

## Article

# The Role of Black Christian Beliefs in the Civil Rights Movement: A Paradigm for a Better Understanding of Religious Freedom

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**Abstract:** This paper builds upon and extends Christian and legal scholarship on the civil rights movement by illuminating a climate of religious freedom that served as a catalyst for and was integral to the success of the spirited activism of the civil rights movement. To date, scholars have not extensively considered how the expansion of religious freedom in church and state jurisprudence both directly and indirectly created a climate that contributed to the success of the CRM, and how advancements in civil rights impacted the broader revolution occurring in constitutional rights. The climate of religious freedom included court support for evangelizing in residentially exclusive areas, exemptions for conscientious opposers from participating in oath swearing and other ceremonies, and exemptions from other general laws that unduly inhibited the free exercise of religious rights.

**Keywords:** free exercise clause; establishment clause; religious freedom; liberty of conscience; black church; Jehovah's Witnesses; sit-ins; protest act; Martin Luther King, Jr.; civil disobedience; anarchy; First Amendment; Fourteenth Amendment; nonviolence



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“The church must be reminded that it is not the master or the servant of the state, but rather the conscience of the state. It must be the guide and the critic of the state, and never its tool. If the church does not recapture its prophetic zeal, it will become an irrelevant social club without moral or spiritual authority.”

—Martin Luther King, Jr., “A Knock At Midnight”

“The mystic chords of memory, stretching from every battlefield and patriot grave to every living heart and hearthstone all over this land, will yet swell the chorus of the Union, when again touched, as, surely, they will be, by the better angels of our nature.”

—Abraham Lincoln—First Inaugural Address

## 1. Introduction

The vital role of Christian beliefs in the strategic leadership of the civil rights movement (hereinafter the CRM) has been well documented and vigorously contested (Baldwin 2003, p. 15; Raboteau 2004, pp. 4–16; Paris 1985, p. 67; Cone 1969). What, at times, are underappreciated are the ways in which the CRM interacted and was interrelated with the broader church–state movement. This research examines how the courts have succeeded and failed to safeguard and buffer the church from the domineering and repressive influences of the state (Carter 1993).<sup>1</sup> Here, I advance a view of church–state interactions that defends the rights of racial minorities and has an analog in legal protections for racial minorities. Like religious minorities who seek legal support from majoritarian laws that restrict their rights, racial minorities similarly seek legal relief from anti-democratic majoritarian laws.

Despite misconceptions, religiously grounded formal leaders and grassroots leaders did not adhere to the view that religion has a solely spiritual role to play in the larger society. Instead, many believed that religious beliefs, especially those espoused by Black Christians, provided symbols, principles, and an alternative vision that could advance the

cause of freedom and equality. Finally, it was precisely this climate of religious freedom that catalyzed the vocal religious minority to put their faith in action in order to expand religious liberties (Grohsgal 2011, p. 99).<sup>2</sup>

## 2. The Role of Christian Faith in the Civil Rights Movement

The ongoing work of faith-based leaders to protest and agitate for the extension of rights to racially vilified minorities has been widely discussed (Paris 1985). Some scholars have documented the ways in which the black church inspired traditions of protest well before the emergence of the CRM (Tracy 1986). Others have discussed how religious principles animated early protest strategies, while other forces later shaped and helped energize the movement.<sup>3</sup>

Even considering the success of Christian-based nonviolent tactics and strategies, the success of other religious groups who used nonviolent tactics and the courts to expand religious rights provided fertile soil for the CRM, which used spirit-filled protests in the streets to expand civil rights (Marsh 2005; Tracy 1986).<sup>4</sup> This work examines the period of 1930–1960, when religious minorities like the Jehovah’s Witnesses, Seventh-day Adventists, etc., received relief from the courts in the face of local laws and policies aimed at restricting their religious liberties.

By resisting undemocratic and religiously discriminatory laws, prayer-filled foot soldiers were forcing America to live out the true meaning of its democratic and constitutional principles. Despite a common misconception, movement agitators were not just committed to resisting unjust laws, they were also willing to face the consequences of their actions out of respect for the rule of law (Baldwin 2002, pp. 85–86). They put their faith in a higher power, a Just Judge who would lead them in their quest for social justice, liberty, and freedom for all (Dunbar 2009, pp. 211–12). In the following section, I propose a model of church–state relations that protects the rights of religious minorities while respecting state sovereignty.

### 2.1. The Tyranny of Faith Position

A well-established position on church–state relations contends that religion is fundamentally dogmatic, contentious, and polarizing. Disciples of this viewpoint argue that religious beliefs can strain public reasoning, as religious people are less open to compromise, persuasion, and questioning their own presuppositions (Rorty and Zabala 2001, pp. 29–42). The idea is that those who are inclined to lay down principles and viewpoints as incontrovertibly true are less inclined to participate in public deliberations with those who hold competing views to promote the common good.

During the CRM, concerns about the polarizing impact of religious views surfaced in the so-called “protest decisions”, where certain judges were quick to tell spirit-filled protestors that, no matter how morally righteous their cause, all are required to conform to the rule of law (*Walker v. City of Birmingham*, 388 US 307, 321 (1967)). More recently, these concerns have surfaced in controversies over posting the Ten Commandments in a courthouse and the display of religious symbols on public land, where the mere presence of religious symbols in a prime public space sparks controversy (*Stone v. Graham*, 449 US 39, 42–43 (1980); *Van Orden v. Perry*, 545 US 677 (2005)). Proponents of this position contend that a wall of separation should be maintained between church and state to protect non-Christians from the tyranny of religion (*Everson v. Board of Education*, 330 US 1, 16 (1947)).

This principle was expressed by pioneers of religious liberty including Thomas Jefferson, who did not seek total separation of Church and State, but was concerned about protecting the state from religion in the interest of preserving the freedom of individual conscience and the right of nonreligious minorities from being dominated and persecuted by religious majorities on account of their views. Jefferson’s view was the counterargument to Roger Williams’ position that an important purpose of the first amendment is to protect the church from the state. This included protecting the sanctity of individual

conscience, religious free choice and the views of religious minorities who are vulnerable to the establishment of religious majorities that are prejudicial to their interests. Nevertheless, separationism has been applied in a way that seems hostile to the religious because those who drafted the Constitution did not expect the “wall of separation” to be a wall of steel, callously applied against the religious in the name of protecting the state from the church. As John Witte noted, despite these repeated efforts to restrict religious liberty, curtail free exercise rights, and support the state coercion of religion, separationism did not accomplish its stated goals (Witte 2006, pp. 30–34). Post-*Lemon v. Kurtzman* (1971), while certain cases expanded religious liberty, others weakened it by empowering atheists and the nonreligious with veto power to limit public expression and the free exercise rights of religious persons (411 US 192 (1971)).

The circumstances that led to the adoption of the Religion Clauses substantiate the importance of safeguarding religious freedom and preventing state establishment. Accounts of discussions relating to the framers of the Bill of Rights raised issues about religious establishment, primarily as it related to government aid for religion. One strong view is that the Establishment Clause was only meant to prohibit government aid that provided preferential treatment for one or some faiths over others. This view supports “non-preferential aid for religion” (*Wallace v. Jeffre*, 472 US 38, 106 (1985)). When ratified in 1791, the Bill of Rights was exclusively applied to the federal government. This meant that states were unburdened by religion clauses. States that had preexisting religious establishments were permitted to keep them intact. Eventually, states relinquished their religious establishments, with Massachusetts being the last state to follow suit in 1833. It was not until over a century later that the Supreme Court ruled that the adoption of the Fourteenth Amendment after the Civil War resulted in the First Amendment being applicable to the states (Rogers 2019, p. 25). It was not until this action that both federal and state establishments were prohibited from diluting individual liberty.

Based upon the records of discussions by the drafters and ratifiers of the Fourteenth Amendment, there were strong concerns about the violation of disestablishment clause principles by southern states, especially those states that restricted slaves’ and churches’ religious freedoms and quashed prophetic leadership that resisted slavery. Slaves were forbidden from selecting their own clergy and they could not engage in public worship without the approval and presence of whites. By 1860, this led, according to Professor Kurt Lash, to the South’s creation of “the most comprehensive religious establishment to exist on American soil since Massachusetts Bay” (Rogers 2019, p. 29). In addition, according to Gedicks, “one may reasonably conclude that slave–state action to promote proslavery Christianity violated both free exercise and anti-establishment norms and that the concern of the members of the Reconstruction Congresses to eliminate this practice reflected an intention to apply both [Religion Clause] norms to the states” (Rogers 2019, p. 29).

Interestingly, if separationist concerns dominated, the black church would remove itself from the public sphere and divorce Gospel preaching from social activism, to the detriment of religious freedom and civil rights for all. This was the case during slavery, when state-sponsored religion tried to co-opt a model of prophetic black church activism that challenged the institution of slavery. The motivation for these separationist concerns was three-fold: a failure to see a link between the Gospel message and a commitment to human freedom; a fear that religious involvement in politics would encroach upon the freedom of the nonreligious minority to speak freely; and a mistaken view that an attempt by some to secure civil rights by force trumped the goals of the majority to use nonviolent means and methods to protect civil rights. These underlying justifications for secularization theories may overlook the historical evidence of twentieth-century legal history that shows the great benefits that religious activism brings to all of society, especially during those historical moments when America fails to live up to its stated ideals and constitutional principles.

As this paper will show, a religious, legal, and moral confluence made the CRM possible. The model of church–state interaction that the civil rights movement embodied

was precisely the kind of church–state interaction that supporters of the First Amendment envisioned when they pushed for religious freedom and religious pluralism during a period in American history when religious minorities were stigmatized for their beliefs.

## 2.2. Religion as a Force of Good

Alternatively, the position that casts religion as a force of good primarily envisions religion as fundamentally and chiefly the pathway to peace, equality, and freedom (Carter 1993, p. 80). A prominent proponent of this view during the CRM was the African American mystic Howard Thurman. He maintained that the Christian ethic of love, grounded in forgiveness and pointing toward reconciliation (Thurman 1976, p. 100), offers transformative possibilities for the whole of society (King 1963, pp. 49–57).

This perspective argues that excluding religion from politics, based on concerns about coercion, dogmatism, and incivility, misunderstands an underlying source of opposition to religious public involvement. By priming the moral conscience, religion, at its best, helps all people to work toward the common betterment of society. This is what made the spirit-filled CRM so threatening. Religion was used to unite, reconcile, and challenge discriminatory state laws at a time when America was largely divided along racial and economic lines, and many were working to keep society that way. Consequently, religion should be welcomed in the public space since, as the CRM reminds us, the church, i.e., religion, can potentially overcome barriers and restore fractured relationships. This perspective concedes that certain religious views might polarize the electorate, and also that religious believers sometimes embrace a fanaticism that makes them closed to civil discourse. Nevertheless, the experience of the CRM shows that religion can be a uniquely positive force in society.

This author proposes a model of religious involvement that integrates insights from both positions. The first position too quickly vilifies religion, while the unification position too unrealistically valorizes religion and makes it vulnerable to becoming the dependent handmaiden of the state. The first position proposes that religion has nothing uniquely distinctive to contribute to the good of society, while the second view downplays the relentless attempts by government officials and agents to neutralize religious views and traditions that challenge the imbalance of power and unjust policies. While it is incontrovertible that religion can be used to discriminate, marginalize, and dehumanize, this does not mean that religion itself has no socially redeeming value or utility for the good of society (Wolterstorff 1996).

## 2.3. Religion as Creative and Justly Threatening

In this work, I argue for a third alternative to the two schools of thought highlighted above on the role of religion in public life. Religion can and often does offer a radical critique of the socio-political order by appealing to sacred principles and offering alternative visions for achieving a more just society. I propose a view of separationism designed to protect religious minorities (and even the nonreligious) from the tyranny of religious majorities, one that has a parallel in laws protecting racial minorities from the tyranny of racial majorities (Grohsgal 2011, p. 329).<sup>5</sup> A distinctive contribution of this work is how paying attention to church–state relations during the CRM extends our understanding of church–state legal scholarship more broadly, and how greater attention to little-explored areas of church–state legal scholarship might deepen and expand our understanding of the motivations, goals, impacts, and success of the CRM in particular. This work goes a step further than previous research by this author, by arguing that the role of the courts in protecting religious freedom is an indispensable part of the heritage of the CRM.

Despite attempts by dominant Anglo-Saxon traditions to privatize religion, many black Christians rejected this view and instead embraced a reading of the scriptures that called for a robust engagement of religion in advancing the cause of cultural improvement and constitutional expansion. Religion need not be dogmatic or destructively threatening, but, rather, creative and justly threatening. The CRM shows how a religious movement can contribute robustly to the public good, whereby prophetic ministers and believers who

were committed to democratic principles built diverse coalitions with persons driven by religious and secular ideals in a highly contentious environment (Marsh 2005, pp. 2–3).<sup>6</sup> The CRM also shows how religious and moral principles can inspire people to work toward a better society for all—both believers and skeptics in church and state alike.

In the next section, I will examine how the legal climate of religious freedom led to the emergence of the CRM, sparked by Supreme Court cases that protected the free exercise of religion—even of culturally vilified minorities in the day (e.g., Jehovah’s Witnesses, Seventh-day Adventists, Jews, and others)—helped to foster the success of the prayer-filled witness of the movement.<sup>7</sup> While scholars have examined the role of traditions of black protest, grassroots leadership, the personality of Martin Luther King Jr., and the impact of the 1954 *Brown v. Board* decision on the CRM, they have not focused on the importance of America’s commitment to religious freedom and robust church–state involvement in the mid-twentieth century as important catalysts for the efficacy, reach, and legacy of the movement. The religious freedom that First Amendment victories afforded enabled this movement to pursue its civil rights agenda, without unduly bracketing its religious convictions (Carter 1993).<sup>8</sup>

### 3. Religious Freedom Expanded through Free Exercise Cases and Important Principles

A foundational understanding of the intention of the principal drafters of the Constitution is the view that religious freedom is integral to the development of “a more perfect union”. (Warren 2003, pp. 669–70) Enshrined in the First Amendment is the protection of religious freedom, religious disestablishment, freedom of speech, freedom of the press, and the rights of assembly and petition (Warren 2003, pp. 669–70). The Court has consistently championed the view that free exercise protects the religious from state policies that seek to compel or penalize religious beliefs (*Reynolds v. United States*, 98 US 145, 164 (1878)). While individuals are free to think and believe without constraint, individuals are not free to express all aspects of their faith without constraint. (*Cantwell v. Connecticut*, 310 US 296, 303–4 (1940)). On the contrary, the Establishment Clause states that “Congress shall make no law respecting the establishment of religion”. At least three approaches have characterized legal scholarship in this area: strict separation, neutrality, and accommodation (Chemerinsky 2002, pp. 1149–55). These two clauses, taken together, support the vital role that religious expression can play in expanding constitutional protections and contributing to the betterment of society (Eisgruber and Sager 1994, pp. 1248–49).

Religious freedoms were safeguarded in a series of Supreme Court cases leading up to the CRM that helped to expand religious rights—by upholding the principles of religious pluralism, religious equality, freedom of conscience and exercise, the separation of church and state, and the disestablishment of religion (Witte 2000, pp. 41–63). This section will show how these broad principles provided strong protection for religious conduct and clarified the vital role that diverse religious groups play in all areas of society. The early cases provided exclusions from general laws for claimants and offered comprehensive principles to protect religious rights (*Cantwell v. Connecticut*, 310 US 296 (1940)).

The dominant legal principles concerned the impact of free exercise protections on state rights and property rights, as well as the importance of safeguarding freedom of conscience and freedom of worship. Important secondary principles that emerged during this era concerned religious discrimination, respect for the judicial process, and reasonable accommodations. While the Court championed protecting the religious beliefs and activities of all people, it was honest about the challenges of protecting religious pluralism in an increasingly diverse society, with many people holding beliefs “alien to the majority” (*Cantwell*, 310; *Sherbert v. Verner*, 374 US 398, 411 (1963) (Douglas, J., concurring)).

The Court vigorously protected the right to believe and worship according to the tenets of one’s faith (*Braunfeld, v. Brown*, 366 US 599, 603 (1961)). At the same time, the Court’s concerns about the impact of unfettered religious pluralism on law and order and national unity often undermined its ability to apply the Free Exercise Clause and Establishment Clause consistently. That is, the boundaries of religious freedom became



less permeable, as concerns about maintaining national unity and law and order gained precedence in judicial reasoning (Braunfeld, 603; *Gallagher v. Crown Kosher Supermarket*, 366 US 617 (1961)). Nevertheless, these early First Amendment decisions established a climate of religious freedom—by protecting religious dissent, privileging free exercise rights over property rights, constraining states' rights, and safeguarding free speech—that paved the way for the explosive rights revolution during the CRM.

### 3.1. Freedom of Religion

The principle of religious freedom is an important legal precept, with roots in the early American experiment that was magnified in early cases (Witte 2000, p. 41). This legal principle affirms personal choice regarding the exercise of religious expression (Witte 2000, p. 155). It rejects any form of coercion, governmental interference, and laws that prohibit the free expression of religion (Witte 2000, pp. 155–60).

Commencing in the early 1930s, the Jehovah's Witnesses surfaced as fierce champions of religious freedom as they turned to the courts to defy discriminatory laws that were often enacted to maintain the white-mainline-Protestant status quo, which was threatened by their nontraditional methods of religious expression (Witte 2000, p. 146). Undeterred by efforts to limit their religious expression, the Witnesses petitioned the courts in a landmark case that reached the Supreme Court in 1940. The principle of religious freedom was introduced by the Court in *Cantwell*, along with a heightened scrutiny test that the Court applied under the Free Exercise Clause (Witte 2000, p. 137). The case concerned an avowed Jehovah's Witness, Mr. Cantwell, who engaged in religious solicitation in a residential community. In particular, the plaintiff played a phonograph that was construed by two listeners as being extremely critical of the Catholic faith. Consequently, Cantwell was charged with breaching the peace and soliciting without a license (*Cantwell v. Connecticut*, 310 US 296, 303–4 (1940)). He eventually appealed to the Supreme Court.

The Court provided a strong defense of religious expression, based upon the principle of religious freedom. The majority reasoned that the regulation of religious behavior is allowed, as long as the state meets the burden of showing that laws are “general and nondiscriminatory” and are applied for the benefit of an important or significant public interest, including public safety and security. However, the state burden was not satisfied in a case where a Jehovah's Witness was arrested solely for playing a phonograph and by imposing licensing requirements on members of this faith tradition and not on others. Here, the state law required that one who wanted to engage in religious solicitation should apply to the secretary of the public welfare council for a certificate. The secretary had the sole discretion to determine whether a matter was religious. The Court reasoned that this kind of “censorship of religion” and prior restraint on religious expression denies the petitioner the religious liberty protected by the First Amendment (Cantwell, 305, 1940). Furthermore, the Court ruled that the principle of free religious expression means that the freedom to peacefully worship is constitutionally protected. However, religious expression can be subject to reasonable time, place, and manner restrictions. The Court expanded upon these metrics in subsequent cases.

The Court's decision in the *Cantwell* case was important to the expansion of free exercise law. The Court ruled that the Free Exercise Clause of the First Amendment, applied to the states through the Due Process Clause of the Fourteenth Amendment, subjected the states to the same restrictions on inhibiting religious expression as belong to Congress. Although the state is free to act to protect the public interest, the Court found that there was no evidence of “assault or threatening of bodily harm, no truculent bearing, no intentional discourtesy, no personal abuse” to warrant the restraint on religious freedom (Cantwell, 305). Mr. Cantwell's sole purpose was to convince listeners to buy religious materials and support “true religion”.

Furthermore, *Cantwell's* importance in elevating the principle of religious freedom regards the Court's role in helping to temper the belief–action distinction, which the Court had previously used to limit religious liberty protections given to historically maligned

religious minorities (Fricke 2009, p. 137; Gedicks 2005, pp. 1200–1). From 1879 to 1939, the Court reasoned that the Free Exercise Clause protects religious beliefs, not religious expression (*Reynolds v. United States*, 98 US 145 (1879); Greenawalt 2009, p. 29). In *Cantwell*, the Court ruled that the constitution protects freedom of conscience and the freedom to choose one's form of religious expression. While the freedom to act is not absolute, it is still constitutionally protected:

The constitutional inhibition of legislation on the subject of religion has a double aspect. On the one hand, it forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship. Freedom of conscience and freedom to adhere to such religious organization or form of worship as the individual may choose cannot be restricted by law. On the other hand, it safeguards the free exercise of the chosen form of religion. Thus, the Amendment embraces two concepts, freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society. (Witte 2000, pp. 146–47)

In addition to tempering the freedom to believe/act distinction, *Cantwell* softened the free speech and free exercise distinction (Lupa and Tuttle 2009, p. 131). This meant that it was not unusual for a religious petitioner to file both free exercise and free speech claims, as “these liberties are, in the long view, essential to enlightened public opinion and right conduct on the part of the citizens of a democracy” (*Cantwell*, 310). Even highly offensive or politicized views are constitutionally protected because the freedom to believe and act are essential rights that are vital to the functioning, well-being, and development of a democratic society.

### 3.2. Liberty of Conscience: A Violation of States' Rights or a Reasonable Accommodation

The motif of religious freedom was critical to the Court's First Amendment decisions. Liberty of conscience was another legal principle that was applied haphazardly (Witte 2000, p. 158). In a decision rendered soon after *Cantwell*, *Minersville School District v. Gobitis* (1940), the Court denied a requested exception by Jehovah's Witnesses parents who believed that their children's school compulsory flag-salute policy was unconstitutional (310 US 586 (1940)). Their children were conscientiously opposed to saluting the flag based on their religious beliefs, which regarded this as a form of idolatry, and they were expelled from school.

Although the Court agreed that schools are not free to compel students to engage in practices that violate their beliefs, it refused to apply the same logic to this case. While affirming the principle of liberty of conscience, the Court reasoned that this principle does not mean that people have a right to obtain an exemption from neutral laws of general applicability that are enforced for the purpose of advancing national unity.

The Court woodenly interpreted the requested exemption as springing from a desire to obtain a special benefit. Petitioner's objection to saluting the flag was in defense of liberty of conscience. Contrary to the Court's ruling, the exemption requested by Mr. Cantwell fell squarely within the zone of liberty protected by the Court in *Cantwell*.

The Court, however, reversed its ruling in *Minersville School District v. Gobitis* (where the majority declined the family's argument that the First Amendment safeguarded their children's right to be exempted from participating in compulsory flag salutes) with *West Virginia State Board of Education v. Barnette* in 1943, when the children of Jehovah's Witnesses were also expelled from school for not complying with the school's daily flag salute exercises (310 US 586 (1940); *West Virginia State Board of Education v. Barnette*, 319 US 624 (1943)).

The court reasoned that the First Amendment protects people's right to resist policies to which they are conscientiously opposed. This decision had ramifications for religious individuals and institutions that had turned to the courts during the CRM to resist discriminatory laws that violated God's universal law. Among others, this principle was championed by Martin Luther King, Jr., a primary leader of the CRM, who argued that protecting the LOC is congruent with God's higher law: “The Christian owes his ultimate

allegiance to God, and if any earthly institution conflicts with God's will, it is your duty to take a stand against it" (King 2000, p. 84).

### 3.3. *Property Rights vs. Freedom of Religious Expression*

In *Marsh v. Alabama*, the majority extended protections for free religious expression, even in the case of private property owners who opened their property for public use (326 US 501 (1946)). The case concerns a company town in Chickasaw that was owned and operated by the Gulf Shipbuilding Corporation. The corporation posted an anti-solicitation sign that included the following statement: "This Is Private Property, and Without Written Permission, No Street or House Vendor, Agent, or Solicitation of Any Kind Will Be Permitted". Notice was served on the plaintiff that she could not distribute materials without a permit and that the defendant would not give her one. The plaintiff refused to leave the sidewalks because the policy violated her First Amendment rights.

The Supreme Court ruled that policies that restrict the free-flowing channels of communication on property that is opened for public use cannot withstand constitutional challenge, whether or not a municipality or corporation owns the town. The Court reasoned that "[T]he more the owner, for his advantage, opens up his property for public use, the more his rights are curtailed by the statutory and constitutional rights of those who use his space" (Marsh, 506). The Court also addressed the implications of its ruling for the Commerce Clause: "[w]hether a corporation or a municipality owns or possesses the town, the public in either case has an identical interest in the functioning of the community in such a manner that the channels of communication remain free" (507). The Marsh holding stands for the proposition that whether an open public space is owned by a governmental body or by a corporation, constitutional rights cannot be abrogated.

The next section, which examines the impact of the climate of religious freedom on the success of the CRM, explores how the movement's legal strategists turned to Marsh for a legal precedent to support their argument that the rights of private property owners who opened their business as a public space should not enable them to maintain segregated facilities that denied blacks the equal protection of the law because free press, religious liberty, and other constitutional rights are all interrelated (Cantwell, 509; Greenberg 1994, p. 277). Although restaurant owners alleged that sit-in protestors were trespassing on private property, the Court reasoned that the public interest in protecting First Amendment rights in a public space outweighed the rights of property owners to restrict constitutional rights regarding the full enjoyment and use of their property.

### 3.4. *Reasonable Accommodation vs. Respect for Judicial Process*

Nevertheless, in *Poulos*, the Supreme Court limited its holding in Marsh by ruling that constitutionally protected liberties are not immune from regulation for the purpose of public welfare and safety (*Poulos v. State of New Hampshire*, 345 US 395 (1953)). The plaintiff, a Jehovah's Witness, requested a license to conduct religious services in a public park while agreeing to pay all required fees and abide by all stated regulations. When the license was denied, the Jehovah's Witnesses conducted services before they were arrested. In response to the plaintiff's assertion that the law violated their First Amendment rights, the Court reasoned that "[t]here is thus no restriction in its application with respect to time or place. It is not limited to ways which might be regarded as inconsistent with the maintenance of public order, or as involving disorderly conduct, the molestation of the inhabitants, or the misuse or littering of the streets" (408). The Court also demonstrated its impatience with lawbreaking, even for the purpose of violating an unjust law out of a sense of religious duty:

One would not be justified in ignoring the familiar red traffic light because he thought it his religious duty to disobey the municipal command or sought by that means to direct public attention to an announcement of his opinions.' (quoting *Cox v. State of New Hampshire*, 312 US 569, 574 (1941). If a municipality has authority to control the use of its public streets for parades or processions, as it



undoubtedly has, it cannot be denied authority to give consideration, without unfair discrimination, to time, place, and manner in relation to the other proper uses of the streets. (Cox 408)

Thus, the Court reasoned that a municipality has the authority to use time, place, and manner regulations to control speech on its public street without violating constitutional rights. Without evidence of discrimination, an individual or an institution cannot decide to speak, even when motivated by religious duty, without a license without pursuing remedial state procedures: “Delay is unfortunate but the expense and annoyance of litigation is a price citizens must pay for life in an orderly society where the rights of the First Amendment have a real and abiding meaning”(Cox 409).

Section fourill elaborate on the boundaries of the Supreme Court’s tolerance for civil disobedience in the context of protest cases. In particular, the limits of the Court’s patience were tested in the Birmingham, Alabama campaign for civil rights when movement strategists conducted Easter marches in defiance of an injunction (Walker v. City of Birmingham, 388 US 307 (1967)). The Court reasoned that, despite the religious character of the protests and the arbitrary actions of state officials in denying the request to march on public streets, the protestors were not free to disregard the judicial process. To be sure, these cases reveal the extent of the Court’s commitment to protect First Amendment rights while demonstrating its impatience with discriminatory laws and acts of civil disobedience.

### 3.5. Sunday Blue Laws: State Establishments or Reasonable Accommodations?

As discussed previously, the *Cantwell* case and its progeny provided constitutional protections for certain religious minorities, while reinforcing restrictions on First Amendment rights under heightened and intermediate scrutiny. However, while some religious minorities enjoyed greater First Amendment protections, others found the Supreme Court unresponsive to their grievances. This bias was apparent in the Court’s treatment of at least one religious minority, Jews and Sabbath Day observers.

In a sequence of Sabbath Day cases, the Court was reluctant to provide exemptions from laws restricting the petitioners’ First Amendment rights (Laband and Heinbuch 1987, p. 39). *McGowan v. Maryland* (1961) involved apparel and furniture storeowners who complained that Sunday blue laws, which did not permit sales on Sunday, violated their constitutional rights (366 US 420). The Court ruled that “Sunday blue laws” forbidding nonessential and unnecessary commercial sales on Sunday did not violate the establishment or Equal Protection Clause because “Sunday blue laws” had demonstrated sufficient “secular justifications” to satisfy constitutional standards (*McGowen*, 420). The Court held that a Jewish apparel and furniture merchant’s free exercise rights were not violated since the legislature had a reasonable basis for the regulation, even though it affected certain groups differently from others (*McGowen*, 425). The Court reasoned that the prohibition on Sunday sales did not infringe constitutional rights because it was based upon grounds that were rationally related to the State’s objective of securing Sunday rest for “the purpose of providing a Sunday atmosphere of recreation, cheerfulness, repose and enjoyment” (*McGowen*, 448). As a consequence, the Court reasoned the statute did not have the effect of infringing free expression because it applied to store hours, not to religious conduct (*McGown*, 429).

In addition, the Court conveyed its impatience with Sabbath Day observers in *Braunfeld v. Brown* (1961), when it held that Sunday blue laws were not tantamount to an establishment of religion (366 US 599). The petitioners Abraham Braunfeld and Pennsylvania merchants, all Orthodox Jews, challenged a state law disallowing business on Sunday because the law discriminated against them by giving Christian merchants the unfair advantage of remaining open for an additional day. The Court rejected the petitioners’ argument and reasoned that even though the law amounted to an “inconvenience” and an “economic disadvantage”, when other avenues existed for them to engage “in some other commercial activity which does not call for either Saturday or Sunday labor”, this

meant that the law did not rise to the level of “abhorrence and religious prosecution” that abridged constitutional rights (Braunfeld, 605–6, 1961).

The prohibition on Sunday sales did not infringe conditional rights, even when the business owner’s primary customer base was Sabbath Day observers. *Gallagher* involved a Kosher store owner who mainly sold merchandise to Jewish customers. The store owner was convicted for operating his business on Sundays, although the Orthodox Jewish religion required its followers to eat kosher food and forbade them from shopping on the Sabbath (*Gallagher v. Crown Kosher Supermarket*, 366 US 617 (1961)). The conviction was upheld, according to the Court, because the regulation was not a restriction of religious activity (*Two Guys from Harrison-Allentown v. McGinley*, 366 U.S. 582, 591 (1961)).

The Court’s early Sabbath Day decisions provide a stunning demonstration of the failure of the Court to consistently apply First Amendment principles when laws violate the constitutional rights of certain despised religious minorities. Practicing the Sabbath is not an ancillary religious activity; it is a core religious tradition that relates to all other aspects of a person’s faith. For religious believers who practice religion as a way of life, traditions cannot be taken off like garments and discarded, because each commandment or practice contributes to the whole of a well-functioning, ordered, and faithful religious life.

In addition, if the Court had granted Sabbath Day observers an exclusion to operate their businesses on Sunday, that would not have interfered with the state’s ability to enforce Sunday blue laws since the law already provided exclusions to other groups based upon acceptable classifications (Laband and Heinbuch 1987, p. 41). The targeting of Sabbath Day observers served to reinforce stereotypes and spread the animus traditionally aimed at religious minorities like Jews who have faced a history of discrimination. The First Amendment prohibits this form of religious discrimination by the state.

Finally, the Court’s rulings in this area were an explicit acknowledgment that minority religions would not have the power to successfully challenge laws designed to establish majority religion as the state’s favored religion (Piar 2006, pp. 1009–10). In America’s constitutional scheme, religious establishments are unconstitutional because establishing any religion as the state religion subjects despised minority religions to the kind of religious intolerance and discrimination that is prohibited by the constitution. Paradoxically, the kind of religious discrimination allowed in these cases undermined the climate of religious freedom encouraged in other First Amendment cases and contradicted America’s history of championing the rights of religious minorities abroad (i.e., Jewish observers during the Holocaust).

Ironically, the *Torcaso* decision, which protected the liberty of conscience rights of an atheist, was issued in the same month that the court ruled on the four Sabbath Day cases. This was the promise and tragedy of the *Cantwell* regime. The Court’s ruling did not have the ripple effect of expanding First Amendment protections to all disfavored religious minorities, even while protecting the rights of nonreligious persons. In *Torcaso v. Watkins*, the Court invoked the principle that a state cannot force individuals to “profess a belief or disbelief in any religion” and added that a state could not require a party who is conscientiously opposed to declaring his belief in God to do so before commissioning him for public office (367 US 488 (1961)).

Because of a constitutional history of strong opposition to test oaths, the Court reasoned that, when the Constitution was adopted, the framers intended to outlaw test oaths as stated in Article VI (United States Constitution, Art. 6). Any law that requires individuals to profess is an unconstitutional burden upon an individual’s free choice and religious liberty.

### 3.6. The Sherbert Revolution and the Expansion of Religious Freedom

The holding in *Sherbert* signaled a renewed effort by the Supreme Court to provide a more balanced approach to free exercise jurisprudence while protecting the rights of religious minorities. In *Sherbert v. Verner* (1963), the pinnacle of free exercise jurisprudence, the Court reasoned that the free exercise clause permitted exemptions, even from general laws and regulations that burdened the exercise of one’s “sincere” and true faith (*Sherbert v.*

*Verner*, 374 US 398 (1963)). The plaintiff, Adell Sherbert, a textile worker and Sabbath Day observer, refused to work on the Sabbath and was fired by her South Carolina employer and denied unemployment compensation benefits because she was unavailable for work.

In the most compelling defense of religious freedom since *Cantwell*, the Supreme Court reversed the lower court's decision denying petitioners unemployment benefits. The denial of benefit, according to the Court, forced the plaintiff to "choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand" (*Sherbert*, 404). In essence, her employer's action had the effect of placing an unconstitutional burden upon the free exercise of Sherbert's religion "as a fine imposed against appellant for her Saturday worship" (*Sherbert*, 404).

Ironically, although the ruling extended unemployment benefits to Sabbatarians, the holding was limited to unemployment eligibility requirements in South Carolina; the Court had rejected other claims for exemption from generally applicable laws, demonstrating the majority's unwillingness to extend the holding in *Sherbert* beyond the facts of the case (Sullivan 1992, p. 195). To be sure, the *Sherbert* holding was important because, for the first time since *Cantwell*, it afforded heightened protection to the beliefs of religious minorities, clearing the way for other religious minorities, especially those who played a central role in the CRM, to turn to the courts to advance the cause of social uplift and constitutional improvement (Grohsgal 2011, p. 99; see also Smith 2011, pp. 2040–41; Pepper 1986, pp. 314–15; Nacheff 1982, pp. 846–47).

In its decisions leading up to *Sherbert*, the Court had already expanded legal protections for religious freedom in a mix of cases covering proselytism, public education, government benefits, property rights, and test oaths. While the Court affirmed First Amendment constitutional principles in theory, it did not apply these principles consistently, especially in the case of despised religious minorities like Jews. In contrast, the *Sherbert* case challenged the federal, state, and local government's ability to discriminate against or deny religious exemption to citizens. This ruling, despite its limited application, was another critical factor that helped to create a climate of religious freedom that inspired other religious minorities to defend their constitutional rights (Magid and Prenkert 2005, pp. 207–8).

#### 4. Impact of First Amendment Religion Clause Victories on the Revolution for Civil Rights

Following *Cantwell* and *Sherbert*, religious minorities enjoyed greater constitutional protections due, in large part, to the successful litigation strategies of groups like the Witnesses (Witte 2000, p. 146). The CRM, as a religiously inspired movement that championed the cause of racial justice, benefited from a broader climate of religious freedom (Grohsgal 2011, p. 352).

In this section, I will show how a view of church–state relations that is designed to protect religious minorities has an analog in the movement to protect racial minorities. Interestingly, a free exercise case involving a Jehovah's Witness provided legal justification for the NAACP's litigation strategy, demonstrating the important role this religious minority's tactics played in setting the climate of religious freedom that inspired a movement to protect the rights of racial minorities using similar nonviolent tactics. According to attorney Jack Greenberg, *Marsh v. Alabama* was important to the NAACP's defense strategy. In this important case, referenced in the previous section, the Supreme Court reversed the trespass convictions of Jehovah's Witnesses for soliciting in a company town (Greenberg 1994, pp. 275–76). Even though Chickasaw was a private town, the Court ruled that it was not exempt from the state action doctrine. Emboldened by the Court's ruling, civil rights attorneys planned to take a case to the Supreme Court involving nonviolent protestors and a trespass violation on private property similar in size to Chickasaw. Next, they planned to represent protestors charged with violating trespass laws in similar businesses, which they planned to win based on precedent. Ultimately, they hoped to achieve a legal victory in a case including "a dime store or a corner store" (Greenberg 1994, pp. 276–77).

This legal strategy was employed by the NAACP Legal Defense Fund to defend CRM activists based upon the precedent of *Marsh*, to protect racial minorities in the same way that Marsh helped to protect religious minorities. The proposition that the “fundamental concept of liberty embodied in the Fourteenth Amendment’s Due Process Clause embraces the liberties guaranteed by the First Amendment” was shared by legal strategists for Jehovah’s Witnesses and CRM activists (*Cantwell v. Connecticut*, 310 US 296, 307–08 (1940)) (see Note 7). Furthermore, legal strategists believed that the liberties protected by the Fourteenth Amendment encompassed the liberties enshrined in the First Amendment.

In summary, legal practitioners hoped that the elusive goal of racial justice and liberty could be achieved when exceptional lawyers used legally transferable concepts to catalyze nonviolent social movements that were designed to advance the cause of constitutional improvement. The Witnesses stood out as pioneers in linking the religion clause to the movement to expand minority rights. This linkage fertilized the soil for the eventual expansion of civil rights in the form of racial equality through religious civil disobedience. Although the Witnesses did not actively participate in the CRM, the group contributed to the changing landscape in religious and civil rights protections by successfully fighting for freedom of worship, speaking the truth in the face of opposition, publicly connecting their activities with others seeking to expand civil liberties, exhausting the appellate process, and employing civil disobedience to expand rights.

The CRM fought to dismantle segregation in public accommodations while the Court expanded First Amendment rights to disfavored religious minorities. A survey of the movement’s litigation efforts demonstrates that the religion clauses were not at the front and center of its litigation strategy. First, some believed that efforts to achieve racial equality through nonviolent spirited protest undermined attempts to achieve democratic reform through the courts. Second, the Free Exercise Clause was traditionally used by religious minorities to request exemptions from laws that interfered with religious practices, but there was no legal precedent for religious minorities exercising their free exercise rights to advance the cause of racial equality (Wilkins 1994; Marshall 2001, p. 510).<sup>9</sup>

In a culture that historically denied blacks a full range of rights and privileges, the role of religion is to provide a zone of liberty where oppressed groups can regroup, retool, and reimagine a society where liberty and justice for all can be achieved. More specifically, CRM protestors were pressing society to embrace a new vision of religious equality, liberty, and human dignity for all (Marshall 2001, pp. 124–25). Although a climate of religious freedom fertilized the soil of the CRM, there was no legal precedent for protecting this diverse view of racial equality and liberty for all. Filling this gap became the unfinished business of the CRM.

Protestors in, for the most part, sit-ins and other peaceful demonstrations were devoted to the principles of nonviolent civil disobedience, and this solidarity greatly contributed to the success of the litigation strategies.<sup>10</sup> Even though the goal was to expose the evils of dehumanization, with the goal of helping others to respect the dignity and worth of all people, peaceful protestors believed that nonviolent direct action was the most effective means of achieving racial equality and justice.

For this reason, nonviolent direct action was not merely a “strategy or device”, even though many characterized it as such. Instead, nonviolent direct action was a philosophy of life inspired by Judeo-Christian beliefs, Hindu religion, and democratic principles. According to Martin Luther King, Jr., nonviolence became “a way of life with love and redemption as its center” (King 1963, p. 6). For many activists in the CRM, nonviolent resistance was a way of life, rooted in the tenets of their faith, and something as critical to one’s faith as proselytizing is for Jehovah’s Witnesses, because resistance to social evil is central to the mission of Christianity (Carson 1998, p. 95; Lawson and Payne 1998, p. 141; Luke 4:18–19 and Matthew 25:31–40, NIV).

#### 4.1. The Emergence of Prayer-Filled Sit-In Movements

The protest cases that surfaced around 1960 were a powerful demonstration of the power of nonviolent direct protest to work in tandem with litigation strategies to achieve constitutional reform.<sup>11</sup> The first phase of protest cases emerged after Oklahoma sit-ins that inspired young people to stage sit-ins on Canal Street in Greensboro, North Carolina. The Canal Street protests were led by members of the NAACP Youth Council and the Congress of Racial Equality (CORE) and commenced with demonstrations at the lunch counter of Woolworth's in Greensboro on the first day of the protest. Sit-ins typically followed a particular order: protestors sought service in segregated facilities and they were denied service and were asked to leave (Bell 2008, p. 545); they maintained their commitment to nonviolence in the face of violent threats by white bystanders and police officers (Bell 2008, p. 545). The Greensboro sit-ins achieved national coverage and inspired other nonviolent protests in the South (Robnett 2000, p. 98).

The formal leadership of the CRM was led by a number of Christian and civil rights groups that were committed to the cause of racial equality and constitutional improvement while employing religiously inspired nonviolent strategies and litigation tactics. The Congress of Racial Equality was founded in 1942 and was characterized as part of the "Big Six" civil rights organizations (including the National Association for the Advancement of Colored People, the Southern Christian Leadership Conference, the Congress of Racial Equality, the Student Nonviolent Coordinating Committee, the Brotherhood of Sleeping Car Porters, and the National Urban League). CORE was firmly committed to the principles of nonviolence as practiced by Gandhi and Jesus Christ, with the goal of achieving racial equality in the South. James Farmer Jr., one of CORE's first leaders and the honorary chair of the Democratic Socialists of America, was a graduate of Howard University Divinity School and was trained by the prominent mystic theologian, Howard Thurman. The day before the first Woolworth's sit-in, Reverend A.L. Davis hosted a CORE nonviolent direct action training workshop at his church. These and other opportunities to host training sessions by church leaders helped ensure that certain churches played an active role as participants, financiers, and organizers of the movement, and reminded protestors to maintain their commitment to the religious and moral principles of nonviolence (King 1991, p. 46; Harding 1991, pp. 35–37; Paris 1985, pp. 398–404).

#### 4.2. Protecting Free Speech and Maintaining Law and Order

Throughout protest cases, the Supreme Court acknowledged the protestors' commitment to principles of nonviolent civil disobedience when granting relief for peaceful and nonviolent action. In *Lombard v. State of Louisiana* (1963), three black college students and one white college student entered the McCrory Five and Ten Cent Store in New Orleans, sat down at the counter, and asked to be served. The Court held that the petitioners' conduct did not rise to the level of criminal mischief because they were "orderly" and did not pose a clear or present threat of violence through their demonstrations (*Lombard v. State of Louisiana*, 374 US 267, 277–78 (1963)).

In *Edwards v. South Carolina* (1963), protestors exercised their First Amendment rights through nonviolent methods (*Edwards v. South Carolina*, 372 US 229, 235 (1963)). They reasoned that the conduct of delivering a sermon, singing patriotic and religious songs, and clapping one's hands and feet are protected speech acts and "basic constitutional rights in their most pristine and classic form" (*Edwards*, 235 (1963)). The Court further reasoned that when minority viewpoints are rejected by members of the majority so as to arouse hostility, violence, and unrest, nonviolent responses are a reasonable consequence of protecting free speech in our democratic government.

Like the Free Exercise context, in protest cases, the Court defended free speech as a basic constitutional right. Religious and political free speech are entitled to First Amendment protection, and even hecklers are not free to violate a person's free speech rights. This view was illuminated in the Court's holding in *Cox v. State of Louisiana* (374 US 536, 547–48 (1963)). The controversy centered around a boycott that took place at segregated



restaurants in Baton Rouge, Louisiana as part of a broader protest movement against racial segregation. Twenty-three black college students were arrested for picketing stores that maintained segregated lunch counters; the protests were directed by the local chapter of CORE and led by an ordained Congregational minister, the Reverend Mr. B. Elton Cox, who also served as a Field Secretary of CORE (Cox, 523–39). In the days leading up to the protest, Cox and others participated in a “direct nonviolent clinic” sponsored by CORE and St. Mark’s church.

Rev. Cox guided about 2000 students peacefully down to the courthouse, where the marchers peacefully sang freedom songs and hymns and, in response, the inmates joined in the singalong. The courthouse grounds were flooded with angelic sounds that transformed the government complex into a tent revival meeting in the segregated South. Appreciative of the nonviolent religious character of the protests, the Court ruled in *Cox* that unsettling, annoying, or inconvenient speech is insulated from censorship and punishment. Even though students cheered, clapped, and sang, the Court reasoned that there was no clear and present danger of a substantive evil that permitted the abridgment of constitutional rights (*City of Sumter v. Lewis*, 241 S.C. 364 (1962); *State v. Edwards*, 239 S.C. 339, 344 (1961)). Ironically, although the Court acknowledged the religious and nonviolent character of the protest, it declined to address the larger constitutional issue as to whether the state enforcement of segregation in private establishments amounted to the kind of state action that ran afoul of the Equal Protection Clause of the Fourteenth Amendment.

#### 4.3. Mere Presence or Worship Do Not Amount to a Breach of the Peace

Additionally, the Supreme Court held that the mere presence of persons or of religious worship did not amount to a breach of the peace (*Garner v. State of Louisiana*, 368 US 157 (1961)). In *Taylor v. Louisiana* (1962), the majority reasoned that the defendants’ conduct was not a breach of the peace when petitioners calmly, orderly, and politely entered a bus station waiting room for whites only and requested to purchase tickets in the white-only section as interstate passengers (*Taylor v. State of Louisiana*, 370 US 154 (1962) (per curiam); *Peterson v. City of Greenville*, 373 US 244 (1963)). The fact that the petitioners stayed on the property after requests to leave did not amount to a breach of peace by the petitioners (*Bowie v. City of Columbia*, 378 US 347, 355 (1964)).

The majority assumed a similar judicial posture in *Barr v. Columbia* (1964), one of five sit-in cases decided by the Court on 22 June 1964. In this case, petitioners refused to exit a library after repeated requests to leave. The Court ruled that “we are reluctant to assume that the breach-of-peace statute covers petitioners’ conduct here,” where protestors maintained peaceful conduct throughout the protest (*Barr v. City of Columbia*, 378 US 146, 150 (1964)). Furthermore, where a breach of the peace will not be established because conduct is calm, mild-mannered, and decorous, “[t]here was no violation of the statute which petitioners are accused of breaching; no disorder, no intent to provoke a breach of the peace, and no circumstances indicating that a breach might be occasioned by petitioners’ actions” (*Brown v. State of Louisiana*, 383 US 131, 141 (1966)). The Court did not address the question of whether private actions of segregation that were protected by state courts amounted to the kind of state action that violated the Equal Protection Clause of the Fourteenth Amendment (Webster 2001, pp. 373–407).

The Court was less tolerant of protestors who resorted to violence to protect constitutional rights. In *People of State of Michigan v. Bernard*, petitioners staged a protest in front of City Hall in Ann Arbor, Michigan, protesting police brutality against blacks. The protest was peaceful and was at the point of dispersing when a fireman collided with the picket line and was hit on the head by one of the picketers. Additional firemen arrived on the scene and started fighting with some of the picketers, and the police arrested a number of protestors for disturbing the peace. The Court reasoned that protestors who resist arrest when officers are seeking to maintain the peace are not engaging in constitutionally protected conduct. Where there is the threat of imminent violence, officers do not breach constitutional rights by preserving the peace.

Each of these cases—*Lombard*, *Edwards*, *Taylor*, *Bouie*, and *Cox*—defined the boundaries of protected versus unprotected speech while affirming the right of persons to nonviolently and peacefully protest. These decisions are also a response to a change in the national climate: nonviolent protests increased in number, momentum was gained to end segregation, and the Court responded to national pressure to achieve racial justice through nonviolent means, as long as the protestors took the moral high ground through nonviolence.

#### 4.4. Gradually Chipping Away at the Wall of Segregation

The Equal Protection Clause of the Fourteenth Amendment provides that neither the state nor a government body may deny persons the equal protection of its governing laws. In essence, the government must treat every individual in the same manner as other individuals in similar circumstances and conditions. In this series of cases, the Supreme Court dodged the constitutional challenge because the majority did not believe that the Equal Protection Clause covered public accommodations based on the legislative history and debates leading to the ratification of the Fourteenth Amendment. On the contrary, a small but very vocal minority in the Court argued that the Fourteenth Amendment safeguards the rights of all Americans to be treated as equal citizens, especially with respect to public accommodations. Friends of the Court have argued that the tendency of government officials to use their authority to restrict freedom of expression led to ratifying the Fourteenth Amendment to prohibit official abuses (*Walker v. Birmingham*, 388 US 307 (1967)). The Court reiterated the Constitution's protection of freedom of speech, freedom of the press, the right of persons to assemble peaceably, and the right to petition the government for the redress of grievances. These freedoms may not be abridged unless there is a "clear and present danger of a serious substantive evil" (*Edwards v. South Carolina*, 372 US 229, 235–37 (1963)).

In the case of the CRM, the Court ruled that "delivering a religious harangue, singing loudly patriotic and religious songs, clapping feet and hands" are all foundational First Amendment rights (*Edwards*, 237, 1963). These rights are free from infringement, especially when the minority advocates a position that clashes with the majority. According to the Court, censorship would "lead to the standardization of ideas either by legislatures, courts, or dominant political or community groups" (*Cox v. State of Louisiana*, 374 US 536, 547, 552 (1965)).

As in religious clause cases, the Court reasoned that the freedom to act is not unlimited (*Cox*, 556, 1965). First Amendment rights can be constrained by a state acting in its interests for the protection of public health and safety, where "[t]he rights of free speech and assembly, while fundamental in our democratic society, still do not mean that everyone with opinions or beliefs to express may address a group at any public place and at any time" (*Cox*, 556, 1965). The preservation of democratic rights requires that we maintain public order to avoid the perils of anarchy (*Cox*, 556, 1965).

#### 4.5. Prior Restraint on Free Speech Is No Excuse to Break the Law

In addition, even when free speech entails demonstrations, marching, and parading on public streets and sidewalks, the fact that speech is nonviolent does not excuse one from following the law. In *Walker*, wherein petitioners were arrested for defying an injunction preventing a march on the Friday before Easter in Birmingham, the Supreme Court ruled that a prior restraint on free speech does not exempt petitioners from following the law and pursuing alternative channels of redress (*Walker v. City of Birmingham*, 388 US 307 (1967)).

A repeated concern of the Court was that, despite the methods used by the opposition, protestors must be subject to the judicial process, even in the face of arbitrary procedures and discriminatory laws. In *Walker v. Birmingham* (1967), city commissioner Bull O'Connor, a strong proponent of segregation, denied two requests for a permit to allow protestors to march in Birmingham. The plaintiffs defied an ex parte injunction issued in the wake of the Good Friday march by going ahead with their demonstration (*Walker*, 311, 1967). The *Walker* decision reveals the limits of judicial support for nonviolent protests when they

violate court orders. The majority sustained the contempt convictions of Martin Luther King Jr. and others for violating an injunction prohibiting the Birmingham marches planned for Good Friday and Easter Sunday (Walker, 307, 1967). The Court declined to address concerns regarding the validity of the injunction or the statute at issue, although the same Birmingham statute was later nullified in *Shuttlesworth v. City of Birmingham* (394 US 147 (1969)). Rather, the Court emphasized the need to maintain respect for the law:

The rule of law that Alabama followed in this case reflects a belief that in the fair administration of justice, no man can be judge in his own case, however exalted his station, however righteous his motives, and irrespective of his race, color, politics, or religion. This Court cannot hold that the petitioners were constitutionally free to ignore all the procedures of the law and carry their battle to the streets. One may sympathize with the petitioners' impatient commitment to their cause. But respect for judicial process is a small price to pay for the civilizing hand of law, which alone can give abiding meaning to constitutional freedom. (Walker, 320–21, 1967)

The Court, here, makes explicit its view that violations of judicial orders would not be permitted, whether the actor was motivated by a desire to promote racial reform and conform to divine law, to protect the right of the individual to communicate his ideas first and suffer the consequences later, or to oppose procedures that impair the free exercise of religious freedoms (Walker, 318–19, 1967). The Court privileged respect for the judicial process, even though many participated in protests out of their love for democracy and fidelity to God's moral law.

The Reverend Dr. Martin Luther King Jr., Reverend Fred Shuttlesworth, and Reverend Ralph Abernathy confirmed that their acts of civil disobedience were expressions of their religious beliefs. Rev. Shuttlesworth attacked the injunction as "a flagrant denial of our constitutional privileges" and vowed that the injunction would not stop the progress of the movement: "[A]n injunction nor anything else will stop the Negro from obtaining citizenship in his march for freedom" (Walker, 349, 1967). Rev. King provided a more elaborate critique of the injunction on religious and political grounds. He surmised that protestors had "anchored our faith and hope in the righteousness of the Constitution and the moral laws of the universe" (Walker, 349, 1967). They believed that their faith in God and America's constitutional principles backed their right to peacefully assemble, protest unjust laws, and achieve equal protection by the law.

Furthermore, King rebuked charges that the protests were motivated by blatant disrespect for the rule of law. The march, according to King, was held "not out of any disrespect for the law" or was rooted in attempts to "evade or defy the law or engage in chaotic anarchy". Instead, nonviolent protests demonstrated "the highest respect for the law", a theme that King returned to in his letter from Birmingham Jail. Stated another way, their "great love for the Constitution of the U.S.", coupled with their "desire to purify the judicial system of the State of Alabama", inspired them to protest, being cognizant of the rightness of their cause and the consequences of their decision.

In dissent, Justice Brennan criticized the majority's overriding concern with public order:

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

Justice Brennan critiqued the majority for being more preoccupied with fears of riots, civil disobedience, and Black Power while ignoring the crucial constitutional issue at stake. Not only did the majority conflate threats of 'Black Power' with civil disobedience, when it was clear that the protests were motivated by religious scruples, it also permitted a prior

restraint on First Amendment rights to stand, even though such actions were condemned by the Court as far back as *Cantwell*.

The rights to picket and parade are methods of expression that are protected by the First Amendment and must not be infringed by ex parte orders where petitioners did not have a fair opportunity to be heard in Court before they were restrained. Brennan reasoned that since these demonstrations involved the use of public grounds, they could be policed as to the time, manner, and location. However, the state was prohibited by the First Amendment from barring protests on public grounds for the purpose of petitioning the government for a redress of grievances (Walker, 334–35, 1967). Moreover, where a “permit has been arbitrarily denied”, one should not have to go down “the long and expensive route of this court to obtain remedy” before making a speech, delivering a sermon, picketing, parading, or assembling. More specifically, if a person must exhaust all judicial remedies before speaking, protesting, or parading, the occasion necessitating immediate protest would have passed and the protest would have become “futile or pointless” (Walker, 336, 1967).

This preoccupation with timing, which is particularly relevant in the case of protests, was critical to the Birmingham protests, which were designed to take place during the Easter season to awaken the moral conscience of the nation regarding the undemocratic and inhumane character of racial segregation. The injunction was designed to disrupt their demonstrations before they could gain mass support for their movement to dismantle segregation (Walker, 70–71, 1967). Given the fact that the plaintiffs were ministers who represented religious organizations, the injunction was calculated to ban demonstrations on a religious holiday, namely, Good Friday and Easter Sunday, ceremonies of “special sacramental significance” on which “church-oriented organizations” hoped to draw national attention to their demonstrations (Walker, 349, 1967). The fact that the protest activity was nonviolent and religiously motivated did not shield it from attack; the protestor must exhaust all legal remedies before engaging in demonstrations, even if the point of demonstrating would have been lost with delayed timing.

#### 4.6. Civil and Voting Rights Victories

Despite the victories of *Brown*, the Montgomery Bus Boycott, the Birmingham Campaign, the March on Washington, and the Supreme Court protection of protestors’ free speech rights, the civil and voting rights of millions of African Americans in the South were threatened. The Selma to Montgomery March in 1965 helped to achieve a significant victory for the CRM. Selma emerged as an ideal staging ground for the next phase of the CRM’s efforts to secure voting rights, in part because of the police force’s fierce support of segregation. Sheriff Clark had a reputation as one who “could be counted on to provide vivid proof of the violent sentiments that formed white supremacy’s core”. The other reason that Selma provided fertile soil for the expansion of the voting rights movement is because the organizers were focused on securing voting rights, and they were disciplined in utilizing nonviolent disobedience to achieve that objective.

The police brutality reached its climax on Bloody Sunday on 7 March 1965, when police officers violently and brutally attacked marchers as they crossed the Edmund Pettus Bridge en route to Montgomery. The nation was outraged, and support for racial reform bloomed as television screens broadcasted images of children sprayed by water hoses, bitten by dogs, and beaten with sticks. The death of two white volunteers from the North was also deeply disturbing and included a Unitarian minister from Boston and a mother of five from Detroit (Branch 1989, pp. 779–80; Fairclough 2001, pp. 229–43; Klarman 2004).

The week after Bloody Sunday, a massive wave of supporters flooded Selma in support of renewed calls for peaceful protests. Hundreds of ministers traveled to Selma to march across the Edmund Pettus Bridge again in support of voting rights. In a landmark address, President Johnson vowed his support for historic voting rights legislation before a joint session of Congress to help the nation “overcome this crippling legacy of bigotry and injustice”. In the spirit of protestors whose peaceful protests shook the foundation of the

segregated South, President Johnson stated that America “shall overcome” (Johnson 1965, pp. 291, 294).

As a consequence of the passage of the Civil Rights Act of 1964, the demise of institutionalized discrimination in public accommodations was in clear view (Civil Rights Act of 1964, Public Law 88–352, § 602, U. S. Statutes at Large 78 (1964), 241, 252–53). Given this historic achievement, the Court was called upon to determine whether peaceful attempts to be served on an equal basis were shielded from criminal prosecution. The Court spoke in *Hamm v. Rock Hill* (1964), where the majority held that the Civil Rights Act abates conduct that occurred before its enactment, as well as “still-pending convictions” (*Hamm v. City of Rock Hill*, 379 US 306 (1964)).

Elsewhere, the Court ruled that the Civil Rights Act “forbids discrimination in places of public accommodation and removes peaceful attempts to be served on an equal basis from the category of punishable activities.” (Cox, 318–19) Thus, because the Act transformed a crime (peaceful attempts to be served on an equal footing with whites) into a right, the Court reasoned that the act decriminalized peaceful attempts to be treated and served equally. Despite an instance by the dissent in *Hamm* that the Court should not provide a blanket sanction of nonviolent civil disobedience, the Court in *Cox* was clear in distinguishing protected nonviolent disobedience from “riotous conduct” that conflicts with “properly drawn statutes and ordinances designed to promote law and order, protect the community against disorder, regulate traffic, safeguard legitimate interests in private and public property, or protect the administration of justice and other essential governmental functions” (Cox, 574, 1965).

## 5. Summary and Conclusions

The preceding research and case studies demonstrate how principles that guided the Supreme Court’s First Amendment religious freedom jurisprudence from the 1930s and through the 1960s created a climate of religious freedom that supported the CRM in beneficial ways. Namely, the Jehovah’s Witnesses resisted laws mandating the flag salute because their faith mandated that such cultural practices violated their religious beliefs. In nonviolently practicing their faith in the face of discriminatory laws, this religious minority helped to lay the foundation for other religious minorities who engaged in civil disobedience and pursued litigation to expand civil rights. However, while Jehovah’s Witnesses benefited from constitutional protection, other religious minorities like Sabbath Day observers were treated unfairly. Even though the *Sherbert* revolution promised to expand First Amendment rights to despised religious minorities, it fell well short of its stated goal because the decision was limited to the facts of the case, and others who were denied benefits and rights based upon their disfavored religious views could not rely on the holding in *Sherbert*.

A survey of the principles and tactics of the CRM reveals how free exercise and civil rights are two sides of the same coin. The view that God’s law is higher than the law of the state is a central tenet of the nonviolent civil disobedience powerfully expressed in the CRM. However, a belief in the supremacy of God’s law was not tantamount to disrespect for the rule of law, as protestors engaged in protest out of respect for God’s higher law and constitutional principles. Because groups like the Jehovah’s Witnesses proselytized their faith, solicited support for their cause, appealed to divine law to justify civil disobedience, and finally prevailed, they helped to establish a climate of religious freedom. This climate prepared the way for civil rights protestors over a decade later, who used the gains of the religious rights movement to build a foundation that catalyzed a constitutional revolution that benefited racial minorities.

A pervasive concern was that nonviolent protests threatened to erode the social fabric of America. However, what many observers, including the courts, failed to acknowledge was that the protests were a painful reminder that the social fabric was both frayed and torn into pieces, and that nonviolent protests were concerted attempts to make right everything that was wrong with American society. We saw the limits of the courts’ patience, even



with nonviolent protests, when petitioners defied injunctions that violated constitutionally protected activity. The Court was more worried about protestors following the law and pursuing all legal alternatives, even when doing so meant that the purpose of their protests would have lost its relevance. The Constitution protects the rights of even despised religious and racial minorities to use nonviolent means to obtain redress for grievances, and this right must not be abridged by prior restraints on constitutional rights. It was this goal of promoting the common good and supporting the cause of racial harmony that inspired protestors to use nonviolent methods to overturn laws that promoted racial division and threatened the public good.

Furthermore, the Court affirmed the right of individuals to speak their minds without compulsion. This theme resurfaced in protest cases during the CRM where protestors sought to modify the law by shaping public opinion about segregation. The fullest expression of individual freedom, according to the Court, is when an individual has the right to differ on things that “touch the heart of the existing order”. Freedom of religion also prohibited officials from proscribing what should be orthodox in politics, nationalism, or religion. Like the Sabbath Day observers and Jehovah’s Witnesses, the CRM protestors believed that the laws of God were more exacting than the obligations imposed by the state. The state could not force CRM protestors to confess their faith in a tradition or practice that violated their own religious beliefs.

Another theme emerging from cases under the Religion Clauses that was revisited in protest cases during the CRM was that private property rights do not supersede constitutional rights. Once spaces were opened to the public, an assertion of private ownership rights could not trump the need to protect the constitutional rights of patrons. The *Marsh v. Alabama* (1946) case extended religious expression beyond state-run towns and municipalities to cover private towns that are infused with the public interest (*Marsh v. Alabama*, 326 US 501 (1946)). The more the owner opens up his or her business or property for use by the general public, the more his or her (property) rights become circumscribed by the constitutional rights of those who use them. The corporation, state, and officers cannot enforce statutes that restrict the constitutional rights of those who use a property that has been opened for public use. This holding became a key part of the legal strategy of the CRM, which argued that once restaurants and other establishments were open to the public, service could not be provided to certain groups while being denied to others, based upon the Equal Protection Clause.

However, these cases also point to the limits of First Amendment cases in protecting religious conduct from state infringement. While the Court held that the right to believe is absolute, it was not prepared to provide constitutional protection to engage in acts of civil disobedience, even to protect a religious belief or expand civil rights. This trend emerged regarding nonviolent protests, where the Court provided relief based on individual cases but refused to rule that nonviolent protestors had a constitutional right to engage in acts of civil disobedience. Even if an official acted arbitrarily or capriciously to deny a constitutional right, any inconvenience, delay, or cost was not deemed a sufficient justification to break the law, whatever the cause. The Court was overly concerned in these cases that if it allowed one person to disregard laws or procedures, others would do the same and anarchy would replace the rule of law. Similar concerns over state action and governmental powers resurfaced in protest cases during the CRM. It was not until the passing of the Civil Rights Act that peaceful attempts to be served were removed from the category of punishable activities.

In summary, in the period leading up to the CRM, a climate of religious freedom was encouraged by First Amendment cases that protected religious liberty, safeguarded the freedom to believe and worship minority faiths, placed limits on government regulatory powers, prohibited religious discrimination, and challenged prior restraints on religious freedom. These court rulings reminded protestors that religious and, very often, political speech enjoyed the highest constitutional protection; they affirmed the right of groups to follow the dictates of their faith, even if the higher law conflicted with the laws of the state.

This climate of religious freedom provided an important catalyst for civil rights activists who were compelled to resist discriminatory laws that violated constitutional principles and the moral laws that governed their faith.

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## Notes

- <sup>1</sup> This article is based upon the author's dissertation research, which extended and integrated existing scholarship on the CRM and church and state scholarship by examining the connections between First Amendment religion clause decisions and the advancement of civil rights during the CRM. This paper seeks to extend this thesis by arguing that it is impossible to appreciate the success of the CRM without appreciating the impact of First Amendment legal victories. Failure to do so secularizes the movement and downplays its distinctive religious underpinnings and goals.
- <sup>2</sup> This work builds on the thesis of Grohsgal, who argues that even though scholarship has deepened our understanding of the various dissensions of the CRM, to date, scholars have failed to relate the aims of the CRM to other movements to expand religious protections through the First Amendment religion clauses (99). She also contends that most legal scholars fail to appreciate the connections between the tactics used by Jehovah's Witnesses and the methods of civil rights activists. For this reason, she contends that CRM scholarship would be enhanced by "extending the frame of reference", both chronologically and politically, to "include other groups whose struggles helped to define Constitutional rights".
- <sup>3</sup> My view of the role of religious discourse, primarily in the early stages of the CRM, is consistent with Charles Marsh's view that "there were many SNCC activists whose moral energies were driven by secular ideals, as there were those who considered the faith of black people altogether quaint. Nevertheless, student-based organizations like SNCC and COFO, as well as the larger movement itself, were initially anchored in the language, imagery, and energies of the church, in search of a 'circle of trust, a band of sisters and brothers gathered around the possibilities of agapeic love, the beloved community'" pp. 2–3. In addition, Anthony Pinn calls attention to the pivotal role that the church played initially in promoting the goals and shaping the direction of the CRM. By participating in the CRM, black churches and leaders believed that they were carrying out the mandate of the Gospel. Pinn shows how the black church supported the struggle by providing volunteers, meeting places, and financial resources. The church also participated in direct action, distributed materials, and provided the movement with religious and theological underpinnings (13). Other scholars have argued that the role of black religion in the public realm has always been contested, with various religious leaders and church members offering shifting political positions, methods, goals, and strategies at different historical moments in the CRM, including an emphasis on economic empowerment, political activism, Christian unity, social reform, etc. (Best 2006, pp. 197–200). Lerone Martin supports the thesis of the competing positions of black liberation advanced during the CRM by arguing that black religion and politics "has always been disputed ground, expressing and pursuing a range of religious and political options, some of which prove to buttress black freedom struggles, others that hinder them, as well as all points in between" (5).
- <sup>4</sup> My view of the role of religious discourse in the civil rights movement is consistent with Marsh's view, which acknowledges the spiritual roots of the CRM; however, I look at how nonviolent protest interacted with the church, politics, and the law to advance cultural and constitutional rights.
- <sup>5</sup> Carter claims that the purpose of religion is not merely to understand oneself or to make sense of the rest of the world "but to act, and to act at times without regard to what others consider the settled facts". This makes religion a destabilizing and transformative force. *Culture of Disbelief*, 41.
- <sup>6</sup> This thesis embraces the view that the civil rights movement builds on and extends the "rights revolution", which included such groups as the Jehovah's Witnesses, who helped to advance the cause of constitutional improvement. Weinryb Grohsgal, *ibid.*, 329.
- <sup>7</sup> Marsh argues that "there were many SNCC activists whose moral energies were driven by secular ideals, as there were those who considered the faith of black people altogether quaint. Nevertheless, student-based organizations like SNCC and COFO, as well as the larger movement itself, were initially anchored in the language, imagery, and energies of the church, in search of a 'circle of trust, a band of sisters and brothers gathered around the possibilities of agapeic love, the beloved community'". *Ibid.*, 3.
- <sup>8</sup> This research builds upon and goes beyond Grohsgal's work by examining free exercise cases from the late 1930s to the mid-1960s, covering the litigation tactics of a broad range of religious groups, not just the Witnesses. This work shows how the CRM was inspired by religious principles similar to those of the Witnesses, who had different goals. What movement activists were trying

to achieve was not the freedom to worship but the freedom to live out their faith in ways that offered a more inclusive vision of democracy and freedom for all.

- 9 This author is not arguing that the climate of religious freedom was the sole factor that contributed to the success of the CRM, merely that it is an important and, heretofore, largely unnoticed factor. I certainly agree with others that important factors that enhanced the success of the civil rights movement include black civil religion, black protest traditions, civil rights litigation, slave religion, labor movement advances, American democratic theory, etc. For an article that traces the first wave of the expansion of religious freedom to the abolitionist critique of slavery, see (Lash 1994), in which the author claims that while the Original Free Exercise Clause “was intended to prohibit nothing more than laws that targeted religion qua religion, the abolitionists challenged the adequacy of that protection: by demanding “a broader interpretation of the original Bill of Rights, one that emphasized the rights of the individual over the prerogatives of state majorities”.
- 10 It is important to note here that while NAACP litigation strategists were inspired by the First Amendment advances of groups like the Witnesses, not all civil rights activists and black church members who participated in the protest were aware of the expansion of minority religious rights in the wake of Supreme Court decisions. I argue that the activity of the Jehovah’s Witnesses fertilized the soil for civil rights activists and Black Christians to offer a broader vision of church–state relations that eventually led to an unprecedented expansion of constitutional rights.
- 11 Roy Wilkins, executive secretary of the NAACP during the CRM, expresses clearly the goals of the movement: “What the NAACP wanted, what I wanted, was to include Negro Americans in the nation’s life, not to exclude them. America was our land as much as it was any American’s—every square inch of every city and town and village” (Wilkins 1994, p. 319). Thurgood Marshall, interview by Ed Erwin, printed as “The Reminiscences of Thurgood Marshall”, in *Thurgood Marshall: His Speeches, Writings, Arguments, Opinions, and Reminiscences*, ed. Mark Tushnet (Chicago: Lawrence Hill Books, 2001) (see Marshall 2001). Although Justice Thurgood Marshall was publicly critical of the activists’ “disregard for the law”, he was emphatic about the central role of black churches in the struggle: “Eighty percent of the branches of the NAACP when I went there were run by ministers, in churches. Ninety-eight percent of the meetings were held in Negro churches. The Negro church support was beautiful, from one end of the country to the other.” He went on to say that “[T]here were some bad ones [churches]. But I don’t think there would have been an NAACP without the church.” *Ibid.*, 510.

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