



---

2019

## Cooper v. Aaron and Judicial Supremacy

Christopher W. Schmidt

Follow this and additional works at: <https://lawrepository.ualr.edu/lawreview>



Part of the [Law Commons](#)

---

### Recommended Citation

Christopher W. Schmidt, *Cooper v. Aaron and Judicial Supremacy*, 41 U. ARK. LITTLE ROCK L. REV. 255 (2019).

Available at: <https://lawrepository.ualr.edu/lawreview/vol41/iss2/11>

This Article is brought to you for free and open access by Bowen Law Repository: Scholarship & Archives. It has been accepted for inclusion in University of Arkansas at Little Rock Law Review by an authorized editor of Bowen Law Repository: Scholarship & Archives. For more information, please contact [mmserfass@ualr.edu](mailto:mmserfass@ualr.edu).

## COOPER V. AARON AND JUDICIAL SUPREMACY

*Christopher W. Schmidt\**

“[T]he Federal judiciary is supreme in the exposition of the law of the Constitution.”

— Cooper v. Aaron (1958)<sup>1</sup>

“The logic of *Cooper v. Aaron* was, and is, at war with the basic principles of democratic government, and at war with the very meaning of the rule of law.”

— Attorney General Edwin Meese III (1986)<sup>2</sup>

### I. INTRODUCTION

The greatest Supreme Court opinions are complex heroes. They have those attributes that make people recognize them as great: the strategic brilliance and bold assertion of the authority of judicial review in *Marbury v. Madison*;<sup>3</sup> the common-sense refutation of the fallacies that justified racial segregation in *Brown v. Board of Education*;<sup>4</sup> the recognition that something as fundamental as a right to privacy must be a part of our constitutional protections in *Griswold v. Connecticut*.<sup>5</sup> But they also have flaws, blind spots, and complications. *Marbury* was the product of a dizzying array of craven politics, flagrant violations of judicial ethics, and tendentious legal analysis.<sup>6</sup> In *Brown*, Chief Justice Earl Warren narrowed the Court’s holding by unconvincingly differentiating segregated schools from other forms of state-mandated segregation and then referencing questionable claims about the psychological damage of black children to justify that holding.<sup>7</sup> Justice

---

\* Professor of Law, Associate Dean for Faculty Development, and Co-Director, Institute on the Supreme Court of the United States (ISCOTUS), Chicago-Kent College of Law; Faculty Fellow, American Bar Foundation; Editor, *Law & Social Inquiry*.

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

2. Edwin Meese III, *The Law of the Constitution*, 61 TUL. L. REV. 979, 987 (1987) (address at Tulane University, October 21, 1986).

3. *Marbury v. Madison*, 5 U.S. 137 (1803).

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

5. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

6. JOEL RICHARD PAUL, WITHOUT PRECEDENT: CHIEF JUSTICE JOHN MARSHALL AND HIS TIMES 243–61 (2018); William W. Van Alstyne, *A Critical Guide to Marbury v. Madison*, 1969 DUKE L.J. 1, 6–33 (1969).

7. See, e.g., Charles L. Black, Jr., *The Lawfulness of Segregation Decisions*, 69 YALE L.J. 421, 430 n.25 (1960).

William O. Douglas's opinion of the Court in *Griswold*, with its reliance on "penumbras" and "emanations" of enumerated rights, has been reduced to a laugh line for constitutional lawyers.<sup>8</sup>

So too *Cooper v. Aaron*.<sup>9</sup> Its attributes of greatness are self-evident. In language more resonant and forceful than Warren's carefully measured words in *Brown*, the Justices in *Cooper* denounced the white South's continuing commitment to segregation. To amplify the Court's unanimity, each of the nine justices attached his name to the ruling. Yet for a decision that on the surface seems so right, *Cooper* has attracted an unusual collection of critics, people from across the ideological spectrum who believe that in the Court's effort to undermine the legitimacy of the white supremacist backlash against *Brown*, the Justices went too far and thereby got something very wrong. The target of this critique is the Court's claim that "the federal judiciary is supreme in the exposition of the Constitution" and "the interpretation of the Fourteenth Amendment enunciated by this Court in the *Brown* case is the supreme law of the land."<sup>10</sup> This claim of judicial interpretive supremacy—the idea that the Court is the ultimate and exclusive interpreter of the Constitution and that the American people must defer to the Court's interpretation of the Constitution as if it were the Constitution itself<sup>11</sup>—has been condemned as mistaken, nonsensical, a power grab by the Supreme Court, and an affront to the most fundamental principle of a constitutional democracy.<sup>12</sup>

In this Essay, I offer a brief biography of this particular hero of American constitutional history, with a focus on its complexities, on its interwoven strands of moral stature and bluster. My portrait of *Cooper* includes the history that led the Justices to craft an opinion that contained

---

8. See, e.g., LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW VOLUME 1, at 43 (3rd ed. 2000) (describing Douglas's reference to "penumbras, formed by emanations" as "twilight zone talk").

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

10. *Id.* at 18.

11. Other efforts to encapsulate the strong judicial supremacist position include KEITH E. WHITTINGTON, POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY 7 (2007) ("Judicial supremacy asserts that the Constitution is what the judges say it is, not because the Constitution has no objective meaning or that the courts could not be wrong but because there is no alternative interpretive authority beyond the Court."); MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS 7 (1999) ("It is emphatically the province and duty of the *judicial department*—and no one else—to say what the law is. Once we say what the law is, that's the end of it. After that, no one obliged to support the Constitution can fairly assert that the Constitution means something different from what we said it meant."); and LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 125 (2004) (defining judicial supremacy as "the notion that judges have the last word when it comes to constitutional interpretation and that their decisions determine the meaning of the Constitution for everyone").

12. See *infra* Part V.

such a mix of the laudable and contestable.<sup>13</sup> It then surveys the debates over *Cooper* and its proclamation of judicial supremacy that have taken place ever since, each bout of criticism invariably followed by flurries of defenses of the decision.<sup>14</sup> I conclude with an effort to explain why *Cooper* remains such a complex presence in the history of the Supreme Court.<sup>15</sup>

## II. TO THE SUPREME COURT

How did the Justices arrive at the point in September 1958 where they agreed it necessary to so starkly proclaim themselves supreme above all challengers in giving meaning to the Constitution? The story of the road to *Cooper* has often been told. But even for those who are familiar with its basic contours, the sheer drama of the events—the twists and turns, the striking scenes of confrontation, the personalities involved, and of course the raw heroism of the black students who were at the center of the maelstrom—remains gripping and shocking. The extraordinary background to *Cooper* helps explain why the Court felt compelled in this case to articulate such an extraordinary proclamation of its own authority.

In the spring of 1955, before the Supreme Court issued its second *Brown* ruling providing guidelines for implementing school desegregation,<sup>16</sup> the Little Rock school board approved a gradual desegregation plan for the city's public schools.<sup>17</sup> Desegregation would begin with a small number of black students attending one of the city's high schools, Central High School, the following fall; the plan called for all Little Rock schools to be desegregated after eight years.<sup>18</sup> The Little Rock chapter of the National Association for the Advancement of Colored People (NAACP) challenged the school board's plan in federal court in February 1956, arguing that the gradualist plan failed to meet the requirements the Court laid out in *Brown*

13. See *infra* Parts II–IV.

14. See *infra* Part V.

15. See *infra* Part VI.

16. *Brown v. Bd. of Educ.*, 349 U.S. 294 (1955).

17. Soon after *Brown I*, the Little Rock District School Board stated, “It is our responsibility to comply with Federal Constitutional Requirements and we intend to do so when the Supreme Court of the United States outlines the method to be followed.” *Cooper v. Aaron*, 358 U.S. 1, 7 (1958) (quoting Statement, Little Rock District School Board, Supreme Court Decision-Segregation in Public Schools (May 23, 1954)). On May 24, 1955, seven days before the Court issued *Brown II*, the school board approved a desegregation plan. *Id.* On the background to the school board's moderate stance on desegregation during this period, see JOHN KIRK, *REDEFINING THE COLOR LINE: BLACK ACTIVISM IN LITTLE ROCK, ARKANSAS, 1940–1970*, at 92–94 (2002).

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

*II*.<sup>19</sup> In August 1956, Judge John E. Miller dismissed the NAACP's lawsuit and approved the plan.<sup>20</sup> After more delays, the federal court issued a series of additional orders to begin desegregation, and the Little Rock school district began to prepare for its desegregation plan.

White segregationists in Arkansas then mobilized and turned the tide against these modest desegregation efforts.<sup>21</sup> Governor Orval Faubus, who had initially appeared willing to quietly accept *Brown*,<sup>22</sup> now adopted a defiant tone, declaring he would not be forced to accept "a change to which the people are overwhelmingly opposed."<sup>23</sup> The March 1956 release of the "Southern Manifesto"—a statement signed by nearly every southern member of Congress that denounced *Brown* as an "unwarranted decision" and a "clear abuse of judicial power" and vowed to "use all lawful means to bring about a reversal of this decision"<sup>24</sup>—fueled the incipient resistance movement in Arkansas.<sup>25</sup> In a November 1956 referenda, Arkansas voters adopted a series of measures designed to oppose school desegregation.<sup>26</sup> In the spring of 1957, the Arkansas legislature passed a law that removed the mandatory school attendance policy for children who were required to attend integrated public schools.<sup>27</sup> The legislature also established a State Sovereignty Commission and empowered school boards to spend district funds to pay for legal representation in lawsuits over integration.<sup>28</sup> A federal appeals court would describe the state's machinations as "a systematic campaign" that had the result of "undermin[ing] whatever confidence the

19. In the year following its introduction in the spring of 1955, the school board had weakened its desegregation plan. The revised version included opening a new all-black high school. KIRK, *supra* note 17, at 96–99.

20. *Aaron v. Cooper*, 143 F. Supp. 855, 866 (E.D. Ark. 1956), *aff'd*, 243 F.2d 361 (8th Cir. 1957).

21. See Tony Badger, "The Forerunner of Our Opposition": *Arkansas and the Southern Manifesto of 1956*, 56 ARK. HIST. Q. 353, 354–55 (1997).

22. KIRK, *supra* note 17, at 89.

23. Badger, *supra* note 21, at 355. According to historian Tony Badger, "Faubus's moderate strategy in 1956 was predicated on the notion that concessions to segregationist pressure would enable moderates like himself to stay in office and defuse the extremist threat. Instead, he found that in a battle where one side is prepared to mount a righteous crusade to defy the Supreme Court and the other wants to keep quiet, the extremists were going to win." *Id.* at 360.

24. 102 CONG. REC. 4459–64 (1956) (Declaration of Constitutional Principles).

25. Badger, *supra* note 21, 356–59.

26. These included: a constitutional amendment commanding the state legislature to oppose "in every Constitutional manner the Un-constitutional desegregation decisions" in *Brown I* and *Brown II*, Ark. Const. amend. 44 (repealed 1990); and a pupil assignment law, Ark. Stat. §§ 80-1519 to 80-1524.

27. Ark. Stat. § 80-1525.

28. Ark. Stat. §§ 6-801 to 6-824. See generally *Aaron v. Cooper*, 163 F. Supp. 13, 15 (E.D. Ark. 1958) (detailing resistance to school desegregation in Arkansas), *rev'd*, 257 F.2d 33 (8th Cir. 1958).

public might have had in the plan to integrate the public schools.<sup>29</sup> Under these increasingly volatile circumstances, Little Rock school authorities made final preparations in the summer of 1957 to begin desegregation.

Governor Faubus had other plans. He now placed himself squarely at the head of the segregationist resistance movement.<sup>30</sup> On September 2, the day before Central High School was scheduled to begin its school year, he announced that as a concession to the majority of voters who opposed desegregation and in response to the threat of violence, he would order the National Guard to block enforcement of the desegregation plan at Central High School.<sup>31</sup> The next day, Judge Davies of the federal district court ordered the school to proceed with the desegregation plan already approved by the court.<sup>32</sup> On the morning of September 4, nine black students who had been allowed to enroll in Central High School—known to history as the Little Rock Nine—arrived at their new school.<sup>33</sup> Members of the National Guard, acting under orders from Faubus, blocked them from entering.<sup>34</sup> The school board asked for a stay, which, on September 7, the court denied.<sup>35</sup> After a series of appeals, and negotiations with President Dwight D. Eisenhower, Faubus agreed to withdraw the National Guard—which had remained in place with instructions to keep the black students out of Central High School—and let the desegregation plan proceed.<sup>36</sup> On September 23, under the protection of the Little Rock Police Department, the Little Rock Nine entered Central High School.<sup>37</sup> But after withdrawing the troops, Faubus did nothing to provide protection for the black students.<sup>38</sup>

---

29. *Aaron v. Cooper*, 257 F.2d 33, 35 (8th Cir. 1958).

30. On Faubus's opportunistic evolution from racial moderate to diehard segregationist, see KIRK, *supra* note 17, at 101–05, 113–14.

31. STATE OF ARK. EXEC. DEP'T., PROCLAMATION (1957), reprinted in *Governor's Action*, 2 RACE REL. L. REP. 937, 937 (1957).

32. *Order to Show Cause*, 2 RACE REL. L. REP. 938, 938–39 (1957).

33. On the Little Rock Nine, see KIRK, *supra* note 17, at 108–12.

34. *Id.* at 115, 117.

35. *Board Seeks Stay*, 2 RACE REL. L. REP. 939, 941 (1957). “I have a Constitutional duty and obligation from which I shall not shrink,” declared Judge Davies in denying the petition. “In an organized society there can be nothing but ultimate confusion and chaos if court decrees are flaunted, whatever the pretext. That we, and each of us, has a duty to conform to the law of the land and the decrees of its duly constituted tribunals is too elementary to require elaboration.” *Id.* at 940; see also Robert E. Baker, *Little Rock's Bid For More Time Termed 'Anemic'*, WASH. POST, Sept. 8, 1957, at A1.

36. See *Proceedings Against Governor*, 2 RACE REL. L. REP. 942, 942–63 (1957); JAMES F. SIMON, *EISENHOWER V. WARREN: THE BATTLE FOR CIVIL RIGHTS AND LIBERTIES* ch. 11 (2018).

37. See ELIZABETH JACOWAY, *TURN AWAY THY SON: LITTLE ROCK, THE CRISIS THAT SHOCKED THE NATION 170–74* (2007).

38. *Id.*

With a large crowd of hostile whites amassed outside the school, the Nine were pulled out of the school after just a few hours.<sup>39</sup>

President Eisenhower faced a crisis that not only made him look weak in the eyes of the nation, but also embarrassed the nation in the eyes of the world.<sup>40</sup> Little Rock's mayor sent the President desperate telegrams begging him to act.<sup>41</sup> Just two months before, the President had declared that he could not "imagine any set of circumstances that would ever induce me to send federal troops . . . into any area to enforce the orders of a federal court. . . ."<sup>42</sup> Now, Eisenhower felt compelled to use his power to enforce school desegregation in Little Rock. On September 24, he called in Army troops to restore order and allow the desegregation plan to go forward.<sup>43</sup> He delivered a speech to the nation that evening about the crisis in which he denounced the "demagogic extremists" and "disorderly mobs" that "have deliberately prevented the carrying out of proper orders from a Federal Court. . . . Mob rule cannot be allowed to override the decisions of our courts."<sup>44</sup>

"We are now an occupied territory," Faubus lamented in his own address.<sup>45</sup> "[B]y the use of Federal troops without proper request, rights just as precious, if not more so, than integration have been trampled into the dust under the boots of paratroopers or cut to pieces by their shiny unsheathed bayonets."<sup>46</sup>

Eight of the original nine black students attended Central High School through the remainder of the school year.<sup>47</sup> Their white classmates subjected

---

39. *Id.*

40. See MARY L. DUDZIAK, *COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY* ch. 4 (2000).

41. Telegram from Mayor Woodrow Wilson Mann to President Dwight D. Eisenhower (Sept. 24, 1957) (on file with the Eisenhower Digital Archives at [https://www.eisenhower.archives.gov/research/online\\_documents/civil\\_rights\\_little\\_rock/1957\\_09\\_24\\_Mann\\_to\\_DD\\_E.pdf](https://www.eisenhower.archives.gov/research/online_documents/civil_rights_little_rock/1957_09_24_Mann_to_DD_E.pdf)) ("I am pleading to you as president of the United States in the interest of humanity, law and order and because of democracy world wide [sic] to provide the necessary federal troops. . . .").

42. President Dwight D. Eisenhower, *The President's News Conference* (July 17, 1957) (transcript available at <https://www.presidency.ucsb.edu/documents/the-presidents-news-conference-298>).

43. SIMON, *supra* note 36, at 306.

44. President Dwight D. Eisenhower, *Radio and Television Address to the American People on the Situation in Little Rock* (Sept. 24, 1957) (transcript available at <https://www.presidency.ucsb.edu/documents/radio-and-television-address-the-american-people-the-situation-little-rock>).

45. *Text of Faubus Address on Little Rock Controversy*, N.Y. TIMES, Sept. 27, 1957, at 10.

46. *Id.*

47. The troops from the 101st Airborne Division were replaced by federalized National Guardsmen, who remained at the school for the rest of the school year.

them to a steady stream of harassment.<sup>48</sup> Hundreds of white students were suspended for their abusive behavior.<sup>49</sup> The school was also subject to regular bomb threats.<sup>50</sup>

The winter of 1958 saw a new round of litigation, and this one would make its way to the U.S. Supreme Court. The Little Rock school board filed suit in federal court on February 20, 1958, seeking a delay in implementing its desegregation plan.<sup>51</sup> On June 20, Judge Harry Lemley approved a plan that would delay desegregation until 1960.<sup>52</sup> In his opinion, he emphasized the resistance of whites in Little Rock to the desegregation plan, quoting a vice principal at Central High School who described the experience of the 1957–58 academic year as one of “chaos, bedlam and turmoil. . . .”<sup>53</sup> The resulting “situation of tension and unrest among the school administrators, the classroom teachers, the pupils, and the latter’s parents inevitably had an adverse effect upon the educational program,” he worried.<sup>54</sup> “[T]he orderly administration of the school was practically disrupted” and “educational standards have suffered.”<sup>55</sup> The chaotic situation cannot be attributed to “mere lawlessness,” Judge Lemley wrote.

Rather, the source of the trouble was the deep seated popular opposition in Little Rock to the principle of integration, which, as is known, runs counter to the pattern of southern life which has existed for over three hundred years. The evidence also shows that to this opposition was added the conviction of many of the people of Little Rock, that the Brown decisions do not truly represent the law, and that by virtue of the

---

48. See, e.g., JACOWAY, *supra* note 37, at 214–41; KIRK, *supra* note 17, at 119–23; MELBA PATTILLO BEALS, WARRIORS DON’T CRY: A SEARING MEMOIR OF THE BATTLE TO INTEGRATE LITTLE ROCK’S CENTRAL HIGH (1994); DAISY BATES, THE LONG SHADOW OF LITTLE ROCK 113–60 (1962).

49. MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 327 (2004).

50. *Id.*

51. *Aaron v. Cooper*, 163 F. Supp. 13, 17 (E.D. Ark. 1958), *rev’d*, 257 F.2d 33 (8th Cir. 1958).

52. *Id.* at 32.

53. *Id.* at 20–21.

54. *Id.* at 21.

55. *Id.* The judge offered summaries of testimony by teachers and school staff detailing the difficulties they faced. *Id.* at 22–25. Judge Lemley also wrote, In reaching this conclusion [to grant the injunction] we are not unmindful of the admonition of the Supreme Court that the vitality of those principles ‘cannot be allowed to yield simply because of disagreement with them;’ here, however, as pointed out by the Board in its final brief, the opposition to integration in Little Rock is more than a mere mental attitude; it has manifested itself in overt acts which have actually damaged educational standards and which will continue to do so if relief is not granted.

*Id.* at 26 (quoting *Brown v. Bd. of Edu.*, 349 U.S. 294, 300 (1955)).



1956–57 enactments, heretofore outlined, integration in the public schools can be lawfully avoided.<sup>56</sup>

The situation, he concluded, justified granting a “breathing spell in Little Rock. . . .”<sup>57</sup>

Lemley’s decision “caused jubilation among the ranks of segregationist states,” according to news reports.<sup>58</sup> It “will do much to re-establish the normal and friendly relations which prevailed before here,” said Faubus.<sup>59</sup> A leader of the Mother’s League of Central High, a local segregationist group formed in the midst of the Little Rock desegregation battle, hoped that the delay would give the Supreme Court the opportunity to reverse *Brown*.<sup>60</sup> The Court’s approval of the delay “shows that massive resistance works,” said a Louisiana legislator.<sup>61</sup> “This gives us a powerful new weapon with which to protect our schools.”<sup>62</sup> The *Washington Post* lamented that the ruling in effect was an invitation to resistant southern school districts to “use violence to obstruct the law.”<sup>63</sup> Judge Lemley “has struck a severe blow at the cause of integration in the public schools.”<sup>64</sup>

The lawyers of the NAACP Legal Defense and Educational Fund (LDF) tried to bypass the federal appeals court and get the Supreme Court to review Judge Lemley’s ruling.<sup>65</sup> Although the LDF lawyers failed to persuade the Supreme Court to take the case at this point, they soon found success at the United States Court of Appeals for the Eighth Circuit.<sup>66</sup> In an August 18, 1958 opinion, the appeals court reversed the district court ruling. “[T]he time has not yet come in these United States when an order of a Federal Court must be whittled away, watered down, or shamefully withdrawn in the face of violent and unlawful acts of individual citizens in opposition thereto,” wrote the court.<sup>67</sup> The Eighth Circuit then put a hold on

56. *Id.* at 21

57. *Aaron*, 163 F. Supp. at 27.

58. *Little Rock News Hailed in the South*, N.Y. HERALD TRIB., June 22, 1958, at 2.

59. *U.S. Judge Lets Little Rock Halt Its Integration*, N.Y. TIMES, June 22, 1958, at 1.

60. *Id.* at 30.

61. KLARMAN, *supra* note 49, at 328.

62. *Id.*

63. *Retreat at Little Rock*, WASH. POST, June 23, 1958, at A12.

64. *Id.*; see also *Little Rock Decision*, CHI. TRIB., June 24, 1958, at 16 (“Judge Lemley has worked himself into the absurd position of saying that the public interest demands the denial of the constitutional rights of citizens. On that theory anybody who takes the trouble to organize a mob can force the suspension of free speech, free press, trial by jury, and every other guarantee of liberty.”).

65. *Aaron v. Cooper*, 357 U.S. 566, 567 (1958).

66. *Aaron v. Cooper*, 257 F.2d 33, 40 (8th Cir. 1958); JACK GREENBERG, CRUSADERS IN THE COURTS: HOW A DEDICATED BAND OF LAWYERS FOUGHT FOR THE CIVIL RIGHTS REVOLUTION 232–36 (1994) (detailing LDF efforts to get the case to the Supreme Court).

67. *Aaron*, 257 F.2d at 40.

its order to allow the Supreme Court time to consider the school board's request for a petition for a writ of certiorari.<sup>68</sup>

The Little Rock school board appealed, and, in an extraordinary step, the Supreme Court convened a special summer term to consider the case.<sup>69</sup> After hearing arguments on August 28 and September 11, 1958, the Justices issued a three-paragraph per curiam opinion on September 12, 1958, in which they unanimously upheld the Eighth Circuit's ruling.<sup>70</sup> Because the new school year was imminent, the Court explained, "we deem it important to make prompt announcement of our judgment affirming the Court of Appeals. The expression of the views supporting our judgment will be prepared and announced in due course."<sup>71</sup>

"[W]e figured that the Supreme Court would uphold justice," was the reaction of Ernest Green, one of the Little Rock Nine and the first to graduate from Central High School.<sup>72</sup> "We are pleased."<sup>73</sup> A leader of a local segregationist group had a predictably different reaction, describing the Court's ruling as "one of the most unfortunate things which has ever happened to our country in its existence."<sup>74</sup> Arkansas had recently passed a law authorizing a special election to vote to close schools if they were ordered to desegregate,<sup>75</sup> and on September 27, the citizens of Little Rock voted to close their schools rather than comply with the court order to initiate a desegregation plan.<sup>76</sup>

The Court issued its full opinion in *Cooper v. Aaron* on September 29.<sup>77</sup> The opinion opens with a reference to Faubus's claim "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"<sup>78</sup> and then returns in its famous closing paragraphs to the question of constitutional interpretative authority.<sup>79</sup> Between these dramatic bookends, the opinion offers a straightforward summary and legal assessment of the Little Rock situation. Following a detailed review of the desegregation saga in Little

68. *Cooper v. Aaron*, 358 U.S. 1, 13–14 (1958).

69. *Id.* at 14; SETH STERN & STEPHEN WERMIEL, *JUSTICE BRENNAN: LIBERAL CHAMPION* 142–43 (2010).

70. *Cooper*, 358 U.S. at 5.

71. *Id.* at 5 n\*, (reprinting per curiam order announced on Sept. 12, 1958).

72. Claude Sitton, *Faubus Orders 4 Schools Shut*, N.Y. TIMES, Sept. 13, 1958, at 1, 8.

73. *Id.*

74. *Id.*

75. Act of Sept. 12, 1958, No. 4, Ark. Gen. Assemb., reprinted in *School Closing—Arkansas*, 3 RACE REL. L. REP. 1048, 1048–49 (1958).

76. Claude Sitton, *Little Rock Vote Supports Faubus on Segregation*, N.Y. TIMES, Sept. 28, 1958, at 1, 52.

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

78. *Id.* at 4.

79. *Id.* at 17–20.

Rock,<sup>80</sup> the opinion lays out the Court's reasons for affirming the appeals court in rejecting any more delays in implementing the school desegregation plan.<sup>81</sup> "One may well sympathize with the position of the Board in the face of the frustrating conditions which have confronted it, but, regardless of the Board's good faith, the actions of the other state agencies responsible for those conditions compel us to reject the Board's legal position," the Court explained.<sup>82</sup> "The constitutional rights of respondents are not to be sacrificed or yielded to the violence and disorder which have followed upon the actions of the Governor and Legislature. . . . [L]aw and order are not here to be preserved by depriving the Negro children of their constitutional rights."<sup>83</sup>

With this, the Court had done the work of giving its answer to the legal dispute in Little Rock. "What has been said, in the light of the facts developed, is enough to dispose of the case."<sup>84</sup> But the Justices had more that they wanted to say. In the opinion's closing paragraphs, they returned to the issue they had flagged in the opinion's opening paragraph: the question of judicial authority on matters of constitutional dispute. They would take the opportunity to provide their "answer" to "the premise of the actions of the Governor and Legislature that they are not bound by our holding in the *Brown* case."<sup>85</sup>

In providing this answer, the opinion presented the most direct, forceful endorsement of judicial supremacy the Supreme Court has ever made.

### III. BUILDING THE CASE FOR JUDICIAL SUPREMACY

In making the case for the Supreme Court's supremacy over all others in assigning meaning to the Constitution, the Justices found support in the fact that many outside the Court had been making similar arguments in recent years. Although *Cooper's* assertion of judicial authority went beyond anything the Supreme Court had said before, it was an assertion that a growing chorus of people wanted the Justices to make.

Extrajudicial support for expansive judicial authority, a story with roots tracing to the beginnings of the Republic,<sup>86</sup> grew in reaction to the South's campaign of organized resistance to *Brown*. The faith in the power of the Supreme Court expressed in *Cooper* was in large part the product of a

---

80. *Id.* at 5–14.

81. *Id.* at 14–17.

82. *Id.* at 15.

83. *Cooper*, 358 U.S. at 16.

84. *Id.* at 17.

85. *Id.*

86. See generally WHITTINGTON, *supra* note 11; Mark Graber, *The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary*, 7 *STUD. AM. POL. DEV.* 35 (1993).

campaign, inside and outside the Court, to defend *Brown*. An array of critics challenged *Brown*, ranging from segregationists<sup>87</sup> to liberal law professors uncomfortable with its legal reasoning.<sup>88</sup> Defenders of the decision countered with increasingly strident defenses of the Court and its authority to interpret the Constitution.

Although the backlash to *Brown* took time to coalesce, by the point the Court issued its implementation ruling (*Brown II*) in the spring of 1955, segregationist opposition was steadily gaining momentum.<sup>89</sup> The basic legal claim driving the South's resistance effort was that the Court simply got it wrong in its conclusion that school segregation violated the Constitution, and a judicial misreading of the Constitution such as this could and should be resisted.<sup>90</sup> A resolution the Virginia legislature adopted in early 1956 is representative. The *Brown* decision, it declared,

constitutes an unlawful and unconstitutional assumption of power which does not exist. An agency created by a document to which sovereign states were parties cannot lawfully amend the creating document when that document clearly specifies in Article V thereof the manner of amendment. . . . Until such time as the Constitution of the United States may be amended in the manner provided by that Constitution, this commonwealth is under no obligation to accept supinely an unlawful decree of the Supreme Court of the United States based upon an authority which is not found in the Constitution of the United States nor any amendment thereto. Rather this commonwealth is in honor bound to act to ward off the attempted exercise of a power which does not exist lest other excesses be encouraged.<sup>91</sup>

The Georgia legislature issued its own nullification resolution, stating, “[I]t is clear that [the Supreme] Court has deliberately resolved to disobey the Constitution of the United States, and to flout and defy the Supreme Law of the Land[.]”<sup>92</sup> Other southern states issued similar proclamations.<sup>93</sup>

---

87. See, e.g., NUMAN V. BARTLEY, *THE RISE OF MASSIVE RESISTANCE: RACE AND POLITICS IN THE SOUTH DURING THE 1950'S*, at 67–81, 126–49 (1969); KLARMAN, *supra* note 46, at 385–421.

88. See, e.g., Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 31–35 (1959).

89. BARTLEY, *supra* note 87, at 67–81.

90. *Id.* at 126–49.

91. Act of Jan. 11, 1956, Va. Gen. Assemb., reprinted in *Interposition and Nullification—Virginia*, 1 RACE REL. L. REP. 252, 253 (1956) (Virginia Nullification Statement).

92. H.R. 185, Gen. Assemb., Reg. Sess. (Ga. 1956), reprinted in *Interposition and Nullification—Georgia*, 1 RACE REL. L. REP. 438, 440 (1956).

93. See, e.g., Act of Feb. 2, 1956, No. 42, Ala. Gen. Assemb., Spec. Sess., reprinted in *Interposition and Nullification—Alabama*, 1 RACE REL. L. REP. 437, 437 (1956); S. Con. Res. No. 125, Gen. Assemb., Reg. Sess. (Miss. 1956), reprinted in *Interposition and*

The most prominent challenge to *Brown* and to the authority of the Court came in what became known as the Southern Manifesto, the March 1956 statement signed by almost all southern members of Congress, which denounced the Supreme Court's "clear abuse of judicial power" in *Brown*.<sup>94</sup> The law must be based in a community's "habits, traditions, and way of life" of a community, insisted the document's signatories.<sup>95</sup> But with its *Brown* decision, the Supreme Court abandoned "established law."<sup>96</sup> The Justices "substituted their personal, political, and social ideas for the established law of the land."<sup>97</sup> This was nothing more than an exercise of "naked power."<sup>98</sup>

The Southern Manifesto helped transform scattered discontent and prevalent uncertainty into a united resistance movement. According to historian C. Vann Woodward, with the Southern Manifesto, "The law of the land had been clearly defined by the Supreme Court of the United States, and that definition had been just as clearly rejected by responsible spokesmen of millions of our people . . . [This] was a real constitutional crisis that the country was facing."<sup>99</sup> Harvard Law professor Paul Freund wrote that the Manifesto posed "not only a crisis in race relations but—what could in the long run be even more shattering—a crisis in the role of the Supreme Court as the authoritative voice of our highest law."<sup>100</sup>

The Southern Manifesto's critics regularly voiced judicial supremacist arguments, sounding themes that were quite similar to those the Justices invoked in *Cooper* two years later.<sup>101</sup> In December 1956, a hundred leading lawyers and law professors signed a statement defending the Supreme Court against the Manifesto's challenges.<sup>102</sup> The attacks against the Court, they wrote, "have been so reckless in their abuse, so heedless of the value of judicial review and so dangerous in fomenting disrespect for our highest law that they deserve to be repudiated by the legal profession and by every

---

*Nullification—Mississippi*, 1 RACE REL. L. REP. 440, 440–43 (1956); S.J. Res. S.514, Gen. Assemb., Reg. Sess. (S.C. 1956), reprinted in *Interposition and Nullification—South Carolina*, 1 RACE REL. L. REP. 443, 443 (1956).

94. 102 CONG. REC. 4459–64 (1956) (Declaration of Constitutional Principles).

95. *Id.* at 4460.

96. *Id.*

97. *Id.*

98. *Id.*

99. C. VANN WOODWARD, *THE STRANGE CAREER OF JIM CROW* 169 (rev. ed. 1957).

100. Justin Driver, *Supremacies and the Southern Manifesto*, 92 TEX. L. REV. 1053, 1118 (2014) (quoting Paul A. Freund, Editorial, *Understanding the School Decision*, CHRISTIAN SCI. MONITOR, Mar. 26, 1956, at 18).

101. *Id.* at 1058 (citing the debate sparked by the Southern Manifesto as evidence that "widespread notions of judicial supremacy actually preceded *Cooper*").

102. George W. Pepper, et al., *Recent Attacks upon the Supreme Court: A Statement by Members of the Bar*, 42 A.B.A. J. 1128, 1128–29 (1956).

thoughtful citizen. . . . In cases of disagreement, we have established the judiciary to interpret the Constitution for us.”<sup>103</sup>

Perhaps the most prominent defender of the Court’s supremacy in determining constitutional meaning was President Eisenhower—a point rich with irony, since Eisenhower held serious personal reservations toward *Brown*.<sup>104</sup> From the time the Court announced *Brown*, the President openly expressed his doubts about the limited ability of the law to change people’s beliefs and attitudes; in private he said that *Brown* had set back racial progress in the South.<sup>105</sup> When reporters pressed him for his views, Eisenhower avoided directly expressing his approval of *Brown*. Rather, he said that he accepted the supremacy of the Court on matters of constitutional interpretation. “The Supreme Court has spoken and I am sworn to uphold the constitutional processes in this country, and I will obey,” Eisenhower said at a news conference two days after the Court handed down *Brown*.<sup>106</sup> Two years later, as the forces of the massive resistance campaign gathered strength, he said, “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.”<sup>107</sup>

The press also made the case for the supremacy of the Supreme Court. “No American is compelled to like the decisions of the Supreme Court,” wrote the editors of the *Washington Post* in September 1957.<sup>108</sup> “But for more than a century and a half of history and tradition the Supreme Court has been the final interpreter of the Constitution. Every American, by virtue of his citizenship in the Union, is enjoined to accept and obey the orders of the Federal Courts.”<sup>109</sup>

Between the time the Justices called a special summer session to hear the *Cooper* case and the release of the Court’s written opinion, the Justices’ commitment to using the case as a platform to issue a bold defense of the

103. *Id.* at 1128.

104. See WHITTINGTON, *supra* note 11, at 145–49; Michael S. Mayer, *With Much Deliberation and Some Speed: Eisenhower and the Brown Decision*, 52 J. S. HIST. 43, 60 (1986).

105. KLARMAN, *supra* note 49, at 324–25.

106. President Dwight D. Eisenhower, The President’s News Conference (May 19, 1954) (transcript available at <https://www.presidency.ucsb.edu/node/232016>).

107. President Dwight D. Eisenhower, The President’s News Conference (Sept. 5, 1956) (transcript available at <https://www.presidency.ucsb.edu/node/233130>); see also President Dwight D. Eisenhower, The President’s News Conference (Mar. 21, 1956) (transcript available at <https://www.presidency.ucsb.edu/node/233050>) (“[R]emember that the Constitution, as interpreted by the Supreme Court, is our basic law.”).

108. *To Preserve the Constitution*, WASH. POST, Sept. 25, 1957, at A12.

109. *Id.* The “true subversives,” the *Post* explained, were those “who have cultivated contempt for the Supreme Court and disrespect for law.” *Id.*

broader principle of judicial interpretive supremacy only grew, a development fueled by the events taking place outside the Court.<sup>110</sup> As the Justices considered *Cooper*, Governor Faubus and his segregationist allies in Arkansas were mobilizing against federally enforced desegregation. At a special session of the Arkansas General Assembly, where Faubus declared himself locked in a struggle for “states rights and constitutional government,”<sup>111</sup> the legislature passed a collection of measures designed to preserve racial segregation in the state’s schools, including a bill authorizing the governor to shut them down rather than desegregate.<sup>112</sup> Faubus disavowed his earlier concession in which he accepted *Brown* as the law of the land, claiming that he had only said so because the Eisenhower administration had forced him.<sup>113</sup> He declared that he would “probably” close down the schools rather than allow the desegregation plan to go forward, since “it is my feeling that integration could not be accomplished without disorder and bloodshed.”<sup>114</sup>

Meanwhile, the northern press condemned Faubus’s defiant statements and praised the Court for standing its ground. “The children of Little Rock, white and Negro alike,” wrote the editors of the *New York Herald Tribune*, “are taught in school to respect the Constitution; they must not be given the spectacle of a breach of that document, as interpreted by the highest court in the land, whether the breach is committed by a mob or by the executive power of the city or state.”<sup>115</sup> In rejecting the pleas for more delays, the Court “has done what its integrity and the nation’s honor required it to do,” wrote the *Newark Evening News*.<sup>116</sup>

At oral argument at the Supreme Court, the Justices were given an up-close display of the ways in which the Little Rock crisis risked undermining their authority. Richard Butler, the lawyer for the Little Rock school board, tried to explain to the Justices why the board was asking for a delay in

---

110. See Dennis J. Hutchinson, *Unanimity and Desegregation: Decisionmaking in the Supreme Court, 1948–1958*, 68 GEO. L.J. 1, 77–79 (1979); Daniel A. Farber, *The Supreme Court and the Rule of Law: Cooper v. Aaron Revisited*, 1982 U. ILL. L. REV. 387, 397–403 (1982).

111. JACOWAY, *supra* note 37, at 260.

112. *Id.* at 259–60; Claude Sitton, *Faubus Disavows Yielding to Court*, N.Y. TIMES, Sept. 1, 1958, at 1, 19; *School Closing—Arkansas*, *supra* note 75.

113. Sitton, *supra* note 112. According to Faubus, “the laws of the land are the laws made by Congress and the Supreme Court or other courts merely passes upon those laws as to whether they are constitutional or in conflict with other laws.” *Id.*

114. Jack V. Fox, *Faubus Hints He Will Close Central High*, WASH. POST, Sept. 1, 1958, at A1.

115. *Editorial Comment on Decision by Supreme Court*, N.Y. TIMES, Sept. 14, 1958, at 56.

116. *Id.*

implementing its school desegregation plan.<sup>117</sup> A two-and-a-half year delay, he explained, would give time so that “a national policy could definitely be established” and “laws could be tested so that the people would know, the people who want to obey the final word.”<sup>118</sup> Justice Felix Frankfurter shot back, asking why the Court’s rulings in the two *Brown* decisions were not considered “national policy[.]”<sup>119</sup> Chief Justice Warren asked what would happen if school districts across the South demanded more legal clarity before they were willing to desegregate. Butler explained that the desegregation should be delayed while the people in Arkansas “have a doubt in their mind and a right to have a doubt,” in large part because the state’s leaders, starting with its governor, were urging them to question whether they might avoid desegregation. This caused the Chief Justice to lose his patience: “I have never heard such an argument made in a Court of Justice before. I have never heard a lawyer say that the statement of a Governor as to what was legal or illegal should control the action of any court.”<sup>120</sup>

The Justices received a steady stream of expressions of support for the Court’s preeminence as the nation’s constitutional authority. Outside observers saw the drama in the courtroom as providing an object lesson in the importance of the Supreme Court. James Reston of the *New York Times* wrote a column that described of the Court’s power in reverential terms: “It was the court, in all its majesty, that was in command today. . . .”<sup>121</sup>

Briefs filed in *Cooper* and statements made at the next round of oral arguments further bolstered the Justices’ sense of their own interpretative authority. The LDF lawyers defined the issue in their brief as “a national test of the vitality of the principles enunciated in *Brown v. Board of Education*.”<sup>122</sup> But the issue also transcended the school desegregation struggle, they wrote. It involved “not only vindication of the constitutional rights declared in *Brown*, but indeed the very survival of the Rule of Law. This case affords this Court the opportunity to restate in unmistakable terms both the urgency of proceeding with desegregation and the supremacy of all constitutional rights over bigots—big and small.”<sup>123</sup> At oral argument, LDF lead counsel Thurgood Marshall pressed the same points, chiding

117. *Excerpts from Oral Argument Before Supreme Court on Question of Integration*, N.Y. TIMES, Aug. 29, 1958, at 10.

118. *Id.*

119. *Id.*

120. *Id.*

121. James Reston, *The Court in Command*, N.Y. TIMES, Aug. 29, 1958, at 10.

122. Brief for John Aaron, et al., Respondents at 4, *Cooper v. Aaron*, 358 U.S. 1 (1958) (Misc. No. 1).

123. *Id.* at 5.



Arkansas's lawyers for casting doubt on "the power or authority of the Supreme Court."<sup>124</sup>

Solicitor General J. Lee Rankin reinforced the NAACP's argument. "The element in this case is lawlessness[,]” he said at oral argument.<sup>125</sup> "In Little Rock, the people decided they were going to defy the laws of this country."<sup>126</sup> The issue transcended Little Rock, and it transcended the battle over school desegregation. "There isn't a single policeman who isn't going to watch this Court and what it has to say about this matter that doesn't have to deal with people everyday who don't like the law he is trying to administer and enforce. And he has to go against that public feeling and will and do his duty."<sup>127</sup> He argued that the school board should "tell the people that this Supreme Court has spoken; that's the law of the land; it's binding; we've got to do it[.] . . . [T]hey have a duty as a citizen, the highest duty of a citizen, to obey the law and to support the Constitution."<sup>128</sup> The Supreme Court must declare "in a manner that cannot be misunderstood, throughout the length and breadth of this land: There can be no equality of justice for our people if the law steps aside, even for a moment, at the command of force and violence."<sup>129</sup>

On September 12, Chief Justice Warren read the Court's unanimous three paragraph per curiam order affirming the court of appeals and thereby denying the school board's request for a delay, and noting that the Justices would release their full opinion "in due course."<sup>130</sup> Faubus responded by signing into law the various pro-segregation bills the Arkansas legislature had recently passed, declaring that he would shut down Little Rock's four high schools so as to prevent "impending violence and disorder[,]” and calling for a referendum so that Little Rock could decide whether to close all its schools rather than desegregate.<sup>131</sup> "Gov. Faubus Defies Court" ran the headline in the next day's *Boston Globe*.<sup>132</sup>

124. Oral Arguments at 46, *Cooper v. Aaron*, 358 U.S. 1 (1958), reprinted in 54 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 711 (Philip B. Kurland & Gerhard Casper eds. 1975) [hereinafter LANDMARK BRIEFS].

125. *Id.* at 58, reprinted in 54 LANDMARK BRIEFS, *supra* note 124, at 723.

126. *Id.*

127. *Id.*

128. *Id.* at 61, reprinted in 54 LANDMARK BRIEFS, *supra* note 124, at 726.

129. *Id.* at 62, reprinted in 54 LANDMARK BRIEFS, *supra* note 124, at 727; see also TONY FREYER, LITTLE ROCK ON TRIAL 182 (2007) (noting that Solicitor General Rankin's words in oral argument likely further strengthened the Court's commitment to a strong judicial supremacist statement in *Cooper*).

130. Anthony Lewis, *Court Bars Little Rock Delay*, N.Y. TIMES, Sept. 13, 1958, at 1; *Cooper v. Aaron*, 358 U.S. 1, 5 n\* (1958) (reprinting per curiam order announced on Sept. 12, 1958).

131. Claude Sitton, *Faubus Orders 4 Schools Shut*, N.Y. TIMES, Sept. 13, 1958, at 1, 8.

132. *Gov. Faubus Defies Court*, BOS. GLOBE, Sept. 13, 1958, at 1.

## IV. DECLARING SUPREMACY

The Court would release its full written opinion in *Cooper* on September 29. To signal the Court's unanimous commitment to *Brown*, each of the nine Justices signed the opinion,<sup>133</sup> but its primary author was Justice William Brennan.<sup>134</sup> On September 17, Brennan circulated a draft of the opinion to the other Justices.<sup>135</sup> Most of its eighteen pages were taken up with a detailed account of the Little Rock desegregation saga, along with an explanation that the Supremacy Clause commanded state and local officials to comply with federal court orders.<sup>136</sup> After Brennan circulated his draft, the other Justices offered editorial suggestions. A common theme in these suggestions was the need to do more to emphasize the Court's authority.<sup>137</sup> Chief Justice Warren felt Brennan's opening was "rather dry."<sup>138</sup> Justice Black urged Brennan to use "more punch and vigor. . . ."<sup>139</sup> The Justices wanted the opinion to respond to the defiant southern states' claims that the Court had been wrong to rule as it did in *Brown* and that therefore the states were not bound to follow its mandate.<sup>140</sup>

In his revisions, Brennan strengthened the Court's defense of its own interpretive supremacy. The claim that *Marbury* established "the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution" Brennan had initially followed with a qualified defense, noting that *Marbury* "was not without its critics, then and even now[.]"<sup>141</sup> He then concluded: "The country has long since accepted it as a sound, correct and permanent interpretation."<sup>142</sup> The revised version had more of the courage of its convictions: "the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution" is "a permanent and indispensable feature of our constitutional system."<sup>143</sup> The revised version also added the stronger opening paragraph, which made clear from

---

133. EARL WARREN, *THE MEMOIRS OF EARL WARREN* 298 (1977); BERNARD SCHWARTZ, *SUPER CHIEF: EARL WARREN AND HIS SUPREME COURT—A JUDICIAL BIOGRAPHY* 299–300 (1983).

134. Hutchinson, *supra* note 110, at 79; STERN & WERMIEL, *supra* note 69, at 147–52; SCHWARTZ, *supra* note 133, at 295–301.

135. Hutchinson, *supra* note 110, at 79; SCHWARTZ, *supra* note 133, at 295.

136. SCHWARTZ, *supra* note 133, at 295.

137. *Id.*

138. *Id.* at 297.

139. Hutchinson, *supra* note 110, at 79.

140. *Id.*

141. *Id.* at 80.

142. *Id.* at 80.

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

the start that the case raised foundational questions about the Court's authority.<sup>144</sup>

Justice Felix Frankfurter, in a letter to Justice John Marshall Harlan II several days after the first round of oral arguments in *Cooper*, articulated his belief in the need for a forceful statement of the Court's authority. The key to making school desegregation a reality, he argued, was to win over southern moderates.<sup>145</sup> Rather than trying to persuade this group to accept *Brown* "on the merits," Frankfurter insisted "they ought to be won, and I believe will be won, to the transcending issue of the Supreme Court as the authoritative organ of what the Constitution requires."<sup>146</sup> "[T]he ultimate hope for the peaceful solution of the basic problem," Frankfurter explained in a letter to Chief Justice Warren, "largely depends on winning the support of the lawyers of the South for the overriding issue of obedience to the Court's decision."<sup>147</sup>

Justice Harlan drafted a revised version of the closing section of the opinion that he shared with some of the other justices.<sup>148</sup> Unlike Brennan's draft, his did not cite *Marbury* to defend the principle of judicial interpretive supremacy. He referenced instead the constitutional oath provision, which "embraces of course both acts of Congress and the judgments of this Court, which under our federal system has the final responsibility for constitutional adjudication."<sup>149</sup> Brennan pushed back, defending his use of *Marbury* "and the detailed discussion in my draft of the Court's responsibility for the exposition of the law of the Constitution."<sup>150</sup> This point, Brennan said, "is a very essential part of what I believe our opinion should contain."<sup>151</sup>

By the time of the fourth draft of *Cooper*—the version that, with only minor stylistic changes, the Court would issue on September 29<sup>152</sup>—Brennan, with the encouragement of his colleagues, had elevated the opinion's dramatic elements as well as its authoritative tone. Rather than

---

144. Hutchinson, *supra* note 110, at 81.

145. FREYER, *supra* note 129, at 160.

146. *Id.* (quoting Letter from Justice Felix Frankfurter to Justice John Marshall Harlan II (Sept. 2, 1958)).

147. *Id.* at 198 (quoting Letter from Justice Felix Frankfurter to Chief Justice Warren (Sept. 11, 1958)); *see also id.* at 189 (quoting Letter from Justice Felix Frankfurter to C.C. Burlingham (Nov. 12, 1958) in which Frankfurter argues that the Court could win over moderate southern lawyers, not because they want desegregation, but because they "will gradually realize that there is a transcending issue, namely, respect for law as determined so impressively by a unanimous Court in construing the Constitution of the United States").

148. FREYER, *supra* note 129, at 177; Hutchinson, *supra* note 110, at 79; SCHWARTZ, *supra* note 133, at 298.

149. FREYER, *supra* note 129, at 178.

150. *Id.* at 179.

151. *Id.*

152. Hutchinson, *supra* note 110, at 81–82.

opening with a prosaic factual recitation of the developments that brought the case to the Court, the opinion now began with a striking rendering of the larger stakes at issue. Justice Black had drafted the bold opening, and Justice Brennan incorporated it without change.<sup>153</sup> The case “raises questions of the highest importance to the maintenance of our federal system of government. . . . 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*[.]”<sup>154</sup>

After defining the larger stakes of the case, the opinion then turns back to the details of the Little Rock controversy and the particular legal issues presented. Then, twelve pages later, the opinion makes its pivot: “What has been said, in the light of the facts developed, is enough to dispose of the case. However, we should answer the premise of the actions of the Governor and Legislature that they are not bound by our holding in the *Brown* case.”<sup>155</sup> This then paved the way for the Court’s declaration that “the federal judiciary is supreme in the exposition of the Constitution” and “the interpretation of the Fourteenth Amendment enunciated by this Court in the *Brown* case is the supreme law of the land[.]”<sup>156</sup>

*Cooper* was an overwhelmingly popular opinion outside the South. The Justices “laid down the law of this land,” wrote the editors of the *New York Times*.<sup>157</sup> The ruling “restates once more the doctrine of constitutional supremacy and the basic principle, recognized as fundamental to the American system ever since the days of John Marshall, ‘that the Federal judiciary is supreme in the exposition of the law of the Constitution.’”<sup>158</sup> The ruling

simply reiterates in strong and clear language, understandable even to the most fanatical segregationist, that the Supreme Court’s interpretation of the Constitution is the law, that the desegregation decision stands, that neither direct nullification nor indirect evasion will be tolerated, that

---

153. SCHWARTZ, *supra* note 133, at 300–01.

154. *Cooper v. Aaron*, 358 U.S. 1, 4 (1958).

155. *Id.* at 17.

156. *Id.* at 18. The final draft also added language, urged by Justice Harlan, emphasizing the agreement of recent appointees to the Court with the basic principle of *Brown*. SCHWARTZ, *supra* note 135, at 299. “The basic decision in *Brown* was unanimously reached by this Court only after the case had been briefed and twice argued and the issues had been given the most serious consideration. Since the first *Brown* opinion three new Justices have come to the Court. They are at one with the Justices still on the Court who participated in that basic decision as to its correctness, and that decision is now unanimously reaffirmed.” *Cooper*, 358 U.S. at 19.

157. *Spelling Out Desegregation*, N.Y. TIMES, Sept. 30, 1958, at 30.

158. *Id.*

state officials are as subject to Federal law as anyone else, that violent resistance to this law is futile[.]<sup>159</sup>

“The Court has silenced once and for all the segregationists who have placed preservation of law and order above constitutional rights,” wrote the editors of the *Chicago Defender*.<sup>160</sup> An approving C. Vann Woodward described the tone of the *Cooper* decision as “judicial rhetoric . . . amounting to anger.”<sup>161</sup>

#### V. COOPER’S CRITICS

That most of the white South would denounce what the Court did in *Cooper* was surely expected. Perhaps less expected was that after the Little Rock crisis receded from the headlines, and after *Brown* had been elevated to iconic status in the consciousness of the public and the legal academy, *Cooper* has remained the target of a persistent stream of criticism and even ridicule.

One of the earliest and most influential of these critiques of *Cooper* came from Yale law professor Alexander Bickel. In his classic 1962 book, *The Least Dangerous Branch*, Bickel chided defenders of *Brown*, including the justices themselves, for failing to adequately respond to the attacks on *Brown* by the white South.<sup>162</sup> Southerners attacked the Court in *Brown* for having “botched the job that [Chief Justice John] Marshall describes in *Marbury v. Madison*; pretty obviously, the Court had performed some other function, not the one there indicated.”<sup>163</sup> The Court’s response in *Cooper* was to assert that based on *Marbury*,

the Court is empowered to lay down the law of the land, and citizens must accept it uncritically. Whatever the Court lays down is right, even if wrong, because the Court and only the Court speaks in the name of the Constitution. Its doctrines are not to be questioned; indeed, they are hardly a fit subject for comment. The Court has spoken. The Court must be obeyed. There must be good order and peaceable submission to lawful authority.<sup>164</sup>

This, Bickel argued, was the essence of the Court’s pronouncement in *Cooper*. Bickel’s arch hyperbole made this perhaps the most memorable of

159. *Id.*

160. *Our Opinions: The Court Asserts Its Power*, CHI. DEFENDER, Oct. 11, 1958, at 10.

161. C. Vann Woodward, *The South and the Law of the Land*, 26 COMMENTARY 369, 370 (1958).

162. ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 244–65 (1962).

163. *Id.* at 264.

164. *Id.*

*Cooper* takedowns, but his was only an early exemplar of a long line of *Cooper* critiques by legal luminaries.

From across the ideological spectrum, scholars have made sport out of taking shots at *Cooper*'s judicial supremacist language. The Court got "carried away with its own sense of righteousness" in *Cooper*, wrote University of Chicago law professor Philip Kurland.<sup>165</sup> He also described *Cooper* as an expression of the "the Court's Louis XIV's notion of itself, *l'état, c'est moi*["]"<sup>166</sup> "[I]n the drama of the occasion," wrote J. Harvie Wilkinson, a law professor who is now a respected federal judge, "the Court went somewhat overboard, with a sweeping and unprecedented assertion of its own authority and place."<sup>167</sup> *Cooper*'s proclamation of the Court's authority, he added, was "both unrealistic and undesirable."<sup>168</sup> Another scholar dismissed *Cooper*'s "bombast,"<sup>169</sup> and Professor Sanford Levinson has described *Cooper*'s declaration of the Court's interpretive supremacy as "really quite preposterous in its depiction of American history."<sup>170</sup> "If a student wrote such a statement in a final exam," he added, "it would receive a D from a generous grader["]"<sup>171</sup> Larry Kramer referred to *Cooper*'s supremacist claims as "just bluster and puff."<sup>172</sup>

165. Philip B. Kurland, *Egalitarianism and the Warren Court*, 68 MICH. L. REV. 629, 643 (1970).

166. Philip B. Kurland, "Brown v. Board of Education was the Beginning": *The School Desegregation Cases in the United States Supreme Court: 1954–1979*, 1979 WASH. U. L.Q. 309, 328 (1979).

167. J. HARVIE WILKINSON III, FROM BROWN TO BAKKE: THE SUPREME COURT AND SCHOOL INTEGRATION, 1954–1978, at 92 (1979).

168. *Id.* at 93.

169. ROBERT A. BURT, THE CONSTITUTION IN CONFLICT 310 (1992); *see also id.* at 293 (describing *Cooper* as an "atavistic rhetorical demand for absolute submission.").

170. ROBERT G. MCCLOSKEY, THE AMERICAN SUPREME COURT 276 (Sanford Levinson ed., 5th ed. 2010).

171. *Id.*

172. KRAMER, *supra* note 11, at 221; *see also* SANFORD LEVINSON, CONSTITUTIONAL FAITH 46–50 (1988); TUSHNET, *supra* note 11, at 6–32; Frank H. Easterbrook, *Presidential Review*, 40 CASE W. RES. L. REV. 905, 924–27 (1990); Josh Blackman, *The Irrepressible Myths of Cooper v. Aaron*, 107 GEO. L.J. (forthcoming 2019) (online source on file with author) (criticizing *Cooper*'s "unprecedented assertions of judicial power were, and remain, entirely inconsistent with how all courts, including the Supreme Court, operate"); Ed Whelan, *This Day in Liberal Judicial Activism—September 29*, NAT'L REV. (Sept. 29, 2014), <https://www.nationalreview.com/bench-memos/day-liberal-judicial-activism-september-29-ed-whelan-5/> (describing *Cooper* as the first time the Court asserted the "myth of judicial supremacy"); David A. Strauss, *Little Rock and the Legacy of Brown*, 52 ST. LOUIS U. L.J. 1065, 1080 (2008) ("This issue of judicial supremacy is complex and difficult. The Court's position in *Cooper*, taken at face value, seems to go too far."); Gerald Gunther, *The Subtle Vices of the "Passive Virtues"—A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1, 25 n.155 (1964) (contrasting *Cooper*'s judicial supremacist position with *Marbury*'s more moderate position); WHITTINGTON, *supra* note 11, at 2–3.

The most controversial challenge to *Cooper* came in 1986, when Attorney General Edwin Meese III gave a speech at Tulane University entitled “The Law of the Constitution.” In celebrating the Constitution, Meese insisted on the need to distinguish the document’s text from the Court’s interpretation of that text.<sup>173</sup> “[A]lthough the point may seem obvious,” he said, “there have been those down through our history—and especially, it seems, in our own time—who have denied the distinction between the Constitution and constitutional law.”<sup>174</sup> To drive home his point, he took aim at *Cooper*:

Some thirty years ago, in the midst of great racial turmoil, our highest Court seemed to succumb to this very temptation. By a flawed reading of our Constitution and *Marbury v. Madison*, and an even more faulty syllogism of legal reasoning, the Court in a 1958 case called *Cooper v. Aaron* appeared to arrive at conclusions about its own power that would have shocked men like John Marshall and Joseph Story. . . . The logic of *Cooper v. Aaron* was, and is, at war with the Constitution, at war with the basic principles of democratic government, and at war with the very meaning of the rule of law.<sup>175</sup>

Meese’s remarks were met with scathing criticism. American Civil Liberty Union executive director Ira Glasser denounced them as “an invitation to lawlessness and a breach of constitutional duty to uphold the law.”<sup>176</sup> He questioned whether Meese also sought to undermine *Brown*.<sup>177</sup> “Why Give That Speech?” asked the headline of a *Washington Post* editorial.<sup>178</sup> The Attorney General’s distinction between the Constitution and constitutional decisions, and his claim that the Court’s decisions are “not permanent and fixed or immune from challenge” was, the *Post*’s editors

---

*Cooper*’s critics often cite the long and impressive history of critics of judicial supremacy. Exhibit A in this discussion is usually Abraham Lincoln, who famously warned “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 people will have ceased to be their own rulers” President Abraham Lincoln, First Inaugural Address (Mar. 4, 1861) (transcript available at [http://avalon.law.yale.edu/19th\\_century/lincoln1.asp](http://avalon.law.yale.edu/19th_century/lincoln1.asp)). Other prominent critics of judicial supremacy include James Madison, Thomas Jefferson, Andrew Jackson, Theodore Roosevelt, and Franklin Roosevelt. See generally WHITTINGTON, *supra* note 11; KRAMER, *supra* note 11; BICKEL, *supra* note 162.

173. Meese, *supra* note 2.

174. *Id.*

175. *Id.*

176. Ronald J. Ostrow, *Meese’s View That Court Doesn’t Make Law Scored*, L.A. TIMES, Oct. 24, 1986, at A1, A27.

177. Ira Glasser, Letter to the Editors, *Cooper v. Aaron: What Did Mr. Meese Mean?* WASH. POST, Nov. 24, 1986, at A14.

178. Editorial, *Why Give That Speech?*, WASH. POST, Oct. 29, 1986, at A18.

noted, “self-evident[.]”<sup>179</sup> But the speech was “very troublesome” because of the “signal” he was sending that rulings might not bind anyone beyond the parties to litigation.<sup>180</sup> Failing to make clear that court rulings do indeed extend beyond litigants “is to permit the inference that a Supreme Court decision has no general applicability and that citizens may choose to ignore rulings at will. That’s an invitation to constitutional chaos and an expression of contempt for the federal judiciary and the rule of law.”<sup>181</sup> Former Attorney General Ramsey Clark dismissed Meese’s speech as “essentially a clumsy, vague assault on law” and an expression of “unusual notions[.]”<sup>182</sup>

In response, Meese backtracked somewhat. He explained that he believed constitutional decisions are indeed “law” and “they are the law of the land in the sense that they do indeed have general applicability and deserve the greatest respect from all Americans.”<sup>183</sup> He defended “[t]he process of debating, litigating and legislating in response to a constitutional decision one thinks wrong. . . . This process demonstrates that dialogue among our political institutions and among the American people helps us

179. *Id.* See also Stuart Taylor, *Meese and the Storm Over the Court*, N.Y. TIMES, Oct. 27, 1986, at A20 (“Jefferson said it. Jackson said it. So did Lincoln and Franklin Delano Roosevelt.”). Taylor noted that Meese “often makes potentially far-reaching but fundamentally ambiguous statements about issues of great profundity and complexity without spelling out what he means.” *Id.*

180. *Why Give That Speech?*, *supra* note 178.

181. *Id.*; see also Paul Brest, *Meese, the Lawman, Calls for Anarchy*, N.Y. TIMES, Nov. 2, 1986, at 23 (defending “[o]ur tradition of judicial supremacy” based on the inability of the political branches to “develop[] trustworthy procedures for assessing the constitutionality of their enactments”); *id.* (“Our tradition of according the judicial branch the last word on constitutional questions reflects our dedication to the rule of law.”); Jack Greenberg, Letter to the Editor, *Arbitrary Rules*, N.Y. TIMES, Nov. 6, 1986, at A34 (“For all practical purposes, Attorney General Edwin Meese 3d’s argument that the Supreme Court does not decide what the law is except for individual cases means that in his mind he is the law.”); Anthony Lewis, *Law or Power?* N.Y. TIMES, Oct. 27, 1986, at A23 (accusing Meese of “making a calculated assault on the idea of law in this country”); *id.* (“[T]o argue that no one owes respect to a Supreme Court decision unless he was actually a party to the case . . . is to invite anarchy.”); Michael Kinsley, *Meese’s Stink Bomb*, WASH. POST, Oct. 29, 1986, at 19 (describing Meese’s speech as a “jurisprudential stink bomb”); Howard Kurtz, *Meese’s View on Court Rulings Assailed, Defended*, WASH. POST, Oct. 24, 1986, at A12.

182. Ramsey Clark, *Enduring Constitutional Issues*, 61 TUL. L. REV. 1093, 1094 (1987). Although the bulk of commentary ran sharply critical, Meese had his defenders, including some Reagan administration critics. In its essentials, Mark Tushnet wrote, Meese’s speech “was obviously correct[.]” Mark Tushnet, *Supreme Court, the Supreme Law of the Land, and Attorney General Meese: A Comment*, 61 TUL. L. REV. 1017, 1018 (1987). Walter Dellinger declared Meese’s basic point about the Court and the Constitution “absolutely right.” Kurtz, *supra* note 181. “From Jackson to Lincoln to FDR,” Dellinger added, “there is a strong tradition in defense of this argument.” *Id.*

183. Edwin Meese III, *The Tulane Speech: What I Meant*, WASH. POST, Nov. 13, 1986, at A21.



follow our supreme law, the Constitution.”<sup>184</sup> Meese’s defenders insisted that his critique of *Cooper* was not with the holding but with, as one of Meese’s aides put it, “the pretentious obiter dictum the court saw fit to append to that decision.”<sup>185</sup>

## VI. MAKING SENSE OF COOPER

How to make sense of *Cooper*? Why has a decision that is so obviously right in so many ways become the target of such a persistent barrage of attacks? And why, even in the face of these attacks, does the decision retain such a prominent, even revered place in our constitutional history? In this section, I offer three observations to help explain *Cooper*’s distinctive position in the canon of great Supreme Court opinions.

### A. The *Cooper* Two-Step

In *Cooper*, the justices engaged three overlapping issues: racial segregation, the rule of law, and the rule of the Supreme Court. *Cooper*’s treatment of the first issue was most notable at the time of the decision, and it is probably what the decision is best remembered for today. *Cooper*’s resonant assertion of the unconstitutionality of state-mandated segregation in schools and the rightness of *Brown* provided a principled commitment to racial equality that still resonates today. The Justices memorably emphasized their united commitment to *Brown* by taking the unusual step of listing each of the nine Justices as the joint authors of the opinion.

*Cooper* also staked out a clear position on the rule of law, denouncing the effects of the segregationists’ massive resistance campaign and insisting that “violence and disorder” could not justify denying constitutional rights.<sup>186</sup> This point received widespread approbation at the time and ever since.<sup>187</sup>

The third issue on which the justices staked out a position in *Cooper* was on the authority of the Supreme Court. This position is found in

---

184. *Id.*

185. Gary L. McDowell, *What Mr. Meese Means (Cont’d.)*, WASH. POST, Dec. 2, 1986, at A18.

186. *Cooper v. Aaron*, 358 U.S. 1, 16 (1958). On *Cooper* as a statement on the rule of law, see Christopher W. Schmidt, “*The Civilizing Hand of Law*”: *Defending the Legal Process in the Civil Rights Era*, RHETORICAL PROCESS AND LEGAL JUDGMENTS 31–53 (Austin Sarat ed., 2016); see also Farber, *supra* note 110.

187. See, e.g., *Spelling Out*, *supra* note 157 (praising the Court for writing an opinion that “utterly rejects the anarchic theory that violence and disorder stimulated by actions of the Governor or other authorities of a state can be permitted to undermine the constitutional rights of citizens as defined by the high tribunal”).

*Cooper*'s sweeping concluding proclamation of the Court's exclusive prerogative on matters of constitutional interpretation.<sup>188</sup>

Of these three sides to *Cooper*, the first two have stood the test of time while the third remains contested. One of the challenges in assessing *Cooper* is the difficulty in speaking about the third issue—the contestable claim to judicial interpretive supremacy—without calling into question the first two. Thus, we have what we might call the *Cooper* two-step: critics of judicial supremacy attack *Cooper*; in response, critics of these critics accuse them of attacking *Brown* or undermining the rule of law. This often leads to a strategic retreat by *Cooper*'s critics. The Meese episode provides the most famous example of the *Cooper* two-step.

Like the parable of the elephant and the blind men, it can be difficult to talk about *Cooper* because the opinion means different things to different people at different times.

## B. The Politics of Judicial Supremacy

Bolstering the authority of the Supreme Court has often held political advantages, and not only for the Court itself. Consider the case of President Eisenhower. He was skeptical of the *Brown* ruling. In terms of his views about the Court's interpretive supremacy, his skepticism manifested in contradictory ways. His apparent belief that the Court got it wrong in *Brown* necessarily implied skepticism toward the Court's interpretive supremacy. But he also fell back on interpretive supremacy to justify his actions to enforce *Brown* without taking responsibility for the decision itself. In his address to the nation after sending the U.S. Army's 101st Airborne Division to Little Rock, Eisenhower said that he was acting to prevent “anarchy” and “mob rule,” which was undermining the nation's standing in the world.<sup>189</sup> “Our personal opinions about the [Supreme Court's school desegregation] 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>190</sup> He called on white southerners to “respect the law even when they disagree with it.”<sup>191</sup> What he did not do was to make any statement about school desegregation or about the Court's ruling in *Brown*. As he wrote in a private correspondence later in the fall of 1957, “[M]y main interest is not in the integration or segregation question. . . . The point is that specific orders

---

188. *Cooper*, 358 U.S. at 17–21.

189. President Dwight D. Eisenhower, Radio and Television Address to the American People on the Situation in Little Rock (Sept. 24, 1957) (transcript available at <https://www.presidency.ucsb.edu/node/233623>).

190. *Id.*

191. *Id.* See also *id.* (“Proper and sensible observance of the law then demanded the respectful obedience which the nation has a right to expect from all its people.”).

of our courts, taken in accordance with the terms of the Constitution as interpreted by the Supreme Court, must be upheld.”<sup>192</sup>

A year later, as the Court was about to consider the *Cooper* case, Eisenhower’s strategic embrace of judicial interpretive supremacy remained unchanged. When a reporter pressed Eisenhower to talk about his “own personal feeling on the principle involved” in the school desegregation controversy, Eisenhower responded,

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.<sup>193</sup>

Eisenhower thus found deference to the Court’s supremacy over constitutional interpretation a way to avoid having to publicly embrace a ruling with which he held deep misgivings. He found political shelter beneath the protective umbrella of the Court’s authority.

The Justices arrived at their own commitment to judicial interpretive supremacy for the opposite reason: they were committed to the rightness of *Brown*. Because they were so committed to *Brown*, they unanimously signed an opinion that went out of its way to defend an excessive and unrealistic vision of judicial supremacy.

Yet the Justices spoke from a position of vulnerability as well as commitment. At a time when the Justices were hesitant to expand *Brown* with further guidance on desegregation,<sup>194</sup> they chose to write in *Cooper* a

---

192. SIMON, *supra* note 36, at 309 (quoting Letter from President Dwight D. Eisenhower to Swede Hazlett (Nov. 18, 1957)); *see also id.* (quoting Eisenhower’s other expressions of similar sentiment).

193. President Dwight D. Eisenhower, The President’s News Conference (Aug. 20, 1958) (transcript available at <https://www.presidency.ucsb.edu/node/233865>). *See also* President Dwight D. Eisenhower, Statement by the President on Compliance with Final Orders of the Courts (Aug. 20, 1958) (transcript available at <https://www.presidency.ucsb.edu/node/233866>) (“Every American must understand that if an individual, community or state is going successfully and continuously to defy the courts, then there is anarchy.”).

194. *See* KLARMAN, *supra* note 49, at 326; *Shuttlesworth v. Birmingham Bd. of Educ.*, 162 F. Supp. 372 (N.D. Ala. 1958).

resounding defense of judicial supremacy. “Invariably, the Court takes a bold stand because it fears that the political order will ignore its command,” write Neal Devins and Louis Fisher.<sup>195</sup> The Court makes its most “sweeping declarations of power” to “cloak institutional self-doubts, much as a gorilla pounds his chest and makes threatening noises to avoid a fight.”<sup>196</sup> *Cooper* was written from a defensive, vulnerable posture.<sup>197</sup> The Court was lashing back at its critics. Apprehensive about the institution’s vulnerabilities, the Justices drew on their most powerful resource, the judicial proclamation, expressed with the authority of a written opinion by the highest court in the land, and deployed its hyperbolic assertion of its own supremacy.

### C. Public Acceptance of Judicial Supremacy

A final reason *Cooper* remains such a powerful monument in our constitutional landscape is that despite its bluster and its unrealistic portrayal of the Court’s interpretive authority, the American people often act as if they want the Court to serve this role. Indeed, the strongest arguments in defense of judicial supremacy fall back not on the merits of the supremacist position itself, but on the fact that the public has largely accepted the Court in this role.<sup>198</sup> The power of judicial review, Chief Justice Edward Douglas White

---

195. Neal Devins & Louis Fisher, *Judicial Exclusivity and Political Instability*, 84 VA. L. REV. 83, 93–94 (1998).

196. *Id.*; see also MCCLOSKEY, *supra* note 170, at 276 (Sanford Levinson writing that the Court’s claims “to theoretical ultimacy and, just as significantly, to the popular acceptance of its supremacy, have the overtone of the scared whistler going past the graveyard: ultimately more pathetic than inspiring”).

197. See L.A. Powe, Jr., *The Politics of American Judicial Review: Reflections on the Marshall, Warren, and Rehnquist Courts*, 38 WAKE FOREST L. REV. 697, 712 (2003) (describing *Cooper* as the “boasting of the weak”).

As discussed above, Justice Brennan’s initial draft in *Cooper* included a more explicit discussion of the Court’s weak position. This was removed at the urging of other justices. See *supra*, Part IV; see also Hutchinson, *supra* note 110, at 79; SCHWARTZ, *supra* note 133, at 295.

198. See, e.g., Driver, *supra* note 100, at 1060 (“Rather than unilaterally taking something away from ‘the people’ in *Cooper*, it may be more accurate to understand that decision’s embrace of judicial supremacy as articulating the notion of constitutional interpretation that many citizens desired.”); Dale Carpenter, *Judicial Supremacy and Its Discontents*, 20 CONST. COMMENT. 405, 411 (2003) (“[T]o the extent critics of judicial supremacy claim to be speaking for a people whose role has been diminished by an arrogant judiciary, we ought at least pause to wonder why the people and their formal political organs seem so unconcerned.”) (emphasis omitted); Suzanna Sherry, *Treading on the Supreme Court* [letter to the editor], WASH. POST, Dec. 28, 1982, at A12 (“[T]he *Marbury-Cooper* proposition—that the Supreme Court is the ultimate arbiter of the Constitution—has not been seriously questioned since 1958.”). See generally RICHARD H. FALLON JR., LAW AND LEGITIMACY IN THE SUPREME COURT (2018) (discussing, inter alia, judicial legitimacy and public acquiescence).

once said, rests “solely upon the approval of a free people.”<sup>199</sup> This point can also be applied to the claims of judicial interpretive supremacy. Although the American people often disagree with particular rulings of the Supreme Court, they have generally accepted that the Court should be recognized as the supreme interpreter of the Constitution.<sup>200</sup>

## VII. CONCLUSION

This is where the idea of judicial supremacy over constitutional interpretation stands today. It is a claim about the Supreme Court and the Constitution that goes against logic, against history, against basic democratic principles. But it is also a claim about the Court that is broadly accepted as a truism of American constitutionalism—a description of the way it is and the way it ought to be.

*Cooper v. Aaron*, the Supreme Court’s seminal declaration of its own interpretive supremacy, is, at its core, as right and true as any decision the Court has handed down. The Court squarely and powerfully stood up for the right cause, and it squarely and powerfully pushed aside the claims of those

---

199. Edward Douglas White, *The Supreme Court of the United States*, 7 A.B.A. J. 341, 341 (1921); see generally BARRY FRIEDMAN, *THE WILL OF THE PEOPLE* (2009) (offering what amounts to an extended historical defense of this point).

200. See NEAL DEVINS & LOUIS FISHER, *THE DEMOCRATIC CONSTITUTION* 4 (2015) (observing that “newspapers and constitutional law texts typically treat Court interpretations of the Constitution as supreme”); Larry Alexander & Lawrence B. Solum, *Popular? Constitutionalism?*, 118 HARV. L. REV. 1594, 1637–39 (2005); Larry D. Kramer, *Foreword: We the Court*, 115 HARV. L. REV. 5, 6–7 (2001) (“[I]n the years since *Cooper v. Aaron*, the idea of judicial supremacy—the notion that judges have the last word when it comes to constitutional interpretation and that their decisions determine the meaning of the Constitution for everyone—has finally found widespread approbation. . . . It seems fair to say that, as a descriptive matter, judges, lawyers, politicians, and the general public today accept the principle of judicial supremacy—indeed, they assume it as a matter of course.”).

Edwin Corwin attributed the strength of judicial interpretive supremacy to “professional bias” among lawyers. EDWIN S. CORWIN, *COURT OVER CONSTITUTION: A STUDY OF JUDICIAL REVIEW AS AN INSTRUMENT OF POPULAR GOVERNMENT* 74 (1938). “Brought up on the principle of *stare decisis*, taught to search for the law in the past decisions of the Court, the bar has naturally been prone to identify the judicial version of the Constitution as the authentic Constitution.” *Id.* Corwin quoted a striking articulation of judicial supremacist thinking by Senator M.M. Logan of Kentucky in 1933. The Supreme Court “is solely vested with the authority to tell us what the Constitution means,” the senator explained.

It may be that we could say that we disagree with its opinion, but however much we may disagree with the opinion of the Supreme Court, that opinion is right. It may not have been right five minutes before the opinion was delivered; it may not have been right during the entire history of the Nation up to that time; but the very moment that that opinion is handed down and goes into the law books, when it becomes final, then the Constitution means and must mean exactly what the Supreme Court says its means.

*Id.* at 75 (quoting 77 CONG. REC. 1257 (1933)).

who stood in the way. It is a heroic decision. But like any real-life hero, it is a flawed hero.