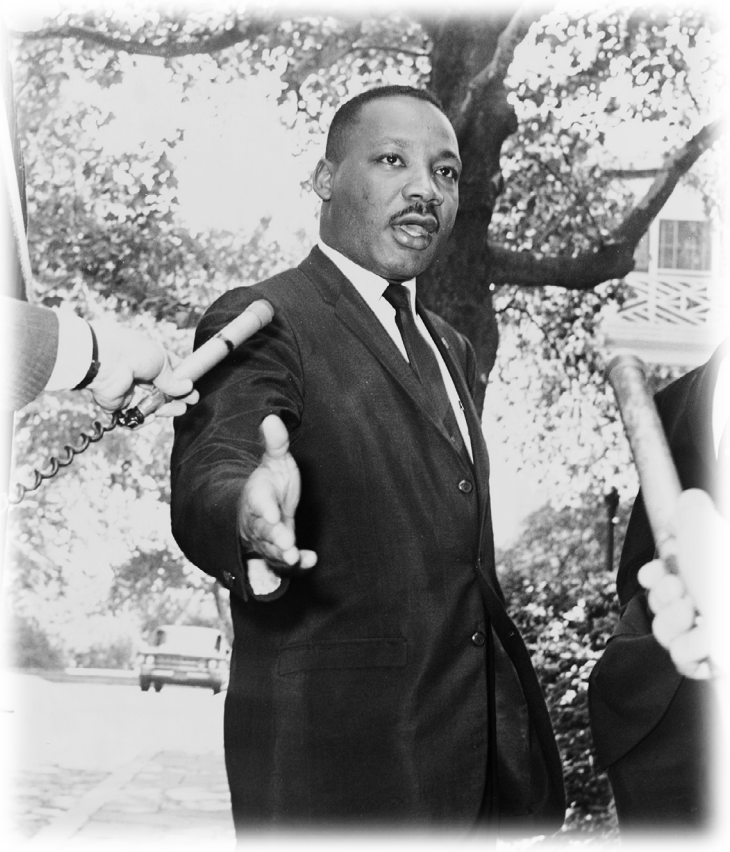
Walker
v.
City of Birmingham
1967



Martin Luther King Jr.

Federal Judicial Center
2020

Central Question

Could civil rights protestors challenge the constitutionality of a state court injunction, having already been charged with contempt of court for violating the injunction?

Historical Context

The city of Birmingham, Alabama, was one of the most significant sites of conflict during the African American civil rights movement of the 1960s. The city had long been a bastion of racial segregation and a place where whites frequently perpetrated acts of violence against African Americans. In 1963, activists in the Southern Christian Leadership Conference and the Alabama Christian Movement for Human Rights launched the Birmingham Campaign, which included protest marches, boycotts of local businesses that had engaged in racial discrimination, and sit-ins at segregated lunch counters.

On Good Friday and Easter Sunday of 1963, these activists participated in the public demonstrations that ultimately resulted in the *Walker* litigation. Prominent ministers Dr. Martin Luther King, Jr., Ralph Abernathy, and Fred Shuttlesworth were arrested for leading the demonstrations. During his eight-day incarceration, King authored his "Letter from Birmingham Jail," a public response to white ministers who had counseled patience in the battle for civil rights. King's missive explaining why nonviolent direct action was necessary and exhorting white moderates to do more to support racial justice became perhaps the most important written document of the civil rights era.

Soon after, protestors in Birmingham, including schoolchildren, were subjected to violent assaults by police wielding nightsticks, attack dogs, and high-pressure fire hoses. These attacks, directed by Commissioner of Public Safety Eugene "Bull" Connor, repulsed a national television audience witnessing these events on the evening news and eventually influenced President John F. Kennedy to advocate publicly for civil rights.

The protests led to a compromise with city business leaders that included the desegregation of lunch counters, restrooms, and water fountains, but racial conflict in Birmingham persisted. After the campaign, whites carried out several terrorist attacks on African Americans, including the firebombing of a Baptist church that resulted in the killing of four young girls. Nevertheless, the Birmingham Campaign was a watershed moment in the civil rights movement, inspiring similar actions in other cities in the Deep South and ultimately helping to bring about passage of the Civil Rights Act of 1964.

Legal Debates Before *Walker*

The African American civil rights movement heightened longstanding tensions regarding the exercise of federal judicial power over state and local officials. This conflict was perhaps

most evident in the context of resistance to school desegregation in the wake of *Brown v. Board of Education* and subsequent cases. The potential for federal-state conflict also existed when local officials attempted to suppress public protest activities through the use of court injunctions. Protestors barred by court order from conducting marches, pickets, or sit-ins faced criminal charges for contempt of court if they disobeyed. A court challenge to vindicate their constitutional rights, however, would be lengthy and difficult, as the plaintiffs would have to proceed through an often-hostile state court system before having a small chance to reach the Supreme Court of the United States. This dilemma was at the heart of the *Walker* case.

The most significant precedent relevant to *Walker* was *Howat v. Kansas*, decided by the Supreme Court in 1922. There, the defendants had been convicted in state court of violating an injunction forbidding them from organizing a coal miners' strike. Before both the trial court and the Supreme Court of Kansas, the defendants argued that the injunction was invalid because it had been issued pursuant to an unconstitutional statute. The Supreme Court of Kansas upheld the convictions, holding that even if the injunction had been issued in error, the defendants could challenge it only through the standard appeal process and not as a defense to an action for contempt. The Supreme Court of the United States affirmed, explaining, "It is for the court of first instance to determine the question of the validity of the law, and until its decision is reversed for error by orderly review, either by itself or by a higher court, its orders based on its decision are to be respected, and disobedience of them is contempt of its lawful authority, to be punished."

In a similar case decided in 1947, *U.S. v. United Mine Workers of America*, the Supreme Court affirmed convictions for contempt based on violation of an anti-strike injunction issued by a U.S. district court. The defendants argued that the district court had lacked the necessary jurisdiction to issue the injunction, but the Supreme Court upheld the convictions. Citing *Howat*, the Court ruled that the injunction required obedience until it was "reversed by orderly and proper proceedings." The district court had the authority, the Court explained, to preserve existing conditions while it considered the question of its jurisdiction. The defendants, having decided for themselves that the injunction was invalid and proceeding to violate it, "acted at their peril," and were guilty of contempt.

In a 1962 case, *In re Green*, the Court ruled the opposite way, reversing convictions for violating an injunction against picketing by a labor union. The defendants argued that the injunction was invalid because it had been issued without a hearing and addressed a matter that was within the exclusive jurisdiction of the National Labor Relations Board. The Supreme Court held that the state court could not hold someone in contempt for violating an injunction that was preempted by federal law. The state court's failure to hold a hearing to establish whether the matter was exclusively federal before issuing the

injunction and holding the defendants in contempt was a violation of the defendants' due process rights under the Fourteenth Amendment. The trial court's action also constituted undue state interference with federal policy. Two justices dissented, arguing that the Court had not been justified in departing from the *Howat* and *Mine Workers* precedents.

The Case

A Birmingham, Alabama, ordinance required a permit from the city commission before "any parade or procession or other public demonstration" could be held on the city's streets. In April 1963, African American civil rights activists sought such a permit from Bull Connor, who refused, saying, "I will picket you over to the City Jail." Connor followed up this refusal with a telegram stating that he was without authority to issue the permit without the approval of the entire commission and demanding that no picketing take place.

A few days later, city officials petitioned a state circuit court for an injunction against the protestors forbidding them from conducting any public demonstrations in Birmingham. The court issued the injunction in a proceeding of which the protestors were not notified in advance and at which they had no attorney present. Upon learning of the injunction, the protestors issued a statement declaring the court's action "raw tyranny under the guise of maintaining law and order." They quickly decided to defy the injunction and proceed with their plans for demonstrations on Good Friday and Easter Sunday.

The protests that ensued resulted in several arrests, including King's. On the following Monday, the protestors filed a motion in the state circuit court seeking to have the injunction dissolved on the grounds that it violated their First Amendment rights. At the same time, city officials filed a motion asking the court to require the protestors to show why they should not be held in contempt of court. The judge refused to consider the protestors' First Amendment arguments on the basis that they had not challenged the injunction in court before violating it. Finding that the court had possessed jurisdiction to issue the injunction and that the protestors had knowingly disobeyed it, the judge held them in contempt of court, sentencing them to five days in jail and a $50 fine. The Supreme Court of Alabama affirmed the convictions, agreeing with the lower court that the constitutionality of the injunction and the ordinance on which it was based could not be challenged in a contempt proceeding. The protestors appealed to the Supreme Court of the United States.

The Supreme Court's Ruling

In a 5–4 decision, the Supreme Court affirmed the Birmingham protestors' convictions for contempt of court. Justice Potter Stewart wrote the Court's opinion, which was joined by Justices John Marshall Harlan, Hugo Black, Byron White, and Tom C. Clark. The majority acknowledged that the injunction and the city ordinance on which it was based

might be unconstitutional, but like the Alabama courts, faulted the protestors for not attempting to challenge the injunction in state court before violating it. Alabama law, the Court pointed out, clearly established that a party could not violate a court order and then challenge the order's constitutionality when appealing a conviction for contempt. "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," wrote Stewart. "One may sympathize with the petitioners' impatient commitment to their cause. But respect for judicial process is a small price to pay for the civilizing hand of law, which alone can give abiding meaning to constitutional freedom." Implicit in the Court's opinion was a concern for judicial federalism. Parties should not, the majority believed, be able to circumvent the state court system by asking a federal court to invalidate an injunction that had not been appropriately challenged in a state tribunal.

Chief Justice Earl Warren and Justices William Brennan, William Douglas, and Abe Fortas voted to reverse the convictions, with all but Fortas writing dissenting opinions. Warren emphasized his belief that the protestors should be treated no differently from someone who had violated a statute in order to test its constitutionality in court, which was a common practice and was often required in order to bring a legal challenge. The Birmingham ordinance clearly violated the First Amendment by circumscribing basic forms of expression, Warren asserted. The injunction, therefore, "transformed the command of an unconstitutional statute into an impregnable barrier, challengeable only in what likely would have been protracted legal proceedings." The city's tactic, Warren believed, was "a gross misuse of the judicial process" designed "to make it possible to punish petitioners for contempt rather than for violating the ordinance, and thus to immunize the unconstitutional statute and its unconstitutional application from any attack."

Justice Douglas agreed that the Birmingham ordinance was blatantly unconstitutional and that the petitioners should not have been required to bring a court challenge before engaging in their protests. "For if a person must pursue his judicial remedy before he may speak, parade, or assemble," he wrote, "the occasion when protest is desired or needed will have become history and any later speech, parade, or assembly will be futile or pointless." Similarly, Justice Brennan found the argument that the petitioners should have challenged the injunction first to be "plainly repugnant to the principle that First Amendment freedoms may be exercised in the face of legislative prior restraints."

Whereas the majority had cited *Howat* in its opinion, the dissenters argued that Howat had been limited by *In re Green*. In *Green*, the state court had erred by not holding a hearing to determine whether the injunction it issued was within the exclusive domain of the National Labor Relations Board. In light of that holding, the dissenters argued, the state court's failure to hold a pre-injunction hearing to allow the protestors to argue against

the injunction on First Amendment grounds could not be acceptable. Moreover, the dissenters pointed out, the injunctions in both *Howat* and *Mine Workers* had been issued to preserve the status quo while the court decided an underlying dispute. The injunction here, by contrast, was aimed only at preventing protest activity.

Aftermath and Legacy

Following his arrest during the Good Friday 1963 protest that resulted in the *Walker* case, Reverend Shuttlesworth was convicted of violating the Birmingham ordinance prohibiting public demonstrations without a permit. He was sentenced to ninety days hard labor and an additional forty-eight days for failing to pay a fine and court costs amounting to $99. His conviction was reversed by the Alabama Court of Appeals, but then reinstated by the Alabama Supreme Court. In *Shuttlesworth v. City of Birmingham* (1969), the Supreme Court of the United States reversed the conviction, striking down the statute on First Amendment grounds. The law, wrote Justice Potter Stewart for the majority, "fell squarely within the ambit of the many decisions of this Court over the last 30 years, holding that a law subjecting the exercise of First Amendment freedoms to the prior restraint of a license, without narrow, objective, and definite standards to guide the licensing authority, is unconstitutional." The language of the Birmingham ordinance was broad and vague, giving the city commission unlimited discretion in its application. The Court cited the factual record in the *Walker* case to show that the city authorities would not have issued the Good Friday protestors a permit under any circumstances, thereby demonstrating that the ordinance was not being applied objectively.

The *Walker* case is often cited by legal scholars as an example of the general rule that a party may not raise a challenge to the validity of an injunction in a contempt proceeding after violating the injunction. The case is significant for reasons going far beyond the basic legal rule it embodies, however. It arose from one of the most significant events of the civil rights movement and provides insight regarding the tactics local officials used to obstruct protest and maintain racial hierarchy, as well as the difficulties civil rights protestors faced not only in state courts, but before the federal judiciary as well.

Discussion Questions

- Do you agree with the protestors' decision to violate the injunction? Why or why not?
- What was the reasoning behind the Supreme Court's ruling that the protestors could not challenge the constitutionality of the injunction in a contempt proceeding? Do you agree?
- Is an injunction prohibiting protest activities ever acceptable? If so, under what circumstances?
- Did the *Walker* case ultimately help or hurt the civil rights movement? How so?

Documents

Foster Hailey, *The New York Times*, April 13, 1963

The Birmingham protests and the violation of the Alabama state court injunction made national news. A front-page article in the New York Times *reported on the events, including the arrest of Martin Luther King, Jr.*

The Rev. Dr. Martin Luther King Jr. was arrested this afternoon when he defied a court injunction and led a march of Negroes toward the downtown section.

The marchers were halted after four and a half blocks—but not before more than a thousand shouting, singing Negroes had joined in the demonstration.

In addition to Dr. King, the Rev. Dr. Ralph D. Abernathy, secretary of the Southern Christian Leadership Conference, and more than 60 others were taken into custody. There was no violence.…

Dr. King was among the first to be put behind bars.

Safety Commissioner T. Eugene Connor, who directed the arrests, said Dr. King would be charged with violation of a city ordinance in parading without a permit and also with defying a state court injunction against demonstrations.

The penalty on conviction of the city charge is 180 days in jail and a fine of $100. Punishment for the injunction violation could be much more severe. The injunction was issued by Circuit Court Judge W. A. Jenkins Wednesday night. Dr. King announced yesterday his intention to defy it.…

The march was the most spectacular of many demonstrations held since a direct action assault on Birmingham racial barriers was begun 10 days ago under the leadership of the local affiliate of the Southern Christian Leadership Conference.…

Two motorcycle patrolmen and two detectives grabbed Dr. King and Dr. Abernathy and hustled them into a police van a few steps away. The order of the marchers, which had started out two abreast, had been disrupted as eager onlookers joined in behind them and on either side. Thus police had difficulty trying to sort the marchers from spectators. . . .

There were shouts of anger from the several hundred Negroes who were in sight of the downtown arrests and who had been singing and clapping hands as they walked or ran alongside the marchers.

When police moved toward them and ordered them back west down Fifth Avenue most of them gave way freely. Three who stopped to argue with policemen were arrested.

The police quickly cleared the streets and sidewalks for two blocks and even moved onlookers out of a small park on 17th Street, but Mr. Connor ordered them to let the people in the park alone.

"Let them stay there and sing all they want to," he said.

When the demonstration started, Mr. Connor asked an onlooker what he thought of the parade, but without pausing for an answer, inquired:

"Was King in that bunch?"

Told that he was, Mr. Connor said:

"That's what he came down here for, to get arrested. Now he's got it."

What effect Dr. King's arrest will have on the campaign is problematical. His father and brother, the latter a clergyman at near-by Ensley, Ala., are still here and all the local leaders are now out of jail.…

Dr. King and the local leaders say that no matter who is arrested others will step forward to take their place. They say that they campaign will be continued until there is at least a beginning made in easing discrimination.

Document Source: Foster Hailey, "Dr. King Arrested at Birmingham," *New York Times*, April 13, 1963, p. 1, 15.

Rev. Martin Luther King, Jr., "Letter from Birmingham Jail," April 16, 1963

While in jail following his arrest during the Birmingham protest, King penned what became one of the most important documents to emerge from the African American civil rights movement. In response to white ministers who had counseled patience, King explained why nonviolent direct action was needed without further delay. The letter was widely published soon afterwards.

My Dear Fellow Clergymen:

While confined here in the Birmingham city jail, I came across your recent statement calling my present activities "unwise and untimely." Seldom do I pause to answer criticism of my work and ideas. If I sought to answer all the criticisms that cross my desk, my secretaries would have little time for anything other than such correspondence in the course of the day, and I would have no time for constructive work. But since I feel that you are men of genuine good will and that your criticisms are sincerely set forth, I want to try to answer your statement in what I hope will be patient and reasonable terms.

I think I should indicate why I am here in Birmingham, since you have been influenced by the view which argues against "outsiders coming in." …

I am in Birmingham because injustice is here. Just as the prophets of the eighth century B.C. left their villages and carried their "thus saith the Lord" far beyond the boundaries of their home towns, and just as the Apostle Paul left his village of Tarsus and carried the gospel of Jesus Christ to the far corners of the Greco Roman world, so am I compelled

to carry the gospel of freedom beyond my own home town. Like Paul, I must constantly respond to the Macedonian call for aid.

Moreover, I am cognizant of the interrelatedness of all communities and states. I cannot sit idly by in Atlanta and not be concerned about what happens in Birmingham. Injustice anywhere is a threat to justice everywhere. We are caught in an inescapable network of mutuality, tied in a single garment of destiny. Whatever affects one directly, affects all indirectly. Never again can we afford to live with the narrow, provincial "outside agitator" idea. Anyone who lives inside the United States can never be considered an outsider anywhere within its bounds.

You deplore the demonstrations taking place in Birmingham. But your statement, I am sorry to say, fails to express a similar concern for the conditions that brought about the demonstrations. I am sure that none of you would want to rest content with the superficial kind of social analysis that deals merely with effects and does not grapple with underlying causes. It is unfortunate that demonstrations are taking place in Birmingham, but it is even more unfortunate that the city's white power structure left the Negro community with no alternative.

In any nonviolent campaign there are four basic steps: collection of the facts to determine whether injustices exist; negotiation; self purification; and direct action. We have gone through all these steps in Birmingham. There can be no gainsaying the fact that racial injustice engulfs this community. Birmingham is probably the most thoroughly segregated city in the United States. Its ugly record of brutality is widely known. Negroes have experienced grossly unjust treatment in the courts. There have been more unsolved bombings of Negro homes and churches in Birmingham than in any other city in the nation. These are the hard, brutal facts of the case. On the basis of these conditions, Negro leaders sought to negotiate with the city fathers. But the latter consistently refused to engage in good faith negotiation.

Then, last September, came the opportunity to talk with leaders of Birmingham's economic community. In the course of the negotiations, certain promises were made by the merchants—for example, to remove the stores' humiliating racial signs. On the basis of these promises, the Reverend Fred Shuttlesworth and the leaders of the Alabama Christian Movement for Human Rights agreed to a moratorium on all demonstrations. As the weeks and months went by, we realized that we were the victims of a broken promise. A few signs, briefly removed, returned; the others remained. As in so many past experiences, our hopes had been blasted, and the shadow of deep disappointment settled upon us. 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 the national community. . . .

You may well ask: "Why direct action? Why sit ins, marches and so forth? Isn't negotiation a better path?" You are quite right in calling for negotiation. Indeed, this is the very purpose of direct action. Nonviolent direct action seeks to create such a crisis and foster such a tension 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. I therefore concur with you in your call for negotiation. Too long has our beloved Southland been bogged down in a tragic effort to live in monologue rather than dialogue.

One of the basic points in your statement is that the action that I and my associates have taken in Birmingham is untimely. Some have asked: "Why didn't you give the new city administration time to act?" The only answer that I can give to this query is that the new Birmingham administration must be prodded about as much as the outgoing one, before it will act. We are sadly mistaken if we feel that the election of Albert Boutwell as mayor will bring the millennium to Birmingham. While Mr. Boutwell is a much more gentle person than Mr. Connor, they are both segregationists, dedicated to maintenance of the status quo. I have hope that Mr. Boutwell will be reasonable enough to see the futility of massive resistance to desegregation. But he will not see this without pressure from devotees of civil rights. My friends, I must say to you that we have not made a single gain in civil rights without determined legal and nonviolent pressure. Lamentably, it is an historical fact that privileged groups seldom give up their privileges voluntarily. Individuals may see the moral light and voluntarily give up their unjust posture; but, as Reinhold Niebuhr has reminded us, groups tend to be more immoral than individuals.

We know through painful experience that freedom is never voluntarily given by the oppressor; it must be demanded by the oppressed. Frankly, I have yet to engage in a direct action campaign that was "well timed" in the view of those who have not suffered unduly from the disease of segregation. For years now I have heard the word "Wait!" It rings in the ear of every Negro with piercing familiarity. This "Wait" has almost always meant "Never."

We must come to see, with one of our distinguished jurists, that "justice too long delayed is justice denied."

Document Source: Martin Luther King, Jr., "Letter from a Birmingham Jail," obtained from African Studies Center, University of Pennsylvania.

Supreme Court of the United States, Opinion in *Walker v. City of Birmingham*, June 12, 1967

In its majority opinion, the Court held the protestors could not challenge the state court injunction in federal court without having first attempted to do so through the standard appeals process in the Alabama courts. The petitioners were not permitted, wrote Justice Potter Stewart, to be the judges in their own case and decide that they were free to violate the injunction with impunity.

Howat v. Kansas, 258 U. S. 181, was decided by this Court almost 50 years ago. That was a case in which people had been punished by a Kansas trial court for refusing to obey an antistrike injunction issued under the state industrial relations act. They had claimed a right to disobey the court's order upon the ground that the state statute and the injunction based upon it were invalid under the Federal Constitution. The Supreme Court of Kansas had affirmed the judgment, holding that the trial court "had general power to issue injunctions in equity and that, even if its exercise of the power was erroneous, the injunction was not void, and the defendants were precluded from attacking it in this collateral proceeding … that, if the injunction was erroneous, jurisdiction was not thereby forfeited, that the error was subject to correction only by the ordinary method of appeal, and disobedience to the order constituted contempt." 258 U. S., at 189.

This Court, in dismissing the writ of error, not only unanimously accepted but fully approved the validity of the rule of state law upon which the judgment of the Kansas court was grounded:

"An injunction duly issuing out of a court of general jurisdiction with equity powers upon pleadings properly invoking its action, and served upon persons made parties therein and within the jurisdiction, must be obeyed by them however erroneous the action of the court may be, even if the error be in the assumption of the validity of a seeming but void law going to the merits of the case. It is for the court of first instance to determine the question of the validity of the law, and until its decision is reversed for error by orderly review, either by itself or by a higher court, its orders based on its decision are to be respected, and

disobedience of them is contempt of its lawful authority, to be punished." 258 U. S., at 189–190.

The rule of state law accepted and approved in *Howat v. Kansas* is consistent with the rule of law followed by the federal courts.

In the present case, however, we are asked to hold that this rule of law, upon which the Alabama courts relied, was constitutionally impermissible. We are asked to say that the Constitution compelled Alabama to allow the petitioners to violate this injunction, to organize and engage in these mass street parades and demonstrations, without any previous effort on their part to have the injunction dissolved or modified, or any attempt to secure a parade permit in accordance with its terms. Whatever the limits of *Howat v. Kansas*, we cannot accept the petitioners' contentions in the circumstances of this case.…

The generality of the language contained in the Birmingham parade ordinance upon which the injunction was based would unquestionably raise substantial constitutional issues concerning some of its provisions.… The petitioners, however, did not even attempt to apply to the Alabama courts for an authoritative construction of the ordinance. Had they done so, those courts might have given the licensing authority granted in the ordinance a narrow and precise scope …. Here … it could not be assumed that this ordinance was void on its face.

The breadth and vagueness of the injunction itself would also unquestionably be subject to substantial constitutional question. But the way to raise that question was to apply to the Alabama courts to have the injunction modified or dissolved. The injunction in all events clearly prohibited mass parading without a permit, and the evidence shows that the petitioners fully understood that prohibition when they violated it.

This case would arise in quite a different constitutional posture if the petitioners, before disobeying the injunction, had challenged it in the Alabama courts, and had been met with delay or frustration of their constitutional claims. But there is no showing that such would have been the fate of a timely motion to modify or dissolve the injunction. There was an interim of two days between the issuance of the injunction and the Good Friday march. The petitioners give absolutely no explanation of why they did not make some application to the state court during that period. The injunction had issued *ex parte*; if the court had been presented with the petitioners' contentions, it might well have dissolved or at least modified its order in some respects. If it had not done so, Alabama procedure would have provided for an expedited process of appellate review. It cannot be presumed that the Alabama courts would have ignored the petitioners' constitutional claims. Indeed, these contentions were accepted in another case by an Alabama appellate court that struck down on direct review the conviction under this very ordinance of one of these same petitioners.

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

Document Source: *Walker v. City of Birmingham*, 388 U.S. 307, 313–21 (1967).

Chief Justice Earl Warren, Dissenting Opinion in *Walker v. City of Birmingham*, June 12, 1967

In his dissenting opinion, Chief Justice Earl Warren characterized the Birmingham ordinance forming the basis for the injunction as "patently unconstitutional." In his view, the petitioners should not have been required to engage in what could have been a lengthy judicial process before exercising their First Amendment rights. The issuance of the injunction, Warren believed, had been a "misuse of the judicial process," motivated by a desire to convert an unconstitutional statute into a court order that would carry an immediate penalty of contempt for disobedience.

Petitioners in this case contend that they were convicted under an ordinance that is unconstitutional on its face because it submits their First and Fourteenth Amendment rights to free speech and peaceful assembly to the unfettered discretion of local officials. They further contend that the ordinance was unconstitutionally applied to them because the local officials used their discretion to prohibit peaceful demonstrations by a group whose political viewpoint the officials opposed. The Court does not dispute these contentions, but holds that petitioners may nonetheless be convicted and sent to jail because the patently unconstitutional ordinance was copied into an injunction—issued *ex parte* without prior notice or hearing on the request of the Commissioner of Public Safety—forbidding all persons having notice of the injunction to violate the ordinance without any limitation of time. I dissent because I do not believe that the fundamental protections of the Constitution were meant to be so easily evaded, or that "the civilizing hand of law" would be hampered in the slightest by enforcing the First Amendment in this case.…

The[] facts lend no support to the court's charges that petitioners were presuming to act as judges in their own case, or that they had a disregard for the judicial process. They did not flee the jurisdiction or refuse to appear in the Alabama courts. Having violated the

injunction, they promptly submitted themselves to the courts to test the constitutionality of the injunction and the ordinance it parroted. They were in essentially the same position as persons who challenge the constitutionality of a statute by violating it, and then defend the ensuing criminal prosecution on constitutional grounds. It has never been thought that violation of a statute indicated such a disrespect for the legislature that the violator always must be punished even if the statute was unconstitutional. On the contrary, some cases have required that persons seeking to challenge the constitutionality of a statute first violate it to establish their standing to sue. Indeed, it shows no disrespect for law to violate a statute on the ground that it is unconstitutional and then to submit one's case to the courts with the willingness to accept the penalty if the statute is held to be valid.

The Court concedes that "[t]he generality of the language contained in the Birmingham parade ordinance upon which the injunction was based would unquestionably raise substantial constitutional issues concerning some of its provisions." … That concession is well-founded but minimal. I believe it is patently unconstitutional on its face. Our decisions have consistently held that picketing and parading are means of expression protected by the First Amendment, and that the right to picket or parade may not be subjected to the unfettered discretion of local officials.…

The only circumstance that the court can find to justify anything other than a *per curiam* reversal is that Commissioner Connor had the foresight to have the unconstitutional ordinance included in an *ex parte* injunction, issued without notice or hearing or any showing that it was impossible to have notice or a hearing, forbidding the world at large (insofar as it knew of the order) to conduct demonstrations in Birmingham without the consent of the city officials. This injunction was such potent magic that it transformed the command of an unconstitutional statute into an impregnable barrier, challengeable only in what likely would have been protracted legal proceedings and entirely superior in the meantime even to the United States Constitution.

I do not believe that giving this Court's seal of approval to such a gross misuse of the judicial process is likely to lead to greater respect for the law any more than it is likely to lead to greater protection for First Amendment freedoms. The *ex parte* temporary injunction has a long and odious history in this country, and its susceptibility to misuse is all too apparent from the facts of the case.…

Insofar as *Howat v. Kansas* might be interpreted to approve an absolute rule that any violation of a void court order is punishable as contempt, it has been greatly modified by later decisions.…

It is not necessary to question the continuing validity of the holding in *Howat v. Kansas*, however, to demonstrate that neither it nor the *Mine Workers* case supports the holding of the majority in this case. In *Howat* the subpoena and injunction were issued to

enable the Kansas Court of Industrial Relations to determine an underlying labor dispute. In the *Mine Workers* case, the District Court issued a temporary antistrike injunction to preserve existing conditions during the time it took to decide whether it had authority to grant the Government relief in a complex and difficult action of enormous importance to the national economy. In both cases the orders were of questionable legality, but in both cases they were reasonably necessary to enable the court or administrative tribunal to decide an underlying controversy of considerable importance before it at the time. This case involves an entirely different situation. The Alabama Circuit Court did not issue this temporary injunction to preserve existing conditions while it proceeded to decide some underlying dispute. There was no underlying dispute before it, and the court in practical effect merely added a judicial signature to a preexisting criminal ordinance. Just as the court had no need to issue the injunction to preserve its ability to decide some underlying dispute, the city had no need of an injunction to impose a criminal penalty for demonstrating on the streets without a permit. The ordinance already accomplished that. In point of fact, there is only one apparent reason why the city sought this injunction and why the court issued it: to make it possible to punish petitioners for contempt rather than for violating the ordinance, and thus to immunize the unconstitutional statute and its unconstitutional application from any attack. I regret that this strategy has been so successful.

Document Source: *Walker v. City of Birmingham*, 388 U.S. 307, 324, 327–28, 330, 332–34 (1967).

David Benjamin Oppenheimer, *University of California Davis Law Review*, 1993

Berkeley Law professor David Benjamin Oppenheimer recounted the history of the Birmingham protests, including the events leading to the protestors' decision to disobey the state court injunction, in this 1993 article.

At 9:00 p.m. on Wednesday, April 10, one week from the day the demonstrations began in Birmingham, City Attorneys John M. Breckenridge and Earl McBee submitted an ex-parte application to Alabama Tenth Circuit Court Judge William A. Jenkins, Jr., seeking an order prohibiting further demonstrations by the SCLC and ACMHR, and specifically naming Revs. King, Walker, Abernathy, Shuttlesworth, and 129 other civil rights activists. The application claimed that King and the other activists had, by their demonstrations and sit-ins, violated the parade permit laws and trespassing laws, and thus endangered the city's peace and safety. It further alleged that without an injunction such activities would continue to disrupt the peace and safety of Birmingham. Judge Jenkins

reviewed the papers and immediately issued a temporary injunction, setting a trial date of April 22 to consider whether the injunction should be made permanent. At approximately 1:00 a.m. Thursday morning, the notice of injunction was served on King, Walker, and Shuttlesworth.

The injunction raised a special problem for King and the other named respondents. Until the injunction was issued, the demonstrators had been arrested for violating local ordinances: trespass for sitting-in in violation of the segregation rules, vagrancy, and parading without a permit. These ordinances, passed by an all-white government, and never judicially reviewed, held no inherent legitimacy for King. They were unjust laws to be resisted. The very purpose of the campaign was to repeal the legal, as well as the social, structure of segregation. But an order from a judge was different. A judge, even a Southern segregationist judge, embodied greater authority than mere political power. Here the judge had specifically reviewed the legitimacy of the laws relied on by the City Attorney, and had determined that the demonstrations were unlawful. His order was not a general rule to be interpreted by the public, police, and courts. It was a direct order to cease all demonstrations.

King had expected an injunction to be sought in Birmingham; experience had prepared him for it. In his first major civil rights campaign, the Montgomery, Alabama bus boycott, the movement was almost destroyed by an injunction prohibiting King and his colleagues from organizing and operating a private car pool system to transport the boycotters. The injunction failed to crush the movement only because the Supreme Court, on the day the injunction was issued, affirmed a district court decision in an NAACP-type action brought by the boycotters, holding that Montgomery's operation of a segregated public bus system violated the Fourteenth Amendment. Thus, although the Montgomery campaign was seen as a major victory for direct action, a well-timed injunction almost killed it. The direct action campaign almost failed due to the efforts of segregationist lawyers and the segregationist courts; in the end it succeeded only because of the accompanying law reform litigation.

In King's last major campaign prior to Birmingham, in Albany, Georgia, an injunction had been used successfully to undermine the movement, a fact of which King was painfully aware in planning for Birmingham. King had been invited to Albany in December of 1961 to assist in leading a general desegregation campaign there. The campaign had been jointly organized by a coalition of activists and civil rights groups, including King's SCLC, the Student Non-Violent Coordinating Committee (SNCC), and local leaders in the NAACP. The Albany campaign got off to a slow start, in part because of organizational problems and events surrounding King's three arrests, but by early summer the momentum of the demonstrations was growing, and a sense of optimism and promise prevailed.

Then, in late July, the United States District Court issued an injunction ordering King and the other movement leaders to cease all public demonstrations.

The Albany injunction was issued by Judge J. Robert Elliot, an avowed segregationist recently appointed by President Kennedy. The SNCC leaders and local activists viewed the injunction as illegitimate, and urged disobedience. King's lawyer William Kunstler believed that the injunction improperly interfered with the demonstrators' First Amendment rights, and could be overturned on appeal. But an appeal would take time, and the movement's momentum would be lost.

King felt divided. He believed that the demonstrations were gaining force, and that it was important to press on. But he also believed that it was important to show respect for legal authority, particularly the federal courts, even while protesting unjust laws. He was building ties to the Kennedy Justice Department, which was beginning to take civil rights cases seriously. The Justice Department was itself attempting to uphold the legitimacy of federal court injunctions, and was prosecuting Mississippi Governor Ross Barnett for his disobedience of an injunction ordering him to admit James Meredith to the University of Mississippi. Attorney General Robert Kennedy personally called King to urge compliance with the injunction.

King decided to obey, and appeal, the Albany injunction. Although he won the appeal, his decision was nonetheless fatal to the Albany campaign. Absent the demonstrations, the movement fizzled. In November of 1962 King left Albany, having met none of the goals of the campaign. He saw his decision to obey the injunction as critical to the failure of the campaign. As he reflected on his decision, he vowed not to let another court order keep him from demonstrating. A month after leaving Albany, King began planning Project C.

In Birmingham, King's lawyers warned him that whatever the political consequences of obeying the injunction, there were significant legal consequences from its disobedience because of the collateral bar rule. If arrested for violating the ordinance, the demonstrators could challenge the validity of the ordinance. But if arrested for violating the injunction, under the collateral bar rule they would only be permitted to challenge the court's jurisdiction to issue the injunction; the constitutional validity of the ordinance limiting demonstrations, both on its face and as applied, would be unreviewable.…

Informed of the collateral bar rule, King understood that … he could not violate the injunction and then challenge its validity, despite its apparent illegitimacy. But while recognizing the dangers posed by violating an injunction, King was cognizant that in the civil rights struggle, as in the labor movement before it, the timely use of an injunction could be devastating to a movement gaining momentum. He publicly pledged to avoid

another Albany; he would violate the injunction, and personally lead a march on City Hall on Good Friday.

On Thursday afternoon the question of whether to violate the injunction was thrown open again, when the movement's bail bondsman informed Walker that his resources had been declared exhausted by the city authorities, and his authority to post further bonds had been lifted. If King and the other leaders were to be arrested on Friday, they and their followers would not be bailed out until additional money had been raised, and the only proven fund raiser among them was King himself.

On Good Friday morning, King met with his closest advisors in his hotel room to decide what action to take. The prudent course seemed clear, to put off the march until more bail money could be raised, while moving to set aside the injunction as improperly granted. NAACP Legal Defense Fund lawyer Norman Amaker warned King that although the injunction was probably unconstitutional, anyone who violated it would probably be punished. King felt trapped, not wanting to go back on his pledge, but not wanting to lead people into jail without the ability to bail them out. His father recommended that he obey the injunction and put off the march; another advisor agreed. Andrew Young and others said they would support whatever decision he made. When all had had their say he left the room and, alone, prayed for guidance. In a few minutes he returned, having changed into clothing more suitable for jail. "I don't know what will happen," he said, "I don't know where the money will come from. But I have to make a faith act." His father again recommended putting off the march, but King would not be dissuaded, explaining, "If we obey this injunction, we are out of business." It was this decision that Andrew Young later pointed to as the "beginning of [King's] true leadership."

Document Source: David Benjamin Oppenheimer, "Martin Luther King, *Walker v. City of Birmingham*, and the *Letter from Birmingham Jail*," *University of California Davis Law Review* 26, no. 4 (Summer 1993): 805–11 (footnotes omitted).

Cases that Shaped the Federal Courts

This series includes case summaries, discussion questions, and excerpted documents related to cases that had a major institutional impact on the federal courts. The cases address a range of political and legal issues including the types of controversies federal courts could hear, judicial independence, the scope and meaning of "the judicial power," remedies, judicial review, the relationship between federal judicial power and states' rights, and the ability of federal judges to perform work outside of the courtroom.

- *Hayburn's Case* (1792). Could Congress require the federal courts to perform non-judicial duties?
- *Chisholm v. Georgia* (1793). Could states be sued in federal court by individual citizens of another state?
- *Marbury v. Madison* (1803). Could federal courts invalidate laws made by Congress that violated the Constitution?
- *Fletcher v. Peck* (1810). Could federal courts strike down state laws that violated the Constitution?
- *United States v. Hudson and Goodwin* (1812). Did the federal courts have jurisdiction over crimes not defined by Congress?
- *Martin v. Hunter's Lessee* (1816). Were state courts bound to follow decisions issued by the Supreme Court of the United States?
- *Osborn v. Bank of the United States* (1824). Could Congress grant the Bank of the United States the right to sue and be sued in the federal courts?
- *American Insurance Co. v. Canter* (1828). Did the Constitution require Congress to give judges of territorial courts the same tenure and salary protections afforded to judges of federal courts located in the states?
- *Louisville, Cincinnati, and Charleston Rail-road Co. v. Letson* (1844). Should a corporation be considered a citizen of a state for purposes of federal jurisdiction?
- *Ableman v. Booth* (1859). Could state courts issue writs of habeas corpus against federal authorities?
- *Gordon v. United States* (1865). Could the Supreme Court hear an appeal from a federal court whose judgments were subject to revision by the executive branch?
- *Ex parte McCardle* (1869). Could Congress remove a pending appeal from the Supreme Court's jurisdiction?
- *Ex parte Young* (1908). Could a federal court stop a state official from enforcing an allegedly unconstitutional state law?
- *Moore v. Dempsey* (1923). How closely should federal courts review the fairness of state criminal trials on petitions for writs of habeas corpus?

- *Frothingham v. Mellon* (1923). Was being a taxpayer sufficient to give a plaintiff the right to challenge the constitutionality of a federal statute?
- *Crowell v. Benson* (1932). What standard should courts apply when reviewing the decisions of executive agencies?
- *Erie Railroad Co. v. Tompkins* (1938). What source of law were federal courts to use in cases where no statute applied and the parties were from different states?
- *Railroad Commission of Texas v. Pullman Co.* (1941). When should a federal court abstain from deciding a legal issue in order to allow a state court to resolve it?
- *Brown v. Allen* (1953). What procedures should federal courts use to evaluate the fairness of state trials in habeas corpus cases?
- *Monroe v. Pape* (1961). Did the Ku Klux Klan Act of 1871 permit lawsuits in federal court against police officers who violated the constitutional rights of suspects without authorization from the state?
- *Baker v. Carr* (1962). Could a federal court hear a constitutional challenge to a state's apportionment plan for the election of state legislators?
- *Glidden Co. v. Zdanok* (1962). Were the Court of Claims and the Court of Customs Appeals "constitutional courts" exercising judicial power, or "legislative courts" exercising powers of Congress?
- *United States v. Allocco* (1962). Were presidential recess appointments to the federal courts constitutional?
- *Walker v. City of Birmingham* (1967). Could civil rights protestors challenge the constitutionality of a state court injunction, having already been charged with contempt of court for violating the injunction?
- *Bivens v. Six Unknown Named Agents* (1971). Did the Fourth Amendment create an implied right to sue officials who conducted illegal searches and seizures?
- *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.* (1982). Did the Bankruptcy Reform Act of 1978 violate the Constitution by granting too much judicial power to bankruptcy judges?
- *Morrison v. Olson* (1988). Could Congress empower federal judges to appoint independent counsel investigating executive branch officials?
- *Mistretta v. United States* (1989). Could Congress create an independent judicial agency to guide courts in setting criminal sentences?
- *Lujan v. Defenders of Wildlife* (1992). Could an environmental organization sue the federal government to challenge a regulation regarding protected species?
- *City of Boerne v. Flores* (1997). Could Congress reverse the Supreme Court's interpretation of the Constitution through a statute purportedly enforcing the Fourteenth Amendment?