

## ARTICLES

# THE THEOLOGY OF CIVIL DISOBEDIENCE: THE FIRST AMENDMENT, FREEDOM RIDERS, AND PASSAGE OF THE VOTING RIGHTS ACT<sup>+</sup>

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### ABSTRACT

In 2011, usage of the term “civil disobedience” resurged in the American lexicon for at least two reasons: (1) there was widespread civil

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<sup>+</sup> This Article is dedicated to the late Rev. Robert H. Grant, former principal of St. Augustine High School in New Orleans, an institution founded by St. Joseph’s Society of the Sacred Heart (a/k/a The Josephite Fathers and Brothers), of which Fr. Grant was a member, and named for the great church doctor and teacher, Augustine of Hippo. St. Augustine High School was established in 1951 as a place of excellence where African American young men could receive a quality Catholic education. *See generally*, MATTHEW J. O’ROUKE, SSJ, *BETWEEN LAW AND HOPE: ST. AUGUSTINE HIGH SCHOOL NEW ORLEANS, LOUISIANA* (2003). *See also* ST. AUGUSTINE HIGH SCHOOL, [http://purpleknights.com/cms/?page\\_id=82](http://purpleknights.com/cms/?page_id=82) (last visited Jan. 24, 2012). Upon information and belief, during the latter part of his tenure at St. Augustine, 1960–1969, Fr. Grant challenged the leadership of Archbishop Phillip M. Hannan regarding discriminatory archdiocesan fiscal appropriations to St. Augustine, in comparison with other Catholic high schools in New Orleans. Shortly thereafter, Fr. Grant was transferred. He will long be remembered as a member of the clergy who advanced human equality through social advocacy and education, with an informed willingness to accept the consequences of his actions.

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protest in Egypt; and (2) America observed the fiftieth anniversary of the now-celebrated Freedom Rides. Both reasons demonstrate the continued relevance of the twentieth century American Civil Rights Movement (“the Movement”).

American media widely covered Egyptian citizens’ nonviolent acts of civil disobedience as Egyptians peacefully protested governmental corruption in demanding free and fair elections. Further, since 2011 marked the golden anniversary of the Freedom Rides in the United States, Americans were reminded of the nonviolent civil disobedience undertaken by an interdenominational movement of clergy and laity, undergirded by a Judeo-Christian suffering servant theology. Dissident adherents literally sacrificed themselves for the democratic cause in which they believed. Notwithstanding differences, the respective movements shared a common goal: indiscriminate citizen participation in voting. Accordingly, civil disobedience led to both movements being successful. In Egypt, the government announced unprecedented open elections. In the United States, Congress passed the Voting Rights Act of 1965 (“VRA”).

This interdisciplinary Article argues that a Judeo-Christian suffering servant theology undergirded the use of civil disobedience in the the Movement and caused it to be successful because, among other things, the VRA was enacted. The Movement’s success can be quantifiably measured through the VRA, as America became a more inclusive society. Indeed, after the VRA’s passage, African Americans were elected to federal, state, and local offices as never before.

As a focal point, this Article details the theology of the Reverend Dr. Martin Luther King, Jr., one of the Movement’s key leaders. This Article also details several key Supreme Court decisions that resulted from dissident acts of civil disobedience and shaped the First Amendment’s scope, while also paying tribute to the Freedom Riders, a group of young college and seminary students that literally risked their lives in a nonviolent fight for democracy. Finally, this Article concludes by highlighting both empirical and anecdotal evidence that support the author’s assertion that the Movement’s success can indeed be measured by the VRA’s passage.

## I. INTRODUCTION

*[W]ith a charisma never before witnessed in this century, King preached black liberation in the light of Jesus Christ and thus aroused the spirit of freedom in the black community. To be sure, one may argue that his method of nonviolence did not meet the needs of the black community in an age of black power; but it is beyond question that it was King's influence and leadership in the black community which brought us to the period in which we now live, and for that we are in debt.*

— James H. Cone, *A Black Theology of Liberation*<sup>1</sup>

In addition to marking the fiftieth anniversary of the now-celebrated Freedom Rides of the American Civil Rights Movement (“the Movement”),<sup>2</sup> 2011 marked the beginning of civil disobedience in Egypt. Egyptian citizens peacefully opposed numerous inequities in their national government, including corruption,<sup>3</sup> the lack of free elections,<sup>4</sup> and police

1. JAMES H. CONE, *A BLACK THEOLOGY OF LIBERATION* 37 (1986).

2. See generally RAYMOND ARSENAULT, *FREEDOM RIDERS: 1961 AND THE STRUGGLE FOR RACIAL JUSTICE* (2006) (providing a narrative historical account of social-political events, beginning with the 1947 Journey of Reconciliation, that led to the Freedom Rides of May 1961). While theories vary on when the Movement began, for this Article's purposes and because of its emphasis on civil disobedience, the author argues the Movement began on December 1, 1955, with Rosa Parks's act of civil disobedience in refusing to vacate her seat on a Montgomery, Alabama, municipal bus in favor of a white person. Parks's courageous act was the impetus of the Montgomery Bus Boycott. CHARLES MARSH, *THE BELOVED COMMUNITY: HOW FAITH SHAPES SOCIAL JUSTICE, FROM THE CIVIL RIGHTS MOVEMENT TO TODAY* 20 (2005). The Rev. Martin Luther King, Jr. (“King”) is popularly regarded as the Movement's leader. See JESSIE CARNEY SMITH, *BLACK HEROES* 422–430 (2001). King's nonviolent leadership during the Movement was influenced in large part by his divinity school study of Mohandas K. Gandhi's use of civil disobedience during the 1940s Indian Independence Movement. Marsh, *supra* note 2, at 45–46. For an excellent analysis of King's understanding of Gandhi's position on civil disobedience and how it influenced his leadership during the Movement, along with civil disobedience in other contexts, see Yxta Maya Murray, *A Jurisprudence of Nonviolence*, 9 CONN. PUB. INT. L.J. 65 (2009). Further, for this Article's purposes, the author respectfully argues the Movement's numerous acts of civil disobedience proved empirically successfully when the Voting Rights Act of 1965 (“VRA” or “the Act”), Pub. L. No. 89-110, 79 Stat. 437 (codified as 42 U.S.C. § 1973, *et seq.*), became law. See *infra* Part V.

3. See, e.g., Ben Wedeman & Amir Ahmed, *3 Dead After Thousands Protest in Rare Egypt Outpouring*, CNN (Jan. 26, 2011), <http://www.cnn.com/2011/WORLD/africa/01/25/egypt.protests/index.html>. See also, Sayed Khatab, *Egyptian Revolution and Its Impact on the Stability in the Middle East*, INT'L ASS'N CONFLICT MGMT 24TH ANNUAL CONFERENCE (2005).

brutality.<sup>5</sup> By engaging in acts of civil disobedience, Egyptians directed worldwide attention to injustice, mobilized international support for democracy and the protection of human rights,<sup>6</sup> and successfully demanded the resignation of President Hosni Mubarak.<sup>7</sup> Both the anniversary of the Freedom Rides and the uprising in Egypt demonstrate the Movement's continuing relevance. The Movement clearly continues to provide a template for citizen action against government. This Article examines the Movement, in the context of a Judeo-Christian suffering servant theology, concluding that its lessons have continuing importance and are reflected in such modern movements as the 2011 uprising in Egypt.

As an interdisciplinary exegesis on law and religion, this Article argues a Judeo-Christian "suffering servant" theology undergirded the Movement's track of civil disobedience and that the adherents' literal willingness to sacrifice themselves for a greater cause proved successful by, among other things, the VRA's enactment.<sup>8</sup> To support its thesis, this

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4. On May 25, 2005, amid many protests, the National Democratic Party-controlled Egyptian legislature submitted an amendment to change the presidential selection system from a single-nominee to a multicandidate system. Kristen A. Stilt, *Constitutional Authority and Subversion: Egypt's New Presidential Election System*, 16 *IND. INT'L & COMP. L. REV.* 335, 335 (2006). Although longtime Egyptian President Hosni Mubarak easily won reelection on September 7, 2005, as a result of the adopted amendment, *see id.* n. 1, there is at least the possibility that a different candidate could be elected in the future, *id.* n. 2 (citing Michael Slackman, *In Egypt, Mixed Views of Politics with a Field of Choices*, *N.Y. TIMES*, Sept. 4, 2005, at 1-14, available at <http://www.nytimes.com/2005/09/04/international/africa/04egypt.html?pagewanted=print>).

5. *See* David D. Kirkpatrick, *Egyptians Defiant as Military Does Little to Quash Protests*, *N.Y. TIMES*, Jan. 29, 2011, at A1, available at <http://www.nytimes.com/2011/01/30/world/middleeast/30-egypt.html?pagewanted=all>. *See also* Paul Richter & Jeffery Fleishman, *Egypt Security Forces Crack Down on Scattered Protests*, *L.A. TIMES*, Jan. 27, 2011, <http://articles.latimes.com/2011/jan/27/world/la-fg-egypt-protests-20110127>.

6. *See, e.g.*, Mary Beth Sheridan, *Clinton Warns Governments that Limiting Internet Will Backfire*, *WASH. POST*, Feb. 16, 2011, at A11.

7. On February 11, 2011, Egyptian Vice President Omar Suleiman announced in a televised address that President Mubarak had resigned from office. *See* Adrien K. Wing & Hisham A. Kassim, *After the Last Judgment: The Future of the Egyptian Constitution*, 52 *HARV. INT'L L.J.* 302, 302 (2011); Craig Whitlock & Kathy Lally, *Egypt's Military Vows Quick Vote*, *WASH. POST*, Feb. 16, 2011, <http://election2010.illumina.org/latest-news/egypt-military-vows-quick-vote>.

8. The Voting Rights Act, 42 U.S.C. § 1973 (2006). *See infra* Part V.A for further discussion of the VRA. President Lyndon Johnson signed the VRA into law on August 6, 1965. In chronicling the Act's historical significance, David Garrow, a noted professor and historian, writes that "the newspapers of August 7 devoted [significant] headline coverage

Article explores the proverbial intersection of law and religion, examining the theology of civil disobedience and the litigation of civil challenge. Specifically, while this Article gives an overview of Judeo-Christian theology, its legal analysis focuses on free assembly and legal challenges brought against discriminatory state actions under the First and Fourteenth Amendments of the United States Constitution.<sup>9</sup>

This Article is organized into seven interconnected parts, all juxtaposed at the intersection of law and religion. Part I of this Article serves as an overview and introduction by establishing the foundation from which the Article develops. Part II builds upon Part I by examining the Movement's interconnected components of civil disobedience and civil challenge.<sup>10</sup> Part III then addresses the theological foundation for the Movement's acts of civil disobedience by detailing a theology of equality, while focusing on the theological beliefs and associated actions of Martin

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[to the law]. On the same morning front-page stories also informed readers that voter registration officials in Sumter County, Georgia had dropped their opposition to a black registration drive that had been going on for some two weeks, and that some three hundred new black voters had been registered in Sumter County on August 6 alone." DAVID J. GARROW, *PROTEST AT SELMA: MARTIN LUTHER KING, JR. AND THE VOTING RIGHTS ACT OF 1965*, at xi (1978) [hereinafter GARROW, *PROTEST AT SELMA*]. Moreover, in analyzing the Act, Garrow writes "the Voting Rights Act was being called 'the most successful piece of civil rights legislation ever enacted' by [Nicholas Katzenbach,] a former attorney general and 'one of the most important legislative enactments of all time' by [the Rev. Theodore M. Hesburg, president emeritus of the University of Notre Dame and former] . . . chairman of the U.S. Civil Rights Commission. *Id.* Indeed, while the Act's passage marked a significant change in America's political history, it was critically important in protecting the right to vote, described by the Supreme Court as "preservative of all rights." *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886) (discussing the Equal Protection Clause and using as an example the right to vote as a fundamental political right as part of a larger discussion).

9. In relevant part, the First Amendment provides "Congress shall make no law . . . abridging the *freedom of speech . . . or of the people peacefully to assemble, and to Petition the Government* for a redress of grievances." U.S. CONST. amend. I (emphasis added). Although the First Amendment's express language obviously refers to Congress, a branch of the federal government, it was made applicable to the states and/or state action through the Fourteenth Amendment's Due Process Clause. *See Gitlow v. New York*, 268 U.S. 652, 666 (1925). *See also Wallace v. Jaffree*, 472 U.S. 38, 48–49 (1985). As such, the discriminatory state actions discussed herein fall squarely within the First Amendment's protections. Accordingly, when state governments attempt to abridge an individual's First Amendment guarantees, "First Amendment due process" requires the states to justify their actions. *See generally*, Henry Monaghan, *First Amendment "Due Process,"* 83 HARV. L. REV. 518 (1970).

10. *See infra* notes 20–28 and accompanying text.

Luther King, Jr. (“King”).<sup>11</sup> In particular, Part III examines the Judeo-Christian suffering servant theology and associated willingness to accept the consequences for deliberate acts of civil disobedience evidenced by the socio-theological events that served as the Movement’s impetus. This theology manifested in the Old Testament’s book of *Isaiah* and was emphasized through Jesus’ crucifixion in the New Testament gospel narratives.<sup>12</sup> This suffering servant theology was especially evident in the Freedom Rides of 1961<sup>13</sup> and the infamous Bloody Sunday march in

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11. For example, King originally wrote his famed *Letter From Birmingham Jail* on April 16, 1963, after his Good Friday arrest in Birmingham, Alabama. King and other notable Movement activists were engaged in acts of civil disobedience as part of a desegregation campaign against merchants in Birmingham’s business district. King directed the letter to interdenominational members of the clergy that challenged King’s dissent actions as “unwise and untimely.” See Martin Luther King, Jr., *Letter From Birmingham Jail*, in WHY WE CAN’T WAIT 76–95 (1968) [hereinafter King, *Letter From Birmingham Jail*]. Because of its analysis of civil disobedience, the letter was reprinted in *Atlantic Monthly* magazine. See also Martin Luther King, Jr., *The Negro is Your Brother*, ATLANTIC MONTHLY, August 1963, at 78. It also has been reprinted among numerous other places, in recent law reviews. Martin Luther King, Jr., *Letter From Birmingham Jail*, reprinted in 26 U.C. DAVIS L. REV. 835 (1993). In addressing the sociopolitical context in which King was arrested and subsequently wrote the famous letter, Berkley law professor David Oppenheimer writes that “[i]n Birmingham, he faced the choice of obedience to immoral authority, or disobedience and jail; he chose jail. Behind bars over Easter weekend he wrote his great essay defending non-violent direct action, the *Letter From Birmingham Jail*.” David Benjamin Oppenheimer, *Kennedy, King, Shuttlesworth and Walker: The Events Leading to the Introduction of the Civil Rights Act of 1964*, 29 U.S.F. L. REV. 645, 646 (1995).

12. See, e.g., *Matthew 27*; *Mark 15*; *Luke 23*; *John 19* (New Revised Standard Version). For excellent scholarly exegetical interpretations of the messianic suffering servant connectedness between *Isaiah* and the gospel narratives, see generally JESUS AND THE SUFFERING SERVANT: ISAAH 53 AND CHRISTIAN ORIGINS (William H. Bellinger, Jr. & William R. Framer, eds. 1998). See also MORNA D. HOOKER, JESUS AND THE SERVANT: THE INFLUENCE OF THE SERVANT CONCEPT OF DEUTERO-ISAAH IN THE NEW TESTAMENT (1959).

13. The Freedom Rides were scheduled from May 4 through May 17, 1961, to conclude the seventh anniversary of the *Brown v. Board of Education* decision. Young people, clergy and laity, as well as Blacks and whites, were scheduled to ride Greyhound and Trailways buses from Washington, D.C., to New Orleans, Louisiana, in protest of segregationist laws and practices in interstate commerce in the Deep South. The Freedom Riders made their journey, amid threats of death and while suffering through extreme violence and incarceration, because they believed in a cause greater than themselves or their personal safety. See ARSENAULT, *supra* note 2, at 5.

1965.<sup>14</sup> Part IV of this Article demonstrates how the theological track of civil disobedience prompted socio-political events that resulted in a shift to the legal track of civil challenge.<sup>15</sup> Part IV also explores how civil disobedience was used by the dissidents to test their so-called guaranteed rights under the Fourteenth Amendment and to force the Supreme Court to define the contours of the “free speech” and “free assembly,” rights guaranteed by the First Amendment.<sup>16</sup> Part V builds upon Part IV by arguing that the VRA—a quantifiable and empirical measure of societal and political inclusion—demonstrates the Movement was indeed successful.<sup>17</sup> Part V also briefly overviews the VRA’s prospects for continued existence under the currently constituted Supreme Court.<sup>18</sup> Part VI transitions to examine how the civil uprising in Egypt reflects lessons from the Movement. Finally, Part VII concludes by synthesizing the theology of civil disobedience, the litigation of civil challenge, and the VRA, relying on empirical data and anecdotal argument to prove this Article’s thesis.<sup>19</sup>

## II. THE MOVEMENT’S CONNECTION BETWEEN CIVIL DISOBEDIENCE AND CIVIL CHALLENGE

*To call for disobedience to the law is acceptable behavior when such law transgresses upon the city of God.*

—William F. Buckley, Jr.<sup>20</sup>

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14. *See infra* note 111 and accompanying text (describing the events of Sunday, March 7, 1965, as peaceful protesters were violently beaten while attempting to march for the right to vote).

15. *See infra* Part IV.A.

16. *See infra* notes 86–104 and accompanying text.

17. *See infra* notes 115–141 and accompanying text.

18. *See infra* Part V. B.

19. *See infra* Part VII (highlighting both empirical and anecdotal reasons to accept this Article’s thesis as true).

20. William F. Buckley, Jr., *Separation of Church and State of a Different Kind*, HOUSTON CHRON., Mar. 23, 2006, at B11, available at <http://www.chron.com/opinion/outlook/article/Buckley-Separation-of-church-and-state-of-a-1499414.php> (defending Catholic Cardinal Roger Mahoney of Los Angeles in a decision to ask Catholics to deliberately disobey an immigration law the U.S. Conference of Catholic Bishops deemed immoral).

A. DISTINGUISHING BETWEEN CIVIL DISOBEDIENCE AND CIVIL  
CHALLENGE

1. The Track of Civil Disobedience

The Movement's reform-oriented agenda essentially moved on parallel tracks of civil disobedience and civil challenge. While definitions of civil disobedience abound,<sup>21</sup> this Article defines civil disobedience as an outward act in direct contravention of a known prohibition or mandate, based on a moral duty to violate that which is deemed immoral, with the understanding that the immoral prohibition or mandate was government-imposed.<sup>22</sup>

The Movement's track of civil disobedience was theologically-based and action-oriented, as many members of the clergy and committed laity defied what they deemed to be unjust laws.<sup>23</sup> For example, in spite of laws prohibiting African Americans from eating at public lunch counters in many places in the Deep South, many students and members of the clergy participated in lunch counter sit-ins as a means of civil disobedience.<sup>24</sup>

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21. See, e.g., Matthew R. Hall, *Guilty But Civilly Disobedient: Reconciling Civil Disobedience and the Rule of Law*, 28 CARDOZO L. REV. 2083, 2085 n.2 (2007); Steven M. Bauer & Peter J. Eckerstrom, Note, *The State Made Me Do It: The Applicability of the Necessity Defense to Civil Disobedience*, 39 STAN. L. REV. 1173, 1175 n.14 (1987); Symposium, *Symposium on Civil Disobedience*, 5 NOTRE DAME J. L. ETHICS & PUB. POL'Y (1991).

22. See Henry David Thoreau, *Civil Disobedience*, in THE POWER OF NONVIOLENCE 15 (2002).

23. This Article's definition of civil disobedience is quasi-First Amendment in nature as it presupposes the dissent actor(s) openly display their nonconformance against that which is deemed as unjust, by deliberately violating the government's prohibition in a public place during a peaceful assembly. See *supra* note 9 and accompanying text. See also U.S. CONST. amend. I.

24. See, e.g., DAVID J. GARROW, BEARING THE CROSS: MARTIN LUTHER KING, JR. AND THE SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE 127–28 (1986) [hereinafter GARROW, BEARING THE CROSS] (discussing the North Carolina A&T college students' February 1, 1960, sit-ins in protest of racial segregation laws at the F.W. Woolworth lunch counter in Greensboro, N.C., along with Dr. King's vocal support of the college students' activities); DOROTHY STERLING, TEAR DOWN THE WALLS!: A HISTORY OF THE AMERICAN CIVIL RIGHTS MOVEMENT 190–93 (1968). Moreover, there are also countless historical examples of how interfaith clergy and seminarians hosted and participated in public demonstrations against unjust laws. See, e.g., TAYLOR BRANCH, AT CANAAN'S EDGE: AMERICA IN THE KING YEARS 1965–68, at 216–17 (2006).



## 2. The Track of Civil Challenge

The track of civil challenge must be distinguished from the track of civil disobedience. This Article defines “civil challenge” as compliant action, operating within the established realm of acceptable government protocol, relying upon the First Amendment’s protections to petition government for redress of grievances.<sup>25</sup> Accordingly the Movement’s track of civil challenge was litigious in nature, marked by attorneys working in collaboration with organizations like the National Association for the Advancement of Colored People (“NAACP”) to challenge the constitutionality of unjust laws within the judicial system.<sup>26</sup>

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25. See *supra* note 9 and accompanying text; U.S. CONST. amend. I. See also Gregory A. Mark, *The Vestigial Constitution: The History and Significance of the Right to Petition*, 66 *FORDHAM L. REV.* 2153 (1998) (providing a historical analysis of the First Amendment’s Petition Clause, with an emphasis on its political origins in colonial America, and discussing its inherently political function); Julie M. Spanbauer, *The First Amendment Right to Petition Government for a Redress of Grievances: Cut From a Different Cloth*, 21 *HASTINGS CONST. L.Q.* 15 (1993). Although the First Amendment concept of petitioning government for redress of grievances can mean an indirect petition through Congress, as other scholarship makes clear, it was not until after the VRA’s 1965 enactment that there was a significant increase in the number of African Americans elected to Congress and to state legislatures. See, e.g., Jonathan C. Augustine, *Rethinking Shaw v. Reno, The Supreme Court’s Benign Race-Related Jurisprudence and Louisiana’s Recent Reapportionment: The Argument for Intermediate Scrutiny in Racial Gerrymandering According to the Voting Rights Act*, 29 *S.U. L. REV.* 151, 151-52 (2002). Indeed, there was no Congressional Black Caucus as is known today. See generally, *About: Our History*, CBC, <http://thecongressionalblackcaucus.com/about/our-history> (last visited Mar. 6, 2012). During the Movement, therefore, even though the First Amendment’s right to petition included political participation, prior to the VRA’s enactment, the track of civil challenge was limited to the petitioning of government through the judicial system.

26. The oft-cited *Brown v. Board of Education*, 347 U.S. 483 (1954), challenging the constitutionality of school segregation laws under the Fourteenth Amendment’s Equal Protection Clause, provides an example of civil challenge. See, e.g., ROBERT J. COTTRILL, RAYMOND T. DIAMOND & LELAND B. WARE, *BROWN v. BOARD OF EDUCATION: CASTE, CULTURE, AND THE CONSTITUTION* 101–18 (2003) (detailing the NAACP’s many efforts at challenging “separate but equal” in public education); RAWN JAMES, JR., *ROOT AND BRANCH: CHARLES HAMILTON HOUSTON, THURGOOD MARSHALL, AND THE STRUGGLE TO END SEGREGATION* (2010); CHARLES J. OGLETREE, JR., *ALL DELIBERATE SPEED: REFLECTIONS ON THE FIRST HALF CENTURY OF BROWN v. BOARD OF EDUCATION*, 116–23 (2004) (discussing Charles Hamilton Houston’s role as special counsel to the NAACP and the many litigious challenges instituted against Jim Crow segregation laws); Jonathan C. Augustine & Craig M. Freeman, *Grading the Graders and Reforming the Reform: An Analysis of the State of Public Education Ten Years After No Child Left Behind*, 57 *LOY. L. REV.* 237, 264–67 (2011) (discussing many of the systemic inequities in public educational systems resulting

### 3. Reconciling the Tracks of Civil Disobedience and Civil Challenge

Although the respective tracks of civil disobedience and civil challenge ran parallel courses, civil disobedience often led to civil challenge. While the aftermath of Rosa Parks's refusal to give up her bus seat and the Montgomery Bus Boycott, for example, demonstrate how the Movement's acts of civil disobedience ultimately helped shape the First Amendment,<sup>27</sup> the associated lawsuit *Browder v. Gayle* shows how civil disobedience naturally led to civil challenge.<sup>28</sup>

### III. THE THEOLOGICAL UNDERPINNINGS OF THE MOVEMENT'S TRACK OF CIVIL DISOBEDIENCE

*[T]he movement's bold strand of nonviolence (and we will surely teach that there were other, sometimes competing, strands) provides a chance and a challenge that cannot be left unmet. It allows us to go with our students as deeply as we choose toward the sources of that lifestyle, delving, for instance, into the experience and experiments of Gandhi and his movement, into the paths of the Buddha, working our way toward Jesus of Nazareth and his justice-obsessed brother and sister prophets of Israel, moving quietly, firmly into the river-deep meditations of Howard Thurman—perhaps even reading more of King than the worthy and well-worn 1963 March on Washington "I Have a Dream" speech. We must work our way into the depths of spirit which supplied the movement with so much of its early power.*

—Vincent Harding, *Hope and History*<sup>29</sup>

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from de jure and de facto segregation). *See also*, Wendy B. Scott, *Dr. King and Parents Involved: The Battle for Hearts and Minds*, 32 N.Y.U. REV. L. & SOC. CHANGE 543 (2008).

27. *See infra* Part IV.

28. During the Montgomery Bus Boycott, an act that resulted from Parks's act of civil disobedience, members of the Montgomery Improvement Association concurrently engaged in civil challenge by testing the constitutionality of an Alabama state statute and companion Montgomery municipal ordinance requiring racial segregation in carriers of public transportation. The Alabama federal district court declared the laws unconstitutional and the United States Supreme Court affirmed on appeal. *Browder v. Gayle*, 142 F. Supp. 707, 715-17 (M.D. Al. 1956), *aff'd*, 352 U.S. 903 (1956) (distinguishing *Plessy v. Ferguson*, 163 U.S. 537 (1896) and relying on *Shelley v. Kramer*, 334 U.S. 1, 22 (1948) to declare the Alabama laws at issue unconstitutional).

29. VINCENT HARDING, *HOPE AND HISTORY: WHY WE MUST SHARE THE STORY OF THE MOVEMENT* 98 (1990) (emphasis added) (discussing the theology of hope that permeated the civil disobedience during the Civil Rights Movement).

## A. THE ROLE OF THE CLERGY

Although the Movement's impetus came from outside of the church,<sup>30</sup> the clergy accepted leadership in a newly developing "social gospel" and provided "[B]lack"<sup>31</sup> Americans with a sense of stability in the midst of ongoing social change.<sup>32</sup> Black members of the clergy were natural leaders of the Movement because of their independence. Like African American lawyers who served a primarily Black clientele, African American pastors who served a predominately Black congregation were largely immune from white reprisal. The theologically-based interfaith organization that provided a cooperative infrastructure for the clergy's active involvement in the Movement was the Southern Christian Leadership Conference ("SCLC"), founded in 1957.<sup>33</sup> Through the Black church, ministers helped facilitate

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30. Rosa Parks's dissident act of civil disobedience was in response to the 1950s sociopolitical climate. After she was arrested for refusing to follow a bus driver's order to vacate her seat for a white passenger, King and almost all the other African American ministers in Montgomery led a boycott of the city's bus system. See MARTIN LUTHER KING, JR., *STRIDE TOWARD FREEDOM* 43–48 (1958). See also JAMES H. CONE, *RISKS OF FAITH: THE EMERGENCE OF A BLACK THEOLOGY OF LIBERATION, 1968-1998*, 57–58 (1999) (discussing King's study of Henry David Thoreau while a student at Morehouse College and Gandhi while at Crozier Seminary as influences on his philosophical development regarding civil disobedience). Further, in noting the boycott's significance in the Movement and indirectly describing a difference between civil disobedience and civil challenge, Professor Oppenheimer writes that:

The Montgomery bus boycott initiated a profound change in the struggle for civil rights. Whereas the NAACP believed in legal reform through lobbying and litigation, the preachers used the weapon of direct confrontation. *Dr. King believed that only by personally confronting the immorality of segregation, placing his own safety and liberty at risk, would the laws of inequality be challenged.*

Oppenheimer, *supra* note 11 at 648 (emphasis added). See also ADAM FAIRCLOUGH, *TO REDEEM THE SOUL OF AMERICA: THE SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE AND MARTIN LUTHER KING, JR.* (1987).

31. Several legal scholars argue "Black" should be capitalized as a proper noun because, similar to Asian and Latino, it denotes a specific cultural group. See, e.g., D. Wendy Greene, *Black Women Can't Have Blonde Hair . . . in the Workplace*, 14 J. GENDER RACE & JUST. 405, 405 n.2 (2011); Kimberlé Williams Crenshaw, *Race, Reform, and Rentrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1332 n. 2 (1988). See also Neil Gotanda, *A Critique of "Our Constitution is Color-Blind"*, 44 STAN. L. REV. 1, 4 (1991). In deference to these scholars' advocacy, the author hereinafter either uses the terms "African American" or "Black" to denote Americans of African descent.

32. See FAIRCLOUGH, *supra* note 30, at 15.

33. See *id.*; GARROW, *BEARING THE CROSS*, *supra* note 24, at 97 (discussing King's proposal to name the civil rights organization the Southern *Christian* Leadership Conference

the Movement by organizing and leading bus boycotts across the South.<sup>34</sup> In addition, Fred Shuttlesworth, an Alabama clergyman, was instrumental in organizing an alternative civil rights group in Birmingham after the state legislature outlawed the NAACP.<sup>35</sup>

#### B. THE MOVEMENT'S MOTIVATING THEOLOGICAL PRINCIPLES

The primary theological principles that motivated the Movement were: (1) the concept of evangelical liberalism, which envisioned an active role for Christians and the church in reforming social institutions; (2) the moral duty—one which flowed from evangelical liberalism—to disobey unjust laws; (3) King's emphasis on love and equality; and (4) the messianic suffering servant theology. This section explores the manner in which these theological principles permeated and motivated both the Movement's clergy leadership and lay participants. Because of his influential role and leadership, King and his contributions receive special attention herein.

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“to emphasize that most of its participants and its potential popular base came from the black church”).

34. It bears noting that the Montgomery boycott was not the first of its kind. Two years earlier, in Baton Rouge, Louisiana, Blacks also boycotted city busses as a means of economic pressure. Willing to compromise on the parts of both Black and white citizens, Rev. T.J. Jemison and Baton Rouge's Black ministerial leadership succeeded in establishing a “first come, first served” segregated seating. Under this arrangement, white passengers took seats from the front of the bus going toward the rear, while Blacks seated themselves from the rear toward the front. It eliminated the more objectionable features of bus segregation: Blacks having to surrender their places to whites or being compelled to stand while reserved “white” seats remained empty. See FAIRCLOUGH, *supra* note 30, at 11–12. See also ANTOINE L. JOSEPH, *THE DYNAMICS OF RACIAL PROGRESS: ECONOMIC INEQUALITY AND RACE RELATIONS SINCE RECONSTRUCTION* 120 (2005)(discussing the popularity of the Baton Rouge, Louisiana bus boycott of 1953 and how it was overshadowed by the publicity generated from the arguments leading up to the Supreme Court's historic May 17, 1954, decision in *Brown v. Board of Education*, 347 U.S. 483 (1954)). Additionally, during King's leadership of the Montgomery Boycott, a bus boycott was also underway in Tallahassee, Florida. FAIRCLOUGH, *supra* note 30, at 13–14.

35. After the Montgomery boycott's success, segregationists in Alabama successfully sought an injunction prohibiting the NAACP from operating within the state. When the NAACP opposed the injunction, the state of Alabama successfully sought disclosure of the NAACP's membership lists. See, MARK V. TUSHNET, *MAKING CIVIL RIGHTS LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1936–1961*, 283–84 (1994). On appeal, however, the Supreme Court reversed. *NAACP v. Alabama*, 377 U.S. 288 (1964).

## 1. Evangelical Liberalism

The Movement's foundational theology, led by the SCLC and many ordained clergy, was based on the concept of evangelical liberalism. Evangelical liberalism focused on human goodness and the church's necessary social role in society at large.<sup>36</sup> In contrast, unlike evangelical conservatism, which envisioned a strict separation between the church and social and political issues, evangelical liberalism envisioned Christians and the church playing an active role in reforming or eradicating unjust social and political institutions—like slavery and segregation—to reflect Christian ideals.<sup>37</sup> In a sense, therefore, evangelical liberalism was more present-minded than evangelical conservatism in that it attempted to focus

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36. As Georgetown law professor Anthony Cook writes: Evangelical liberalism, from its theory of human nature, deduced a new role for the Church and for Christians. Given intrinsic human goodness, social institutions could and should be transformed to reflect more accurately the ideals of universal kinship and cooperation. An infallible scripture reflecting the static will of God could not justify social institutions like slavery and segregation.

Anthony E. Cook, *Beyond Critical Legal Studies: The Reconstructive Theology of Dr. Martin Luther King, Jr.*, in *CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT* 95 (Kimberlé Crenshaw et al., eds. 1995) (originally published at 103 *HARV. L. REV.* 985 (1990)). Furthermore, as other scholarship notes, “the formative religious traditions of the Western world—Judaism and Christianity—have for millennia embraced the conviction that their religious duty entailed active intervention in the ‘body politic.’ As a result . . . ‘churches and synagogues can no more be silent on public issues than human beings can refrain from breathing.’” Daniel O. Conkle, *Secular Fundamentalism, Religious Fundamentalism, and the Search for Truth in Contemporary America*, in *LAW & RELIGION: A CRITICAL ANTHOLOGY* 326 (Stephen M. Feldman, ed. 2000) (internal citations omitted). Moreover, King was influenced by the theology of Walter Rauschenbusch, a Baptist minister and professor of church history, who “believed that the American democracy undergirded by Christian morality represented a new era of social progress.” Janet Forsythe Fishburn, *Walter Rauschenbusch and “The Woman Movement”: A Gender Analysis*, in *GENDER AND THE SOCIAL GOSPEL* 71 (Wendy J. Deichmann Edwards & Carolyn De Swarte Gifford, eds. 2003). Further, King also credited his studies of Rauschenbusch and Gandhi's ethics of nonviolence as a basis for his social views. See Michael Dwayne Blackwell, *In the Legacy of Martin Luther King, Jr.: the Social Gospel of Faye Wattleton and Marian Wright Edelman*, in *GENDER AND THE SOCIAL GOSPEL* 217 (Wendy J. Deichmann Edwards & Carolyn De Swarte Gifford, eds. 2003).

37. Indeed, with respect to the church's role in society, Cook also writes that “unlike the dichotomy of conservative evangelicalism, there was a necessary relationship between the sacred and the secular, the Church and social issues.” Cook, *supra* note 36, at 95.

Christians on society's existing injustices, rather than the future rewards of an afterlife.<sup>38</sup>

## 2. The Moral Duty to Disobey Unjust Laws

The Movement was characterized by a belief that people had a moral duty to deliberately disobey unjust laws. With respect to King's theological beliefs regarding this duty, Peter Paris, professor emeritus at Princeton Theological Seminary, explains that "[s]ince King had advocated time and again that those who acquiesce to evil participate in promoting evil and are, therefore, as much the agents of evil as the initiators themselves, he concluded that *one could not be moral by obeying immoral laws.*"<sup>39</sup>

Any decision by the leaders and participants in the Movement to engage in civil disobedience was the product of a deliberate process. As a requisite, they initially engaged in acts of discernment to determine whether a law was "just" or "unjust." In doing so, King was influenced by St. Augustine, writing the following in his *Letter from a Birmingham Jail*:

You express a great deal of anxiety over our willingness to break unjust laws. This is certainly a legitimate concern. Since we so diligently urge people to obey the Supreme Court's decision of 1954 outlawing segregation in the public schools, at first glance it may seem rather paradoxical for us consciously to break laws. One may well ask: "How can you advocate breaking some laws and obeying others?" The answer lies in the fact that there are two types of laws: just and unjust. . . . One has not only a legal but a moral responsibility to obey just laws. Conversely, one has a moral responsibility to disobey unjust laws. I would agree with St. Augustine that "an unjust law is no law at all."<sup>40</sup>

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38. *Id.* (recognizing that it was necessary for "[t]he social gospel [to] turn[] Christian attention [away] from the glories of the kingdom to come to the injustices of the kingdom at hand"). See also ALBERT J. RABOTEAU, CANAAN LAND: A RELIGIOUS HISTORY OF AFRICAN AMERICANS 124 (2001) ("The churches not only reacted to social and political change; they also participated in making it happen."). Further, at the end of the successful Montgomery boycott, King himself remarked about the church's "old order" passing away as the church moved toward stressing a social gospel as well as a gospel of salvation. MARSH, *supra* note 2, at 1. See also CHARLES MARSH, GOD'S LONG SUMMER: STORIES OF FAITH AND CIVIL RIGHTS (1997) (discussing the role of faith and the church's developing social gospel, with a focus on the national events occurring in Mississippi during the summer of 1964).

39. PETER J. PARIS, BLACK RELIGIOUS LEADERS: CONFLICT IN UNITY 120-21 (1991) (emphasis added).

40. King, *Letter from Birmingham Jail*, *supra* note 11, at 82.

King's explanation to his fellow members of the clergy regarding the Movement's civil disobedience in Birmingham did not stop with his reliance on St. Augustine. King went further to expound on his discernment between "just" and "unjust" laws to support his actions. In relevant part, he continued by asking

[n]ow, what is the difference between the two? How does one determine whether a law is just or unjust? A just law is a man-man code that squares with the moral law or the law of God. An unjust law is a law that is out of harmony with the moral law. To put it in the terms of St. Thomas Aquinas: an unjust law is a human law not rooted in eternal law and natural law. Any law that uplifts human personality is just. Any law that degrades human personality is unjust. All segregation statutes are unjust because segregation distorts the soul and damages the personality. It gives the segregator a false sense of superiority and the segregated a false sense of inferiority.<sup>41</sup>

After making the requisite determination, the leaders decided whether they would follow or peacefully disobey the law. If they deemed a law unjust, they deliberately engaged in active disobedience. For example, although there is a popular misconception that Rosa Parks's historic act of civil disobedience was merely that of a fatigued worker, scholars observe that her action was actually a deliberate and conscientious objection:

Her decision to choose arrest rather than humiliation when driver J. F. Blake ordered her to give up her seat on December 1, 1955, was more than the impulsive gesture of a seamstress with sore feet. Although shy and unassuming, Rosa Parks held strong and well-developed views about the inequities of segregation. Long active in the NAACP, she had served as secretary of the local branch. In the summer of 1953 she spent two weeks at Highlander Folk School in Monteagle, Tennessee, an institution which assiduously encouraged interracial amity. Founded and run by Myles Horton, Highlander flouted the local segregation laws and gave black and white Southerners a virtually unique opportunity to meet and mingle on

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41. *Id.* (emphasis added). One can also logically argue that as a Baptist minister, King's willingness to break laws for a noble cause was patterned after Jesus' violation of the Hebrew laws prohibiting work on the Sabbath, as done during his public ministry. *See, e.g., Matthew* 12:9–15. Accordingly, King's Judeo-Christian theology and associated willingness to accept the consequences of breaking unjust laws shows that "[t]he philosophy of civil disobedience embodies the recognition that obligations beyond those of the law might compel law breaking, but the doctrine steers that impulse toward a tightly-cabined form of illegal protest nevertheless consistent with respect to the rule of law." Hall, *supra* note 21, at 2083.

equal terms. Rosa Parks's protest on the Cleveland Avenue bus was the purposeful act of a politically aware person.<sup>42</sup>

King's belief in a moral duty to disobey unjust laws was tempered with a respect for the rule of law, as he and his followers accepted the penalties for violating laws they considered unjust.<sup>43</sup> "King contended that the breaking of unjust laws must be done in the spirit of love<sup>44</sup> and with a willingness to accept the penalty. The latter attitude demonstrates a high regard for law in principle."<sup>45</sup> Moreover, highly reputed church historians view the Movement's theological underpinning as a faithful willingness to suffer the consequences of direct actions, such as sit-ins and marches, for the anticipated reform of an unjust system.<sup>46</sup>

### 3. Love and Equality

King's socio-political theology was, first and foremost, undergirded by a Christian philosophy of love.<sup>47</sup> As Professor Paris writes, King believed:

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42. FAIRCLOUGH, *supra* note 30, at 16.

43. *See, e.g.*, Murray, *supra* note 2, at 73–74.

44. Professor Murray describes King's philosophy of love as "agape." *Id.* Indeed, theologians regard the Greek word agape as love or allegiance shared by members of a group. *See, e.g.*, BRUCE J. MALINA & JOHN J. PILCH, SOCIAL-SCIENCE COMMENTARY ON THE LETTERS OF PAUL 116–18 (2006) (defining and discussing the concept of agape in the Apostle Paul's *Corinthians* 13).

45. PARIS, *supra* note 39, at 120–21.

46. *See generally* 2 JUSTO L. GONZÁLEZ, THE STORY OF CHRISTIANITY: THE REFORMATION TO THE PRESENT DAY 485 (2010) (discussing King, the SCLC, and direct action during the Movement).

47. Ironically, notwithstanding such philosophy, many Christians justified racial discrimination, including the institution of slavery, under the so-called Curse of Ham detailed in *Genesis* 9. *See generally* DAVID M. WHITFORD, THE CURSE OF HAM IN THE EARLY MODERN ERA: THE BIBLE AND THE JUSTIFICATION FOR SLAVERY 1–2 (2009) (discussing former U.S. Senator Robert Byrd's opposition to the Civil Rights Act of 1964 and his justification of Jim Crow segregation based on *Genesis* 9:18–27); George H. Taylor, *Race, Religion, and the Law: The Tension Between Spirit and Its Institutionalization*, 6 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 51, 52 (2006) ("Biblical predicates for racist claims by [w]hite Christians include the condemnation by Noah of his son Ham's progeny, due to Ham's misconduct. The book of *Genesis* quotes Noah saying of Ham's son, Canaan: 'Cursed be Canaan; a slave of slaves shall he be to his brothers.'") (quoting *Genesis* 9:25 (RSV)); *Numbers* 25 (detailing the violence instituted because of interracial relations between the children Israel and other nations). Professor Anthony Cook credits King's theological studies as providing the foundation upon which he was able to deconstruct the logic of both "biblically-based racists," like *Genesis* 9 justifiers, and the "slow down clergy," like those who sent their written criticism to which King responded in writing



Not only was love in the form of nonviolent resistance in accord with God's will, but, he claimed, it was the most effective means available to the oppressed in their fight against injustice. Indeed, he contended that there would be no permanent solution to the race problem until oppressed people developed the capacity to love their enemies.<sup>48</sup>

King's unfavorable experiences in litigation suggest he preferred civil disobedience to civil challenge. For example, when King and others in the Movement challenged Birmingham Commissioner Eugene "Bull" Connor's discriminatory refusal to issue a parade permit that would have allowed clergy members to peacefully and legally assemble on Good Friday in 1963, they lost before the Supreme Court.<sup>49</sup> After the Alabama court enjoined the ministers from assembling, the Supreme Court affirmed, looking solely at the fact that the protestors lacked a permit.<sup>50</sup> The Court neglected to cite the discriminatory motives behind Connor's denial of the permit:

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

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*Letter From a Birmingham Jail*: The evangelicalism of George Washington Davis, King's professor of theology at Crozer Seminary, and the social gospel of Walter Rauschenbusch gave King the theological perspectives to challenge conservative evangelicalism's conception of human nature and its debilitating dichotomy between the spiritual and the secular, as well as between order and freedom. Evangelical liberalism turned conservative evangelicalism's conception of human nature on its head and called into question the universality of that theology's assumptions. Evangelical liberalism posited the goodness of human nature, as reflected in and resulting from human moral reasoning, and it conjectured that evil institutions had limited people's efforts to pursue the ideal of the Kingdom of Value, what King would later call the "Beloved Community." Cook, *supra* note 36, at 95.

48. PARIS, *supra* note 39, at 113.

49. *Walker v. City of Birmingham*, 388 U.S. 307 (1967).

50. *Walker*, 388 U.S. at 321–22; LESLIE C. GRIFFIN, *LAW AND RELIGION: CASES AND MATERIALS* 170–71 (2d ed. 2010) (discussing King's stance on civil disobedience, the Supreme Court's decision in *Walker v. City of Birmingham* and King's *Letter From Birmingham Jail*).

process is a small price to pay for the civilizing hand of law, which alone can give abiding meaning to constitutional freedom.<sup>51</sup>

Despite this legal defeat, King remained steadfast in his theological convictions that the Movement—essentially an interdisciplinary juxtaposition of law and religion—placed his actions on a moral high ground that preempted state law. As a testament to his theology, on December 5, 1955, at the onset of the Montgomery Bus Boycott, King shared the following affirmation of civil disobedience while speaking in Montgomery:

[W]e are not wrong in what we are doing. If we are wrong, then the Supreme Court of this nation is wrong. If we are wrong, the Constitution of the United States is wrong. If we are wrong, God Almighty is wrong. If we are wrong, Jesus of Nazareth was merely a utopian dreamer and never came down to earth. If we are wrong, justice is a lie. And we are determined here in Montgomery to work and fight until justice runs down like water, and righteousness like a mighty stream.<sup>52</sup>

From King's theological perspective, human equality stemmed from the identity of all humans as being children of God.<sup>53</sup> Indeed, this is the very essence of agape. As Professor Paris observed:

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51. Walker, 388 U.S. at 321–22 (1967); GRIFFIN, *supra* note 50, at 170–71. *See also* David Luban, *Legal Storytelling: Difference Made Legal: The Court and King*, 87 MICH. L. REV. 2152 (1989).

52. RABOTEAU, *supra* note 38, at 110 (emphasis added). *See also* Randall Kennedy, *Martin Luther King's Constitution: A Legal History of the Montgomery Bus Boycott*, 98 YALE L.J. 999, 1000 (1989) (describing King's first public speech as the leader of the Montgomery Bus Boycott as displaying attentiveness to legal symbolism). Moreover, in recognition of the interdisciplinary connectedness of law and religion, after King's death the editors of the *Columbia Law Review* dedicated an issue to King's life and works. *See generally*, *Symposium in Memory of Martin Luther King, Jr.*, 68 COLUM. L. REV. 1011 (1968).

53. As a point of theological and philosophical lineage, in King's essay on civil disobedience, *Letter From Birmingham Jail*, King cites St. Augustine, affectionately regarded by theologians as the great doctor and teacher of the church. *See INVITATION TO CHRISTIAN SPIRITUALITY: AN ECUMENICAL ANTHOLOGY* 103–13 (John R. Tyson ed., 1999) (highlighting St. Augustine's life and theology). St. Augustine's teachings are known to have significantly influenced the theology of King's namesake, Martin Luther, an Augustinian monk who demonstrated civil disobedience against canon law after disagreeing with the Catholic Church and posting on the church door in Wittenberg his famed *Ninety-Five Theses on the Power and Efficacy of Indulgences*, a point-by-point refutation of Catholic Church orthodoxy. *See generally*, DAVID M. WHITFORD, *LUTHER: A GUIDE FOR THE PERPLEXED* (2011). Indeed, Martin Luther's protest—an act of civil disobedience by this Article's definition—began the Protestant Reformation in Germany.

King's vision of the kinship of humans as a direct corollary of the parenthood of God pervaded his entire thought. Only the divine principle of love can hold the diversity of humankind together in a harmonious community. That kindredness of persons under the parenthood of God was, in King's mind, the kingdom of God . . . His fundamental ethical norm was the Christian understanding of love as presented primarily in the Sermon on the Mount and as symbolized most vividly in the cross on which Jesus died while forgiving his enemies. King viewed Jesus as the supreme manifestation of that religious and ethical principle.<sup>54</sup>

Further, it is readily apparent that in keeping with the Movement's theology of equality, clergy and laity alike engaged in direct action, just as Rosa Parks did when she refused to give up her bus seat in the act of civil disobedience that served as the Movement's genesis. King actually suggested that direct action was systematically designed to create crisis as a prelude to peace. In any nonviolent campaign, there are four basic steps:

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*See generally* GONZÁLEZ *supra* note 46 at 25–31. Moreover, St. Augustine and Martin Luther, figures King undoubtedly studied in seminary, were impacted by the Apostle Paul's theology as an evangelist and apologist in early church history. Although the subject of authentic and disputed (“deutero-Pauline”) authorship is beyond this Article's scope, *see, e.g.*, JAIME CLARK-SOLES, *ENGAGING THE WORD: THE NEW TESTAMENT AND THE CHRISTIAN BELIEVER* 77–87 (2010). *See also* MALINA & PILCH, *supra* note 44, at 1, in examining *Galatians*, an epistle scholars uniformly agree Paul actually wrote. *See, e.g.*, MICHAEL J. GORMAN, *APOSTLE OF THE CRUCIFIED LORD: A THEOLOGICAL INTRODUCTION TO PAUL & HIS LETTERS* 87 (2004). *See also* MARION L. SOARDS, *THE APOSTLE PAUL: AN INTRODUCTION TO HIS WRITINGS AND TEACHING* 57 (1987) (noting that the theology of agape is omnipresent). In expressing “group love” as a universally shared sentiment among believers, St. Paul, a Pharisaic Israelite, famously penned: “There is no longer Jew or Greek, there is no longer slave or free, there is no longer male and female; for all of you are one in Christ Jesus. And if you belong to Christ, then you are Abraham's offspring, heirs according to the promise.” *Galatians* 3:28-29. *See also* *Philemon* 10–16 (describing Paul's appeal to Philemon to accept Onesimus, Philemon's former slave, back into his household as a “brother” in Christ with Paul as a mutual spiritual father). It is therefore apparent that the theology of agape transcended from apostolic evangelism in antiquity to King in the Movement. *See, e.g.*, MARSH, *supra* note 2, at 45 (quoting King, while pastor of Dexter Avenue Baptist Church in Montgomery, as saying “[s]egregation is a blatant denial of the unity which we all have in Jesus Christ . . . it is still true that in Christ there is no Jew nor Gentile (Negro nor white) and that out of one blood God made all men to dwell upon the face of the earth.”).

54. PARIS, *supra* note 39, at 79; HOWARD THURMAN, *WITH HEAD AND HEART: THE AUTOBIOGRAPHY OF HOWARD THURMAN* 113–14 (1979) (discussing his core allegiance to Christianity because of its core principles). *See also* HOWARD THURMAN, *JESUS AND THE DISINHERITED* 11–35 (1949) (explaining the religion of Jesus Christ as one who was an advocate for the marginalized in society).

(1) collection of the facts to determine whether injustices exist, (2) negotiation, (3) self-purification, and (4) direct action.<sup>55</sup> King explained:

We had no alternative except to prepare for direct action, whereby we would present our very bodies as a means of laying our case before the conscience of the local and national community.

You may well ask: "Why direct action? Why sit-ins, marches and so forth? Isn't negotiation a better path?" Indeed, this is the very purpose of direct action. Nonviolent direct action seeks to create such a crisis that a community which has constantly refused to negotiate is forced to confront the issue. It seeks so to dramatize the issue that it can no longer be ignored. My citing the creation of tension as part of the work of the nonviolent-resister may sound rather shocking. But I must confess that I am not afraid of the word "tension." I have earnestly opposed violent tension, but there is a type of constructive, nonviolent tension which is necessary for growth. Just as Socrates felt that it was necessary to create a tension in the mind so that individuals could rise from the bondage of myths and half-truths to the unfettered realm of creative analysis and objective appraisal, so must we see the need for nonviolent gadflies to create the kind of tension in society that will help men rise from the dark depths of prejudice and racism to the majestic heights of understanding and brotherhood. The purpose of our direct-action program is to create a situation so crisis-packed that it will inevitably open the door to negotiation.<sup>56</sup>

#### 4. The Suffering Servant and Messianic Theology in the Movement

King believed that Jesus' cross symbolized suffering and victory, and that Jesus suffered such a brutal death because he consistently lived a life of love.

In [Jesus' crucifixion], history witnesses the sacrificial element implied by love. Love is no guarantor against persecution and suffering. In confronting evil it risks the possibility of suffering and death . . . . And so, Christ died praying for his executioners, thereby manifesting the community his life and mission exemplified. Although he was crucified, love had not been destroyed, even in its darkest hour. And what is the victory the cross symbolizes. Those who love may suffer at the hands of injustice, but injustice cannot destroy the love of God, which is always redemptive.<sup>57</sup>

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55. King, *Letter from Birmingham Jail*, *supra* note 11, at 78–80.

56. *Id.*

57. PARIS, *supra* note 39, at 83. Moreover, consistent with his biblical beliefs on redemptive suffering, as a disclaimer, King noted his reluctance to bring attention to his personal trials because he did not want to be seen as someone with a martyr complex who

Accordingly, the very center of King's theology—and arguably the theology of the Movement—was a belief that God's love was redemptive,<sup>58</sup> especially through unmerited suffering. From a Christological perspective, therefore, the suffering servant theology manifested in the life and death of Jesus, the prophet from Galilee. King's perspective on this aspect of Christology is evident in the following excerpt from an article King wrote in the February 6, 1957, issue of *Christian Century*:

*There is something at the very center of our faith which reminds us that Good Friday may reign for a day, but ultimately it must give way to the triumphant beat of the Easter drums. Evil may so shape events that Caesar will occupy a palace and Christ a cross, but one day that same Christ will rise up and split history into A.D. and B.C., so that even the life of Caesar must be dated by his name. So in Montgomery we can walk and never get*

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was in search of sympathy. MARTIN LUTHER KING, JR., *Suffering and Faith*, 77 *CHRISTIAN CENTURY* 510 (1960), reprinted in *A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS AND SPEECHES OF MARTIN LUTHER KING, JR.* 41 (James M. Washington ed., 1991) (“*My personal trials have also taught me the value of unmerited suffering. . . . I have lived these last few years with the conviction that unearned suffering is redemptive.*”) (internal citations omitted) (emphasis added). See also RABOTEAU, *supra* note 38, at 113 (“*King explained that nonviolence . . . was based upon the firm conviction that suffering was redemptive because it could transform both the sufferer and the oppressor; it tried to convert, not defeat, the opponent; and it was based on the confidence that justice would, in the end, win over injustice.*”) (emphasis added). Moreover, the Pauline Epistles also share this perspective, see, e.g., *Romans* 8:17 (“[A]nd if children, heirs also, heirs of God and fellow heirs with Christ, if indeed we suffer with *Him* in order that we may also be glorified with *Him*.”), as does the oldest gospel narrative, in showing Jesus came to die for others, see *Mark* 10:45 (“For even the Son of Man did not come to be served, but to serve, and to give His life a ransom for many.”). Moreover, King's concept of redemptive suffering was one of the essential faith tenants of the early Christian Church in believing humankind's debt resulting from original sin had been paid by Jesus. See ST. ATHANASIUS, *ON THE INCARNATION* (Cliff Lee ed., 2007), <http://www.ccel.org/ccel/athanasius/incarnation.pdf>. See also JUSTO L. GONZÁLEZ, *THE STORY OF CHRISTIANITY: THE EARLY CHURCH TO THE DAWN OF THE REFORMATION 199–201* (2010) (summarizing Athanasius' Christology as believing the debt of human sin was so significant that God himself became incarnate in the form of Jesus Christ to suffer and die for the redemption of humankind such that believers might not perish but have eternal life); *READINGS IN CHRISTIAN THOUGHT* 82–93 (Hugh T. Kerr ed., 2d ed. 1990) (discussing the theology of Anselm of Canterbury and his belief that Jesus' incarnation and unmerited redemptive suffering was to forgive human sin).

58. See, e.g., GLENN TINDER, *THE FABRIC OF HOPE: AN ESSAY* 71–72 (1999) (explaining the connectedness of hope and suffering through “the concept of justification by faith”).

weary, because we know that there will be a great camp meeting in the promised land of freedom and justice.<sup>59</sup>

Further, King derived his Judeo-Christian perspective on redemptive suffering from messianic scriptures. For example, *Isaiah's* Fourth Servant Song, presumably written to provide hope and inspiration to the children of Israel while suffering during the Babylonian Exile, depicts extreme and unmerited suffering in the name of redemption.<sup>60</sup> The Fourth Servant Song provides the following:

Surely he has borne our infirmities and carried our diseases; yet we accounted him stricken, struck down by God, and afflicted. But he was wounded for our transgressions, crushed for our iniquities; upon him was the punishment that made us whole, and by his bruises we are healed . . .

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59. MARTIN LUTHER KING, JR., *Nonviolence and Racial Justice*, 74 CHRISTIAN CENTURY 165 (1957), reprinted in A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS AND SPEECHES OF MARTIN LUTHER KING, JR. 7–9 (James M. Washington ed., 1991) (emphasis added).

60. Named for the major prophet of Jerusalem and son of Amoz who is believed to be one of the composite's authors, *Isaiah* was written by at least three different people who presumably were prophets during various stages in Israel's history. Indeed, a textual analysis allows the reader to discern three distinct periods, each portrayed in the composite's respective sections. *Isaiah* 1–39, referred to as "First Isaiah," is believed to have been written by the composite's namesake, a prophet of the Southern Kingdom (Judah). Moreover, it is believed to have been written during the time the Southern Kingdom was under Assyrian domination to the Northeast, after the Northern Kingdom (Israel) had ceased to independently exist. The prophet Isaiah presents a message of social justice, faith in God, reward for the obedient, and judgment on the unfaithful. *Isaiah* 40–55, commonly referred to as "Second Isaiah" or "Deutero-Isaiah," is attributed to an unknown prophet who presumably lived in Babylon during the Sixth Century Babylonian exile. A logical deduction is that Second Isaiah's author ministered to the people of Israel during their exile. Consequently, "Deutero-Isaiah" shows continuity with "First Isaiah" by emphasizing trust in God and hope for Israel's imminent return from exile, a period of redemptive suffering. "Second Isaiah" is therefore messianic in providing hopeful anticipation for a redemptive reconciliation after a period of suffering. Finally, *Isaiah* 56–66, attributed to prophet(s) who lived in Judah after Israel's return from exile, is commonly referred to as "Third Isaiah" or "Trito-Isaiah." It is believed to have been written much later than "Second Isaiah." Its similarities with the writings of Haggai and Zechariah suggest "Third Isaiah" was written in the Fourth Century. Moreover, its overall eschatological interest is in events surrounding the last days and on salvation. Accordingly, as a composite, *Isaiah* connects the aforementioned periods of Israel's history and establishes a theme of messianic salvation and eventual reward after redemptive suffering. See generally Geoffrey W. Grogan, *Isaiah*, in 6 THE EXPOSITOR'S BIBLE COMMENTARY 4–13 (Frank E. Gaebelein, gen. ed. 1986). See also THE HARPER COLLINS STUDY BIBLE: NEW REVISED AND STANDARD VERSION 1011–13 (Wayne A. Meeks ed., 1993).

He was oppressed, and he was afflicted, yet he did not open his mouth . . . For he was cut off from the land of the living, stricken for the transgression of my people. They made his grave with the wicked and his tomb with the rich, although he had done no violence, and there was no deceit in his mouth . . .

Out of his anguish he shall see light; he shall find satisfaction through his knowledge. The righteous one, my servant, shall make many righteous, and he shall bear their inequities.

Therefore I will allot him a portion with the great, and he shall divide the spoil with the strong; because he poured out himself to death, and was numbered with the transgressors; yet he bore the sin of many, and made intercession for the transgressors.<sup>61</sup>

Scholars debate whether the redemptive suffering was done by the people of Israel or whether it was messianic in describing Jesus, the foretold Christ who would suffer on behalf of all people.<sup>62</sup> Regardless, in the Movement's context, this suffering servant theology was epitomized by the willingness of many students, clergy, and lay activists to endure beatings, be spat upon, and be the targets of trained attack dogs and water hoses, all because they believed their temporal suffering was for a greater and sustaining cause.<sup>63</sup>

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61. *Isaiah* 53:4–12. The cited pericope demonstrates the sinless suffering of God's servant such that all people might receive salvation. This sinless suffering was arguably the very essence of King's theology. The pericope was written after the fall of Jerusalem in 587 B.C. and during the period of the Babylonian exile before King Cyrus of Persia defeated Babylon in 539 B.C. Consequently, its author(s)' prophesies were directed toward those in exile and were likely delivered shortly before their 538 B.C. return to Judah, as a means of establishing hope. See LYNNE M. DEMING, 12 BASIC BIBLE COMMENTARY: ISAIAH 128-32 (1988). Similarly, with respect to the Movement, "hope" fueled the optimism that sustained the Movement's sacrificial activity. See, HARDING, *supra* note 29, at 95 (discussing the Student Nonviolent Coordinating Committee's founding statement of purpose: "We affirm the philosophical or religious ideal of nonviolence as the foundation of our purpose, the presupposition of our faith, and the manner of our action. Nonviolence as it grows from Judaic-Christian traditions seeks a social order of justice permeated by love.").

62. See, e.g., MICHAEL D. COOGAN, A BRIEF INTRODUCTION TO THE OLD TESTAMENT: THE HEBREW BIBLE IN ITS CONTEXT 334–35 (2009).

63. See, e.g., STERLING, *supra* note 24 at 191–98 (discussing the North Carolina students' lunch counter sit-ins and the Freedom Riders' mob attacks, bus burnings and bombings while noting an activist's message from his hospital bed: "*These beatings cannot deter us . . . We want equality and justice and we will get it. We are prepared to die.*") (emphasis added). Indeed, in the Black church, the theological belief that suffering is a prelude to victory comes through "liberation hermeneutics." Hermeneutics, a word commonly used by theologians to describe scriptural interpretation based on religious

Just as King's theology viewed his personal suffering as redemptive, he viewed the sacrifices of others engaged in the Movement as redemptive, too.<sup>64</sup> In May of 1961, the Congress for Racial Equality, a multiracial group of direct action activists that was originally founded in 1942, challenged the Deep South's segregationist interstate commerce practices by sending buses of college students and other young activists on "freedom rides" from Washington, D.C., to New Orleans.<sup>65</sup> In Alabama and Mississippi, racist mobs violently attacked and beat the Freedom Riders. By embracing a theological perspective of the suffering servant enduring for a greater good, the Freedom Riders significantly affected the Movement's momentum leading up to the VRA's passage by placing their personal safety and security behind the greater causes in which they believed.

Professor Raymond Arsenault writes about the Freedom Riders' suffering servant mentality in describing their willingness to literally

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experience, is derived from the Greek god Hermes (the Roman god Mercury), the messenger or interpreter for the other gods. See MICHAEL J. GORMAN, ELEMENTS OF BIBLICAL EXEGESIS: A BASIC GUIDE FOR STUDENTS AND MINISTERS 140–41 (Rev. expanded ed. 2009); JAMES H. HARRIS, PREACHING LIBERATION 55–62 (1995) (discussing preaching styles influenced by a scriptural read aimed at uplifting the marginalized); LUKE A. POWERY, SPIRIT SPEECH: LAMENT AND CELEBRATION IN PREACHING 30–31 (2009) (describing the cultural belief that the Holy Spirit manifests through Black preaching). See also CLEOPHUS J. LARUE, I BELIEVE I'LL TESTIFY: THE ART OF AFRICAN AMERICAN PREACHING 96–97 (2011) (using King's famous "I Have A Dream" speech in support of the hypothesis that effective Black preaching often creates "a world that does not exist").

64. After espousing upon the realities of prison for Blacks during the Movement, including anticipated beatings and the harsh separation from family, King wrote about young people's willingness to suffer in prison as part of the Movement and for the cause in which they believed:

There were no more powerful moments in the Birmingham episode than during the closing days of the campaign, when Negro youngsters ran after white policemen, asking to be locked up. There was an element of unmalicious [sic] mischief in this. The Negro youngsters, although perfectly willing to submit to imprisonment, knew that we had already filled up the jails, and that the police had no place left to take them.

When, for decades, you have been able to make a man compromise his manhood by threatening him with a cruel and unjust punishment, and when suddenly he turns upon you and says: "Punish me. I do not deserve it. But because I do not deserve it, I will accept it so that the world will know that I am right and you are wrong," you hardly know what to do. You feel defeated and secretly ashamed. You know that this man is as good a man as you are; that from some mysterious source he has found the courage and the conviction to meet physical force with soul force.

Martin Luther King, Jr., *The Sword That Heals*, in WHY WE CAN'T WAIT 30 (1968).

65. See ARSENAULT, *supra* note 2, at 96.



sacrifice their bodies in their nonviolent protests against racial segregation in interstate commerce:

Deliberately provoking a crisis of authority, the Riders challenged federal officials to enforce the law and uphold the constitutional right to travel without being subjected to degrading and humiliating racial restrictions. *Most amazingly, they did so knowing that their actions would almost certainly provoke a savage and violent response from militant white supremacists. Invoking the philosophy of nonviolent direct action, they willingly put their bodies on the line for the cause of racial justice.*<sup>66</sup>

King also recognized the Freedom Riders' unwavering commitment to endure suffering in order to achieve justice on November 16, 1961, speaking before the annual meeting of the Fellowship for the Concerned, a multiracial fellowship group affiliated with the Southern Regional Council.

I can remember the times that we've been together, I remember that night in Montgomery, Alabama, when we had stayed up all night discussing the Freedom Rides, and that morning came to see that it was necessary to go on with the Freedom Rides, that we would not in all good conscience call an end to the Freedom Rides at that point. *And I remember the first group got ready to leave, to take a bus for Jackson, Mississippi, we all joined hands and started singing together. "We shall overcome, we shall overcome." And something within me said, now how is it that these students can sing this, they are going down to Mississippi, they are going to face hostile and jeering mobs, and yet they could sing, "We shall overcome." They may even face physical death, and yet they could sing, "We shall overcome." Most of them realized that they would be thrown into jail, and yet they could sing, "We shall overcome, we are not afraid."* Then something caused me to see at that moment the real meaning of the movement. That students had faith in the future. That the movement was based on hope, that this movement had something within it that says somehow even though the arc of the moral universe is long, it bends toward justice.

. . . .

*Before the victory is won some may have to get scarred up, but we shall overcome. Before the victory of brotherhood is achieved, some will maybe face physical death, but we shall overcome. Before the victory is won, some will lose jobs, some will be called communists, and reds, merely because they believe in brotherhood, some will be dismissed as dangerous*

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66. See *id.* at 2–3 (emphasis added).

*rabblers and agitators merely because they're standing up for what is right, but we shall overcome.*<sup>67</sup>

From a theological perspective, therefore, the Freedom Riders shared King's redemptive suffering sentiment as they achieved victories for freedom of speech and association in interstate commerce.<sup>68</sup>

Furthermore, the same willingness to endure unmerited brutality for the accomplishment of larger and more far-reaching goals motivated the Bloody Sunday marchers in their attempts to bring attention to the need for voting rights legislation in 1965.<sup>69</sup> On the morning of March 7, 1965, more

67. MARTIN LUTHER KING, JR., *Love, Law, and Civil Disobedience*, Address Before the Fellowship of the Concerned (Nov. 16, 1961), in *A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS AND SPEECHES OF MARTIN LUTHER KING, JR.* 52 (James M. Washington ed., 1991) (emphasis added). Many members of the clergy, Black and white, were also engaged in the Freedom Rides. On September 15, 1961, only days before a noted Interstate Commerce Commission ruling, several ordained ministers were singled out by the Hinds County, Mississippi courts to receive punitive fines and sentences of incarceration for their role in the Freedom Rides. See ARSENAULT, *supra* note 2, at 434.

68. In detailing the violent beatings the Freedom Riders endured in May 1961 and their suffering servant resilience, author Helene Hanff observes that:

[t]he riders stayed in Montgomery four days, as guests in Negro homes, until the injured among them were able to travel. On Wednesday, May 24, accompanied by National Guardsmen and sixteen reporters, they left Montgomery for Jackson, with James Lawson holding classes on nonviolent techniques on the bus as it rode into Mississippi.

At Jackson, twenty-seven Freedom Riders were arrested and given the choice of a two hundred dollar fine or two months in jail. Since fines were an enormous burden, the students chose jail. They were immediately transferred from the city jail to Parchman State Penitentiary. There, nine black girls were locked in one filthy cell with the white girls occupying an adjoining cell. The cells contained nothing but mattresses and sheets thrown on the steel floor. When the girls began to sing freedom songs, prison guards took their mattresses away. When they sang the Star-Spangled Banner the guards took their sheets away. For three nights, they slept on the steel floor.

HELENE HANFF, *THE MOVERS AND SHAKERS: THE YOUNG ACTIVISTS OF THE SIXTIES* 32 (1970).

69. The Bloody Sunday demonstration—see *infra* note 111 and accompanying text—was scheduled to be a memorial march honoring the life of Jimmy Lee Jackson, a civil rights activist killed after being shot by an Alabama state trooper on February 17, 1965 in Marion, Alabama, the seat of Perry County. “Marion activists, in conjunction with the SCLC staff, decided that a fitting [M]ovement response to his death would be a mass pilgrimage from Selma to the Alabama state capitol in Montgomery.” David J. Garrow, *Bridge to Freedom (1965)*, in *THE EYES ON THE PRIZE CIVIL RIGHTS READER: DOCUMENTS, SPEECHES, AND FIRSTHAND ACCOUNTS FROM THE BLACK FREEDOM STRUGGLE* 206

than 500 demonstrators, including ordained clergy, members of the SCLC and the Student Nonviolent Coordinating Committee assembled at Morris Brown African Methodist Episcopal Church in Selma.<sup>70</sup> Those assembled planned a peaceful demonstration in support of the unbiased right to vote, along with a voter registration drive.<sup>71</sup> The end result, however, was that uniformed officers brutally attacked the peaceful demonstrators.<sup>72</sup> The willingness of both the Freedom Riders and the Bloody Sunday marchers to endure suffering to garner rights gained the attention of the nation and ultimately facilitated legal advances in their favor.

#### IV. EQUALITY UNDER THE LAW: THE FIRST AMENDMENT DEVELOPED DURING THE MOVEMENT THROUGH CIVIL DISOBEDIENCE AND CIVIL CHALLENGE

*“Congress shall make no law . . . abridging the freedom of speech, or of the press . . . .” But those fourteen words cannot in themselves account for our great freedom . . . . [S]omething has happened to the fourteen words of the speech and press clauses. Their meaning has changed. Or, more accurately, the understanding of those words has changed: judges’ understanding and the public’s.*

—Anthony Lewis, *Freedom for the Thought That We Hate*<sup>73</sup>

The philosophy of the Movement’s civil disobedience—disobeying unjust and discriminatorily enforced laws—was also rooted in the understanding that the First Amendment and the Equal Protection Clause of the Fourteenth Amendment actually supported dissident action. The Movement presented numerous opportunities for clergy and lay activists to shape the First Amendment’s broadening scope by forcing the judiciary to address issues such as the public forum,<sup>74</sup> rules governing mass

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(Clayborne Carson, David J. Garrow, *et al.*, eds. 1987) [hereinafter Garrow, *Bridge to Freedom*].

70. See JOSEPH, *supra* note 34, at 125–26.

71. *Id.* at 126.

72. *Id.*

73. ANTHONY LEWIS, *FREEDOM FOR THE THOUGHT THAT WE HATE: A BIOGRAPHY OF THE FIRST AMENDMENT*, at ix–x (2007).

74. See generally *Cox v. Louisiana*, 379 U.S. 536 (1965) (reversing the state court convictions of Rev. B. Elton Cox for his leadership in a peaceful assembly protesting segregation and discriminatory practices in downtown Baton Rouge, Louisiana).

demonstrations,<sup>75</sup> symbolic speech,<sup>76</sup> and freedom of association.<sup>77</sup> Consequently, the Movement's acts of civil disobedience naturally led to civil challenge under the First Amendment and caused the Supreme Court to shape new legal doctrines regulating free speech and free expression.<sup>78</sup> In addressing this presumably unintended consequence, Harvard law professor Randall Kennedy writes:

The disciplined peacefulness of the civil rights activists and the underlying decency of their demands helped to create an atmosphere conducive to judicial liberality. The result was not only a beneficial transformation in the substantive law of race relations, but also a blossoming of libertarian themes in First Amendment jurisprudence. In the context of the First Amendment, as in many other areas, the struggle for racial justice produced ramifications that extended far beyond its point of origin. Once loosed, liberty, like equality, was an idea not easily cabined.<sup>79</sup>

On frequent occasions, peaceful protesters attempted to exercise their rights to free speech and assembly as guaranteed by the First Amendment.<sup>80</sup> In a discriminatory fashion, however, the unjust enforcement of laws precluded citizens from doing so. Consequently, much of the Movement's direct action came through the civil disobedience of court-issued injunctions or the administrative denial of permits that would lawfully have allowed activists their First Amendment rights.<sup>81</sup> King's

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75. See generally *Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969); *Edwards v. South Carolina*, 372 U.S. 229 (1963).

76. See, e.g., *Brown v. Louisiana*, 383 U.S. 131 (1966).

77. See, e.g., *Louisiana ex rel. Gremillion v. NAACP*, 366 U.S. 293 (1961).

78. See, e.g., *N. Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964) (redefining the legal concept of libel under the First Amendment); *Gremillion*, 366 U.S. 293 (detailing freedom of association); Kennedy, *supra* note 52, at 1001, 1012.

79. Kennedy, *supra* note 52, at 1001 (internal citations omitted). It bears noting that during the Movement, the Court was also required to give expansive breadth to the First Amendment because of the conscience protest by non-clergy, as well. See, e.g., *Cohen v. California*, 403 U.S. 15 (1971) (holding that the First Amendment's guarantee of free speech covered the wearing of a jacket with the inscription "Fuck the Draft" while in a government building).

80. See, e.g., *Cox v. Louisiana*, 379 U.S. 536 (1965) (discussed *infra* note 87).

81. King was arrested in Birmingham, Alabama (on Good Friday, April 12, 1963) where he penned the famous *Letter From a Birmingham Jail* in response to other members of the clergy that criticized his actions as "unwise and untimely." King's arrest was for defying a state court injunction barring peaceful assembly, a right he understood as guaranteed by the First Amendment. Martin Luther King, Jr., *Civil Disobedience Should Be Employed*, in *THE CIVIL RIGHTS MOVEMENT: OPPOSING VIEWPOINTS* 116, 122–23 (William Dudley ed., 1996). Professor Paris also writes the following, explaining the basis for King's

speeches demonstrate his belief that peaceful protest was not only morally permissible, but also a fundamental part of democracy. For example, he stated:

[T]his is the glory of America, with all of its faults. This is the glory of our democracy. If we were incarcerated behind the iron curtains of a Communistic nation we couldn't do this. If we were trapped in the dungeon of a totalitarian regime we couldn't do this. *But the great glory of American democracy is the right to protest for right.*<sup>82</sup>

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civil disobedience: Martin Luther King's respect for the law is well known. He constantly sought to convince his followers that nonviolent direct action did not imply any disrespect for the just laws of the land, inasmuch as it was always practiced for the sake of legal justice. Further, the method is justified by the American Constitution, which provides for legal protest as the means for the redress of grievances. King opposed all forms of anarchy with a passion similar to that with which he opposed tyranny. Since he considered the fundamental problem in America to be the moral cleavage between the national practice and the law of the cosmos, and since the civil rights movement was intended to be the agent for moral reform, he advocated a method for that reform that he could justify by an appeal to the moral law of the universe. He deemed it significant that the Constitution was a document that described truths in accord with that moral law. However, he viewed the nation's customs and practices as contradictions of that law, and consequently, he had no difficulty in appealing to the Constitution as a source for justifying many of his actions since that law was commensurate with the universal moral law. PARIS, *supra* note 39, at 86–87.

82. Martin Luther King, Jr., *Speech at Holt Street Baptist Church in Montgomery, Alabama on December 5, 1955*, in THE EYES ON THE PRIZE CIVIL RIGHTS READER: DOCUMENTS, SPEECHES, AND FIRSTHAND ACCOUNTS FROM THE BLACK FREEDOM STRUGGLE 48, 49 (Clayborne Carson et al. eds., 1991) (emphasis added) (speaking at Holt Street Baptist Church in Montgomery, Alabama on December 5, 1955). *See also* Kennedy, *supra* note 52, at 1000–01. The context in which King spoke about the “right to protest for right” was while addressing the illegality of court-issued injunctions prohibiting civil rights activists from exercising the constitutionally guaranteed rights of free speech and free association. The occasion was King's last public address on April 3, 1968, the evening before his assassination. King and members of the Movement were in Memphis, Tennessee in support of the city's sanitation workers' strike for better wages. In relevant part, King remarked:

Now about injunctions: We have an injunction and we're going into court tomorrow morning to fight this illegal, unconstitutional injunction. All we say to America is “Be true to what you said on paper.” If I lived in China or even Russia, or any totalitarian country, maybe I could understand the denial of certain basic First Amendment privileges, because they hadn't committed themselves to that over there. But somewhere I read of the freedom of assembly. Somewhere I read of the freedom of speech. Somewhere I read of the freedom of the press. Somewhere I read that the greatness of America is the right to protest for right. And so I say, we aren't going to let an injunction turn us around. We are going on.

Martin Luther King, Jr., *Speech at the Mason Temple in Memphis, Tennessee on April 3, 1968*, in THE EYES ON THE PRIZE CIVIL RIGHTS READER: DOCUMENTS, SPEECHES, AND

While the basic tenets of freedom of speech and freedom of expression were not expressly incorporated into the original Constitution, their omission can arguably be explained by the Framers' belief that the federal government, limited to the powers enumerated in the Constitution, could not enact a law restricting free speech.<sup>83</sup> However, the First Amendment's inclusion in the Bill of Rights is evidence of the Framers' desire to protect freedom of speech and assembly. One media commentator observes that:

[t]he Bill of Rights consists of ten amendments that, like the Constitution itself and the Declaration of Independence before it, are grounded by Natural Law. These ten amendments are designed to protect individual freedoms that the Founders considered natural rights, thus God-given, but feared that the new federal government might ignore. The Bill of Rights is supposed to prevent the federal government from denying these fundamental rights to any person. They reflect human nature in the absence of a tyrannical government.<sup>84</sup>

Thus, the First Amendment's express language demonstrates the Framers' desire to protect the freedoms enumerated in the amendment.<sup>85</sup> As detailed herein, however, the Movement proved to be the first time these First Amendment rights developed any real force or meaning.

#### A. CIVIL DISOBEDIENCE AND THE FIRST AMENDMENT IN ACTION

##### 1. *Brown v. Louisiana*

The defiance of unjust laws was at the heart of *Brown v. Louisiana*,<sup>86</sup> the fourth case in just over four years in which the Court addressed

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FIRSTHAND ACCOUNTS FROM THE BLACK FREEDOM STRUGGLE 409, 413 (Clayborne Carson et al. eds., 1991) (speaking at the Mason Temple in Memphis, Tennessee on April 3, 1968).

83. JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 1146 (7th ed. 2004).

84. ANDREW P. NAPOLITANO, THE CONSTITUTION IN EXILE 19 (2006). Further, relevant to the First Amendment challenges during the Movement is the fact that although the Bill of Rights originally only applied to the federal government, it was made applicable to the states through the Fourteenth Amendment's Due Process Clause. *See, e.g.*, *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947); Akhil Reed Amir, *The Bill of Rights and Fourteenth Amendment*, 101 YALE L.J. 1193 (1992) (discussing various theories of incorporation).

85. *See, e.g.*, GOODWIN LIU, PAMELA S. KARLAN & CHRISTOPHER H. SCHROEDER, KEEPING FAITH WITH THE CONSTITUTION 15 (2009). Arguably, there is no constitutional limitation on governmental authority more clear than the express limitations imposed by the First Amendment.

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

Louisiana statutes prohibiting peaceful assembly and governmental redress,<sup>87</sup> The *Brown* Court reversed the convictions of civil rights protesters on the grounds that they violated the First Amendment and the Fourteenth Amendment Equal Protection Clause.<sup>88</sup> The opinion traces the First Amendment's evolution, especially as it addresses free speech, assembly, and governmental redress.

On Saturday March 7, 1964, exactly one calendar year before the infamous Bloody Sunday voting rights march, Henry Brown and four other Black males participated in a library sit-in at the Clinton, Louisiana Audubon Regional Library. They were there to challenge the library's segregationist and discriminatory practices.<sup>89</sup> After their arrests, the state quickly tried the protesters and they were found guilty. Under Louisiana's then-existing law, their convictions were not appealable.<sup>90</sup>

After disposing of several preliminary issues dealing with constitutionally infirm actions, the Supreme Court reversed the protesters' convictions and addressed the heart of protected rights under the First and Fourteenth Amendments. In relevant part, the *Brown* Court explained:

We are here dealing with an aspect of a basic constitutional right—the right under the First and Fourteenth Amendments guaranteeing freedom of speech and of assembly, and freedom to petition the Government for a redress of grievances . . . . As this Court has repeatedly stated, these rights are not confined to verbal expression. They embrace appropriate types of action which certainly include the right in a peaceable and orderly manner

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87. *Id.* at 133. In the other three cases, *Garner v. Louisiana*, 368 U.S. 157 (1961), *Taylor v. Louisiana*, 370 U.S. 154 (1962), and *Cox v. Louisiana*, 379 U.S. 536 (1965), all of the civil rights protestors were found guilty of violating Louisiana's then-existing breach of the peace statute for their public protests of discriminatory laws. In *Cox*, for example, Rev. Cox, an ordained Congregational minister, led a peaceful protest in front of the courthouse in Baton Rouge, the state's capitol. *Cox*, 379 U.S. at 541–42. In all three of the previous cases, the demonstrators' state court convictions were overturned. *Brown*, 383 U.S. at 133. In *Brown*, however, the Court took special consideration of the case's factual history because it involved a quasi-public protest within the parameters of a closed-door public library. *Brown*, 383 U.S. at 135.

88. *Brown*, 383 U.S. at 141–43. The *Brown* opinion was written by Associate Justice Fortas. He was joined by Chief Justice Warren and Associate Justice Douglas. The opinion reached by the three-justice plurality received majority support in the form of two separately written concurrences by Associate Justices Brennan and White. The Court's four member dissent included Associate Justices Black, Clark, Harlan, and Stewart.

89. *Id.* at 135–36.

90. *Id.* at 138.

to protest by silent and reproachful presence, in a place where the protestant has every right to be, the unconstitutional segregation of public facilities . . . . The [Louisiana] statute was deliberately and purposefully applied solely to terminate the reasonable, orderly, and limited exercise of the right to protest the unconstitutional segregation of a public facility. Interference with this right, so exercised, by state action is intolerable under our Constitution.<sup>91</sup>

Accordingly, as demonstrated by the events that prompted *Brown*, the Movement helped the Supreme Court delimit the First Amendment's scope by spurring litigation.<sup>92</sup>

## 2. *Edwards v. South Carolina*

Just as in *Brown*, in *Edwards v. South Carolina*,<sup>93</sup> a factually similar case, the Supreme Court reached the same conclusion as in *Brown* by reversing the South Carolina state court's conviction of Black citizens for violating the state's peaceful assembly statute.<sup>94</sup> In *Edwards*, a South Carolina magistrate convicted 187 African American high school and college students of violating South Carolina's peaceful assembly laws.<sup>95</sup> After assembling at Columbia's Zion Baptist Church on the morning of March 2, 1961, the petitioners walked at noon in separate groups of approximately fifteen people each to the South Carolina state legislature.<sup>96</sup> Their purpose was to express dissatisfaction with the state's racially discriminatory laws.<sup>97</sup>

After their peaceful and otherwise non-eventful arrival at the state capitol, uniformed police officers advised the demonstrators that if they did not disperse, they would be arrested.<sup>98</sup> Rather than dispersing, however, the

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91. *Id.* at 141–42 (internal citations omitted).

92. *See id.* Moreover, in addressing the related Fourteenth Amendment Equal Protection Clause issue of the discriminatory use of public libraries, the Court wrote that “[a] State or its instrumentality may, of course, regulate the use of its libraries or other public facilities. But it must do so in a reasonable and nondiscriminatory manner, equally applicable to all and administered with equality to all.” *Id.* at 143.

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

94. *Id.* at 238.

95. *Id.* at 229–30.

96. *Id.*

97. *Id.* Such a “petitioning” of government for redress of grievances was clearly political in nature and presumably the type of express protection the Framers intended to include in the First Amendment. *See supra* note 25 and accompanying text.

98. *Edwards*, 372 U.S. at 233.



activists began “listening to a ‘religious harangue’ by one of their leaders, and loudly singing ‘The Star Spangled Banner’ and other patriotic and religious songs, while stamping their feet and clapping their hands. After 15 minutes had passed, the police arrested the petitioners and marched them off to jail.”<sup>99</sup> Subsequently, the petitioners were convicted in state court for violating the state’s peaceful assembly statute, and the South Carolina Supreme Court affirmed the conviction.<sup>100</sup>

In reversing the petitioners’ convictions, the U.S. Supreme Court ruled that, “South Carolina infringed the petitioners’ constitutionally protected rights of free speech, free assembly, and the freedom to petition for redress of their grievances.”<sup>101</sup> Moreover, the Court recognized the nexus between the direct action of the Movement and the First and Fourteenth Amendments, by writing:

It has long been established that these First Amendment freedoms are protected by the Fourteenth Amendment from invasion by the states . . . . The circumstances in this case reflect an exercise of these basic constitutional rights in their most pristine and classic form. The petitioners felt aggrieved by laws of South Carolina which allegedly “prohibited Negro privileges in this State.” They peaceably assembled at the site of the State Government and there peaceably expressed their grievances “to the citizens of South Carolina, along with the Legislative Bodies of South Carolina.” Not until they were told by police officials that they must disperse on pain of arrest did they do more. Even then, they but sang patriotic and religious songs after one of their leaders had delivered a “religious harangue.” There was no violence or threat of violence on their part, or on the part of any member of the crowd watching them.<sup>102</sup>

Furthermore, in addressing the relationship between the First and Fourteenth Amendments, the Court also wrote the following:

The Fourteenth Amendment does not permit a State to make criminal the peaceful expression of unpopular views. “A function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea.

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99. *Id.* (internal citations omitted).

100. *Id.* at 234.

101. *Id.* at 235.

102. *Id.* at 235–36 (internal citations omitted).

That is why freedom of speech . . . is . . . protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest . . . There is no room under our Constitution for a more restrictive view. For the alternative would lead to standardization of ideas either by legislatures, courts, or dominant political or community groups.”<sup>103</sup>

Accordingly, the Supreme Court reversed the convictions.<sup>104</sup>

#### B. THE IMPACT OF CIVIL DISOBEDIENCE ON COMMERCE CLAUSE JURISPRUDENCE

In addition to exemplifying suffering servant theology—a willingness to literally die for the cause in which they believed—the Freedom Riders also had a very significant effect on matters related to the Commerce Clause.<sup>105</sup> On June 3, 1946, the Supreme Court decided *Morgan v. Virginia*<sup>106</sup> and held that segregation on buses engaged in interstate commerce violated the Commerce Clause. Further, in December 1960, the Court expanded *Morgan* by opining in *Boynton v. Virginia*<sup>107</sup> that segregation in, *inter alia*, bus terminal waiting rooms and restaurants also violated the Commerce Clause. After the Freedom Riders endured horrific circumstances, on September 22, 1961, the strategy to pursue civil

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103. *Id.* at 237–38 (quoting *Terminiello v. Chicago*, 337 U.S. 1, 4–5 (1949)). Similarly, in *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958), the Supreme Court vacated an Alabama state court disclosure order requiring the state NAACP branch to produce lists of all its members as an unconstitutional violation of the Fourteenth Amendment’s Due Process Clause. *Id.* at 466. In so doing, the Court focused on the First Amendment’s rights of association and expression. *Id.* at 460–64. *See also* *NAACP v. Button*, 371 U.S. 415, 428–29 (1963) (reversing the Virginia Supreme Court of Appeals’ injunction against the Virginia NAACP Branch’s legal operations as an unconstitutional violation of the First and Fourteenth Amendments).

104. *Edwards*, 372 U.S. at 238. *See also* ANN FAGAN GINGER, *THE LAW, THE SUPREME COURT, AND THE PEOPLE’S RIGHTS* 29–36 (1977) (describing the significance of the *Edwards* Court’s ruling).

105. In relevant part, the Commerce Clause of the United States Constitution provides that “Congress shall have the power to . . . regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.” U.S. CONST. art. I, § 8, cl. 3.

106. *Morgan v. Virginia*, 328 U.S. 373, 385–86 (1946).

107. *Boynton v. Virginia*, 364 U.S. 454, 459–60 (1960) (overturning the conviction of an African American law student for trespassing because he was in a segregated restaurant in a bus terminal and declaring that such discriminatory practices violated the Interstate Commerce Act of 1887, as amended).

challenge prevailed when the Interstate Commerce Commission ruled that passengers on interstate carriers could be seated without regard to race.<sup>108</sup>

Furthermore, the Commission also ruled that such carriers could not use segregated terminals.<sup>109</sup> The Deep South's reality, however, was that the Court's rulings were ignored. Consequently, with the success of the Montgomery Bus Boycott as the wind at the Movement's back, along with the 1960 election of John F. Kennedy as president of the United States,<sup>110</sup> other nonviolent activists sought to further shape the Movement by achieving full citizenship for all people. In the next wave of nonviolent activities, the Bloody Sunday marchers endured public beatings that put the denial of suffrage for African Americans front and center for the world. Indeed, the marchers' bloody sacrifice helped expedite the VRA's enactment. In reflecting on that infamous day, Professor David Garrow writes that:

Television footage of the eerie and gruesome attack produced immediate national outrage. King issued a public call for civil rights supporters across the nation to come to Selma to show their support and join a second attempted march; congressmen of both parties called upon President Lyndon B. Johnson to intervene in Alabama and to speedily put voting

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108. 49 C.F.R. 180a (1963). *See also* United States v. City of Jackson, 318 F.2d 1 (5th Cir. 1963); *Freedom Fighters: Freedom to Travel*, PBS, <http://www.pbs.org/wgbh/americanexperience/freedomriders/issues/freedom-to-travel> (last visited Nov. 3, 2011).

109. 49 C.F.R. 180a (1963). *See also* ARSENAULT, *supra* note 2, at 439–41. After the Interstate Commerce Commission's unanimous eleven member ruling, beginning November 1, 1961, all interstate carriers "would be required to display a certificate that read 'Seating aboard this vehicle is without regard to race, color, creed, or national origin, by order of the Interstate Commerce Commission.'" *Id.* at 439.

110. Prior to the controversial and judicially decided 2000 presidential election, the 1960 election was reputed to be the closest in American history. *See, e.g.*, CHRISTOPHER MATTHEWS, KENNEDY & NIXON: THE RIVALRY THAT SHAPED POSTWAR AMERICA 170–80 (1996). In explaining part of the African American community's new allegiance to then-Senator Kennedy in the 1960 election, sociology scholar Antoine Joseph posits: A strong argument can be made that John F. Kennedy owed his election in 1960 to the phone calls he made to Coretta Scott King. His phone calls received wide publicity in the black press, but were virtually ignored by the white media. Kennedy was the beneficiary of a dramatic shift in the black vote. In 1956, blacks had voted Republican by a 60-to-40 margin, but in the 1960 election they voted Democrat by a 70-to-30 margin. The campaign's clever usage of Kennedy's concern for the jailed Martin Luther King stimulated black turnout, while the white press's neglectfulness prevented a backlash. JOSEPH, *supra* note 34, at 122. *See also* MARTIN LUTHER KING, JR., *Atlanta Arrest and Presidential Politics*, in THE AUTOBIOGRAPHY OF MARTIN LUTHER KING, JR. 144–50 (Clayborne Carson ed., 1998).

rights legislation before Congress. Johnson's Justice Department aides had already been hard at work preparing a comprehensive voting rights bill, but the "bloody Sunday" attack and the national reaction to it spurred the White House to press for a faster completion of the drafting process.<sup>111</sup>

Indeed, for King and other leaders of the Movement, the VRA was the promised land of political and social inclusion that resulted from prolonged sacrificial suffering. It was an empirical measure of the success of civil disobedience and redemptive suffering.<sup>112</sup>

#### V. THE FRUITS OF CIVIL DISOBEDIENCE: PASSAGE OF THE VOTING RIGHTS ACT OF 1965 AND ITS IMPACT ON AMERICAN LIFE

*Nonviolence is an orphan among democratic ideas. It has nearly vanished from public discourse even though the most basic element of free government—the vote—has no other meaning. Every ballot is a piece of nonviolence, signifying hard-won consent to raise politics above firepower and bloody conquest. Such compacts work more or less securely in different lands. Nations gain strength from vote-based*

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111. Garrow, *Bridge to Freedom*, *supra* note 69, at 206. *See also* GARROW, *PROTEST AT SELMA*, *supra* note 8, at 73–77. On Bloody Sunday, uniformed officers brutally beat clergy and unarmed laity. BRANCH, *supra* note 24, at 54–55. As historian Taylor Branch writes:

Doctors and nurses worked feverishly through more than a hundred patients, bandaging heads, daubing eyes, shipping more serious cases to the only local hospital that would treat them—Good Samaritan, a Catholic mission facility run by the Edmundite Order in a Negro neighborhood. . . . Lafayette Surney found John Lewis at Good Samaritan two hours after the rampage, admitted for a fractured skull. FBI agents reported the most common injuries to be lacerations and broken bones, but Lewis and Surney alike saw more suffering from tear gas that still seeped out of the patients' saturated clothes.

*Id.*

112. *See, e.g.*, GARROW, *PROTEST AT SELMA*, *supra* note 8, at xii (discussing the 1976 success of then-President-elect Jimmy Carter, as a direct and empirically measurable consequence of increased Black voters—resulting from the VRA—in states including Louisiana, Mississippi, North Carolina, and South Carolina). Further, Professor Joseph also chronicles:

Between 1964 and 1988 the percentage of registered blacks in the eleven southern states grew from 43 percent to 64 percent. In the five states of the [D]eep South, black registration rose from 22.5 percent to 65 percent. The largest increases came in the southern states that had voted in 1964 for [Republican nominee Barry] Goldwater. In sum, the Voting Rights Act swamped the existing systems of disfranchisement.

JOSEPH, *supra* note 34, at 126 (internal citations omitted).

*institutions in commerce and civil society, but the whole architecture of representative democracy springs from the handiwork of nonviolence.*

—Taylor Branch, *At Canaan's Edge*<sup>113</sup>

Although the Movement's leaders had many goals, this Article argues that the Movement's main goal was to achieve full civic participation without racial discrimination. The enactment of the Civil Rights Act of 1964<sup>114</sup> and the VRA—legislative achievements achieved through civil disobedience—suggests that the Movement was indeed successful.<sup>115</sup> Moreover, although both acts were extremely significant milestones in the Movement's history, the enactment of the VRA better reflects the Movement's success because it paved the way for Black political participation in American democracy.<sup>116</sup>

113. BRANCH, *supra* note 24, at xi.

114. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified in scattered sections of 42 U.S.C.).

115. The author respectfully acknowledges other scholars' opinions may differ as to whether the VRA was the Movement's most significant measure of success. *See, e.g.*, Oppenheimer, *supra* note 11, at 645 ("The [Civil Rights Act] was probably the most important legislation enacted by the United States Congress in the twentieth century."). As advanced herein, however, because of the VRA's empirical measure of success, the author respectfully argues the VRA was the Movement's crowning achievement. As recent history records, "[i]n 1990, the twenty-fifth anniversary of the Voting Rights Act, Virginia would have an elected [B]lack governor, there would be 24 [B]lack members of Congress, 417 [B]lack state legislators, 4,388 [B]lack officers of city and county governments, and six of the ten largest cities would have [B]lack mayors." JOSEPH, *supra* note 34, at 135 (internal citations omitted).

116. *See, e.g.*, Jonathan C. Augustine & Hon. Ulysses Gene Thibodeaux, *Forty Years Later: Chronicling the Voting Rights Act of 1965 and Its Impact on Louisiana's Judiciary*, 66 LA. L. REV. 453, 453–94 (2006) (detailing the significant increase in the number of African American lawyers elected to the bench in the state of Louisiana under the VRA and litigation filed pursuant thereto). *See also* ALEX POINSETT, WALKING WITH PRESIDENTS: LOUIS MARTIN AND THE RISE OF BLACK POLITICAL POWER 150–53 (1997) (discussing the advances many African Americans were able to make after the VRA became law, especially through lawsuits in southern states including Mississippi, Louisiana, and Alabama). Furthermore, in also discussing the VRA as the Movement's measure of success, Professor Garrow writes that "[t]he Voting Rights Act of 1965 revolutionized Black access to the ballot throughout most of the Deep South. In so doing, it changed forever the politics of those states and, indirectly, those of the entire nation." GARROW, PROTEST AT SELMA, *supra* note 8, at 1. *See also* Adam B. Cox & Thomas J. Miles, *Judging the Voting Rights Act*, 108 COLUMBIA L. REV. 1, 2 (2008) ("The Voting Rights Act has dramatically reshaped the political landscape of the United States. In the four decades since its enactment, it has

## A. THE NECESSITY TO PASS VOTING RIGHTS LEGISLATION

The Movement's leaders recognized that its success would be incomplete unless it resulted in the extension of voting rights to Blacks. For example, Andrew Young, an ordained United Church of Christ minister and one of the Movement's chief lieutenants, who later served as a U.S. ambassador to the United Nations, a member of Congress, and a mayor of Atlanta, writes that "the Civil Rights Act . . . though historic and important, wasn't sufficient without guarantees of the ballot."<sup>117</sup> In discussing the very deliberate decision King and other civil rights activists made to pursue legislation that would protect all citizens' voting rights, it was apparent that the Civil Rights Acts of 1957 and 1960 were simply not enough. Blacks, especially those in the Deep South, needed a specific federal law aimed at protecting the constitutionally provided right to vote.<sup>118</sup> Indeed, prior to the VRA's passage in 1965, the Supreme Court heard numerous cases addressing voting rights violations under applicable provisions of the Civil Rights Acts of 1957 and 1960.<sup>119</sup> These cases proved that case-by-case litigation of voting rights claims under the then civil rights laws would only result in piecemeal gains.<sup>120</sup> Consequently, it was essential that both the

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helped substantially expand political opportunities for minority voters and has contributed to the radical realignment of southern politics").

117. ANDREW YOUNG, *AN EASY BURDEN: THE CIVIL RIGHTS MOVEMENT AND THE TRANSFORMATION OF AMERICA* 326 (1996). Both the Civil Rights Act of 1964 and Voting Rights Act of 1965 were upheld as valid congressional enactments after judicial challenge before the United States Supreme Court. *See, e.g.*, *South Carolina v. Katzenbach*, 383 U.S. 301 (1966) (upholding challenged provisions of the Voting Rights Act as constitutional); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964) (upholding as valid the public accommodations provisions of the Civil Rights Act of 1964).

118. *See generally* Garrow, *Bridge to Freedom*, *supra* note 69, at 204. Further, notwithstanding the Civil Rights Acts of 1957 and 1960, as Professor Garrow writes in addressing the voting demographics in Selma, Alabama's Dallas County in April 1961 "Blacks comprised approximately half of the voting-age population of Dallas County, within which Selma was situated, but only 156 of them, out of 15,000 or so, were registered voters, and only fourteen had been added to the rolls since 1954." GARROW, *PROTEST AT SELMA*, *supra* note 8, at 31.

119. *See, e.g.*, *United States v. Mississippi*, 380 U.S. 128 (1965); *Gomillion v. Lightfoot*, 364 U.S. 339 (1960); *Baker v. Carr*, 369 U.S. 186 (1962).

120. Tricia Ann Martinez, Comment, *When Appearance Matters: Reapportionment Under the Voting Rights Act and Shaw v. Reno*, 54 LA. L. REV. 1335, 1336 (1994). Moreover, as Kennedy chronicles, "[a]lthough the Fifteenth Amendment to the Constitution prohibited states from disenfranchising persons on account of race, the White South openly and successfully used private power and state authority to deny the Negro the ballot." Kennedy, *supra* note 52, at 1006 (internal citations omitted).

Movement's religious leaders seek to protect voting rights and that Congress act to prevent continued discrimination at the polling place.<sup>121</sup> The timing was right and the Movement was poised to draw attention to the drastic problems of racial inequality.

With the Movement well under way, the Bloody Sunday demonstrators only "attempted to draw attention to the political disparities and inequalities [that] blacks were forced to endure because [they] were so frequently denied the right to vote."<sup>122</sup> It worked. On March 15, 1965—just over a week after Bloody Sunday—President Johnson submitted a voting rights bill to Congress, which, in turn, acted pursuant to its constitutional authority<sup>123</sup> and passed the VRA on August 4, 1965.<sup>124</sup> President Johnson signed the VRA into law on August 6. The theology of civil disobedience had proven successful.

The VRA's passage unquestionably caused significant changes in the United States.<sup>125</sup> In relevant part and of major importance, the VRA

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121. See, e.g., *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 521–22 (1989) (noting that Section 5 of the Fourteenth Amendment gives Congress the unique power to combat state existent problems of race) (Scalia, J., concurring). Moreover, as the Supreme Court noted the year prior to the Act's passage, "[u]ndoubtedly, the right of suffrage is a fundamental matter in a free and democratic society." *Reynolds v. Sims*, 377 U.S. 533, 561–62 (1964).

122. Augustine & Thibodeaux, *supra* note 116, at 453–54. African Americans were originally granted the right to vote during Reconstruction, with Amendment XV to the United States Constitution ("the Fifteenth Amendment"). In relevant part, the Fifteenth Amendment provides that "[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." U.S. CONST. amend. XV, § 1.

123. The Fifteenth Amendment expressly provides that "Congress shall have the power to enforce this article by appropriate legislation." U.S. CONST. amend. XV, § 2.

124. See POINSETT, *supra* note 116, at 153. With respect to the VRA's enactment and immediate effects: The Voting Rights Act included: (1) the prohibition of literacy tests and similar voting restrictions; (2) the empowerment of the attorney general to oversee federal elections in seven southern states by appointing examiners to register those denied the right to vote; and (3) instructions to the attorney general to challenge the constitutionality of poll taxes in state and local elections. JOSEPH, *supra* note 34, at 126.

125. See generally, Augustine, *supra* note 25, at 152 (discussing the election of several African Americans to the United States House of Representatives in congressional districts drawn under the VRA); Robert B. McDuff, *Judicial Elections and the Voting Rights Act*, 38 LOY. L. REV. 931, 939–45 (1993) (detailing VRA cases in which he served as lead counsel with the Lawyers' Committee for Civil Rights Under Law that extended the Act to the elected judiciary). See also GARROW, *PROTEST AT SELMA*, *supra* note 8, at xi. Further, in discussing the VRA's significance, while also describing his then-work as an attorney with

contains two “meat and potatoes” provisions, sections 2 and 5. Section 2 applies universally to all jurisdictions and was originally incorporated into the VRA as a restatement of the Fifteenth Amendment.<sup>126</sup> Section 2 prohibits states and political subdivisions within states from instituting any voting qualifications, prerequisites, standards, procedures, or practices in a way that causes the denial or abridgement of the right to vote based on race or color.<sup>127</sup> By contrast, section 5 is considered the heart of the Act,<sup>128</sup> and is arguably the VRA’s most important provision. Section 5 applies to only certain covered states and political subdivisions (in other words, “covered jurisdictions”),<sup>129</sup> and requires those states and political subdivisions to acquire either judicial or administrative preclearance for any changes to their electoral laws, procedures, or practices.<sup>130</sup> Based on empirical evidence gathered prior to the VRA’s enactment, Section 5 was clearly

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President Johnson’s Office of Economic Opportunity (“OEO”) and associated work with the non-profit Voter Education Project (“VEP”), civil rights icon Vernon Jordan writes:

[T]he passage of the Voting Rights Act in August 1965 changed the entire landscape. For the first time, federal registrars came to the South to make sure that local officials did not thwart the enforcement of the law. From my office at the OEO, I understood immediately what this might mean: The VEP could now do better at the job it had been designed to do. With the help and protection of the federal government, money from this not-for-profit entity could be used to transform the Southern electorate and, along with it, the South.

VERNON E. JORDAN, JR. & ANNETTE GORDON-REED, *VERNON CAN READ! A MEMOIR* 179 (2001).

126. See, e.g., National Conference of State Legislatures, *REDISTRICTING LAW 2000* 47 (NCSL 1999), available at <http://www.senate.leg.state.mn.us/departments/scr/redist/red2000/ch2equal.htm> [hereinafter NCSL]; April D. Dulaney, Comment, *A Judicial Exception for Judicial Elections: “A Burning Scar on the Flesh of the Voting Rights Act,”* 65 TUL. L. REV. 1223, 1223–24 (1991); M. David Gelfand, *Voting Rights and the Democratic Process: Ongoing Struggles and Continuing Questions*, 17 URB. L. 333, 333–34 & n.3 (1985).

127. NCSL, *supra* note 126, at 47–48 (quoting 42 U.S.C. § 1973 (a)). The vast majority of section 2 claims address challenges to multi-member governmental bodies like city councils, schools boards, county commissions, and state legislatures. Kristen Clarke, *The Obama Factor: The Impact of the 2008 Presidential Election on Future Voting Rights Litigation*, 3 HARV. L. & POL’Y REV. 59, 62 (2009).

128. See *South Carolina v. Katzenbach*, 383 U.S. 301, 315 (1966).

129. See Augustine & Thibodeaux, *supra* note 116, at 459.

130. See NCSL, *supra* note 126, at 48. Moreover, when the VRA was passed, “Section 5 was considered one of the primary enforcement mechanisms to ensure that minority voters would have an opportunity to register to vote and fully participate in the electoral process free of discrimination.” *Id.* at 80.



necessary to guarantee the opportunity and right for Blacks to participate in the electoral process.<sup>131</sup>

By precipitating Black voter registration gains and targeting discriminatory election techniques, the VRA gave southern Blacks in small towns and rural communities their first opportunity to meaningfully participate in the American electoral process.<sup>132</sup> Even in places that were not “covered jurisdictions,”<sup>133</sup> African Americans achieved significant firsts with election to offices never before held by Blacks. For example, in 1967, Richard Hatcher and Carl Stokes, elected as mayor of Gary, Indiana, and Cleveland, Ohio, respectively, became the first African American mayors of major cities.<sup>134</sup> Without question, their successful elections, followed in succession by many Black candidates across the United States, showed that the Movement had progressed from “protest to politics.”<sup>135</sup> The VRA has also resulted in longer-term political gains. In Louisiana, for example, as of 2006, 20.8% of the state court judges were African American, compared with 4.8%, 3.5%, and 9.3% in America’s three largest states: California, Texas, and New York, respectively.<sup>136</sup> Moreover, the resulting changes would continually be seen over decades to come in such cities as New Orleans, Atlanta, Detroit, Los Angeles, Seattle, and New York.<sup>137</sup> As a testament to the Act’s continued effectiveness, and in tribute to the Movement, Congress reauthorized the VRA in 2006.<sup>138</sup>

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131. “Before passage of section 5, only 29 percent of [b]lacks were registered to vote in Alabama, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, and Virginia, compared to 73.4 percent of [w]hites. In Mississippi, only 6.7 percent of [b]lacks were registered. By 1967 . . . more than 52 percent of [b]lacks were registered to vote in these states.” *Id.* at 80 n.345 (internal citations omitted).

132. Garrow, *Bridge to Freedom*, *supra* note 69, at 208.

133. See Augustine & Thibodeaux, *supra* note 116, at 459.

134. See Gerald Gill, *Power!: 1966–1968*, in *THE EYES ON THE PRIZE CIVIL RIGHTS READER: DOCUMENTS, SPEECHES, AND FIRSTHAND ACCOUNTS FROM THE BLACK FREEDOM STRUGGLE* 334 (Clayborne Carson et al., eds., 1991).

135. *Id.* at 334–35.

136. See Augustine & Thibodeaux, *supra* note 116, at 488–89, n.210 (internal citations omitted).

137. See Gill, *supra* note 134, at 337 (describing the first-ever elections of Blacks to municipal offices).

138. After what was arguably its most intensive fact-finding, Congress passed the Fannie Lou Hamer, Rosa Parks and Coretta Scott King Voting Rights Reauthorization and Amendments Act of 2006. See Jim Sensenbrenner, Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, H.R. REP. NO. 109–478, 5 (2006); 152ND CONG. REC. S7949, S7967–S7968 (daily ed. July 20,

## B. THE VRA'S FUTURE

After Congress's 2006 VRA reauthorization, the Supreme Court was called upon to address section 5's constitutionality in *Northwest Austin Municipal Utility District No. 1 v. Holder*.<sup>139</sup> Instead of doing so, however, the Court resolved the dispute by reversing a separate part of the appeal without addressing section 5's validity. Accordingly, although section 5 remains "alive," an argument can be made that it may not be "well."

In *Holder*, the petitioner was a small utility district with an elected board that was required to seek preclearance under section 5 before it could change anything related to its elections.<sup>140</sup> The utility district sought judicial preclearance by seeking relief under the Act's "bailout provision" in the VRA's section 4,<sup>141</sup> asserting that it should be released from preclearance because it met certain requirements.<sup>142</sup> Alternatively, the utility district argued if section 5 were interpreted to render it ineligible for section 4's bailout, section 5 was unconstitutional. The federal district court rejected both claims, opining the utility district was not eligible for section 4's bailout and, considering the extensive and comprehensive legislative history associated with the Act's 2006 reauthorization,<sup>143</sup> Section 5's twenty-five year extension was indeed constitutional. The utility district appealed.<sup>144</sup>

In noting the *Holder* litigation's significance, yet deciding to resolve the matter by means other than looking at section 5's constitutionality, the Court wrote:

That constitutional question has attracted ardent briefs from dozens of interested parties, but the importance of the question does not justify our rushing to decide it. Quite the contrary: Our usual practice is to avoid the

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2006). Before reauthorizing the VRA, the House and Senate Judiciary Committees held congressional hearings between October 18, 2005 and July 13, 2006. *Id.*

139. *Nw. Mun.Util. Dist. No. 1 v. Holder*, 129 S.Ct. 2504 (2009).

140. *Holder*, 129 S.Ct. 2504, 2508.

141. To be eligible for Section 4's bailout, the interested political entity must seek declaratory relief before a three-judge panel of the United States District Court for the District of Columbia. 42 U.S.C. §§ 1973b (a)(1); 1973c(a). Among other things, the entity must show it has not been found liable of voting rights violations. *See generally*, 42 U.S.C. §§ 1973b(a)(1)(A)–(F).

142. *Id.*

143. *See supra* note 138 and accompanying text.

144. *Holder*, 129 S.Ct. 2504, 2508.

unnecessary resolution of constitutional questions. We agree that the district is eligible under the Act to seek bailout. We therefore reverse, and do not reach the constitutionality of § 5.<sup>145</sup>

Consequently, the Act continues to survive, in that the Supreme Court's "look" at section 5 was only to look away. Further, in analyzing Chief Justice Robert's opinion, argument can also be made that the Act is existing only on life support.<sup>146</sup> Considering the Court's obvious writing on the wall, therefore, assuming Congress again extends the VRA in 2031, unless there is a drastic change in the judiciary's apparent disposition, the Act will not withstand constitutional challenge.<sup>147</sup>

## VI. APPLYING THE MOVEMENT'S LESSONS TO THE UPRISING IN EGYPT

Although the Egyptian protests were novel in the sense that they were among the first in which citizens demanded redress from a government using social media tools, including Facebook and Twitter,<sup>148</sup> the antecedent Movement occurring a half-century earlier in the United States provided a template for successful nonviolent direct action that informed civil disobedience protestors in Egypt. The Movement, motivated by both law and religion, showcased a model by which nonviolent direct action can lead to democracy. Indeed, there are significant parallels and similarities between the Movement's nonviolence and the issues that led to Mubarak's

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145. *Id.*

146. *See id.* at 2509–13 (noting the quantifiable improvements in Black voter registration and participation and providing a pessimistic rationale for the VRA's continued existence in the future).

147. *See* Stephen Ansolabehere, Nathaniel Persily & Charles Stewart III, *Race, Religion, and Vote Choice in the 2008 Election: Implications for the Future of the Voting Rights Act*, 123 HARV. L. REV. 1385 (2010) (using the 2008 election of Barack Obama, America's first Black president, as a case study in analyzing whether the VRA remains valid legislation considering its reasons for initial enactment and congressional reauthorization). *See also* Richard L. Hansen, *No Exit? The Roberts Court and the Future of Election Law*, 57 S. CAR. L. REV. 669, 678–82 (2006) (analyzing the Supreme Court's past VRA jurisprudence as a prediction of the Act's future status).

148. *See generally* Ashish Kumar Sen, *Yemenis Hit Streets, Demand Ruler's Ouster: Inspired by Protests in Tunisia and Egypt*, WASH. TIMES, Jan. 27, 2011, <http://www.washingtontimes.com/news/2011/jan/27/yemenis-take-to-streets-to-demand-rulers-ouster/?page=all>.

resignation in Egypt;<sup>149</sup> they include demands for voting rights,<sup>150</sup> diversity in citizen participation,<sup>151</sup> and the direct action of civil disobedience.<sup>152</sup> Arguably, of these commonalities, the most important and significant is the citizen desire for democratic participation in fair elections.

In Egypt, citizen frustration with the lack of a democratically elected government was the major catalyst that led to protest.<sup>153</sup> Similarly, prior to the VRA's enactment in 1965,<sup>154</sup> many American citizens, particularly Blacks in the South, were similarly denied the opportunity to vote for and freely elect candidates of their choosing.<sup>155</sup> Another similarity between the Movement and the more recent civil disobedience in Egypt is the diversity of citizen participation.<sup>156</sup> Egyptian protesters were ethnically diverse and drawn from a variety of religious and secular groups that united to oppose laws that they considered unjust. Likewise, the Movement was extremely diverse; its activists were Black and white, clergy and laity, and influenced by varied religious perspectives, all united in opposition to injustice.<sup>157</sup>

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149. Although the Egyptian protests were peaceful in nature, security forces killed at least 846 people and injured approximately 6,000. *Egypt Unrest: 846 Killed in Protests—Official Toll*, BBC NEWS, Apr. 19, 2011, <http://bbc.co.uk/news/world-middle-east-13134956>. See also INTERNATIONAL FEDERATION OF RED CROSS AND RED CRESCENT SOCIETIES, DISASTER RELIEF EMERGENCY FUND FINAL REPORT 2 (September 2011), available at <http://www.ifrc.org/docs/appeals/11/MDREG010dfr.pdf> (last visited Jan. 24, 2012). Similarly, although the Movement's dissident leaders were also nonviolent, see *supra* Part III, they were frequently forced to suffer through violent beatings at the hands of uniformed officers. The March 7, 1965, "Bloody Sunday" march over the Edmund Pettis Bridge in Selma, Alabama, for example, was the brutal event that hastened the VRA's passage and was the Movement's most infamous example of peaceful protesters being brutalized. See *infra* note 111 and accompanying text.

150. See *supra* note 2 and accompanying text.

151. See Heather Hurlburt, *Five Things to Understand About the Egyptian Riots*, THE NEW REPUBLIC, Jan. 28, 2011, <http://www.tnr.com/blog/jonathan-cohn/82416/five-things-you-should-know-about-the-riots-in-egypt>.

152. See, e.g., *Protests in Egypt and Unrest in Middle East—as it Happened*, THE GUARDIAN, Jan. 25, 2011, <http://www.guardian.co.uk/global/blog/2011/jan/25/middleeast-tunisia>.

153. See Stilt, *supra* note 4, at 336, and accompanying text.

154. Pub. L. No. 89-110, 79 Stat. 437 (codified as 42 U.S.C. § 1973, *et seq.*).

155. See *supra* Part IV.

156. See *supra* note 149 and accompanying text.

157. Similar to the diversity of activist participation in the Egyptian protests, see *supra* note 149 and accompanying text, as evidence of the citizen diversity in the Movement, "Black activists born and raised in the South accounted for six of the original thirteen Freedom Riders and approximately one-third of the four hundred-plus Riders who later

Both movements were successful in achieving their goals. In Egypt, civil disobedience led to Mubarak's resignation and the scheduled election of a new president in a multi-candidate election system.<sup>158</sup> In the United States, the VRA's passage led to increased citizen inclusion in a pre-existing election system.

## VII. CONCLUSION

The Movement was a testament to the interdisciplinary connectedness of law and religion. Moreover, the Movement's most quantifiable measure of success, the VRA, was the fruit of the suffering-servant tree whose roots were fed by immeasurable bloodshed. Indeed, the VRA's enactment resulted from acts of civil disobedience, undergirded by the Judeo-Christian sacrificial servant theology of the Movement's members. This theology was especially evidence in the Freedom Riders and the Bloody Sunday marchers.

For this Article's purposes, the Movement began with an act of civil disobedience. Rosa Parks's refusal to abandon her seat for a white person on a public bus in Montgomery, Alabama, was more than the act of a tired seamstress. It was a calculated opportunity to put into practice Judeo-Christian values evidenced in *Isaiah* and the gospel narratives. Moreover, the widespread news coverage of the brutal and senseless beatings suffered by the civilly disobedient dissidents on Bloody Sunday put the absolute need for the VRA at the front and center of national and international audiences. The Movement literally showed the world that so-called guaranteed rights under the First and Fourteenth Amendments were anything but guaranteed. Because of the marchers' willingness to suffer through police brutality and literally sacrifice themselves for a cause in which they believed, however, the VRA expeditiously became law.

The history of the celebrated acts of civil disobedience that led to the VRA's passage remains relevant as other nations move toward democracy. Accordingly, the Movement's Judeo-Christian theology was at least two-fold cause for celebrating civil disobedience in 2011. While the United

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joined the movement. The Freedom Rider movement was as interregional as it was interracial . . ." ARSENAULT, *supra* note 2, at 9.

158. See generally Amr Emam, *Elections in Egypt by the Fall, Leaders Say*, N.Y. TIMES, Mar. 30, 2011, <http://www.nytimes.com/2011/03/31/world/middleeast/31egypt.html>. See also Stilt, *supra* note 4, at 335 n.2.

States observed the fiftieth anniversary of the Freedom Rides, Egypt, influenced by the Movement, has embarked on the road to democracy.