⁰

The line between neutral and racially discriminatory law was, after all, something of a moving target. Herbert Wechsler, the Columbia law professor who represented the *New York Times* in *Sullivan*, had himself famously declared school segregation a confrontation between the opposing race-neutral associational rights and confessed that he could not identify a truly neutral principle to decide the constitutional issue.¹¹¹ It was in refuting Wechsler's analysis that Yale law professor Charles Black gave the classic expression of a realist-inflected rejection of neutral legal

108. NAACP v. Button, 371 U. S. 415, 448 (Harlan, J., dissenting).

109. Harry Kalven Jr., *The New York Times Case: A Note on "The Central Meaning of the First Amendment,"* 1964 SUP. CT. REV. 191, 200.

110. Petitioners' Reply to Respondent's Brief in Opposition at 13, *Abernathy v. Sullivan*, 371 U.S. 946 (1963) (No. 40).

111. See Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 34 (1959).

principles when it came to the Southern defense of segregation.¹¹² This was an argument based on context. The motivation behind the segregation policy was obviously one of white supremacy, Black explained, and it was on this basis that the laws must fall under the Equal Protection Clause of the Fourteenth Amendment.¹¹³ In *Sullivan* the ministers' lawyers pressed an analogous argument on the Justices.

Among the Justices who considered the *Sullivan* case, this kind of context-based, common-sense perspective on equal protection doctrine found a particularly receptive audience in Justice William O. Douglas. He had been calling for just this kind of approach in the series of cases the Court heard emerging from prosecutions resulting from the lunch counter sit-in protests.¹¹⁴ The sit-in cases presented a particular challenge for the Justices when the students were convicted on trespass charges. Although the owners of the privately operated public accommodations were obviously pursuing a policy of racial discrimination in enforcing their "white-only" lunch counter service policy, the question for the Court was whether the state's involvement, through enforcing an ostensibly race-neutral trespass law, constituted racial discrimination in violation of the Fourteenth Amendment.¹¹⁵ In a concurrence in a 1961 case out of Louisiana, Justice Douglas emphasized the state's "deep-seated pattern of segregation of the races."¹¹⁶ "Though there may have been no state law or municipal ordinance that *in terms* required segregation of the races in restaurants," he wrote, "it is plain that the proprietors in the instant cases were segregating blacks from whites pursuant to Louisiana's custom. Segregation is basic to the structure of Louisiana as a community; the custom that maintains it is at least as powerful as any law."¹¹⁷ Justice Douglas took much the same approach when the Court reviewed Virginia's

112. See Charles L. Black, *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421 (1960).

113. See *id.* at 421. "Simplicity is out of fashion, and the basic scheme of reasoning on which these cases can be justified is awkwardly simple. First, the equal protection clause of the fourteenth amendment should be read as saying that the Negro race, as such, is not to be significantly disadvantaged by the laws of the states. Secondly, segregation is a massive intentional disadvantaging of the Negro race, as such, by state law. No subtlety at all." *Id.*

114. See *Bell v. Maryland*, 378 U.S. 226, 260 (1964) (Douglas, J., concurring); *Garner v. Louisiana*, 368 U.S. 157, 179 (1961) (Douglas, J., concurring).

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

116. *Garner*, 368 U.S. at 179.

117. *Id.* at 181. See also *Bell*, 378 U.S. at 260 (Douglas, J., concurring) ("Segregation of Negroes in the restaurants and lunch counters of parts of America is a relic of slavery. It is a badge of second-class citizenship. It is a denial of a privilege and immunity of national citizenship and of the equal protection guaranteed by the Fourteenth Amendment against abridgment by the States. When the state police, the state prosecutor, and the state courts unite to convict Negroes for renouncing that relic of slavery, the 'State' violates the Fourteenth Amendment.").

prosecution of the NAACP on charges of violating legal ethical regulations.¹¹⁸ Although the laws at issue in that case were race-neutral, Douglas insisted that “[t]he fact that the contrivance used is subtle and indirect is not material to the question.”¹¹⁹ The Court must consider “the origins of the state law and the setting in which it operated,” at which point the law’s “discriminatory nature” becomes clear.¹²⁰

The ministers’ lawyers in *Sullivan* laid out this argument before the Supreme Court, insisting that the Court recognize the systemic nature of white supremacy in Southern society and the obvious motivation behind the lawsuits. “[T]he grave violations of petitioners’ fundamental constitutional guarantees are part and parcel of, and induced by Alabama’s notorious and undisputed massive statutory ‘cradle to grave’ system of racial segregation,” they argued in their brief.¹²¹ “These unprecedented libel prosecutions are clearly designed to punish and intimidate all who criticize Alabama’s unconstitutional exclusion of Negroes from juries, voting, public schools, libraries and other public and civic affairs.”¹²² They went on to attack “respondent’s incredulous assertions that ordinary ‘private’ libel actions are herein involved.”¹²³ The rash of libel suits, in fact, “are the direct results of state action and part and parcel of Alabama’s statutory racial segregation system.”¹²⁴

118. See *NAACP v. Button*, 371 U.S. 415, 446 (1963) (Douglas, J., concurring).

119. *Id.*

120. *Id.* Douglas also wanted to take this path in the school desegregation context. He criticized his colleagues when the Court refused to review pupil placement and grade-a-year plans in the late 1950s. See KLARMAN, *supra* note 9, at 331–32. Chief Justice Warren was also sympathetic to this context-based, common sense approach, as evident, most famously, in his decision striking down prohibitions on interracial marriage. *Loving v. Virginia*, 388 U.S. 1, 11 (1967) (describing Virginia’s prohibition of interracial marriages as “designed to maintain White Supremacy” and therefore a violation of the Equal Protection Clause).

121. Petitioners’ Reply Brief in Opposition at 13, *supra* note 110, at 13.

122. *Id.*

123. *Id.*

124. *Id.* As indicated in this quotation, a state-action issue lurked in the background of the *Sullivan* case. Sullivan’s lawyers, following the Alabama Supreme Court’s decision in *Sullivan*, 144 So.2d 25, 40 (Ala. 1962), argued that the Fourteenth Amendment did not apply to the libel suit because it was privately initiated. Brief for Petitioner at 29, *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964) (No. 39). Perhaps this state action argument would work against an equal protection claim based on a libel suit (the Supreme Court reserved the question of whether the defendants had a viable claim on these grounds). But the Court was not going to hold that the state action limitation would effectively immunize libel law from First Amendment scrutiny. Justice Brennan dealt with the issue relatively briefly in his decision. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 265 (1964) (“Although this is a civil lawsuit between private parties, the Alabama courts have applied a state rule of law which petitioners claim to impose invalid restrictions on their constitutional freedoms of speech and press. It matters not that that law has been applied in a civil action and that it is common law only, though supplemented by statute. The test is not the form in which state power has been applied but, whatever the form, whether such power has in fact been exercised.”). The brief for the *New York Times* gave somewhat more attention to this issue:

An amicus brief filed by the American Civil Liberties Union moved a step beyond these general references to the pervasive nature of segregationism to identify specific instances of official state involvement in and encouragement of Sullivan's libel suit.¹²⁵ The Alabama attorney general denounced the advertisement as containing "vicious, unfounded and malicious lies" and said he was considering legal action against its sponsors.¹²⁶ The attorney general also encouraged private suits. "File a multi-million dollar law suit," he was reported to have said to local officials.¹²⁷ Governor Patterson decided to sue because, in his words, the advertisement "constitutes a defamation of the citizens of Alabama."¹²⁸ The fact that *New York Times* reporter Harrison Salisbury was not only the target of private libel actions but also of state-initiated charges of criminal libel was but further evidence of the official nature of the libel-law attack on civil rights activity.

What the lawyers sought to do here was to shift the grounds of legal analysis. Rather than focus narrowly on the race-neutral law being used or on the lawsuit in isolation from surrounding circumstances, the lawyers insisted that the Court focus on the context in which the lawsuit operated. Ultimately the Justices never passed judgment on these legal claims. By deciding the issue on First Amendment grounds, the Court avoided these sweeping equal protection arguments.

2. *Equal Protection II—Racial Bias at Trial*

In addition to the broad, contextual equal protection claims, the ministers' lawyers offered a narrower claim of racial bias, one that focused on the circumstances of the Montgomery trial. They argued that because the trial was hopelessly infected with racial bias, the defendants were denied equal protection of the laws.¹²⁹ This was a "race trial," they argued in their brief to the Supreme Court.¹³⁰ "[F]rom first to last," the defendants were "placed in a patently inferior position because of the color of their skins. Throughout the trial below, the jury had before it an eloquent

The petitioner has challenged a State rule of law applied by a State court to render judgment carrying the full coercive power of the State, claiming full faith and credit through the Union solely on that ground. The rule and judgment are, of course, State action in the classic sense of the subject of the Amendment's limitations.

Brief for Petitioner, *supra*, at 39–40 (citing NAACP v. Alabama, 357 U.S. 449, 463 (1958); Barrows v. Jackson, 346 U.S. 249, 254 (1953); Shelley v. Kraemer, 334 U.S. 1, 14 (1948)).

125. See ACLU Brief, *supra* note 70, at 5.

126. *Alabamians Assail Ad Backing Dr. King*, N.Y. TIMES, Apr. 8, 1960.

127. ACLU Brief, *supra* note 70, at 5.

128. *Id.*

129. Brief for Respondent at 11–13, *Abernathy v. Sullivan*, 376 U.S. 254 (1964) (No. 40).

130. Brief for Petitioners at 52, *Abernathy v. Sullivan* 376 U.S. 254 (1964) (No. 40).

assertion of the inequality of the Negro in the segregation of the one room, of all rooms, where men should find equality, before the law.”¹³¹ The brief further argued:

Where Sullivan, a white public official, sued Negro petitioners represented by Negro counsel before an all-white jury, in Montgomery, Alabama, on an advertisement seeking to aid the cause of integration, the impact of courtroom segregation could only denote the inferiority of Negroes and taint and infect all proceedings, thereby denying petitioners the fair and impartial trial to which they are constitutionally entitled.¹³²

The trial was held in a segregated courtroom.¹³³ The African-American lawyers were denied the dignity of being referred to as “Mr.”; the trial transcript refers to them as “Lawyer.”¹³⁴

The lawyers had something of a smoking gun in the public record of the trial court judge, Walter B. Jones.¹³⁵ In a statement he had made in open court during the trial in one of the other libel suits based on the *New York Times* advertisement, which he heard subsequent to Sullivan’s trial (and conveniently published in Alabama’s bar journal), Judge Jones denounced the influx of “recognized rabble-rousers and negro racial agitators” into his courtroom.¹³⁶ He declared:

From this hour forward in keeping with the common law of Alabama, and observing the wise, time-honored customs and usages of our people, both white and black, which have done so much for the good of both races and the peace of the State, there will be no integrated seating in this courtroom. Spectators will be seated in this courtroom according to their race, and this for the

131. *Id.*

132. *Id.* at 53.

133. *Id.*

134. HALL & UROFSKY, *supra* note 61, at 52.

135. Petitioners’ Reply Brief in Opposition at 5, *supra* note 110 (“Respondent does not dispute or deny that the trial below took place in a racially segregated courtroom, or that the trial judge, Walter B. Jones, has expressly stated and proudly boasted of conducting trials in Alabama in segregated courtrooms where ‘white man’s’ justice governs and the Fourteenth Amendment is allegedly inapplicable.”); Oral Arguments at 32:08, *Abernathy v. Sullivan*, 376 U.S. 254 (1964) (No. 40).

During his years on the bench, Jones compiled a clear record as a staunch defender of segregation and racial discrimination. When the U.S. Supreme Court ordered the desegregation of Montgomery’s buses in 1956, thereby handing victory to the black community that had been boycotting the buses for over a year, Jones ordered that the segregation law no longer be enforced, but not before denouncing the Court as following “neither law nor reason.” *Segregation Ends on Busses in Montgomery*, STATES RIGHTS ADVOCATE, Dec. 25, 1956, at 1. On Jones, see generally HALL & UROFSKY, *supra* note 61, at 48–49.

136. Walter B. Jones, *Judge Jones on Court Room Segregation*, 22 ALA. LAW. 190, 190 (1961).

orderly administration of justice and the good of all people coming here lawfully.¹³⁷

To the contention that this policy ran afoul of the equal protection requirement of the Fourteenth Amendment, Judge Jones declared that “the XIV Amendment has no standing whatever in this Court, it is a pariah and an outcast” if it was understood to interfere with the internal operations of an Alabama courtroom.¹³⁸ He concluded his courtroom peroration with the following statement:

We will now continue with the trial of this case under the laws of the State of Alabama, and not under the XIV Amendment, and in the belief and knowledge that the white man’s justice, a justice born long centuries ago in England, brought over to this country by the Anglo-Saxon Race, and brought today to its full flower here, a justice which has blessed countless generations of whites and blacks will give the parties at the Bar of this Court, regardless of race or color, equal justice under law.¹³⁹

The ministers’ lawyers identified two specific episodes during the *Sullivan* trial that indicated the prejudiced atmosphere and the bias of the judge. One was Sullivan’s lawyers pronunciation of “Negro” as “Nigra” or “Nigger.” The defendants’ lawyer objected, but Judge Jones overruled the objection when the lawyer explained that this was always how he pronounced “Negro.”¹⁴⁰ The other was the closing argument by one of Sullivan’s lawyers, which included the line: “In other words, all of these things that happened did not happen in Russia where the police run everything, they did not happen in the Congo where they still eat them, they happened in Montgomery, Alabama, a law-abiding community.”¹⁴¹

137. *Id.* at 190–91.

138. *Id.* at 191.

139. *Id.* at 192.

140. Brief for Petitioners, *supra* note 130, at 54–55. When one of the defendant’s lawyers again made this complaint in one of the subsequent libel trials (this one by Montgomery Mayor Earl D. James), Judge Jones remained unpersuaded:

One of the lawyers for the four individual defendants here at the Bar of this court has made several loud objections to the pronouncing of the word NEGRO by counsel for the plaintiff, honorable members of the Bar of this court, men of education. These objections have been made with no citation of authority to sustain them and have nothing whatsoever to do with the merits of this case. They do not speed its orderly determination. The objections impress the Court as being grandstand plays to the Negro spectators in the court room. They are simply appeals to race prejudice. The objections are not sound in law. They lack good taste. The Court has for two days patiently borne them. Their further repetition will invoke the summary contempt power of the Court.

Jones, *supra* note 136, at 192.

141. Brief for Petitioners, *supra* note 130, at 54.

In *Sullivan*, the Supreme Court did not accept this line of argument.¹⁴² To overturn the *Sullivan* verdict on the grounds that this particular trial and this particular judge were so infected with racial bias so as to constitute a violation of the Equal Protection Clause would have achieved a just outcome for the case but it would have been a narrow ground for reversal. Furthermore, the claim that racial bias affected the outcome of the trial was not obviously correct. The trial was indeed segregated and it was indeed run in the atmosphere of racism and segregation—which is to say it was held in Montgomery in 1960. And it was incontrovertible that the trial judge was a fervent segregationist. But it was not obvious that Judge Jones had gone out of his way to inject racial bias into the *Sullivan* trial.¹⁴³ Indeed, at times he seemed to bend over backward to avoid the appearance that this was a trial about race or civil rights.¹⁴⁴

The law here—the libel law of Alabama, which basically stacked the deck in favor of the plaintiff in libel lawsuits—did the work for the cause of the segregationists.¹⁴⁵ The advertisement the civil rights activists ran in the *New York Times* was sloppy. It was hurriedly prepared, designed to evoke emotions (and open wallets), not to give an accurate account of the facts on the ground.¹⁴⁶ The *New York Times* had failed to follow its own review policies when it accepted and printed the ad.¹⁴⁷

Judge Jones knew all this. There was no need to rely on racial bias to secure the verdict he felt correct—the verdict he understood as serving to defend the segregationist status quo.

Like the minimalist approach the Justices relied upon in the sit-in cases, this kind of approach had the benefit of resolving the instant case in a just manner without rewriting existing legal doctrine. It served to create a kind of holding pattern. But it lacked the broader application for those who sought to remove this tool in the segregationist arsenal.

142. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 264 n.4 (1964).

143. See HALL & UROFSKY, *supra* note 61, at 49 (“In interviews with some of the lawyers afterward, one scholar found that while they spoke about Jones’s idiosyncracies off the bench, they all stated that he knew the law and had run the trial in a straightforward manner.”).

144. For example, in his jury instructions, Judge Jones declared that “whether [the defendants] belong to this race or that doesn’t have a thing on earth to do with this case but let the evidence and the law be the two pole stars that will guide you and try to do justice in fairness to all of these parties here.” HALL & UROFSKY, *supra* note 61, at 66.

145. See Kalven, *supra* note 109, at 196–97 (1964) (“Alabama did not create any special rules of law for these defendants. It simply applied the existing principles of the law of libel It is important to stress that the Alabama decision was not simply a sham.”).

146. See HALL & UROFSKY, *supra* note 61, at 21.

147. *Id.*

3. *Due Process*

Another approach demonstrated that the lack of evidence to sustain legal action violated the Due Process Clause. This was the most minimalist approach available, in that it would create very little in the way of new doctrine. But to argue that there was a complete absence of evidence was also a very high standard to meet. The key precedent here was *Thompson v. City of Louisville*,¹⁴⁸ in which the Court overturned a conviction for loitering and disturbing the peace, holding that because “the charges against petitioner were so totally devoid of evidentiary support,”¹⁴⁹ the conviction violated the defendant’s Fourteenth Amendment due process rights. This path was followed in the sit-in case of *Garner v. Louisiana*,¹⁵⁰ in which the Court found the disturbing-the-peace convictions “so totally devoid of evidentiary support” that they violated the defendant’s due process rights.¹⁵¹

In *Sullivan*, the defendants’ lawyers presented this line of argument, but the Justices did not accept it.¹⁵² Not only was this a very narrow approach, one that would have left many more rounds of litigation in the other pending libel suits, but it was also a difficult decision to justify, since *Sullivan*’s lawyers had a strong argument that the verdict was not unreasonable under the pro-plaintiff Alabama libel law.

4. *First Amendment*

The approach the Court actually took in *Sullivan* avoided the challenging evidentiary requirements raised by the equal protection and due process claims, relying instead on the First Amendment as the grounds for reversing the verdict.

The Court had used the First Amendment in several earlier cases challenging the Southern legal attack on the Civil Rights Movement. After Little Rock, Arkansas, sought to force the local NAACP to release its membership lists (based on a licensing requirement for organizations operating within its jurisdiction), the Court, in 1960, struck down the requirement as a violation of the First Amendment.¹⁵³ Freedom of speech and association, Justice Potter Stewart wrote for the Court, “are protected

148. *Thompson v. City of Louisville*, 362 U.S. 199 (1960).

149. *Id.* at 199.

150. *Garner v. Louisiana*, 368 U.S. 157 (1961).

151. *Id.* at 163; *see also* *Taylor v. Louisiana*, 370 U.S. 154 (1962) (per curiam) (overturning a breach-of-the-peace conviction for a sit-in protest in a whites-only waiting room in which there was no evidence of violence or disruption).

152. *See* *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 264 n.4 (1964).

153. *See* *Bates v. Little Rock*, 361 U.S. 516, 527 (1960).

not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference.”¹⁵⁴ The Court found “substantial uncontroverted evidence that public identification of persons in the community as members of the organizations had been followed by harassment and threats of bodily harm.”¹⁵⁵ It also found “evidence that fear of community hostility and economic reprisals that would follow public disclosure of the membership lists had discouraged new members from joining the organizations and induced former members to withdraw. This repressive effect, while in part the result of private attitudes and pressures, was brought to bear only after the exercise of governmental power had threatened to force disclosure of the members’ names.”¹⁵⁶

In *NAACP v. Alabama*,¹⁵⁷ the Court unanimously ruled that the First Amendment protected an implied “right to association” that would be violated if organizations could not protect the identities of their members.¹⁵⁸ The state interest in obtaining the membership lists in this case was not sufficient to overcome the First Amendment rights of the NAACP members.¹⁵⁹ When Florida demanded the membership lists of a local NAACP chapter so it could determine whether it was communist-influenced, the Court decided the case along lines parallel to *NAACP v. Alabama*. Since Florida had produced no evidence of communist influence in the NAACP chapter, its membership lists were protected under the right to association.¹⁶⁰

The First Amendment also served to block Southern efforts to attack the NAACP on the grounds of supposed violations of legal ethics. In *NAACP v. Button*, the Court held that public interest litigation was a form of political expression protected under the First Amendment.¹⁶¹ Justice Brennan explained that for groups who are unable to make themselves heard at the ballot box, such as African-Americans in the South, “litigation may well be the sole practicable avenue open to a minority to petition for redress of grievances.”¹⁶² (Although Justice Brennan did not ignore the obvious racial context of the case, making pointed reference to the fact that Virginia’s motivation behind prosecuting the NAACP was the “intense

154. *Id.* at 523.

155. *Id.* at 524.

156. *Id.*

157. *NAACP v. Alabama*, 357 U.S. 449 (1958).

158. *Id.* at 462.

159. *See also Bates*, 361 U.S. at 516 (holding that Little Rock could not require the local NAACP branch secretary to turn over the branch’s membership list); *Shelton v. Tucker*, 364 U.S. 479 (1960) (voiding the Arkansas requirement that all teachers submit an annual list of all organizations the teacher belonged to or contributed to).

160. *Gibson v. Fla. Legis. Investigation Comm.*, 372 U.S. 539 (1963).

161. *NAACP v. Button*, 371 U.S. 415 (1963).

162. *Id.* at 430.

resentment and opposition” of white Virginians to the NAACP’s civil rights activity.)¹⁶³

The Justices also relied on the First Amendment to protect civil rights protesters engaged in acts of civil disobedience. In *Edwards v. South Carolina*,¹⁶⁴ Justice Stewart described a demonstration held on the grounds of the state house as an exercise of First Amendment rights “in their most pristine and classic form.”¹⁶⁵ In *Cox v. Louisiana*,¹⁶⁶ the Court held that peaceful protesters who refused to leave jailhouse property when officials ordered them to were protected from prosecution under the First Amendment; and in *Brown v. Louisiana*,¹⁶⁷ the Court held that a public library sit-in was a form of expression protected under the First Amendment.¹⁶⁸

In *Sullivan*, while the lawyers for the ministers framed their appeal primarily in terms of equal protection, the lawyers for the *New York Times* rested their case squarely on the First Amendment. The case raised free speech concerns of the most fundamental nature:

Contrary to respondent’s incredible assertions and suggestions that this case is an ordinary “private” libel action, our Petition clearly shows that this action, and the four companion cases on substantially identical complaints (instituted by Governor Patterson, Mayor James and Commissioners Parks and Sellers of Montgomery), based on the identical New York Times ad against the identical defendants, and seeking a total aggregate judgment of two and a half million dollars therein . . . , together with the additional pending suits by Birmingham officials seeking a total of \$1,300,000 in damages against the Times based on the Harrison Salisbury articles on racial tensions, and the suits of \$1,500,000 by Alabama officials against the Columbia Broadcasting System, Inc., based on a television program on racial problems . . . , clearly present an ominous and unprecedented threat against basic constitutional liberties and will revive in new guise the long proscribed doctrines of “Seditious Libel”.¹⁶⁹

163. *Id.* at 435. On *Button*, see HARRY KALVEN, JR., *THE NEGRO AND THE FIRST AMENDMENT* 75–90 (1965) [hereinafter *THE NEGRO AND THE FIRST AMENDMENT*].

164. *Edwards v. South Carolina*, 372 U.S. 229 (1963).

165. *Id.* at 235.

166. *Cox v. Louisiana*, 379 U.S. 536 (1965).

167. *Brown v. Louisiana*, 383 U.S. 131 (1966).

168. *See also* *Garner v. Louisiana*, 368 U.S. 157, 185 (1961) (Harlan, J., concurring) (suggesting that the prosecutions of the sit-in protesters might raise a viable First Amendment claim).

169. Petitioners’ Reply Brief in Opposition at 12, *supra* note 110.

In response to the *Sullivan* decision, the press praised the Justices for the fact that they had *not* written a civil rights opinion, or at least not a ruling limited to the context of the civil rights struggle. “This decision establishes beyond question the freedom of debate necessary to the workings of democratic, constitutional government,” wrote the *Boston Globe*.¹⁷⁰ “It should discourage attempts to limit criticism of official conduct that appear from time to time, and not only in the South.”¹⁷¹

For critics of the sweeping First Amendment ruling in *Sullivan*, the Justices’ admirable effort to protect the civil rights movement led them astray.¹⁷² For admirers of the decision, the intersection of free speech principles and the civil rights struggle was a fortuitous development. Not only was the Civil Rights Movement achieving unprecedented gains for African-Americans, it was also elevating the First Amendment to newfound heights, argued Harry Kalven in a lecture delivered soon after the decision came down.¹⁷³ In its effort to protect the black freedom struggle, the Court, in cases such as *Button* and *Sullivan*, was embracing new speech-protective doctrines, which would ultimately serve to benefit the entire society. “[T]he Negro,” Kalven declared, was “winning back for us the freedoms the Communists seemed to have lost for us.”¹⁷⁴

C. *The Legal Attacks: Did They Work?*

1. *Assessing the Other Attacks*

Perhaps the most effective of the legal attacks on the Civil Rights Movement were the attacks on the NAACP. These efforts shut down the NAACP in Alabama for much of the late 1950s and early 1960s and they contributed to the plummeting of membership roles throughout the South.¹⁷⁵ They caused the NAACP to steer scarce resources to fending off

170. Editorial, *The Right to Criticize*, BOS. GLOBE, Mar. 11, 1964, at 10.

171. *Id.*; see also Editorial, *Free Press and Free People*, N.Y. TIMES, Mar. 10, 1964, at 36; *Free Press*, AMSTERDAM NEWS (New York), Mar. 14, 1964, at 12; *A True Charter of Press Liberty*, L.A. TIMES, Mar. 12, 1964, at A4; *Freedom to Criticize Your Government*, CHI. TRIBUNE, Mar. 10, 1964, at 16; *A Landmark Decision*, CHI. DEF., Mar. 17, 1964, at 13. In a subsequent editorial, the *Chicago Tribune* framed the issue as a regional one, but not necessarily a civil rights issue. The penchant for libel suits by public officials was characteristic of the Deep South, the editors noted, while in Illinois “even the lowliest and stupidest government official knows that suing for libel because of unwelcome attention . . . is neither politic nor profitable.” Editorial, *Hungry for Damages*, CHI. TRIBUNE, Apr. 7, 1964, at 24.

172. See, e.g., Richard A. Epstein, *Was New York Times v. Sullivan Wrong?*, 53 U. CHI. L. REV. 782 (1986).

173. See THE NEGRO AND THE FIRST AMENDMENT, *supra* note 163, at 6.

174. *Id.*

175. See KLARMAN, *supra* note 3, at 383; TUSHNET, *supra* note 8, at 284–89, 291.

these attacks, rather than launching their own legal challenges.¹⁷⁶ Although the NAACP eventually won their legal challenges in the Supreme Court, these only came after considerable delay, and they did nothing to counter the short-term costs.¹⁷⁷ As Mark Tushnet has summarized the situation, the NAACP's efforts to defend itself meant that "[Thurgood] Marshall and his staff could do little else. Resistance to segregation succeeded even when the courts rejected the resisters' legal claims."¹⁷⁸

There were some ironic benefits to this unfortunate turn for the Southern NAACP. As Michael Klarman has noted, the undermining of the NAACP in the South contributed to the rise of alternative organizations, with different organizational bases, and often with different techniques for advancing the battle for racial justice.¹⁷⁹ It was in these newly constituted organizations that the new wave of civil rights activism, based in direct-action techniques rather than litigation, would be based. One can locate similar ironic benefits for the Civil Rights Movement in the efforts to use trespass law as a way to suppress the lunch counter sit-ins. Getting thrown in jail for doing nothing more than sitting at a lunch counter and asking for a cup of coffee was an incredibly powerful image for the Civil Rights Movement—particularly when the student protesters amplified their protest by insisting on remaining in jail rather than paying bail and when, after being convicted in court, they chose jail sentences over fines.¹⁸⁰ The legal crackdown on the protests ultimately helped place the cause of nondiscrimination in public accommodations at the forefront of the national agenda, a development that would eventually lead to the including of a federal public accommodations provision in the Civil Rights Act of 1964.¹⁸¹

2. *Assessing the Libel-Law Attack*

The libel-law challenge to the Civil Rights Movement was a serious concern for movement activists and the northern press.¹⁸² But it was not the catastrophe-in-the-making for the press or for the Civil Rights Movement that it has often been portrayed as. Scholars have tended to exaggerate the effectiveness of many of these attacks, particularly the use of libel law at issue in *Sullivan*.

176. See KLARMAN, *supra* note 3, at 383; TUSHNET, *supra* note 8, at 273–74, 284.

177. See KLARMAN, *supra* note 3, at 383–84.

178. TUSHNET, *supra* note 8, at 300.

179. See KLARMAN, *supra* note 3, at 384.

180. See generally Schmidt, *supra* note 50.

181. See Schmidt, *supra* note 115, at 786–91.

182. See *supra* notes 56–75 and accompanying text.

There were unmistakable human costs to the *Sullivan* libel suit. The four ministers who were included in Sullivan's suit and their supporters spent considerable time raising money for their legal defense.¹⁸³ Following the trial, three of them had their cars seized by Alabama authorities, and Ralph Abernathy also had a piece of land seized; all were put up for auction, although the local court held onto the money pending the appeal.¹⁸⁴ In 1961, Fred Shuttlesworth left Alabama for Cincinnati, in part because of the libel suit.¹⁸⁵

Although even here, as with the legal attack on the NAACP and on the sit-in protesters, one can find an ironic upside. Much of the losses incurred as a result of the libel suit were covered by the ministers' supporters. When Joseph Lowry's car was sold at state auction, a church member bought it and sold it to Lowry's wife for a dollar; church members bought new cars for the other two ministers.¹⁸⁶ When, following the *Sullivan* ruling in the Supreme Court, the ministers got the value of their seized property returned to them, the money went back into the Movement.¹⁸⁷ Thus we can see a kind of Civil Rights Movement insurance in action, operating to ameliorate the harsh edge of the legal attack.

Scholarship on *Sullivan* has almost surely exaggerated the costs of the South's libel-law attack on the Civil Rights Movement.¹⁸⁸ To say that the threat posed by Alabama libel law was not as dire as scholars have made it out to be might not be saying all that much, since the claims have tended toward the apocalyptic.¹⁸⁹ Legal historians and First Amendment scholars have basically adopted the claims made by the lawyers for the *New York Times* and the four ministers,¹⁹⁰ claims that were echoed in the amicus

183. See LEWIS, *supra* note 56, at 162.

184. Ala. *Ministers Fight to Regain Property*, ATLANTA DAILY WORLD, Mar. 21, 1964, at 1; 4 in *Suit to Open Restitution Fight*, N.Y. TIMES, Mar. 10, 1964, at 24.

185. See LEWIS, *supra* note 56, at 162.

186. See *id.*

187. See *id.*

188. See, e.g., *id.* at 245; HALL & UROFSKY, *supra* note 61, at 204–05; Anders Walker, "Neutral" Principles: Rethinking the Legal History of Civil Rights, 1934-1964, 40 LOY. U. CHI. L.J. 385, 433–34 (2009).

189. See, e.g., RODNEY A. SMOLLA, SUING THE PRESS: LIBEL AND THE MEDIA 40 (1986); ROBERTS & KLIBANOFF, *supra* note 103, at 357 (the Supreme Court in *Sullivan* "would decide nothing less than how free the press really could be").

190. See, e.g., Brief for Petitioner, *supra* note 124, at 68 ("It is no hyperbole to say that if a judgment of this size can be sustained upon such facts as these, its repressive influence will extend far beyond deterring such inaccuracies of assertion as have been established here. This is not a time—there never is a time—when it would serve the values enshrined in the Constitution to force the press to curtail its attention to the tensest issues that confront the country or to forego the dissemination of its publications in the areas where tension is extreme."); Petition for a Writ of Certiorari at 16, *Abernathy v. Sullivan*, 376 U.S. 967 (1964) (No. 40) ("This case cries for review. The grave constitutional issues involved here and the impact of this decision on civil rights and the desegregation movement—burning issues of national and international importance—are clear and indisputable. What has happened here is

briefs submitted by the *Chicago Tribune*¹⁹¹ and the *Washington Post* and in Justice Black's *Sullivan* concurrence.¹⁹² In a typical assessment of the situation, a recent account of the role of the press in the Civil Rights Movement concluded that "[i]f the officials could win [these libel suits], they would almost certainly silence the civil rights movement in Alabama—as well as the newspaper that consistently covered it. Silence, not money, was the goal."¹⁹³

further evidence of Alabama's pattern of massive racial segregation and discrimination and its attempt to prevent Negro citizens from achieving full civil rights under our Constitution."); *id.* at 17–18 ("If this case stands unreviewed and unreversed, not only will the struggles of Southern Negroes toward civil rights be impeded, but Alabama will have been given permission to place a curtain of silence over its wrongful activities. This curtain of silence will soon spread to other Southern States in their similar attempts to resist civil rights and desegregation. For fear of libel and defamation actions in these States, people will fear to speak out against oppression; ministers will fear to assist the civil rights struggle which they did heretofore as part of their religious belief; national newspapers will no longer report the activities in the South.").

191. See Brief of Tribune Co. as Amicus Curiae at 2, *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964) (No. 39) ("We believe that in this context the several proceedings below were conceived to punish the *Times* for its integration views and to discourage all newspapers from printing such material. If Sullivan's \$500,000 judgment is sustained here, that purpose will be accomplished; nationwide news reporting and commentary, particularly in the civil rights area, will be effectively sterilized."); see also *id.* at 11 ("Clearly, the judgment below is an unconstitutional attempt to reincarnate the long-buried doctrine of seditious libel.").

192. *New York Times v. Sullivan*, 376 U.S. 254, 294–95 (1964) (Black, J., concurring). Black warned that state libel laws "threaten the very existence of an American press virile enough to publish unpopular views on public affairs and bold enough to criticize the conduct of public officials," and the facts in *Sullivan* demonstrated "the imminence and enormity of that threat." *Id.* at 294. Southern libel-law attacks on "persons who favor desegregation, particularly [on] so-called 'outside agitators,'" constitute a "deadly danger" to press coverage of the civil rights struggle, "[o]ne of the acute and highly emotional issues in this country." *Id.* at 294–95. Black summarized the situation:

There is no reason to believe that there are not more such huge verdicts lurking just around the corner for the *Times* or any other newspaper or broadcaster which might dare to criticize public officials. In fact, briefs before us show that in Alabama there are now pending eleven libel suits by local and state officials against the *Times* seeking \$5,600,000, and five such suits against the Columbia Broadcasting System seeking \$1,700,000. Moreover, this technique for harassing and punishing a free press—now that it has been shown to be possible—is by no means limited to cases with racial overtones; it can be used in other fields where public feelings may make local as well as out-of-state newspapers easy prey for libel verdict seekers. *Id.*

193. ROBERTS & KLIBANOFF, *supra* note 103, at 231; see also, e.g., MORTON J. HORWITZ, *THE WARREN COURT AND THE PURSUIT OF JUSTICE* 36 (1998); Garrett Epps, *The Civil Rights Heroes the Court Ignored in New York Times v. Sullivan*, *ATLANTIC MONTHLY*, Mar. 20, 2014, available at <http://www.theatlantic.com/national/archive/2014/03/the-civil-rights-heroes-the-court-ignored-in-em-new-york-times-v-sullivan-em/284550/> (describing the decision as turning back "an existential threat to press freedom—a systematic campaign . . . to drive the major networks and papers out of the South by using local libel laws to bleed or bankrupt them."); Aimee Edmondson, *In Sullivan's Shadow: The Use and Abuse of Libel Law Arising from the Civil Rights Movement, 1960–89*, 37 *JOURNALISM HIST.* 27, 27–28 (2011) ("It has been well established that had the Supreme Court failed to overturn *Sullivan*, the case's impact on the civil rights movement would have been staggering." (citing LEWIS, *supra* note 56)); HARRISON E. SALISBURY, *WITHOUT FEAR OR FAVOR* 388–89 (1980) ("The verdict could not have been more far-reaching. By March of 1964, the total of libel actions outstanding against newspapers, news magazines, television networks and other public media had reached nearly \$300 million. Actions

Harrison E. Salisbury, the *Times* reporter who was himself a target of an Alabama libel suit for his coverage of race relations in Birmingham, later estimated that the press was facing \$300 million in potential libel judgments.¹⁹⁴ This number, which has been cited in many accounts of *Sullivan*,¹⁹⁵ was likely drawn from an April 1964 *New York Times* article, which referenced libel suits claiming more than \$288 million arising out of Alabama, Mississippi, and Louisiana.¹⁹⁶ But a closer look at this article shows that Salisbury's—and by extension many historians'—reliance on this “nearly \$300 million” statistic is misleading. For starters, the vast bulk of the \$288 million came from a single lawsuit by T.B. Birdsong, a Mississippi highway patrol officer who was suing the publisher of the *Saturday Evening Post* for \$275 million dollars—a million dollars for each of the state's highway patrolmen—for an article on the race rioting that accompanied the integration of the University of Mississippi in 1962.¹⁹⁷ And some of the libel suits in the article do not quite fit the purpose for which Salisbury and others were citing them. One lawsuit was by a member of Congress from Louisiana who was suing a paper in his home state.¹⁹⁸ One was a suit by the former mayor of Birmingham against the *Birmingham Post-Herald* for criticisms of his job as mayor unrelated to civil rights issues.¹⁹⁹ Another suit against the same Birmingham paper was filed by Bull Connor, former Birmingham police commissioner, who took issue with the paper's criticism of his handling of a transit problem.²⁰⁰

None of this is to say that the attack on the Northern coverage of the Civil Rights Movement was not real and significant. There was the \$3 million suit by Dewey Colvard, an Alabama sheriff, against the publisher of the *Ladies Home Journal* for an article written by the playwright Lillian Hellman.²⁰¹ There were the three \$500,000 suits against CBS for its 1961 documentary on Birmingham.²⁰² There was the suit against the *Times* for

had been filed in southern states from Florida to Texas. Editors and publishers could not send a reporter or photographer into these states without putting themselves at risk. Had the Supreme Court's verdict gone in the other direction the burden of censorship and official intimidation might well have enabled the 'southern judicial strategy' to prolong lawlessness as a final barrier against the revolution in Civil Rights.”).

194. Salisbury, *supra* note 63, at 388.

195. See, e.g., LEWIS, *supra* note 56, at 36; SMOLLA, *supra* note 189, at 34.

196. John Herbers, *Libel Actions Ask Millions in South*, N.Y. TIMES, Apr. 4, 1964, at 12 (noting that total damages sought in libel actions from Alabama, Mississippi, and Louisiana “exceed \$288 million”). But not all the suits were connected to the Civil Rights Movement.

197. See *id.*

198. See *id.*

199. See *id.*

200. See *id.*

201. See *id.*

202. See *id.* The plaintiffs were Bull Connor, Mayor James W. Morgan, and former City Commissioner James T. Waggoner.

Salisbury's article (four suits of \$500,000 each), as well as the criminal libel indictment against Salisbury himself.²⁰³

On their lawyer's advice, the *New York Times* kept its correspondents out of Alabama for the next two-and-a-half years as Sullivan's case was being tried so as to avoid having legal process served on them.²⁰⁴ "How long are you going to let the damned lawyers run *The New York Times*?" demanded a frustrated Claude Sitton, the paper's Southern regional correspondent, of his bosses.²⁰⁵ Lawyers for the *Atlanta Constitution* apparently advised its editors not to send a reporter to Birmingham, relying instead on the wire service reports for coverage of the civil rights showdown taking place in the spring of 1963.²⁰⁶ But if we are to assess the relative efficacy of the various weapons in the legal arsenal of white resistance to the Civil Rights Movement, we need to have a better assessment of the effects of this line of attack.

Common sense tells us that the impact could not have been quite so bad as the "what if *Sullivan* had come out differently" counter-hypotheticals indicate. After all, the Supreme Court did not decide the *Sullivan* case until some four years after the initial suit was filed. During this time, the possibility of a Supreme Court reversal of the Alabama courts was considered a long shot (the *Times* had to be talked out of settling by their lawyer).²⁰⁷ Certainly a sweeping reformation of First Amendment doctrine could not have been seen as a likely outcome.²⁰⁸ What happened during this period? Certainly the Civil Rights Movement—including press coverage of the Civil Rights Movement, and including vociferous attacks on the public officials who were leading white resistance efforts—was not stalled. These were the most transformative years in the history of the Movement. Media accounts of the sit-ins and Freedom Rides²⁰⁹ brought the core issues of the movement home to people around the nation. King and

203. See *id.*

204. See ROBERTS & KLIBANOFF, *supra* note 103, at 235. Other accounts say that the *Times* avoided Alabama for a year. *Id.* It is not clear why, after the Alabama Supreme Court trial, the *Times* lawyers would continue to advise avoiding the state. Roberts and Klibanoff rely on the Sitton interview for this information, apparently. The one exception to this lawyer-enforced exile from Alabama came during a three-day period surrounding the most explosive moments of the Freedom Rides, when Sitton covered the Birmingham story. See ROBERTS & KLIBANOFF, *supra* note 103, at 253, 255.

205. ROBERTS & KLIBANOFF, *supra* note 103, at 253.

206. See LEONARD RAY TEEL, RALPH EMERSON MCGILL: VOICE OF THE SOUTHERN CONSCIENCE 384–85 (2001). The reasoning here is not fully clear, particularly when the paper published McGill's blunt editorials in which he condemned the city as "smoking with hate." *Id.* at 385.

207. See LEWIS, *supra* note 56, at 107.

208. On the *Sullivan* case, First Amendment scholar Harry Kalven wrote, "I have rarely seen a case in which an inescapably right conclusion was so awkward to support on doctrinal grounds." KALVEN, *supra* note 109, at 55.

209. See, e.g., *Bi-Racial Buses Attacked, Riders Beaten in Alabama*, N.Y. TIMES, May 15, 1961, at 1 (Associated Press account).

the SCLC launched the Birmingham project, which relied—successfully—on sympathetic Northern press coverage.²¹⁰

One need not work hard to find highly critical coverage of the South in the Northern press throughout the years between the jury verdict in the Sullivan trial and the Supreme Court's reversal of that verdict. In the fall of 1960, for example, the *Washington Post* published a partial critique of Salisbury's article on Birmingham.²¹¹ The Salisbury article ran under the title "Fear and Hatred Grip Birmingham."²¹² The *Post* article, which sought to capture more of the diversity and complexity of race relations in Birmingham, was titled: "Enjoying Birmingham Hinges on Point of View."²¹³ But underneath this mild title, there was plenty of direct, unflinching reporting of white supremacy in Birmingham—hardly difficult to "expose" since the officials were so explicit about where they stood. The article described crosses being burned; it described violence and hatred.²¹⁴ Indeed, much of the condemnatory material discussed in this particular article was quoted from Birmingham's local newspapers.²¹⁵

When the 1961 Freedom Rides were met with vicious attacks, the Northern press laid blame squarely on state and local officials. *Time* accused Alabama's leaders, from "Governor John Patterson on down," of "abdicat[ing] their duties of maintaining law and order."²¹⁶ Even the local Birmingham paper accused the Governor of making it clear to thugs "that they were free to do as they pleased when it came to the hated integrationists."²¹⁷ The Freedom Rides, hardly a popular protest in the North prior to these horrific events, suddenly gained majority support in the North.²¹⁸

If the *New York Times* was intimidated by the threat of libel suits, it was not particularly evident in its coverage. The paper's avoidance of Alabama in the early 1960s had more to do with avoiding being served process in pending lawsuits than with a fear of writing something that might result in another libel suit.²¹⁹ Much of the coverage of the Civil Rights Movement—particularly the reporting of Southern bureau chief

210. On the role of the press in creating more national support for the civil rights cause, see, e.g., ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 267 (1962); ROBERTS & KLIBANOFF, *supra* note 103, *passim*.

211. James E. Clayton, *Enjoying Birmingham Hinges on Point of View*, WASH. POST, Oct. 23, 1960, at E1.

212. Salisbury, *supra* note 63, at 1.

213. Clayton, *supra* note 211, at E1.

214. *See id.*

215. *See id.*

216. KLARMAN, *supra* note 3, at 431.

217. *Id.*

218. *See id.* at 432.

219. *See id.* at 255.

Claude Sitton—was deeply critical of the way the white South was treating the Civil Rights Movement.²²⁰ As the *Sullivan* case worked its way through the legal system, the *Times* actually expanded its coverage of the South.²²¹

The same goes for CBS. The threat of the \$1.5 million libel suit for its coverage of disfranchisement in Montgomery did not deter the network from sending its star correspondent and Louisiana native, Howard K. Smith, to Birmingham to make a documentary titled “Who Speaks for Birmingham?”²²² The documentary was originally intended to examine the libel suits against Salisbury and the *New York Times*, but CBS decided that since the litigation was still pending in those cases it would focus on differing views of Birmingham residents, black and white, on the race relations in the city.²²³ Smith was in Birmingham when the Freedom Rides came through, and he was on CBS radio giving hourly updates as the Freedom Riders were attacked.²²⁴ He made little effort to hide the fact that he believed the Birmingham police were complicit in the beatings. Although the attacks took place near police headquarters, it took the police ten minutes to arrive at the scene, he pointedly noted. When the police finally arrived, the “hoodlums . . . got into waiting cars and moved down the street a ways, where I watched some of them discussing their achievements of the day. That took place just under Police Commissioner . . . Connor’s window.”²²⁵ In his regular weekly radio commentary he identified individuals he believed were most responsible for the attack on the Freedom Riders and he warned that the South was spiraling toward “a racial dictatorship, like Nazi Germany.”²²⁶ He brought beaten riders into his hotel room to be interviewed.²²⁷ Although he fought with editors over some of the editorial commentary he wanted to include, the documentary that finally aired was hard-hitting enough to inspire yet another million-dollar libel suit.²²⁸

220. See, e.g., LEWIS, *supra* note 56, at 40 (“The reporting of Claude Sitton and the other correspondents in the South made the meaning of official racism clear to many in the North who had been ignorant or unconcerned about it.”); ROBERTS & KLIBANOFF, *supra* note 103, at 237 (“Not getting to Alabama did not slow Sitton down . . .”); see also ANTHONY LEWIS, *PORTRAIT OF A DECADE passim* (1964).

221. See ROBERTS & KLIBANOFF, *supra* note 103, at 355.

222. *Id.* at 235.

223. See Jack Gould, *TV: ‘C.B.S. Reports’ Turns Camera on Birmingham*, N.Y. TIMES, May 19, 1961, at 63.

224. See ROBERTS & KLIBANOFF, *supra* note 103, at 249.

225. *Bi-Racial Buses Attacked*, *supra* note 209.

226. Richard Goldstein, *Howard K. Smith, Courty, Outspoken Voice of Radio and Television, Is Dead at 87*, N.Y. TIMES, Feb. 19, 2002, at C9.

227. See ROBERTS & KLIBANOFF, *supra* note 103, at 249.

228. See Gould, *supra* note 223 (“The plight of the Negroes in Birmingham was depicted in moving and graphic terms.”); ROBERTS & KLIBANOFF, *supra* note 103, at 251 (citing HOWARD K.

Further evidence that the threat to the press has been somewhat exaggerated can be found in the difficulty the *New York Times* had in attracting other newspapers to support the *Times* in its litigation battle against Sullivan. In the early stages, only the *Chicago Tribune* and the publisher of the *Atlanta Constitution* and *Atlanta Journal* joined in support.²²⁹

When *Sullivan* came down, the nation's press predictably praised the decision, but one finds in the appreciative editorials only sporadic, brief mention of the civil rights struggle. *New York Times* Supreme Court reporter Anthony Lewis wrote a long assessment of the decision in which he predicted that "[i]ts most immediate effect is likely to come in . . . the context of the racial struggle in the South" and noted the pending libel suits against the *Times* and CBS.²³⁰ The *Pittsburgh Courier*, an African-American newspaper, noted, "The Negro newspapers should be particularly jubilant over the high court's decision because a ruling the other way would have made them especially vulnerable and could have left them with no bulwark against destruction."²³¹ But most newspaper editorials simply praised the decision in general terms, declaring it a victory for the freedom of the press with little or no mention of the civil rights struggle specifically.²³²

Despite the pending *Sullivan* case, the press covered the Civil Rights Movement, and they did so quite effectively. At some civil rights confrontations, Northern reporters outnumbered protesters.²³³ When Alabama Governor George Wallace staged his stand against federal enforcement at the University of Alabama in 1963, reporters from around the nation, as well as a sizable contingent of foreign reporters, converged on Tuscaloosa.²³⁴ The *New York Times* had two reporters on the scene.²³⁵ And most of the press reports emerging from the desegregation showdown made little effort to hide the reporters' antipathy toward Wallace and his segregationist posturing.²³⁶

The libel-law attack certainly did not lead to a news blackout in the South. Indeed, even in the heart of the South, citizens received much

SMITH, EVENTS LEADING UP TO MY DEATH: THE LIFE OF A TWENTIETH-CENTURY REPORTER 274 (1996)).

229. See ROBERTS & KLIBANOFF, *supra* note 103, at 242.

230. Anthony Lewis, *Court Broadens Freedom of the Press*, N.Y. TIMES, Mar. 15, 1964, at E10.

231. *Good News for the Press*, PITTSBURGH COURIER, Mar. 21, 1964, at 14.

232. See sources cited in note 171.

233. See John H. Nelson, *Southern Exposure: The Northern Press on the South*, NIEMAN REP., Apr. 1962, at 24, 24–26.

234. See ROBERTS & KLIBANOFF, *supra* note 103, at 328–29.

235. See *id.* at 329.

236. See *id.* at 331–32.

information about the Movement. In the process of denouncing Salisbury's "Fear and Hatred" story in the *Times*, the *Birmingham News* reprinted the story in its entirety.²³⁷ Then, in 1961, after Birmingham citizens viciously beat the Freedom Riders, the *News* ran a page-one editorial under the headline "Where Were the Police?" in which it echoed the headline of the Salisbury article: "Fear and Hatred Did Stalk Birmingham Streets Yesterday."²³⁸ "When will the people demand that fear and hatred be driven from the streets?" asked the paper's editors.²³⁹

Furthermore, the *Sullivan* decision did not resolve the threat libel suits posed to press coverage of the Civil Rights Movement. The ruling extended the "actual malice" standard to public officials.²⁴⁰ Pending libel suits by public figures—such as former Major General Edwin Walker's \$20 million suits against a number of media outlets that accused him of fomenting rioting at the University of Mississippi in 1962²⁴¹—remained until the Court extended its new libel standard to include public figures three years after *Sullivan*.²⁴² And there even were some victories for public officials in libel cases after *Sullivan*. Birmingham Police Commissioner Bull Connor won a \$40,000 jury libel verdict against the *New York Times* (he had asked for \$400,000) in federal district court based on Harrison Salisbury's 1960 reporting.²⁴³

In short, scholars have surely overestimated the impact of the South's libel-law offensive against the Civil Rights Movement—and hence the impact of the *Sullivan* decision.

CONCLUSION

My central goal in this Article has been to show that the libel suit that led to the *Sullivan* decision should be understood as a reflection of a tactical shift on the part of segregation's defenders that took place over the course of the Civil Rights Movement. This shift saw direct defenses of de jure segregation increasingly displaced by more indirect legal tactics—ones that relied on laws that were in and of themselves not the target of civil rights reform. In their effort to prevent or slow the demise of white supremacy in the South, segregationists turned to laws regulating subversive activity, business registration requirements, tax collection,

237. *See id.* at 333.

238. *Id.* at 249.

239. *Id.*

240. *See* N.Y. Times Co. v. Sullivan, 376 U.S. 245, 278–79 (1964).

241. *See* Associated Press v. Walker, 389 U.S. 28 (1967).

242. *See* Curtis Publ'g Co. v. Butts, 388 U.S. 130 (1967).

243. *See* 'Bull' Connor \$40,000 Libel Verdict OK'd, CHI. TRIBUNE, Dec. 31, 1964, at 7.

public demonstrations, disorderly conduct, trespass, and libel. They employed these formally race-neutral laws in ways designed to undermine the efforts of civil rights reformers.

This new, legalistic phase in the white South's defense of Jim Crow had ramifications in various contexts. For the defenders of segregation, these tactics helped unite their fractious movement. Race-neutral laws provided a common ground that would bring together moderate and radical factions in the segregationist campaign. Libel-law litigation in particular served as a way to create alliances among people who shared little other than opposition to the civil rights movement and the way the northern press was covering events in the South.

For the Supreme Court, these new tactics posed serious difficulties, as the Justices sought to balance their sympathy for the cause of civil rights with their hesitancy to rewrite existing law to protect the Civil Rights Movement from these attacks. In the end, the Court did create a great deal of new law in response to the South's attack on the Civil Rights Movement, although not always, and often these cases were deeply divisive for the Court. (The unanimous *Sullivan* decision was an exception on this count.)

These legal attacks left a mark on civil rights activists as well. They exacted important short-term costs on movement activity, as they forced civil rights organizations to divert time and resources to defending themselves in court. Yet, as I have argued, these costs should not be exaggerated. The Movement proved remarkably adaptable; activists found ways to turn the South's attacks to its advantage; and the Movement's momentum would not be turned by threats of litigation. Even the effort to attack the Movement through libel suits, so often described in scholarship on *Sullivan* as presenting an existential threat to the Civil Rights Movement, proved ineffective in scaring the Northern press away from the dramatic events unfolding across the South or in dissuading criticism of white supremacist practices.

This shift toward reliance on race-neutral laws as the leading edge of the legal defense of white supremacy should be understood, in part, as an achievement of the Civil Rights Movement. It was an indication that the system of white supremacy was in retreat. Its central legal props were being undermined, forcing white Southerners to rely upon more indirect methods of protecting the world of Jim Crow. But it also was a harbinger of future challenges for the cause of civil rights reform. For once race-conscious white supremacist policy was consigned to the past, race-neutral policy remained, a more subtle but still quite effective tool for preserving the racial inequalities of American society. Race-conscious use of race-neutral law was an intermediate stage for the white South as it moved away from Jim Crow and toward a post-civil rights era. With this new phase in the history of white supremacy we can see the foundations for the emergence

of modern racial conservatism. By rejecting overt racial discrimination and defining itself based on ostensibly race-neutral principles—such as the protection of law and order, property rights, and local control over education—racial conservatism in its modern incarnation established shared grounds for Southern and Northern conservatives.

The tactical shift away from embedding racial inequality on the surface of the law and toward a reliance on race-neutral law that I have described in this Article—and that the history of the *Sullivan* case illuminates so well—marked a critical point of development in the legal history of race in modern America. The white South's increasing reliance on race-neutral laws as a primary tool for limiting civil rights activity foreshadowed the kinds of legal obstacles that would ultimately operate to limit the reach of the Civil Rights Movement. For once laws and policies that directly required racial separation had been struck from the books, entrenched racial inequalities remained, reinforced and protected by race-neutral laws. The continued racial stratification of our society today is in large part a product of race-neutral laws that are selectively enforced or, even when fairly enforced, have disparate impact along racial lines. In the segregationist turn to using race-neutral laws to attack the Civil Rights Movement, we can see both the achievement and the limitations of the civil rights revolution.