2008

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Tony A. Freyer

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Cover Page Footnote
In September 2007, the city of Little Rock — and the entire country — commemorated a crisis of public school integration and race relations that occurred fifty years ago at Central High School in Little Rock, Arkansas. The following is one of six essays which are products of the Ben J. Altheimer Symposium on the 50th Anniversary of the Central High Crisis, held at the University of Arkansas at Little Rock Bowen School of Law on September 20 and 21, 2007. Symposium speakers and participants included nationally-renowned civil rights activists, members of the local judiciary, and local leaders involved both fifty years ago and today in working toward equality between all races and ethnicities.

This essay is available in University of Arkansas at Little Rock Law Review: http://lawrepository.ualr.edu/lawreview/vol30/iss2/10
THE LITTLE ROCK CONFRONTATION AND COOPER V. AARON:
DEVELOPMENT AND IMPLEMENTATION OF CONSTITUTIONAL
LITIGATION

Tony A. Freyer *

I. INTRODUCTION

Assessing the legacy of the Little Rock crisis has special relevance to America's commitment to constitutional government. The struggle over Central High's racial desegregation reflected the contested constitutional principles of equality the Declaration of Independence first proclaimed. The Emancipation Proclamation reaffirmed and the Supreme Court's Brown v. Board of Education 1954 (I) and 1955 (II) opinions reconstituted these principles.¹ The confrontation in Little Rock during 1956–59 established the constitutional boundaries within which the Civil Rights Movement and Martin Luther King, Jr., pursued the spirit of Brown, ultimately defeating the South's Jim Crow racial apartheid system. The Little Rock crisis thus was a struggle over constitutional legitimacy whereby one regime began displacing another. Even so, the origins, events and aftermath of the crisis—including the Supreme Court's first significant enforcement of Brown in Cooper v. Aaron—suggested how much African American agency has been essential to attaining equal constitutional guarantees of individual opportuni-

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* Tony A. Freyer is University Research Professor of History and Law at the University of Alabama. For support he thanks Law School Dean Kenneth C. Randall, University of Alabama Law School Foundation, and the Edward Brett Randolph Fund. He is grateful also for the expert assistance of David Warrington, Harvard Law School Manuscript Division; Duan van Ee and his colleagues at the Library of Congress Manuscripts Division; and the staff of the Seeley G. Mudd Manuscript Library, Princeton University. At the University of Alabama School of Law he thanks his secretary, Mrs. Caroline Barge, and, in the Law Library, Paul Pruitt, Penny Gibson, and Creighton Miller for indispensable research assistance.

ty and liberty. These were the stakes in developing and implementing civil rights litigation.\(^2\)

Journalists Gene Roberts and Hank Klibanoff reported that Little Rock established the marketable media images to which civil rights stories conformed from the mid-1950s through the 1960s. In 1961, historian Daniel Boorstin explored the technological and business context fostering this market for civil rights issues, declaring that "The central paradox—that the rise of images and of our power over the world blurs rather than sharpens the outlines of reality—permeates one after another area of our life." Indeed, there was "hardly a corner of our daily behavior where the multiplication of images, the products and by-products of the Graphic Revolution, have not befogged the simplest old everyday distinctions."\(^3\) Elsewhere I employ these insights to argue that the potential and actual use of civil rights media images gave new contested meaning to the constitutional principles at issue in the Little Rock struggle. In this paper I suggest the implications of this interpretation for the conflicting rights claims of African Americans and extreme segregationists, Governor Orval Faubus, school officials and other Arkansas racial moderates, certain federal judges and the Eisenhower Administration, the Civil Rights Movement, and their legacy a half-century later.\(^4\)

II. LITTLE ROCK NAACP PROTEST LITIGATION AND SEGREGATIONIST STATES’ RIGHTS STRATEGY

Racial discrimination at Little Rock’s Central High School during the 1950s symbolized wider inequality. By the mid-twentieth century, Central High’s academic excellence was recognized nationally. That high academic quality enabled youths from poor, middle-class, and elite white families to pursue the American dream of improved life opportunities. These same opportunities accentuated, however, the profound injustice Arkansas’s and the South’s Jim Crow system imposed on African Americans. Little Rock’s

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2. See generally Jack Bass, Taming the Storm: The Life and Times of Judge Frank M. Johnson, Jr., and the South’s Fight over Civil Rights (1993); Taylor Branch, Parting the Waters: America in the King Years, 1954–1963 (1998); Freyer, supra note 1, at 13–144; David J. Garrow, Bearing the Cross: Martin Luther King, Jr., and the Southern Christian Leadership Conference (1986); Michael J. Klorman, From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality (2004); Tushnet, supra note 1, at 257–66; Juan Williams, Eyes on the Prize: America’s Civil Rights Years, 1954–1965 (1987).


4. Freyer, supra note 1.
Dunbar High was one of very few taxpayer supported black schools in the entire South possessing enough resources enabling it to meet minimum national academic standards. No one suggested Dunbar and Central were equal.\textsuperscript{5} Indeed, by every objective measure, the South's separate-but-equal system was deplorably unequal. Moreover, the constitutional law that legitimated state police powers implementing this gross discrimination in educational opportunity also enforced economic inequality in labor, property, and credit relations. Ultimately, this same constitutional law sanctioned terrorism in order to enforce racially discriminatory family and criminal law because southern courts rarely if ever punished whites for crimes against African Americans.\textsuperscript{6}

As a turning point in the struggle for constitutional access to individual opportunities, the Little Rock crisis thus was significant for African Americans. John Kirk, Judith Kilpatrick, myself, and others have corroborated Georg Iggers's contention that the Little Rock NAACP's switch from supporting to litigation challenging school superintendent Virgil Blossom's minimalist desegregation plan emerged entirely from local initiative in 1955–56. The New York headquarters of neither the NAACP itself nor the NAACP Legal Defense and Educational Fund (LDF) provided significant assistance until the crisis of September 1957. This local focus indicated, moreover, that despite setbacks, the \textit{Aaron v. Cooper} litigation in 1956–57 mobilized working class and poorer African Americans to a new level of civil rights activism. Wealthier African Americans joined the struggle once Orval Faubus's defiance created black community solidarity after September 2, 1957. Emphasizing African American agency also revealed the Little Rock Nine's courage and academic success at Central from the end of the September crisis on the 25th through Ernest Green's historic graduation in May 1958, despite relentless harassment from the group of pro-segregationist white students.\textsuperscript{7}


\textsuperscript{6} See generally supra note 2.

African Americans' challenge to Jim Crow's constitutional legitimacy exposed divisions within the Little Rock white community. Seeking improved opportunity for their children, African American parents persistently pressed for admission to white schools. Blossom ensured, however, that the fewest possible African Americans would desegregate these schools, beginning with Central High. Systematically employing purportedly race-neutral pupil assignment procedures permitted under *Brown II*, he reduced the number of African Americans from about 200 to, ultimately, nine. Blossom nonetheless made a fatal error. He shielded the elite Pulaski Heights families, rejecting similarly token desegregation of Hall High. This played into the hands of the violence-prone white Citizens' Council. The Council exploited not only racist but also social class demagoguery, claiming truly that the poorer white families living around Central High faced "race mixing" while the Pulaski Heights "blue-stocking" elite families would attend all-white Hall High. Switching from moderation to defiance, Faubus employed the same social-class rhetoric, though he did not also resort to the Citizens' Council's threatening racist demagoguery.8

Wiley Branton and Daisy Bates led in maneuvering among conflicting claims of constitutional legitimacy. Branton did the bulk of the pre-trial, trial, and appellate work in the *Aaron v. Cooper* litigation, which lasted from 1956–58. Like the relatively few other African American civil rights lawyers then working across the post-World War II South, Branton routinely reported to the LDF's New York headquarters any civil rights cases he filed. Usually, Thurgood Marshall and Assistant Counsel John L. Carter reviewed such filings and arguments in order to avoid legal or constitutional wrong turns, but the LDF offered no funding and would not be further involved unless and until the case was appealed. Indeed, Marshall himself argued the case only when the school board—ignoring the Little Rock Nine's academic success, despite ongoing harassment from pro-segregationist students—appealed to the United States Supreme Court in *Cooper v. Aaron* during an unusual August Special Term in 1958. Beginning in February of that year, the school board sought a two-and-one-half year delay in the enforcement of the Little Rock desegregation plan. The issue Marshall litigated before the Supreme Court was whether, under *Brown II*, opposition was a permissible basis for suspending desegregation for thirty months.9

Daisy Bates presented another image of civil rights activism. Segregationists boycotted Mr. L. C. and Mrs. Bates's newspaper, the *Arkansas State*

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Press; state tax authorities harassed them as well. Yet by summer 1957, Daisy Bates was the public intermediary between nine African American students and the outside world. Amid accelerating conflict from mid-August on, Bates effectively employed the media, projecting the students' academic commitment, courage, and patriotic Cold War Americanism. Martin Luther King's understanding of the power of the media, gained in the Montgomery boycott of 1955–56, was consistent with civil rights activist Pauli Murray's assessment of Daisy Bates's stand with Minnijean Brown, Elizabeth Eckford, Ernest Green, Thelma Mothershed, Melba Pattillo, Gloria Ray, Terrance Roberts, Jefferson Thomas, and Carlotta Walls. The Little Rock NAACP litigation was an early form of protest that won over African Americans, as well as northern and international media, to the constitutional rights claims asserted against Faubus and the segregationists. Thus, Bates "represents the tough-minded tactical leadership in this struggle," Murray wrote, "as Martin Luther King represents the moral and spiritual leadership."10

Pauli Murray's characterization of Bates's leadership suggested how it popularized conflicting constitutional assumptions. Until Little Rock, Americans generally perceived constitutional principles like "federalism," "police powers," "interposition," and even "separate-but-equal" to be vague abstractions. By contrast, among southerners "states' rights" and the Civil War were self-identity myths, while the evil of slavery was rationalized away or ignored. Thus, "states' rights" possessed an intuitive meaning that southerners did not share with non-southerners. For the national and international media, Bates's "tactical leadership" reduced constitutional abstractions to the concrete story of nine patriotic African American students courageously pursuing their education against great odds. The cruel racist intimidation Elizabeth Eckford experienced—forever captured in Ira Wilmer Counts's September 4, 1957 photograph—epitomized how the media gave a human face to the struggle over constitutional rights. Among southerners, however, those same images aggravated a regional self-identity in which the preservation of white supremacy depended upon defending states' rights against the Supreme Court and the federal government, the NAACP, and the northern and international media.11

10. KIRK, supra note 5, at 131. See generally id. at 108–12, 130–32.
Two articles by legal opinion leaders suggested sexual tensions were underlying these divergent public images. In 1958, amidst Faubus’s third-term gubernatorial campaign and the Supreme Court’s review of *Cooper v. Aaron*, Harvard law professor Paul Freund wrote, “It would be idle to look for a sudden miraculous reconciliation. For one thing, resistance to integration flows from a deep spring of primitive, subrational fears, summed up by the frightful ‘mongrelization’ of the races. To exorcise this image is not the work of a day or a year.” Moreover, in “districts where the Negro populace exceeds that of whites, the consequence of desegregation is that the white children in effect will be attending colored schools.” Former United States Supreme Court Justice and South Carolina governor James Byrnes presented a contrary view: “It is our duty to let the people of other sections know the attitude of the South is due not to racial prejudice but to the firm belief that the court has arrogated to itself the power of a third legislature and if not curbed by Congress, will destroy local governments.” Nevertheless, Byrnes knew, of course, that in their private and public rhetoric segregationists often advocated states’ rights as a surrogate for the racist, often violent, defense of white supremacy.12

While they linked states’ rights to Christian teachings purportedly supporting Jim Crow, segregationists differed regarding express appeals to racism and violence. Arkansas Citizens’ Council speakers readily resorted to crudities such as “a nigger in your school is a potential communist in your school,” and the use of “grass ropes” to enforce racial separation. The Mothers’ League of Central High, however, described itself as “working as a group of Christian mothers in a Christian-like way. We do not approve of violence.” Both the men and women’s segregationist groups nonetheless agreed that:

If this injustice of the states losing their rights continues, we will be losing everything that has made America a great and Christian nation. When the will of the people is ignored, then dictatorship sets in....[T]he mothers in the league can never accept integration in our hearts and it has never been the American way of life to sit and have something forced on us.

They also believed that the pernicious consequences of integration could include “interracial marriages and the resulting diseases.” According-

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Eckford and Hazel Bryan is courtesy of the *Arkansas Democrat-Gazette* and Special Collections Division, University of Arkansas Libraries.

ly, "God himself set us apart by boundaries and language." These differences among segregationists separated them from both Little Rock’s NAACP and Faubus.

III. THE ORIGINS OF FAUBUS’S DEFIANCE-COMPLIANCE STRATEGY

Faubus’s defiance ranked him among the segregationists, but he differed from them, particularly regarding interposition. Arkansans knew Faubus to be a quintessential economic liberal, successfully cultivating white and independent black voters alike. Prior to the crisis Wiley Branton voted for him. Even during the crisis some independent African Americans voted for Faubus because he did not resort to racist rhetoric and he distributed economic-political opportunities more fairly than his predecessors. Up to the summer of 1957, he rebutted the segregationists’ states’ rights-interposition platform with a more moderate version relying upon a pupil assignment law and providing state legal aid to local school boards challenged by desegregation suits. Still, Faubus never opposed school desegregation in small Arkansas communities where it had already occurred. He resisted racial desegregation of neither higher education nor public facilities in various Arkansas cities, including Little Rock. Thus, until the 1957 August turning point, Faubus’s public position towards racial desegregation was that it was a local not a state matter. As late as July, he publicly committed that “if anyone expects me to try to use. . . [interposition laws] to supersede federal laws they are wrong.”

Although a third-term gubernatorial reelection bid clearly motivated Faubus, the political calculus was complex, especially involving interposition. Biographer Roy Reed quotes Faubus frankly telling a few supporters in 1954 that should he discover the means to exploit racial conflict, “they’ll never get me out of office.” During the intervening years before the crisis, Faubus adhered to the local control inherent in the “with all deliberate speed” standard of Brown II to outmaneuver segregationist extremist James Johnson’s more radical interposition program. But amidst the growing tension of August 1957, Reed also reports that Daisy Bates believed Faubus was a follower rather than an instigator of political pressures unleashed by school officials and the Little Rock Pulaski Heights elite, which, in turn,


aggravated poorer white’s racial as well as social class antagonisms. As the segregationists insisted, because of the Blossom plan blue-collar and middle class families living around Central High faced “race-mixing,” whereas the elite families sending their children to Hall High did not. Thus, Daisy Bates told her friend, white lawyer Edwin E. Dunaway, concerning Faubus, “He’s against you and the people in the Heights and I’m going to have to pay for it.”

Given these political imperatives, Faubus used states’ rights to distinguish himself from both segregationist extremists, like Johnson, and federal authority. During the 1956 gubernatorial campaign, east Arkansas lawyer R. B. McCulloch fashioned the moderate interposition platform Faubus employed to counter Johnson’s more radical states’ rights program. McCulloch knew that federal litigation challenging his own or Johnson’s interposition measures faced protracted legal proceedings lasting years before the federal courts would likely declare such measures to be unconstitutional. Meanwhile, segregationist extremists and moderates alike could claim that federal supremacy remained in doubt, engendering among the mass of white Arkansans citizens hopeful political support for resistance. What Faubus understood that Johnson did not, however, was that many Arkansas citizens were racial moderates who, while favoring racial segregation, also resisted the tendency towards violence associated with Johnson’s brand of interposition. McCulloch shaped his interposition platform to sentiments held by his fellow moderate segregationists in east Arkansas, where the poor black majority was dependent upon white planters for employment and credit.

These interposition politics shaped Faubus’s actions during the August 1957 clandestine maneuvers among white leaders. Blossom and school board members publicly expressed confidence that Central High’s desegregation would proceed in an orderly fashion. Privately, however, the segregationists’ covert threats and aggressive public rhetoric aroused Blossom’s profound fears that trouble was imminent. Among various other private initiatives, Judge Miller privately informed a school board member of his willingness to grant a delay in the implementation of his own desegregation order until the constitutionality of interposition measures was decided, which he undoubtedly knew would take time. Thus, in an August 13 private meeting, Miller focused not upon the possible outcome of a public adversarial process in which school board and LDF lawyers presented evidence addressing a formal legal question. Instead, to a school board member, the representative of one of the parties upon whom his order was binding, Miller

15. Reed, supra note 14, at 169, 205; see also Freyer, supra note 8, at 74–98; Jacoway, supra note 8, at 106–29.
16. Freyer, supra note 8, at 34–35, 77, 80, 89, 128, 129; Reed, supra note 14, at 189; Baer, supra note 11, at 35–100.
directly acknowledged a preference for granting a delay favoring the school board. Although school officials eventually dropped the idea, they did so only after privately suggesting to Faubus that such proceedings could delay the desegregation of Central High.\textsuperscript{17}

Much research has demonstrated how such private exchanges converged with the segregationists' public actions to shape Faubus's claim in the \textit{Thomason} suit that violence was imminent should desegregation proceed on September 3. Although this scholarship reveals no hard evidence supporting Faubus, the local court ordered desegregation halted. Visiting federal judge Ronald N. Davies overruled the state court as a result of petitions from school board and LDF lawyers on April 30. Davies enjoined anyone from interfering with Central High's racial desegregation. Insisting that disorder was imminent, Faubus nonetheless issued a proclamation on September 2 ordering the Arkansas National Guard to prevent African American students from entering Central High. At that time and subsequently, Faubus's motivations seemed driven by the third-term reelection bid. Still, several works noted, the political calculus was, as Faubus himself admitted, murky. Deserving of emphasis was, however, the constitutional rational supporting Faubus's proclamation and the terms his lawyer-advisor, William J. Smith, used to justify it. What was Smith's private assessment of Faubus's claim that in order to prevent impending violence he dispatched the Guard to prevent desegregation at Central High?\textsuperscript{18}

Answering this question indicates that Faubus sought to delay Central High's desegregation and thereby to shift upon others the responsibility for enforcement. Reflecting a formally correct reading of United States constitutional law prescribing state authorities' duty under police powers to suppress possible unlawful acts, Smith advised Faubus that he should act only \textit{after} enforcing the African American students' rights resulted in disorder. Otherwise, absent strong evidence vindicating Faubus's belief that violence was imminent, the federal court would certainly declare his action to be illegal. Smith's advice was consistent, too, with the provision in \textit{Brown II}, which Miller's decision in \textit{Aaron v. Cooper} affirmed, that opposition to desegregation was not a lawful basis for state officials' refusal to enforce a desegregation order. As a result of Smith's professional advice, then, Faubus knew that in response to the guard's obstruction of the federal desegregation order, the federal court would demand from him unequivocal evidence supporting his professed concerns about impending violence. As he had shown in the \textit{Thomason} proceedings, Faubus was unable to meet that high standard.

\textsuperscript{17} FREYER, supra note 8, at 99-100; JACOWAY, supra note 8, at 90; REED, supra note 14, at 193-96.

\textsuperscript{18} FREYER, supra note 8, at 98-114; JACOWAY, supra note 8, at 84-103, 106-29; KIRK, supra note 5, at 112-29; REED, supra note 14, at 193-223.
of proof. But according to this reading, Faubus saw political advantage in the lack of evidence.19

Based on Smith’s advice, Faubus could not have doubted that the federal court would hold that his use of the guard was unlawful and, therefore, that enforcement of desegregation should proceed. Moreover, Faubus probably perceived that the surest political gains were to be achieved by defying and then complying with the federal court order. Why? First, because he could take political credit for following the segregationists’ states’ rights-interposition ideology; second, by doing so he could claim the pure motive of seeking to avoid violence, but at the same time create an atmosphere in which enforcement of desegregation would engender probable if not inevitable disorder. Furthermore, the legal and symbolic moral duty of addressing such disorder would lie—clearly not with Faubus, who could assert he had done his best and been rebuffed—but with either the federal government or school officials. Finally, these legalistic and constitutional imperatives enabled Faubus to avoid the inflammatory public racism that even led many segregationist-minded Arkansans such as McCulloch to shun extremists like Johnson, thereby casting Faubus as being comparatively moderate within state politics.20

These political imperatives informed Smith’s drafting of Faubus’s September 2 proclamation igniting the crisis. Contemporary and later commentators focused upon Faubus’s weak evidence justifying his expressed fear of impending violence. Receiving less public attention was Smith’s charge that Judge Davies’s orders prevented a legal test of the interposition laws. As a result, “one of the greatest reasons for unrest and for the imminence of disorder and violence,” Faubus declared, was public doubt about whether the Supreme Court desegregation decisions or the states’ rights-interposition measures were supreme. Until this uncertainty was resolved, those state laws bound him as governor. Smith’s lawyerly expertise explained the legal dimensions of the proclamation, crafted in preparation for inevitable challenges to be raised by LDF lawyers on behalf of the African American students’ constitutional rights claims, as well as those involving school board officials’ duty. Faubus contended that preserving segregation by military force was necessary until a “proper authority” settled the question of constitutional supremacy. This compliance-defiance strategy violated the Brown II principle: faced with resistance state officials should enforce, not oppose, constitutional rights.21


20. This paragraph states the author’s conclusion based on a reading of the evidence above; my argument is consistent with Baer, supra note 11, at 100–202.

21. See generally supra note 18, 19.
IV. THE EISENHOWER ADMINISTRATION COLD WAR IMPERATIVE AND OBSCURE CONTINGENCIES

The initial Aaron v. Cooper litigation, the Little Rock crisis itself, and the 1958–59 phase of struggle converged with national Cold War politics. The litigation arose in Faubus’s second-term reelection campaign touting a compromised version of the segregationists’ states’ rights-interposition platform during 1956–57. In this period the South’s congressional delegation joined with conservative Republicans supporting bills attacking the Supreme Court’s jurisdiction over civil rights and Cold War civil liberties cases. The conservative coalition defeated Title III of the 1957 Civil Rights Act. Title III would have expanded federal authority over civil rights litigation. Without President Dwight Eisenhower’s support, the provision died; he signed the weakened law during the September 1957 crisis. Other assaults the conservative coalition mounted against the federal judiciary’s jurisdiction were defeated narrowly in 1957–58. Overall, however, such attacks isolated the Supreme Court as the agent of desegregation, while the South’s “massive resistance” campaign accelerated following the 1956 Southern Manifesto. In line with Byrnes’s contention, the southern congressional delegation quieted racial appeals to conservative Republicans, emphasizing instead states’ rights and communism.22

Little Rock African Americans’ struggle against segregationist defiance thus succeeded gradually. The local NAACP’s Aaron v. Cooper litigation mobilized poorer African Americans, despite the School Board’s federal trial and appellate court triumphs in August 1956 and April 1957. Wealthier African Americans gave the local NAACP support as a result of the crisis during August 30 to September 25. Although extraordinary public events held popular attention, complex clandestine contacts among (1) school officials, Judge Miller, federal authorities, and Faubus on the one hand, and (2) Faubus and Citizens’ Council leaders on the other hand during the fateful summer of 1957 shaped the crisis and its outcome.23 Consistent with these obscure events was the federal government’s failure to offer into


23. See generally supra note 18.
evidence at the September 20 trial the FBI Report refuting Faubus's contention that violence had been imminent on September 3. At trial Davies decided against Faubus. The governor then withdrew the Guard, creating a vacuum in authority filled by the "Battle of Central High" on September 23-25 that Eisenhower ended by ordering the 101st Airborne to Little Rock. Still, Faubus turned the Justice Department's failure to use the report to demagogic purposes.  

The government's reasons for not using the FBI Report remained obscure, but unwillingness to expose Judge Miller's conduct may have been a factor. Amidst the turmoil of September 3-5 Judge Davies ordered the FBI to investigate all leads that could prove or disprove Faubus's rationale that impending violence justified his deployment of the Guard at Central High. Davies granted Faubus the September 20 trial to offer his own evidence on the issue; lacking convincing evidence, his lawyers, after preliminary matters, simply walked out of court. Before the trial the FBI had delivered to Davies the 500-plus page report. As a result, Davies learned of Miller's confidential exchanges with school officials during August regarding a possible delay in enforcing the desegregation order, pending a court test of the interposition laws. "I did not have any idea of Judge Miller's involvement until reading the FBI Report. I consider Judge Miller's actions, as set out in the report, if true, to be wholly inappropriate and unbecoming a federal judge," he later informed the present author. After weeks of confrontation preceding the September 20 trial, the Justice Department thus may have withheld the FBI Report to avoid inflaming the situation further by publicizing Judge Miller's behavior.  

Davies also realized how much his presence in Little Rock enhanced Faubus's demagoguery. Although Davies was chosen randomly to handle a backlog of cases, the selection became necessary because Miller confidentially had requested to be removed from the Aaron v. Cooper litigation during the Thomason case. A North Dakota Republican and devout Catholic, Davies inevitably clashed with Arkansas Democratic politics, southern racial mores, and Protestant culture. Thus, though in fact routine, Davies's appointment enabled Faubus to assert that the judge's appearance in Little Rock resulted from a conspiracy. Miller's abandonment of the desegregation litigation at the point of Faubus's emerging defiance—combined with the ethics problem—convinced Davies that Arkansans were being exploited by their own leaders. These considerations only strengthened Davies's resolve.

24. Freyer, supra note 8, at 118-28; Kirk, supra note 5, at 118; Reed, supra note 14, at 222.

25. Freyer, supra note 8, at 101-07, 122-25, 134. For Judge Davies's comment on Judge Miller's conduct, see memorandum from Ronald N. Davies, Sr., United States District Court Judge for the District of North Dakota, to Tony Freyer (Mar. 1980) (on file with author).
that as the presiding judge he would address the momentous issues at stake in the crisis according to the strictest regard for the law and the Constitution. Having done his duty, Davies departed Little Rock not long after the crisis. The school board then decided to seek the thirty month delay, relieved that the case was in the hands of a “southern” federal judge, Arkansan Harry Lemley.26

Eisenhower’s vacillation before and during the crisis contrasted sharply with Judge Davies’s decisiveness. Eisenhower’s lack of support for making Title III part of the 1957 Civil Rights Act suggested the President’s well-known dislike of and refusal to provide moral support for either the Brown decision or the Supreme Court. During the crisis Faubus exploited Eisenhower’s willingness to allow the governor an “orderly retreat.” Such sentiments were consistent with Justice Department officials’ confidential suggestion to Branton that he agree to delay Central High’s desegregation—a suggestion Branton of course refused. Nevertheless, after weeks of public and private negotiations confirmed that Faubus sought only narrow political advantage, Eisenhower on September 24 and 25 asserted executive leadership, dispatching the 101st Airborne to quell the riot outside Central High, and thereby to enforce Judge Davies’s desegregation order.27 In an Executive Order, Eisenhower explained that the Supreme Court’s holding in Brown that “compulsory segregation laws are unconstitutional” was followed on the basis of “gradual progress” in certain “southern states”—but regretfully not Arkansas—showing the “world that we are a nation in which laws, not men, are supreme.”28

Notwithstanding the Brown reference, Eisenhower offered other justifications for sending troops to Little Rock. All United States citizens’ “individual rights and freedoms rest[ed] upon the certainty that the President and the Executive branch of the Government will . . . insure the carrying out of the decisions of the federal courts . . . . Mob rule cannot be allowed to override the decisions of our courts.” Even so, the “proper use of the powers of the Executive Branch to enforce the orders of a federal court is limited to extraordinary and compelling circumstances. Manifestly, such an extreme situation has been created in Little Rock.” Pointedly describing the Cold War danger, Eisenhower then declared, “We face grave situations abroad because of the hatred that communism bears toward a system of government based on human rights.” Thus, “it would be difficult to exaggerate the harm that is being done to the prestige and influence, and indeed to the safety, of

26. Id.; see also generally Cooper v. Aaron, 1 U.S. 358 (1958).
27. See supra note 22, 24.
our nation and the world.” Moreover, he warned, “Our enemies are gloating over this incident and using it everywhere to misrepresent our whole nation. We are portrayed as a violator of those standards” of “human rights” the “peoples of the world united to proclaim in the Charter of the United Nations.”

National surveys revealed that northerners and southerners diverged regarding Eisenhower’s rationales. The Trendex organization publicized telephone surveys on September 26. Of 1,000 respondents, 68.4 percent favored Eisenhower ordering United States Army units to Little Rock. Removing southern respondents, the positive supporters rose to 77.5 percent. In the South alone, the surveys revealed, 62.6 percent opposed Eisenhower’s order; just 33.9 percent supported it and 3.5 percent had no opinion. A Gallup poll of national opinion gave Eisenhower’s actions almost two-thirds support, whereas 53 percent of southerners opposed them. The President’s broad support among a majority of Americans responding to the surveys was consistent with his firmly expressed executive duty to enforce federal court orders, especially given the harm Arkansas officials’ defiance did national security in the propaganda battle against communist enemies.

The pro-western foreign press also generally favored the Eisenhower Administration. Thus, national and international opinion suggested that preserving the African American students’ constitutional rights was a necessary condition for maintaining federal supremacy over demagogic state and local defiance. But southerners associated Little Rock’s federal “occupation” with authoritarianism.

From the September crisis to the summer of 1959, the national offices of the NAACP and the LDF supported Mr. and Mrs. Bates and the nine students. During the Supreme Court’s 1958 August Special Term, Thurgood Marshall argued for and won Cooper v. Aaron. Professor Lee Lorch and his wife Grace were, by contrast, casualties of the national NAACP’s new leadership role in Little Rock. Respected and active members of the local NAACP since the beginning of the desegregation suit, Lee conducted a tutorial program for the Little Rock nine while they were excluded from class during the crisis. The program helped the nine to do well when they finally entered Central High. Grace assisted Elizabeth Eckford during her September 4 ordeal. But notwithstanding his acquittal in federal court regarding charges of communist affiliation, Lorch’s identification with radicalism re-

31. See generally supra note 22.
ceived publicity. Grace also came under suspicion. Accordingly, concerned about preserving the nine students and the NAACP's own patriotic, staunch anti-communist image, national NAACP officials forced Lorch's resignation from the local organization and departure to Canada. During the year of Little Rock's closed schools, 1958–59, it seemed that segregationist defiance had prevailed.\(^3^2\)

By mid-1959, however, racial segregation encountered defeat on several fronts. Little Rock moderates and the Pulaski Heights business elite finally took a firm public stand against Faubus and the segregationists. In the wake of Faubus's defiance of the Supreme Court's *Cooper v. Aaron* decision of September 29, 1958, the segregationist-controlled school board attempted but failed to fund private schools with public money. Stymied, the segregationist board fired many dedicated teachers, claiming they were desegregation sympathizers. Discreetly aided by the Women's Emergency Committee, the business elite responded at last by calling a special election; along with black voters, the moderates narrowly won in May 1959. The newly constituted school board, learning from Blossom's mistake, brought token desegregation to both Central and Hall High Schools in August 1959 without significant resistance. The close victory indicated that the Supreme Court's *Cooper v. Aaron* decision had limited the moderates' and segregationists' options, forcing the political settlement. During the summer of 1959, the federal court finally declared segregationists' states' rights measures unconstitutional. Faubus was critical but did nothing. The Little Rock confrontation was over.\(^3^3\)

V. LITTLE ROCK'S LEGACY OF CIVIL RIGHTS ACTIVISM

Although the Little Rock NAACP initiated *Aaron v. Cooper* on its own, the litigation reflected King's emerging protest strategy. During the first half of 1957, as Branton appealed and lost this initial phase of the case, a group of Christian ministers, identified with King and sparked by the Montgomery bus boycott, consolidated organizational efforts into the new Southern Christian Leadership Conference (SCLC). NAACP leader Roy Wilkins asserted that his organization "does wish to cooperate with the minister group." He nonetheless stated that "the particular form of direct action used in Montgomery was effective only for certain kinds of local problems and could not be applied safely on the national scale." King, by contrast, supported both effective civil rights legislation and federal litigation culmi-

\(^3^2\) See supra note 22; see also FREYER, supra note 1, at 135–211; interview by Tony Freyer with Lee Lorch, in Toronto, Canada (June 10, 2006).

\(^3^3\) FREYER, supra note 8, at 128–63; JACOWAY, supra note 8, at 183–348; Baer, supra note 11, at 203–45.
nating in cases such as Brown I. He resisted, however, dissipating valuable resources through litigation in state court, especially given those courts' general presumption that whites would rarely if ever be convicted for illegal conduct against African Americans. Thus, King wrote, African Americans "[m]ust not get involved in legalism [and] needless fights in lower courts," which was "exactly what the white man wants the Negro to do. Then he can draw out the fight." 34

Civil rights litigation in Little Rock vindicated part of King's emerging strategy. Given the futility of state court litigation, he declared, "Our job now is implementation . . . . We must move on to mass action . . . in every community in the South, keeping in mind that civil disobedience to local laws is civil obedience to national laws." 35 By mid-August 1957, the pastor of the First Baptist Church of Little Rock, Rev. Roland S. Smith, led ten African American ministers in filing a federal lawsuit testing the constitutionality of the interposition laws the Arkansas legislature had enacted earlier in 1957. Supported by the local NAACP and LDF lawyers, the suit targeted segregationist extremists' assertions that state police powers enabled state authorities to block the enforcement of federal court orders mandating desegregation. The case bogged down, seemingly vindicating King's prediction about pernicious "legalism." Nevertheless, the litigation, like Aaron v. Cooper itself, fostered unity within the Little Rock African American community. Thus, although these cases became entangled in delay and even experienced initial defeat, thereby suggesting inconsistency with King's mass action, ultimately they encouraged African American community solidarity that such action required. 36

King grasped the significance of Little Rock for the emerging nonviolent protest campaign. He attended Ernest Green's historic graduation from Central High in May 1958. In 1959, although northern whites were receptive to Eisenhower's shifting position towards Brown and the Supreme Court, King stated that "much of the tension in the South and many of the reverses we are now facing could have been avoided if President Eisenhower had taken a strong, positive stand on the question of civil rights and the Supreme Court's [Brown] decision as soon as it was rendered." As a result, Faubus's "irresponsible actions brought the [civil rights] issue to [the] forefront of the conscience of the nation" and, unlike Eisenhower's vacillation, "allowed people to see the futility of attempting to close the public schools." 37 As early as the Montgomery bus boycott, echoing Pauli Murray's assessment of

34. See generally supra note 7; GARROW, supra note 2, at 91–92.
35. GARROW, supra note 2, at 91–92.
36. Id.; see also Smith v. Faubus, 230 Ark. 831, 327 S.W.2d 562 (1959); 2 RACE REL. L. REP. 1103 (1957); Baer, supra note 11, at 143.
37. GARROW, supra note 2, at 119; JACOWAY, supra note 8, at 249.
Daisy Bates's tactical leadership, King distinguished federal and state judicial action, saying as follows:

Our local [Alabama] judges, it seems succumb to the whims and caprices of local custom in deciding cases like ours. In the federal courts, a judge is appointed and doesn’t have to worry about being reelected. God grant them the moral courage and integrity to interpret the Constitution in its true meaning.\(^{38}\)

*Cooper v. Aaron* revealed, however, the difficulties inherent in the “deliberate speed” standard of *Brown II*. Thurgood Marshall’s construction of this standard was accepted by the Court in *Cooper*, holding that state and local officials facing opposition like that occurring in Little Rock should enforce rights claims rather than surrender to defiance. In their closed deliberations during the 1958 August Special Term, the members of the Court nonetheless disagreed over the limits of discretion *Brown II* permitted federal judges enforcing the standard. Supported by Justices Hugo L. Black and William O. Douglas, Justice William J. Brennan drafted an opinion curbing local federal judges’ discretion in applying “deliberate speed.” Had Brennan prevailed, it would have limited federal judges in the future from using discretion like that employed by Judge Miller to easily reject the local NAACP’s initial suit in 1956, as well as the incentive for his problematic conduct contributing to the crisis in August 1957. Nevertheless, a majority of the Court led by Justices John M. Harlan and Felix Frankfurter rejected Brennan’s attempt, asserting instead the Court’s expansive judicial supremacy that LDF lawyers eventually used to establish “synergy” between LDF litigation and non-violent protest.\(^{39}\)

Admittedly, this “synergy” occurred episodically. New York NAACP leaders and even Thurgood Marshall disagreed with King initially regarding the practice. Following the holding in *Cooper v. Aaron* that opposition could never justify public officials’ refusal to enforce *Brown*, however, LDF lawyers and civil rights protestors increasingly cooperated. This was especially so after local officials in Albany, Georgia, outmaneuvered King in 1961, employing tactics reminiscent of Faubus’s manipulation of police powers in

\(^{38}\) BASS, *supra* note 2, at 109; KIRK, *supra* note 5, at 131–32.

Little Rock. "Because of Dr. King's initial belief that the federal government was sure to intervene," wrote former LDF lawyer Michael Meltsner, "little effort was put into attempts to challenge the machinations of Albany city fathers by pressuring them in court. It was a mistake that King and his southern allies would largely succeed in avoiding thereafter, and this solidified his future relationship with the LDF." As George Wallace replaced Faubus as the symbol of states' rights defiance, King and his followers combined passive resistance with judicial vindication of constitutional rights claims that the LDF won from a few federal judges like Alabama's Frank Johnson, federal appellate courts, and the Supreme Court.40

The Freedom Riders during 1961 promoted opposing images of civil rights protest and southern defiance, as had occurred in Little Rock. The Ku Klux Klan's and others' bloody assault on the Freedom Riders in Alabama produced the court order from Judge Frank Johnson that helped to mobilize federal-state cooperation to preserve order. Johnson responded to further defiance, however, with an even broader court order threatening all parties with imprisonment if resistance continued. Through Alabama and Mississippi to New Orleans, the African American and white protestors held out signs from bus windows exclaiming such messages as: "Take a Stand for the Law of the Land," "Enforce the Constitution 13th, 14th, 15th Amendments," "Freedom's Wheels Are Rolling," and "The Law of the Land Is Our Demand." Along the same route United States Nazi Party storm troopers displayed on a van slogans exclaiming: "We Do Hate Race Mixing" and "Lincoln Rockwell's HATE BUS." Amidst such clashing messages, especially given the 1961 Cold War environment, the Freedom Riders' obedience to Frank Johnson's order reinforced a public impression of the moral and constitutional high ground against violence-prone destroyers of true American freedom.41

The combined litigation and non-violent protests thus challenged the constitutional underpinnings of "southern massive resistance" and ultimately won. At the same time, states' rights and surrogate racist images resonating among southerners enabled Faubus, Wallace, and many others to shift to federal authorities not only legal and political responsibility, but also blame, for implementing desegregation polices. To a greater or lesser extent these leaders repeated the defiance-compliance strategy Faubus pioneered in Little Rock. Sometimes public officials overplayed their hand, such as Bull Connor's deployment of fire hoses and police dogs in Birmingham from May 2-7, 1963, against peacefully demonstrating African American children, or Dallas County sheriff Jim Clark's attack on upon peaceful marchers at Ed-

40. Meltsner, supra note 39, at 34, 43-44, 84-91, as quoted at 87.
mound Pettus Bridge in Selma on "Bloody Sunday," March 7, 1965. In such instances, the leader's error was not only the brutality itself, but that he carried it out before media that transmitted the images across America and around the world. These public images of lawless lawmen merged, moreover, with the bombers' killing of four African American girls in Sunday school on September 15, 1963, at the 16th Street Baptist Church in Birmingham.\footnote{GARROW, supra note 2, at 268–69, 313–30, 380–407; MARTIN LUTHER KING, JR., Letter from [a] Birmingham Jail, in WHY WE CAN'T WAIT 85, 89 (1964); see also generally supra note 34.}

The Little Rock confrontation presaged the civil rights movement heritage of hope and continuing struggle. King's 1963 "Letter from a Birmingham Jail" noted the integral connection between federal litigation and nonviolent protest. "I can urge men to obey the 1954 decision of the Supreme Court because it is morally right, and I can urge them to disobey segregation ordinances because they are morally wrong," he said. Furthermore, "as federal courts have consistently affirmed . . . it is immoral to urge an individual to withdraw his efforts to gain his constitutional rights because the quest precipitates violence. Society must protect the robbed and punish the robber." Although disappointed in Judge Frank Johnson's initial order against the Selma march, King shaped his protest strategy around the ultimately prescient hope that the federal judge would eventually order the voting rights marchers to proceed under federal protection. The Little Rock NAACP's decision to sue in 1955 thus evidenced a struggle culminating in Congress enacting the revolutionary Civil Rights Act of 1964 and the Voting Rights Act of 1965, overturning Jim Crow and establishing the basis for continuing federal intervention in state and local affairs in defense of constitutional rights.\footnote{BASS, supra note 2, at 248; BORSTELMANN, supra note 22, at 160–61, 188–91; MELTSNER, supra note 39, at 60, 63, 122–23, 91, 108–09.}

VI. CONCLUSION

Fifty years after the 1957 confrontation, a federal court has ended its oversight of Little Rock schools. An African American majority school board faces equitable funding problems, white families' "flight" to private or suburban public schools, and a large gap in standardized test scores between whites and the school district's 70 percent African American students. The roughly 52 percent minority population of Central High suggests, however, alternative considerations. Central High remains ranked among the nation's best public high schools; regularly, African American students' academic excellence contributes to that ranking. Moreover, Central is the nation's first and, as of 2007, only operating high school that is also a histor-
ic site run by the United States Park Service. In practical as well as symbolic terms, today’s African American students at Central share at least one experience with the Little Rock Nine: though comparatively few, Central’s present African American students pursue individual opportunity amidst wider inequality beyond Central. Even so, the Nine’s most conspicuous legacy is that their African American successors attend Central High free from the omnipresent discrimination and fear imposed by the Jim Crow racial apartheid system.44

What does the Little Rock Nine’s courageous triumph over this oppressive system suggest regarding America’s ongoing struggle to attain the ideal of equality? First, as Georg Iggers long ago demonstrated, the Nine’s struggle arose from the local NAACP’s decision to challenge the Little Rock School Board’s calculated choice of a desegregation plan permitting the most minimal compliance with Brown II. This plan allowed only the fewest possible African Americans into the city’s white school system. Focusing on the Little Rock NAACP, Daisy Bates, and Wiley Branton indicated, moreover, that only local African Americans actively pursued the maximum educational opportunity consistent with both Brown opinions. An unintended consequence of the September 1957 crisis was that Little Rock’s white moderates established their minimalist desegregation plan as the basis for enforcing the Brown II standard of “with all deliberate speed” against “massive resistance.” Thus, the constitutional confrontation of Faubus’s compliance-defiance strategy delayed, Judge Miller’s problematic behavior complicated, and segregationist violence aggravated the local NAACP’s original goal of attaining truly equal educational opportunity for Little Rock’s African American families.

Second, among white supporters of minimal desegregation, enforcing equal educational opportunity was subordinate to other goals. Little Rock moderates remained consistent during and after the September crisis, in the 1958 appeal for a thirty-month delay and in the spring 1959 campaign to reopen Little Rock’s schools, stating that they countenanced desegregation only out of pragmatic obedience to Supreme Court authority. The new moderate school board’s willingness in 1959 to bring minimal desegregation to Central and Hall High suggested both the limited options Cooper v. Aaron imposed, as well as a practical unwillingness to repeat the Blossom Plan’s mistaken favoritism towards Pulaski Heights. Even though the Supreme

Court's *Cooper* decision impelled those limits by forcefully affirming judicial supremacy, it did so because the majority refused to accept Justice Brennan's attempt—supported only by Black and Douglas—to restrict federal judicial discretion inherent in the "deliberate speed" standard. Eisenhower's strict regard for federalism, heightened by Cold War necessity, explained his vacillation before, during, and after the crisis. Over the same period, Congress could not escape the conservative coalition's obstructionism.

The Little Rock confrontation thus instituted images of triumph and conditional constitutional rights. Daisy Bates's "tactical" use of the student-centered media imagery personalized constitutional rights within a Cold War context, winning over the national media, northern voters, and federal elected officials. Eisenhower's dispatch of paratroopers and the Supreme Court's historic August Special Term—both targeting enforcement of those rights claims—solidified the media imagery Bates and the Little Rock Nine established. King and the civil rights movement employed similar images combining nonviolent protest and federal litigation to defeat Jim Crow through the 1964 Civil Rights Act and the 1965 Voting Rights Act. This resistance engendered a new birth of American liberty; it nonetheless proved vulnerable on the national level to the same political compromises and expedients at work in Little Rock since the September crisis. From the mid-1960s to the present, the nation's changing political context altered congressional, presidential, and Supreme Court priorities, which in turn enabled white flight and inequitable public school funding to dilute the equal-opportunity principle of *Brown I*.

The Little Rock Nine and their successors at Central High today epitomize a triumph as well as the need for renewed commitment. Little Rock white moderates' success in complying with *Cooper v. Aaron* through the implementation of a minimum desegregation plan in 1959 established the pattern that persists. Compared to the Jim Crow era the numbers of African Americans gaining access to greater economic opportunity has grown; compared to the white majority, however, opportunity is still unequal. The white majority's unwillingness to support educational opportunity, reflected in white flight, contributes significantly to this inequality. At the same time, the resources that are available enable limited numbers of minority students to achieve more economic opportunity than ever before, a course the Little Rock Nine pioneered. In Little Rock and the nation, the problem thus endures: how to enlarge for the many the opportunity of the few. From the Revolution, through the Emancipation Proclamation, to *Brown* and the civil rights era, social struggle has gradually changed the established constitutional regime. Future change demands continuing struggle. Or, as the poet
W. H. Auden observed, "the only knowledge that can be true for use is the knowledge we can live up to."\textsuperscript{45}