NOTES

RESULT OR REASON: THE SUPREME COURT AND THE SIT-IN CASES

Brad Ervin[*]

[*] Law Clerk to the Honorable Karen LeCraft Henderson, United States Court of Appeals for the District of Columbia Circuit; J.D. May 2006, University of Virginia School of Law. I would like to thank Professor Michael Klarman, whose work inspired this Note and whose thoughtful guidance and criticism ensured its completion. This Note also owes its existence to the encouragement and feedback of Professor A.E. Dick Howard as well as Andy Genz, Alan Trammell, and Mike Nemelka. Finally, I thank the staff of the Virginia Law Review for helping to prepare this Note for publication, particularly Christopher Lynch for both his careful editing of the Note and enduring patience with its author. All errors are my own.

INTRODUCTION

ON the afternoon of June 17, 1960, twelve black college and high school students entered Hooper's Restaurant in Baltimore, Maryland. The restaurant's hostess refused to seat the students on the ground that the restaurant followed a policy of racial segregation. This position was quickly reiterated to the students by the restaurant's manager. In spite of these formal protestations, the students pushed their way into the restaurant, past the hostess and manager, seating themselves at open tables where they quietly read books and awaited either service or arrest. As white patrons continued to be seated and served around the quiet protest, the restaurant's owner, Hooper, instructed the manager to call the police. Upon the arrival of the police, the manager again informed the students of the establishment's segregation policy, read to them the state's trespass statute, and asked them to leave. When the students refused to leave, Hooper proceeded to the police station and obtained warrants for the students' arrest. In response, the students exited the restaurant with the understanding that, though they were not to be taken into custody, they were to be charged and tried for violation of Maryland's criminal trespass statute as a result of their silent protest against the segregation of privately owned businesses of public accommodation.[1]

A. What Are the Sit-In Cases?

In similar fashion, scores of protestors waged a non-violent war against the system of segregation in privately owned lunch counters and restaurants across the South in the early 1960s. These protestors inevitably found themselves in court, charged either with violating state trespass or breach-of-the-peace statutes for refusing to

[1] See Memorandum from the Chief Justice, Re: The Sit-In Cases Remaining on the Docket of the Court 45–46 (May 1963) (on file with the Virginia Law Review Association).

leave segregated businesses upon the owners' requests. Following conviction under such statutes, the protestors challenged their convictions, along with the underlying system of segregation that fostered them, as violations of the Equal Protection Clause of the Fourteenth Amendment.[2]

Unfortunately, such contentions under the Fourteenth Amendment met firm resistance in the form of the "state action requirement," a limitation, first articulated by the Supreme Court in the *Civil Rights Cases*, upon cases cognizable under the Amendment.[3] Under the state action requirement, "[i]t is . . . state action that is prohibited by the Fourteenth Amendment, not the actions of individuals. So far as the Fourteenth Amendment is concerned, individuals can be as prejudiced and intolerant as they like."[4] In the context of sit-in demonstrations, the state action requirement posed a problem because segregation in restaurants and lunch counters appeared to be mandated by private owners, barring blacks from their private property, rather than by the state. The only "state action" visibly involved in these cases lay in the enforcement by state police and courts of generally applicable trespass statutes, invoked by private property owners in order to enforce private preferences.

As a result, the central constitutional question raised by the demonstrators' challenges to segregation revolved around "whether arrest and prosecution of persons refusing voluntarily to vacate privately owned facilities upon request converted private racial discrimination into an equal protection violation."[5] In their attempt to cast state enforcement of private discrimination through general trespass and breach-of-peace statutes as impermissible state action, protestors could look to the case of *Shelley v.*

[2] The phrase "sit-in cases" traditionally refers to a series of cases raising these contentions during the 1962 and 1963 Terms. The "sit-in cases" are those in which the Court truly debated making a ruling on the state action question. This Note will also discuss a few cases that preceded and followed this period. Although these cases raised the same constitutional questions, they reached the Court at times when the Court was either not ready to decide the constitutional question at all or after enactment of the 1964 Civil Rights Act rendered the question moot.

[3] 109 U.S. 3, 11–12 (1883).

[4] Garner v. Louisiana, 368 U.S. 157, 177–78 (1961) (Douglas, J., concurring).

[5] Michael Klarman, An Interpretive History of Modern Equal Protection, 90 Mich. L. Rev. 213, 272–73 (1991).

Kraemer[6] for inspiration. In *Shelley*, the Supreme Court held that judicial enforcement of racially restrictive covenants constitutes state action.[7] If state enforcement of discriminatory private contracts satisfied the state action requirement, perhaps the Court would similarly hold that state enforcement of private property decisions was sufficient state action to invoke the Fourteenth Amendment's promise of equal protection: "in other words, the question was how far to extend *Shelley v. Kraemer*."[8] From 1960 until the passage of the Civil Rights Act in the early summer of 1964, this question dogged the Supreme Court as the Justices sought to balance the competing constitutional rights of liberty and equality: the liberty of private property owners to control access to their property and the right of black citizens to equality in the use of businesses open to the public.[9]

B. Historical Interpretations of the Sit-In Cases

The Supreme Court heard and decided a dozen "sit-in cases" during the Terms of 1962 and 1963. In each case the petitioners raised the state action argument noted above in order to challenge their convictions under the Equal Protection Clause.[10] And in all of the cases, although the Court ruled in favor of the petitioning demonstrators, "it . . . rested its decisions on a variety of grounds concerned with the peculiar facts of the various cases, all of which [were] too narrow to support conclusions about the larger issue" of state action.[11] Those grounds included evidentiary insufficien-

[6] 334 U.S. 1 (1948).

[7] Id. at 20; see also Klarman, supra note 5, at 269 n.264 ("*Shelley*'s logic suggested that . . . state court enforcement of trespass laws in support of a property owners' [sic] racially motivated exclusion would violate the Equal Protection Clause.").

[8] Klarman, supra note 5, at 273.

[9] See infra Part I.

[10] See Lupper v. Arkansas, 379 U.S. 306, 307 (1964); Bouie v. City of Columbia, 378 U.S. 347, 349 (1964); Bell v. Maryland, 378 U.S. 226, 228 (1964); Robinson v. Florida, 378 U.S. 153, 154–55 (1964); Barr v. City of Columbia, 378 U.S. 146, 148 (1964); Griffin v. Maryland, 378 U.S. 130, 135 (1964); Avent v. North Carolina, 373 U.S. 375 (1963); Gober v. Birmingham, 373 U.S. 374 (1963); Wright v. Georgia, 373 U.S. 284, 291–92 (1963); Lombard v. Louisiana, 373 U.S. 267 (1963); Peterson v. City of Greenville, 373 U.S. 244, 247 (1963); Garner v. Louisiana, 368 U.S. 157, 162–63 (1961).

[11] Thomas P. Lewis, The Sit-In Cases: Great Expectations, 1963 Sup. Ct. Rev. 101, 102.

cies,[12] the presence of local segregation laws,[13] and changes in state or local law.[14] Thus, "[f]rom the published record all that one confidently can conclude is that the Justices ducked the constitutional issue for several years through a variety of stratagems, until passage of the 1964 Civil Rights Act effectively mooted the question by *statutorily* prohibiting race discrimination in places of public accommodation."[15]

Professor Michael Klarman challenges this traditional interpretation of the sit-in cases in an examination of the internal debates and documents of the Justices.[16] He argues that "[i]nternal Court documents . . . considerably illuminate the Justices' thought regarding the sit-in controversy, revealing how broadly a majority was prepared to interpret the state action requirement in order to avoid judicial enforcement of private discriminatory preferences."[17] The Justices sought symbolically unanimous holdings in favor of sit-in demonstrators:[18] "[t]hus at Court conferences on the sit-in cases, individual Justices proclaimed their willingness to stretch for the 'right' result, which was understood to mean reversal of convictions without reaching the constitutional question."[19] And although unanimity proved impossible in the long term, the Court managed, through the efforts of Justice Brennan, to duck the state action issue.

[12] *Garner*, 368 U.S. at 173–74.
[13] *Peterson*, 373 U.S. at 247–48.
[14] *Bell*, 378 U.S. at 228–30.
[15] Klarman, supra note 5, at 273.
[16] A note on primary sources: citations to the conference notes of the Justices reference a specific case, and its Case File Number, when it is clear from the notes themselves that only that case was discussed. Often, several sit-in cases were argued on the same day and therefore were also discussed in the same conference. When multiple cases were discussed, no case name is specified and the Case File reference is to the "sit-in cases" generally.
[17] Id.
[18] See Douglas conference notes, Peterson v. City of Greenville (Nov. 9, 1962) (Library of Congress ("LOC"), Douglas Papers, Box 1281, Case File No. 71) (Justice Goldberg stating that "he too would like to have unanimity"); see also Letter from Chief Justice Warren to Justice Douglas (May 18, 1963) (LOC, Douglas Papers, Box 1281, Case File: sit-in cases) (expressing the Court's desire for unanimity); Klarman, supra note 5, at 273–74 nn.286–87.
[19] Klarman, supra note 5, at 273–74.

C. A New Narrative

Professor Klarman's account, however, overstates the willingness of the Justices to decide the state action question in the context of the sit-in cases. This Note will explore previously untapped internal Court documents in order to rewrite the story of the sit-in cases, providing a more thorough account of the intellectual inclinations of the Justices charged with deciding such politically and socially explosive cases. Although the Court never officially decided the constitutional question presented by the sit-in cases, a majority of the Justices engaged in the controversy ultimately proved willing to, and in fact did, decide the constitutional state action question in the pivotal 1964 case *Bell v. Maryland*.[20] In the cases leading up to *Bell*, the Justices' internal debates illustrate that, far from leaning toward a "broad" interpretation of state action as Professor Klarman suggests, the most powerful inclination on the Court was to keep the state action requirement as narrowly confined as possible.

Ultimately, the key to understanding the inclinations of the Justices involves maintaining a clear distinction between the preferred results and the preferred constitutional interpretations of the Justices. Although the Court remained unanimous regarding the desired results in the sit-in cases, the Justices, almost from the beginning of the controversy, failed to achieve unanimity of constitutional interpretation. The internal history of the Court during this era reveals a gradual hardening of two distinct interpretive positions: one committed to the liberty of private property owners and the other committed to equality in public accommodations. While both camps preferred to reverse demonstrator convictions, the private property camp preferred a much narrower conception of state action. This interpretive position eventually led its adherents, during the 1963 Term, to break from the unanimity of result achieved during the preceding years, when narrower holdings based on legislative and executive action allowed the private prop-

[20] See 378 U.S. at 242 (Douglas, J., reversing); id. at 286 (Goldberg, J., and Warren, C.J., concurring); id. at 318 (Black, Harlan & White, JJ., dissenting). Thus, only Justices Clark, Brennan, and Stewart avoided addressing the state action question in an opinion. *Bell* was the most critical sit-in decision in that its disposition ultimately determined whether the Court would officially decide the constitutional question in *any* sit-in case.

erty adherents to reconcile their preferred results with their preferred view of state action. And it was this position that proved dominant on the Court in the months leading up to the passage of the Civil Rights Act in the early summer of 1964. In the end, however, the allure of overturning convictions led several key Justices to withdraw from the private property position, preventing the Court from deciding whether judicial enforcement of state trespass laws to maintain segregation in privately owned establishments of public accommodation constituted state action in violation of the Fourteenth Amendment.

In recounting the internal Court history of the sit-in cases, this Note will proceed in a largely chronological fashion, emphasizing primary source material on the debates and positions of the members of the Court, particularly in relation to the "key" Justices responsible for shaping the ultimate disposition of the Court in *Bell*: Justices Clark, Brennan, and Stewart. Part I will begin with a description of the actors in this drama—the Justices who heard and decided the sit-in cases. This Part will describe the two major extant constitutional interpretations of state action and then classify each Justice's particular inclination on the issue. Part I will then conclude with two preliminary cases that reached the Supreme Court in 1960 and 1961, setting the stage for the debates that would rage during the Terms of 1962 and 1963.

Following this introduction to the Warren Court and its interpretive factions, Part II will walk through the sit-in cases of the 1962 Term, which proved to be the most cohesive period of the sit-in controversy on the Court. The narrow rulings in these cases, based upon clear legislative or executive actions, allowed the private property interpretive group to achieve their desired result of overturning convictions without compromising their constitutional principles. However, these cases also illustrate the hardening of the two constitutional positions as the two most extreme adherents, Justices Douglas and Harlan, drifted away from each other and the rest of the Court. The obvious interpretive break between these two Justices began the process that would lead to the disunity of result that marked the 1963 Term.

Part III will document the chaos of the 1963 Term as majority opinions rose and fell for both of the interpretive positions on the Court. During this period, the interpretive disunity on the Court

finally resulted in a break in the unanimity of result previously achieved by the Justices. The constantly shifting votes on the Court—particularly the movements of Justices Clark, Brennan, and Stewart—occurred in the shadow of the debates over the 1964 Civil Rights Act and the southern filibuster that temporarily prevented its passage. Ultimately, this shifting resulted in a fiercely divided Court that voiced multiple opinions on the constitutionality of private discrimination in public accommodations, but never said anything authoritative on the merits. The field of civil rights was thus left to disappointed scholars and congressional action.

Finally, Part IV will track the key Justices in the months after the debacle of the 1963 Term and the passage of the Civil Rights Act. The purpose of this Part will be to verify the constitutional inclinations of the three key Justices by examining their positions once the constitutional issue became moot through congressional action. This analysis will confirm that the inclination of a majority of the Court was toward a more narrow understanding of the state action requirement. Although this majority failed to write its narrow interpretation into constitutional law, the state action doctrine ultimately survived its brush with destruction under the Warren Court, ready to be pressed into service by the more conservative Burger and Rehnquist Courts as they rolled back government accountability for private acts of discrimination.

I. THE PRELUDE

In October 1960, the first challenge to the discriminatory exclusion of a restaurant patron on account of race reached the halls of the Supreme Court.[21] The men who heard this case, and would hear the avalanche of sit-in cases to follow, were already seasoned veterans of civil rights litigation. Of the nine Justices on the Court in October 1960, five had been on the Court for the landmark decision in *Brown v. Board of Education*.[22] The remaining Justices—eleven in all heard sit-in cases—began their careers on the Supreme Court with civil rights issues, ranging from enforcement of *Brown* to actions against suspected Communists. As a result, these

[21] See Boynton v. Virginia, 364 U.S. 454, 455–57 (1960).

[22] 347 U.S. 483 (1954). The Justices remaining on the Court from *Brown* were Chief Justice Warren and Justices Black, Douglas, Frankfurter, and Clark.

men entered the sit-in controversy with a wealth of experience on civil rights questions and were prepared to extend that experience to this new context.

As the sit-in cases bombarded the Court, two distinct constitutional interpretations of the central state action question emerged. Over time, the Justices divided among these positions, which hardened as the flood of sit-in cases continued. Although a majority of the Justices became firmly entrenched in one interpretive camp or the other, three key Justices failed to fully cast their lots, declining to join any of the constitutionally based opinions of 1964.[23] These three Justices ultimately constituted the deciding votes during the fateful 1963 Term, determining whether the Court would address the state action issue in the sit-in cases, either by recognizing a constitutional right in favor of the liberty of private property owners or by coming down on the side of the equality of black citizens seeking service in businesses open to the public.

A. Positions and Players

Despite the universal sentiment on the Court in favor of the civil rights demonstrators convicted for sit-ins at segregated lunch counters across the South, the state action question exposed a serious tension between competing constitutional rights—a tension that eventually drove a wedge between the Justices. Justice Harlan presented the clearest exposition of this tension, along with his preferred position, in his consolidated opinion on the sit-in cases of the 1962 Term:

> Underlying the cases involving an alleged denial of equal protection by ostensibly private action is a clash of competing constitutional claims of a high order: liberty and equality. Freedom of the individual to choose his associates or his neighbors . . . as he sees fit, to be irrational, arbitrary, capricious, even unjust in his personal relations are things all entitled to a large measure of protection from governmental interference.[24]

[23] Justices Clark, Brennan, and Stewart only joined Justice Brennan's majority opinion in *Bell*, the only opinion that refused to reach the state action question. See supra note 20.

[24] Peterson v. City of Greenville, 373 U.S. 244, 250 (1963) (Harlan, J., concurring and dissenting in part).

Thus, in the battle between the competing interests of liberty and equality, Justice Harlan favored protection of the private property owner's liberty to choose those who could enter upon or remain on their property. In order to vindicate this liberty, Justice Harlan favored a narrow interpretation of the state action requirement that regarded private decisions as beyond the reach of the Fourteenth Amendment. This aspect of state action also implicated concerns about federalism, "a recognition that there are areas of private rights upon which federal power should not lay a heavy hand and which should properly be left to the more precise instruments of local authority."[25]

Although Justice Harlan stood most firmly and consistently upon this private property position, he by no means stood alone. Over time, other Justices joined Justice Harlan, first in conference and (some) later in opinions. Justice Black represented the most clear and consistent adherent to the private liberty arguments voiced by Justice Harlan. As early as 1961, Justice Black expressed an interpretive preference for the private property constitutional position.[26] Similarly, Justice White, at least by the 1963 Term, voiced adherence to the private property views of Justices Black and Harlan.[27] These three Justices constituted the strongest bloc behind the private property position, ultimately voting to uphold the convictions of demonstrators during the 1963 Term based on the narrow state action position required by their private liberty reasoning.[28] Along with this bloc, two of the key Justices who avoided the constitutional question in the sit-in cases, Justices

[25] Id. at 250.

[26] See Douglas conference notes, certiorari conference on Case File Nos. 617–19 (Mar. 17, 1961) (LOC, Douglas Papers, Box 1268, Case File Nos. 26–28) (Justice Black stating that an "owner of a store has the right (absent an Act of Congress or state statute) to say who can and who cannot come into his store or stay there").

[27] See Warren conference notes, 1963 Term sit-in cases (Oct. 23, 1963) (LOC, Warren Papers, Box 510, Case File: sit-in cases) (Justice White declaring that he agrees with Justice Black); see also Judge's Notes on Conference (Oct. 23, 1963) (LOC, Black Papers, Box 376, Case File: sit-in cases), *reprinted in* A.E. Dick Howard & John G. Kester, The Deliberations of the Justices in Deciding the Sit-In Cases of June 22, 1964, at 4 (unpublished manuscript compiled from the files of Justice Black by his law clerks) (stating that Justice White agrees with Justice Black).

[28] See, e.g., Bell v. Maryland, 378 U.S. 226, 318 (1964) (Black, J., dissenting).

Clark and Stewart, voiced their support for the private property interpretation of the state action requirement.[29]

In contrast to this private property position, Justice Douglas articulated an interpretation of the state action requirement that sought to vindicate the right of citizens of all races to equal treatment in the public sphere. In his concurring opinion in *Lombard v. Louisiana*, Justice Douglas offered the most concise version of this equality position:

> We live under a constitution that proclaims equal protection of the laws . . . . And under that standard [a] business serving the public cannot seek the aid of the state police or the state courts or the state legislatures to foist racial segregation in public places under its ownership and control.[30]

According to Justice Douglas, a property owner who opened his premises to the public at large could not invoke the power of the state to enforce racial segregation without transforming that private discrimination into unconstitutional state action.[31] This broad reading of state action transformed judicially enforced private discriminatory choices, particularly long-established customs of segregation,[32] an almost universal condition across the South at the time, into state action. In addition, Justice Douglas explicitly drew upon *Shelley v. Kraemer* to denounce judicial enforcement of state trespass laws in a way that vindicated private discrimination as unconstitutional state action.[33]

As with the private property position, Justice Douglas initially occupied this constitutional ground alone. However, other members of the Court soon joined him. Chief Justice Warren and Justice Goldberg proved to be the most ardent supporters of the equality position, ultimately reaching the constitutional question

[29] See, e.g., Warren conference notes, 1962 Term sit-in cases (Nov. 9, 1962) (LOC, Warren Papers, Box 604, Case File: sit-in cases) (noting that Justice Clark "agrees with [Justice Black] as to the fundamental issue"); id. (noting that Justice Stewart agrees with Justice Black on the constitutional issue and cannot agree with Justice Douglas).

[30] 373 U.S. 267, 277–78 (1963).

[31] See Garner v. Louisiana, 368 U.S. 157, 181–83 (1961) (Douglas, J., concurring).

[32] See id. at 178–81 (Douglas, J., concurring).

[33] *Lombard*, 373 U.S. at 278–81 (Douglas, J., concurring).

themselves in *Bell v. Maryland*.[34] In addition, Justice Brennan, the final of the three Justices who refused to reach the constitutional question in *Bell*, early on expressed adherence to the broad state action arguments voiced by Justice Douglas.[35]

Thus, led by Justices Harlan and Douglas, the sit-in Court developed a clear interpretive split, which ultimately led a number of Justices to break from their preference for overturning demonstrator convictions, thereby disrupting the unanimity of result maintained prior to the 1963 Term. The central question of this controversy, therefore, is how and why Justices Clark, Brennan, and Stewart, despite voicing interpretive preferences along with their brethren, subscribed to an opinion in *Bell* that prevented the Court from speaking authoritatively on the state action question. Although the division among the Justices developed slowly over time, not reaching its chaotic zenith until *Bell*, the first inklings of the interpretive positions, and the split between the Justices they fostered, are apparent in cases that reached the Court in the years before the sit-in controversy began in earnest.

Discussion of these earlier cases, however, introduces two Justices who did not figure in the disposition of the primary sit-in cases of the 1962 and 1963 Terms. Following the 1961–1962 Term, Justices Frankfurter and Whittaker retired from the Court. Thus, the early cases not only illustrate the inclinations of the Justices who remained on the Court throughout the period, but also those of the two men replaced by Justices White and Goldberg. To the extent that Justices Frankfurter and Whittaker's constitutional leanings differed from their successors, these changes in the composition of the Court, just before the arrival of the central sit-in cases, might have played a role in the final dodging of the constitutional question.

[34] See 378 U.S. 226, 286 (Warren, C.J., Douglas & Goldberg, JJ., concurring).

[35] See Douglas conference notes, certiorari conference on Case File Nos. 617, 618, 619 (Mar. 17, 1961) (LOC, Douglas Papers, Box 1268, Case File Nos. 26, 27, 28) (noting that Justice Brennan "agrees with [Justice Douglas that] Shelley v. Kraemer controls").

B. The Calm Before the Storm: A Hint of Controversy

The sit-in cases that flooded the Supreme Court during 1962 and 1963 began with a trickle in the preceding terms—a trickle that quickly exposed the disunity of constitutional interpretation among the Justices then sitting on the Court. These initial cases also offer a glimpse into the constitutional inclinations of Justices Frankfurter and Whittaker, whose fortuitous departures before the sit-in flood perhaps prevented the Court from answering the constitutional question presented by the cases, thereby providing fodder for subsequent counterfactual exercises.

The first case challenging discrimination in public accommodations ended much the same as all the cases to follow—without a ruling based on the Fourteenth Amendment. *Boynton v. Virginia* arose from the refusal of a black law student, traveling from Washington, D.C., to Alabama, to leave the "white section" of a bus terminal restaurant in Richmond, Virginia.[36] Appealing his conviction for unlawfully remaining upon the premises of another, Boynton challenged the segregated restaurant under both the Commerce Clause and the Fourteenth Amendment to the Constitution.[37] As with subsequent sit-in cases, a majority of the Justices sought to withhold decision on the applicability of the Equal Protection Clause.[38] Instead of looking to the Fourteenth Amendment, the Chief Justice raised the possibility at conference of reversing Boynton's conviction under the equality of service provisions of the Interstate Commerce Act.[39] Following the lead of Chief Justice War-

[36] 364 U.S. 454, 455 (1960).

[37] Id. at 456–57.

[38] See Douglas conference notes, Boynton v. Virginia (Oct. 14, 1960) (LOC, Douglas Papers, Box 1234, Case File No. 7) (Chief Justice Warren and Justice Frankfurter favor reversing the conviction without reaching the Fourteenth Amendment question).

[39] Id. (characterizing Chief Justice Warren's position as believing that the "passenger is entitled to non-discriminatory service which [the Interstate Commerce] Act prescribes" and characterizing Justices Frankfurter and Harlan's position as agreeing to reverse "along [the] lines indicated by [the Chief Justice]"). However, use of the Interstate Commerce Act raised a potential problem insofar as it was not clear that the Act was before the Court. It had not been raised in Boynton's petition for certiorari—only in his motion to dismiss below. Because the constitutional questions argued before the Supreme Court presented the same questions of discrimination as the Interstate Commerce Act arguments in brief to the Virginia Supreme Court, the Justices felt justified in confining their decision to the statutory questions. See *Boynton*,

ren, the majority opinion, authored by Justice Black, found the restaurant and terminal to be "an integral part" of the interstate services provided by the bus company, thereby bringing the restaurant under the non-discriminatory provisions of the Interstate Commerce Act.[40]

However, the victory of Chief Justice Warren's position in an opinion by Justice Black, the great champion of private rights, reveals only part of the story of *Boynton*. The Court's internal debates illuminate far more division among the Justices—division that foreshadowed the state action struggles to come. The majority position faced a strong challenge regarding the private nature of the bus terminal restaurant. Foreshadowing his objections during the sit-in cases of 1962, Justice Harlan, the progenitor of the private property position, expressed concern that there was "no showing of control of [the] terminal by [the interstate] carrier."[41] Despite his later objections in the sit-in cases, Justice Harlan overcame such concerns in *Boynton* and joined the majority opinion.

Justices Clark and Whittaker, however, proved unable to reconcile their private property objections with the majority opinion. Justice Clark stated this dissenting sentiment at conference on October 14, 1960, noting that "most bus stops are at private places—petitioner is trying to get [a] ruling that these private places are terminal facilities." He concluded that the Court "should not reach in and decide the issue."[42] Similarly, Justice Whittaker, both at conference and in his dissenting opinion, questioned the applicability of the Interstate Commerce Act to a restaurant that "was owned and controlled by a noncarrier who alone operated it as a *local and private enterprise*."[43] Although this private property position rested

364 U.S. at 457. Although Justice Whittaker's dissent attacked the majority for this evasion, it also focused on the statutory ruling. See id. at 464 (Whittaker, J., dissenting). At any rate, this point, though important, is tangential to the discussion between the majority and dissent concerning the nature of the terminal restaurant: whether or not it was private. It is this latter discussion that is relevant to this Note's description of the Justices' opinions regarding the state action doctrine.

[40] *Boynton*, 364 U.S. at 462–64.

[41] Douglas conference notes, Boynton v. Virginia (Oct. 14, 1960) (LOC, Douglas Papers, Box 1234, Case File No. 7).

[42] Id. (statement of Justice Clark).

[43] *Boynton*, 364 U.S. at 466 (Whittaker, J., dissenting) (emphasis added); see also Douglas conference notes, Boynton v. Virginia (Oct. 14, 1960) (LOC, Douglas Papers, Box 1234, Case File No. 7).

upon an application of the Interstate Commerce Act rather than the Fourteenth Amendment, the breadth of the commerce power implies that Justices Clark and Whittaker would similarly find it impossible to reach the private restaurant owner in *Boynton* under a Fourteenth Amendment saddled with a state action restriction unknown to the Commerce Clause. Thus, as early as 1960, Justice Harlan expressed doubts about the reach of the Constitution into private property, while Justices Clark and Whittaker went the additional step of openly questioning the majority's reasoning because of its implications for private property, thereby upsetting any early attempt at unanimity of result and constitutional interpretation.

The second preliminary case, *Garner v. Louisiana*, further illustrates the complete absence of uniformity of interpretation, although, in this case, the Court did achieve the absolute unanimity of result that would characterize the first stage of the sit-in controversy.[44] As with most of the sit-in cases, *Garner* arose when two black college students sat quietly at the "white" lunch counter of a department store in which both blacks and whites were welcome to shop, but in which food service was segregated.[45] Upon the students' refusal to leave the "white" counter, the store manager called the police who ordered the students to leave before arresting them for disturbance of the peace.[46] Again, foreshadowing the cases that would follow, the petitioners in *Garner* raised a series a challenges to their convictions, including lack of evidence of a disturbance of the peace, vagueness of the implicated statute, and a violation of freedom of expression, in addition to the basic Fourteenth Amendment claim of state action via judicial enforcement of the custom of racial segregation.[47]

The Court unanimously overturned the convictions of the demonstrators in *Garner*.[48] However, the views of the Justices, as expressed both at conference and in the four separate opinions that emerged from the case, illustrate a profound split of constitutional

[44] 368 U.S. 157 (1961).
[45] See id. at 159–60, 159 n.2.
[46] Id. at 160.
[47] Id. at 162–63.
[48] See id. at 174; id. at 176 (Frankfurter, J., concurring in the judgment); id. at 177 (Douglas, J., concurring); id. at 185–86 (Harlan, J., concurring in the judgment).

inclinations among the members of the Court. The majority opinion penned by Chief Justice Warren reversed the breach-of-the-peace convictions for lack of evidence that any such breach had occurred. Basing this decision on *Thompson v. City of Louisville*,[49] the Chief Justice noted that the petitioners did nothing to attract attention aside from their "mere presence" at the lunch counter, a fact insufficient to support a conviction for breach of the peace.[50] However, this position failed to garner anything close to unanimous support among the members of the Court as early as the certiorari conference on March 17, 1961.

From the beginning, Justice Douglas nearly articulated his full equality interpretation of the state action requirement in response to the *Garner* convictions, noting his reasoning at the certiorari conference as merely "Shelley v. Kraemer"[51] and following up at the post-argument conference with the statement that "a state cannot restrict either by statute or by judicial decision the use of any public place to one race."[52] Indeed, Justice Douglas's concurrence began with the bold assertion that "the constitutional questions must be reached" before launching into the earliest explication of his interpretive theory.[53] Although Justice Brennan ultimately sided with the majority's *Thompson*-based opinion, throughout the conferences he expressed his affinity for Justice Douglas's constitutional interpretation.[54] Thus, *Garner* provides the first example of Justice Brennan accepting a much narrower constitutional holding, in this case an evidentiary insufficiency under the Due Process

[49] 362 U.S. 199, 204 (1960) (finding that the record was "entirely lacking in evidence to support any of the charges" and therefore that the convictions violated due process).

[50] *Garner*, 368 U.S. at 170, 173–74.

[51] Douglas conference notes, certiorari conference on Case File Nos. 617, 618, 619 (Mar. 17, 1961) (LOC, Douglas Papers, Box 1268, Case File Nos. 26, 27, 28).

[52] Douglas conference notes, Garner v. Louisiana (Oct. 20, 1961) (LOC, Douglas Papers, Box 1268, Case File No. 26).

[53] *Garner*, 368 U.S. at 177 (Douglas, J., concurring).

[54] Douglas conference notes, Garner v. Louisiana (Oct. 20, 1961) (LOC, Douglas Papers, Box 1268, Case File No. 26) (Justice Brennan stating that "he agrees with [Justice Douglas] but believes the case can go on Thompson"); see also Douglas conference notes, certiorari conference on Case File Nos. 617, 618, 619 (Mar. 17, 1961) (LOC, Douglas Papers, Box 1268, Case File Nos. 26, 27, 28) (Justice Brennan noting that he agrees with Douglas that *Shelley v. Kraemer* controls).

Clause, while stating a preference for the broad equality interpretation of the state action requirement.

On the opposite extreme, *Garner* represents the beginning of Justice Harlan's interpretive break with the majority in the sit-in cases. In this case, however, Justice Harlan had company in his constitutional position: Justice Felix Frankfurter. Both of these Justices refused to reverse on the strength of *Thompson*, objecting to the implications of the case for the liberty of private property owners. At conference, Justice Frankfurter stated that "if [a] merchant wants to serve only one race, he can," a position quickly joined by Justice Harlan.[55] Despite their constitutional misgivings, both Justices Frankfurter and Harlan sought to reverse the convictions in *Garner*, with Justice Frankfurter settling on a failure of the state to satisfy its "quantum of proof,"[56] while Justice Harlan relied upon a variety of arguments ranging from vagueness to freedom of expression.[57] Thus, *Garner* illustrates the constitutional congruence between Justices Frankfurter and Harlan, suggesting that, had he remained on the Court, Justice Frankfurter might have followed a path similar to Justice Harlan. At the very least, *Garner* confirms that when Justice Frankfurter left the Court, he was firmly in the private property camp.

In addition, the debates surrounding *Garner* further illuminate the early constitutional inclinations of Justice Clark as well as the final constitutional position of the outgoing Justice Whittaker. Although these two enigmatic Justices eventually joined in the majority opinion with little comment,[58] their earlier statements reveal a continued adherence to the private property concepts they expressed in the debates over *Boynton*.[59] Both Justices Clark and Whittaker revealed their positions at the certiorari conference on

[55] Id. (noting that Justice Harlan agrees with Justice Frankfurter's position).

[56] Douglas conference notes, Garner v. Louisiana (Oct. 20, 1961) (LOC, Douglas Papers, Box 1268, Case File No. 26); see also *Garner*, 368 U.S. at 174–76 (Frankfurter, J., concurring in the judgment).

[57] See *Garner*, 368 U.S. at 199 (Harlan, J., concurring in the judgment).

[58] See Douglas conference notes, Garner v. Louisiana (Oct. 20, 1961) (LOC, Douglas Papers, Box 1268, Case File Nos. 26, 27, 28) (stating that Justice Whittaker reverses on *Thompson* and noting only that Justice Clark "could not agree with [Justice Douglas]" and his broad state action interpretation, but that Justice Clark will reverse on *Thompson*).

[59] See supra Section I.A.

Garner.[60] Justice Clark cast his vote to deny certiorari on the fact that the "proprietor . . . expressed his decision not to serve" the demonstrators, thereby implying that the proprietor possessed a right to exclude whomever he chose.[61] Although Justice Whittaker voted to grant certiorari, he did so because he believed that the proprietor in this case had granted patrons an "unlimited invitation" to enter the drug store, without a later direction to leave.[62] However, Justice Whittaker suggested that the case would have been different had the proprietor revoked the invitation, transforming the demonstrators into trespassers.[63] In this way, *Garner* illustrates the continuing intellectual inclination of Justices Clark and Whittaker to the private property constitutional position they first expressed in *Boynton*. In contrast to *Boynton*, however, these two Justices maintained the unanimity of result in *Garner* that the Court would continue to display throughout the sit-in cases of 1962. Moreover, Justice Whittaker's continued alignment with Justice Clark suggests the possibility that his views would have developed along lines similar to those of his fellow traveler.

The preliminary skirmishes over state action in 1960 and 1961 reveal a Supreme Court largely committed to both reversing demonstrator convictions and doing so unanimously. Despite the unanimity of result in *Garner*, however, the Justices evoked hints of the constitutional controversy that would rage within the halls of the Court during the Terms of 1962 and 1963. In conference and in their opinions, the members of the Court broached the constitutional positions along which they would continue to divide in the coming months and years. Months later, Justice Douglas summed up the growing divisions on the Court in the wake of *Garner*:

> Both Black and Frankfurter in subsequent discussions . . . expressed the view that . . . a merchant could, if he desired, refuse

[60] See Douglas conference notes, certiorari conference on Case File Nos. 617, 618, 619 (Mar. 17, 1961) (LOC, Douglas Papers, Box 1268, Case File Nos. 26, 27, 28).

[61] Id.

[62] Id. It is likely that, as he gained further information on this case, Justice Whittaker switched to the *Thompson* rationale when it became clear that the proprietor in *Garner* did ask the petitioners to leave.

[63] Id. (statement of Justice Whittaker).

> to serve a Negro and invoke the aid of the police department and the aid of the State judiciary . . . .
>
> . . . .
>
> Two other members of the Court shared the views of Black and Frankfurter. One was Harlan and the other was Clark.[64]

Arrayed against this liberty-of-private-property bloc, which "would fasten segregation in a constitutional way," Justice Douglas saw only himself, Chief Justice Warren, and Justice Brennan.[65] Yet, despite this constitutional split, unanimity of result remained, for even "the usually unbending Frankfurter and Harlan . . . evinced some willingness to compromise their legal rectitude in order to avoid Court affirmance of the demonstrators' convictions."[66] Ultimately, however, Justice Harlan proved unable to maintain that position as he refined his constitutional position.

In addition to illustrating the competing forces of unanimity of result and divergence of constitutional interpretations, these preliminary cases present the information necessary to engage in an interesting counterfactual based on the fortuity of changes in Court composition. As argued above, Justice Frankfurter strongly sympathized with the private property position later championed by Justice Harlan. Given this intellectual agreement, coupled with Justice Frankfurter's proven willingness to break from the majority opinion, it seems plausible to speculate that, had he remained on the Court for the onslaught of sit-in cases, he would have remained a strong and vocal companion to both Justice Harlan's interpretations and, ultimately, his results. Justice Whittaker, as well, evinced an inclination toward the private property position, although not as strong an inclination as that of Justice Frankfurter. It is not unlikely that he also would have continued to develop along the lines of his closest counterpart, Justice Clark.

Entering the 1962 Term and the first major round of sit-in cases, several questions pressed upon the Court: Would the Justices maintain unanimity of results? Would the constitutional divisions

[64] Memorandum from Justice Douglas (Nov. 6, 1962) (LOC, Douglas Papers, Box 1268, Case File Nos. 26, 27, 28) (regarding *Garner v. Louisiana* and companion cases).

[65] Id.

[66] Klarman, supra note 5, at 273.

that emerged in *Garner* continue to grow? And would Justices Frankfurter and Whittaker's successors continue along their path or move in the direction of Justice Douglas's position, thereby swinging the Court toward a broader interpretation of the state action requirement?

II. SEEDS OF CHAOS: THE 1962 TERM

In the first week of November 1962, the sit-in controversy reached the Supreme Court in full force. During a three-day span, the Court heard oral arguments in five major sit-in cases, all potentially raising the central state action question.[67] As the Justices debated this first round of sit-in cases, their interpretive divisions became increasingly pronounced, ultimately leading two Justices to break from their brethren in official opinions. The fractures, however, ran much deeper. Beyond the two breakaway Justices, several others began to voice strong preferences for one constitutional position or another, thereby threatening to destroy even the unanimity of result that the Court fought so hard to maintain. In the end, however, the lure of unanimous reversals proved too strong and the 1962 Term ended as it began: without official resolution of whether judicial enforcement of private discriminatory choices in businesses of public accommodation constituted impermissible state action under the Fourteenth Amendment. Yet the compromises made in ensuring this result foreshadowed a constitutional showdown in the Term of 1963.

A. The Cases: Unanimity of Result and the Douglas-Harlan Break

The five sit-in cases that reached the Court in 1962 can be divided into two distinct fact patterns. The first group, in which *Peterson v. City of Greenville* was the central decision, involved situa-

[67] Griffin v. Maryland, 378 U.S. 130 (1964); Avent v. North Carolina, 373 U.S. 375 (1962); Gober v. City of Birmingham, 373 U.S. 374 (1962); Lombard v. Louisiana, 373 U.S. 267 (1962); Peterson v. City of Greenville, 373 U.S. 244 (1962). Two more minor cases also reached the Court at the same time, but were decided on somewhat different grounds from the "core" sit-in cases. See Wright v. Georgia, 373 U.S. 284 (1963) (holding, based on insufficient evidence of conduct amounting to breach of peace and inadequate notice, that petitioners' conduct was covered by statute); Shuttlesworth v. City of Birmingham, 373 U.S. 282 (1963) (overturning convictions mooted by the result in *Gober*).

tions where demonstrators were arrested under state trespassing statutes due to their sit-ins at segregated restaurants or lunch counters.[68] The critical factual wrinkle in this collection of cases, however, was the presence of local ordinances requiring racial segregation in restaurants.[69] Thus, these cases presented the Court with potential state segregation, mandated by local legislatures. The ultimate debate, therefore, concerned the effect to be given to these ordinances.

In his opinion for the Court in *Peterson*, Chief Justice Warren treated the presence of the ordinance as state action per se, regardless of the actual effect of the statute upon the proprietor's decision. Such per se state action enabled the Court to find violations of the Equal Protection Clause without addressing private discriminatory choices. The Chief Justice explained:

> When a state agency passes a law compelling persons to discriminate against other persons because of race, and the State's criminal processes are employed in a way which enforces the discrimination mandated by that law, such a palpable violation of the Fourteenth Amendment cannot be saved by attempting to separate the mental urges of the discriminators.[70]

On the strength of this per se rule, the Court reversed the convictions in *Gober v. City of Birmingham*[71] and remanded the case in *Avent v. North Carolina* for reconsideration of the convictions in light of the *Peterson* rule.[72] In this way, the Chief Justice avoided confronting the liberty-equality debate over state action: whenever a local government enacted a law commanding segregation, it "removed that decision from the sphere of private choice" arguably shielded from the Fourteenth Amendment by the state action requirement.[73]

The second group of cases, centered upon the convictions in *Lombard v. Louisiana*, involved similar sit-in scenarios to the *Pe-*

[68] See, e.g., *Peterson*, 373 U.S. at 246–47.

[69] See id. at 246; id. at 257 (Harlan, J., concurring in part and dissenting in part) (noting the existence of a local ordinance in *Avent*); id. at 255 (Harlan, J., dissenting) (noting the existence of a local ordinance in *Gober*).

[70] *Peterson*, 373 U.S. at 248.

[71] *Gober*, 373 U.S. at 374.

[72] *Avent*, 373 U.S. at 375.

[73] *Peterson*, 373 U.S. at 248.

terson line of cases.[74] The major difference, however, was an absence of any local law mandating racial segregation.[75] Speaking once again through Chief Justice Warren, the majority latched on to the actions of another branch of local government—the executive—in order to avoid deciding the relevance of judicial enforcement of private segregation to the state action requirement. In *Lombard*, prior to the events giving rise to the cases, "New Orleans city officials . . . had determined that such attempts to secure desegregated service, though orderly and possibly inoffensive to local merchants, would not be permitted."[76] Specifically, both the superintendent of police and the mayor issued public statements condemning sit-in demonstrations and promising to continue enforcement of state laws.[77] Reasoning that a "State, or a city, may act as authoritatively through its executive as through its legislative body," the Chief Justice applied the *Peterson* rule to this situation to overturn convictions, "commanded as they were by the voice of the State directing segregated service at the restaurant."[78] Although not decided until the following term, *Griffin v. Maryland* relied on similar reasoning to overturn trespass convictions because the original complaint and arrest were made by an employee of the private owner who also happened to be a deputized sheriff.[79] In this way, Chief Justice Warren, along with the six other Justices who fully joined his opinions in both the statutory and non-statutory cases, relied upon legislative and executive action in support of racial segregation. This allowed them to avoid the ultimate question regarding state action: whether judicial enforcement of general statutes to enforce private discriminatory choices passed constitutional muster.

[74] See Lombard v. Louisiana, 373 U.S. 267, 268–69 (1962). The only major factual difference was that, in *Griffin v. Maryland*, 378 U.S. 130 (1963), the sit-in demonstrators were arrested for trespassing in a segregated amusement park rather than a segregated restaurant. See *Griffin*, 378 U.S. at 131. Although other factual circumstances set *Griffin* apart, and required reargument, the substitution of an amusement park for a restaurant is a distinction without significance.

[75] See *Griffin*, 378 U.S. at 135; *Lombard*, 373 U.S. at 268.

[76] *Lombard*, 373 U.S. at 269.

[77] Id. at 270–71.

[78] Id. at 273, 274.

[79] *Griffin*, 378 U.S. at 135 ("If an individual is possessed of state authority and purports to act under that authority, his action is state action.").

Despite joining in the disposition of the *Peterson* statutory cases, Justice Douglas made an interpretive break from the majority in *Lombard*. His concurring opinion in *Lombard* provided the second major exposition of the broad equality interpretation of the state action requirement. Focusing upon the public nature of restaurants and lunch counters, Justice Douglas invoked *Marsh v. Alabama*'s[80] injunction that once one opens his private property to the public for profit, his property rights become increasingly circumscribed by the rights of the public.[81] Justice Douglas also marshaled arguments ranging from state licensing of restaurants[82] to the "needs of the times" for all people to engage in America's now "highly interdependent life."[83] Ultimately, Justice Douglas turned to *Shelley v. Kraemer* in order to expand state action to the point of covering private discriminatory choices:

> [W]e have "state" action here, wholly apart from the activity of the Mayor and police, for Louisiana has interceded with its judiciary to put criminal sanctions behind racial discrimination in public places.
>
> . . .
>
> The criminal penalty . . . was imposed . . . by Louisiana's judiciary. That action of the judiciary was state action.[84]

Although unwilling to do so in *Peterson*, with its more "classic" state action (legislative enactments), Justice Douglas clearly signaled his continued interpretive break from the majority with his opinion in *Lombard*. While the majority struggled to extend the restriction of state action to more attenuated circumstances of state intervention, Justice Douglas reaffirmed his desire to torpedo the restriction of state action, at least in the public sphere, into oblivion.

One Justice, however, refused to join *any* of the reasoning proffered by the Chief Justice during the 1962 Term. Justice Harlan

[80] 326 U.S. 501, 506 (1946).
[81] *Lombard*, 373 U.S. at 275 (Douglas, J., concurring) (citing *Marsh*, 326 U.S. at 506).
[82] Id. at 281–83.
[83] Id. at 279.
[84] Id. at 278.

"balked at the effectual creation by the majority of an irrebuttable presumption of obedience to the ordinances and pronouncements by the private managers," and preferred instead to view the discrimination as private choice.[85] It was in his consolidated opinion on the 1962 sit-in cases that Justice Harlan articulated his constitutional position, centered around the liberty of private property owners to control their businesses and personal relationships.[86] With regard to the *Peterson* statutory-based cases, Justice Harlan's constitutional position prevented his acceptance of a per se rule that completely discounted the possibility that the proprietor had made a private choice to exclude potential patrons on the basis of race.[87] Maintaining that "[a]n individual's right to restrict the use of his property, however unregenerate . . . lies beyond the reach of the Fourteenth Amendment," Justice Harlan concluded that "the question in each case, if the *right of the individual* to make his own decisions is to remain viable, must be: was the discriminatory exclusion in fact influenced by the law?"[88] As a result, Justice Harlan crafted his own rule in *Peterson*, which, once the existence of a segregation statute had been proven, shifted the burden to the state to prove that the exclusion resulted solely from the proprietor's uninfluenced private choice.[89] In this way, Justice Harlan sought to vindicate the liberty of purely private choices that the majority's per se rule assumed to be directed by the state.

With regard to *Lombard*, Justice Harlan dismissed the influence of the statements by the mayor and police almost out of hand, as they carried no force of law. He believed that the statements were "more properly read as an effort by these two officials to preserve the peace in . . . a highly charged atmosphere."[90] However, Justice Harlan still managed to maintain unanimity of result, to some extent, with his brethren. Although his position prevented reversal of the convictions in *Lombard*, Justice Harlan found some evidence indicating the possibility of "advance collaboration between the

[85] Lewis, supra note 11, at 105.
[86] See supra notes 24–25 and accompanying text.
[87] Peterson v. City of Greenville, 373 U.S. 244, 252–53 (1963) (Harlan, J., concurring in the judgment).
[88] Id. at 252 (emphasis added).
[89] Id. at 253.
[90] Lombard v. Louisiana, 373 U.S. 267, 274 (Harlan, J., remanding).

police and [the proprietor]," which would qualify as state action.[91] Thus, Justice Harlan voted to remand the case for consideration of the collaboration evidence, thereby maintaining a rough unanimity of result despite his marked break from the constitutional reasoning of the Court.

B. Behind the Scenes: Unanimity of Result and the Interpretive Gap

Despite the overwhelming official support of the Chief Justice's opinions, the internal debates surrounding the sit-in cases of 1962 reveal a much more complex and contentious atmosphere. The overriding desire of the Court remained the same: reversing or remanding demonstrator convictions in as unanimous a fashion as possible. Yet the internal debate illustrates the further division of the Justices, including the new Justices White and Goldberg, over the competing constitutional interpretations of the state action requirement. This hardening division, coupled with the stated majority desire to avoid the constitutional questions in 1962, portended the chaos of the 1963 Term as private property adherents such as Justice Black no longer had the easy "outs" of *Peterson*'s ordinance and *Lombard*'s executive action.

On November 9, 1962, the members of the Supreme Court met to discuss the sit-in cases they had heard during the preceding week. Speaking first, Chief Justice Warren conveyed his desire to reverse the convictions in the primary cases of *Lombard* and *Peterson*, expressing the reasoning that ultimately became the majority opinions in those cases.[92] While the sentiment of the other Justices was unanimous in terms of reversal of the convictions, the reasoning behind reversal evoked marked disagreement.[93] Following the

[91] *Peterson*, 373 U.S. at 255 (noting the possibility of collaboration in *Lombard*).

[92] See Douglas conference notes, Lombard v. Louisiana (Nov. 9, 1962) (LOC, Douglas Papers, Box 1291, Case File No. 58) (Chief Justice Warren noting that the statements of the mayor and police constitute state policy similar to the enactment of an ordinance); Douglas conference notes, Peterson v. City of Greenville (Nov. 9, 1962) (LOC, Douglas Papers, Box 1281, Case File No. 71) (Chief Justice Warren stating that he would reverse based on the ordinance while expressing his preference for a per se rule given the existence of an ordinance).

[93] This Note omits Justice Douglas's comments from the conference as he largely stated the position that would become his concurring opinion in *Lombard*. Specifically, Justice Douglas noted his willingness to reach the constitutional merits and go farther than he had in *Garner*, both of which he did in his *Lombard* concurrence. Jus-

Chief Justice, Justice Black stated that, for the first time, he was "[r]eady to meet these cases on their merits" but only "if it is necessary."[94] If the Court were to reach the merits, however, Justice Black's preference for the private property interpretation of state action was made abundantly clear in conference. In defense of a narrow, private-property interpretation of state action, Justice Black argued that "a store owner as a home owner has a right to say who can come on his premises and how long they can stay. If [the store owner] has that right he cannot be helpless to call the police" for its enforcement.[95]

Yet Justice Black still sought a means of reversing the sit-in convictions.[96] Fortunately for Justice Black, the facts of *Peterson* and *Lombard* presented a way out of the conflict between his desired results and his constitutional interpretation, in the form of the segregation ordinance and statements of executive officials mandating segregation.[97] Although able to reconcile his preferred results and constitutional interpretations under the facts of the 1962 sit-in cases, the growing conflict between the two was apparent in Justice Black's conference statements. Having "no difficulty in sustaining [a] state or federal law that merchants must serve everyone despite color,"[98] thereby achieving his preferred results, Justice Black bluntly refused to recognize a constitutional difference between

tice Douglas also noted that he could never join the views stated by Justice Black, believing that restaurants constituted a public trust. See Clark conference notes, 1962 Term sit-in cases (Nov. 9, 1962) (University of Texas Law Library, Clark Papers, Box A134, Case File: sit-in cases); Warren conference notes, 1962 Term sit-in cases (Nov. 9, 1962) (LOC, Warren Papers, Box 604, Case File: sit-in cases); Douglas conference notes, Peterson v. City of Greenville (Nov. 9, 1962) (LOC, Douglas Papers, Box 1281, Case File No. 71).

[94] Warren conference notes, 1962 Term sit-in cases (Nov. 9, 1962) (LOC, Warren Papers, Box 604, Case File: sit-in cases).

[95] Id.

[96] Id. (stating that Justice Black "[w]ould try to work out opinions to reverse on all").

[97] See Clark conference notes, 1962 Term sit-in cases (Nov. 9, 1962) (University of Texas Law Library, Clark Papers, Box A134, Case File: sit-in cases) (Justice Black noting that "*if [a] state has a law* which makes it a crime" to integrate, he "would look no further" and be able to reverse); Warren conference notes, Lombard v. Louisiana (Nov. 9, 1962) (LOC, Warren Papers, Box 604, Case File No. 58) (Justice Black stating that he would treat the statements of the mayor and police in *Lombard* as though they were an ordinance).

[98] Clark conference notes, 1962 Term sit-in cases (Nov. 9, 1962) (University of Texas Law Library, Clark Papers, Box A134, Case File: sit-in cases).

the protected privacy of a home and that of a privately owned store.[99] Thus, while the facts of the 1962 cases allowed Justice Black to briefly avoid the conflict between his desired outcome of overturning convictions and his preferred constitutional position, the increasing intensity of his constitutional arguments suggested that such an uneasy détente might not last through the next Term should case facts begin to illustrate clearer elements of private choice.

Several other Justices expressed an inclination toward the constitutional position announced by Justice Black.[100] For instance, Justice Clark fully agreed with Justice Black's private property position, claiming that an "owner has the right to choose customers."[101] Similarly, Justice Stewart stated that he could not ascribe to Justice Douglas's constitutional theory, agreeing instead with Justice Black concerning the right of private property owners to choose their customers. Essentially mirroring Justice Black, Justice Stewart even questioned the use of a per se rule in *Peterson* "because the individual should have the choice of selecting his own customers."[102] In the end, however, Justices Clark and Stewart, similar to Justice Black, sought a means to reverse the sit-in convictions, ultimately joining the Chief Justice's majority opinions of 1962. Indeed, Justice Stewart expressed his willingness to "cooperate" and even be "persuaded" to accept the mayor's statement in *Lombard* as state action.[103] Thus, like Justice Black, Justices Clark and Stew-

[99] Warren conference notes, 1962 Term sit-in cases (Nov. 9, 1962) (LOC, Warren Papers, Box 604, Case File: sit-in cases) (Justice Black stating that "[t]here is of course a difference between a home and a store and [he] would honor a state law that would prevent racial discrimination of customers, but [that difference] cannot make a constitutional difference").

[100] The most obvious and consistent supporter of Justice Black's position was Justice Harlan. However, unlike Justice Black, Justice Harlan refused to follow the majority's constitutional evasion, instead following his own, which resulted in his separate opinions in the 1962 cases. As a result, this Note will not discuss Justice Harlan's comments at conference. To the extent that his views at conference differed from those of Justice Black, the differences were vented in his separate opinion. For his statements of agreement with Justice Black on the constitutional positions, see, for example, Douglas conference notes, 1962 Term sit-in cases (Nov. 9, 1962) (LOC, Douglas Papers, Box 1281, Case File No. 71).

[101] Id. (statement of Justice Clark).

[102] Id. (statement of Justice Stewart).

[103] See Douglas conference notes, 1962 Term sit-in cases (Nov. 9, 1962) (LOC, Douglas Papers, Box 1281, Case File No. 58).

art clearly preferred to preserve the liberty of private property owners when interpreting the Fourteenth Amendment but proved willing to set aside their constitutional objections in order to achieve their preferred results, a compromise that promised to become more difficult in 1963.

In contrast to their brethren, the three remaining Justices—Brennan, White, and Goldberg—preferred to put off taking sides on the constitutional question altogether. These Justices agreed to Chief Justice Warren's opinions from the beginning, affirmatively stating that the constitutional questions should not be reached.[104] The only caveat to this classification was Justice Goldberg. His position on the constitutional question was unclear, not because he refused to state a position (like Justice White), but rather because he provided contradictory indications of his position.[105] However, whatever his constitutional position, Justice Goldberg clearly sought to avoid a constitutional holding during the 1962 Term. Clarification of his views on the state action requirement, therefore, would also await the next Term.

The final problem facing the Justices during the 1962 Term involved the disposition of *Griffin v. Maryland*. Unlike *Peterson*, where a local ordinance required segregation, and *Lombard*, where the mayor and police superintendent issued official statements, the facts in *Griffin* presented a much more difficult case for conventional state action. In November 1962, only Justices Black, Brennan, and Goldberg appeared to agree with the Chief Justice's ulti-

[104] See Douglas conference notes, 1962 Term sit-in cases (Nov. 9, 1962) (LOC, Douglas Papers, Box 1281, Case File No. 71) (Justice Brennan stating that the Court "need not deal with the broad problem described by [Justice Black] and [Justice Douglas]"); id. (Justice Goldberg noting that "it is not necessary to face the broad issue"); Warren conference notes, 1962 Term sit-in cases (Nov. 9, 1962) (LOC, Warren Papers, Box 604, Case File: sit-in cases) (Justice White agreeing with Justice Brennan).

[105] Compare Douglas conference notes, 1962 sit-in cases (Nov. 9, 1962) (LOC, Douglas Papers, Box 1281, Case File No. 71) (Justice Goldberg claiming that "there is a lot to what [Douglas] says especially in light of Shelley v. Kraemer") with Memo from Warren law clerk Tim Dyk to Chief Justice Warren (Feb. 14, 1963) (LOC, Warren Papers, Box 604, Case File: sit-in cases) (suggesting that a recent memo from Justice Goldberg on *Griffin* stated "that a private individual may use police power to eject trespassers from his premises even if the decision by the private individual is motivated by a racially discriminatory purpose").

mate characterization of the deputized sheriff as a state actor.[106] Aside from Justice Douglas, who alone sought to reverse based on the broad interpretation of state action contained in his *Lombard* concurrence, most of the remaining Justices expressed uncertainty concerning the presence of state action in the case.[107] The fact that the deputized sheriff who asked the petitioners to leave, and eventually arrested them, worked for the private employer caused problems for the Justices inclined toward the private property interpretation of state action. The connection here seemed a bit too attenuated. Indeed, the connection proved too much for Justice Harlan, whose hardened private property position led him to vote for affirmance in *Griffin*, believing that "deputization leads to no inference that [the] state was enforcing segregation" policy.[108] At this stage, the overriding desire to maintain unanimity of results took over and the Justices voted to put *Griffin* over for reargument in 1963. Chief Justice Warren described the decision to Justice Douglas in a letter on May 18, 1963. The Chief Justice stated that "all agreed" to expend the effort to reach "as nearly a unanimous conclusion as possible in these 'Sit-In' cases," continuing:

> I share the views of the Conference that it is highly desirable that we do present as united a front as possible, leaving some facets of the problem to be dealt with next Term. To this end all agreed that we would do well to put over for reargument the cases of *Griffin v. Maryland*.[109]

As though the burgeoning interpretive split were not enough, the reargument of *Griffin* would ensure that at least one contentious case, with the difficult "facets of the problem," would cause friction during the 1963 Term.

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[106] See Douglas conference notes, 1962 sit-in cases (Nov. 9, 1962) (LOC, Douglas Papers, Box 1509, Case File: sit-in cases) (Justice Black indicating that he "is willing to follow [Chief Justice Warren] . . . [because] there is logic in saying the deputy wore two hats"); id. (Justice Brennan agreeing with the Chief Justice); id. (Justice Goldberg finding state action).

[107] Id. (Justice Clark "prefers to send this [case] back to determine what the status of the policeman was"); id. (Justice Stewart expressing a willingness to follow the Chief Justice, but with "difficulty"); id. (Justice White that he "is doubtful and uncertain what to do").

[108] Id. (statement of Justice Harlan).

[109] Letter from Chief Justice Warren to Justice Douglas (May 18, 1963) (LOC, Douglas Papers, Box 1281, Case File: court memoranda).

C. Summation: Where Are They Now?

Following a full term of sit-in cases, the Supreme Court had yet to decide the underlying constitutional question. However, the 1963 Term would present the Court with an opportunity to try again. Soon after the announcement of the opinions of the Term on May 20, 1963, Chief Justice Warren began to look ahead to the seventeen sit-in cases then remaining on the docket.[110] In a statement that boded well for an ultimate disposition of the state action question, the Chief Justice noted that "[n]one of these cases . . . is squarely governed by the Court's recent decisions."[111] Thus, a new batch of cases, potentially lacking the easy legislative and executive "outs," which had allowed Justice Black in particular to reconcile reversals with his constitutional position, appeared bound to present the fundamental issue in 1963.

As illustrated above, at least three Justices could be expected to rule upon the constitutional merits, particularly if the 1963 cases involved "pure" private choice untainted by legislative or executive action. Indeed, by the end of the 1962 Term, Justice Douglas had already written two published opinions based on the constitutional merits of the state action question.[112] Justice Harlan, though yet to reach the merits in an opinion, appeared poised to do so, given that he had already broken from the majority's interpretations in the 1962 Term and was prepared to affirm the convictions in *Griffin*. Finally, Justice Black's assertions in the conference of November 9, 1962 that he would reach the merits in those cases "if necessary" suggested an impending constitutional opinion, since the 1963 cases promised factual scenarios distinct from those that saved Justice Black from making a constitutional ruling in 1962.

The seemingly greater strength of the private property position at the end of the 1962 Term bolstered the possibility of a decision, written by Justice Black or Justice Harlan, on the state action question in 1963. As noted above, Justice Stewart declared his preference for the private property interpretation during conference, stating that he could never join the Douglas position. Along with

[110] See Memorandum from the Chief Justice, supra note 1.

[111] Id.

[112] See Lombard v. Louisiana, 373 U.S. 267, 278 (1963) (Douglas, J., concurring); Garner v. Louisiana, 368 U.S. 157, 177 (1961) (Douglas, J., concurring).

similar pronouncements in conference, Justice Clark moved a step further in the private property direction by circulating a draft dissent to a potential reversal of the convictions in *Griffin*.[113] Only two paragraphs in length, the dissent summed up Justice Clark's constitutional position: "[b]elieving on this record that the action taken against petitioners here was that of the owners of the park—not of the State . . . I would *affirm*."[114] This draft opinion illustrates not only Justice Clark's preference for the vindication of the liberty of private choices, but also the possibility that he was prepared to reach out and decide the constitutional question, given that he was now ready to break the unanimity of result to which the Court had long clung.

Should one of the above Justices waver, however, the 1962 Term left doubt as to whether any of their remaining brethren were prepared to reach the state action question. Although Justice Brennan voiced his preference for the equality position during the *Garner* conference in 1961, he failed to reiterate that position during the debates of 1962. His failure to reaffirm his adherence to the equality principle, at the very least, suggested a minimal intensity for any such allegiance. The final three Justices, however, lacked any clear position on the constitutional question at all. It is noteworthy that two of the undecided were Justices White and Goldberg, the men who replaced Justices Frankfurter and Whittaker. Given the general constitutional inclinations of these departed Justices,[115] it seems likely that, had Justices Frankfurter and Whittaker remained on the Court, the chances of a constitutional ruling, specifically one in favor of the Black-Harlan bloc, would have been much greater. Justice Whittaker's similarities to Justice Clark suggest that his presence would have presented another vote dangerously close to reaching the constitutional question in support of the private property position. And Justice Frankfurter's parting shots from the Court in 1961 support the distinct possibility of another Justice fully prepared to decide the state action question in favor of private property owners. Thus, the potential significance of the recent

[113] See Clark draft opinion, Griffin v. Maryland 1 (May 3, 1963) (LOC, Douglas Papers, Box 1309, Case File No. 26).

[114] Id. (emphasis added).

[115] See infra Part I.

change in the composition of the Court was staggering as the 1963 Term approached.

In the end, the decisions of 1962 maintained the unanimity of result so important to the Justices but at the price of almost ensuring a vicious constitutional confrontation in the 1963 Term. Unlike the Douglas position, the private property interpretation of the state action restriction naturally led to affirmance of trespass convictions, at least in the absence of the convenient state actions of *Peterson* and *Lombard*. And the rulings in *Peterson* and *Lombard* ensured that local officials would no longer be so foolish as to memorialize segregation in official action. Thus, if the new term brought cases lacking the easy "outs" of a segregation ordinance and the official statements of local officials, thereby supplementing the already contentious *Griffin* reargument, the Black-Harlan group, including sympathetic Justices such as Clark and Stewart, faced a difficult choice. As classic executive and legislative action disappeared and segregation appeared more and more to be the product of private choice on the part of proprietors, these Justices would have to decide whether their ultimate allegiance was to the result or to the reasoning.

III. THE 1963 TERM: *BELL V. MARYLAND* AND JUSTICE CLARK'S CHOICE

In the fall of 1963, three more sit-in cases appeared before the Supreme Court.[116] As promised, these cases more directly implicated the state action controversy than did their predecessors. Gone were legislative enactments requiring segregation. Gone were executive pronouncements disfavoring sit-in demonstrations and promising swift legal retribution. All that remained were seemingly private choices. The primacy of private choice in these cases would test the mettle of the four Justices most closely associated with the narrow private property interpretation of the state action requirement in the wake of the 1962 Term. In late 1963, with the aid of a new convert, this group appeared to win the day. Yet, as the dissenters shuffled among themselves, venting the issues of the state action interpretations in the pivotal case of *Bell v. Maryland*,

[116] Bouie v. City of Columbia, 378 U.S. 347 (1964); Bell v. Maryland, 378 U.S. 226 (1964); Barr v. City of Columbia, 378 U.S. 146 (1964).

the initially clear private property majority disintegrated into a storm of rising and falling majorities. When the smoke cleared, the Supreme Court emerged, though more fractured than before, with the answer it offered in all preceding sit-in cases: the demonstrators' convictions were reversed. But "[n]o additional light was shed on the [constitutional] question by the . . . 1964 sit-in cases; they were all decided in a way that avoided the central question" whether judicial enforcement of generally applicable statutes in a manner that vindicated private discriminatory choices constituted unconstitutional state action forbidden by the Fourteenth Amendment.[117]

A. Justice Black and the Triumph of Private Property[118]

For an observer hoping for a final answer from the Supreme Court on the reach of the Fourteenth Amendment, the facts of the 1963 sit-in cases were promising. In each case, although particularly in *Bell*, the proprietor requested that the demonstrators leave the segregated restaurant or lunch counter in the absence of an official mandate from the local legislature or executive.[119] Without the obvious specter of state-ordered segregation, these cases thus presented the pure constitutional state action question: "whether a proprietor of an establishment open to the public can, as a matter

[117] Monrad G. Paulsen, The Sit-In Cases of 1964: "But Answer Came There None," 1964 Sup. Ct. Rev. 137, 138.

[118] Although three cases, four counting the reargued *Griffin*, appeared before the Court during the 1963 Term, this Note primarily focuses upon *Bell v. Maryland*. The facts, debates, and final dispositions of the other cases will be described, but most of the analysis and description centers around *Bell* and the debates that determined its outcome. The reason for this is simple: the majority that emerged from *Bell* would be the majority controlling *Bouie*, *Barr*, and *Griffin* as well. Ultimately, the party that won the battle over *Bell* won the war over the state action requirement.

[119] *Bouie*, 378 U.S. at 348; *Bell*, 378 U.S. at 227–28; *Barr*, 378 U.S. at 147. The cases of *Bouie* and *Barr* did present a few complications in that the proprietor did not ask the demonstrators to leave until after the police arrived. Indeed, in *Barr*, the proprietor had arranged ahead of time for police presence on the day of the demonstration. 378 U.S. at 147. Such facts raise the specter of state coercion capable of allowing the Supreme Court to find state action without answering the central constitutional question. However, because the Court did not rely on these facts in its holdings and because the disposition of these cases depended on *Bell*, which lacked any similar complications, this Note will also ignore the factual problems as distinctions without significance. For a description of the facts of *Bell*, see supra note 1 and accompanying text.

of personal choice, bar members of one race and obtain the aid of the State in enforcing his racial bias."[120] And in the post-argument conference on October 23, 1963, the Supreme Court engaged this question in earnest.

The general sentiments of the conference indicated that the constitutional question would be reached during the Term, given the factual scenarios presented by the cases. Indeed, this tone was set early by the Chief Justice, who lamented that he "[h]ad hoped we could take these cases step by step, not reaching the final question until much experience had been had. That course seems to me to be impracticable."[121] This acknowledgment was quickly echoed by a majority of the Court.[122] The Chief Justice continued, broadening the reach of these sentiments, by stating "if we reach the basic question in one case we should reach it in all," adding that "before deciding we should ask the United States for its views."[123]

With regard to the cases, Chief Justice Warren preferred to rest reversal of the convictions in *Griffin*, *Barr*, and *Bouie* upon the role played by the local police in the arrests.[124] Unlike previous conferences, however, only two Justices—Stewart and Goldberg—placed themselves firmly behind the Chief Justice on these narrow

[120] Douglas draft opinion, Griffin v. Maryland 2 (Apr. 5, 1963) (LOC, Douglas Papers, Box 1309, Case File No. 6).

[121] Warren conference notes, 1963 Term sit-in cases (Oct. 23, 1963) (LOC, Warren Papers, Box 510, Case File: sit-in cases).

[122] See Judge's Notes on Conference (Oct. 23, 1963), *reprinted in* Howard & Kester, supra note 27, at 4 ("Stewart says there is at least one of these cases where we must decide the basic trespass question. He thinks that we are squarely faced with the basic questions."); see also Warren conference notes, 1962 Term sit-in cases (Oct. 23, 1963) (LOC, Warren Papers, Box 510, Case File: sit-in cases) (Justice Clark agrees with Justice Black and would thus reach the constitutional question); id. (Justice Harlan also agrees with Justice Black); id. (Justice White also agrees with Justice Black); Judge's Notes on Conference (Oct. 25, 1963), *reprinted in* Howard & Kester, supra note 27, at 4–6 (describing Justice Goldberg's arguments on the basis of the Constitution). Finally, it almost goes without saying that Justice Douglas wished to reach the constitutional question.

[123] Judge's Notes on Conference (Oct. 23, 1963), *reprinted in* Howard & Kester, supra note 27, at 3. The Court finally invited the United States to share its position on the constitutional state action issues on November 18, 1963.

[124] See id. at 2–6. For a description of *Griffin*, see supra notes 107–08 and accompanying text. For a description of the police involvement in *Barr* and *Bouie* upon which the Chief Justice relied, see supra note 119.

grounds of decision.[125] Indeed, in the case of *Griffin*, Justices Black and White stated a new willingness to affirm the convictions, thereby joining Justices Clark and Harlan, whose constitutional inclinations had led them to the same conclusion during the previous Term.[126] Despite the growing sentiment among this private property group to affirm, the Justices' inclination to overturn convictions continued to surface in cases such as *Barr* and *Bouie*, where the facts, riddled with police involvement, seemed to offer a means of reversal.[127] Thus, although a split in the unanimity of result was certain for *Griffin*, with the exception of Justice Harlan's vote for affirmance in *Bouie*, the Court managed to maintain unanimity of result with respect to *Barr* and *Bouie*.

The post-argument conference also revealed the broader constitutional inclinations of all the members of the Court, should a case require them to reach the state action question. Again, the Chief Justice began the discussion, arguing that "in the field of public accommodations owners abandoned their right of privacy by engaging in a public business," thereby leaving *Shelley v. Kraemer* and *Marsh v. Alabama* to control.[128] In this way, Chief Justice Warren cast his lot with Justice Douglas's long-stated equality interpretation of the state action requirement.[129] Similarly, Justice Brennan finally reaffirmed his preference "to reverse all going all the way with [Warren] and [Douglas] . . . on *Shelley v. Kraemer* grounds."[130] In addition to this reaffirmance by Justice Brennan, Justice Goldberg at last revealed his inclination toward a broad reading of the

[125] See Warren conference notes, 1963 Term sit-in cases (Oct. 23, 1963) (LOC, Warren Papers, Box 510, Case File: sit-in cases) (Justice Stewart "[c]ould reverse Griffin and the two So. Carolina cases [*Barr* and *Bouie*] on limited grounds"); id. (showing that Justice Goldberg could reverse on narrow grounds in *Griffin*, *Barr*, and *Bouie*).

[126] See id. (noting that Justice Black will affirm the "Maryland cases," *Griffin* and *Bell*, and revealing that Justice White will "[p]robably affirm Griffin").

[127] See id. (showing that Justices Black, Clark, and White are prepared to reverse *Barr* and *Bouie* and noting that, although Justice Harlan would affirm *Bouie*, he would at least remand *Barr*).

[128] See Judge's Notes on Conference (Oct. 23, 1963), *reprinted in* Howard & Kester, supra note 27, at 3.

[129] See supra notes 80–84 and accompanying text.

[130] See Judge's Notes on Conference (Oct. 23, 1963), *reprinted in* Howard & Kester, supra note 27, at 4.

state action requirement.[131] Indeed, at conference on October 25, Justice Goldberg elaborated the broad interpretation of state action to an extent yet to be reached by any Justice save Justice Douglas. Beginning "on the premise that these sit-downers' constitutional rights have been violated," Justice Goldberg attacked segregation under both *Shelley v. Kraemer* and the *Civil Rights Cases*, emphasizing "that the 13th, 14th and 15th [amendments] together outlawed segregation [as] . . . . 'Indicia of slavery.'"[132] Thus, by the end of the conference, Justice Douglas gained three new adherents to his equality position. Unfortunately for him, there were five other Justices who constituted a majority.

In response to this rally around Justice Douglas's position, Justice Black bristled at what he viewed as an overruling of the *Civil Rights Cases*.[133] He then reaffirmed his belief that there was no constitutionally relevant distinction between a privately owned home and a privately owned store.[134] As they had countless times before, Justices Clark and Harlan expressed their agreement with Justice Black on the ground that a "property owner has a right to choose his customers."[135] Following his uncertainty during the 1962 Term, Justice Stewart finally sided with the private property position in 1963.[136] Thus, with Justice White ultimately casting his vote for the narrow interpretation of the state action requirement,[137] Justices Black and Harlan commanded a majority. Still, the question remained: would a case offer the private property bloc a chance to announce its constitutional interpretation as the opinion of the Court?

[131] Id. (Justice Goldberg agreeing with Chief Justice Warren and Justices Douglas and Brennan).

[132] Judge's Notes on Conference (Oct. 25, 1963), *reprinted in* Howard & Kester, supra note 27, at 4–5.

[133] See Warren conference notes, 1963 Term sit-in cases (Oct. 23, 1963) (LOC, Warren Papers, Box 510, Case File: sit-in cases).

[134] See id.

[135] See Judge's Notes on Conference (Oct. 23, 1963), *reprinted in* Howard & Kester, supra note 27, at 3 (statement of Justice Harlan); see also Warren conference notes, 1963 Term sit-in cases (Oct. 23, 1963) (LOC, Warren Papers, Box 510, Case File: sit-in cases) (Justice Clark "[a]grees with everything Hugo said" and Justice Harlan also "[s]ubscribes to everything Hugo says").

[136] Id. at 4 ("Stewart says he fully agrees with [Justice Black].").

[137] See id. (Justice White agreeing with Justice Black).

In *Bell v. Maryland*, Justice Black and his companions appeared to have their chance. As noted above, *Bell* lacked the complications of obvious police involvement. In *Bell*, the manager and owner first informed the demonstrators of the restaurant's segregation policy, with the owner eventually swearing out warrants for their arrest.[138] Given the minimal police involvement, with the concurrently minimal likelihood of state coercion, an overwhelming majority of the Justices voted to reach the constitutional question in *Bell*. And, in light of the constitutional opinions of the Justices, noted above, the narrow private property position carried the day.[139] Although voting to reverse, Justice Brennan voiced a more flexible position than (at least) Justices Douglas and Goldberg. Justice Brennan vacillated on reaching the constitutional issues, preparing to reverse "on very much the same grounds as those urged by [Warren] and [Douglas] on *Shelley or limited grounds*."[140] Thus, while his brethren seemed to voice staunch constitutional positions in *Bell*, Justice Brennan offered an opportunity to continue the Court's tradition of both reversing convictions and avoiding the Constitution.

In the wake of the October 23 conference, therefore, the Supreme Court set out to break new ground. The Court would decide *Bell* under the Constitution and the liberty of private property owners to exclude customers based on race would be shielded from Section One of the Fourteenth Amendment. The majority behind Justice Black's position took care to leave Section Five of the Fourteenth Amendment, conferring affirmative power on Congress, untouched:

[138] See supra note 1 and accompanying text.

[139] The vote came down 5-4 with Justices Black, Clark, Harlan, Stewart, and White voting to affirm and Chief Justice Warren and Justices Brennan, Douglas, and Goldberg voting to reverse. See Warren conference notes, 1963 Term sit-in cases (Oct. 23, 1963) (LOC, Warren Papers, Box 510, Case File: sit-in cases) (Justice Clark, agreeing with Justice Black, "[w]ould reach the Const. in Bell . . . and affirm") (Justice Black affirming in the "Maryland cases," *Bell* and *Griffin*, Justice Harlan affirming, Justice White following Justice Black and affirming, and Justice Goldberg reversing "broadly" in *Bell*); see also Judge's Notes on Conference (Oct. 23, 1963), *reprinted in* Howard & Kester, supra note 27, at 3–4 (noting Chief Justice Warren and Justice Douglas reversing).

[140] Warren conference notes, 1963 Term sit-in cases (Oct. 23, 1963) (LOC, Warren Papers, Box 510, Case File: sit-in cases) (emphasis added).

> We express no views as to the power of Congress, acting under one or another provision of the Constitution, to prevent racial discrimination in the operation of privately owned businesses . . . . Our sole holding is that § 1 of the Fourteenth Amendment, standing alone, does not embody such a drastic change in what has until very recently been accepted by all as the right of a man who owns a business to run the business in his own way . . . .[141]

Yet Justice Goldberg, at the conference of October 25, warned of the broader societal implications of the Court's disposition. "I fear the results of this opinion," he claimed, because "if we hold as we have voted we are going to set back legislation . . . a hundred years" by providing discrimination in public places with a "[s]tamp of approval."[142] Such considerations of a tacit Court approval of private discrimination in public accommodations seemed dire with the Civil Rights Act facing spirited opposition in Congress, including a determined southern filibuster in the Senate. Justice Goldberg implored the majority to reconsider their position for the "[g]ood of the country and good of the Court."[143]

B. Continuing Support and Early Decisions

Despite these pessimistic predictions, the majority behind Justice Black's position held firm, even pressing for a quick resolution of the constitutional issue. In the months following the initial vote in *Bell*, the members of the majority continually reaffirmed their support for Justice Black and his private property opinion in *Bell*.[144] On March 5, 1964, Justice Black first circulated his draft opinion in *Bell*, with its narrow conception of state action, to the other four members of the majority.[145] Justice Clark hailed the draft as "*just right* . . . [and a] fine job," before declaring his "hope that it can

[141] See Letter from Justice Harlan to Justice Black (May 6, 1964), *reprinted in* Howard & Kester, supra note 27, at 21.

[142] Id. at 5.

[143] Id. at 6.

[144] From this point onward, this Part deals almost exclusively with *Bell v. Maryland*. As noted, the dispositions in *Barr* and *Bouie* tracked the disposition in *Bell*. The majority that decided *Bell* would ultimately decide the other cases.

[145] Memoranda (Mar. 5, 1964), *reprinted in* Howard & Kester, supra note 27, at 9.

come down soon."[146] Similarly, Justice Stewart proclaimed his happiness "to join the excellent opinion you have written for the Court in [*Bell*]."[147]

During the early spring of 1964, the dissenting opinions of the other Justices began to circulate through the Court, offering the possibility of persuading members of the majority to reconsider their allegiance. On April 8, Justice Douglas circulated an early version of his opinion in *Bell*, providing the broad state action position ultimately published as his official opinion in *Bell*.[148] Justice Goldberg quickly joined this broad constitutional opinion,[149] which also won the support of the Chief Justice and Justice Brennan by the end of April.[150] Subsequently, Justice Goldberg circulated his own opinion, quickly joined by the other dissenters,[151] based on an argument "that the 14th Amendment, of itself, prevents enforcement of trespass laws against sit-in demonstrators."[152] In fact, this opinion proved to be so strongly worded, referencing *Dred Scott* while referring to the majority opinion as an "apologia," that Justice Goldberg felt compelled to apologize to Justice Black.[153] In response, Justice Black accused Justice Goldberg of allowing the emotional context of the cases to subvert reasoned argument.[154]

Throughout this flurry of opinions, the majority remained intact. Justices Clark and Stewart reaffirmed their support of Justice Black's constitutional position in mid-April, approving his draft opinions in *Bouie* and *Barr*.[155] Indeed, once again, Justice Black's supporters urged him to deliver the opinions as early as possible. On April 16, Justice Harlan summed up the sentiment: "I am in-

[146] Note from Justice Clark to Justice Black (Mar. 9, 1963), *reprinted in* Howard & Kester, supra note 27, at 10.

[147] Id. at 12.

[148] Id. at 13.

[149] Circulations, *reprinted in* Howard & Kester, supra note 27, at 13.

[150] Id. at 20.

[151] Id. at 17.

[152] Id. at 17.

[153] Bench Memo from Justice Goldberg to Justice Black (Apr. 23, 1964), *reprinted in* Howard & Kester, supra note 27, at 17–20. On May 4, Justice Goldberg removed his references both to *Dred Scott* and Justice Black's apologia. Id. at 20.

[154] Bench Memo from Justice Black to Justice Goldberg (Apr. 23, 1964), *reprinted in* Howard & Kester, supra note 27, at 19.

[155] Notes from Justices Clark and Stewart to Justice Black, *reprinted in* Howard & Kester, supra note 27, at 15.

creasingly of the view, as I know you are, that it is important to bring these sit-in cases down without further unnecessary delay . . . ."[156]

In contrast to this majority solidarity, Justice Brennan repeatedly altered his position during the spring of 1964. On April 27, Justice Brennan circulated his own dissent in *Bell*, arguing that the Court should not reach the constitutional issues, but rather remand the case in light of changes in Maryland law that forbade segregation in public accommodations.[157] As a result, by May 5, Justice Brennan had pulled out of Justice Goldberg's opinion and its constitutionally based arguments, lambasting both the majority and his fellow dissenters:

> The constitutional question decided today should not have been reached, and I therefore join neither the Court [Justice Black's opinion] nor my Brothers DOUGLAS and GOLDBERG . . . . In holding that the store owners have a constitutionally protected right to refuse to serve food to Negroes . . . the Court rides roughshod over well-settled principles that compel the reversal of the judgments . . . on narrower grounds.[158]

Justice Brennan based these assertions upon the warnings issued by Justice Goldberg the previous October. With the Civil Rights Act before the Senate, the Court "cannot be blind to the fact that [*Bell*'s] opposing opinions on the constitutional question decided will inevitably enter into and perhaps confuse that debate."[159] Deciding the state action issue in this context risked incurring a "self-inflicted wound," depending upon the outcome of congressional debates.[160] Still, the majority's stubborn insistence on reaching the constitutional merits again led Justice Brennan to join the opinion of Justice Goldberg on May 14.[161]

Thus, by the middle of May 1964, the Justices settled into largely well-defined positions regarding the constitutional position in *Bell*.

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[156] Letter from Justice Harlan to Justice Black (Apr. 16, 1964), *reprinted in* Howard & Kester, supra note 27, at 16.

[157] Circulations, *reprinted in* Howard & Kester, supra note 27, at 19.

[158] Brennan draft opinion, Bell v. Maryland 1 (May 5, 1964) (LOC, Warren Papers, Box 511, Case Files Nos. 9, 10, 12).

[159] Id.

[160] Id.

[161] See Circulations, *reprinted in* Howard & Kester, supra note 27, at 23.

The members of the majority steadfastly held to the narrow conception of state action contained in Justice Black's opinion for the Court. Similarly, Chief Justice Warren, along with Justices Douglas and Goldberg, remained staunchly opposed to the majority's constitutional position, joining the broad assessments of the state action requirement of Justices Douglas's and Goldberg's dissenting opinions. Yet there remained a wild card. Justice Brennan's preference for the broad equality interpretation of the state action requirement appeared overshadowed by his desire to avoid the constitutional question altogether. Finally, it seemed, the constitutional question would be decided and decided in favor of private property rights, barring an unexpected judicial change of heart.

C. May 27, 1964: Justice Clark's Choice

On May 27, 1964, Justice Tom Clark chose the Brennan route, which permitted him to avoid the constitutional question by way of remanding the case.[162] That same day, Justice Brennan again pulled out of the broad opinions of Justices Douglas and Goldberg, believing the cases now to be "reversed on narrow grounds."[163] Justice Douglas's reaction to the implication that the constitutional issues would not be reached was swift and harsh.[164] Despite the new majority for reversal in *Bell*, Justice Douglas refused to join Justice Brennan's opinion. Given the position of the now-depleted Black group, "a majority believ[es] that the change in the state law since [the *Bell*] convictions present [sic] no federal question," thereby subverting the authoritativeness of Justice Brennan's opinion.[165] Justice Douglas's tirade suggested that he preferred the Court to reach the constitutional issue, and have his position lose, rather

[162] Clark Memorandum to the Conference (May 27, 1964), *reprinted in* Howard & Kester, supra note 27, at 24 ("As I advised Brother Black this morning, I am joining the opinion of Brother Brennan in these cases [*Barr*, *Bouie*, *Bell*].").

[163] See Brennan Memorandum to Conference (May 27, 1964), *reprinted in* Howard & Kester, supra note 27, at 24.

[164] Upon learning of Justice Clark's decision and Justice Brennan's assertion of a narrow, non-constitutional decision, Justice Douglas, "according to his clerk, exclaims 'Oh, shit!' and sits down and writes memo of his own to the conference." See Circulations, *reprinted in* Howard & Kester, supra note 27, at 24.

[165] Douglas Memorandum to the Conference (May 28, 1964), *reprinted in* Howard & Kester, supra note 27, at 27.

than not reach it at all. Justice White summarized this concept in a letter to Justice Black:

> The majority controls whether the merits are to be reached and the six who have voted on the merits constitute a quorum. Four of these six have voted to affirm . . . . The three members of the Court who refuse to vote on the merits cannot control the action of the Court. The judgment of the Court is therefore an affirmance.[166]

In contrast to these extreme reactions, Justice Harlan took a more neutral approach to Justice Clark's sudden change of heart. Lamenting that "in these circumstances it would have been better practice for the three Justices, who vote to remand, to reach the constitutional question," ultimately, "[t]he fact is that there is not a majority for *any* disposition."[167] Whatever their personal reactions to Justice Clark's switch, these Justices were faced with the results: a non-constitutional plurality opinion, surrounded by three separate opinions on the merits.[168] Had matters remained the same, this disposition of *Bell* would have been easy to explain: Justice Brennan never truly wanted to reach the constitutional question while Chief Justice Warren and Justice Clark ultimately decided, for one reason or another, that it was best to back away from their constitutional inclinations. Unfortunately, matters became significantly more complicated.

D. June 1964: The Chaos Intensifies

In a meeting with Justice Douglas, Justice Clark attempted to explain his reasons for deciding to reverse in *Bell*. As recounted by Justice Douglas, Justice Clark decided that *Bell* could be decided along the lines of *Peterson*, "that though there are no statutes there

[166] Letter from Justice White to Justice Black (June 2, 1964), *reprinted in* Howard & Kester, supra note 27, at 30.

[167] Letter from Justice Harlan to Justice Black (June 2, 1964), *reprinted in* Howard & Kester, supra note 27, at 29.

[168] A draft opinion from June 4 sets out the Court breakdown: Chief Justice Warren and Justices Clark and Brennan voting to reverse for Justice Brennan's non-constitutional reasoning; Justices Douglas and Goldberg reversing for their stated reasons; Justices Black, Harlan, Stewart, and White remaining with Justice Black's earlier opinion to affirm. See Black draft opinion, Bell v. Maryland 21 (June 4, 1964) (LOC, Warren Papers, Box 512, Case File No. 12).

is custom, attitude, etc. and that they are sufficient."[169] Concluding the meeting, Justice Clark suggested to Justice Douglas that he planned "to write an opinion along that line."[170] On June 11, Justice Clark circulated an opinion for *Bell v. Maryland*.[171] However, the opinion Justice Clark drafted bore little resemblance to the moderate extension of *Peterson* he proposed to Justice Douglas. Instead, Justice Clark reached the merits of the constitutional question. While the opinion did discuss the custom of segregation, as Justice Clark mentioned to Justice Douglas, it also relied upon such equality interpretation stalwarts as *Shelley v. Kraemer*, *Marsh v. Alabama*, and the common law duty of innkeepers to serve all comers.[172] In the space of two weeks, therefore, Justice Clark transitioned from the narrow private property interpretation of the state action requirement to the broad equality position.

Unlike the other opinions for reversal, Justice Clark quickly garnered a majority, including a relieved Justice Douglas, and his became the first official "Opinion of the Court" since his own departure from Justice Black's old majority.[173] Yet, despite the fact that the opinion seemed to be a complete change of direction for a previously staunch private property advocate, Justice Clark's draft opinion was less radical than it seemed on its face. For instance, as noted above, the opinion obviously cited a number of the traditional arguments for a broad interpretation of state action. The problem, however, with raising so many arguments was to make it almost "impossible to know just what the opinion rest[ed] on."[174] In

[169] Notes of meeting between Justice Clark and Justice Douglas (LOC, Douglas Papers, Box 1314, Case File No. 12).

[170] Id.

[171] See Circulations, *reprinted in* Howard & Kester, supra note 27, at 33.

[172] See Clark draft opinion, Bell v. Maryland 8–11 (June 11, 1964) (LOC, Warren Papers, Box 512, Case File No. 12).

[173] See Memorandum from Justice Douglas to Justice Clark (June 11, 1964) (LOC, Douglas Papers, Box 1311, Case File No. 12) (Justice Douglas expressing happiness to join Justice Clark's opinion and hoping that it would become the Court's official opinion); see also Memorandum from Chief Justice Warren to Conference (June 11, 1964), *reprinted in* Howard & Kester, supra note 27, at 34 (memorandum from the Chief Justice stating: "inasmuch as he [Justice Clark] has now circulated an opinion in [*Bell*], this case and the other sit-in cases controlled by it are assigned to Justice Clark").

[174] Circulations, *reprinted in* Howard & Kester, supra note 27, at 33 (describing a memo prepared for Justice Black by his law clerks, A.E. Dick Howard and John G.

addition, Justice Clark ended his opinion with a call to Congress, which "is better advised as to the necessary steps to be taken and in the give and take of the legislative process can fashion an Act that will meet the necessities of the situation."[175] Thus, the seemingly radical change in Justice Clark's constitutional inclinations was tempered by an opinion that appeared to do too much and a call for congressional action, circulated the day after the southern senatorial filibuster broke. Not to mention that within the week, Justice Clark again abandoned the constitutional question altogether.

On June 16, 1964, Justice Brennan announced the final victory of his moderate opinion.[176] Justice Stewart served as the catalyst for this final transition. As a result, the constitutional questions lay undecided once again, this time giving way to changes in Maryland law, leaving Justice Douglas, once again, livid at the Court's failure to decide the reach of the state action requirement. Indeed, Justice Douglas soon circulated a new version of his opinion in *Bell*, "castigating the Court for failing to reach the constitutional issue" in an attempt "to shake members of the Brennan group into reaching the merits," particularly Justice Clark.[177] However, the shifting of opinions was over. No members of the Brennan majority would budge and the Court announced Justice Brennan's opinion as the opinion of the Court on June 22, 1964.

E. Reasoning and Result

The only internally produced explanation of these events and their causes comes from Justice Douglas, whose views on the affair could be suspect. Justice Douglas clearly blamed Justice Brennan for the ultimate failure of the Court to reach the constitutional merits in 1964, describing Justice Brennan's final opinion as "the product of his plan to keep the Court from deciding the basic con-

Kester). Such an assessment of the Clark opinion is noteworthy coming from a pair of men charged with attacking the weaknesses of its arguments for Justice Black.

[175] Clark draft opinion, Bell v. Maryland 14 (June 11, 1964) (LOC, Warren Papers, Box 512, Case File No. 12).

[176] See Brennan Memorandum to Conference Re: Nos. 10 and 12 – Bell v. Maryland & Bouie v. City of Columbia (June 16, 1964), *reprinted in* Howard & Kester, supra note 27, at 35 ("Since Justice Stewart has joined my opinions . . . the Chief Justice has assigned [the cases] to me to circulate as opinions for the Court. The Chief Justice and Brothers Clark, Stewart, Goldberg and I make the five.").

[177] See Circulations, Howard & Kester, supra note 27, at 3.

stitutional issue of the Fourteenth Amendment."[178] According to Justice Douglas, Justice Brennan was fully prepared to follow along with Justice Clark's opinion on the merits, but was shamed into returning to his non-constitutional opinion when Justice Stewart "implied that Brennan's opinion merely to vacate was an opinion not of principle but of expediency."[179] Through a series of internal negotiations, Justice Brennan then convinced Stewart to join his opinion; Justice Stewart induced Justice Clark to return to the Brennan opinion; and, finally, Justice Clark persuaded the Chief Justice to join, bringing Justice Goldberg with him.[180]

Yet the movements on the Court might be more accurately explained by the combination of the intellectual moderation of the Justices in the majority and their desire to reverse the convictions. While every member of the Court illustrated a clear preference for reversing demonstrator convictions, several of the Justices in the final majority consistently displayed more moderate reasoning than their brethren. The Chief Justice, for instance, originally preferred to reverse all of the cases without reaching the constitutional questions.[181] Similarly, although always prepared at conference for an affirmance in *Bell*, Justices Clark and Stewart preferred to reverse *Barr* and *Bouie* on limited grounds.[182]

Given such vacillation on the other cases of the 1963 Term, coupled with the somewhat ambiguous nature of Justice Clark's opinion on the merits in *Bell*, it is possible that the lure of overturning convictions pushed the Justices toward reversals. This vacillation would also lead them to accept the most moderate opinion available, the Brennan opinion. Such an interpretation receives some support from Justice Douglas's account of events. According to

[178] Douglas memorandum for the files, Bell v. Maryland (June 20, 1964) (LOC, Douglas Papers, Box 1314, Case File No. 12).

[179] Id.

[180] See id. This is a very brief description of Justice Douglas's account. For a more competent and thorough summary, see Klarman, supra note 5, at 275 n.293.

[181] See Judge's Notes on Conference (Oct. 23, 1963), *reprinted in* Howard & Kester, supra note 27, at 3 (stating that Chief Justice Warren could reverse *Griffin*, *Barr*, and *Bouie* based on the actions of the police in coercing the arrests); see also id. at 7 (showing that Chief Justice Warren originally argued for reversal in *Bell* for lack of notice to prospective customers that the restaurant was segregated).

[182] See Warren notes on conference, 1963 Term sit-in cases (Oct. 23, 1963) (LOC, Warren Papers, Box 510, Case File: sit-in cases) (showing that Justice Clark would reverse for lack of notice, and Justice Stewart would reverse on limited grounds).

Justice Douglas, Justice Clark, who had just transitioned from an opinion reaching the merits to one that did not, only wrote his opinion in *Bell* following the discussion that, since a quorum of the Court reached the merits, the majority of that quorum should decide the disposition in the case.[183] At the time, when the Black opinion still commanded four votes, this would have resulted in affirmance. In this way, Justice Clark's opinion could be viewed as a means to achieve reversal through an ambiguous opinion, while Justice Stewart's switch could be viewed as a similar attempt to achieve reversal, but through a non-constitutional opinion. Whatever the reasons, the result was clear; the convictions were overturned without an opinion addressing the constitutional question.

The separate opinions in *Bell v. Maryland* merely elaborated upon the constitutional positions of their respective authors.[184] The majority opinions in *Bell*, *Barr*, and *Bouie*, however, were at best expedients to overturn convictions and, at worst, disingenuous. As noted above, the Brennan opinion in *Bell* remanded the case to the Maryland courts to determine the effect of a "supervening change in state law," namely the passage in Baltimore of laws forbidding discrimination in places of public accommodation. It was up to the courts of Maryland to determine whether this change of state law required dismissal of petitioners' conviction.[185] The Brennan opinion then set out to ensure that *Bell* would not return to the Supreme Court after reargument in Maryland. As one commentator noted, Justice Brennan "proceeded to set forth the main points of an opinion that could be written by the Maryland Court of Appeals to overturn the convictions under state law."[186]

The convictions in *Barr* and *Bouie* were similarly overturned on a disingenuous stratagem. According to Justice Brennan, the con-

[183] See Douglas memorandum for the files, Bell v. Maryland (June 20, 1964) (LOC, Douglas Papers, Box 1314, Case File No. 6).

[184] See *Bell*, 378 U.S. at 242 (Douglas, J., reversing); id. at 286 (Goldberg, J., concurring); id. at 318 (Black, J., dissenting).

[185] See id. at 228–30 (majority opinion).

[186] Paulsen, supra note 117, at 144. For a description of the roadmap of Maryland law laid out by Justice Brennan, see id. at 144–45; see also *Bell*, 378 U.S. at 235–36. The reasoning in *Griffin* will not be discussed, except to say that the majority accepted the opinion offered by Chief Justice Warren during the 1962 Term and described in Part II, supra, namely that the deputized sheriff responsible for the arrests of the demonstrators constituted sufficient state action to avoid the question of judicial enforcement as state action. See Griffin v. Maryland, 378 U.S. 130, 135 (1964).

victions could not stand because the South Carolina Supreme Court had "unforeseeably and retroactively expanded by judicial construction" the reach of a trespass statute, explicitly outlawing unauthorized entry onto property, to reach unauthorized *remaining* on property of another.[187] Justice Black's dissent lambasted Justice Brennan, arguing that no one could be "misled by the language of [the] statute into believing that it would permit them to stay on the property of another over the owner's protest."[188] Indeed, Justice Brennan's opinion seemed to impugn all judicial construction of statutes because "[w]henever a state appellate court settles the meaning of a criminal statute, the scope of which had been disputed, the judges necessarily add to the statutory words retroactively."[189] Despite the arguable legal deficiencies of the opinions, however, they achieved a purpose that all the Justices could respect: the convictions were overturned.

Thus, again, the sit-in cases of the 1963 Term, like those of 1962, provided no answer to the reach of the state action requirement and its implications for the liberty of private property owners. With the passage of the 1964 Civil Rights Act, and its signing on July 2, the Court never had the opportunity to decide again. Unlike earlier Terms, however, 1963 held the most promise for decision as the long-defunct unanimity of interpretation evolved into a stark disunity of result in *Bell*, *Barr*, and *Bouie*. And, although the Court came agonizingly close to deciding the constitutional question, indeed within weeks, a bloc of Justices, either preferring to avoid the constitutional question or preferring to reverse the convictions of demonstrators (or both), ensured that the Court did not speak authoritatively on the state action question. It is conceivable that this would not have been possible had Justices Frankfurter and

[187] Bouie v. City of Columbia, 378 U.S. 347, 352 (1964).

[188] Id. at 366–67 (Black, J., dissenting).

[189] Paulsen, supra note 117, at 141. It can even be argued that to act retroactively is the peculiar function of the judiciary. See James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 549 (1991) (Scalia, J., concurring in the judgment) ("I am not so naive (nor do I think our forebears were) as to be unaware that judges in a real sense "make" law. But they make it as *judges make it*, which is to say *as though* they were 'finding' it—discerning what the law is, rather than decreeing what it is today *changed to*, or what it will *tomorrow* be.").

Whittaker[190] remained on the Court. Their affinity for the private property position, noted above, suggests the possibility of at least one more vote for Justice Black's position during the debates over *Bell*.[191] Ultimately, six Justices, three for the private property position and three for equality, *did* address the constitutional question, such that, to the outside world, the Court appeared equally divided. But were they? Had Justice Clark or Justice Stewart, the staunch private property advocates from the conferences of 1962 and 1963, truly abandoned the narrow interpretation of state action? Was a majority now at least intellectually committed to a broad conception of state action? Time would tell the extent of Justices Clark and Stewart's conversions.

EPILOGUE: LIFE AFTER THE CIVIL RIGHTS ACT AND THE FINAL TALLY

The final sit-in cases reached the Supreme Court on October 12, 1964. *Hamm v. City of Rock Hill* and *Lupper v. Arkansas* presented classic sit-in case factual scenarios.[192] The key difference between these cases and their predecessors was the 1964 Civil Rights

[190] Especially important in Justice Whittaker's case are his statements at the certiorari conference during *Garner* in which he suggested that once a property owner revokes the invitation to be on their property, anyone disobeying that revocation is a trespasser. See Douglas conference notes, certiorari conference on Case File Nos. 617, 618, 619 (Mar. 17, 1961) (LOC, Douglas Papers, Box 1268, Case File Nos. 26, 27, 28). Potentially more telling, Justice Whittaker delivered an interview in July 1964, mere days after the passage of the 1964 Civil Rights Act. During the course of the interview, the former Justice denounced sit-ins as illegal invasions of private property rights and suggested that the new Civil Rights Act suffered from the same constitutional infirmities as the act overturned in the *Civil Rights Cases*, presumably a lack of state action. While suggesting the inclinations of the former Justice, it is important to remember the context of this interview; given after his retirement and without the benefit of briefing on the recent round of cases, Justice Whittaker was free from the pressures that forced some of his brethren away from their constitutional leanings. See Whittaker Raps Sit-ins, Wash. Post, July 5, 1964, at A6.

[191] One vote because Justice Frankfurter's replacement, Justice White, turned out to be a staunch supporter of the narrow private property position. But, given the presumed extra vote provided, were Justice Whittaker still in Justice Goldberg's place, coupled with Justice Frankfurter's proven persuasive (or bullying) prowess, it is possible that neither Justice Clark nor Justice Stewart would have abandoned the Black group. Of course, as with all counterfactual exercises, we will never know. Yet, as with all counterfactuals, the discussion illuminates the role of fortuity on the path of history.

[192] 379 U.S. 306 (1964).

Act, signed into law three months before oral argument, but well after the events involved in *Hamm* and *Lupper* occurred. The intervention of the Civil Rights Act resulted in opinions vastly different from previous sit-in cases. On its face, the battle in these cases was not over the scope of the state action requirement of the Fourteenth Amendment, but rather over the effect of the Civil Rights Act on trespass convictions predating its passage. However, the lines drawn by the debate over the Act's abatement of prior convictions, essentially marking out the final lines of the state action controversy, are significant to the extent that they illuminate the constitutional positions of Justices Clark and Stewart.

Justice Clark authored the majority opinion in the consolidated cases of *Hamm* and *Lupper*, vacating the convictions due to their abatement by the passage of the Civil Rights Act.[193] Concurring, Justices Douglas and Goldberg proceeded further to reach the constitutional issues left unsettled in the 1963 Term, suggesting that the Act merely enforced the right of freedom from discrimination in places of public accommodation already secured by the Fourteenth Amendment.[194] In a series of separate opinions, however, Justices Black, Harlan, Stewart, and White, while sympathetic to the result,[195] attacked the abatement conclusion as unrelated to interstate commerce, inapplicable when a federal law conflicts with state convictions, and unintended by Congress.[196] This split alone presents the two constitutional factions of the sit-in controversy firmly entrenched against one another. However, the division also offers a prism for assessing the underlying concerns of the key Justices from 1963: Stewart, Clark, and Brennan.

The decision of Justice Stewart to dissent in *Hamm* and *Lupper* suggests that he subscribed to the narrowest interpretation of the

[193] See id. at 308. Specifically, Justice Clark reasoned that, since under federal law the Civil Rights Act would abate federal prosecutions, the Supremacy Clause mandated abatement of state cases as well. See id. at 315.

[194] Id. at 317–18 (Douglas, J., concurring).

[195] See Douglas conference notes, Hamm v. City of Rock Hill (Oct. 16, 1964) (LOC, Douglas Papers, Box 1338, Case File No. 2, 5) (describing Justice Harlan's sympathy for the result and Justice Stewart's desire to "go along with" the majority for reversal).

[196] See *Hamm*, 379 U.S. at 321–22 (Black, J., dissenting) (legislative history); id. at 323–26 (Harlan, J., dissenting) (federalism and interstate commerce); id. at 326–27 (Stewart, J., dissenting) (federalism); id. at 327–28 (White, J., dissenting) (legislative history).

Bell opinion, restricted to its facts, to achieve reversal. While willing to accept a remand to Maryland courts to decide whether Maryland convictions were abated by a change in Maryland law, Justice Stewart proved unable to accept the abatement argument when made to reverse state convictions based on changes in federal law.[197] Such restriction to the facts of *Bell* implies that, if forced to decide the constitutional question, Justice Stewart's preference for the private property position had not changed. Although sympathetic to reversal in *Hamm* and *Lupper*,[198] the difference in facts (federal law rather than state), proved too much for Justice Stewart and he consequently dissented.

With regard to Justices Clark and Brennan, their positions in *Hamm* and *Lupper*—federal abatement of state convictions—merely illustrate a preference to avoid the constitutional question while achieving their favored result of reversed convictions. Had they wished to weigh in on the constitutional issues, and completely agreed with the equality interpretation, they could easily have joined the Douglas concurrence, particularly given that the passage of the Civil Rights Act effectively mooted the effect of the constitutional question. Instead, Justices Brennan and Clark rested on the decision of Congress, a position actually foreshadowed by the chaos surrounding *Bell*. In draft opinions for *Bell*, both Justice Brennan and Justice Clark either called on congressional action[199] or criticized Justice Black's majority for reaching out to decide a question that Congress possessed the greater institutional capacity to decide.[200]

Furthermore, in the case of Justice Clark, the *Lupper* opinions indicate an overriding preference for the result of reversals. First, the abatement argument, which arguably held past convictions to burden present interstate commerce,[201] contradicted the narrow conception of interstate commerce voiced by Justice Clark in

[197] See id. at 326–27 (Stewart, J., dissenting).

[198] See supra note 195.

[199] See Clark draft opinion, Bell v. Maryland 14 (June 11, 1964) (LOC, Warren Papers, Box 512, Case File No. 12); see also Brennan draft opinion, Bell v. Maryland (May 5, 1964) (LOC, Warren Papers, Box 511, Case File No. 12).

[200] See Clark draft opinion, Bell v. Maryland 14 (June 11, 1964) (LOC, Warren Papers, Box 512, Case File No. 12).

[201] See *Hamm*, 379 U.S. at 325 (Harlan, J., dissenting).

Boynton.[202] Second, at the conference for *Hamm*, the Chief Justice offered two means of overturning the convictions: abatement and evidentiary under *Thompson v. Louisville*.[203] As a ruling based on *Thompson* would require an evidentiary determination in each case in order to overturn the convictions, Justice Clark noted "with apprehension . . . the 3000 cases of sit-ins on their way" to the Court.[204] Thus, Justice Clark ultimately sided with the position offering his preferred result through the simplest means.

A. The Sit-In Cases: The Final Count

Throughout the foregoing analysis, this Note sought to track the positions of the Justices in the hopes of determining their inclinations toward the ultimate constitutional question presented by the sit-in cases: whether judicial enforcement of generally applicable statutes in a way that vindicated racially discriminatory choices in privately owned places of public accommodation constituted impermissible state action in violation of the Equal Protection Clause. In the final tally, the men who occupied the Supreme Court during the sit-in controversy inclined toward enforcing the choices of private property owners.

Three Justices, as confirmed by their dissents in *Bell v. Maryland*, clearly supported a narrow interpretation of the state action requirement, which upheld the liberty of private landowners to make discriminatory choices. Similarly, three other Justices, confirmed by their opinions in *Bell*, clearly preferred a broad interpretation of state action that vindicated the equality of all citizens to the use of public accommodations. The key to the Court's overall inclination thus lay with the remaining three Justices: Clark, Brennan, and Stewart.

As illustrated above, Justice Stewart entered the 1963 Term with a preference for the private property position on state action. In the end, however, Justice Stewart proved unwilling to affirm the convictions in *Bell* and settled for an opinion that avoided the con-

[202] See Boynton v. Virginia, 364 U.S. 454, 468–70 (1960) (Whittaker, J., dissenting).

[203] See Clark conference notes, 1964 Term sit-in cases (Oct. 16, 1964) (University of Texas Law Library, Clark Papers, Box A165, Case File Nos. 2, 5).

[204] See Douglas conference notes, 1964 Term sit-in cases (Oct. 16, 1964) (LOC, Douglas Papers, Box 1338, Case File Nos. 2, 5).

stitutional question. But his preferences remained unchanged. By dissenting in *Lupper*, thereby functionally affirming the convictions, Justice Stewart signaled his adherence to only the narrow reasoning of *Bell*, showing that he had not repudiated his previous preference for the liberty-based interpretation of state action.

Likewise, Justices Brennan and Clark never truly repudiated their constitutional inclinations. In the pivotal vote, and most difficult case, Justice Clark's continued preference for the private property interpretation is best illustrated through his concurring opinion in *Griffin v. Maryland*. In that opinion, Justice Clark made clear that the Court did not pass upon the central state action question.[205] Had Justice Clark truly subscribed to the broad interpretation of state action included in his draft opinion for *Bell*, it is doubtful that he would have felt a strong enough compulsion to avoid the constitutional question to warrant writing separately in *Griffin* to clarify the point. Justice Brennan obviously felt no such need, perhaps because the result in *Griffin* conformed to his preferred equality interpretation of the state action requirement. In contrast, Justice Clark's earlier preference for the private property interpretation would logically result in such a clarifying statement.

In addition, viewed in the context of Justice Clark's voting record in cases touching upon states' rights, his reticence in *Griffin* suggests that the draft *Bell* opinion was an anomaly in the constitutional inclinations of Justice Clark. Indeed, Justice Clark followed Justice Harlan's lead in almost every contemporaneous case that implicated federalism, illustrating an overriding concern for maintaining a line between federal and state power even in the face of serious evidence of racial discrimination.[206] The question remains: why would Justice Clark write a broad opinion in order to achieve the desired reversals when Justice Brennan offered a moderate mode of reversal that did not compromise Justice Clark's apparent constitutional inclinations?

In light of his voting record, the broad implications of Justice Clark's *Bell* opinion may have been the unintentional result of other considerations. Specifically, at the time that Justice Clark

[205] Griffin v. Maryland, 378 U.S. 130, 137–38 (1964) (Clark, J., concurring).

[206] See e.g., Gibson v. Fla. Legislative Investigation Comm., 372 U.S. 539, 576–79 (1963) (Harlan, J., dissenting); NAACP v. Button, 371 U.S. 415, 448 (1963) (Harlan, J., dissenting); see also Fay v. Noia, 372 U.S. 391, 448 (1963) (Harlan, J., dissenting).

wrote his *Bell* opinion, five votes had materialized to reverse the sit-in convictions, but no majority opinion existed to explain the result because Justice Douglas refused to join the moderate Brennan opinion.[207] Thus, Justice Clark's draft, coming days after he informed Justice Douglas of his intention to write an opinion, may be viewed as an attempt to draw Justice Douglas into a full opinion for the Court and avoid a fractured majority opposed by a bloc of four Justices.

This theory explains the similarities between Justice Clark's *Bell* opinion and the equality interpretation of the state action requirement. In an attempt to garner Justice Douglas's vote, Justice Clark could simply copy various arguments from Justice Douglas's earlier opinions, the only available explication of the equality interpretation. A story of strategic opinion writing without commitment to, or perhaps understanding of, its doctrinal implications draws support from the inability of Justice Black's clerks to identify the ultimate grounds of the opinion.[208] Under such a theory, therefore, Justice Clark's draft opinion in *Bell* represents an accommodation to other considerations rather than a repudiation of a long-standing constitutional position. While any explanation of Justice Clark's anomalous *Bell* opinion must ultimately rely on similar conjecture, both his vote in *Griffin* and larger voting record on states' rights strongly imply that, in the final tally of *constitutional inclinations*, Justice Clark cast his lot with the private property interpretation, giving it the intellectual victory: 5 to 4.

Ultimately, the Court achieved the results that all of its members preferred. It merely achieved those results through reasoning that none of the Justices believed ideal. And once Congress spoke, the Justice most conflicted by his preferences of result and interpretation was content to sit back and rely on the Civil Rights Act. In the end, the Supreme Court of the sit-in era left posterity with conflict and evasion on the Constitution, but with results vindicated in the public policy of Congress and the social acceptance of the nation's people.

[207] See supra Section III.C.
[208] See supra note 174 and accompanying text.