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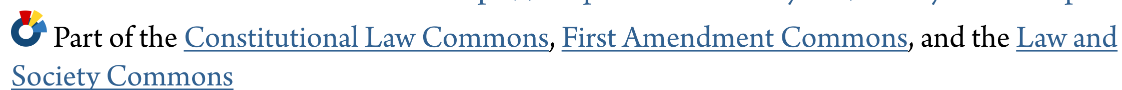

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A Fractured Establishment's Responses to Social Movement Agitation: The U.S. Supreme Court and the Negotiation of an Outsider Point of Entry in *Walker v. City of Birmingham*

Carlo A. Pedrioli
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In classical social movement theory, scholars have identified the advocates of change as elements of agitation and the establishment as the entity that responds in an attempt to control the agitators (Bowers, Ochs, & Jensen 8 & 48-49). Decision-makers with power presumed to be legitimate comprise the establishment (Bowers, Ochs, & Jensen 4). This classical approach has assumed that the establishment is a generally monolithic entity that responds in a unified manner to the efforts of the advocates of change.

While this approach may accurately characterize some rhetorical situations, it does not necessarily have to characterize all such situations. For example, one would probably describe the judiciary as a part of the establishment because judges are well-connected and powerful individuals who, in many cases, have benefited from existing power structures. Although the judiciary, through majority opinions, makes decisions on appeals that come before it, the judiciary also issues dissenting opinions that can directly contradict the majority opinions. Hence, if the judiciary is sending mixed signals, it cannot always function as a virtually monolithic entity within the establishment.

As the head of the federal judiciary, one of the three branches of the U.S. government, the U.S. Supreme Court certainly represents the establishment. The Supreme Court has "the awesome authority to nullify any governmental act" in conflict with the Constitution, and the Constitution is essentially what the Court says it is (Schwartz 379). In the early nineteenth century, Chief Justice John Marshall asserted, "It is emphatically the province and duty of the judicial department to say what the law is" (*Marbury v. Madison* 177). Consequently, the Supreme Court is a key decision-maker within the governmental power structure.

The Supreme Court primarily is made up of elite members of society with "wealth, power, and status" (Bowers, Ochs, & Jensen 8), and this was true during the first half of 1967. For instance, Earl Warren had studied at the University of California, Berkeley, and had been both attorney general and governor in California (Epstein & Walker 860). Hugo Black had been a U.S. senator, and William Douglas had studied at Columbia University and been a law professor (Epstein & Walker 856 & 857). Meanwhile, Tom Clark had been a student at the University of Texas and later had become attorney general for the United States, and John Marshall Harlan had received his education at Princeton University and Oxford University, eventually acting as chief counsel for the New York State Crime Commission (Epstein & Walker 857 & 858). William Brennan had studied at the University of Pennsylvania and Harvard University, later sitting on the New Jersey Supreme Court, while Potter Stewart had studied at Yale University and Cambridge University, later becoming a federal court of appeals judge (Epstein & Walker 856 & 860). Also, Byron White had obtained his education at Oxford University and Yale University and held a position as a deputy U.S. attorney general (Epstein & Walker 861). Finally, Abe Fortas had studied at Yale University and been counsel for various federal agencies (Epstein & Walker 857). In the typical manner of members of the Court, these elite members of society were in positions that enabled them to act as establishment decision-makers.

The idea that the judiciary does not always function as a generally homogeneous entity within the establishment calls for further study, particularly in a case in which a prominent judicial body issued very mixed signals to the advocates of change and to society more generally. The 1967 civil rights protest case of *Walker v. City of Birmingham*, which the above Court heard, is one such case. In *Walker*, the U.S. Supreme Court upheld by a vote of five to four the collateral bar rule, which says that parties to a legal dispute may not challenge the validity of a court's injunction by violating the injunction (Subrin, Minow, Brodin, & Main 175; *Walker* 314). An injunction is a court's order to parties of a lawsuit to take or refrain from taking a specific action ("Injunction" 788). Two years later, in *Shuttlesworth v. City of Birmingham*, the Court found that the Birmingham protest ordinance in *Walker* violated the First Amendment[1] (*Shuttlesworth* 158-59). Nonetheless, the immediate effect of the Court's decision in *Walker* was to restrict the ability of members of the civil rights movement, including Martin Luther King, Jr., to march legally on short-term notice in protest of racially discriminatory laws.

Walker is an important case for analysis in part because the case became an ongoing and prominent news story beginning with its origins in 1963. On April 12, 1963, the *New York Times* reported in page-one fashion that the previous day Martin Luther King and other civil rights leaders had violated an Alabama state court injunction that barred them from marching in protest of discriminatory laws (Hailey, "Negroes Defying" 1). On April 13 of the same year, the *Times* provided page-one coverage of the arrests of King, Ralph Abernathy, and other civil rights protesters, which had taken place the day before (Hailey, "Dr. King Arrested" 1). In the April 13 report, the newspaper provided photographic coverage of the arrests of King and Abernathy, showing the two men in the process of being taken to a police van (Hailey, "Dr. King Arrested" 1). The *Times* also reported on King's ensuing contempt hearing and conviction ("Dr. King's Hearing" 20, "Dr. King Convicted" 9). Approximately four years later, when the U.S. Supreme Court eventually announced its decision in *Walker*, the *Times* covered the Court's upholding the convictions of King and other Black civil rights leaders for violating the Alabama trial court's temporary injunction ("Dr. King Loses Plea" 1).

Of historical note, during his imprisonment that resulted from the events that eventually led to the Supreme Court's decision in the case, King wrote what became his famous "Letter from Birmingham Jail" (Michelman 76), in which King responded to eight White religious leaders of Birmingham who had criticized his civil disobedience approach to fighting social injustice ("Dr King Loses Plea" 26, Fulkerson 122). Because it made the case for civil disobedience, King's "earnest plea addressed to fellow clergymen" soon "became one of the classic statements of the civil rights movement" (Gaipa 280, "Dr King Loses Plea" 26). Commentators have regarded the "Letter" as "King's greatest written work" (Oppenheimer 662).

Beyond the attention the news media gave to the protests and the historical significance that stemmed from King's "Letter," the *Walker* case has the potential for reconfiguring social movement theory. For instance, *Walker* provides a clear example of agitation by members of a historically recognized social movement; in the sequence of events that set up the case, Black civil rights protesters, including King, marched in violation of a court injunction, as noted above. Besides having clear agitation, the case provides competing responses from the establishment to the violation of the injunction. Going beyond the simplistic binary of agitation and control, the case adds clashing versions of control that vie to justify their positions. Thus, *Walker* presents a classical agitation and control social movement situation but throws in the rhetorical twist of fractured control.

An underlying assumption of this paper is that free speech and social movements are closely related (Fraleigh 190). Indeed, free speech doctrine and social movements mutually shape each other (Koehler 73). Just as *Walker* limited speech rights and thus restricted the rights of members of the civil rights movement, the rhetoric of the civil rights movement helped to open the door to the famous case of *New York Times Company v. Sullivan*, which revolutionized libel law (Hopkins 2-3).

In light of the potential for expanding social movement theory beyond an essentially monolithic understanding of the establishment, *Walker* affords communication scholars an opportunity for needed development of social movement theory. Therefore, this paper will argue that two key texts from *Walker*, the majority opinion of Justice Potter Stewart and a dissent by Justice William Brennan, demonstrate how the establishment can fracture in its response to the speech of advocates of change. To make this argument, the paper initially will address some foundations of social movement theory in communication studies. Then the paper will review the background of the *Walker* case in greater detail. After reviewing the case, the paper will provide analysis of the two judicial opinions noted above. Finally, the paper will offer some implications of the analysis.

Theoretical Foundations of Social Movements

Since the 1950s, but more so since the 1960s and 1970s, communication scholarship has offered a theoretical understanding of social movements (Henry 97). Classical social movement scholarship in communication has held that social movements take place under specific circumstances and in a sequence. Normally, for a social movement to develop, people have to be dissatisfied with some aspect of their environment and want change (Griffin, "The Rhetoric" 184). Individuals with shared beliefs engage in shared activities (Hahn & Gonchar 44-46), trying to bring about change (Griffin, "The Rhetoric" 184). After time has passed, the attempts at change either have made some progress or not, and the social movement has come to an end (Griffin, "The Rhetoric" 184).

This classical scholarship has suggested a number of characteristics of social movements. For instance, a social movement has some degree of organization, and the movement is non-institutionalized, which means that it is outside of the establishment (Stewart, Smith, & Denton 2 & 5). Also, a social movement is large in scope with regard to "geographical area, time, events, organizations, participants, goals, strategies, and critical adaptations" (Stewart, Smith, & Denton 8).

Within a social movement, leadership plays an important role (Simons, "Requirements" 3-4). Leadership puts a face or faces on the movement that the public will come to recognize as symbolic of the movement (Stewart, Smith, & Denton 111-12). In addition to attracting, maintaining, and molding followers (Simons, "Requirements" 3), leaders also help to organize a movement and make decisions within the movement (Stewart, Smith, & Denton 107-10).

Such a movement must engage in agitation, which is "persistent, long-term advocacy of social change, where resistance to the change is also persistent and long-term" (Bowers, Ochs, & Jensen 3). More specifically, agitation involves "people outside the normal decision-making establishment" who strive for "significant social change" and "encounter . . . resistance within the establishment such as to require more than the normal discursive means of persuasion" (Bowers, Ochs, & Jensen 4). The agitation, which calls for a change in the status quo, is by nature political (Stewart, Smith, & Denton 225-27).

To this agitation, the establishment then responds, often with an attempt at control (Bowers, Ochs, & Jensen 8). Bowers, Ochs, and Jensen have listed several responsive strategies, including avoidance, suppression, adjustment, and capitulation (48-49). Stewart, Smith, and Denton have listed the responsive strategies as evasion, counterpersuasion, coercive persuasion, coercion, adjustment, and capitulation (325).

A major focus of classical social movement studies has been verbal communication, either oral or written. This focus should not be surprising because the study of social movements fits within the field of public address (Griffin, "The Rhetoric" 188), which traditionally focused on verbal messages. In suggesting texts for analysis, Griffin offered texts of the following types of rhetors, among others: lecturers; pulpit, political, legislative, academic, and forensic orators; editors; journalists; novelists; dramatists; and poets ("The Rhetoric" 187). Historical texts for study could include "books, pamphlets, broadsides, tracts, almanacs, newspapers, and periodicals, the pulpit, the lecture platform, the political rostrum, the stump, and the stage" (Griffin, "The Rhetoric" 187).

This classical conception of social movements has received criticism over the years. Some communication scholars have challenged various general aspects of the classical understanding of social movements. For instance, McGee argued that critics should see social movements as meanings rather than as phenomena (233-44). McGee's position calls for shifting scholarly attention away from the study of human organizational behavior and toward the study of human consciousness (242). Also, Zarefsky suggested that social movement rhetoric is not necessarily different from other types of rhetoric, and hence he has proffered that social movement theory does not add much to an understanding of rhetoric (245-54).

In addition, scholars have offered critiques of specific aspects of the classical understanding of social movements. Responding to the usual focus on the verbal content of social movements, Haiman suggested that social movement rhetoric, if it includes "*all* the available means of persuasion," would be more than simply the verbal ("The Rhetoric" 99-100), and Griffin considered *body rhetoric*, such as the use of the African-American body in 1960s civil rights protests, as a type of nonverbal rhetoric employed in social movements ("The Rhetorical Structure" 127). In other words, "putting one's body where one's mouth is . . . is a rhetorical act" (Haiman, "Nonverbal Communication" 381). DeLuca has explained how social movement spectacles called *image events*, which are made for television and other visual media, can be points of entry into the establishment for outsiders (1-22).

Taking issue with social movement scholars who have focused on either verbal or nonverbal elements of social movement rhetoric, Enck-Wanzer has theorized about *intersectional rhetoric*, which is rhetoric within which no one type of discourse is privileged over others (191). Enck-Wanzer describes intersectional rhetoric as including words, images, and bodies (191), but, in more traditional terms, such rhetoric would consist of verbal and nonverbal elements. In "refus[ing] to recognize the singularity or boundedness of any solitary rhetorical form," such rhetoric works to resist hegemonic norms for social movement rhetoric (Enck-Wanzer 193).

Further criticism has problematized the leader-focused nature of much social movement scholarship. Enck-Wanzer has noted how leader-focused studies can be limiting because such studies do not encourage effective study of groups that consider themselves as collectives (180). Often, such groups have resisted the emergence of leaders and thus do not fit the classical social movement model (Enck-Wanzer 180).

Finally, Wilson has expanded upon the notion of *prudence* in a way that is useful to the study of social movements. As Wilson sees it, prudence is "a coveted space of legitimacy that [rhetors] attempt to occupy by discursively controlling its meaning" or "a contested space that political actors struggle to control through discourse" (133). A different way of approaching prudence would be to say that rhetors possess prudence "when they calculate well with a view to attaining some particular end or value" (Levasseur 333-34). Since prudential performances are easier to carry out than locate, identifying them is not always a simple task (Jasinski 456).

The Background of Walker v. City of Birmingham

To provide a better understanding of *Walker*, this section of the paper addresses the background of the case. In the interest of offering a reasonably balanced overview of the events that led to the case, the paper blends background material from both Stewart's majority opinion and Brennan's dissent.

Late on the night of Wednesday, April 10, 1963, city officials of Birmingham, Alabama, asked an Alabama court to grant a temporary injunction that would prohibit various civil rights protesters, including *Walker* petitioners Martin Luther King, Ralph Abernathy, Fred Shuttlesworth, and five other Black ministers, from "participating in or encouraging mass street parades or mass processions without a permit as required by a Birmingham ordinance" (*Walker* 340, 309, 341, & 338). Birmingham City Code Section 1159 provided that, upon request, the city would grant a permit unless "'the public

welfare, peace, safety, health, decency, good order, morals or convenience'" required that the city not issue the permit (*Walker* 309). In asking for the injunction, the city maintained that the civil rights protesters had engaged in previous conduct that breached the peace, threatened public safety, and put a strain upon the police department (*Walker* 309). That night, the court granted the temporary injunction without notice to the civil rights protesters (*Walker* 309 & 340).

The next day, Thursday, April 11, after several of the petitioners received notice of the injunction, they declared at a press conference their intention to defy the injunction and then distributed a message (*Walker* 310 & 341). The message observed that Alabama had "openly defied the desegregation decision of the [U.S.] Supreme Court" and permitted "raw tyranny under the guise of maintaining law and order" (*Walker* 323). As a way of "'purify[ing] the judicial system,'" on April 12, which was Good Friday, King, Abernathy, and Shuttlesworth led fifty or sixty individuals in a march from a black church and toward city hall as a crowd of one thousand to fifteen hundred people observed (*Walker* 324, 310, & 341). Several members of the crowd followed the parade (*Walker* 311). Two days later, April 14, which was Easter Sunday, a group of about fifty people left a black church and marched down the street, while a crowd of fifteen hundred to two thousand people watched (*Walker* 311 & 341). About three or four hundred individuals followed the parade (*Walker* 311).

A contempt of court proceeding ensued. At the hearing, the petitioners attempted to attack the constitutionality of both the temporary injunction and Birmingham City Code Section 1159, claiming they were vague, overbroad, and unlawful restrictions on free speech (*Walker* 311). The petitioners also claimed that the city officials had administered the ordinance in an "arbitrary and discretionary manner" (*Walker* 311). Moreover, the petitioners attempted to put on testimony to show that they had tried to obtain permits (*Walker* 339). For instance, a member of the Alabama Christian Movement for Human Rights testified that the member had gone to city hall to inquire about permits (*Walker* 339). At city hall, Police Commissioner Connor had replied, "No, you will not get a permit in Birmingham, Alabama[,] to picket. I will picket you over to the City Jail" (*Walker* 339). Connor repeated that statement twice (*Walker* 339). Two days later, Shuttlesworth sent Connor a telegram to request a permit, but Connor answered, "I insist that you and your people do not start any picketing on the streets in Birmingham, Alabama" (*Walker* 339-40).

The trial court, asserting that it could look only at its jurisdiction over the injunction and whether the petitioners knowingly had violated the injunction, imposed upon each petitioner a jail sentence of five days and a fine of fifty dollars (*Walker* 312). In upholding the lower court's decision against the petitioners, the Alabama Supreme Court remarked, "Petitioners did not file any motion to vacate the temporary injunction until after the Friday and Sunday parades. Instead, petitioners deliberately defied the order of the court . . ." (*Walker* 312-13). The petitioners requested that the U.S. Supreme Court grant certiorari, which is done at the Court's discretion (Nowak & Rotunda 28-29), and the Court did so.

Analysis of the Opinions

With this overview of the background of *Walker* presented, the paper now considers the more partisan factual narratives, as well as the legal arguments, that Stewart's majority opinion and Brennan's dissent offer. Joining Stewart in the majority were Hugo Black, Tom Clark, John Marshall Harlan, and Byron White. Joining Brennan's dissent were Earl Warren, William Douglas, and Abe Fortas.

Although Chief Justice Warren and Justice Douglas also wrote dissents, this paper will focus on the dissent of Justice Brennan. Among the three justices who wrote dissents, Brennan and Douglas were well-known for their pro-free speech opinions (Wicker 46, Bollinger 88), and, in *Walker*, Brennan's dissent was more extensive than Douglas' dissent. Also, since the three justices who wrote dissents offered similar arguments, including that established constitutional rights should take priority over an unconstitutional statute packaged in a court injunction (*Walker* 334, 338, & 346), Brennan's dissent ought to provide an adequate sampling of the criticisms of the majority opinion.

Of importance is the point that, regardless of how persuasive one may find Brennan's dissent, or the dissent of Warren or Douglas, the majority opinion, as always, prevailed. Unlike a dissent, Stewart's opinion has weight as binding precedent in similar cases. While Brennan's dissent explains why Stewart and the majority erred, as well as why, if a similar case should appear in the future, the Court should change its position, such a dissent carries no precedential value.

Factual Narratives in the Opinions

In presenting his narrative of the events of the case, Justice Stewart focuses on the legal violations of the protesters. Stewart notes that the Alabama trial court granted the temporary injunction that prohibited the protesters from marching and then carefully adds that the court had a legitimate reason for doing so, specifically that the civil rights protesters previously had engaged in conduct that breached the peace, threatened public safety, and put a strain upon the police department (*Walker* 309). Hence, the lower court acted properly.

According to Stewart's narrative, the protesters received notice of the injunction and then promptly declared their intention to defy the injunction (*Walker* 310 & 311). They acted on this desire to defy the court's order, marching on both Good Friday and Easter Sunday (*Walker* 310 & 311). As such, Stewart tells a story of individuals who, despite having notice of the injunction, knowingly violated a justified court order against marching.

Writing in dissent, Brennan tells a much different story of the events that set up the *Walker* case, instead pointing out the injustices that the protesters faced along the way to the violation of the injunction. He notes that, late on the night of April 10, city officials of Birmingham asked an Alabama court for a temporary injunction that would prohibit civil rights protesters from "engaging in, sponsoring, inciting or encouraging mass street parades or mass processions or like demonstrations without a permit . . ." (*Walker* 340). That night, since the civil rights protesters were not invited to the hearing, the court granted the temporary injunction without any notice to the protesters (*Walker* 340). This description is one of a covert misuse of legal power, certainly not one of open justice where both parties could make their arguments in court.

Furthermore, Brennan's narrative goes to great lengths to point out how the protesters had made efforts to behave lawfully until they had no other options besides violating the law or missing the chance to send their message during Easter weekend. Given attempts by the civil rights protesters to obtain a permit lawfully and the response by the White establishment, the protesters, to send the message they sought to send on Easter weekend, felt that they had no other choice but to violate the law.

Legal Arguments in the Opinions

These two narratives of the events that led up to the *Walker* case help the justices make divergent legal arguments about how to resolve the matter at hand. Stewart frames the legal issue as whether the rule that parties to a legal action who receive notice of an injunction from a court of general jurisdiction must obey the injunction, no matter how erroneous the action of the court may be, is constitutionally appropriate (*Walker* 314-15). Here, Stewart focuses on the duty to obey that the protesters had, not whether the law is just.

Consistent with his proffered narrative, Stewart addresses the legal violations of the protesters. In laying out what he sees as the appropriate legal rule to decide this case, the justice quotes favorably the 1922 U.S. Supreme Court case *Howat v. Kansas*, which itself cites prior authority:

> An injunction duly issuing out of a court of general jurisdiction with equity powers upon pleadings properly invoking its action, and served upon persons made parties therein and within the jurisdiction, must be obeyed by them however erroneous the action of the court may be, even if the error be in the assumption of the validity of a seeming but void law going to the merits of the case (*Walker* 314).

Stewart observes that federal courts have followed this rule of law, called the collateral bar rule (Subrin, Minow, Brodin, & Main 175), and that the rule, as Stewart understands it, is thus appropriate (*Walker* 314). The rule applies unless an injunction is "transparently invalid" or has "only a frivolous pretense to validity" (*Walker* 315).

Applying the rule to his understanding of the facts, Stewart determines that the lower state court had jurisdiction over the petitioners and the subject matter in controversy (*Walker* 315). Moreover, the injunction was not "transparently invalid," and it had more than "a frivolous pretense to validity" (*Walker* 315). For added effect, the justice downplays the petitioners' reliance on free speech issues, rejecting the notion that the First Amendment gives marching and picketing the same protection as pure speech, and he adds that states have a strong interest in regulating the use of their streets (*Walker* 316 & 315). According to Stewart, no matter the excuse that the protesters may offer, violation of the law remains unacceptable.

Stewart does make several concessions to the petitioners, but the concessions do not change his decision. For example, he acknowledges that the Birmingham ordinance would "unquestionably be subject to a substantial constitutional question," perhaps for overbreadth and vagueness (*Walker* 317). Nonetheless, the petitioners should not have assumed that the ordinance was facially invalid and instead ought to have applied to the lower court to request modification or dissolution of the injunction (*Walker* 316-17). Also, Stewart admits that the petitioners might have succeeded in claiming that the city previously had administered the ordinance "in an arbitrary and discriminatory fashion," but the petitioners did not make an application to the lower court regarding this matter (*Walker* 317-19). In essence, legal precedent gave the petitioners notice that they could not bypass judicial review of the injunction before they disobeyed the injunction (*Walker* 320).

Concluding, Stewart again focuses on the protesters' violations of the law, noting "that in the fair administration of justice no man can be judge in his own case, however exalted his station, however righteous his motives" (*Walker* 320-21). Regardless of the petitioners' cause, "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* 321).

As one would expect from Brennan's factual narrative, Brennan makes a strikingly different legal argument from that of Stewart. Brennan begins by framing the issue as whether a court may hold the petitioners criminally liable for violation of a facially unconstitutional injunction and a facially unconstitutional ordinance, where the city has applied the parade ordinance in a discriminatory manner (*Walker* 342). Rather than looking at a duty to obey the law, as does Stewart, Brennan looks at the injustice in the case under review.

In his dissent, Brennan strongly objects to the Court's holding, viewing it as a "distortion in the hierarchy of values" of U.S. society (*Walker* 338). He notes that, although states are free to promulgate rules designed to promote respect for court orders, this observation does not allow states to harm "more vital interests" (*Walker* 343-44). In short, the Supremacy Clause of the U.S. Constitution demands "that a valid state interest must give way when it infringes on rights guaranteed by the Federal Constitution" (*Walker* 344). In the case at hand, Alabama's interest is the promotion of adherence to court orders, and the petitioners' interests are the First Amendment rights of speech, peaceable assembly, and petitioning the government for redress of grievances (*Walker* 344). Citing the 1931 case of *Near v. Minnesota* and the 1967 case of *Keyishian v. Board of Regents*, among other cases, Brennan notes that the Court previously had acknowledged the "chilling effect" that prior restraint, vagueness, and overbreadth can have upon First Amendment rights "so high in the scale of constitutional values" (*Walker* 344-45 & 347).

Furthermore, Brennan points out how Birmingham had avoided, but should not have been allowed to avoid, the spirit of the law. Specifically, precedent supports the notion that a party's failure to obtain a license under a facially invalid ordinance does not prevent an appellate court from later reviewing the party's conviction under the ordinance (*Walker* 345-46). However, Brennan describes as an

"inscrutable legerdemain" Birmingham's avoiding this rule of law by taking "the precaution to have some judge append his signature to an ex parte order which recites the words of the invalid statute" (*Walker* 346). Because of such judicial action, the petitioners, who have marched already, can no longer challenge the constitutionality of the ordinance, nor can they challenge the constitutionality of the injunction (*Walker* 347).

Beyond considering the spirit of the law, Brennan notes the inappropriateness of silencing the petitioners pending outcome of the legal process (*Walker* 348). A halt in the petitioners' actions might damage the petitioners' efforts to march against segregation (*Walker* 348-49). Also, petitioners, all religious leaders, desired to use Good Friday and Easter Sunday to gain special attention for their cause, and the timing of their march was critical to their message (*Walker* 349). The Court essentially ignores the impediments to the petitioners' striving toward their goals.

In concluding, Brennan sees the Court's holding as an unconstitutional prior restraint and thus "a devastatingly destructive weapon for infringement of freedoms jealously safeguarded" (*Walker* 349). Convictions for contempt of constitutionally impermissible court orders must receive the same judicial condemnation as convictions for constitutionally impermissible statutes (*Walker* 349). Hence, unlike Stewart, who focuses on violation of the law, Brennan looks at the problem with the law itself and excuses the protesters' violation of the law because of their attempts to work toward racial justice.

Discussion of the Opinions

This consideration of the two opinions points out how the establishment majority and the establishment dissent respond very differently to the agitation of the civil rights protesters. The establishment majority, as articulated by Stewart, uses counterpersuasion, or discourse "that challenge[s] a social movement's version of reality" (Stewart, Smith, & Denton 327), to explain that the protesters had failed to obey the law. Such a strategy characterizes the protesters "as ill-advised and lacking merit" (Stewart, Smith, & Denton 327). Since this strategy of counterpersuasion has the backing of the government's enforcement power, the control strategy has a coercive edge to it, too.

In contrast, because the establishment dissent declines to "challenge [the protesters'] version of reality" (Stewart, Smith, & Denton 327), and instead accepts such a version of reality, the dissent relies upon persuasion rather than counterpersuasion. Brennan's opinion focuses on the unjust nature of the case at hand, in which individuals' speech rights are constrained. Thus, the protesters, who want to employ body rhetoric, as Griffin described it ("The Rhetorical Structure" 127), and march in an attempt to bring attention to their quest to improve society, should have the right to do so in a way that allows them to communicate their desired message, regardless of whether this process involves violation of an unjust law or injunction. However, since the opinion does not have the weight of a majority opinion and consequently the backing of the government's enforcement power, the opinion lacks a coercive edge.

Nonetheless, the interaction of Brennan's dissent with Stewart's majority opinion is critical. Brennan's opinion offers a forum in which part of the establishment speaks on behalf of the agitators as the majority and the dissent, both very much parts of the establishment, engage each other in negotiation of potential change. In law, this rhetoric between competing and powerful insider factions is how the establishment can begin to consider change. Moreover, since this negotiation is discursive as opposed to violent, the direct threat to society is less than the threat that might result from outright violence on the street as an alternate means of change. Hence, in law, a dissenting opinion as engaged with the majority opinion can be a site for negotiation of outsider-proposed change that is both important and nonviolent.

Such negotiation of change can be thought of in terms of what is prudent in the case at hand. As noted above, prudence is "a coveted space of legitimacy that [rhetors] attempt to occupy by

discursively controlling its meaning" or "a contested space that political actors struggle to control through discourse" (Wilson 133). Prudence does not have to be a static concept; rather, communicators negotiate prudence through discourse. In *Walker*, Stewart's majority and Brennan's dissent both attempt to negotiate this prudence through their different perspectives on the case. In this matter, although the protesters ultimately do not prevail legally, largely because five privileged rhetors reinforce a conservative, or status quo-oriented, position (Wilson 145), the protesters eventually have their hearing before the Supreme Court. This prudence is the middle-ground between capitulation and violent repression, or, more specifically, between giving the protesters everything they requested and using force on the street, that the establishment works out to resolve the dispute at hand.

A slight tension exists between the entertaining of change by the establishment and the conservative forum of law. While traditionally the law has reified the status quo, particularly with regard to race (Bell 1), this forum still can address some of the problems of U.S. society. Although the majority takes a very conservative and authoritarian position, Brennan's dissent, offering a rhetorical disruption on behalf of "marginal voices" (Wilson 145), takes a much more progressive position. Despite being a member of the establishment, Brennan remains open to alternatives to the status quo and uses the authority of the establishment, including legal precedents such as the *Near v. Minnesota* and *Keyishian v. Board of Regents* precedents, noted above, to make a vigorous case for change (*Walker* 344). Accordingly, progressive thinking on social problems can occur even in a traditionally conservative forum like law, although that thinking may not always prevail in the particular case.

Implications of This Study

The foregoing analysis suggests several implications for social movement theory and the practice of free speech within social movements. For instance, the classical social movement theory perspective of an essentially homogeneous establishment that responds to outsider agitation, outlined in the works of scholars such as Stewart, Smith, and Denton, as well as Bowers, Ochs, and Jensen, calls for some reconsideration. In the *Walker* opinions, the establishment majority, led by Stewart, chooses to control the civil rights protesters. However, the establishment dissent, led by Brennan, would allow the protesters to violate what the dissent describes as an unconstitutional injunction and law. Clearly, the establishment, made up of the members of the U.S. Supreme Court, is divided in its response to agitation. Such a rhetorical dynamic does not sit easily within the classical understanding of the establishment. Instead, this dynamic suggests an establishment sharply fractured and in conflict with itself. While the establishment does not "routinely resort to rent strikes, vigils, hartals, renouncing honors, sit-ins, or other such nonviolent direct action techniques" (Simons, "On Terms" 313), sometimes a portion of the establishment, often the dissenting portion, may endorse such techniques. Indeed, a slightly more refined perspective of how the establishment can respond to agitation should lead to a deeper understanding of rhetoric within a social movement framework.

A closely-related insight is that, in the context of social movements, engagement is not just between the agitators and the establishment. Rather, engagement can occur between different factions of the establishment. As discussed in this essay, the Stewart majority and the Brennan dissent clash with different factual narratives and legal arguments that come to antithetical conclusions. In a way, this format for engagement leaves the agitators as an impetus for the ensuing discussion. When resolution comes to the case that began with the marches, the main players are the establishment and the establishment. In short, after the initial agitation, the focus of the conflict is within different facets of the establishment itself.

Given such an engagement, the law can be another forum for negotiation of prudence in a social controversy at hand. While some previous research has addressed the negotiation of prudence in the legislature (Wilson 131-49), the above consideration of *Walker* supports the idea that negotiation of

prudence can take place in other government forums such as the court system. One example of this negotiation has been over the social role of blacks in U.S. society, which has taken place in legislatures (Wilson 131-49), and, via cases such as *Walker* or *Brown v. Board of Education* (483-96), has taken place in the courts as well.

A final insight is that the court system, although traditionally symbolic of the establishment and thus potentially resistant to change, has the potential to function as a door through which advocates of change can enter. This point addresses concerns about outsider access to the establishment (DeLuca 1-22), especially since not all individuals and parties have equal access to the means of public communication (Dee 94). Although in *Walker* the civil rights protesters lost their case, they came within one vote of winning. This insight is in line with judicial history from the mid-twentieth century. For instance, during the 1950s and 1960s, the U.S. Supreme Court was especially open to change. With the 1954 *Brown v. Board of Education* decision that called for an end to racially segregated public schooling (483-96), the 1964 *New York Times v. Sullivan* decision that provided heightened protection for criticism of public officials (254-92), the 1966 *Miranda v. Arizona* decision that strengthened criminal defendants' rights against self-incrimination (436-99), and other cases, the Court proved remarkably open to change. However, later versions of the U.S. Supreme Court, especially the Court under Chief Justice William Rehnquist (Chemerinsky 660-61), have proved to be more conservative in nature. Thus, under some, but certainly not all, circumstances, the Court is open to advocacy for change, and those who advocate for such change can make their arguments for change through this point of rhetorical access.

Advocates of change need to be aware of this doorway into the establishment. They should be able to make their cases to empathetic members of the establishment such as the Justice Brennans of the world and take advantage of the idea that empathetic insiders will pass on or develop such arguments for change. In a way, observers might think of this dynamic as one in which outsiders are able to set themselves up for vicarious negotiation of change with the establishment. If advocates of change effectively study empathetic power figures within the establishment, this approach, over time, can be a powerful tool for promoting social progress.

Since *Walker*, the federal courts have grappled with application of the collateral bar rule, including in the news media context. For example, in the case of *U.S. v. Dickinson*, a federal district court had issued contempt citations against two reporters who, against a court order, published testimony obtained in open court. Although the Fifth Circuit Court of Appeals agreed with the reporters that the injunction was unconstitutional (*Dickinson* 513-14), the appellate court eventually upheld the contempt citations (*Dickinson* 374). Also, in the case of *In the Matter of Providence Journal Company*, a district court had forbidden the publication of information the FBI had gained through electronic surveillance of an organized crime figure, even though the newspaper had obtained the information legally from the FBI. The First Circuit Court of Appeals found that, as a prior restraint on press communication, the court order was transparently invalid; thus, the order could not justify a citation for contempt (*In the Matter of Providence Journal* 1353). When the Supreme Court heard the case, the Court could have clarified the collateral bar rule in the press context but concluded that the Court did not have jurisdiction (*U.S. v. Providence Journal* 698-708). Since the special prosecutor in the case had not obtained authority to represent the United States before the Court, the Court dismissed the writ of certiorari (*U.S. v. Providence Journal* 698-708). Consequently, application of the collateral bar rule in the news media context has lacked the clarity that the press would have desired.

With regard to future study of the judiciary's responses to social movements, communication scholars may want to examine other civil rights cases from the 1950s and 1960s. Furthermore, scholars may want to consider more recent judicial responses, favorable or otherwise, to the rhetoric of advocates who have spoken out for change. Studies of more recent cases may help in the consideration of a broader array of judicial responses over time to calls for social progress. Ideally, such scholarship will lead to a deeper understanding not just of social movements, free speech, and the judiciary, but also of their nexus and, more importantly, the impact of such a nexus on society.

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1. The U.S. Supreme Court has held that the First Amendment applies to the states via the Fourteenth Amendment. The consequence of such application is that individuals' First Amendment rights have protection against the actions of state and local governments, not just against the actions of the federal government (Nowak & Rotunda 496 & 1252).