THE SUPREME COURT AND THE RULE OF LAW: *COOPER v. AARON* REVISITED

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I. INTRODUCTION

Political scientists have devoted considerable time to researching the impact of U.S. Supreme Court decisions. They have found a substantial gap between the Supreme Court's pronouncements and the subsequent actions of public officials. School prayer, for example, remained widespread in public schools long after the Court declared the practice unconstitutional.[1] Many public officials apparently do not consider themselves under any duty to comply with the Court's decisions. Indeed, disputes about the binding effect of the Court's decisions stretch back to its first exercise of judicial review in *Marbury v. Madison*.[2]

The Court stated its own position on this issue in *Cooper v. Aaron*,[3] a desegregation case. In a unique opinion signed by each Justice,[4] the Court asserted that its pronouncements were "the supreme law of the

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1. For a thorough review of the literature, see J. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT 150 (1980); *see also id.* at 146-54.

2. 5 U.S. (1 Cranch) 137 (1803). For citations to some of the historical sources, see P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 81-85 (2d ed. 1973); P. BREST, PROCESSES OF CONSTITUTIONAL DECISIONMAKING 66-73 (1975); G. GUNTHER, CONSTITUTIONAL LAW: CASES AND MATERIALS 25-36, 46-48 (10th ed. 1980). The best historical discussion remains E. CORWIN, COURT OVER CONSTITUTION 65-67 (1938).

3. 358 U.S. 1 (1958). Repeated citations will be made to the lower court opinions, all but one of which are titled Aaron v. Cooper. The following shortened citations will be used: *Aaron I*, 143 F. Supp. 855 (W.D. Ark. 1956); *Aaron II*, 243 F.2d 361 (8th Cir. 1957); *Aaron III*, 156 F. Supp. 220 (W.D. Ark. 1957); *Aaron IV*, 254 F.2d 797 (8th Cir. 1958) [Faubus v. United States]; *Aaron V*, 163 F. Supp. 13 (W.D. Ark. 1958); and *Aaron VI*, 257 F.2d 33 (8th Cir. 1958). *Aaron I* and *Aaron II* approved the school board's original plan. *Aaron III* and *Aaron IV* involved interference by the Governor. *Aaron V* and *Aaron VI* involved the board's request for a delay. "*Cooper*" will be used to refer only to the Supreme Court opinion, which affirmed *Aaron VI*.

4. *See* S. WASBY, A. D'AMATO & R. METRAILER, DESEGREGATION FROM *BROWN* TO *ALEXANDER*: AN EXPLORATION OF SUPREME COURT STRATEGIES 177 (1977). Obviously, no one has checked every case in the 357 prior volumes of the *United States Reports*, but no other examples of the same format are known to exist.

land,"[5] binding all state officials under the supremacy clause.[6] Under *Marbury*, the Court said, it was not only authorized to interpret the Constitution, it also was "supreme in the exposition" of the Constitution.[7]

Cooper has come under scathing attack from commentators.[8] The Court's discussion of the supremacy clause has been called "a rhetorical flourish,"[9] a "doubtful proposition,"[10] "a highly emotional screed,"[11] "both unrealistic and undesirable,"[12] just "loose talk,"[13] and an example of a court "carried away with its own sense of righteousness."[14] The most vociferous critic, Alexander Bickel, considered the matter important enough to discuss in three separate books.[15] He argued that a Supreme Court decision imposes no legal duties except on the parties to that case.[16] All other persons are entitled to exercise "the

5. 358 U.S. at 18.

6. The supremacy clause reads:

> 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.

U.S. CONST. art. VI, § 2.

7. 358 U.S. at 18.

8. For other critical references to the opinion besides those cited in notes 9 through 15, see 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) (citing *Cooper* as holding that the Court's decisions "are not to be questioned" by anyone); Miller, *Toward a Concept of Constitutional Duty*, 1968 SUP. CT. REV. 199, 202 & n.11 (*Cooper* "hardly disposed of the issue", Supreme Court decisions actually bind no one but federal judges); Wechsler, *The Courts and the Constitution*, 65 COLUM. L. REV. 1001, 1008 (1965) (not citing *Cooper* but rejecting the view that the Court's decisions "call for obedience by all within the purview of the rule that is declared"). Professor Tribe also rejects the view that Supreme Court opinions are a binding part of the law of the land, but argues that *Cooper* is really consistent with his view. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 27-32 (1978). Not surprisingly, Southern commentators also denied that *Brown* was the law of the land. *See* Frankel, *The Alabama Lawyer, 1954-1964*, 64 COLUM. L. REV. 1243, 1249-51 (1964).

For a more favorable view of *Cooper*, see Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739, 755-59 (1982) (adopting the view that the Supreme Court is the authoritative source of constitutional interpretation).

9. Wilkinson, *The Supreme Court and Southern School Desegregation, 1955-1970: A History and Analysis*, 64 VA. L. REV. 485, 520 (1978).

10. Monaghan, *Constitutional Adjudication: The Who and When*, 82 YALE L.J. 1363,1363 n.2 (1973).

11. 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 (also referring to "the Court's Louis XIV's notion of itself, 'l'etat, c'est moi' ").

12. Wilkinson, *supra* note 9, at 520.

13. Miller & Scheflin, *The Power of the Supreme Court in the Age of the Positive State: A Preliminary Excursus*, 1967 DUKE L.J. 273, 289.

14. P. KURLAND, POLITICS, THE CONSTITUTION AND THE WARREN COURT 116 (1970).

15. *See* A. BICKEL, THE MORALITY OF CONSENT 105-11 (1975) [hereinafter cited as MORALITY OF CONSENT]; A. BICKEL, POLITICS AND THE WARREN COURT 10-16 (1973) [hereinafter cited as POLITICS AND THE WARREN COURT]; A. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 259-64 (1962) [hereinafter cited as LEAST DANGEROUS BRANCH].

16. Following the Lincoln-Jackson-Roosevelt tradition, southern politicians were perfectly within their rights in declining to accept the Court's decision in the *School Segregation Cases* as a political rule. They were within their rights in deploring it and arguing against it.

dissenter's option to wait for litigation."[17] Thus, until an actual enforcement order has been issued against them, non-parties have no duty to comply with the Court's pronouncements.[18] The decision's other critics have made essentially the same argument, generally accusing the Court of confusing judicial decrees with statutes.[19]

This article re-examines the debate between the *Cooper* Court and its critics. The article begins by considering the dramatic events leading to the Court's opinion. Those events alone are a noteworthy part of our constitutional history. Not often has the President of the United States used the army to enforce federal law; even more rarely has he used the army to protect individual rights. The spectacle of paratroopers protecting school children from an angry mob is not easily forgotten.[20]

Apart from their drama, these events also bear upon the supremacy issue. The behavior of the officials involved in the crisis was significantly affected by their views about the rule of law.[21] If Pro-

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They could hope to convert public opinion. They could vote for laws that failed to advance its principle and even failed to concur with it. They could refuse to consider the issue settled and could relitigate it at every opportunity that the judicial process offered, and of course it offers a thousand and one. *They could reject as laughable statements that they were bound by their oaths to put the decision into effect in all situations in which it was applicable, without waiting for the constraint of litigation*. If they succeeded in turning public opinion, they could realistically look to the day when the principle announced by the Court would be rescinded or allowed to lapse without enforcement. Until that day, the decision was law, in accordance with the uses of decisions of courts. But this meant only that specific decrees ordering certain children to be admitted to certain schools had to be obeyed, and that until public opinion could be turned, children standing in the same position would be similarly treated, though only following litigation and more litigation.

LEAST DANGEROUS BRANCH, *supra* note 15, at 263-64 (emphasis added).

17. POLITICS AND THE WARREN COURT, *supra* note 15, at 13.

18. *See id.* at 11; LEAST DANGEROUS BRANCH, *supra* note 15, at 263-64; MORALITY OF CONSENT, *supra* note 15, at 111. For further discussion, see *infra* text accompanying notes 164-73.

19. *See* P. KURLAND, *supra* note 14, at 116-17; Kurland, *supra* note 11, at 327; Miller, *supra* note 8, at 202; Miller & Scheflin, *supra* note 13, at 289; Wechsler, *supra* note 8, at 1008 (suggesting, however, that a case that is repeatedly reaffirmed becomes more binding).

20. Bickel considered this to be the most important aspect of Little Rock and similar episodes:

> Compulsory segregation, like states' rights and like "The Southern Way of Life," is an abstraction and, to a good many people, a neutral or sympathetic one. These riots, which were brought instantly, dramatically, and literally home to the American people, showed what it means concretely. Here were grown men and women furiously confronting their enemy: two, three, a half dozen scrubbed, starched, scared, and incredibly brave colored children. The moral bankruptcy, the shame of the thing, was evident. Television, it should be emphasized, as in the Army-McCarthy hearings, played a most significant role. There was an unforgettable scene, for example, in one CBS newscast from New Orleans, of a white mother fairly foaming at the mouth with the effort to rivet her distracted little boy's attention and teach him how to hate. And repeatedly, the ugly, spitting curse, NIGGER! The effect, achieved on an unprecedented number of people with unprecedented speed, must have been something like what used to happen to individuals (the young Lincoln among them) at the sight of an actual slave auction, or like the slower influence on northern opinion of the fighting in "Bleeding Kansas" in 1854-55.

LEAST DANGEROUS BRANCH, *supra* note 15, at 267.

21. *See infra* text accompanying notes 29-37 & 71-86. Studies by political scientists confirm that this is a significant factor in obtaining compliance with Supreme Court decisions. In one study of compliance with the school prayer decisions, Richard Johnson found that a significant portion of the population in his sample community disagreed with the decisions, but believed that

fessor Bickel's ideas had been more widely shared, implementation of desegregation would have been even more difficult than it actually was. The Court has been criticized for attaching any practical significance to respect for its decisions as part of the law of the land.[22] Professor Bickel said the supremacy clause debate "didn't matter;"[23] instead, "[t]he decisive issue . . . going beyond the fictions of *Marbury v. Madison*," was the correctness of the Court's desegregation opinion.[24] A review of the facts, however, shows that the "fictions of *Marbury*" did matter. Influential persons supported desegregation even though they disagreed with it, precisely because they believed in the "fictions of *Marbury*." Far from being merely a surprising addendum to the *Cooper* opinion, as Professor Kurland suggests,[25] the supremacy discussion was an inevitable result of the events surrounding the case.

After an exploration of *Cooper* as a piece of constitutional history, this article analyzes *Cooper* as constitutional theory. The article argues that the Court was largely correct in viewing its constitutional decisions as part of the law of the land. The Court was wrong only in basing its conclusion on the erroneous premise that its decisions literally embody the Constitution.[26] That was an overstatement, as the critics have charged. The Court's hyperbole, however, is understandable given the circumstances. This article argues that the Court's decisions are at least a form of federal common law. Just as state judicial decisions are considered a binding part of state law under *Erie*,[27] so Supreme Court decisions are binding federal law under the supremacy clause.

II. *COOPER V. AARON* AS CONSTITUTIONAL HISTORY

A. The Road to Presidential Intervention

The Supreme Court's opinion in *Cooper v. Aaron* was the culmina-

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the community should comply anyway. He also found that the Superintendent of Schools, who agreed with the prayer decisions, was able to use this popular deference to the Court in order to obtain compliance. R. JOHNSON, THE DYNAMICS OF COMPLIANCE: SUPREME COURT DECISION-MAKING FROM A NEW PERSPECTIVE 104-08, 110-20 & 123-41 (1967). Another study of response to the school prayer decision found that state attorneys general, by taking a position on the binding effect of court decisions, exercised a great influence on compliance. *See* S. WASBY, THE IMPACT OF THE UNITED STATES SUPREME COURT: SOME PERSPECTIVES 230-31 (1970). Still another study showed that individuals favoring school prayer frequently changed their position after being told of the Supreme Court decision. Dolbeare, *The Supreme Court and the States: From Abstract Doctrine to Local Behavioral Conformity*, in THE IMPACT OF SUPREME COURT DECISIONS: EMPIRICAL STUDIES 202, 205-06 (2d ed. T. Becker & M. Freeley eds. 1973).

22. *See* POLITICS AND THE WARREN COURT, *supra* note 15, at 11; Wilkinson, *supra* note 9, at 520.

23. LEAST DANGEROUS BRANCH, *supra* note 15, at 265.

24. *Id.* In his last book, Bickel suggested that until individuals who disagree with the Court's decisions can be persuaded (not coerced) into complying, "we do not quite have law." MORALITY OF CONSENT, *supra* note 15, at 110.

25. Kurland, *supra* note 11, at 327.

26. *See infra* text accompanying notes 146-54.

27. The reference, of course, is to Erie Railroad v. Tompkins, 304 U.S. 64 (1938). For further discussion, see *infra* text accompanying notes 179-84.

tion of a year-long crisis in Little Rock, Arkansas. The supremacy issue, which the Court stressed so heavily in its opinion, was an integral part of this crisis from the beginning. Consequently, the decision can be fully understood only when placed in its historical setting.

The events leading to the crisis began immediately after *Brown v. Board of Education*, the Supreme Court's 1954 desegregation decision.[28] The Little Rock school board met the day after *Brown* to consider its response. Although the members of the board disagreed with *Brown*, none of them wanted to disobey what they saw as the "law of the land."[29] According to the Superintendent of Schools, some board members "were very much opposed . . . but they voted for the plan because the Board's attorneys assured them that it represented a legal minimum of compliance with the law."[30] Even Dr. Alford, who proved to be a rabid segregationist,[31] went along with the group on this basis.[32] In a public statement, the school board members proclaimed that they recognized "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."[33] The board subsequently adopted a gradual desegregation plan. As finally implemented in 1957, the first year of the plan called only for the admission of nine blacks to a single school, Central High School.[34] The stated purpose of the plan was to establish the "[p]roper time and method for integration . . . in a manner consistent with the law as finally interpreted by the Supreme Court. . . ."[35] This message was publicized by other board statements and numerous speeches by the Superintendent of Schools.[36] Throughout the crisis, the Board's position was that it had a legal duty

28. 347 U.S. 483 (1954). *Brown* held, of course, that intentional school segregation was a violation of the equal protection clause of the fourteenth amendment, overruling Plessy v. Ferguson, 163 U.S. 537 (1896). The Court's rationale was that "[s]eparate educational facilities are inherently unequal." 347 U.S. at 495. In a companion case, Bolling v. Sharpe, 347 U.S. 497 (1954), the Court held that segregation in the District of Columbia schools was also unconstitutional, despite the inapplicability of the equal protection clause to the federal government. In *Bolling*, the Court's rationale was that segregation in public schools was "not reasonably related to any proper government objective," 347 U.S. at 500, and hence violated the due process clause of the fifth amendment.

29. V. BLOSSOM, IT HAS HAPPENED HERE 10 (1959).

30. *Id.* at 22. Such legal advice by Southern lawyers apparently was not unusual. *See* R. SARRATT, THE ORDEAL OF DESEGREGATION: THE FIRST DECADE 187 (1966). The Arkansas Attorney General also said *Brown* was "the law of the land and we are going to abide by it." *Id.* at 183.

31. Alford later defeated Representative Hays, a moderate who had played an important role in the crisis. V. BLOSSOM, *supra* note 29, at 196-97; A. LEWIS, PORTRAIT OF A DECADE 69 (1964).

32. *Id.* at 22.

33. V. BLOSSOM, *supra* note 29, at 11.

34. J. PELTASON, FIFTY-EIGHT LONELY MEN: SOUTHERN FEDERAL JUDGES AND SCHOOL DESEGREGATION 163 (1959). The plan is summarized in Aaron v. Cooper, 243 F.2d 361, 362-63 (8th Cir. 1957) *(Aaron II)*. *See also Cooper*, 358 U.S. at 8.

35. *See* Aaron v. Cooper, 143 F. Supp. 855, 859 (E.D. Ark. 1956) *(Aaron I)*.

36. V. BLOSSOM, *supra* note 29, at 15; N. BARTLEY, THE RISE OF MASSIVE RESISTANCE: RACE AND POLITICS IN THE SOUTH DURING THE 1950'S 255 (1969).

to comply with *Brown* regardless of the individual members' feelings about the decision.[37]

The board's position was typical of the attitude of Southern moderates in the years following *Brown*. School officials in Houston, Nashville, Greensboro, Charlotte, Arlington, and elsewhere made similar statements between 1954 and 1956.[38] The Chattanooga Board of Education, for example, announced that it would "comply with the decision [in *Brown*] . . . . Should we . . . not comply, we would have been saying that each man is the sole judge of what laws he shall obey."[39] As the Virginia Superintendent of Schools put it, "[w]e are trying to teach school children to obey the law of the land and we will abide by it."[40] Statements about the need to obey *Brown* as the law of the land were not limited to school officials. Governor Folsom of Alabama,[41] Governor Shivers of Texas,[42] Governor Stanley of Virginia,[43] and Governor Cherry of Arkansas[44] all issued such statements. By defining the issue as one of lawfulness, these Southern moderates hoped to defuse racist attacks.[45]

Although opposition did exist in Little Rock, the school board's plan apparently would have been successful if the newly elected governor had not intervened.[46] Little Rock's elected officials were mostly moderates;[47] the city had little history of racial violence.[48] Additionally, the "color line" already had been successfully broken in public

37. For example, in its response to an NAACP complaint demanding faster integration, the board stated that it had regarded segregation as unlawful and state segregation statutes as void since *Brown*. *Aaron I*, 143 F. Supp. at 857. Another example is V. BLOSSOM, *supra* note 29, at 43-44. Little Rock's Congressman took the same position. B. HAYS, A SOUTHERN MODERATE SPEAKS 94, 162 (1959).

38. J. PELTASON, *supra* note 34, at 31. For instance, the chairman of the Norfolk, Va. Board of Education said in 1955, "We intend without reservation, to uphold and abide by the laws of the land." R. SARRATT, *supra* note 30, at 96.

39. J. PELTASON, *supra* note 34, at 31.

40. *Id.* at 31-32.

41. N. BARTLEY, *supra* note 36, at 281, 285. Folsom said, "When the Supreme Court speaks, that's the law." R. SARRATT, *supra* note 30, at 4, 11 (1966).

42. Shivers said: "Regardless of how we feel about this unfortunate and untimely situation, we must recognize it now as part of the supreme law of the land." J. PELTASON, *supra* note 34, at 32.

43. 3 W. GOLDSMITH, THE GROWTH OF PRESIDENTIAL POWER: A DOCUMENTED HISTORY 1602 (1974). Goldsmith also lists the governors of Kentucky, Tennessee, Oklahoma, and Maryland as initially supporting compliance with *Brown*.

44. V. BLOSSOM, *supra* note 29, at 25.

45. *See* J. PELTASON, *supra* note 34, at 49-50. For additional statements by moderates, see R. SARRATT, *supra* note 30, at 4-21.

46. *See* B. HAYS, *supra* note 37, at 153; B. MUSE, TEN YEARS OF PRELUDE: THE STORY OF INTEGRATION SINCE THE SUPREME COURT'S 1954 DECISION 124-25 (1964); Wilkinson, *supra* note 9, at 516. The Little Rock business community had expected the board's plan to work. *See* R. SARRATT, *supra* note 30, at 287.

47. A. LEWIS, *supra* note 29, at 47 (1964). N. BARTLEY, *supra* note 36, at 254, discusses other aspects of Little Rock's "relatively flourishing moderate community."

48. "For at least twenty-five years there has been no reported incident of violence arising from racial tension, either between adults or between children of school age." *Aaron III*, 156 F. Supp. at 224.

transportation.[49] Moreover, the moderates had shown popular strength in the March 1957, school board elections.[50] Indeed, Governor Faubus himself had campaigned as a moderate.[51] In the summer of 1957, Faubus said that "everyone knows that no state law supersedes a federal law."[52]

Even today, the motives behind Governor Faubus's change of position are not completely clear. Perhaps he was simply drifting in a crisis situation, improvising in response to events and segregationist pressures. On the other hand, he may have been consciously planning to exploit racial tension by taking a hardline position.[53] Whatever his motives, his actions are clear. After unsuccessfully attempting to block integration with a state court injunction,[54] Governor Faubus called out the National Guard on September 3, 1957.[55] He denied that he was "defying the orders of the United States Supreme Court" and claimed merely to be preserving public order,[56] though no genuine threat to order was ever shown.[57] The Guard was instructed to bar blacks from Central High School, the only school to be integrated in the first year of the school board plan.[58] From that time forward, Little Rock was plagued by angry white crowds which jeered and spat upon the nine black children, blocked their access to the school, and attacked reporters.[59]

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49. N. BARTLEY, *supra* note 36, at 251. *See also Aaron III*, 156 F. Supp. at 224.

50. V. BLOSSOM, *supra* note 29, at 32; B. MUSE, *supra* note 46, at 124-25 (1964).

51. N. BARTLEY, *supra* note 36, at 260; A. LEWIS, *supra* note 31, at 47 (Faubus's election "had been considered a liberal victory"); B. MUSE, *supra* note 46, at 125. Faubus's opponent had accused him of being a communist. R. SHERRILL, GOTHIC POLITICS IN THE DEEP SOUTH 80 (1968). Faubus's early conduct in office seemed to confirm his moderation on racial issues. *Id.* at 82-84.

52. V. BLOSSOM, *supra* note 29, at 37. *See also* B. MUSE, *supra* note 46, at 125 (Faubus conceded *Brown* was the law of the land). Faubus was later to say, "Just because I said it doesn't make it so." R. SHERRILL, *supra* note 51, at 74.

53. Bartley argues that Faubus "reluctantly filled the leadership void by coming to the defense of segregation." N. BARTLEY, *supra* note 36, at 252-53. On the other hand, Peltason argues that Faubus deliberately decided to manufacture a racial crisis. *See* J. PELTASON, *supra* note 34, at 155-65. Some evidence exists that Faubus saw support of segregation as the only way to win a third term. *See* R. SHERRILL, *supra* note 51, at 87-89.

54. The state court action is reported as Thomason v. Cooper, 2 RACE REL. L. REP. 931 (Pulaski County Ch. Ct., Aug. 29, 1957).

55. His proclamation is *reprinted in* 2 RACE REL. L. REP. 937 (1957). Before taking this action, Faubus took the precaution of assuring himself that the Justice Department would not intervene. *See* statement of Warren Olney III, Assistant Attorney General, *reprinted in* 104 CONG. REC. 5090 (1958).

56. *Quoted in* V. BLOSSOM, *supra* note 29, at 73. In another part of the speech, Faubus said the Guardsmen were there to act "not as segregationists or integrationists but as soldiers" to maintain order. *Id. See also* W. RECORD & J. RECORD, LITTLE ROCK, U.S.A. 37 (1960).

57. The Mayor of Little Rock said that "the Governor's excuse for calling out the Guard is simply a hoax." 3 W. GOLDSMITH, *supra* note 43, at 1600. The district court also disbelieved Faubus's claim. *See Aaron III*, 156 F. Supp. at 225.

58. *See Aaron III*, 156 F. Supp. at 225; B. MUSE, *supra* note 46, at 123, 127-28; Wilkinson, *supra* note 9, at 517.

59. For a vivid description of the mob, see A. LEWIS, *supra* note 31, at 47-56. The description by Elizabeth Eckford, one of the black students, is especially compelling. *See* 3 W. GOLDSMITH, *supra* note 43, at 1602-04.

In the meantime, the federal district court had become involved in the desegregation dispute. In an NAACP suit seeking faster integration, the district court had denied relief, approved the school board plan as consistent with *Brown II*,[60] and retained jurisdiction.[61] Subsequently, the court had entered an order directing the board to proceed with the plan,[62] enjoined interference from the state court,[63] and directed the U.S. Department of Justice to enter the case.[64] Thus, Governor Faubus's actions brought him into direct conflict with the federal district court.

At this point, the focus shifted to Washington. President Eisenhower previously had not taken a strong stand on civil rights. Even today his views on the merits of *Brown* remain unclear.[65] The President did believe, however, that *Brown* was the law.[66] In the 1956 campaign, he had said: "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."[67] Moreover, he took this position both in public and in letters to friends.[68] In one letter, for instance, he discussed the need to respect "the binding effect that Supreme Court decisions must have on all of us if our form of government is to survive and prosper."[69] If every individual followed his own personal interpretation of the Constitution, Eisenhower argued, the result would be chaos.[70]

Congressman Hays, who represented the Little Rock district, was a close friend of Sherman Adams, one of the President's most trusted aides.[71] Hays was distressed at the "disrespect for the Constitution" being shown in Little Rock and decided a meeting between President Eisenhower and Governor Faubus would be helpful.[72] It was clear by this time that the district court was likely to issue an injunction against Governor Faubus, and there was concern about whether Faubus would

60. In its initial opinion in *Brown*, the Court declared school segregation unconstitutional and requested further argument concerning the proper remedy. In *Brown II*, 349 U.S. 294 (1955), the Court directed the lower courts to issue appropriate equitable decrees in order to desegregate "with all deliberate speed." 349 U.S. at 301.

61. *Aaron I*, 143 F. Supp. 855, *aff'd*, *Aaron II*, 243 F.2d 361.

62. *See Aaron III*, 156 F. Supp. at 221.

63. The district court's order and the Board's petition are reprinted in 2 RACE REL. L. REP. 934-36 (1957).

64. This order is reprinted in 2 RACE REL. L. REP. 941-42 (1957).

65. There is some evidence that Eisenhower disagreed with *Brown*. *See* E. HUGHES, THE ORDEAL OF POWER: A POLITICAL MEMOIR OF THE EISENHOWER YEARS 242-43 (1963); A. LARSON, EISENHOWER: THE PRESIDENT NOBODY KNEW 124-25 (1968). *But see* S. ADAMS, FIRSTHAND REPORT: THE STORY OF THE EISENHOWER ADMINISTRATION 331 (1961).

66. D. EISENHOWER, THE WHITE HOUSE YEARS: WAGING PEACE, 1956-1961 159 (1965).

67. *Quoted in* S. ADAMS, *supra* note 65, at 339.

68. D. EISENHOWER, *supra* note 66, at 157, 169; S. ADAMS, *supra* note 65, at 337.

69. Letter from Eisenhower to Hazlett, July 22, 1957, *quoted in* D. EISENHOWER, *supra* note 66, at 150, 157, 175.

70. *Id.*

71. S. ADAMS, *supra* note 65, at 346-48.

72. *Id.* at 346-47; B. MUSE, *supra* note 46, at 132.

comply. Adams told Hays that no meeting could take place unless Faubus declared "his willingness to comply with the Constitution, Federal law, and the 1954 decision of the Supreme Court."[73] Faubus agreed to do so, but later managed to evade honoring this commitment.[74]

The meeting between Eisenhower and Faubus took place on September 14, 1957, at the President's vacation home in Newport. At the meeting, Governor Faubus apparently stressed his loyalty as a citizen and his willingness to obey federal law.[75] According to Adams, the governor also admitted the validity of the desegregation rulings.[76] President Eisenhower urged Faubus to leave the National Guard in place to control the unruly crowds around the high school, but not to use the Guard to exclude the black students.[77] After the meeting, Hays and Adams pressured Faubus into adding a sentence to his press release saying that *Brown* was "the law of the land and must be obeyed."[78] President Eisenhower was left with the impression that the governor would revoke his orders to the National Guard to exclude black children from the school.[79] Nevertheless, Faubus took no action on his return to Arkansas.[80]

On September 20, the district court issued the expected injunction.[81] Governor Faubus removed the National Guard three hours later, leaving no way of controlling the angry crowds surrounding the school.[82] Thus, the Little Rock mayor sent President Eisenhower an urgent plea to restore order.[83] The President issued a proclamation

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73. *Quoted in* D. EISENHOWER, *supra* note 66, at 165. *See also* S. ADAMS, *supra* note 65, at 348.

74. S. ADAMS, *supra* note 65, at 348-49; 3 W. GOLDSMITH, *supra* note 43, at 1606; B. MUSE, *supra* note 46, at 132-33.

75. D. EISENHOWER, *supra* note 66, at 166.

76. S. ADAMS, *supra* note 65, at 351.

77. 3 W. GOLDSMITH, *supra* note 43, at 1607.

78. S. ADAMS, *supra* note 65, at 352; V. BLOSSOM, *supra* note 29, at 95. Faubus's statement said: "I have never expressed any personal opinion regarding the Supreme Court decision of 1954 which ordered integration. The decision is the law of the land and must be obeyed." B. HAYS, *supra* note 37, at 151. Faubus later disclaimed that statement on the grounds that it was made under pressure, adding, "Because I said it doesn't make it so." W. RECORD & J. RECORD, *supra* note 56, at 115.

79. Eisenhower later said, "I definitely got the impression that, upon returning to Arkansas, he would within a matter of hours revoke his orders to the Guard to prevent re-entry of the Negro children into the school." D. EISENHOWER, *supra* note 66, at 166. At the meeting, Eisenhower reportedly felt that Faubus was confused about what course to take. *See* S. ADAMS, *supra* note 65, at 351. According to B. HAYS, *supra* note 37, at 149, Faubus said he "expect[ed] to send the Guard home."

80. D. EISENHOWER, *supra* note 66, at 166.

81. *Aaron III*, 156 F. Supp. 220 (W.D. Ark. 1957); *aff'd sub nom.* Faubus v. United States, 254 F.2d 797 (8th Cir. 1958).

82. J. PELTASON, *supra* note 34, at 175; B. MUSE, *supra* note 46, at 136. *See also id.* at 136-38 (describing the crowds). Other descriptions of the crowd can be found in S. ADAMS, *supra* note 65, at 353; D. BATES, THE LONG SHADOW OF LITTLE ROCK 93-94 (1962).

83. V. BLOSSOM, *supra* note 29, at 113.

that day, which seemed to have no effect.[84] The following day, the President directed the Secretary of Defense to use troops to restore order and enforce the district court's decrees.[85] In his speech to the nation explaining his action, President Eisenhower said:

> As you know, the Supreme Court of the United States has decided that . . . compulsory school segregation laws are unconstitutional.
>
> 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. Local Federal Courts were instructed by the Supreme Court to issue such orders as might be necessary [to implement *Brown*].
>
> During the past several years, many communities in our Southern States have instituted public school plans . . . in order to bring themselves into compliance with the law of the land.
>
> They have thus demonstrated to the world that we are a nation in which laws, not men, are supreme.[86]

Eisenhower then went on to explain the breakdown in law and order in Little Rock and stressed the need for compliance with judicial decrees.[87] The President's action successfully restored order and implemented the district court decree.[88]

B. The Supremacy Issue in the Supreme Court

Although the federal forces could control crowds outside the school, they could not control other forms of white resistance. School administrators faced severe disciplinary problems in controlling white students who engaged in an organized campaign of harassment against the nine black students.[89] Many bomb threats, nuisance fires, and other acts of vandalism took place.[90] Two hundred students were suspended and two expelled.[91] The school board, already under great pressure because of its position, was confronted with the possibility that the state legislature would take steps to re-establish segregation.[92] Moreover, segregationist attitudes seemed to be hardening. Whatever his previous motivations may have been, by January 1958, Governor Faubus clearly had decided to align himself with the extreme segrega-

84. S. ADAMS, *supra* note 65, at 354. The President's proclamation is reprinted in 3 W. GOLDSMITH, *supra* note 43, at 1608.

85. S. ADAMS, *supra* note 65, at 354-56. The Executive Order authorizing the use of military force is reprinted in 3 W. GOLDSMITH, *supra* note 43, at 1609-10.

86. Radio and Television Address by President Dwight D. Eisenhower, Sept. 24, 1957, *reprinted in* 3 W. GOLDSMITH, *supra* note 43, at 1614.

87. *Id.* at 1616-17.

88. *Id.* at 1617; B. HAYS, *supra* note 37, at 174; W. RECORD & J. RECORD, *supra* note 56, at 67-86.

89. J. PELTASON, *supra* note 34, at 179-81; *Aaron V*, 163 F. Supp. at 24.

90. *Aaron VI*, 257 F.2d at 37.

91. *Id.*

92. *See Aaron V*, 163 F. Supp. at 15.

tionists.[93] For the first time, he declared that "the Supreme Court decision is not the law of the land."[94] Unwilling or unable to resist these pressures, the board filed a request for a two-and-a-half-year delay in implementing desegregation.[95] It was this request which ultimately led to the Supreme Court's decision in *Cooper v. Aaron*.

The district court, somewhat unexpectedly, granted the board's request for a delay.[96] The NAACP immediately sought a writ of *certiorari* in advance of judgment in the court of appeals. The Supreme Court denied *certiorari*, but its brief *per curiam* stressed the need for a prompt hearing in the court of appeals.[97] The court of appeals reversed the district court on August 18, 1958,[98] but stayed its mandate pending appeal to the Supreme Court. The scene was set for the Supreme Court to hear the case.

The plaintiffs requested an order suspending the court of appeals' stay of its mandate. In response, Chief Justice Warren called a Special Term of the Court into session.[99] On August 28, 1958, the Court heard arguments on the stay issue. Concluding that this issue was inseparable from the merits, the Court directed the school board to file its petition for *certiorari* and set the case for argument on the merits on September 11.[100]

The supremacy clause issue, which had not been discussed in the lower court opinions, began to emerge in the Supreme Court briefs. The school board's brief stressed its inability to overcome the resistance of state government, as expressed in recent segregationist legislation.[101] A segregationist *amicus* brief argued that *Brown* was not the law of the land.[102] The NAACP brief, on the other hand, argued that the case involved "not only vindication of the constitutional rights declared in *Brown*, but indeed the very survival of the Rule of Law."[103]

The oral argument on September 11 brought the supremacy issue

93. *See* E. BLACK, SOUTHERN GOVERNORS AND CIVIL RIGHTS: RACIAL SEGREGATION AS A CAMPAIGN ISSUE IN THE SECOND RECONSTRUCTION 100-04 (1976).

94. N. BARTLEY, *supra* note 36, at 273. For a later statement by Faubus to the same effect, see W. RECORD & J. RECORD, *supra* note 56, at 111-12 (quoting a statement by Faubus on Aug. 20, 1958).

95. J. PELTASON, *supra* note 34, at 183-84.

96. *Aaron V*, 163 F. Supp. 13.

97. Cooper v. Aaron, 357 U.S. 566 (1958).

98. *Aaron VI*, 257 F.2d 33.

99. This was the only Special Term ever convened by Warren and only the third in the century. Hutchinson, *Unanimity and Desegregation: Decisionmaking in the Supreme Court, 1948-1958*, 68 GEO. L.J. 1, 75 n.634 (1979).

100. 358 U.S. at 4.

101. Brief for Petitioners in Case No. 1, Aug. Special Term, 1958, at 16, 19-27, *reprinted in* 54 P. KURLAND & G. CASPER, LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 571, 574-82 (1975).

102. Brief of the Arlington County Chapter of the Defenders of State Sovereignty and Individual Liberties, in Cases No. 1 & 2, Aug. Special Term, 1958, at 14-19, *reprinted in* 54 P. KURLAND & G. CASPER, *supra* note 101, at 653-58.

103. Brief for Respondents in Case No. 1, Aug. Special Term 1958, at 5, *reprinted in* 54 P. KURLAND & G. CASPER, *supra* note 101, at 603.

into sharper focus. Early in the argument, the lawyer for the school board conceded to Justice Frankfurter that resistance by state government was a fundamental reason for its request for delay.[104] Somewhat later, Justices Frankfurter and Harlan both indicated that, as they read the record, official actions had caused much of the popular resistance.[105]

Justice Brennan then directly raised the supremacy clause issue. He began by reading the clause aloud. He noted that the board's request for a delay was now being attributed to the active opposition of the state government to enforcement of *Brown*. "Just how," he asked, "is this Court in a position to allow or sanction or approve a delay sought on the ground that the responsible State officials, rather than be on the side of enforcement of these constitutional rights, have taken actions to frustrate their enforcement?"[106] The best answer the board lawyer could give was that the school board, as a creature of the state, was "placed between the millstones . . . in a conflict between the State and the Federal government."[107] Later, Justice Harlan followed up on this argument by asking whether a delay would not simply reward the state government's actions.[108]

Justice Black then asked again whether the Board's position simply came down to a request for delay because of local resistance.[109] This question gave rise to the following dialogue:

> MR. BUTLER: Let me state it this way, Mr. Justice Black. Here is the position we take. This conflict has resolved itself, as we see it as a School Board, into a head-on collision between the Federal and State Governments.
>
> MR. JUSTICE BLACK: But there is not any doubt about what the Constitution says about that, is there?
>
> MR. BUTLER: No, sir. But that conflict insofar as the executives of those two sovereignties are concerned must be resolved, and this school Board [sic] can't resolve it.[110]

At this point in the argument, the idea had clearly emerged that the school board's request for delay ultimately stemmed from state government resistance and, furthermore, that granting the delay would legitimize resistance by state governments. Moreover, the school board seemed to view itself as subject to dual loyalties in a battle between two sovereigns. The Justices clearly believed that in such a conflict loyalty to the national sovereign was paramount.

104. Transcript of Oral Argument at 7, Cooper v. Aaron, 358 U.S. 1 (1958) [hereinafter cited as Transcript of Oral Argument]. The transcript is reprinted, with the original pagination, in 54 P. KURLAND & G. CASPER, *supra* note 101, beginning at page 665.

105. Transcript of Oral Argument at 11-12.

106. *Id.* at 20.

107. *Id.*

108. *Id.* at 32.

109. *Id.* at 37.

110. *Id.*

Immediately after this exchange, Justice Frankfurter raised the issue from another angle. In a letter to Justice Harlan on September 2, 1958, he had argued that Southern moderates could be won "to the transcending issue of the Supreme Court as the authoritative organ of what the Constitution requires."[111] He expressed the same view in a letter to Chief Justice Warren on the day of oral argument.[112] At this point in the oral argument, he intervened in search of documentation for his view:

> MR. JUSTICE FRANKFURTER: . . . Am I right to infer that you suggest that the mass of people in Arkansas are law-abiding, are not mobsters; they do not like desegregation, but they may be won to respect for the Constitution as pronounced by the organ charged with the duty of declaring it, and therefore adjusting themselves to it, although they may not like it? Is that the significance of what you've said?
>
> MR. BUTLER: Your Honor, you have said it so much better and so much more accurately and so much more concisely than I could that I adopt it wholeheartedly, and that is exactly my personal feeling, and I believe it is the feeling of the School Board as an organization.[113]

At this point, the Court broke for lunch. In the afternoon session, the lawyer for the school board gave a brief summary of his argument. Thurgood Marshall, counsel for the NAACP, then argued for the plaintiffs. He detailed the various legislative measures already enacted and those awaiting Governor Faubus's signature. He concluded by saying that the decision of the court of appeals should be affirmed "in such a fashion as to make clear even to the politicians in Arkansas that Article VI of the Constitution [the supremacy clause] means what it says."[114]

Following the school board's rebuttal argument, the Solicitor General presented the argument on behalf of the United States as *amicus*. His argument also stressed the supremacy issue:

> What is there in this community, in Little Rock, in Arkansas that's different? . . . The element in this case is lawlessness. It is a community, a small number at first at least—maybe more later—who decided they were going to defy the laws of this country. And I say to you that that's a problem that's inherent in every little village, great city, or country area of this United States. There isn't a single policeman who isn't going to watch this Court and

111. Letter from Justice Frankfurter to Justice Harlan, Sept. 2, 1958, *quoted in* Hutchinson, *supra* note 99, at 76-77.

112. Letter from Justice Frankfurter to Justice Warren, Sept. 11, 1958, *quoted in* Hutchinson, *supra* note 99, at 77. The letter says the "ultimate hope for a peaceful solution . . . largely depends on winning the support of lawyers of the South for the overriding issue of obedience to the Court's decision." *Id.*

113. Transcript of Oral Argument at 38-39.

114. *Id.* at 52.

> 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. That is the responsibility of every man in this country that's fit to occupy public office.
>
> Now, there is another thing that I object to in the brief of the School Board here and in the argument, and that's this idea that there are two sovereignties, one on this side and one on this side, and they're equal; let's see how they fight it out, and we'll join up with the one that wins.
>
> There is nothing to that stuff, and that's all it is.[115]

The Solicitor General then reviewed the history of the Articles of Confederation and pointed to the supremacy clause as disposing of all issues of state and federal conflict.[116] The obligation of the school board, under its oath of office, was "to use all the power they have and exhaust it to try to perform that oath, and first start out with trying to carry out the obligations of the Constitution of the United States as interpreted by this Court."[117] At least, the Solicitor General argued, the board should "come forward and say: We'll 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; the sooner we do it the better; let's get started."[118]

Thus, by the conclusion of oral argument, the supremacy clause issue had become critical to the case. The school board's position seemed to several Justices to come down to a plea for tolerating obstruction by other agencies of state government. The Solicitor General and the NAACP both had urged the Court to reaffirm its role under the supremacy clause in rejecting the board's claim. Justice Frankfurter and the Solicitor General also had stressed the idea that Southern moderates would prove responsive to an appeal for obedience to the law. Beyond the oral argument itself, the entire history of the Little Rock crisis had involved appeals to *Brown* as the "law of the land." Consequently, it is not surprising that the Court felt compelled to address this issue in its opinion.

The Court apparently decided the case within half an hour after argument.[119] The Court promulgated an order the following day, with the formal opinion to follow later.[120] Immediately after the decision was announced, Governor Faubus signed pending segregationist legislation that he had been holding on his desk.[121] This response undoubt-

115. *Id.* at 58.
116. *Id.* at 59-60.
117. *Id.* at 60.
118. *Id.* at 61.
119. Hutchinson, *supra* note 99, at 78.
120. The order is reproduced in 358 U.S. at 5 n.*.
121. J. PELTASON, *supra* note 34, at 195; N. BARTLEY, *supra* note 36, at 274.

edly stiffened the Court's resolve to address the supremacy issue in its formal opinion.

Although the opinion was signed by all nine Justices, the primary draftsman was Justice Brennan.[122] The group-signing was intended to dramatize the Court's adherence to *Brown*.[123] On September 17, 1958, Justice Brennan submitted a draft opinion.[124] Justice Black apparently wanted "more punch and vigor" with respect to the supremacy clause.[125] Two additional drafts followed quickly. In the third draft, Justice Brennan added a crucial reference to *Marbury* as establishing "the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution."[126] Only in the fourth draft was the supremacy clause issue addressed in a full-blown manner.[127] The opinion was finally announced on September 29, 1958, only two weeks after argument.

Although Justice Frankfurter had wanted to write a separate opinion, he was dissuaded from announcing it the same day as the main opinion.[128] Justices Brennan and Black strongly opposed his desire to write separately, but the situation was finally defused by a memo from Justice Harlan.[129] In a letter written shortly afterwards, Justice Frankfurter explained his separate opinion as an appeal to "Southern lawyers and law professors."[130] He explained that he was "of the strong conviction that it is to the legal profession of the South on which our greatest reliance must be placed for the gradual thawing of the ice," due to the "transcending issue, namely, respect for law."[131] His concurrence stressed the importance of "a government of laws, not men,"[132] and "[t]he duty to abstain from resistance to 'the supreme Law of the Land' as . . . declared by the organ of our government for ascertaining it."[133] He later reported favorable responses to his opinion from Southern lawyers.[134]

The majority opinion in *Cooper* also makes a strong appeal to respect for law. After reviewing the facts of the case, and conceding the Board's good faith, the Court strongly reaffirmed *Brown* and held that

122. Hutchinson, *supra* note 99, at 79.

123. E. WARREN, THE MEMOIRS OF EARL WARREN 298 (1977).

124. Hutchinson, *supra* note 99, at 79.

125. *Id.* at 79 n.671. Burton also suggested increased discussion of the supremacy issue. *Id.* at 79 n.672.

126. *Id.* at 80.

127. *Id.* at 81.

128. *Id.* at 82 (quoting from Justice Burton's diary).

129. *Id.* at 83.

130. Letter from Justice Frankfurter to C.C. Burlingham, Nov. 12, 1958, *reprinted in* Hutchinson, *supra* note 99, at 84.

131. *Id.*

132. 358 U.S. at 23.

133. *Id.* at 24 (citation omitted).

134. Hutchinson, *supra* note 99, at 85.

external opposition could not excuse compliance.[135] Although the Court admitted that this might be enough to dispose of the case, it felt called upon to "answer the premise of the actions of the Governor and Legislature that they are not bound by our holding in the *Brown* case."[136] The crucial paragraph of the opinion reads as follows:

> 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 law of the nation," declared in the notable case of *Marbury v. Madison*, 1 Cranch 137, 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." Chief Justice Taney, speaking for a unanimous Court in 1859, said that this requirement reflected the framers' "anxiety to preserve it [the Constitution] in full force, in all its powers, and to guard against resistance to or evasion of its authority, on the part of a State . . . ." Ableman v. Booth, 21 How. 506, 524.[137]

The Court then re-emphasized the importance of racial equality under the *Brown* holding and the Court's continued unanimous support for that holding.[138] The opinion ends on an almost evangelical note:

> The principles announced in that decision and the obedience of the States to them, according to the command of the Constitution, are indispensable for the protection of the freedoms guaranteed by our fundamental charter for all of us. Our constitutional ideal of equal justice under law is thus made a living truth.[139]

In retrospect, it is hard to see how the Court could have avoided making such a plea for obedience to *Brown* as the "law of the land."

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135. 358 U.S. at 1-17.

136. *Id.* at 17.

137. *Id.* at 18 (emphasis added). This passage, as well as the oral argument in the case, seems inconsistent with Professor Tribe's reading of *Cooper*. Tribe suggests that the Court merely meant to proscribe interference by state officers with decrees implementing *Brown*. L. TRIBE, *supra* note 8, at 32.

138. *Id.* at 19.

139. *Id.* at 20.

Failure to do so would have seemed a betrayal of moderates who had supported desegregation. The Court could not very well allow itself to be seen as condoning the actions of Governor Faubus and his supporters.

The *Cooper* decision did not end the Little Rock crisis. One immediate result of the opinion was to cause the Eighth Circuit to shut off public funding for a proposed private school system.[140] Nevertheless, the public schools were closed and did not reopen until the absence of public education had created intolerable results.[141] Ultimately, the Little Rock schools were successfully integrated.[142] The nine school children who were the subject of so much litigation and who withstood so many threats and abuses completed their academic careers, apparently unscathed by their experiences.[143] Governor Faubus enjoyed a successful political career, though his use of racial rhetoric declined within a few years.[144] In the end, after his political appeal vanished, he went to work for a bank.[145]

III. *COOPER V. AARON* AS CONSTITUTIONAL THEORY: THE SUPREME COURT AND THE SUPREMACY CLAUSE

As noted at the beginning of this article, the supremacy clause discussion in *Cooper* has come under heavy academic attack.[146] The two major criticisms have been that *Cooper* amounts to a claim of Supreme Court infallibility and that *Cooper* overlooks the limited binding effects of judicial decisions.

The infallibility argument has given rise to the most strongly critical language. In *Cooper v. Aaron*, according to Professor Kurland, "in one fell swoop, a judgment became a ukase."[147] Professor Bickel made the same point in a rather sarcastic paraphrase of *Cooper*:

> [U]nder *Marbury v. Madison*, ran the reply . . . , 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.[148]

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140. The Justice Department telephoned the relevant part of the opinion to the Eighth Circuit. J. PELTASON, *supra* note 34, at 198-99.

141. *Id.* at 200-06; B. MUSE, *supra* note 46, at 193-96.

142. 3 W. GOLDSMITH, *supra* note 43, at 1619; Wilkinson, *supra* note 9, at 522 n.157.

143. *Id.* For background on the impact of the crisis on these students, see D. BATES, *supra* note 82, at 72, 120, 125, 124-35, 215 (1962).

144. *See* E. BLACK, *supra* note 93, at 100-04, 174-76, 296-99.

145. United Press International, "Faubus recalls turbulent times of Little Rock," Chicago Sun-Times, June 14, 1981, at 62, col. 1.

146. *See supra* text accompanying notes 8-19.

147. Kurland, *supra* note 11, at 309, 327.

148. THE LEAST DANGEROUS BRANCH, *supra* note 15, at 264.

Thus, *Cooper* was seen as resting on an implicit identification of the Constitution itself with the Court's interpretation of the Constitution.[149]

This criticism of *Cooper* does have a measure of validity. In parts of its opinion, the Court seems to identify its decisions with the Constitution itself. As the source of *Brown's* binding effect, the Court relies on that portion of the supremacy clause making "the Constitution the 'supreme Law of the Land.' "[150] The implication is that the clause's reference to the Constitution also encompasses judicial decisions. The Court then quotes Chief Justice Marshall's famous statement that it is the judicial role "to say what the law is." The Court refers to this as the "basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution."[151] This statement is immediately followed by a reference to the oath taken by public officials to support the Constitution.[152] The clear implication is that this is an oath to support the Constitution as construed by its "supreme expositor," the Court. This is a far-from-inevitable reading of the oath clause. That clause can equally well be read as requiring an oath to support the Constitution as the oathtaker, not the Court, understands it.[153]

To the extent that the Court is proclaiming an identity between the Constitution and its judicial gloss, the critics clearly are correct in their attacks. Obviously, the Constitution is not identical with the Court's interpretation of it. Otherwise, the Supreme Court's interpretation of the Constitution could never be called incorrect. Even the Justices themselves do not believe this, because each of them files a dissent from time to time. Of course, this means only that the Court's argument was weak, not that its ultimate conclusion in *Cooper* was wrong.

The Court's critics were not content to point out that its argument was flawed. They went on to argue that judicial decisions create no legal duties and hence cannot be part of the "supreme law of the land." The argument was stated most fully by Professor Bickel:

> The general practice is to leave the enforcement of judge-made constitutional law to private initiative, and to enforce it case by case, so that no penalties attach to failure to abide by it before completion of a successful enforcement litigation. This means

149. *See also* Jaffe, *Impromptu Remarks*, 76 HARV. L. REV. 1111 (1963); Monaghan, *supra* note 10, at 1363, 1363 n.2. Corwin said that this conception of judicial review invokes a miracle: "It supposes a kind of transubtantiation whereby the Court's opinion of the Constitution . . . becomes very body and blood of the Constitution." E. CORWIN, *supra* note 2, at 68.

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

151. *Id.*

152. *Id.* The oath clause requires all federal and state officers to be "bound by Oath or Affirmation, to support this Constitution." U.S. CONST. art. 6, cl. 3.

153. *See* E. CORWIN, *supra* note 2, at 66-67; Van Alstyne, *A Critical Guide to* Marbury v. Madison, 1969 DUKE L.J. 1, 25-26. The argument that each branch must make its own constitutional judgments was made by Jefferson and Jackson. *See* W. LOCKHART, Y. KAMISAR & J. CHOPER, CONSTITUTIONAL LAW 13 (5th ed. 1980).

> quite literally that no one is under any legal obligation to carry out a rule of constitutional law announced by the Supreme Court until someone else has conducted a successful litigation and obtained a decree directing him to do so.[154]

In addition to endorsing Professor Bickel's argument, Professor Kurland argues that prior to *Cooper*, "[i]t had been the accepted learning that no one is bound by a court's judgment except parties to the litigation."[155] Hence, according to Professor Kurland, the Court's holding simply ignores the well-settled law of *res judicata*.

The Bickel-Kurland critique of *Cooper* has at least three difficulties of its own. First, in arguing that violations of "judge-made rules of constitutional law" carry no penalties, Professors Bickel and Kurland ignore modern remedies law. Second, in suggesting that only legislative rules can be considered part of the law, they ignore much of the common law tradition. In other contexts, such as *Erie*, the same mistake was corrected long ago. Third, in restricting the idea of legal duty to obedience to penal statutes and injunctions, they overlook the supremacy clause itself, which makes a broad range of federal actions part of "the supreme law of the land."

Perhaps the most obvious flaw in the Bickel-Kurland thesis is their mistaken view of remedies law. Both Kurland and Bickel assume that non-parties are free to ignore Supreme Court rulings until issuance of a compliance order; from this, they conclude that no legal obligation is created by the initial Supreme Court decision. The assumption, therefore, is that a Supreme Court decision merely forms the precedential basis for a later cease-and-desist order.

This assumption is incorrect. It is simply wrong to say that constitutional rules can be violated with impunity until after entry of an enforcement decree. If nothing else, the availability of damages would make this position untenable. With respect to state officers, such damages can be obtained under 42 U.S.C. section 1983.[156] Thousands of these suits are filed annually.[157] No such statute exists with respect to constitutional torts by federal officials, but the Supreme Court has rec-

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154. THE MORALITY OF CONSENT, *supra* note 15, at 111 (1975). The same argument also appears in POLITICS AND THE WARREN COURT, *supra* note 15, at 11 (1973).

155. Kurland, *supra* note 11, at 327. The same argument is made in Miller & Scheflin, *supra* note 13, at 289. Abraham Lincoln made a similar argument with respect to the *Dred Scott* case. 2 J. RICHARDSON, MESSAGES & PAPERS OF THE PRESIDENTS 5, 9-10 (1900).

Kurland also suggests that if everyone "abides by" Supreme Court decisions, the Court will never have a chance to overrule erroneous decisions. Kurland, *supra* note 11, at 328. This argument is true if "abides by" is taken to mean unquestioning acceptance, but false if it means only outward compliance. Although the Little Rock school board complied with *Brown I*, it was sued on the charge that its plan was too gradual. In defense to that claim, the board could have argued that *Brown I* was wrongly decided. Declaratory judgment actions are another possible method of challenging existing case law without violating it.

156. The leading case, of course, is Monroe v. Pape, 365 U.S. 167 (1961).

157. *See* Whitman, *Constitutional Torts*, 79 MICH. L. REV. 5, 6 & n.9 (1980).

ognized such a cause of action as a matter of federal common law.[158] Thus, apart from those having some exceptional immunity defenses,[159] public officials face much more serious consequences than the cease-and-desist orders contemplated by Bickel.

When the Supreme Court hands down an important decision, a public official would be foolish indeed to follow Professor Bickel's advice of waiting to be sued. The issuance of the decision immediately affects the official's legal position by eliminating the possibility of a "good faith" defense. This defense requires the existence of reasonable legal uncertainty. Hence, the defense is unavailable to officials who deliberately ignore definitive Supreme Court opinions such as *Brown*.[160] Furthermore, refusal to comply with the "clear dictates" of a Supreme Court decision may be relevant to an award of attorneys' fees or punitive damages.[161] Indeed, if a public official's lawyer based his advice on Bickel's views ("they can't touch you until they get an injunction"), the official might well have a cause of action for malpractice.

Apart from the possibility of a damage award, Professors Bickel and Kurland also ignore other important parts of remedies law. Even when the plaintiff seeks only equitable relief, the defendant often will be required to do much more than desist from future violations. A court of equity is not limited to saying "go and sin no more." When a school board has been found guilty of violating *Brown*, for example, it is not enough that the board allow students free choice of schools.

158. Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971).

159. *See, e.g.*, Pierson v. Ray, 386 U.S. 547 (1967) (absolute immunity for state judges); Tenney v. Bandhove, 341 U.S. 367 (1951) (absolute immunity for state legislators).

160. Executive officials are immune from damages for constitutional violations provided they can show good faith, in the sense of not violating settled law. *See* Wood v. Strickland, 420 U.S. 308 (1975); Procunier v. Navarette, 434 U.S. 555, 562-65 (1978). Since *Brown* and *Cooper*, racial discrimination has been considered so clearly unconstitutional as to preclude a good faith defense. *See* Flores v. Pierce, 617 F.2d 1386, 1392 (9th Cir. 1980) (citing *Cooper*—"all public officials . . . charged with knowledge" of this); Williams v. Anderson, 562 F.2d 1081, 1101 (8th Cir. 1977) (citing *Brown* and other desegregation cases). *See also* McNamara v. Moody, 606 F.2d 621, 625 & n.8 (5th Cir. 1979), holding that the Supreme Court's ruling in Procunier v. Martinez, 416 U.S. 396 (1974), stripped prison officials of their good-faith defense as to subsequent conduct violating *Martinez*. For this reason, even Holmes's "bad man" would have to regard Supreme Court decisions as the law, because he would be penalized for violations. *See* O. HOLMES, *The Path of the Law*, in COLLECTED LEGAL PAPERS 167 (1920).

161. Under the American rule, attorneys' fees normally can be awarded only when the defendant's litigation conduct shows "bad faith." Hutto v. Finney, 437 U.S. 678 (1978); Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240 (1975). (There is now a statutory exception for civil rights cases. *See* Pub. L. No. 94-559, 90 Stat. 2641, *amending* 42 U.S.C. § 1988 (1976).) Refusal to comply with the "clear dictates" of a Supreme Court decision has been held to be a form of bad faith. Doe v. Poelker, 515 F.2d 541, 547-48 & n.8 (8th Cir. 1975). *See also* Rolfe v. County Bd., 391 F.2d 77, 81 (6th Cir. 1968). Knowledge of a Supreme Court opinion may also be relevant to an award of punitive damages. *See* Lee v. Southern Homes Sites Corp., 429 F.2d 290, 294-95 (5th Cir. 1970). Such damages can be substantial. *See, e.g.*, Zarcone v. Perry, 572 F.2d 52 (2d Cir. 1978) ($60,000 punitive damage award upheld). *See also* Harris v. Harvey, 605 F.2d 330 (7th Cir. 1979), *cert. denied*, 100 S. Ct. 1331 (1980) (remanding a $200,000 punitive award for further consideration).

Such a "freedom of choice" plan was unanimously rejected by the Supreme Court in *Green v. County School Board*.[162] Instead, as the Court made clear in *Swan v. Board of Education*,[163] the remedy can include far-reaching judicial intervention into decisions about school construction, student attendance zones, busing, and teacher assignment in order to "eliminate from the public schools all vestiges of state-imposed segregation."[164] The goal is not just prevention of future violations, but conversion to "a unitary system in which racial discrimination would be eliminated root and branch."[165] Thus, contrary to Professor Bickel's assumption, equitable decrees are not limited to preventing future constitutional violations, but also can be designed to remedy the effects of past violations. Professor Kurland is equally incorrect in asserting that decrees have no effects on non-parties. Entry of an injunction can affect non-parties such as Governor Faubus who may interfere with the decree. They can be enjoined without ever being allowed to relitigate the underlying merits,[166] thus losing a right they would have had in an independent suit.[167]

In short, judicial remedies for constitutional violations are far more powerful than Professors Bickel and Kurland assume. There are indeed adverse legal consequences for violations of judge-made constitutional rules occurring before an enforcement action. In addition to the civil remedies considered above, criminal penalties also are a potential threat.[168] Other forms of collateral consequences exist which, while not technically penalties, certainly cannot be ignored: evidence may be suppressed,[169] convictions of aggrieved individuals may be re-

162. 391 U.S. 430 (1968). *See also* Raney v. Board of Educ., 391 U.S. 443 (1968) (also unanimously rejecting a "freedom of choice" plan).

163. 402 U.S. 1 (1971).

164. *Id.* at 15. For recent extensions of this principle, see Dayton Bd. of Educ. v. Brinkman, 443 U.S. 526 (1979); Columbus Bd. of Educ. v. Penick, 443 U.S. 449 (1979).

165. Green v. County School Bd., 391 U.S. at 438.

166. *See* Valley v. Rapides Parish School Bd., 646 F.2d 925, 942-44 (5th Cir. 1981); Augustus v. School Bd., 507 F.2d 152, 156 (5th Cir. 1975); United States v. Hall, 472 F.2d 261 (5th Cir. 1972); United States v. Farrar, 414 F.2d 936, 938-39 (5th Cir. 1969); Faubus v. United States, 254 F.2d 797, 806-07 (8th Cir. 1958); O. FISS, INJUNCTIONS 628-29 (1972); Rendleman, *Beyond Contempt: Obligors to Injunctions*, 53 TEX. L. REV. 873, 899-911 (1975); Comment, *Community Resistance to School Desegregation: Enjoining the Undefinable Class*, 44 U. CHI. L. REV. 111 (1976). The Supreme Court has never squarely ruled on the issue, but in an opinion citing *Hall* with approval, the Court apparently accepted "the rule that nonparties who interfere with the implementation of court orders establishing public rights may be enjoined." Washington v. Fishing Vessel Ass'n, 443 U.S. 658, 692 n.32 (1979).

A criminal statute, 18 U.S.C. § 1509 (1976), also makes it a misdemeanor to forcibly interfere with the exercise of rights or the performance of duties under a federal court order. *See, e.g.*, United States v. Griffin, 525 F.2d 710 (1st Cir. 1975).

167. These broad equitable powers are not limited to desegregation cases. *See, e.g.*, Hutto v. Finney, 437 U.S. 678, 687 & n.9 (1978) (upholding a broad prophylactic order involving eighth amendment violations in a prison).

168. *See, e.g.*, United States v. Price, 383 U.S. 787 (1966); Screws v. United States, 325 U.S. 91 (1945); 18 U.S.C. §§ 241, 242 (1976).

169. The existence of the exclusionary rule has the purpose of deterring violations of the fourth and fifth amendments. United States v. Calandra, 414 U.S. 338, 347-48 (1974).

versed,[170] or attorneys' fees may be awarded.[171] All of these consequences are quite inconsistent with the view that individuals may violate rules of constitutional law with impunity until entry of an enforcement decree. Indeed, despite the assurance with which this view has been stated by such respected commentators, it would be hard to find a more ill-founded statement about the law.

The second flaw in the Bickel-Kurland thesis is more fundamental than their erroneous view of remedies law. Ultimately, their argument is that statutes create binding rules of law, but judicial opinions do not.[172] This argument flies in the face of the entire common law tradition. Certainly the normal practice of lawyers in common law jurisdictions is to speak of cases as embodying rules of law[173]—the Rule Against Perpetuities, for instance, or the various rules of contract law.[174] Arguably, these are not "true" rules of law, but simply the basis for predictions about what future courts will do.[175] This argument proves too much, however, because the argument also is largely applicable to statutes. After all, a statute generally cannot result in sanctions until some court applies it; the existence of the statute is only one factor in predicting the court's behavior.[176] In this respect, statutes and common law rules are not fundamentally different.[177] As shown above, they have similar practical effects: violations may be attended by pen-

170. *E.g.*, Gideon v. Wainwright, 372 U.S. 335 (1963) (conviction reversed because of denial of right to counsel).

171. *See, e.g.*, 42 U.S.C. § 1988 (1976) (providing for attorneys' fees in civil rights cases).

172. *See supra* notes 16 & 24 and text accompanying notes 154-55. Oddly enough, Professor Bickel seems to have taken a much broader view of law earlier in his career. In 1958, he said that "Anglo-American courts make law and have always done so." NEW REPUBLIC, Sept. 29, 1958, at 10. Bickel's jurisprudential approach is sharply criticized in Linde, *Judges, Critics, and the Realist Tradition*, 82 YALE L.J. 227, 229-38 (1972).

173. This idea goes back at least to Blackstone. 1 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND * 68-73. H.L.A. HART, THE CONCEPT OF LAW 121-44 (1961), offers some persuasive arguments for taking this idea of law seriously. For present purposes, it is unnecessary to consider whether the common law includes other entities besides rules—principles, policies, and the like. *See* R. DWORKIN, TAKING RIGHTS SERIOUSLY 14-80 (1977); Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 YALE L.J. 221, 222-54 (1973).

174. The *Miranda* rules governing police interrogation are an excellent modern example. Miranda v. Arizona, 384 U.S. 436 (1966). The quasi-legislative effect of *Miranda* is made particularly clear by the fact that it was given only prospective operation. *See* Johnson v. New Jersey, 384 U.S. 719 (1966).

175. *See, e.g.*, J. FRANK, LAW AND THE MODERN MIND 46-47, 55 (1930) (defining law as "[a]ctual specific past decisions, and guesses as to actual future decisions"); O. HOLMES, *supra* note 160, at 173 ("The prophecies of what the courts will do . . . are what I mean by the law."); K. LLEWELLYN, THE BRAMBLE BUSH 9 (2d ed. 1951) ("What officials do about disputes is . . . the law itself."); Green, *The Duty Problem in Negligence Cases*, 28 COLUM. L. REV. 1014, 1020 (1928) (legal rules are "but the trappings through which judgment is passed").

176. *See* J. FRANK, *supra* note 175, at 124-27, 191 ("Rules, whether . . . in statutes, opinions or text-books by learned authors, are not the Law, but are only some among many of the sources to which judges go . . . ."); Green, *supra* note 175, at 1015 (statutes, judicial opinions, etc., "are merely the wiring and fixtures with which we equip our legal habitat," but "stop short of any power within themselves"). *See also* M. COHEN, LAW AND THE SOCIAL ORDER 131 (1933).

177. Indeed, Bickel's argument clearly implies that some federal statutes are not laws in Bickel's sense. For instance, § 5 of the FTC Act, 15 U.S.C. § 45(a)(1) (1976), declares unlawful certain

alties, equitable relief, damage awards, and other adverse consequences. Both types of rules are statements by duly authorized government officials indicating that certain kinds of behavior are forbidden. Although they are originated by different branches of government, both statutes and common law rules seem to have equal claims to being considered part of federal law.[178]

The idea that statutes but not appellate decisions are part of a jurisdiction's laws has been decisively repudiated in other contexts. For example, when the content of state law is at issue, the *Erie* doctrine clearly defines state law to include not only statutes and state constitutions but also the state court decisions construing those documents as well as the state's common law.[179] Indeed, the fundamental insight underlying *Erie* was that common law courts and legislatures both are engaged in law-making enterprises.[180] For *Erie* purposes, therefore, the term "law" includes common law. The same is also true under the jurisdictional provisions concerning cases arising under federal law; the Court has frequently held that these provisions include cases arising under federal common law.[181] Professors Bickel and Kurland offer no grounds for resurrecting the discredited notion that judicial rules are not part of a jurisdiction's laws.

Unlike the Supreme Court's argument in *Cooper*, the argument made here does not rest on any assumptions about the Court's unique role in the constitutional scheme. Instead, it rests only on the Court's position as the highest federal tribunal. Whatever else it may be, the Court is at least that, and its decisions, even on constitutional issues, ought to be given at least the effect normally accorded appellate decisions in common law countries. Essentially, Professors Bickel and Kurland fail to give the Supreme Court's decisions construing the federal Constitution the effect that would be given any state court's construction of its own state constitution.

The third major flaw in the Bickel-Kurland thesis is their failure to consider the broad scope of the supremacy clause. The idea of law embodied in the supremacy clause is necessarily broad. It goes far be-

"unfair or deceptive acts," but until recently the only remedy was the issuance of a cease-and-desist order. Under Bickel's view, this statute was not a law.

178. Erie R.R. v. Tompkins, 304 U.S. 64, 78 (1938), makes it clear that a state's internal allocation of power is no business of outsiders: "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." It seems equally true that the federal government's allocation of law-making power is not any business of state officials under the supremacy clause.

179. Erie R.R. v. Tompkins, 304 U.S. 64 (1938).

180. *See id.* at 78-79.

181. *See* Illinois v. City of Milwaukee, 406 U.S. 91, 99-100 (1972). Similarly, the Court's *certiorari* jurisdiction has been held to extend to issues of federal common law, even though the jurisdictional statutes speak only of federal statutes. Hinderlider v. La Plata River Co., 304 U.S. 92, 110 (1938). The same theory was applied to the Rules of Decision Act in United States v. Little Lake Misere Land Co., 412 U.S. 580, 590-94 (1973) (holding that state law is displaced by federal common law under the Act).

yond the injunctions and penal statutes Professor Bickel seems to view as the sole sources of legal obligation. The Constitution explicitly includes itself as part of the "supreme law of the land." Yet, with perhaps minor exceptions,[182] the Constitution does not consist of rules attended by penalties. Rather, the Constitution is primarily a set of rules empowering further actions by government officials or forbidding them from taking certain actions.[183] Treaties are explicitly covered by the supremacy clause, but they often are not self-executing. Furthermore, as the Supreme Court has made clear in a long line of cases, a wide variety of executive actions are covered by the supremacy clause.[184] A concept of federal law which includes executive actions, treaties, and constitutional provisions such as the commerce clause is broad enough to encompass judicially created rules of law.

It would certainly seem peculiar to say that state courts were bound by federal statutory law, executive actions, and treaties, but not by judge-made law created under the admiralty clause or some other grant of power.[185] Numerous cases indicate that federal common law is binding on the states under the supremacy clause.[186] It also would seem senseless to say that federal statutes are binding, but that their definitive construction by the authoritative federal tribunal is entitled to no respect.[187] The only other possible argument is that the Supreme

182. The impeachment clause could be seen as forbidding high crimes and misdemeanors and attaching a penalty (removal from office) to violations.

183. In Hart's terminology, the Constitution is primarily composed of secondary rules. *See* H.L.A. HART, *supra* note 173.

184. *See* Free v. Bland, 369 U.S. 663, 666-68 (1962) (Treasury regulation overrides state law); United States v. Allegheny County, 322 U.S. 174, 183 (1944) (federal procurement policies "may not be defeated or limited by state law"); United States v. Pink, 315 U.S. 203 (1942); United States v. Belmont, 301 U.S. 325 (1937) (both *Pink* and *Belmont* hold that an executive agreement with a foreign power overrides state law); Johnson v. Maryland, 254 U.S. 51, 56-57 (1920) (federal employees cannot be required to comply with state licensing requirements); *In re* Neagle, 135 U.S. 1, 58-59 (1890) (despite lack of express statutory authority, Executive has inherent power to protect federal judges; this power overrides state criminal law).

185. The supremacy clause refers twice to laws, once in reference to federal law and once in reference to state laws. *See supra* note 6. If the reference to federal "laws" does not include common law, then presumably the references to state "laws" must be given the same interpretation. The supremacy clause says that state judges are bound by federal law, "any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." Here, "laws" must include common law; otherwise the implication would be that state common law could override federal law. *See generally* Testa v. Katt, 330 U.S. 386 (1947); United States v. Belmont, 301 U.S. 324 (1937). This strongly suggests that "laws" should be construed to include common law throughout the clause.

186. *See* Kossick v. United Fruit Co., 365 U.S. 731, 738-42 (1961); Romero v. International Terminal Operating Co., 358 U.S. 354, 378 & n.49 (1959); Hinderlider v. La Plata River Co., 304 U.S. 92, 110 (1938); Southern Pac. Co. v. Jensen, 244 U.S. 205, 215-17 (1917); Hill, *The Law-Making Power of the Federal Courts: Constitutional Preemption*, 67 COLUM. L. REV. 1024, 1073-79 (1967); Westen & Lehman, *Is There Life for* Erie *After the Death of Diversity?*, 78 MICH. L. REV. 311, 320 n.32 (1980).

187. Even in Swift v. Tyson, 41 U.S. (16 Pet.) 1, 18 (1842), Justice Story conceded that the construction of state statutes adopted by local tribunals was binding on the federal courts. In the same passage, Story argued that judicial decisions in common law cases are "not, of themselves, laws." His now discredited argument is quite similar to those raised by the critics of *Cooper*.

Court's constitutional rulings are somehow entitled to less respect than its statutory or common law rulings. But assuming that the Supreme Court's exercise of judicial review is legitimate, the products of that review should be entitled to parity with the products of its other functions.

IV. CONCLUSION

Supreme Court opinions, like other adjudications of courts in common law systems, are a source of rules of law. Under the supremacy clause, these rules, like the rest of federal law, are the "supreme law of the land." Therefore, state officers are bound to regard Supreme Court holdings, until overruled, as "the law."[188] Just as they must obey their own state's statutes or its common law of trespass or libel, so too state officers must obey federal law, whether statutory or judge-made. Any contrary action can only be considered, at best, a form of civil disobedience.[189]

The *Cooper* situation itself illustrates the binding effect of Supreme Court decisions. Professor Bickel suggests that because the Little Rock school board members disagreed with *Brown*, they were at liberty to ignore it.[190] The analysis presented in this article, however, supports the advice actually given the board by its lawyer.[191] The *Brown* rule clearly prohibited continued *de jure* segregation and, as a part of federal law, was binding on the board regardless of state law. Thus, while the board members were free to criticize *Brown*,[192] they could not lawfully continue *de jure* segregation. Similarly, Governor Faubus could speak out against *Brown* and take political positions contrary to the Supreme Court's decision. When Governor Faubus ordered the National Guard to exclude black children, however, he directly violated the *Brown* rule by preventing blacks from attending a white school. No legal system could function if its rules were obeyed only after litigation; such conduct by individuals like Governor Faubus is essentially lawless.

Thus, the Supreme Court was correct in *Cooper* when it held that its decisions are a binding part of federal law. Of course, identifying

188. It is now beyond dispute that state officers have no greater role in construing or limiting federal law than ordinary citizens. *See* J. NOWAK, R. ROTUNDA & J. YOUNG, HANDBOOK ON CONSTITUTIONAL LAW 20 (1978). "That, at least, was settled on the battlefields of the Civil War." Wechsler, *The Courts and the Constitution*, 65 COLUM. L. REV. 1001, 1007 (1965).

189. This is not an appropriate occasion to enter the debate about the moral permissibility of civil disobedience. It is rather dubious, however, whether a moral case could be made for the use of civil disobedience in pursuit of racism, for it is hard to see how an immoral goal could ever serve as a justification for disobeying the law.

190. *See supra* notes 16, 24, and text accompanying notes 154-55.

191. *See supra* text accompanying note 30.

192. Corwin draws a similar distinction between compliance with a decision as a rule of law, and capitulation to its correctness as a reading of the Constitution. *See* E. CORWIN, *supra* note 2, at 82.

something as a "law" does not guarantee universal compliance, particularly in crisis situations. Demands for "obedience to the law of the land," however, do play a significant part in generating compliance.