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## JUDICIAL SUPREMACY IN A FEDERALISM CONTEXT THROUGH THE LENS OF *COOPER*

Joel K. Goldstein\*

### I. INTRODUCTION

*Cooper v. Aaron*,<sup>1</sup> the 1958 Supreme Court decision addressing the Little Rock school desegregation controversy, is a significant decision in American history. Justice Stephen Breyer has written, “The Little Rock cases eventually helped to produce victory for the cause of racial integration, a victory that helped secure the rule of law in America.”<sup>2</sup> Unfortunately, even sixty years after *Cooper* it remains premature to declare “victory” for racial integration as a description of American life. Contrary to the premise and promise of *Brown v. Board of Education*,<sup>3</sup> America still operates in important ways as multiple, separate societies, not as an indivisible nation where all enjoy liberty and justice. Yet Justice Breyer surely is right that *Cooper* was an important milestone in the effort to make state-sponsored racial segregation unlawful. *Cooper* signaled that the Court would not accept mob violence as a reason to defer realization of constitutional rights for a minority group, thereby reaffirming its commitment to the rule of law. And Little Rock provided an occasion when Northerners could see, courtesy of newly-developed technologies, “the viciousness and brutality that was always latent in segregation,”<sup>4</sup> thereby shifting public opinion in support of *Brown*. *Cooper* was an important step of America’s journey on a path which did not begin with *Brown*, but counts it as a giant leap.

Notwithstanding its status as a landmark in America’s history regarding race, doctrinally *Cooper* is not primarily a case about civil rights. It is most significant for its discussion of, and claims regarding, the Supreme Court’s role in American government and federalism. *Cooper* famously

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1. 358 U.S. 1 (1958).

2. STEPHEN BREYER, MAKING OUR DEMOCRACY WORK: A JUDGE’S VIEW 49 (2010).

3. 347 U.S. 483 (1954).

4. David A. Strauss, *Little Rock and the Legacy of Brown*, 52 ST. LOUIS U. L.J. 1065, 1067 (2008).

asserted as a basic constitutional principle that the Supreme Court is the ultimate constitutional expositor.<sup>5</sup> The Court relied on that precept in service of its insistence that its then-recent decision in *Brown*, which declared racial segregation in public schools unconstitutional,<sup>6</sup> was the law of the land, that the decision was not simply the Court's interpretation of the Constitution but what the Constitution meant and required, and that *Brown* constitutionally bound not only the parties before it,<sup>7</sup> but also federal and state officials in non-party states like Arkansas as well.<sup>8</sup> Whereas *Brown* was an opinion about the unconstitutionality of racial segregation, *Cooper* focused more on asserting judicial supremacy than on rejecting white supremacy.<sup>9</sup> And it traced the principle it decreed regarding the finality of the Court's constitutional decisions to Chief Justice John Marshall's foundational opinion in *Marbury v. Madison*.<sup>10</sup>

The Court was certainly on firm ground in demanding respect for *Brown*, but *Cooper*'s claims regarding judicial supremacy misstated their source, status, and strength. *Marbury* did not articulate the proposition of judicial supremacy as the Court claimed, but a narrower principle regarding the Court's role as constitutional interpreter. Although the Court's heavy reliance on *Marbury* was misplaced, its claims regarding judicial supremacy did find some support in other constitutional doctrine regarding the Court's role, especially in a federalism context. Yet what allowed the Court to assert judicial supremacy was not so much the judicial doctrine consistent with its claim, but the support national political actors, particularly President Dwight D. Eisenhower and the Department of Justice, gave that principle in the months leading up to *Cooper*. Eisenhower and his lieutenants repeatedly defended the separate, but related, ideas that the Supreme Court's constitutional interpretations bound other officials and that the executive branch was duty-bound to enforce federal court decisions. This support fortified the Court by persuading it that it would not stand alone against resisters. Even so, Eisenhower's support was insufficient to enforce *Brown*.

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5. 358 U.S. at 18 (“[T]he basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution. . .”).

6. 347 U.S. 483. See generally Joel K. Goldstein, *Approaches to Brown v. Board of Education: Some Notes on Teaching a Seminal Case*, 49 ST. LOUIS U. L.J. 777 (2005).

7. *Brown* decided four cases involving “separate but equal” schools in the states of Kansas, Delaware, South Carolina, and Virginia. See *Brown*, 347 U.S. at 486. A companion case, *Bolling v. Sharpe*, 347 U.S. 497 (1954), addressed the constitutionality of the same doctrine in the District of Columbia under the Fifth Amendment’s Due Process Clause.

8. *Cooper*, 358 U.S. 1.

9. Cf. Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 22 (1959) (stating that the Court’s opinion in *Cooper* “deal[s], of course, with other matters”).

10. 5 U.S. (1 Cranch) 137 (1803).

Unfortunately, that was a more complicated project, one not amenable to resolution simply by judicial pronouncement and decree.

Especially in light of the Court's reliance on *Marbury*, the comments and role of Eisenhower and his administration in the Little Rock crisis present something of an institutional and historical irony. The institutional irony was that the Court's ability in *Cooper* to claim judicial supremacy as constitutional interpreter in a federalism context depended on public acceptance of that ideal by leaders of other branches of American government. Its claim was not self-executing, but rather required acceptance by political actors, and others. And the historic irony was that even though *Cooper* misattributed judicial supremacy to *Marbury*, the 1958 decision did underscore an important lesson from that classic case. In *Marbury*, Chief Justice John Marshall could not direct high executive officials to deliver a commission to William Marbury because he feared they would disobey the Court's order.<sup>11</sup> In *Cooper*, the Court could assert such a power because the executive branch had prospectively signaled its agreement. Nonetheless, even presidential support for the principle that the Court's interpretations were binding law was insufficient to allow the Court's pronouncements regarding school desegregation to be so treated. That project required societal acceptance as well.

Appreciating the Court's discussion of judicial supremacy requires some understanding of the facts that gave rise to the case. Accordingly, this article will begin with a rather lengthy sketch of the facts of *Cooper* and the context in which it arose. Part III will present the Court's judicial supremacy assertion and demonstrate that the Court misstated *Marbury* and its lineage in American history. Part IV will consider other theories that might justify the Court's claim of judicial supremacy in the federalism context *Cooper* presented. Part V will recount the important support Eisenhower and his administration gave judicial supremacy prior to the Court's embrace of it and its impact. Part VI will offer conclusions.

## II. TO THE DECISION IN *COOPER V. AARON*

On May 17, 1954, the Supreme Court, in *Brown v. Board of Education*,<sup>12</sup> overturned the doctrine of "separate but equal" in public education<sup>13</sup> on the grounds that government-sanctioned racial segregation

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11. See *infra* text accompanying notes 155–56.

12. 347 U.S. 483 (1954).

13. *Id.* at 495 ("We conclude that in the field of public education, the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal.").

stamped African-American children as inferiors.<sup>14</sup> The Court, however, deferred imposing a remedy and invited further briefing on that subject during its next term.<sup>15</sup>

Although Little Rock operated a segregated public school system, neither it nor Arkansas had been a defendant in *Brown*. The Little Rock School Board pledged to comply with *Brown* once the Supreme Court provided guidance<sup>16</sup> despite the School Board's disagreement with the decision.<sup>17</sup> The Little Rock School Board directed school officials to prepare a plan.<sup>18</sup> Among Southern cities, Little Rock had a reputation for relative racial moderation,<sup>19</sup> and its initial attitude was consistent with the disposition of some other Southern centrists who felt compelled to abide by a Court decision notwithstanding their disagreement.<sup>20</sup> Arkansas filed a brief in *Brown II* promising to implement *Brown*.<sup>21</sup> Shortly before the Court gave its remedial guidance in *Brown II*, the Little Rock School Board made public its plan to allow a few black students to attend Central High School in 1957 with junior high school and elementary school integration beginning roughly three and six years later, respectively.<sup>22</sup> The Little Rock plan allowed any student to attend a school where his or her race would be in the majority, thereby assuring whites that they would be able to transfer from a predominantly black school.<sup>23</sup> The School Board's initial response, modest though it was, later shifted to accommodate segregationist attitudes it encountered and School Board leaders privately reassured Little Rock's white community that school desegregation would occur as slowly as possible.<sup>24</sup>

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14. *Id.* at 494 ("To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.").

15. *Id.* at 495–96.

16. *Cooper v. Aaron*, 358 U.S. 1, 7 (1958).

17. TONY A. FREYER, LITTLE ROCK ON TRIAL: *COOPER V. AARON* AND SCHOOL DESEGREGATION 16 (2007); see *Cooper*, 358 U.S. at 7; Daniel A. Farber, *The Supreme Court and the Rule of Law: Cooper v. Aaron Revisited*, 1982 U. ILL. L. REV. 387, 391.

18. *Cooper*, 358 U.S. at 8.

19. Keith E. Whittington, *The Court as the Final Arbiter of the Constitution: Cooper v. Aaron (1958)*, in *CREATING CONSTITUTIONAL CHANGE: CLASHES OVER POWER AND LIBERTY IN THE SUPREME COURT* 9, 10 (Greg Ivers & Kevin T. McGuire eds., 2004); Farber, *supra* note 17, at 392; Strauss, *supra* note 4, at 1076; J. Harvie Wilkinson, III, *Supreme Court and Southern School Desegregation, 1955–1970: A History and Analysis*, 64 VA. L. REV. 485, 516 (1978).

20. Farber, *supra* note 17, at 392.

21. FREYER, *supra* note 17, at 21–22.

22. *Cooper*, 358 U.S. at 7–8.

23. FREYER, *supra* note 17, at 27–28.

24. *Id.* at 23–24.

At the Supreme Court, some Justices worried about issuing unenforceable orders.<sup>25</sup> As Corinna Barrett Lain has written, “Disobedience of Supreme Court rulings reveals the Court’s weakness; it shows that the emperor has no clothes and that the Supreme Court cannot, without help, make anyone do much of anything. That, in turn, renders the Court vulnerable to future disregard of its rulings.”<sup>26</sup> These concerns of these Justices were not unfounded. Some Southern states had refused to submit briefs regarding implementation, suggesting a disposition to deny that the ultimate decision would bind them.<sup>27</sup> At oral argument, the South’s lead attorney refused to commit to comply with a Supreme Court decision, stating “we would not send our white children to the Negro schools,”<sup>28</sup> a position that seemed to undercut the fiction that the schools had been equal as well as separate as *Plessy v. Ferguson*<sup>29</sup> required.

At the recommendation of Attorney General Herbert Brownell, the Eisenhower administration accepted the Supreme Court’s invitation to participate in the briefing and argument of *Brown*.<sup>30</sup> The Department of Justice urged the Court to require school districts to submit desegregation plans to the local supervising courts within ninety days,<sup>31</sup> but the Court accepted those recommendations only in part.<sup>32</sup> In its May, 1955 decision (*Brown II*),<sup>33</sup> the Court imposed an obligation on local school districts, under the supervision of the local federal or state courts, to begin to desegregate schools “with all deliberate speed,”<sup>34</sup> a formulation widely viewed as accepting a gradual desegregation.<sup>35</sup> Some Justices had worried that requiring immediate desegregation would prompt defiance and hoped that a show of judicial patience would induce good faith compliance.<sup>36</sup>

The hopes of the Justices were disappointed. *Brown* did not immediately achieve its current iconic status in American constitutional law. In fact, as David Strauss reminds us, some of its critics rejected it as “a

25. BARRY FRIEDMAN, *THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION* 246–47 (2009).

26. Corinna Barrett Lain, *Soft Supremacy*, 58 WM. & MARY L. REV. 1609, 1658 (2017).

27. MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY* 314 (2004).

28. FRIEDMAN, *supra* note 25, at 246–47.

29. 163 U.S. 597 (1896).

30. HERBERT BROWNELL & JOHN BURKE, *ADVISING IKE: THE MEMOIRS OF ATTORNEY GENERAL HERBERT BROWNELL* 190–91 (1993).

31. BREYER, *supra* note 2, at 51 (summarizing Attorney General Herbert Brownell’s briefs); BROWNELL & BURKE, *supra* note 30, at 197.

32. BREYER, *supra* note 2, at 51; BROWNELL & BURKE, *supra* note 30, at 197.

33. *Brown v. Bd. of Educ. (Brown II)*, 349 U.S. 294, 301 (1955).

34. *Id.*

35. See, e.g., SETH STERN & STEPHEN WERMIEL, *JUSTICE BRENNAN: LIBERAL CHAMPION* 141 (2010) (“[*Brown II*] seemed to put the brakes on rapid school desegregation.”).

36. FREYER, *supra* note 17, at 14.

lawless act of judicial usurpation.”<sup>37</sup> Many Southern states reacted defiantly. About 100 Southern members of Congress signed a Southern Manifesto in March 1956 which decried the Court’s decisions in *Brown I* and *II* as “a clear abuse of judicial power” and insisted that the *Plessy v. Ferguson*<sup>38</sup> doctrine of “separate but equal,” which was nearly a century old, correctly construed the Equal Protection Clause.<sup>39</sup> The signatories pledged “to use all lawful means to bring about a reversal of this decision which is contrary to the Constitution and to prevent the use of force in its implementation”;<sup>40</sup> although, as the distinguished legal historian Tony A. Freyer pointed out, the meaning of “lawful” was ambiguous.<sup>41</sup> Arkansas’s two senators, John McClellan and J. William Fulbright, were among the nineteen senators who signed as did all six members of the House of Representatives from Arkansas, including the moderate Brook Hays.<sup>42</sup> Arkansas Governor Orval E. Faubus had been elected as something of a racial moderate in 1954, yet over time embraced increasingly extreme segregationist positions apparently to advance his political career.<sup>43</sup>

Frustrated by the gradual approach of the Little Rock School Board, the National Association for the Advancement of Colored People (NAACP), on behalf of thirty-three African-American children, filed suit against the Little Rock School District in federal court on February 8, 1956.<sup>44</sup> The case drew its name from John Aaron, the first plaintiff, and Dr. William G. Cooper, the School Board President.<sup>45</sup> In August 1956, the federal district court upheld the School Board’s minimalistic plan,<sup>46</sup> and the United States Court of Appeals for the Eighth Circuit affirmed that decision.<sup>47</sup>

Whereas the NAACP sought to expedite integration, the Little Rock Citizens Council, consistent with the Southern pattern elsewhere, sought to

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37. Strauss, *supra* note 4, at 1066; see also Charles J. Bloch, *The School Segregation Cases: A Legal Error That Should Be Corrected*, 45 A.B.A. J. 27, 98 (1959) (arguing that the Supreme Court lacked power in *Brown* to declare its decision as the “law of the land”); *id.* (denying that *Brown* could “irrevocably fix[]” government policy regarding non-party states); *id.* (denying that *Brown* was the law of the land).

38. 163 U.S. 537 (1896).

39. 102 CONG. REC. 4459–61 (1956).

40. *Id.* at 4460.

41. FREYER, *supra* note 17, at 8; see also *Recent Attacks upon the Supreme Court: A Statement by Members of the Bar*, 42 A.B.A. 1128, 1128 (1956) (calling formulation appealing for “‘resistance’ to decisions of the Court ‘by any lawful means’” as a self-contradiction and ambiguous).

42. 102 CONG. REC. 4460 (1956).

43. FREYER, *supra* note 17, at 8; Strauss, *supra* note 4, at 1077; Wilkinson, *supra* note 19, at 515–17.

44. FREYER, *supra* note 17, at 34.

45. *Id.* at 34–35.

46. Aaron v. Cooper, 143 F. Supp. 855 (E.D. Ark. 1956).

47. Aaron v. Cooper, 243 F.2d. 361 (8th Cir. 1957).

prevent it.<sup>48</sup> Amis Guthridge, working with gubernatorial candidate and arch-segregationist James Johnson, denied the legitimacy of *Brown* and adopted states' rights rhetoric as code to perpetuate apartheid and to resist integration.<sup>49</sup> The Council's multi-faceted strategy included proposing legislation to strip the federal courts of jurisdiction over civil rights cases, intimidating blacks from voting, pushing Faubus to oppose integration, and threatening and using violence.<sup>50</sup> Johnson unsuccessfully challenged Faubus in the Democratic primary in 1956, but the so-called Johnson interposition amendment to the Arkansas Constitution, which required adoption of measures to frustrate *Brown*, passed in the November election,<sup>51</sup> and the electoral challenge also pushed Faubus towards segregationist policies.<sup>52</sup> In particular, the referendum amended the state constitution directing the Arkansas State Legislature to resist "in every Constitutional manner the Unconstitutional desegregation decisions of May 17, 1954, and May 31, 1955, of the United States Supreme Court[.]"<sup>53</sup> The state legislature responded by passing laws relieving children from compulsory attendance at racially mixed schools, and establishing a State Sovereignty Commission.<sup>54</sup>

Although President Dwight D. Eisenhower stated his unequivocal belief in his post-presidential memoir that *Brown* was correctly decided,<sup>55</sup> he never publicly endorsed the decision as President.<sup>56</sup> He later explained that he had refused to state publicly his view on that Supreme Court decision because he did not wish to set a precedent since he thought that if he ever expressed disagreement with an opinion that action would erode public confidence in his willingness to enforce it.<sup>57</sup> Brownell regarded Eisenhower as a "strong supporter of states' rights" who was disinclined to be a "crusader" for civil rights but who had "strong views" regarding the need to enforce law and his "deep respect" for the Constitution and the duties it

48. BREYER, *supra* note 2, at 52–54.

49. FREYER, *supra* note 17, at 36–38.

50. *Id.* at 39–40.

51. *Id.* at 69.

52. *Id.* at 64–67; Strauss, *supra* note 4, at 1077.

53. *Cooper v. Aaron*, 358 U.S. 1, 8–9 (1958).

54. *Id.* at 9.

55. DWIGHT D. EISENHOWER, *MANDATE FOR CHANGE: 1953–1956*, at 229–30 (1963); DWIGHT D. EISENHOWER, *WAGING PEACE, 1957–1961*, at 150 (1965) [hereinafter *WAGING PEACE*].

56. KLARMAN, *supra* note 27, at 324; *cf.* BROWNELL & BURKE, *supra* note 30, at 197–98 (describing Eisenhower's action in correcting the draft Republican platform in 1956 to point out that he had not taken a stand on *Brown*).

57. *WAGING PEACE*, *supra* note 55, at 150; *see also* The President's News Conference of September 5, 1956, 1956 PUB. PAPERS 732, 737 (Sept. 5, 1956) ("I think it makes no difference whether or not I endorse [*Brown*]. The Constitution is as the Supreme Court interprets it; and I must conform to that and do my very best to see that it is carried out in this country.").



imposed on the President.<sup>58</sup> Others construed Eisenhower's behavior as signaling a "general dislike" for the decision.<sup>59</sup> Eisenhower had made inroads into the South and Border States in 1952 and hoped to expand his support in those regions in 1956.

After the United States Court of Appeals for the Eighth Circuit affirmed the Little Rock gradualist program, the Little Rock schools proceeded to prepare for a few black students to begin attending Central High School in September 1957.<sup>60</sup> In response to opposition from leaders of the Citizens Council, the Little Rock School Board reaffirmed its disagreement with *Brown* but deemed itself committed to follow it based on the Supremacy Clause and the federal court decisions.<sup>61</sup> Faubus, too, had initially conceded publicly that federal laws prevailed over state laws.<sup>62</sup> As the school year approached, however, the Central High Mothers' League mobilized to oppose the inclusion of nine African-American students at Central High.<sup>63</sup> One of its leaders proclaimed that the loss of state autonomy *Brown* involved would cost "everything that has made America a great and Christian nation."<sup>64</sup> Faubus spent time with segregationists who suggested that integration would adversely affect his re-election prospects in 1958.<sup>65</sup> Faubus connived to have Mothers' League personnel file a state court lawsuit seeking to enjoin the desegregation plan to avert threatened violence.<sup>66</sup> Although Faubus testified to the likelihood of violence, various Little Rock School Board and police officials contested his prediction.<sup>67</sup> Nonetheless, the state judge, who Faubus had appointed, granted the injunction on August 29, 1957.<sup>68</sup> The Little Rock School Board then asked

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58. BROWNELL & BURKE, *supra* note 30, at 190.

59. See, e.g., FREYER, *supra* note 17, at 11; see also RICHARD KLUGER, *SIMPLE JUSTICE* 753 (1975) (criticizing President Eisenhower for not publicly supporting *Brown*); ROBERT G. McCLOSKEY, *THE AMERICAN SUPREME COURT* 217 (1960) (stating that Eisenhower's "moral support" for *Brown* "which might have helped to muster obedience, was accorded too grudgingly and tardily to do much good"); Frederic M. Bloom, Cooper's *Quiet Demise: (A Short Response to Professor Strauss)*, 52 ST. LOUIS U. L.J. 1115, 1119 (2008) (calling Eisenhower "at best an ambivalent supporter of *Brown*"); cf. Farber, *supra* note 17, at 394 & n.65 (stating that Eisenhower's views on *Brown* were "unclear" and that there was "some evidence" he opposed it). *But see* LUCAS A. POWE, JR., *THE SUPREME COURT AND THE AMERICAN ELITE, 1789–2008*, at 246 (2009) (rejecting the idea that Eisenhower opposed *Brown*).

60. *Cooper v. Aaron*, 358 U.S. 1, 8–9 (1958).

61. FREYER, *supra* note 17, at 80–81.

62. *Id.* at 95.

63. *Id.* at 95–97.

64. *Id.* at 97.

65. *Id.* at 95–96.

66. *Id.* at 105.

67. FREYER, *supra* note 17, at 105.

68. *Id.* at 104–06; see BREYER, *supra* note 2, at 55.

the federal court to quash the state-court issued injunction which it did the following day.<sup>69</sup> The School Board later blamed Faubus for intensifying opposition to its desegregation plan and encouraging the hope that Arkansas had constitutional power to defy *Brown*.<sup>70</sup>

A few days later, Faubus dispatched the Arkansas National Guard to Central High School without any request from school officials.<sup>71</sup> In a televised speech on September 2, 1957, Faubus said that recent events had left most Arkansas citizens doubtful that *Brown* bound the state.<sup>72</sup> Moreover, he stated that he was bound by the November 1956 interposition measures and subsequent acts the state legislature had adopted.<sup>73</sup> Uncertainty regarding whether *Brown* or the Arkansas laws were supreme had contributed to a climate of imminent disorder.<sup>74</sup> The troops would not act as “segregationists or integrationists” but that since “forcible integration” would interfere with law and order the public schools would operate “for the time being” as they had traditionally,<sup>75</sup> in other words, on a segregationist basis. The Little Rock School Board then publicly asked the nine African-American students not to attend Central High School until the legal dispute was resolved.<sup>76</sup> None sought to attend on September 3, 1957.<sup>77</sup> The district court held a hearing that day in response to the School Board’s request for instructions, and determined that the state’s positioning of troops at Central High was not a reason to depart from the approved plan to desegregate the school.<sup>78</sup>

On September 4, 1957, the nine African-American students sought to enter Central High, but the Arkansas National Guard and a hostile mob prevented them from going to school.<sup>79</sup> One student, Elizabeth Eckford,

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69. Whittington, *supra* note 19, at 12. The Court of Appeals for the Eighth Circuit upheld the decision. *Thomason v. Cooper*, 254 F.2d. 808, 811 (8th Cir. 1958).

70. *Cooper v. Aaron*, 358 U.S. 1, 10 (1958) (“The Board’s petition for postponement in this proceeding states: ‘The effect of that action [of the Governor] was to harden the core of opposition to the Plan and cause many persons who theretofore had reluctantly accepted the Plan to believe there was some power in the State of Arkansas which, when exerted, could nullify the Federal law and permit disobedience of the decree of this [District] Court, and, from that date, hostility to the Plan was increased, and criticism of the officials of the [School] District has become more bitter and unrestrained.’”).

71. *Id.* at 9.

72. FREYER, *supra* note 17, at 113.

73. *Id.*

74. *Id.*

75. Whittington, *supra* note 19, at 12–13.

76. *Cooper v. Aaron*, 358 U.S. 1, 10 (1958); Whittington, *supra* note 19, at 13.

77. Whittington, *supra* note 19, at 13.

78. *Cooper*, 358 U.S. at 10–11.

79. *Id.* at 11 (“On the morning of the next day, September 4, 1957, the Negro children attempted to enter the high school, but, as the District Court later found, units of the Arkansas National Guard, ‘acting pursuant to the Governor’s order, stood shoulder to shoulder at the

became separated from the others and was taunted with vicious racial epithets by angry whites; a photograph capturing the ugly scene was transmitted internationally.<sup>80</sup>

The federal district court then asked the federal government to intervene in the case and to investigate whether Faubus had interfered with the district court's order.<sup>81</sup> The Little Rock School Board requested a delay of desegregation, which the federal court denied on September 7, 1957.<sup>82</sup>

In acknowledging receipt of Faubus's telegram regarding the crisis, Eisenhower responded on September 5, 1957, "When I became President, I took an oath to support and defend the Constitution of the United States. The only assurance I can give you is that the Federal Constitution will be upheld by me by every legal means at my command."<sup>83</sup> Eisenhower denied that the federal government was considering arresting Faubus or had tapped his phone and expressed confidence that Faubus and other Arkansas officials, including the National Guard would "give full cooperation to the United States District Court."<sup>84</sup>

Faubus requested a meeting with Eisenhower,<sup>85</sup> and, with Representative Brooks Hays of Arkansas serving as an intermediary, Eisenhower and Faubus met during the President's vacation in Newport, Rhode Island.<sup>86</sup> Eisenhower sought to persuade Faubus that he could not prevail in a contest with the national government and asked him to have the National Guard protect the African-American students, not prevent them from attending school.<sup>87</sup> Faubus expressed recognition that federal law prevailed over contrary state law and left Eisenhower with the impression that he would accede to his requests,<sup>88</sup> but he was less agreeable before cameras. Eisenhower reported that Faubus had said he would honor federal

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school grounds and thereby forcibly prevented the 9 Negro students . . . from entering,' as they continued to do every school day during the following three weeks.").

80. BREYER, *supra* note 2, at 56; FREYER, *supra* note 17, at 115.

81. *Cooper*, 358 U.S. at 11.

82. *Id.*

83. Telegram to the Governor of Arkansas in Response to His Request for Assurance Regarding His Action at Little Rock, 1957 PUB. PAPERS 659, 659 (Sept. 5, 1957) [hereinafter Telegram on Assurance to the Governor].

84. *Id.*

85. Telegram to the Governor of Arkansas in Response to His Request for a Meeting, 1957 PUB. PAPERS 673 (Sept. 11, 1957).

86. WAGING PEACE, *supra* note 55, at 166.

87. Dwight D. Eisenhower, *Diary*, EISENHOWER ARCHIVES (Oct. 8, 1957), [https://www.eisenhower.archives.gov/research/online\\_documents/civil\\_rights\\_little\\_rock/1957\\_10\\_08\\_Diary\\_Notes\\_Faubus\\_Meeting.pdf](https://www.eisenhower.archives.gov/research/online_documents/civil_rights_little_rock/1957_10_08_Diary_Notes_Faubus_Meeting.pdf).

88. *Id.*

court orders<sup>89</sup> and expressed confidence that Faubus would comply with the supreme law of the land.<sup>90</sup>

Eisenhower's confidence was misplaced. At a federal court argument on September 20, 1957, Faubus's representatives opposed the federal government's request for an injunction and questioned the court's jurisdiction.<sup>91</sup> When the court rejected Faubus's jurisdictional arguments, the State's attorneys left the hearing.<sup>92</sup> The federal court issued an injunction against Faubus and officers of the Arkansas National Guard and directed them to enforce, not seek to nullify, the court's order.<sup>93</sup> Faubus then withdrew the Arkansas National Guard.<sup>94</sup> Eisenhower issued a statement acknowledging that local law enforcement authorities were prepared to maintain law and order as the School Board proceeded with its desegregation plan,<sup>95</sup> called for a "sympathetic understanding of the ordeal" of the African-American students and praised the "dignity and . . . restraint" they and their parents had demonstrated,<sup>96</sup> and expressed confidence that citizens of Little Rock and Arkansas "will welcome this opportunity to demonstrate that in their city and in their state proper orders of a United States Court will be executed promptly and without disorder."<sup>97</sup>

Once again, Eisenhower proved overly optimistic in his expectations or exhortations, whichever they were. Although the nine African-American students finally entered Central High on September 23, 1957 under the protection of the Little Rock Police Department and other law enforcement despite the presence of a large, hostile mob, officials thought the situation precarious and sent them home early.<sup>98</sup> Eisenhower issued an angry statement about the "disgraceful occurrences" at Central High School and in Little Rock, in which he asserted that federal law and court orders could not be "flouted with impunity by any individual or any mob of extremists,"

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89. Statement by the President Following a Meeting with the Governor of Arkansas, 1957 PUB. PAPERS 674, 674 (Sept. 14, 1957) [hereinafter President's Statement After Meeting with Governor] ("The Governor stated his intention to respect the decisions of the United States District Court and to give his full cooperation in carrying out his responsibilities in respect to these decisions. In so doing, I recognize the inescapable responsibility resting upon the Governor to preserve law and order in his state.").

90. *Id.* at 674–75 ("I am sure it is the desire of the Governor not only to observe the supreme law of the land but to use the influence of his office in orderly progress of the plans which are already the subject of the order of the Court.").

91. FREYER, *supra* note 17, at 122; *see also* Cooper v. Aaron, 358 U.S. 1, 11–12 (1958).

92. *Id.*

93. Cooper, 358 U.S. at 11–12; Aaron v. Cooper, 156 F. Supp. 220 (E.D. Ark. 1957).

94. Cooper, 358 U.S. at 12.

95. Statement by the President on the Developments at Little Rock, 1957 PUB. PAPERS 678 (Sept. 21, 1957).

96. *Id.* at 679.

97. *Id.*

98. Cooper, 358 U.S. at 12.

pledged to use necessary force “to prevent any obstruction of the law and to carry out” federal court orders,” and implored “every right thinking citizen” to hope that “the American sense of justice and fair play will prevail in this case” since “[i]t will be a sad day for this country—both at home and abroad—if school children can safely attend their classes only under the protection of armed guards.”<sup>99</sup> Eisenhower expressed “confidence” that “citizens of Little Rock and of Arkansas will respect the law and will not countenance violations of law and order by extremists.”<sup>100</sup> He also issued a presidential proclamation finding that “certain persons in the State of Arkansas, individually and in unlawful assemblages, combinations, and conspiracies ha[d] willfully obstructed the enforcement of [federal court] orders” and that “such obstruction of justice constitutes a denial of the equal protection of the laws secured by the Constitution of the United States” and accordingly commanded all such persons to cease and desist from such behavior and to disperse.<sup>101</sup>

At this point, President Eisenhower reinforced his words with dramatic action. He nationalized the Arkansas National Guard and directed the Secretary of Defense to dispatch federal troops to Little Rock to enforce the federal court orders regarding the desegregation of Central High School.<sup>102</sup> On September 24, 1957, aircraft carrying roughly one thousand troops of the 101<sup>st</sup> Airborne Division of the United States Army arrived in Little Rock.<sup>103</sup>

Eisenhower returned to the White House to address the nation by television and radio on the Little Rock crisis. In his speech, Eisenhower repeatedly explained that his obligation as President to enforce federal court orders compelled his decision to send federal troops to Little Rock.<sup>104</sup> Since

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99. Statement by the President Regarding Occurrences at Central High School in Little Rock, 1957 PUB. PAPERS 689, 689 (Sept. 23, 1957).

100. *Id.*

101. Proclamation No. 3204, 22 Fed. Reg. 7628 (Sept. 23, 1957).

102. Exec. Order No. 10730, 22 Fed. Reg. 7628 (Sept. 23, 1957).

103. FREYER, *supra* note 17, at 130–31.

104. Radio and Television Address to the American People on the Situation in Little Rock, 1957 PUB. PAPERS 689, 690 (Sept. 24, 1957) [hereinafter Radio and TV Address] (“[I]n the action I was compelled today to take and the firmness with which I intend to pursue this course until the orders of the Federal Court at Little Rock can be executed without unlawful interference.”); *id.* (“Whenever normal agencies prove inadequate to the task and it becomes necessary for the Executive Branch of the Federal Government to use its powers and authority to uphold Federal Courts, the President’s responsibility is inescapable.”); *id.* at 691 (“But when large gatherings of obstructionists made it impossible for the decrees of the Court to be carried out, both the law and the national interest demanded that the President take action.”); *id.* at 693 (“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.”); *id.* at 694 (“If resistance to the Federal Court orders ceases at once, the further presence of Federal troops will be unnecessary and the City of Little Rock will return to its normal habits

“under the leadership of demagogic extremists, disorderly mobs have deliberately prevented the carrying out of proper orders from a Federal Court” and local authorities had not “eliminated that violent opposition,” the President’s “responsibility” had become “inescapable.”<sup>105</sup> Although some Southern cities had proceeded in accordance with *Brown*, thereby demonstrating to the world that America was a nation subject to law,<sup>106</sup> agitators in Little Rock had defied law. Presidential action was necessary to protect individual liberty and security. “The very basis of our individual rights and freedoms rests upon the certainty that the President and the Executive Branch of Government will support and insure the carrying out of the decisions of the Federal Courts, even, when necessary with all the means at the President’s command[.]” Eisenhower said.<sup>107</sup> Eisenhower reminded the country that the Supreme Court had held that “separate public educational facilities for the races are inherently unequal and therefore compulsory school segregation laws are unconstitutional.”<sup>108</sup> That decision settled the constitutional question, Eisenhower suggested.<sup>109</sup> “Our personal opinions about the decision have no bearing on the matter of enforcement; the responsibility and authority of the Supreme Court to interpret the Constitution are very clear.”<sup>110</sup> The following day, the federal troops escorted the nine African-American students into Central High School.<sup>111</sup>

The experience of the nine students during the next months was “not a happy one.”<sup>112</sup> White students subjected their African-American classmates to violence and harassment and the school had to deal with bomb threats and other acts of vandalism and terror, threatened or actual.<sup>113</sup> In early 1958, the Little Rock School Board asked the federal district court to delay integration by thirty months.<sup>114</sup> It attributed the request to the difficulty of operating the schools given the hostility of the governor, state legislature, and community and to allow courts to consider the legality of state measures challenging *Brown*.<sup>115</sup> The district court granted the School Board’s request in June 1958,<sup>116</sup> but the Court of Appeals for the Eighth Circuit reversed two months

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of peace and order and a blot upon the fair name and high honor of our nation in the world will be removed.”).

105. *Id.* at 690.

106. *Id.* at 691.

107. *Id.* at 692.

108. *Id.* at 690.

109. *Id.* at 690–91.

110. Radio and TV Address, *supra* note 104, at 690.

111. *Cooper v. Aaron*, 358 U.S. 1, 12 (1958).

112. *Wilkinson*, *supra* note 19, at 518.

113. *Id.*; see *Farber*, *supra* note 17, at 396.

114. *Cooper*, 358 U.S. at 12–13.

115. *Id.*

116. *Id.* at 13.

later in mid-August 1958.<sup>117</sup> The Supreme Court agreed to hear an appeal in the case.<sup>118</sup> That in itself was significant since the Court had refused to accept other school desegregation cases after *Brown*. In fact, other than *Brown*, *Cooper* was the only such case the Court heard until 1963.<sup>119</sup>

In different ways, the briefs before the Supreme Court raised the issue regarding the binding effect of *Brown*. The Little Rock School Board argued that it had attempted in good faith to comply with *Brown I* and *II* but had been precluded from doing so due to widespread public opposition and violence and resistance by officials of all branches of Arkansas's government.<sup>120</sup> Indeed, the Arkansas legislature had recently passed bills awaiting Faubus's action to allow the governor to close schools to avoid integration, to allow students to transfer to segregated schools or to attend segregated classes, and to recall School Board members who complied with *Brown*.<sup>121</sup> The situation confronting the Little Rock School Board involved "massive resistance to and defiance of a constitutional principle running counter to the mores of the people."<sup>122</sup> Popular public officials had encouraged Arkansas citizens to pursue "a steady course of absolute nonrecognition of the validity of the *Brown* decisions, usually on the premise that they are unconstitutional."<sup>123</sup> Since "thousands of school districts" in the South had done nothing to comply with *Brown*, "it would be the height of irony" if Little Rock's schools, "having made the start in good faith," were denied a delay "at the expense of the entire educational program at the high school level."<sup>124</sup>

In their simultaneous submission, the respondent characterized the question before the Court as "a national test of the vitality of the principle enunciated in *Brown*"<sup>125</sup> and as involving "not only vindication of the constitutional rights declared in *Brown*, but indeed the very survival of the

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117. *Id.*

118. *Id.* at 14.

119. KLARMAN, *supra* note 27, at 324.

120. Brief for the Petitioners at 3-4, 6, *Cooper*, 358 U.S. 1 (No. 1, 1958 Aug. Special Term), *reprinted in* 54 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 558-559, 561 (Philip B. Kurland & Gerhard Casper eds., 1975) [hereinafter LANDMARK BRIEFS].

121. *Id.* at 16-17, *reprinted in* LANDMARK BRIEFS, *supra* note 120, at 571-72.

122. *Id.* at 27, *reprinted in* LANDMARK BRIEFS, *supra* note 120, at 582.

123. *Id.*, *reprinted in* LANDMARK BRIEFS, *supra* note 120, at 582; *see also id.*, *reprinted in* LANDMARK BRIEFS, *supra* note 120, at 582. ("The people have been told repeatedly by high officials, nationally syndicated columnists and others that the *Brown* decisions are not 'the law of the land'.")

124. *Id.* at 7-8, *reprinted in* LANDMARK BRIEFS, *supra* note 120, at 562-63.

125. Brief for Respondents at 4, *Cooper*, 358 U.S. 1 (No. 1, 1958 Aug. Special Term), *reprinted in* LANDMARK BRIEFS, *supra* note 120, at 602.

Rule of Law” including “the supremacy of all constitutional rights over bigots—big and small.”<sup>126</sup>

During oral argument, the question of the status of *Brown* became more prominent. The counsel for the Little Rock School Board repeatedly suggested that actions by state officials had created uncertainty regarding whether *Brown* was constitutional and that these doubts had encouraged public resistance,<sup>127</sup> which might be resolved by state court decisions finding various Arkansas interposition measures unconstitutional.<sup>128</sup> The School Board’s attorney said that the case went beyond problems raised by “lawless mobs” to “the conflict of two sovereignties: the State and Federal Governments”<sup>129</sup> and raised the “essential issue[]” of the “refusal of a State government to accept the validity of a Federal court decision as being the law.”<sup>130</sup>

As attorney for the children, Thurgood Marshall responded that it was “one thing” for a state politician to express disagreement with a Court decision but “it’s another thing for a lawyer to stand up in this Court and argue that there is any doubt about it” which is “where we are in this case.”<sup>131</sup> Marshall argued that he could not imagine “any more horrible destruction of principle of citizenship” than to signal white children that they could “violate the law and defy the lawful authorities” yet prevail.<sup>132</sup> In closing, Marshall said *Cooper* involved the “narrow question” of whether a federal district court could delay a desegregation plan in progress “solely because of violence and threats of violence.”<sup>133</sup> In calling for a negative answer, he asked that the Court deliver that response “in such a fashion as to make it clear even to the politicians in Arkansas that Article VI of the Constitution means what it says.”<sup>134</sup>

Similarly, J. Lee Rankin, the United States Solicitor General, argued that the Supremacy Clause made *Brown* the supreme law of the land<sup>135</sup> and the Oath Clause made it binding on federal and state officials.<sup>136</sup> The Little Rock School Board should “carry out the obligations of the Constitution of

126. *Id.* at 5, reprinted in LANDMARK BRIEFS, *supra* note 120, at 603.

127. Transcript of Oral Argument at 14–15, 17–19, 30, 52, *Cooper*, 358 U.S. 1 (No. 1, 1958 Aug. Special Term), reprinted in LANDMARK BRIEFS, *supra* note 120, at 679–80, 682–84, 695, 717.

128. *Id.* at 14–15, reprinted in LANDMARK BRIEFS, *supra* note 120, at 679–80.

129. *Id.* at 42–43, reprinted in LANDMARK BRIEFS, *supra* note 120, at 707–08.

130. *Id.* at 43, reprinted in LANDMARK BRIEFS, *supra* note 120, at 708.

131. *Id.* at 46, reprinted in LANDMARK BRIEFS, *supra* note 120, at 711.

132. *Id.* at 48–49, reprinted in LANDMARK BRIEFS, *supra* note 120, at 713–14.

133. Transcript of Oral Argument, *supra* note 127, at 52, reprinted in LANDMARK BRIEFS, *supra* note 120, at 717.

134. *Id.*, reprinted in LANDMARK BRIEFS, *supra* note 120, at 717.

135. *Id.* at 59, reprinted in LANDMARK BRIEFS, *supra* note 120, at 724.

136. *Id.* at 60, reprinted in LANDMARK BRIEFS, *supra* note 120, at 725.



the United States as interpreted by this Court.”<sup>137</sup> Rankin said that the Little Rock schools should educate “the people that this Supreme Court has spoken, that’s the law of the land; it’s binding; we’ve got to do it,” and that their duty as citizens was “to obey the law and to support the Constitution.”<sup>138</sup>

In its opinion, the Supreme Court accepted the lower court’s findings that the School Board, the School Superintendent, and counsel had acted in good faith and that the events in Little Rock had impeded the educational progress of all students.<sup>139</sup> The Court considered these findings:

[I]n light of the fact, indisputably revealed by the record . . . that the conditions they depict are directly traceable to the actions of legislators and executive officials of the State of Arkansas, taken in their official capacities, which reflect their own determination to resist this Court’s decision in the *Brown* case and which have brought about violent resistance to that decision in Arkansas.<sup>140</sup>

Whereas *Cooper* came to the Court as a case about the integration of the Little Rock public schools pursuant to the Equal Protection Clause, the Court characterized it differently. *Brown* had already held that state-mandated segregation in public education was unconstitutional.<sup>141</sup> The issue in *Cooper* was *Brown*’s status. Thus, the Court framed *Cooper* as raising fundamental issues of federalism and separation of powers, not primarily as a case about desegregation. The opinion, signed by all nine Justices as co-authors, began:

As this case reaches us, it raises questions of the highest importance to the maintenance of our federal system of government. It necessarily involves a claim by the Governor and Legislature of a State that there is no duty on state officials to obey federal court orders resting on this Court’s considered interpretation of the United States Constitution. Specifically, it involves actions by the Governor and Legislature of Arkansas upon the premise that they are not bound by our holding in *Brown v. Board of Education*, 347 U. S. 483. That holding was that the Fourteenth Amendment forbids States to use their governmental powers to bar children on racial grounds from attending schools where there is state participation through any arrangement, management, funds or property. We are urged to uphold a suspension of the Little Rock School Board’s plan to do away with segregated public schools in Little Rock until state laws and efforts to upset and nullify our holding

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137. *Id.*, reprinted in LANDMARK BRIEFS, *supra* note 120, at 725.

138. *Id.* at 61, reprinted in LANDMARK BRIEFS, *supra* note 120, at 726.

139. *Cooper*, 358 U.S. at 15.

140. *Id.*

141. *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954).

in *Brown v. Board of Education* have been further challenged and tested in the courts. We reject these contentions.<sup>142</sup>

The Court spent most of its twenty-page opinion summarizing the procedural history and facts of the case including the lower court's findings that actions of state executive and legislative officials had created conditions that led the Little Rock School Board to seek to delay desegregation.<sup>143</sup> The Court pointed out that the actions of state executive and legislative officials constituted state action in violation of the Equal Protection Clause from which the Little Rock School Board could not disassociate itself notwithstanding its good faith.<sup>144</sup> The Court wrote:

[T]he constitutional rights of children not to be discriminated against in school admission on grounds of race or color declared by this Court in the *Brown* case can neither be nullified openly and directly by state legislators or state executive or judicial officers nor nullified indirectly by them through evasive schemes for segregation whether attempted "ingeniously or ingenuously."<sup>145</sup>

"What has been said, in the light of the facts developed, is enough to dispose of the case," the Court declared as it neared the end of page seventeen of its twenty-page opinion.<sup>146</sup> Yet the Court did not want to stop without "answer[ing] the premise of the actions of the Governor and Legislature that they are not bound by our holding in the *Brown* case," an answer it said required "only to recall some basic constitutional propositions which are settled doctrine."<sup>147</sup>

### III. THE JUDICIAL SUPREMACY ARGUMENT

#### A. The Argument in *Cooper*

In the closing passages of its opinion in *Cooper*, the Supreme Court asserted that the Constitution made the Supreme Court the ultimate expositor of the Constitution. In the familiar language the nine Justices as co-authors, wrote in pertinent part:

Article VI of the Constitution makes the Constitution the "supreme Law of the Land." In 1803, Chief Justice Marshall, speaking for a unanimous Court, referring to the Constitution as "the fundamental and paramount

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142. *Cooper*, 358 U.S. 1.

143. *Id.* at 4–15.

144. *Id.* at 15–16.

145. *Id.* at 17.

146. *Id.*

147. *Id.*

law of the nation,” declared in the notable case of *Marbury v. Madison*, 1 Cranch 137, 5 U. S. 177, that “It is emphatically the province and duty of the judicial department to say what the law is.” This decision declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system. It follows that the interpretation of the Fourteenth Amendment enunciated by this Court in the *Brown* case is the supreme law of the land, and Art. VI of the Constitution makes it of binding effect on the States “any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.” Every state legislator and executive and judicial officer is solemnly committed by oath taken pursuant to Art. VI, cl. 3 “to support this Constitution.”<sup>148</sup>

The first sentence accurately summarized part of the Supremacy Clause, and the second sentence correctly quoted *Marbury*. Those two sentences provided foundation for the third sentence which proclaimed, and attributed to *Marbury*, the doctrine of judicial supremacy in constitutional interpretation (“This decision declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system.”). The fourth sentence asserted that the Court’s interpretation of the Fourteenth Amendment in *Brown* was the supreme law of the land notwithstanding anything in state law.

The Justices surely thought that invoking *Marbury* strengthened their contention that the Court’s opinion in *Brown* bound Governor Faubus, the Arkansas State Legislature, and other Arkansas officials rather than leaving them free to follow their own constitutional interpretations. But *Marbury* did not really say what *Cooper* said it did, and the principle of judicial supremacy was not nearly as well-established as the Court claimed.

#### B. The Mistaken Reliance on *Marbury*

The particulars of *Marbury* are familiar,<sup>149</sup> perhaps painfully so, to law students everywhere. Following the Federalists’ defeat in the 1800 presidential election, the lame-duck Federalist Congress had created additional federal judgeships which outgoing President John Adams could fill with co-partisans before Thomas Jefferson and his loyalists took control

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148. *Cooper*, 358 U.S. at 18.

149. See generally LARRY KRAMER, *THE PEOPLE THEMSELVES* 116–22 (2004); 4 DUMAS MALONE, *JEFFERSON THE PRESIDENT: FIRST TERM, 1801–1805*, at 143–49 (1970); William W. Van Alstyne, *A Critical Guide to Marbury v. Madison*, 1969 DUKE L.J. 1, 3–6.

of the national legislative and executive branches.<sup>150</sup> In abbreviated form, William Marbury was among those Adams nominated and the Senate confirmed as a Justice of the Peace for the District of Columbia in the closing hours of the Adams presidency, but although Adams signed Marbury's commission and Secretary of State John Marshall affixed the seal of the United States to it, thereby authenticating Adams's John Hancock, Marbury and a few others did not receive their commissions before Adams's term ended.<sup>151</sup> Jefferson directed his new Secretary of State, James Madison, not to deliver some commissions, including Marbury's.<sup>152</sup> Meanwhile, during the last weeks of Adams's term, the ubiquitous Marshall was installed as Chief Justice, having been nominated by Adams and confirmed by the Senate.<sup>153</sup> Marbury sought a writ of mandamus from the Supreme Court under section 13 of the Judiciary Act of 1789 to direct Madison to deliver his commission.<sup>154</sup>

Marshall and his judicial colleagues were in a bind. They feared that Jefferson would defy a Court order directing Madison to deliver the commissions, recognized that the Court would be powerless to compel compliance, and worried that such a scenario would reveal the Court's frailty, undermine its future utility, and perhaps prompt repercussions against some of its members.<sup>155</sup> Those consequences might be avoided by concluding that the Court could never assert jurisdiction over a high executive officer, a course that would mollify Jefferson but would create doctrine crippling the Court.<sup>156</sup>

Instead, Marshall devised a judicial strategy that allowed him to score doctrinal and political points while avoiding an unwinnable confrontation with Jefferson and Madison.<sup>157</sup> Marshall concluded that Marbury was entitled to the commission that Jefferson and Madison wrongfully withheld<sup>158</sup> and that federal courts could assert jurisdiction over high executive officials like Madison in cases where an individual claimed that the federal official had violated a legal duty to him or her.<sup>159</sup> These

150. Van Alstyne, *supra* note 149, at 3–6.

151. *Id.*

152. *Id.*

153. *Id.* at 3.

154. *Id.* at 3–6.

155. *See, e.g.,* Lain, *supra* note 26, at 1658 (pointing out that disobedience to judicial rulings imperils the Court's legitimacy and makes its future work similarly vulnerable).

156. *See generally* ARCHIBALD COX, *THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT* 10 (1976); KRAMER, *supra* note 149, at 122–23; MCCLOSKEY, *supra* note 59, at 41 (describing the “painful and unpromising dilemma” facing Marshall and the Court).

157. *See generally* JOHN B. ATTANASIO & JOEL K. GOLDSTEIN, *UNDERSTANDING CONSTITUTIONAL LAW* 23–30 (4th ed. 2012); MCCLOSKEY, *supra* note 59, at 40–44.

158. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 162 (1803).

159. *Id.* at 166, 168.

conclusions were mere dicta, however, because the Court determined that in this instance it could not issue such an order because section 13, as Marshall interpreted it, attempted to give the Court original subject matter jurisdiction over a case in which the Constitution gave the Supreme Court only appellate subject matter jurisdiction.<sup>160</sup>

Much could and has been said about Marshall's reasoning, but this article is not the place for an extended discussion. *Marbury*, of course, established several important constitutional principles: the Constitution is paramount law; our system is one in which government and governing institutions have limited powers conferred and confined by law; officials are accountable to law and to democratic judgments; and the judiciary has the power of judicial review, i.e., to interpret law which arises in a case or controversy before it and to determine whether a statute is consistent with the Constitution and, if it is not, to refuse to apply it.<sup>161</sup>

But *Marbury* did not say that the Court was the ultimate constitutional interpreter.<sup>162</sup> The statements it made ("It is emphatically the province and duty of the Judicial Department to say what the law is."<sup>163</sup>), and on which *Cooper* relied in part, alone and especially when read in context, fell short of declaring "the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution."<sup>164</sup> Rather than make that claim, Marshall made the more modest assertion that the Court could interpret the Constitution to decide a case, and in doing so, could declare a law unconstitutional and accordingly refuse to give it effect.<sup>165</sup>

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160. *Id.* at 175–76.

161. ATTANASIO & GOLDSTEIN, *supra* note 157, at 30.

162. *See also* KRAMER, *supra* note 149, at 125–27 (arguing that *Marbury* did not assert judicial exclusivity or judicial supremacy); *id.* at 221 (stating that *Marbury* did not declare principle of judicial supremacy); WILLIAM E. NELSON, *MARBURY V. MADISON: THE ORIGINS AND LEGACY OF JUDICIAL REVIEW* 95 (2d ed. 2018) ("They had no intention to behave as the Supreme Court ultimately would in *Cooper v. Aaron*, a 1958 school desegregation case in which the Court for the first time in its history explicitly arrogated to itself the exclusive power to interpret the Constitution. Unlike the Justices in *Cooper*, Marshall and his colleagues did not declare themselves to be the ultimate arbiters of the nation's constitutional policy choices, with power to bind coordinate branches of government to their judgments of constitutionality and thereby invalidate popularly supported legislative policies inconsistent with the constitutional values they favored."); Christopher L. Eisgruber, *The Fourteenth Amendment's Constitution*, 69 S. CAL. L. REV. 47, 81 (1995) ("If successful, Marshall's argument in *Marbury* establishes only that the Court may pass upon the constitutionality of laws; the argument does not say anything about whether other branches of the government must accept the Court's judgment."). *But see* MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* 7 (1999) (arguing that *Marbury's* sentence can be read either as simply asserting power of judicial review or as conferring monopoly power).

163. *Marbury*, 5 U.S. (1 Cranch) at 177.

164. *Cooper v. Aaron*, 358 U.S. 1, 18 (1958).

165. BREYER, *supra* note 2, at 21.

Most of Marshall's discussion establishes that the judiciary has the power and duty to review legislation as it becomes pertinent in cases or controversies to determine whether or not it is constitutional, not that the Court's interpretation binds subsequent non-party conduct. That becomes clearer when the sentences following the one the Court cited are added since they speak only to the Court's power of judicial review without claiming a monopoly or ultimate interpretive power.<sup>166</sup> And elsewhere in *Marbury*, Marshall suggested that the Court's power to interpret the Constitution in the course of its work is not exclusive. He reasoned that courts can interpret the Constitution since they are governed by it.<sup>167</sup> Courts must interpret it to make certain they remain within its confines.<sup>168</sup> He wrote that "it is apparent that the framers of the Constitution contemplated [the Constitution] as a rule for the government of courts, as well as of the Legislature."<sup>169</sup> If the fact that the Constitution bound the courts required them to interpret the Constitution, it also empowered Congress to interpret the Constitution to make sure it also stayed within its boundaries.<sup>170</sup> Marshall returned to that theme in expanded form in closing *Marbury*: "Thus, the particular phraseology of the Constitution of the United States confirms and strengthens the principle, supposed to be essential to all written Constitutions, that a law repugnant to the Constitution is void, and that courts, *as well as other departments*, are bound by that instrument."<sup>171</sup>

Marshall also rested the judiciary's power to interpret the Constitution<sup>172</sup> on the Oath Clause<sup>173</sup> which compels federal judges to swear to support the Constitution. How could they fulfill that commitment without interpreting it? Yet the same logic would also apply to other national and

166. *Marbury*, 5 U.S. (1 Cranch) at 177 ("Those who apply the rule to particular cases must, of necessity, expound and interpret that rule. If two laws conflict with each other, the Courts must decide on the operation of each.").

167. *Id.* at 177–78.

168. *Id.* at 179.

169. *Id.* at 179–80.

170. *Cf.* THOMAS REED POWELL, VAGARIES AND VARIETIES IN CONSTITUTIONAL INTERPRETATION 7 (1956) (stating that Marshall's formulation is susceptible to possible but not inevitable inference that each body must interpret the Constitution for itself).

171. *Marbury*, 5 U.S. (1 Cranch) at 180 (emphasis added).

172. *Id.* ("Why otherwise does it direct the judges to take an oath to support it? . . . Why does a judge swear to discharge his duties agreeably to the constitution of the United States, if that constitution forms no rule for his government? if it is closed upon him and cannot be inspected by him?").

173. U.S. CONST. art. VI, cl. 3 ("The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.").

state officials who also commit to support the Constitution.<sup>174</sup> Accordingly, the Oath Clause tends to rebut the idea that courts have a unique relationship with the Constitution.

*Marbury* simply established that the Court had power to interpret the Constitution in the course of deciding cases and controversies.<sup>175</sup> It made no claim regarding the scope of its power.<sup>176</sup> Indeed, a narrow reading of the case consistent with its facts would limit that power to questions regarding the Court's jurisdiction,<sup>177</sup> although *Marbury* hinted, and later decisions confirmed,<sup>178</sup> that the power of judicial review extended further. *Marbury* implied that its power to interpret the Constitution was not exclusive.<sup>179</sup> And it made no claim that other branches were bound in later actions by the Court's constitutional interpretations.

In fact, such a claim of interpretive superiority would have been inconsistent with Marshall's agenda in *Marbury*. Marshall was trying to establish foundational principles of American constitutional law including the power of judicial review, but he was also anxious to avoid a conflict

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174. *Id.*; see 4 MALONE, *supra* note 149, at 151 (arguing that Marshall's reliance on oaths left room for executive and legislative interpretation).

175. *Marbury*, 5 U.S. (1 Cranch) at 177–78 (“It is emphatically the province and duty of the Judicial Department to say what the law is. Those who apply the rule to particular cases must, of necessity, expound and interpret that rule. If two laws conflict with each other, the Courts must decide on the operation of each. So, if a law be in opposition to the Constitution, if both the law and the Constitution apply to a particular case, so that the Court must either decide that case conformably to the law, disregarding the Constitution, or conformably to the Constitution, disregarding the law, the Court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.”).

176. See Van Alstyne, *supra* note 149, at 36–37.

177. See, e.g., POWELL, *supra* note 170, at 8 (describing this possible interpretation); Van Alstyne, *supra* note 149, at 34–36 (describing though rejecting this narrow interpretation of *Marbury*).

178. See, e.g., *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 377 (1821) (“If such be the constitution, it is the duty of the Court to bow with respectful submission to its provisions. If such be not the constitution, it is equally the duty of this Court to say so; and to perform that task which the American people have assigned to the judicial department.”); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 400–01 (1819) (“In the case now to be determined, the defendant, a sovereign state, denies the obligation of a law enacted by the legislature of the Union, and the plaintiff, on his part, contests the validity of an act which has been passed by the legislature of that State. . . . On the supreme court of the United States has the Constitution of our country devolved this important duty.”); *id.* at 423 (“Should congress, in the execution of its powers, adopt measures which are prohibited by the constitution, or should congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not intrusted to the government, it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say that such an act was not the law of the land.”).

179. *Marbury*, 5 U.S. (1 Cranch) at 179–80 (describing the Constitution as binding the legislature and other departments as well as the courts).

with Jefferson and Madison. Asserting judicial superiority would have invited unwanted retaliation.

Moreover, Marshall's opinion in *Marbury* deliberately avoided reliance on executive enforcement which would have tested a claim of judicial supremacy. The holding, that section 13 was unconstitutional because Congress could not expand the Court's original jurisdiction, did not require the Court to assert that it was the supreme constitutional interpreter. No other branch needed to comply with the Court's decision. The Court simply recognized a limit on its own power by concluding it could not decide *Marbury's* case; it did not require Congress, the President, or anyone else to acknowledge its interpretive supremacy.

Significantly, Marshall made more modest claims for the judiciary in *Marbury* than Alexander Hamilton had made in *The Federalist Papers* fifteen years earlier.<sup>180</sup> Hamilton had argued that "[t]he interpretation of the laws is the proper and peculiar province of the courts."<sup>181</sup> Hamilton's formulation, particularly in its use of "peculiar," suggested that the judiciary's role in interpreting laws, including the Constitution, was unique. Hamilton also wrote that the judiciary's duty was "to declare all acts contrary to the manifest tenor of the Constitution void."<sup>182</sup> Hamilton further buttressed that conclusion by calling the judiciary "the least dangerous" branch since it possessed neither the purse nor the sword.<sup>183</sup> Accordingly, Hamilton reasoned that the judiciary could safely determine the Constitution's bounds because it was least able to aggrandize power in a manner inconsistent with those limits.<sup>184</sup> Hamilton accordingly used the Court's relative weakness to justify the Court's role as constitutional umpire.

By contrast, Marshall did not invoke "the least dangerous branch" rationale in *Marbury*. Yes, he wanted to avoid a hopeless confrontation with Jefferson but without being obsequious. But he also did not need to make such a sweeping claim regarding judicial supremacy in order to refuse to exercise original subject matter jurisdiction in *Marbury's* case. All he needed to establish was that the Court had the more limited power of judicial review.

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180. THE FEDERALIST NO. 78, at 464–72 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

181. *Id.* at 467.

182. *Id.* at 466.

183. *Id.* at 465.

184. *Id.* at 465–66.



### C. A Brief Sketch of Judicial Supremacy in History and Doctrine

Notwithstanding the Court's claim in *Cooper*, judicial supremacy has not rested on the sturdy foundation it depicted.<sup>185</sup> Not only did *Marbury* not support the judicial supremacy proposition the Court asserted in *Cooper*, historically *Marbury* was not read as establishing judicial supremacy in constitutional interpretation. Before and after *Marbury*, prominent thinkers rejected the idea that the judiciary's constitutional interpretations bound other non-party actors. In the first years after adoption of the Constitution, the three branches were widely thought to enjoy interpretive independence.<sup>186</sup> Although courts upheld the constitutionality of the Alien and Sedition Acts, Thomas Jefferson wrote that the President, deeming those laws unconstitutional, could use his pardon power to negate those sentences.<sup>187</sup> In his First Inaugural Address, President Abraham Lincoln conceded that the Supreme Court's constitutional interpretations bound the parties to the particular case and merited influence in related matters but denied that they necessarily bound non-parties.<sup>188</sup> Politicians, Richard A. Fallon, Jr. has pointed out, routinely claim that various judicial decisions improperly interpret the Constitution and work to change them.<sup>189</sup> This behavior is not unique to this age but characterized earlier times regarding

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185. Paul A. Freund, *Storm over the American Supreme Court*, 21 MOD. L. REV. 345, 346 (1958) ("Resistance to the court has been a persistent strain in American life from the beginning. . . .").

186. KRAMER, *supra* note 149, at 105–10, 135–36.

187. Thomas Jefferson, Letter from Thomas Jefferson to Mrs. John Adams (Sept. 11, 1804), in 11 THE WRITINGS OF THOMAS JEFFERSON 49, 50–51 (Albert Ellery Bergh ed., 1905); see also 4 MALONE, *supra* note 149, at 153–56 (discussing Jefferson's belief that branches of federal government shared duty to interpret Constitution); *id.* at 207 (discussing Jefferson's pardons and view that the Sedition Act was unconstitutional).

188. Abraham Lincoln, First Inaugural Address (Mar. 4, 1861), in 4 THE COLLECTED WORKS OF ABRAHAM LINCOLN 262, 268 (Roy P. Brasler ed., 1953) ("I do not forget the position assumed by some, that constitutional questions are to be decided by the Supreme Court; nor do I deny that such decisions must be binding in any case, upon the parties to a suit as to the object of that suit, while they are also entitled to very high respect and consideration, in all parallel cases, by all other departments of the government. And while it is obviously possible that such decision may be erroneous in any given case, still the evil effect following it, being limited to that particular case, with the chance that it may be overruled and never become a precedent for other cases, can better be borne than could the evils of a different practice. At the same time the candid citizen must confess that if the policy of the government, upon vital questions, affecting the whole people, is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made in ordinary litigation between parties, in personal actions, the people will have ceased, to be their own rulers, having, to that extent, practically resigned their government, into the hands of that eminent tribunal.").

189. Richard H. Fallon, Jr., *Judicial Supremacy, Departmentalism, and the Rule of Law in a Populist Age*, 96 TEX. L. REV. 487, 498–500 (2018).

decisions like *Dred Scott v. Sandford*,<sup>190</sup> *Plessy v. Ferguson*,<sup>191</sup> *Lochner v. New York*,<sup>192</sup> and other judicial mistakes.<sup>193</sup>

As suggested above, political actors have discharged their duties based on constitutional interpretations different from those of the courts. Presidents might veto measures based on constitutional considerations that take issue with judicial decisions or pardon convicted defendants based on the view that they were indicted for violating unconstitutional laws as Jefferson did. Legislators might debate or vote on measures based on constitutional conclusions that diverge from those the Court has given. Congress has passed, and Presidents have recognized, legislative veto provisions<sup>194</sup> that seem to run afoul of *INS v. Chadha*.<sup>195</sup>

In some areas, courts defer to political institutions in constitutional interpretation. Although *Marbury* said that courts could exercise jurisdiction over executive officials when they allegedly violated individual rights,<sup>196</sup> it recognized that sometimes political actors are given discretion such that their conduct is not subject to judicial jurisdiction.<sup>197</sup> Under the “political question” doctrine, the Court has recognized a broader set of situations that are committed to political institutions, namely Congress (or one house or the other) or the President.<sup>198</sup> These matters are nonjusticiable because either the Constitution delegates decision-making and interpretative authority to a coordinate political institution or the Court determines there are no judicial materials to fashion or implement a governing rule or standard.<sup>199</sup> Thus, in *Nixon v. United States*,<sup>200</sup> the Court held that the Senate, not the Court, could interpret the Constitution’s Impeachment Trial Clause because the Constitution’s text committed that issue to the Senate, not the judiciary,<sup>201</sup> and because of an absence of judicially discoverable and manageable standards to interpret “try.”<sup>202</sup>

190. 60 U.S. (19 How.) 393 (1857).

191. 163 U.S. 537 (1896).

192. 198 U.S. 45 (1905).

193. Fallon, *supra* note 189, at 498–500.

194. Louis Fisher, *The Unitary Executive and Inherent Executive Power*, 12 U. PA. J. CONST. L. 569, 581 (2010).

195. 462 U.S. 919, 942–43 (1983) (holding legislative veto provision unconstitutional).

196. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 166 (1803).

197. *Id.*

198. *See, e.g.,* Lain, *supra* note 26, at 1629–30 (discussing how political question and other justiciability doctrines leave some constitutional decision-making to political branches).

199. *See, e.g.,* *Baker v. Carr*, 369 U.S. 186 (1962) (stating that the factors that make the issue a political question include the textual commitment of the issue to a political department or the absence of judicial standards).

200. 506 U.S. 224 (1993).

201. *Id.* at 230–32.

202. *Id.* at 229–30.

Sometimes Congress or the President has interpretive authority because no person has standing to bring an issue to federal court. Thus, the Court dismissed suits to bar congressmen from serving in the military reserve<sup>203</sup> and requiring the Central Intelligence Agency budget to be published<sup>204</sup> on the grounds that the plaintiffs lacked sufficient interest to raise those challenges. At times, the Court concludes that it cannot formulate constitutional restraints even though it recognizes that political departments might do so. Thus, in *Garcia v. San Antonio Metropolitan Transit Authority*<sup>205</sup> the Court deemed itself unable to fashion a standard to insulate states from generally applicable regulatory legislation, although it concluded that Congress might protect the states.<sup>206</sup> These examples, among others, rebut *Cooper's* claim that *Marbury* and American history established universal judicial supremacy in constitutional interpretation.

The Court's assertion of judicial supremacy in *Cooper* has proved controversial.<sup>207</sup> To some extent, the pushback against the claim related to the exaggerated reading of *Marbury* and from its inadequacy as a descriptive account of American constitutional experience. Moreover, even some sympathetic to the result in *Cooper*<sup>208</sup> questioned the Court's language giving its decision the status accorded constitutional provisions under the Supremacy Clause.<sup>209</sup> There is a logical problem with considering the constitutional interpretation in a Supreme Court decision, even one like *Brown*, as the supreme law of the land. If the Court's decisions have that status, presumably they bind not only political actors, but judges as well.<sup>210</sup> Yet the Court often overrules earlier decisions especially in constitutional cases, where legislative correction is impossible. As Justice Brandeis put it,

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203. *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208 (1974).

204. *United States v. Richardson*, 418 U.S. 166 (1974).

205. 469 U.S. 528 (1985).

206. *Id.* at 550–52.

207. *See, e.g.*, Ashutosh Bhagwat, *Cooper v. Aaron and the Faces of Federalism*, 52 ST. LOUIS U. L.J. 1087, 1092 (2008); Justin Driver, *Supremacies and the Southern Manifesto*, 92 TEX. L. REV. 1053, 1102–03 (2014) (stating that *Cooper* has been widely criticized for articulating some “dubious” propositions); Farber, *supra* note 17, at 388 (stating that *Cooper* generated “scathing attack from commentators” and giving examples); Strauss, *supra* note 4, at 1080 (calling *Cooper's* assertion of judicial supremacy “highly controversial”); Wilkinson, *supra* note 19, at 520 (stating that the Court went “somewhat overboard”).

208. *See, e.g.*, PHILIP B. KURLAND, *POLITICS, THE CONSTITUTION AND THE WARREN COURT* 185–86 (1970) (expressing support for *Cooper* yet stating misgivings regarding the idea of giving Supreme Court decisions Supremacy Clause status).

209. *See, e.g., id.* at 185 (questioning the “elevation of Supreme Court decisions to inclusion in the Supremacy Clause of the Constitution”).

210. *See, e.g., id.* (referring to the “immutability of constitutional decisions” implicit in viewing them as part of supreme law); Strauss, *supra* note 4, at 1080–81 (suggesting a logical problem with requiring other branches of the national government to comply with judicial decisions which the Court may overturn).

“The Court bows to the lessons of experience and the force of better reasoning, recognizing that the process of trial and error, so fruitful in the physical sciences, is appropriate also in the judicial function.”<sup>211</sup> *Brown*, of course, effectively overruled *Plessy*. If a Supreme Court decision was part of the supreme law of the land, how was *Plessy* overruled?<sup>212</sup> Moreover, Professor Philip Kurland thought the Court’s formulation equating the Court’s decisions with the Constitution made it difficult to even suggest that the Court overturn a precedent.<sup>213</sup>

The view that the Court’s rulings are equivalent to the Constitution, also suggests that constitutional meaning is fixed and certain, not dynamic and the subject of dispute, as many believe. Judge Wilkinson argued that *Cooper*’s language “[t]aken literally” compelled non-party officials “to immediately support, both in word and in deed, whatever the Court has said,”<sup>214</sup> but that cannot have been the Court’s intent since “taken literally” that formulation would foreclose criticism of a decision or any action to change it. A Court that had just effectively overruled a century-old precedent based on the argument that, whatever its initial merit, it no longer constituted equal protection,<sup>215</sup> could not have intended a meaning that would forever freeze doctrine in place.<sup>216</sup> In fact, it is more plausible to think that the Court viewed its decisions as entitled to respect under the Supremacy Clause, not because they were part of the Constitution but because they were the product of an authorized exercise of constitutional power,<sup>217</sup> a form of constitutional common law that was binding until properly changed.<sup>218</sup>

Professor Tribe has suggested a narrower reading of *Cooper*’s judicial supremacy claim as applying essentially to *Brown* and its progeny and claiming that they had binding effect such that state officials who interfered with their enforcement “or act to undermine its goals” act “unlawfully.”<sup>219</sup> This view would leave officials free to engage in nonjusticiable behavior inconsistent with the Court’s interpretation.<sup>220</sup>

211. *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 407–08 (1932) (Brandeis, J., dissenting).

212. KURLAND, *supra* note 208, at 185–86.

213. *Id.* at 186.

214. Wilkinson, *supra* note 19, at 520.

215. *Brown v. Bd. of Educ.*, 347 U.S. 483, 492–95 (1954).

216. *See also Recent Attacks upon the Supreme Court: A Statement by Members of the Bar*, *supra* note 41, at 1128 (statement of prominent lawyers recognizing that critics of a Supreme Court decision may properly criticize it and seek an “overruling decision”).

217. LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 257 (3d ed. 2000).

218. Farber, *supra* note 17, at 409, 410–11.

219. TRIBE, *supra* note 217, at 257.

220. *Id.* at 258.

Although the Court's claim in *Cooper* was inaccurate, it was not without some basis. Justin Driver argues persuasively that *Cooper* did not invent a new doctrine of judicial supremacy but "merely amplified" an existing notion that courts "enjoyed a privileged role" in constitutional interpretation.<sup>221</sup> Generally speaking, political actors do follow the Court's constitutional decisions, even when those decisions impose unpalatable outcomes.<sup>222</sup> In his classic, *The American Supreme Court*, which first appeared in 1960, but was apparently completed before *Cooper* was issued since it did not mention Little Rock, Robert G. McCloskey wrote that the power of judicial review

must be nourished and cultivated so that it will grow into the doctrine of *judicial sovereignty*, or the idea that a law may be held unconstitutional if the Court thinks it is, even though the case is not plain, and that the Court's opinion to that effect is binding on other branches of government.<sup>223</sup>

In part, what McCloskey called judicial sovereignty is widely recognized because the Court exercises its authority in areas that political leaders and most citizens "accept as lying within the lawful bounds of judicial authority."<sup>224</sup> Put differently, the Court generally stays in the lanes that have been constructed as appropriate for judicial intervention and does not trespass in those where political discretion seems warranted. The Court encourages acquiescence through its selective assertion of power and through the manner in which it acts. Court rationales have presumptive, not absolute, finality,<sup>225</sup> and Presidents and others generally follow the Court's constitutional interpretations because of public expectations and because judicial behavior generally invites acceptance.<sup>226</sup>

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221. Driver, *supra* note 207, at 1102.

222. See, e.g., *Bush v. Gore*, 531 U.S. 98 (2000) (deciding, 5-4, that recount of Florida electoral votes must end, thereby effectively determining that Governor George W. Bush had won Florida's electoral votes and the presidency); *United States v. Nixon*, 418 U.S. 683 (1974) (deciding, 8-0, that President Richard M. Nixon must produce certain White House tapes that showed that he was complicit in the cover-up of the Watergate break-in from an early point); *Clinton v. Jones*, 520 U.S. 681 (1997) (declining, 8-0, to stay, during his presidency, a civil case against President Bill Clinton arising out of alleged pre-presidential behavior); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (deciding, 6-3, that Secretary of Commerce Charles Sawyer unconstitutionally seized and operated the steel mills pursuant to President Harry S. Truman's order).

223. McCLOSKEY, *supra* note 59, at 30.

224. Fallon, *supra* note 189, at 494.

225. *Id.* at 507.

226. *Id.* at 507-08.

## IV. JUDICIAL SUPREMACY IN A FEDERALISM CONTEXT

In a sense, though, the Court's discussion of judicial supremacy in *Cooper*, especially its reliance on *Marbury* as the source of that doctrine, was beside the point, or beside most of the point. *Marbury* involved a situation quite different from that in *Cooper*. As previously mentioned, in *Marbury* the Court interpreted the Constitution to find the case not within its own original subject matter jurisdiction and accordingly did not need acquiescence or external support to enforce its judgment or rationale.<sup>227</sup> By contrast, *Cooper* addressed the refusal of officials to abide by newly-promulgated Supreme Court doctrine regarding the operation of public schools those officials had a part in running.<sup>228</sup> Accordingly, in Little Rock, unlike in *Marbury*, the Court very much depended on external acquiescence and support. Moreover, *Marbury* involved a separation of powers dispute in which the Court reviewed, and found unconstitutional, an act of Congress.<sup>229</sup> By contrast, *Cooper* involved a federalism controversy in which state officials rejected their obligation to follow federal court orders and the Court's new interpretation of the Equal Protection Clause as expressed in *Brown*.<sup>230</sup> Indeed, the latter part of the Court's judicial supremacy formulation in *Cooper* implicitly recognized this distinction since it spoke of the Supremacy Clause binding the states to follow the Court's interpretations of the Fourteenth Amendment (which itself limits the states) and since it specifically concluded that the Oath Clause binds "[e]very state legislator and executive and judicial officer" to support the Constitution.<sup>231</sup> Ashutosh Bhagwat has perceptively observed that much of the critical discussion of *Cooper*'s judicial supremacy statement has addressed the role of the Court relative to coordinate branches of the federal government and accordingly is misdirected since the thrust of the *Cooper* comment was to

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227. See *supra* text accompanying notes 179–80.

228. *Cooper v. Aaron*, 358 U.S. 1 (1958).

229. See *supra* text accompanying notes 179–80.

230. Cf. Van Alstyne, *supra* note 149, at 37 (stating that *Marbury* does not involve any question of the role of states in constitutional interpretation); Charles Warren, *Earliest Cases of Judicial Review of State Legislation by Federal Courts*, 32 YALE L.J. 15, 15 (1922) (stating that power of federal judicial review of Congressional and state statutes involves different considerations). But see MCCLOSKEY, *supra* note 59, at 44 (arguing that *Marbury* rationales for judicial review are broadly stated to apply to state as well as national legislation).

231. 358 U.S. at 18 ("It follows that the interpretation of the Fourteenth Amendment enunciated by this Court in the *Brown* case is the supreme law of the land, and Art. VI of the Constitution makes it of binding effect on the States 'any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.' Every state legislator and executive and judicial officer is solemnly committed by oath taken pursuant to Art. VI, cl. 3 'to support this Constitution.'").

make a “more modest statement” regarding the obligations of state, not national, officials.<sup>232</sup>

The arguments for judicial supremacy in a federalism context differ from, and are stronger than, in the separation of powers context. There are textual, historical, structural, and pragmatic reasons why the Court’s decisions should enjoy a stronger presumption of applicability to non-parties in a federalism context than regarding a separation of powers issues, and some doctrine tends to recognize that distinction. Justice Oliver Wendell Holmes, Jr. famously opined, “I do not think the United States would come to an end if we lost our power to declare an Act of Congress void. I do think the Union would be imperiled if we could not make that declaration as to the laws of the several States.”<sup>233</sup> Although Holmes spoke of the relative importance of two species of judicial review, what might be called horizontal versus vertical judicial review, not judicial supremacy, the reasons making judicial review more important vertically than horizontally also inform the discussion regarding judicial supremacy in the federalism versus separation of powers context.

A federal system needs an umpire to resolve disputes between various levels of government and the Court has largely inherited that role.<sup>234</sup> James Madison apparently recognized greater deference to the federal judiciary in deciding federalism controversies than those involving its coordinate branches.<sup>235</sup> Indeed, the text supports that conclusion: in the Supremacy Clause,<sup>236</sup> which makes federal law prevail over state law and binds state judges to follow federal law in preference to the law from the state of which they are an officer; the Oath Clause,<sup>237</sup> which requires all state officers and

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232. Bhagwat, *supra* note 207, at 1093.

233. OLIVER WENDELL HOLMES, *Law and the Court: Speech at a Dinner of the Harvard Law School Association of New York*, in COLLECTED LEGAL PAPERS 291, 295–96 (1920); see also PAUL A. FREUND, *THE SUPREME COURT OF THE UNITED STATES: ITS BUSINESS, PURPOSES, AND PERFORMANCE* 99 (1961) (justifying judicial review primarily as “restraint on state action”).

234. COX, *supra* note 156, at 21–22 (“The peculiar nature of our federal system also gives rise to the need for somebody to manage the interplay between State and federal law and State and federal courts.”).

235. KRAMER, *supra* note 149, at 186–87.

236. U.S. CONST. art. VI, cl. 2 (“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”).

237. *Id.* cl. 3 (“The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.”).

legislators to obey the Constitution; the grant of subject matter jurisdiction to the federal courts of a range of cases in which states are parties; and the grant of appellate jurisdiction to the Court in cases or controversies within most of the categories Article III assigns the federal courts.<sup>238</sup>

Judicial supremacy is implicit in two basic functions of a Supreme Court in a federalist system—protecting the supremacy and promoting the uniformity of national law.<sup>239</sup> The Supremacy Clause implies federal judicial power to subject the actions of state officials to constitutional review.<sup>240</sup> Indeed, the federal structure of the Constitution implied a constitutional value that federal constitutional and statutory law should have uniform meaning. A central function of federal courts, especially the Supreme Court, is to provide a consistent interpretation for federal law such that its meaning does not vary in different jurisdictions.<sup>241</sup>

Although *Marbury* did not consider whether the Court’s constitutional decisions bound state officials, other Marshall Court cases addressed that subject. In *Martin v. Hunter’s Lessee*,<sup>242</sup> Virginia acknowledged the supremacy of federal law but argued that its highest court had final interpretive power in cases brought before it.<sup>243</sup> The Court, speaking through Justice Joseph Story, rejected this contention. The Constitution gave the Supreme Court, not the highest state court, this constitutional power.<sup>244</sup> Justice Story further affirmed the Court’s power to declare null and void the acts of each branch of the state government to preserve the supremacy of federal law.<sup>245</sup> The Court also invoked the importance of uniformity in

238. Ashutosh Bhagwat has suggested that state executive and legislative officials may have greater leeway to resist the Constitution since the Supremacy Clause speaks directly to state judges, since *Martin v. Hunter’s Lessee* established a hierarchy between the Court and state judiciaries, and to promote judicial efficiency. Bhagwat, *supra* note 207, at 1099–1100. Yet if the Supremacy Clause commits state judges to follow constitutional interpretations of the Court, the Oath Clause would seem to require that state political actors comply with those same decisions and doctrine. See, e.g., TRIBE, *supra* note 217, at 255 (noting that the Oath Clause has been used to compel state nonjudicial officials to comply with the Constitution).

239. Paul A. Freund, *A Supreme Court in a Federation: Some Lessons from Legal History*, 53 COLUM. L. REV. 597, 615 (1953) (“The supreme court in federation has two principal functions: to maintain the supremacy of the constitution and to promote the uniformity of law.”).

240. POWELL, *supra* note 170, at 16, 22.

241. Freund, *supra* note 239, at 598 (“Every federation has thought it necessary to establish a supreme court which performs the twofold function of interpreting the constitution and promoting uniformity of law.”).

242. 14 U.S. (1 Wheat.) 304 (1816).

243. *Id.* at 346–47.

244. *Id.*

245. *Id.* at 344 (“The courts of the United States can, without question, revise the proceedings of the executive and legislative authorities of the states, and if they are found to be contrary to the constitution, may declare them to be of no legal validity. Surely the



federal law to justify Supreme Court review of state court decisions regarding matters of federal law.<sup>246</sup>

In *Cohens v. Virginia*,<sup>247</sup> Chief Justice Marshall rejected Virginia's argument that the Constitution allowed each state to interpret the ultimate meaning of the Constitution and federal law.<sup>248</sup> The Constitution made clear, by its structure and its text, that "[t]he general government, though limited as to its objects, is supreme with respect to those objects."<sup>249</sup> The federal judiciary was charged "to decide all cases of every description arising under the Constitution or laws of the United States" in order to vindicate the Constitution's principles.<sup>250</sup> He reaffirmed this principle, asking rhetorically:

Is it so improbable that they should confer on the judicial department the power of construing the Constitution and laws of the Union in every case, in the last resort, and of preserving them from all violation from every quarter, so far as judicial decisions can preserve them, that this improbability should essentially affect the construction of the new system?<sup>251</sup>

There Marshall reaffirmed that the federal courts existed to protect the Constitution and federal law from state intrusions.<sup>252</sup> Echoing Story's arguments regarding the Court's role in preserving the supremacy and uniformity of federal law, Marshall wrote:

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exercise of the same right over judicial tribunals is not a higher or more dangerous act of sovereign power.").

246. *Id.* at 347–48 ("That motive is the importance, and even necessity, of uniformity of decisions throughout the whole United States upon all subjects within the purview of the constitution. Judges of equal learning and integrity in different States might differently interpret a statute or a treaty of the United States, or even the constitution itself; if there were no revising authority to control these jarring and discordant judgments and harmonize them into uniformity, the laws, the treaties, and the constitution of the United States would be different in different states, and might perhaps never have precisely the same construction, obligation, or efficacy in any two states. The public mischiefs that would attend such a state of things would be truly deplorable, and it cannot be believed that they could have escaped the enlightened convention which formed the Constitution.").

247. 19 U.S. (6 Wheat.) 264 (1821).

248. *Id.* at 377 ("[T]he constitution of the United States has provided no tribunal for the final construction of itself, or of the laws or treaties of the nation; but that this power may be exercised in the last resort by the Courts of every State in the Union. That the constitution, laws, and treaties may receive as many constructions as there are States; and that this is not a mischief, or, if a mischief, is irremediable.").

249. *Id.* at 381.

250. *Id.* at 382.

251. *Id.* at 388.

252. *Id.* at 391 ("A more important, a much more interesting, object was the preservation of the Constitution and laws of the United States, so far as they can be preserved by judicial authority, and therefore the jurisdiction of the Courts of the Union was expressly extended to all cases arising under that Constitution and those laws.").

Dismissing the unpleasant suggestion that any motives which may not be fairly avowed, or which ought not to exist, can ever influence a State or its Courts, the necessity of uniformity, as well as correctness in expounding the Constitution and laws of the United States, would itself suggest the propriety of vesting in some single tribunal the power of deciding, in the last resort, all cases in which they are involved.<sup>253</sup>

After invoking *Marbury*, *Cooper* cited in passing *Ableman v. Booth*<sup>254</sup> for the proposition that the Constitution imposed an oath on state office-holders in order to preserve the Constitution, but elsewhere in the opinion *Ableman* came much closer to articulating a doctrine of judicial supremacy in a federalism context than did *Marbury*. Having assisted in the escape of a fugitive slave from federal custody, *Ableman* was arrested for violating the federal Fugitive Slave Law but then released on order of the Wisconsin state courts.<sup>255</sup> The federal government appealed to the Supreme Court arguing that the actions of Wisconsin's courts was unlawful.<sup>256</sup> The Court agreed.<sup>257</sup>

Writing for the Court, Chief Justice Taney echoed the structural arguments from *Hunter's Lessee* and *Cohens* regarding the Court's role in preserving the supremacy and uniformity of federal law.<sup>258</sup> It was necessary that a federal tribunal be created so cases arising under federal law "should be finally and conclusively decided."<sup>259</sup> The Supreme Court's "ultimate appellate power" was essential to preserve the supremacy and uniformity of federal law.<sup>260</sup> Moreover, since federal and state courts might often differ regarding constitutional and legal interpretation, the constitutional system required a Supreme Court to resolve disputes "finally and with out appeal."<sup>261</sup> States were bound to support the Constitution "[a]nd no power is

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253. *Cohens*, 19 U.S. (6 Wheat.) at 416.

254. 62 U.S. (21 How.) 506 (1859).

255. *Id.* at 507–08, 511.

256. *Id.* at 511–14.

257. *Id.* at 526.

258. *Id.* at 517–18 ("But the supremacy thus conferred on this Government could not peacefully be maintained, unless it was clothed with judicial power equally paramount in authority to carry it into execution; for if left to the courts of justice of the several States, conflicting decisions would unavoidably take place, and the local tribunals could hardly be expected to be always free from the local influences of which we have spoken. And the Constitution and laws and treaties of the United States, and the powers granted to the Federal Government, would soon receive different interpretations in different States, and the Government of the United States would soon become one thing in one State and another thing in another."); *id.* at 518 (stating that Supreme Court was needed "to secure the independence and supremacy" of the federal government and to make the Constitution and federal law uniform).

259. *Id.*

260. *Ableman*, 62 U.S. (21 How.) at 518.

261. *Id.* at 519–20 ("And as the courts of a State, and the courts of the United States, might, and indeed certainly would, often differ as to the extent of the powers conferred by the

more clearly conferred by the Constitution and laws of the United States than the power of this court to decide, ultimately and finally, all cases arising under such Constitution and laws[.]”<sup>262</sup>

To be sure, *Martin*, *Cohens*, and *Ableman* spoke of the Court’s role resolving cases on final appeal rather than making the sort of sweeping statement the Court made in *Cooper*. Yet the underlying values of supremacy and uniformity of federal law could only be served if the meanings the Court inferred from the Constitution were generally binding. If the Court’s analysis applied only in the case decided, inconsistent behavior in other jurisdictions could frustrate the purposes behind Supreme Court appellate review by subordinating federal law or construing and applying it differently than the Court did.

The adoption of the Fourteenth Amendment in 1868 signaled further subordination of state government to constitutional norms within the broad area it covered. In a single sentence, the Amendment protected as against adverse state action privileges or immunities of United States citizens and prohibited states from denying persons the equal protection of the laws or life, liberty, or property without due process of law.<sup>263</sup> The language suggested the constitutionalization of a range of rights, thereby limiting state autonomy.<sup>264</sup> In *The Slaughter-House Cases*,<sup>265</sup> Justice Miller, writing for the majority, recognized that an expansive reading of the Fourteenth Amendment would make the Supreme Court “a perpetual censor upon all legislation of the States, on the civil rights of their own citizens, with authority to nullify such as it did not approve as consistent with those rights, as they existed at the time of the adoption of this amendment.”<sup>266</sup> Justice Miller rejected the proposition that the Amendment protected white butchers from the state-created monopoly there in question, but he did not deny that it gave the Court such broad power over state authorities regarding claims of African-Americans alleging racial discrimination, the class he identified as its intended beneficiaries.<sup>267</sup> The imposition of new constitutional norms on

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General Government, it was manifest that serious controversies would arise between the authorities of the United States and of the States, which must be settled by force of arms, unless some tribunal was created to decide between them finally and with out appeal.”); see also *id.* at 520 (describing the Supreme Court as exercising “final appellate power” so disputes could be “finally settled”).

262. *Id.* at 525.

263. U.S. CONST. amend. XIV, § 1.

264. Joel K. Goldstein, *Teaching the Transformative Fourteenth Amendment*, 62 ST. LOUIS U. L.J. 581 (2018).

265. 83 U.S. (16 Wall.) 36 (1872).

266. *Id.* at 78.

267. *Id.* at 67–68, 71–72, 81.

the states through the Fourteenth Amendment<sup>268</sup> expanded the Court's role as constitutional reviewer in a federalism context and the uniformity and supremacy imperatives suggested that the doctrine produced should apply to non-parties.<sup>269</sup>

The idea that state officials needed to defer to federal judges regarding the meaning of the Constitution or federal statutes was hardly a heretical idea. Indeed, in *Erie Railroad Co. v. Tompkins*,<sup>270</sup> the Court's most significant recognition of state judicial power in the twentieth century, the Court, implicitly and explicitly, recognized areas in which the Supreme Court enjoyed interpretive supremacy. Since *Erie* held that state legislatures and highest courts were supreme regarding state law and were entitled to deference from federal courts in those spheres,<sup>271</sup> the mirror image would also seem to follow, that the Supreme Court's constitutional interpretations were authoritative vis-à-vis state officials.<sup>272</sup> Justice Louis Brandeis did not leave that point wholly to inference, although his formulation might have been more broadly stated.<sup>273</sup>

Finally, the practical exigencies of governing a federal system would seem to require greater deference to Court decisions in a vertical than horizontal context. In criticizing the sweep of the Court's judicial supremacy pronouncement, Kurland had argued that *Brown* did not bind non-parties like Arkansas but provided a precedent that courts needed to follow in other litigation, including that involving the Little Rock schools, and that when followed, the lower federal or state court decisions became part of the supreme law of the land.<sup>274</sup> In such litigation, Arkansas officials could appeal to the Court and ask it to revisit or overrule *Brown*, but absent such judicial action the state officials were bound to follow the lower court order.<sup>275</sup> Yet such an approach creates the possibility of an endless series of challenges to judicial decisions as various local jurisdictions refuse to

268. See, e.g., JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 22–30 (1980).

269. But see Eisgruber, *supra* note 162, at 81–84 (arguing that Fourteenth Amendment undercuts argument for judicial supremacy).

270. 304 U.S. 64 (1938).

271. *Id.* at 78 (“Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. And whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern.”).

272. See Farber, *supra* note 17, at 390.

273. *Erie*, 304 U.S. at 79 (“Supervision over either the legislative or the judicial action of the States is in no case permissible except as to matters by the constitution specifically authorized or delegated to the United States.”).

274. KURLAND, *supra* note 208, at 117–18.

275. *Id.*

comply with a Court constitutional interpretation until it is applied to them through litigation and judgment.

Although the Court had not previously issued a *Cooper*-like statement of judicial supremacy in a federalism context, the theory enjoyed significant jurisprudential support. In 1938, then Professor Felix Frankfurter had termed “the special function of the Supreme Court . . . to mediate between the individual and government, and to mark the boundaries between state and national action.”<sup>276</sup> Frankfurter continued that “[t]he Court is the final authority in adjusting the relationships of the individual to the separate states, of the individual to the United States, of the forty-eight states to one another, and of the states to the Union.”<sup>277</sup>

Almost two years before the Court decided *Cooper*, leading American lawyers issued a statement that sounded many of the themes that case later articulated. The December 1956 pronouncement, which leading lawyers and law scholars signed, declared that “[i]n cases of disagreement” the federal judiciary existed “to interpret the Constitution for us” with the Supreme Court being “the embodiment of judicial power.”<sup>278</sup> Individuals might disagree with a Supreme Court decision or seek to have it reversed by a subsequent Supreme Court decision or constitutional amendment, but they had “a duty to recognize the decision as the supreme law of the land as long as it remains in force.”<sup>279</sup> The Court may not have asserted its supremacy in constitutional interpretation before *Cooper*, but there was support for some version of such a position in a federalism context, and the proposition found some support among leading lawyers.

## V. EISENHOWER AND JUDICIAL SUPREMACY

President Eisenhower was among those who embraced the idea that Supreme Court decisions bound other officials. Although President Eisenhower has been criticized for failing to provide more enthusiastic support for *Brown*,<sup>280</sup> the actions of Eisenhower and his administration were important in the Court’s articulation of judicial supremacy in *Cooper*. Eisenhower did not champion *Brown*,<sup>281</sup> but he did embrace the idea that the

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276. FELIX FRANKFURTER, MR. JUSTICE HOLMES AND THE SUPREME COURT 5 (1938).

277. *Id.*

278. *Recent Attacks upon the Supreme Court: A Statement by Members of the Bar*, *supra* note 41, at 1128.

279. *Id.*

280. *See supra* note 59 and accompanying text.

281. *See, e.g.*, The President’s News Conference of August 11, 1954, 1954 PUB. PAPERS 696, 700 (Aug. 11, 1954) (stating that “the subject has not even been mentioned to me” in response to question whether he had considered asking Congress to legislate to enforce school integration).

Supreme Court was the supreme constitutional expositor and that he was bound to enforce federal court orders.<sup>282</sup> He articulated those ideas frequently after the Court decided *Brown* especially after he was re-elected in 1956 and in 1957 and 1958 with reference to Little Rock.

When Eisenhower was questioned in his regular press conference whether he had any advice for the South two days after the Court's decision in *Brown*, he said, in pertinent part, "The Supreme Court has spoken and I am sworn to uphold the constitutional processes in this country; and I will obey."<sup>283</sup> The following year, Eisenhower told the American Bar Association that one product of Chief Justice John Marshall's work had been "to create among Americans a deep feeling of trust and respect for the Judiciary."<sup>284</sup> When asked about efforts to include an anti-discrimination requirement in the School Construction Bill, Eisenhower again stated his commitment to the Court's decisions which he characterized as "complete"<sup>285</sup> even while suggesting that the rider should be left out,<sup>286</sup> especially since the Court had said desegregation should be implemented gradually.<sup>287</sup>

When asked in February 1956 about his reaction to the interposition resolutions four states had passed denying that the Supreme Court was the ultimate constitutional interpreter, Eisenhower obfuscated, but his answer implicitly accepted the binding nature of the Court's decision even as he

282. See, e.g., Driver, *supra* note 207, at 1116–18 (providing brief discussion of Eisenhower's support for judicial supremacy).

283. The President's News Conference of May 19, 1954, 1954 PUB. PAPERS 489, 491 (May 19, 1954); see also The President's News Conference of November 23, 1954, 1954 PUB. PAPERS 1060, 1066 (Nov. 23, 1954) ("[T]he Supreme Court has ruled what the law is in this case, what the Constitution means.").

284. Address at the Annual Convention of the American Bar Association, Philadelphia, 1955 PUB. PAPERS 802, 803 (Aug. 24, 1955).

285. The President's News Conference of January 25, 1956, 1956 PUB. PAPERS 182, 186 (Jan. 25, 1956) ("Now, when it comes to my devotion to the Constitution—what it provides—my devotion to the decisions of the Supreme Court, particularly when they are unanimous, I hope is complete.").

286. *Id.* ("Now, it isn't though quite as simple as that. If we go to the other end and begin to talk about laws, I believe that every law, every important bill, and every important purpose from Congress should be in a bill of its own, so that we don't get a confusion of issues and, therefore, don't know for what we are voting or what we are not voting for.").

287. *Id.* ("The Supreme Court, in reaching its decision as to what the law was, provided, and specifically provided, there be a gradual implementation, and referred it back to the district courts so that it should be gradual."); *id.* ("But I just think that is the way I would handle it, to put it very clearly, because we want the schools now; and as much as the decision of the Supreme Court must be implemented, they said themselves, implemented gradually, because they recognize the deep ruts of prejudice and emotionalism that have been built up over the years in this problem.").

emphasized that the Court called for gradual implementation.<sup>288</sup> When Eisenhower was asked the following month about the Southern Manifesto, his answer implicitly accepted the Supreme Court's interpretations of the Constitution as binding.<sup>289</sup> And when asked about the possibility that some

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288. The President's News Conference of February 29, 1956, 1956 PUB. PAPERS 263, 269-70 (Feb. 29, 1956) ("William V. Shannon, New York Post: As you may know, four of the southern State legislatures have passed interposition resolutions stating that the Supreme Court decision outlawing segregation has no force and effect in their States; and I was wondering what you thought about this concept of interposition, and what you thought was the role of the Federal Government in enforcing the Supreme Court decision? THE PRESIDENT. Well, of course, you have asked a very vast question that is filled with argument on both sides. You have raised the question of States rights versus Federal power; you have particularly brought up the question whether the Supreme Court is the last word we have in the interpretation of our Constitution. Now, this is what I say: there are adequate legal means of determining all of these factors. The Supreme Court has issued its own operational directives and delegated power to the district courts. I expect that we are going to make progress, and the Supreme Court itself said it does not expect revolutionary action suddenly executed. We will make progress, and I am not going to attempt to tell them how it is going to be done.").

289. The President's News Conference of March 14, 1956, 1956 PUB. PAPERS 301, 303-05 (Mar. 14, 1956) ("Edward P. Morgan, American Broadcasting Company: Mr. President, southern members of Congress, including a couple of Republicans, have posed a direct challenge to both the other branches of Government, first, in the implied if not declared threat to block your appointments to the judiciary, which might find disfavor on the racial issue; and, second, in a manifesto which was introduced in Congress on Monday, in which some 100 members of the House and Senate commit themselves to try to overturn the Supreme Court decision on segregation. Would you comment on those developments, sir, particularly with reference to what you think the Executive responsibility is and should be. THE PRESIDENT. Well, you are asking a question that we are probably going to be busy on for a while. First, I have nothing whatsoever to say about their right to confirm or not confirm. The constitutional duty of the Senate to act as it sees fit upon the nominations sent up by the President is clear. I could urge publicly, and I probably would if I thought there were unnecessary blocks, but that is their business, and that doesn't call, as I see it, for any further comment. Now, the first thing about the manifesto is this: that they say they are going to use every legal means. No one in any responsible position anywhere has talked nullification; there would be a place where we get to a very bad spot for the simple reason I am sworn to defend and uphold the Constitution of the United States and, of course, I can never abandon or refuse to carry out my own duty. Let us remember that the Supreme Court itself talked about emotionalism in this question, and it was for that reason that it said, 'Progress must be gradual.' Now, let us not forget there has been some progress. I believe there is something on the order of more than a quarter of a million of Negro children in the border and some southern States, that have been integrated in the schools, and except for a certain area in which the difficulties are greatest, there has been progress. As a matter of fact, there was not long ago a decision by the Supreme Court of Texas to the general effect that anything in the laws or in the Constitution of the State of Texas that was in defiance of the Constitution of the United States was null and void. So, let us remember that there are people who are ready to approach this thing with moderation, but with the determination to make the progress that the Supreme Court asked for. If ever there was a time when we must be patient without being complacent, when we must be understanding of other people's deep emotions as well as our own, this is it. Extremists on neither side are going to help this

of his supporters might defy the Supreme Court's decision in *Brown*, he replied in part that "when we carry this to the ultimate, remember that the Constitution, as interpreted by the Supreme Court, is our basic law,"<sup>290</sup> essentially the claim the Court later made in *Cooper*. On October 11, 1956, Eisenhower reaffirmed his obligation to enforce the Constitution as interpreted by the Supreme Court.<sup>291</sup> Although some of Eisenhower's answers could have been clearer,<sup>292</sup> Eisenhower essentially adhered to the

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situation, and we can only believe that the good sense, the common sense, of Americans will bring this thing along. The length of time I am not even going to talk about; I don't know anything about the length of time it will take. We are not talking here about coercing, using force in a general way; we are simply going to uphold the Constitution of the United States, see that the progress as ordered by them is carried out. Now, let us remember this one thing, and it is very important: the people who have this deep emotional reaction on the other side were not acting over these past three generations in defiance of law. They were acting in compliance with the law as interpreted by the Supreme Court of the United States under the decision of 1896. Now, that has been completely reversed, and it is going to take time for them to adjust their thinking and their progress to that. But I have never yet given up my belief that the American people, faced with a great problem like this, will approach it intelligently and with patience and with understanding, and we will get somewhere; and I do deplore any great extreme action on either side.").

290. The President's News Conference of March 21, 1956, 1956 PUB. PAPERS 327, 340 (Mar. 21, 1956).

291. The President's News Conference of October 11, 1956, 1956 PUB. PAPERS 880, 884 (Oct. 11, 1956) ("Charles W. Roberts, Newsweek: On September 5 you stated that it was not important whether you endorsed the Supreme Court's decision on integration so long as it was enforced. Since then a number of people, mostly Democrats, have said that it is important whether you endorse the decision. Could you amplify your position on that? THE PRESIDENT. Look, I put that in this way: We start out with article I of the Constitution, and we go on right down to the end, including its amendments, and the Constitution as it is interpreted by the Supreme Court, I am sworn to uphold it. I don't ask myself whether every single phase of that Constitution, with all its amendments, are exactly what I agree with or not. I am sworn to uphold it, and that is what I intend to do.").

292. The President's News Conference of September 3, 1957, 1957 PUB. PAPERS 639, 640-41 (Sept. 3, 1957) ("Merriman Smith, United Press: Mr. President, over quite a wide section of the South today and this week, children are going back to school under difficult circumstances, in places where integration is being attempted for the first time. We have a case in Arkansas this morning where the Governor has ordered State troops around a school that a Federal court had ordered integrated. I just wonder what you think of this situation. THE PRESIDENT. Well, first, to say 'what you think about it' is sort of a broad subject that you are giving me. Actually, this particular incident came to my attention the first thing this morning. I have been in contact with the Attorney General's office. They are taking a look at it. They are going to find out exactly what has happened, and discuss this with the Federal judge. As of this moment, I cannot say anything further about the particular point, because that is all I know about it. Now, time and again a number of people—I, among them—have argued that you cannot change people's hearts merely by laws. Laws presumably express the conscience of a nation and its determination or will to do something. But the laws here are to be executed gradually, according to the dictum of the Supreme Court, and I understand that the plan worked out by the school board of Little Rock was approved by the district judge. I



idea that he would enforce the Constitution as interpreted by the Supreme Court.

As the situation in Little Rock gained prominence, Eisenhower said as much in a telegram to Faubus in September 1957.<sup>293</sup> “When I became President, I took an oath to support and defend the Constitution of the United States,” Eisenhower wrote.<sup>294</sup> “The only assurance I can give you is that the Federal Constitution will be upheld by me by every legal means at my command.”<sup>295</sup> Eisenhower denied that federal authorities were considering arresting Faubus or had tapped his phone lines and expressed confidence that he and other Arkansas authorities including the National Guard would cooperate with the federal court.<sup>296</sup> He also consistently argued that as President he was obligated to support decisions of federal courts.<sup>297</sup>

believe it is a ten-year plan. Now there seems to have been a road block thrown in the way of that plan, and the next decision will have to be by the lawyers and jurists.”).

293. Telegram on Assurance to the Governor, *supra* note 83, at 659; *see also* President’s Statement After Meeting with Governor, *supra* note 89, at 674.

294. Telegram on Assurance to the Governor, *supra* note 83, at 659.

295. *Id.*

296. *Id.*

297. The President’s News Conference of May 14, 1958, 1958 PUB. PAPERS 394, 397 (May 14, 1958) (“That is right, to obey a court order; and that is the point. I did not send troops anywhere because of an argument or a statement by a governor about segregation. There was a court order, and there was not only mob interference with the execution of that order, but there was a statement by the Governor that he would not intervene to see that that court order would be exercised. That is exactly what I did. Now, I don’t know, I am not going to try to predict what the exact circumstances in any other case will be. But I do say this: I deplore the need or the use of troops anywhere to get American citizens to obey the orders of constituted courts; because I want to point this one thing out: there is no person in this room whose basic rights are not involved in any successful defiance to the carrying out of court orders. For example, let us assume one of you were arrested, and you were arrested by a sheriff who didn’t think what you were doing in the particular town was correct, and the town was inflamed against you; but the Federal judge says—this taking place, let’s say, on some Federal property—the Federal judge comes in and says he will issue a writ of habeas corpus. You are in jail, unjustly, illegally, unconstitutionally; but there is no power there—the governor won’t intervene; the marshal of the court is powerless; no one can do anything. Now, what is a President going to do? That is a question you people answer for yourselves. I answered it for myself.”); Statement by the President Concerning the Removal of the Soldiers Stationed at Little Rock, 1958 PUB. PAPERS 387, 387 (May 8, 1958) (“I trust that state and local officials and citizens will assume their full responsibility and duty for seeing that the orders of the federal Court are not obstructed. The faithful execution of this responsibility will make it unnecessary for the federal Government to act further to preserve the integrity of our judicial processes.”); The President’s News Conference of October 3, 1957, 1957 PUB. PAPERS 704, 705–06 (Oct. 3, 1957) [hereinafter President’s October 3 News Conference] (“The National Guard, or the State Guard at that moment, was called out and given orders to do certain things which were a definite direct defiance of a Federal court’s order. That put the issue squarely up to the Executive part of the Government, and I would not, as I told you once before in this meeting—such as this—I couldn’t conceive that anyone would so forget common sense and our common obligations of loyalty to the Constitution of America that

Indeed, he presented his action as necessary to vindicate the rule of law.<sup>298</sup> Eisenhower suggested that public officials sometimes must follow Supreme

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force of this kind would ever have to be used for any purpose. But I just say this: the courts must be sustained or it's not America."); Statement by the President Regarding Continued Federal Surveillance at Little Rock, 1957 PUB. PAPERS 701, 701 (Oct. 1, 1957) (stating that since Faubus's statement failed to commit to sufficiently prevent obstruction of federal court orders, he had "no recourse at the present time except to maintain Federal surveillance of the situation."); Telegram to Senator Russell of Georgia Regarding the Use of Federal Troops at Little Rock, 1957 PUB. PAPERS 695, 696 (Sept. 28, 1957) ("When a State, by seeking to frustrate the orders of a Federal Court, encourages mobs of extremists to flout the orders of a Federal Court, and when a State refuses to utilize its police powers to protect against mobs persons who are peaceably exercising their right under the Constitution as defined in such Court orders, the oath of office of the President requires that he take action to give that protection. Failure to act in such a case would be tantamount to acquiescence in anarchy and the dissolution of the union.").

298. Statement by the President on Compliance with Final Orders of the Courts, 1958 PUB. PAPERS 631 (Aug. 20, 1958) ("This case, however, or any person's agreement or disagreement with its outcome, must not be confused with the solemn duty that all Americans have to comply with the final orders of the court. . . . Defiance of this duty would present the most serious problem, but there can be no equivocation as to the responsibility of the federal government in such an event. My feelings are exactly as they were a year ago. As I said then: 'The very basis of our individual rights and freedoms rests upon the certainty that the President and the Executive Branch of Government will support and insure the carrying out of the decisions of the Federal Courts.' Every American must understand that if an individual, community or state is going successfully and continuously to defy the courts, then there is anarchy."); The President's News Conference of March 26, 1958, 1958 PUB. PAPERS 232 (Mar. 26, 1958) ("Now I have preached, since the day I came to this office, and long before, that we are going to solve some of these great internal social problems of the United States of America by reason, by education, by tolerance of the other fellow's views. I do not believe that all of these problems can be solved just by a new law, or something that someone says, with teeth in it. For example, when we got into the Little Rock thing, it was not my province to talk about segregation or desegregation. I had the job of supporting a federal court that had issued a proper order under the Constitution, and where compliance was prevented by action that was unlawful. I had to do that, and that is an entirely different thing from me starting out new laws for attacking this basic problem, which I again say is not going to be solved finally until it is done by understanding and reason."); President's October 3 News Conference, *supra* note 297, at 704 ("I think, having answered your specific question, it is well to remember, to re-emphasize to ourselves why the troops are there. The problem grew out of the segregation problem, but the troops are not there as a part of the segregation problem. They are there to uphold the courts of the land under a law that was passed in 1792 because it was early discovered that unless we supported the courts in whose hands are all our freedoms and our liberties, our protection against autocratic government, then the kind of government set up by our forefathers simply would not work. That is why they are there, and for no other purpose, and it is merely incidental that the problem grew out of the segregation problem."); *id.* at 710 ("But I want to point to this: the great overwhelming mass of America believes that our courts and the respect for our courts must be sustained. The people that are defying the Courts are doing so under a very mistaken notion of what can happen, because if we can with impunity defy successfully the orders of the court in one regard, we can in all regards. Consequently, if a case comes up where your right to print the news as you see it is challenged by the Government, and the courts find that you are innocent,

Court decisions they opposed as had Southern governors with whom he had met.<sup>299</sup> Although Eisenhower thought that equal rights depended on changes in personal feeling and morality which law could not impose,<sup>300</sup> he also committed to implement Supreme Court decisions. Indeed, Eisenhower refused to discuss his own views on school desegregation because he was constitutionally obligated to follow the Constitution as interpreted by the Supreme Court.<sup>301</sup>

Officials in the Eisenhower Justice Department made clear their belief that the Court's decision in *Brown* was entitled to respect. As the Supreme Court prepared to hear oral arguments in *Cooper*, Attorney General William

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and the Government says, 'We will do nothing that the court says,' what is going to be the result except chaos and anarchy? These courts are not here merely to enforce integration. These courts are our bulwarks, our shield against autocratic government. Now, I think, therefore, you can say with certainty to these people the mass of America believes in the sanctity of the court. There is a very great division on the destiny of the races in the United States, how they should act, particularly when we come into the social aspects of our lives as opposed merely to the economic and the legal. But those quarrels will, as some others in the past in our country, eventually be settled. But we will, the population itself on the whole, will remember its respect for law; and it will be settled on that basis.'")

299. President's October 3 News Conference, *supra* note 297, at 704 ("Now, the people that visited me, the governors, understand this responsibility that is on the Executive, on the President, in this connection. They are aware of it themselves. They themselves opposed and differed with the decision of the Supreme Court. They don't like it. They are doing their duty as good citizens and responsible officials. They were helpful, cooperative and I must say excited my admiration as citizens who wanted to do their duty even when disagreeable."); *id.* at 709 ("And as I say, it is this kind of spirit that has been exhibited by these four governors who visited me themselves, . . . I know most of them absolutely opposed to the content of the decision and the orders of the courts, nevertheless, as loyal citizens, carrying them out.").

300. *See, e.g.*, The President's News Conference of July 2, 1958, 1958 PUB. PAPERS 511, 514 (July 2, 1958) ("Now, my own idea is this: the Attorney General will execute, so far as the Constitution of our land implies for him, all the duties laid upon him. At the same time, I still hold, as I have always held, that the true cure for our racial difficulties lies with each citizen in this land—each citizen examining himself, seeing whether he is doing his duty as is expected by our basic Constitution and legal procedures, and whether he is trying at least to obey law and logic and correct procedures rather than his own prejudices and emotions. This, to my mind, is something that must come about before law, that might be called punitive law, can ever be universally successful. Of course, it will have its effect, and it will be executed as laid down by the Supreme Court procedures. But the fact is that we must look to ourselves in more of this business.").

301. The President's News Conference of August 20, 1958, 1958 PUB. PAPERS 621, 626 (Aug. 20, 1958) ("I have always declined to do that for the simple reason that here was something that the Supreme Court says, 'This is the direction of the Constitution, this is the instruction of the Constitution'; that is, they say, 'This is the meaning of the Constitution.' Now, I am sworn to one thing, to defend the Constitution of the United States, and execute its laws. Therefore, for me to weaken public opinion by discussion of separate cases, where I might agree or might disagree, seems to me to be completely unwise and not a good thing to do. I have an oath; I expect to carry it out. And the mere fact that I could disagree very violently with a decision, and would so express myself, then my own duty would be much more difficult to carry out I think. So I think it is just not good business for me to do so.").

P. Rogers addressed the American Bar Association annual meeting in California.<sup>302</sup> In addition to explaining *Brown* sympathetically,<sup>303</sup> Rogers made clear that it represented the law of the land and was obligatory on officials. “In our system of government, of course, the Constitution is the supreme law of the land and it is the function of the judiciary to expound it,”<sup>304</sup> he said, echoing, but not citing *Marbury*, but invoking Alexander Hamilton’s *Federalist* 78. This principle, Rogers said, was “the very cornerstone of our federal system.”<sup>305</sup> Although Rogers recognized that *Brown II* had left some issues open for resolution, he voiced no patience for those whose “intent” was “defiance.”<sup>306</sup> “[T]ime to work out constructive measures in an honest effort to comply is one thing; time used as a cloak to achieve complete defiance of the law of the land is quite another[.]”<sup>307</sup> he said, explicitly recognizing the Court’s decision in *Brown* as supreme law. Although Rogers pointed out that the United States was not a party in *Brown* and that implementation involved the local courts and the parties, he made clear that the federal government could become engaged, as it had in other instances, in various ways.<sup>308</sup> That would be particularly true if a state impeded a judicial decree through misuse of state military forces or failed to protect those whose rights a court had determined and violence hindered the exercise of those rights.<sup>309</sup> These, of course, were the precise conditions that had occurred in Little Rock. If a state failed to meet its responsibility by impeding a decree or by failing to protect individuals’ rights from lawlessness, “there can be no equivocation.”<sup>310</sup> As Eisenhower had said, the federal government would act to “support and insure” the execution of federal court orders.<sup>311</sup> In concluding, Rogers reiterated that “[t]he decision of the Supreme Court in the school cases and in related fields is the law of the land[.]” thereby embracing again the judicial supremacy idea, repeated Eisenhower’s view that defiance would lead to anarchy, stated that states were obligated to protect the “lawfully determined rights” of individuals from violence, and committed the federal government to step in to enforce court orders if the states failed.<sup>312</sup>

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302. William P. Rogers, *The Problem of School Segregation: A Serious Challenge to American Citizens*, 45 A.B.A. J. 23, 23 (1958).

303. *Id.* at 23–24.

304. *Id.* at 24.

305. *Id.*

306. *Id.*

307. *Id.*

308. Rogers, *supra* note 302, at 24–25.

309. *Id.* at 25.

310. *Id.* at 26.

311. *Id.*

312. *Id.*

Although no party expressly supported interposition before the Court, the description of events and the parties' arguments placed that issue squarely before the Court. At oral argument on September 11, 1958, Solicitor General J. Lee Rankin argued that state officials needed "to carry out the obligation of the Constitution of the United States as interpreted by this Court,"<sup>313</sup> implicitly anticipating the judicial supremacy articulation. He further asserted that the Little Rock schools should educate "the people that this Supreme Court has spoken, that's the law of the land; it's binding; we've got to do it" and that their duty as citizens was "to obey the law and to support the Constitution."<sup>314</sup>

When the Court issued its decision on September 12, 1958, Eisenhower emphasized that it was unanimous and appealed "to the sense of civic responsibility that animates the vast majority of our citizenry to avoid defiance of the Court's orders in this matter."<sup>315</sup> He invoked common knowledge that "if an individual, a community or a state is going continuously and successfully to defy the rulings of the Courts, then anarchy results."<sup>316</sup> States and localities had a "constitutional duty to maintain peace and order."<sup>317</sup> If they faithfully discharged this responsibility, "then lawless elements will not be able by force and violence to deprive school children of their Constitutional rights."<sup>318</sup> In closing, Eisenhower invoked the rule of law: "I hope that all of us may live up to our traditional and proud boast that ours is a government of laws. Let us keep it that way."<sup>319</sup>

When Virginia and Arkansas closed public schools later that month rather than comply with court orders consistent with *Brown*, Eisenhower said, "[D]irect consequences to the children in those schools and the eventual consequences to our Nation could be disastrous" and took the occasion implicitly to endorse *Brown*.<sup>320</sup>

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313. Transcript of Oral Argument, *supra* note 127, at 60, reprinted in LANDMARK BRIEFS, *supra* note 120, at 725.

314. *Id.* at 61, reprinted in LANDMARK BRIEFS, *supra* note 120, at 726.

315. Statement by the President Concerning the Supreme Court Order in the Little Rock School Case, 1958 PUB. PAPERS 701, 701 (Sept. 12, 1958).

316. *Id.*

317. *Id.*

318. *Id.*

319. *Id.*

320. Letter to the Chairman, Committee for Public Education, Charlottesville, Virginia, 1958 PUB. PAPERS 705, 705-06 (Sept. 25, 1958) ("Most of us in the United States, as part of our religious faith, believe that all men are equal in the sight of God. Indeed, our forefathers enshrined this belief in the Declaration of Independence as a self-evident truth. Just as we strive to live up to our fundamental convictions, we constantly strive to achieve this ideal of the equality of man. We had been making progress—substantial progress—toward that goal. The closing of the schools, however, represents a material setback not only in that progress, but in what we have come to regard as a fundamental human right—the right to a public education.").

In mid-September, five days after the Court decided *Cooper v. Aaron* but twelve days before it issued its opinion, Rogers spoke in Washington, D.C. to a National Conference on Citizenship.<sup>321</sup> Rogers observed that opponents of *Brown* argue that a Supreme Court decision was not “an authoritative expression of the law,” a position Rogers disparaged as “an unsound idea which causes misunderstanding and confusion.”<sup>322</sup> The Constitution was the supreme law, but it required interpretation which occurred “in concrete cases,”<sup>323</sup> Rogers said. The Constitution’s framers intended that “the ultimate responsibility for interpreting the Constitution and for determining whether governmental action squares with constitutional requirements should be vested in the federal judiciary.”<sup>324</sup> Once again he relied on Hamilton for the proposition that the Court was to “ascertain” constitutional meaning,<sup>325</sup> to serve as “the final arbiter in constitutional controversies.”<sup>326</sup> This idea, “that the judiciary finally must determine challenges to the constitutionality of acts of the federal and state governments” was “central to our political structure.”<sup>327</sup> Individuals who disagreed with the Court’s decisions could seek to try to amend the Constitution but could not pick and choose which judicial decrees to obey.<sup>328</sup> The Constitution imposed on federal and state officers the obligation to take an oath to support the Constitution but that was not an oath to interpret it as the individual thought appropriate “but as it *is* interpreted by our courts.”<sup>329</sup>

After the Court handed down its opinion in *Cooper*, Eisenhower issued another statement endorsing *Brown* and *Cooper*. Although much of Eisenhower’s statement endorsed “equal justice under law” as a central American ideal, Eisenhower began by declaring it “incumbent upon all Americans, public officials and private citizens alike, to recognize their duty of complying with the rulings of the highest court in the land. Any other course, as I have said before, would be fraught with grave consequences to our nation.”<sup>330</sup>

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321. William P. Rogers, *Desegregation in the Schools: The Citizen’s Responsibility*, 45 CORN. L. REV. 488, 494 n.\* (1958).

322. *Id.* at 495.

323. *Id.* at 495–96.

324. *Id.* at 496.

325. *Id.* at 497 (quoting THE FEDERALIST NO. 78, at 485 (Alexander Hamilton) (Henry Cabot Lodge ed., 1888)).

326. *Id.* at 497.

327. Rogers, *supra* note 321, at 497.

328. *Id.* at 498.

329. *Id.*

330. Statement by the President on the Duty of Compliance with Supreme Court Decisions, 1958 PUB. PAPERS 722, 722 (Oct. 1, 1958) [hereinafter President’s Statement on Compliance with Court].

In October 1958, shortly after the *Cooper* opinion came out, Rogers returned to California to again address the subject. Resistance to *Brown* was damaging America's standing around the world, he told the California State Bar.<sup>331</sup> He summarized *Cooper* positively, highlighting the "fundamental . . . proposition that it is the province and the duty of the federal judiciary to interpret and expound the law of the Constitution," a principle that "from the earliest days of the Republic . . . has been recognized [as] a permanent and indispensable feature of our constitutional system of government."<sup>332</sup> Contrary to what some state officials had suggested, *Cooper* made it clear that states could not preserve segregation in public schools, Rogers said.<sup>333</sup> People could try to change the law through constitutional amendment, but disagreement with the Supreme Court's decisions did not license its critics "to override the Court's mandate," he said.<sup>334</sup>

Finally, in December 1958, Rogers told the Anti-Defamation League that "[t]he legal issue has been settled" such that "defiance" by "extremists and fanatics" could not be countenanced and that the Justice Department would act vigorously against "guilty parties."<sup>335</sup> The "misconception" that *Brown* "was something less than an authoritative expression of the law" had been "effectively dispelled."<sup>336</sup> The decision could not be "nullified."<sup>337</sup>

Yet Eisenhower's support and the Court's opinion in *Cooper* were not enough to make *Brown* a reality in Little Rock. After the Court issued its September 12, 1958 order upholding the court of appeals decision, Faubus signed legislation calling for a public vote on whether to close Little Rock's public schools, and about two weeks later, just before the Court issued its opinion ordering the desegregation plan to go forward, Little Rock voters chose to close and privatize the public schools by a lopsided margin.<sup>338</sup> The day the Court issued its opinion declaring that Faubus must obey its doctrine and orders, Faubus defiantly closed the Little Rock schools.<sup>339</sup> They remained closed for almost a year.<sup>340</sup> During this time the various events gave rise to litigation, in which the federal court held that the school closing was unconstitutional and enjoined further action to frustrate integration, moderates won control of the Little Rock School Board, and they determined to reopen the schools on an integrated basis.<sup>341</sup> Presidential

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331. Rogers, *supra* note 321, at 499.

332. *Id.* at 500.

333. *Id.*

334. *Id.* at 503.

335. *Id.* at 506–07.

336. *Id.* at 508.

337. Rogers, *supra* note 321, at 512.

338. FREYER, *supra* note 17, at 190, 203.

339. *Id.* at 203.

340. *Id.* at 209.

341. *Id.* at 209; *see generally id.* at 202–09.

support was certainly helpful to the Court, but it was not sufficient to integrate the public schools in Little Rock or elsewhere. Public acceptance was even more critical, and *Brown* and *Cooper* clearly did not resonate with the people of Little Rock in September 1958.

That would only occur as opponents of desegregation changed their minds. After the Court issued its opinion in *Cooper*, Eisenhower issued a statement of support.<sup>342</sup> Its first paragraph contained his customary invocation of judicial supremacy, but the second paragraph made a more substantive argument based on equal justice for all.<sup>343</sup> He said:

The Supreme Court, in its opinion rendered Monday, once again has spoken with unanimity on the matter of equality of opportunity for education in the nation's public schools. It is incumbent upon all Americans, public officials and private citizens alike, to recognize their duty of complying with the rulings of the highest court in the land. Any other course, as I have said before, would be fraught with grave consequences to our nation.

Americans have always been proud that their institutions rest on the concept of equal justice under law. We must never forget that the rights of all of us depend upon respect for the lawfully determined rights of each of us. As one nation, we must assure to all our people, whatever their color or creed, the enjoyment of their Constitutional rights and the full measure of the law's protection. We must be faithful to our Constitutional ideals and go forward in good faith with the unremitting task of translating them into reality.<sup>344</sup>

Later that month, Eisenhower answered a question about civil rights to a Republican group, saying that existing laws and decisions would “be brought into effect only as the whole population, in its heart and in its intelligence, understands that this principle of equality is important to the United States and must be sustained.”<sup>345</sup> These ideals would not “be achieved in a moment, or even in a year[,]” but “the Republican Party will always work for this ideal.”<sup>346</sup>

Eisenhower's expressions recognized that public acceptance was a necessary component of legal efficacy. That had been a long-standing belief

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342. President's Statement on Compliance with Court, *supra* note 330, at 722.

343. *Id.*

344. *Id.*

345. Radio and Newsreel Panel Discussion Sponsored by the National Republican Committee in Chicago, 1958 PUB. PAPERS 780, 782 (Oct. 22, 1958) [hereinafter Radio and Newsreel Panel].

346. *Id.*



which he had previously articulated on other occasions.<sup>347</sup> Then he had coupled his defense of judicial supremacy with calls for recognition that change in racial attitudes would occur gradually.<sup>348</sup> Although he still said that change would not occur “in a moment, or even a year[,]” he now increasingly introduced some calls for racial justice.<sup>349</sup>

Eisenhower initially may have thought that emphasizing judicial supremacy would be more persuasive with a Little Rock audience than defending *Brown* or perhaps the former formulation was more comfortable for him. Eisenhower often thought in terms of duty; as Brownell later put it, “for Eisenhower, his duty, first and foremost, was to see that the Constitution, and by implication the Supreme Court’s interpretation of it, was upheld.”<sup>350</sup> Perhaps Eisenhower exploited judicial supremacy since it provided an alternative vocabulary which allowed him to avoid taking an overt stand on *Brown* even while supporting its enforcement.<sup>351</sup> Ultimately, the argument also had to appeal to hearts, minds, and self-interest, and the political branches needed to join the judiciary in public education and action. The Court’s judgments are stated to be “universally prescriptive” wrote Alexander Bickel, but they “actually become so only when they gain widespread assent.”<sup>352</sup> To bind non-parties they require “the assent and the

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347. See, e.g., President’s October 3 News Conference, *supra* note 297, at 707 (“Now, you will recall that I have here stated a belief that is the very core of my political thinking, which is that it has got to be the sentiment, the good will, the good sense of a whole citizenry that enforces law. In other words, you have got to win the hearts and minds of men to the logic and the decency of a situation before you are finally going to get real compliance. Law alone, as we found out in the prohibition experiment, does not cure some of the things it set out to cure.”).

348. See, e.g., The President’s News Conference of October 30, 1957, 1957 PUB. PAPERS 774, 781 (Oct. 30, 1957) (“I personally believe this problem is never going to be solved without patience and tolerance, consideration. We just simply cannot solve it completely just by fiat or law and force. This is a deeper human problem than that. The South has lived for 56 years under a social order that was approved by the Supreme Court, and specifically with respect to education, the theory of separate but equal facilities. Now they are asked suddenly to consider that whole system unconstitutional and, naturally, this causes difficulties. Now, with respect to the Little Rock situation, it seems to improve daily. I most devoutly hope and pray that we soon can be confident enough of the situation that we can remove all Federal force, and I hope that all future steps in this will be accomplished in a spirit of real conciliation, and it does remain with us as a very urgent problem.”).

349. See, e.g., Radio and Newsreel Panel, *supra* note 345, at 782.

350. BROWNELL & BURKE, *supra* note 30, at 200.

351. Cf. Lain, *supra* note 26, at 1679 (“judicial supremacy is a political construct built over time by the representative branches to further ends that they would find difficult, if not impossible, to accomplish on their own.”); *id.* at 1681 (“judicial supremacy provides an alternative forum for the resolution of conflicts that are too salient and divisive for the political process to resolve.”); *id.* at 1683 (suggesting that political actors sometimes find court orders useful for removing discretion from them).

352. ALEXANDER BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS 90 (1978).

cooperation, first of the political institutions, and ultimately of the people.”<sup>353</sup>

## VI. CONCLUSION

In *Cooper*, the Supreme Court responded to the defiance of Faubus and other Southern politicians by insisting that it was the ultimate constitutional interpreter and that its constitutional decisions bound state officials. The Southerners’ challenge attracted the Court’s attention and, in responding, the Court understandably reached back to an old chestnut like *Marbury* to try to place the promise of *Brown* on the firmest legal foundation. For reasons stated above, *Marbury* did not really provide the support to anchor the sweeping claims the Court made regarding judicial supremacy.

Nonetheless, the Court’s claims of judicial supremacy deserve a greater presumption of validity in a federalism context than in separation of powers disputes. The constitutional imperatives that federal law is supreme and should be interpreted uniformly require a national arbiter, and the Court is often the institution which draws that assignment even if the constitutional system must allow some leeway to criticize, test, and revise Supreme Court doctrine even in a federalism context.<sup>354</sup> The Court was encouraged to assert its supremacy in constitutional interpretation by the recurring statements Eisenhower and high officials in the Department of Justice made supporting the idea that the Court’s conclusions in that regard bound other officials. In this sense, *Cooper* provides something of a complementary bookend (or case-end) to *Marbury* where the Court declined to issue the order consistent with its resolution of the merits for lack of presidential support. In *Cooper*, by contrast, Eisenhower’s support of judicial supremacy emboldened the Court.

Yet even that was insufficient. *Cooper* illustrated the difficulty the Court faces in umpiring a federalism dispute even with presidential support that involves one of those relatively rare episodes that engage intense emotional reactions. The effective functioning of the national government often depends on the concerted action of multiple branches, especially when the Court is called to resolve matters which are socially contentious. Even so, *Cooper* teaches that in such situations, judicial pronouncements, even

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353. *Id.*

354. Determining the exact parameters must await another day. *Cf.* Fallon, *supra* note 189, at 530. One might condemn the refusal of a government attorney to prosecute protesters who prevented students from entering Central High because he disagreed with *Brown* even while praising a hypothetical such official who refused to prosecute African-American protesters who trespassed on school property to protest “separate but equal” before *Brown* became law. Sometimes moral judgments may influence our attitude towards the willingness to accept the applicability of Supreme Court doctrine on non-parties.

when forcefully asserted in unanimous decisions, may only work gradual change. Ultimately, sustainable constitutional change depends not simply on workable constitutional doctrine supported by political officials, but also public acceptance.