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## ARTICLES

### CONFRONTATION AS REJOINER TO COMPROMISE: REFLECTIONS ON THE LITTLE ROCK DESEGREGATION CRISIS\*

Raymond T. Diamond\*\*

In September 1957, soldiers of the 101st Airborne Division of the United States Army were called to duty in hostile territory. These soldiers were called to Little Rock, Arkansas, to keep safe nine Black children who, under a court order of desegregation, attended Little Rock's Central High School.<sup>1</sup>

The Little Rock crisis is writ large in the history of the desegregation of the American South. Because many of the events of the crisis were performed before the television camera at a time when television was new, the Little Rock crisis was etched graphically in the American consciousness.<sup>2</sup> The camera showed in violent detail the willingness of the South to maintain segregation, and the willingness of the federal government to support federal law.

Many books have been published regarding the Little Rock crisis. Daisy Bates wrote *The Long Shadow of Little Rock, A Memoir* from her perspective as a leader of the Arkansas branch of the National Association for the Advancement of Colored People (NAACP).<sup>3</sup> Brooks Hays<sup>4</sup> and Orval Faubus<sup>5</sup> have provided the perspective of elected officials who influenced the event of Little Rock. Virgil Blossom wrote as a superintendent of schools who attempted to implement a "go slow" desegregation plan which would recognize the mandate of *Brown v. Board of Education*<sup>6</sup> but still take advantage of the

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1. Exec. Order No. 10,730, Sept. 24, 1957, 22 F.R. 7628 (1957). D. Eisenhower, Radio and Television Address to the American People on the Situation in Little Rock, 1957 PUBLIC PAPERS OF THE PRESIDENTS: DWIGHT D. EISENHOWER 689 (1957) (hereinafter cited as 1957 PUBLIC PAPERS). See also Proclamation 3,204, Sept. 24, 1957, 22 F.R. 7628 (1957).

2. The power of these television images is presented in "Fighting Back (1957-62)," *Eyes on the Prize: America's Civil Rights Years, 1954-65* (PBS television broadcast, January 28, 1986) (videotape available through PBS Adult Learning Services). See also J. WILLIAMS, *EYES ON THE PRIZE - AMERICA'S CIVIL RIGHTS YEARS, 1954-1965* (1987) (hereinafter cited as *EYES ON THE PRIZE*).

3. D. BATES, *THE LONG SHADOW OF LITTLE ROCK, A MEMOIR* (1982).

4. B. HAYS, *POLITICS IS MY PARISH, AN AUTOBIOGRAPHY* (1981), and B. HAYS, *A SOUTHERN MODERATE SPEAKS* (1959). Hays was a member of Congress who lost his seat because he counseled moderation.

5. O. FAUBUS, *DOWN FROM THE HILLS* (1980). Faubus was a governor who pioneered what came to be known as massive resistance.

6. 347 U.S. 483 (1954) (hereinafter cited as *Brown I*). *Brown I* declared "[s]eparate educational facilities are inherently unequal." *Brown I* at 347 U.S. 494.

weaknesses of *Brown's* implementation formula,<sup>7</sup> and who was frustrated from even this minimal attempt.<sup>8</sup> Elizabeth Huckaby's *Crisis at Central High* is the account of an assistant principal at Central High during the critical period, an eyewitness account of what happened not just outside the schoolhouse gates but also what happened behind the schoolhouse's closed doors.<sup>9</sup>

None of these authors have attempted to explain the Little Rock crisis in constitutional terms. Content to describe events and explain them as they understood them, these authors have the gift and the limitation of personal perspective. Not even Tony Freyer's *The Little Rock Crisis A Constitutional Interpretation*,<sup>10</sup> written from the perspective of an objective observer, fully explains the constitutional significance of Little Rock. Instead it performs the same descriptive task as the participants in this crisis, but paints a more global picture.

This Article speaks to this lacuna in our understanding of the events of Little Rock. The remainder of this Article is divided into four parts. Part I describes the events of the Little Rock crisis. Part II suggests the implications of *Brown v. Board's* implementation formula as a factor contributing to the character and the severity of the Little Rock crisis. Part III examines the constitutional basis of interposition and the concept of localism as a justification for resistance in Little Rock.

The concluding section speaks to the question which the Little Rock crisis begged and which was answered by the Supreme Court in *Cooper v. Aaron*,<sup>11</sup> whether the pronouncements of the Supreme Court deserve recognition as the law of the land.

## I. PEOPLE AND EVENTS

The seeds of the crisis in Little Rock were planted the day after *Brown v.*

7. Desegregation was to take place not immediately but "with all deliberate speed" 349 U.S. 294, 300 (1955) (hereinafter cited as *Brown II*) and "as soon as practicable" *Id.* at 299.

8. V. BLOSSOM, *IT HAS HAPPENED HERE* (1959).

9. E. HUCKABY, *CRISIS AT CENTRAL HIGH* (1980).

10. T. FREYER, *THE LITTLE ROCK CRISIS: A CONSTITUTIONAL INTERPRETATION* (1984). The subtitle is deceiving. *THE LITTLE ROCK CRISIS* is not a constitutional interpretation, instead a rendering of the facts and their political/sociological explanations. Freyer's intent was to "approach the integration conflict in terms of the interplay of local politics and judicial process." *Id.* at ix. He explores through the history of the Little Rock crisis "the relationship between change imposed through law and that achieved through moral principle." *Id.* at 4. Though *THE LITTLE ROCK CRISIS* performs the same task as have the works of the participants who have written on the crisis, it not only benefits from a more global perspective, but it is a book with more factual depth, having the benefit of access to records of the Federal Bureau of Investigation, private records of the National Association for the Advancement of Colored People and private legal files. *Id.* at ix. I. SPITZBERG, JR., *RACIAL POLITICS IN LITTLE ROCK, 1954-1967* (1987), covers the crisis as part of a more extensive time period of examination. Other non-participants have published on the subject of the Little Rock crisis but have not had the benefit of Freyer's sources. See, e.g., C. SILVERMAN, *THE LITTLE ROCK STORY*. Additionally they have attempted to view Little Rock not as an isolated topic of a major work but have written chapters on Little Rock in books on larger topics. See, e.g., N. BARTLEY, *THE RISE OF MASSIVE RESISTANCE: RACE AND POLITICS IN THE SOUTH DURING THE 1950's* (1969); E. JACOWBY and D. COLBURN, *SOUTHERN BUSINESSMEN AND DESEGREGATION* (1982); A. BICKEL, *THE LEAST DANGEROUS BRANCH* (1962); J. PELTASON, *FIFTY EIGHT LONELY MEN* (1961); F. READ, L. MCGOUGH, *LET THEM BE JUDGED* (1978); O. HANDLIN, *FIRE BELL IN THE NIGHT* (1964); *but cf.* *ARKANSAS GAZETTE, CRISIS IN THE SOUTH: THE LITTLE ROCK STORY* (1958); H. ALEXANDER, *THE LITTLE ROCK RECALL ELECTION* (1960).

11. 358 U.S. 1 (1958).

*Board*<sup>12</sup> was rendered in 1954. On May 17, 1954, *Brown I*, as it later was called, laid to rest the constitutional doctrine of "separate but equal," recognized by *Plessy v. Ferguson*,<sup>13</sup> declaring instead that "[s]eparate educational facilities are inherently unequal."<sup>14</sup> On May 18th, the Little Rock school board instructed its superintendent, Virgil Blossom, "to develop a plan consistent with the Court's order," and by the end of the month school officials had issued a public statement committing Little Rock to desegregation.<sup>15</sup>

By fall of 1954, Superintendent Blossom had formed a plan under which desegregation would begin almost immediately, in two high schools as soon as construction reached completion by 1956, and in junior high schools by 1957.<sup>16</sup> For several months, Blossom promoted the plan before the academic community and the public at large.<sup>17</sup>

In May of 1955, however, the school board approved a second and less ambitious plan. It limited desegregation to but one high school, Central High School, to the extent of allowing entrance to "only a handful of black children."<sup>18</sup> The plan would not desegregate junior high and elementary schools until years later.<sup>19</sup> This, the school board and its superintendent explained, was "consistent with an absolute minimum of what the law required."<sup>20</sup>

Little Rock's grudging willingness to desegregate its schools went hand in hand with the Supreme Court's second decision bearing the name *Brown v. Board of Education*.<sup>21</sup> *Brown II*, decided May 31, 1955, provided that district courts implementing desegregation need not order immediate and full desegregation, but should take cognizance of local conditions. Desegregation, the Court said, should take place not immediately but "with all deliberate

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

13. 163 U.S. 537 (1896).

14. *Brown I*, 347 U.S. at 494.

15. FREYER, *supra* note 10, at 15.

16. *Id.* at 16. The overall outlines of the plan were extensive:

In the eastern part of the city a new all-black junior high school was being built. According to the Blossom Plan, this would instead become an integrated high school (subsequently named Horace Mann High School), and Dunbar, the existing black high school, would become a junior high whose student body would remain black. A second high school (subsequently called Hall High School) was under construction in the western part of Little Rock; it, too, would be integrated on completion, probably in September 1956. The next year the junior high schools would be integrated. The date for integration of the elementary schools was left unclear, but Blossom expected the process to occur more slowly. Finally, the board would outline several school attendance zones throughout the city. Assignment of students to these zones was to be made without regard to race. For several months, Blossom promoted his plan before various white business organizations and Black and White parent groups.

Note that this plan did not desegregate existing high schools, that the details of junior high desegregation were left unspecified, and that the date of desegregation for elementary school was nebulous and that actual desegregation for these was expected to move even more slowly.

17. *Id.*

18. *Id.* at 16, 17.

19. A second phase would open the junior high schools of a few blacks by 1960. No specific date for integration of the elementary schools was set, but the fall of 1963 was considered a strong possibility. Children would be allowed to transfer out of districts where their race was in a minority, which virtually assured that Horace Mann High, when opened, would be all Black. Finally, the Phase Program provided for a selective screening process that made it certain that only a small number of black children would attend Central.

*Id.* at 17.

20. *Id.*

21. 349 U.S. 294 (1955).

speed.”<sup>22</sup> The state of Arkansas in its amicus brief filed November 15, 1954 in *Brown II*<sup>23</sup> had supported this position.<sup>24</sup> Between fall 1954 and May 1955 the Little Rock School board revised its plan “along lines remarkably consistent” with the state’s brief.<sup>25</sup> In effect, when the Supreme Court issued the opinion in *Brown II*, “it therefore indirectly sanctioned the [new] Blossom Plan.”<sup>26</sup>

After a period of internal dissension within the local branch of the National Association for the Advancement of Colored People (NAACP) and the Little Rock Black community,<sup>27</sup> the NAACP, in order to force the pace of desegregation in Little Rock,<sup>28</sup> filed suit in February 1956 on behalf of thirty-three children not allowed to register at White schools. This request was rejected by the federal courts,<sup>29</sup> but not before the matter of school desegregation became an issue in the 1956 Arkansas gubernatorial campaign.

Orval Faubus had taken office as governor of Arkansas in 1955,<sup>30</sup> but because of a two-year term of office, campaigning was a constant, though not always formal activity. In September 1955, Faubus was warned that a refusal to actively support school segregation would lead to opposition in the 1956 race; Faubus’ position that whatever he might do “might only aggravate the situation” was not acceptable.<sup>31</sup> Indeed, Faubus drew opposition based on the segregation issue in the 1956 campaign, in which he was accused of “‘pussy-footing’ on the integration question and . . . wait[ing] for sentiment to develop before taking a stand . . . .”<sup>32</sup>

22. *Id.* at 300.

23. Amicus Brief of the Attorney General of Arkansas, *Brown v. Board of Education*, 349 U.S. 294 (1955) reprinted in 49A LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES 831 (1975) [hereinafter cited as Amicus Brief].

24. *Id.* at 7-13.

25. FREYER, *supra* note 10, at 35.

26. *Id.*

27. *Id.* at 42-45.

28. FREYER, *supra* note 10, at 45. The NAACP’s reasoning was this:

Our objective is to secure the prompt and orderly end of segregation in the public schools. We want all children, regardless of race, to have the opportunity to go to the public schools nearest their homes. We seek an end to the hazards, inconveniences and discrimination of a system which now requires little children to pass each day several schools from which they are barred because of race and to travel nearly 10 miles to racially designated schools. . . .

We are unwilling to connive by continued silence at such blows against the welfare of our young people, and so we have entered this suit.

The school board has announced what it calls a “three-phase” plan for desegregation. It has, however, given no fixed dates for integration at any level and not even the vaguest target dates for integration at the elementary and junior high level. Meanwhile, it proposes to allow young children to endure indefinitely unnecessary hazards of needless daily travel. Its policy continues to exclude Negro boys from the training necessary for many important trades in technical fields. School authorities have refused relief even on these points and have thus driven us to ask the courts for needed relief for the children now in school.

Interview with J. C. Crenshaw, president of the Little Rock NAACP, as reported by the Arkansas Democrat, February 8, 1956, at 1, as excerpted in W. RECORD & J. RECORD, LITTLE ROCK U.S.A. 12 (1960).

29. *Aaron v. Cooper*, 143 F. Supp. 855 (E.D. Ark 1956), *aff’d* 243 F.2d 361 (8th Cir. 1957). A description of the trial and initial decision in *Aaron* may be found in FREYER, *supra* note 10, at 54-59.

30. FREYER, *supra* note 10, at 23; FAUBUS, DOWN FROM THE HILLS, *supra* note 5, at 72-74; 11 WHO’S WHO IN THE SOUTH AND SOUTHWEST 1969-70, at 325 (1969) [hereinafter cited as WHO’S WHO].

31. FREYER, *supra* note 10, at 65.

32. Southern School News, August 1956, at 3, reprinted in W. RECORD & J. RECORD, *supra* note 28, at 19. Faubus maintained that “segregation was a minor issue because all the candidates agreed

In particular, segregation was brought to the fore by the candidacy of James Johnson, a former state senator who in 1954 had lost a statewide race for attorney general, and who had found in segregation a new and popular issue.<sup>33</sup> Johnson had gained some notoriety in opposing desegregation of schools in Hoxie, Arkansas, a tiny town which had sought to voluntarily desegregate its schools — because “it was ‘right in the sight of God,’ necessary because of the *Brown* decisions, and ‘cheaper’ ”<sup>34</sup> — only to be opposed by a statewide, even interstate network of segregationists who threatened violence, intimidated members of the school board and parents of Black children, and engendered a boycott of Hoxie schools.<sup>35</sup> A federal injunction put a stop to the opposition,<sup>36</sup> but the opposition had already reaped a significant result in the prominence of the name of James Johnson as a vigorous and imaginative segregationist.<sup>37</sup>

Johnson became convinced of the sense of the doctrine of interposition; the state, he thought, could and should interpose itself between the federal courts and the people of the state on the issue of segregation.<sup>38</sup> He proposed in late 1955 three measures meant to forestall desegregation. The first was a state constitutional amendment directing the legislature to “take appropriate action” to evade the *Brown* decisions. The second was an act meant to effectuate pupil assignment on grounds other than race. The third was a resolution of interposition placing the state on record against desegregation.<sup>39</sup> These measures met with success in the November 1956 election, but Johnson’s candidacy, which the measures, in part, were meant to foster, did not.<sup>40</sup>

Governor Faubus had understood the need to position himself in favor of segregation,<sup>41</sup> and had understood that as the perceived segregationist candidate, Johnson was the candidate to beat.<sup>42</sup> As a result, Faubus jumped on the interposition bandwagon and, turning the issue to good advantage, won in a landslide.<sup>43</sup> Faubus’ position had implications, however, that in Little Rock proved critical.

When the Arkansas legislature met in February 1957, it passed several statutes meant to maintain school segregation, and Governor Faubus felt constrained to support them.<sup>44</sup> This put Faubus and the legislature at odds with

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on the subject,” but promised there would be “no breakdown of the state’s traditional segregation pattern.” *Id.*

33. FREYER, *supra* note 10, at 68. Southern School News August 1956, at 3, *reprinted in* W. RECORD & J. RECORD, *supra* note 28, at 19.

34. FREYER, *supra* note 10, at 64.

35. Hoxie School District No. 46 v. Brewer, 135 F. Supp. 296, (E.D. Ark. 1955). Order for Injunction printed in 1 RACE REL. LAW REP. 43, 45 (1956).

36. *Id.* See Freyer’s discussion of the *Hoxie* incident at 63-68.

37. FREYER, *supra* note 10, at 68.

38. *Id.* at 70.

39. *Id.* at 70-71, 79-80, 87-88. Southern School News December 1956, at 8, *reprinted in* W. RECORD & J. RECORD, *supra* note 28, at 27.

40. Southern School News, December 1956, at 8, *reprinted in* W. RECORD & J. RECORD, *supra* note 28, at 26. FREYER, *supra* note 10, at 81.

41. FREYER, *supra* note 10, at 75.

42. *Id.* at 78.

43. *Id.* at 81; FAUBUS DOWN FROM THE HILLS, *supra* note 5, at 141.

44. Once interposition formally became part of the state’s law in November, legislators in the upcoming session of 1957 were bound to consider a number of segregation measures.

One such proposal (a result of Amendment 47) would create a state sovereignty commission with extensive investigative and police powers. Newly elected state attorney general Bruce

the school board and the people of Little Rock, who in March 1957 elected two moderates to the school board over two segregationists.<sup>45</sup> Faubus' position was in concert with the band of segregationists who had obstructed desegregation in Hoxie and who now sought to do the same in Little Rock. As the spring and summer wore on this opposition caused concern to the school board, who were determined to let their plan go forward.<sup>46</sup>

In late August of 1957, the situation grew tense. On August 22nd, Governor Marvin Griffin of Georgia, a guest of Governor Faubus at the Arkansas governor's mansion in Little Rock, delivered a rabble-rousing segregationist speech. Faubus claimed that the speech changed citizen perception of desegregation, such that now the governor feared violence at Central High.<sup>47</sup> Whether violence was an honest concern of Faubus is not clear. Two days before Griffin's speech, Faubus had talked with a United States Justice Department official about the subject,<sup>48</sup> and on August 29th in a state court proceeding he had instigated to enjoin the school board from desegregating Central High School,<sup>49</sup> Faubus testified to his fear of violence.<sup>50</sup> On neither of these occasions did Faubus state the basis for his concern.<sup>51</sup> Moreover, Faubus' concern was belied in the state court proceeding by the testimony of Superintendent Blossom that he had no expectation of trouble,<sup>52</sup> and by the later finding of a federal district court that until September 2nd "no acts of violence or threats of violence in connection with the carrying out of the plan had occurred."<sup>53</sup> Nonetheless, as a result of Faubus' testimony, a state judge on August 22nd granted an injunction against the September 3 desegregation, an injunction which itself was enjoined by a federal judge on August 30th.<sup>54</sup>

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Bennett sponsored other legislation requiring supporters of desegregation, particularly local NAACP branches, to register and make public reports of their activities. And, finally, Governor Faubus pushed for his own enactments: one to relieve school children of compulsory attendance in racially mixed school districts, the other to authorize school districts to hire legal counsel to defend school boards and school officials in suits involving desegregation. Although he had not sponsored them, Faubus publicly supported the Bennett and sovereignty commission measures, despite their doubtful constitutionality and threat to civil liberties.

FREYER, *supra* note 10, at 88-89 (footnotes omitted).

45. *Id.* at 92.

46. *Id.* at 93-98. The influence of the federal government on the positions of Faubus and of the board was minimal.

President Eisenhower had provided little direct public support for desegregation in general, and in a public statement in July 1957 he said that use of federal forces to enforce the principle was unlikely. Neither the president nor the Justice Department resisted Governor Allan Shiver's use of Rangers to reestablish segregation in several Texas communities after desegregation had resulted in disorderly crowds. Division in the president's cabinet had also prevented vigorous executive lobbying for a new civil rights bill, which enabled southern congressional leaders to significantly weaken the measure during the summer of 1957.

FREYER, *supra* note 10, at 98-99 (footnotes omitted).

47. *Id.* at 100-01.

48. *Id.* at 101.

49. *Id.*

50. *Id.* at 102.

51. *Id.* at 101-02.

52. *Id.* at 102. Moreover, when asked about Governor Faubus' statement, Little Rock's police chief responded, "Let's say I haven't heard what Governor Faubus says he hears." Southern School News September 1957, at 6 reprinted in W. RECORD & J. RECORD, *supra* note 28, at 33, 34.

53. Aaron v. Cooper, 156 F. Supp. 220, 225 (E.D. Ark 1957).

54. Aaron v. Cooper, (E.D. Ark. Civ. No. 3113 August 30, 1957), reprinted in 2 RACE REL.

In spite of this loss in federal court, Governor Faubus on September 2nd issued a proclamation calling out the Arkansas National Guard,<sup>55</sup> and explained that because of an “imminent danger of tumult, riot and breach of peace and the doing of violence to persons and property,”<sup>56</sup> he had charged the Guard to prevent, “for the time being,” desegregation at Central High School.<sup>57</sup>

On September 3rd, the school board petitioned the federal district court for instructions,<sup>58</sup> and the court ordered implementation of the plan “immediately and without delay.”<sup>59</sup> The following day, the National Guardsmen nonetheless blocked the entrance of the nine Black students, and pictures and reports of the abuse of one student appeared around the nation and the world.<sup>60</sup> That same day, Governor Faubus telegraphed President Eisenhower, disclaiming any interest in “integration vs. segregation,” and claimed that the

LAW REP. 934 (1957). FREYER, *supra* note 10, at 102. Southern School News September 1957, at 6, reprinted in W. RECORD & J. RECORD, *supra* note 28, at 33, 34.

55. O. Faubus, Proclamation, Sept. 2, 1957, reprinted in 2 RACE REL. LAW REP. 937.

56. *Id.*

57. O. Faubus, Television Address, September 2, 1957, reprinted in W. RECORD & J. RECORD, *supra* note 28, at 37.

58. Petition of William G. Cooper et al., Aaron v. Cooper, 156 F. Supp. 220 (E.D. Ark. 1957) reprinted in 2 RACE REL. LAW REP. 937.

59. Order, Aaron v. Cooper, 156 F. Supp. 220 (E.D. Ark. 1957) reprinted in 2 RACE REL. LAW REP. 938, 939.

60. FREYER, *supra* note 10, at 104 and sources cited therein, at 114, 68. EYES ON THE PRIZE, *supra* note 9, at 101, 102. The simple word “abuse” does not fully describe the ordeal suffered by the student. Elizabeth Eckford:

Getting off the bus near Central High, Eckford saw a throng of white people and hundreds of armed soldiers. But the presence of the guardsmen reassured her. The superintendent had told the black students to come in through the main entrance at the front of the school, so Elizabeth headed in that direction. “I looked at all the people and thought, ‘Maybe I’ll be safe if I walk down the block to the front entrance behind the guards,’” she remembers. “At the corner I tried to pass through the long lines of guards around the school so as to enter the grounds behind them. One [soldier] pointed across the street . . . so I walked across the street conscious of the crowd that stood there, but they moved away from me . . . [Then] the crowd began to follow me, calling me names. I still wasn’t afraid - just a little bit nervous. Then my knees started to shake all of a sudden and I wondered whether I could make it to the center entrance a block away. It was the longest block I ever walked in my whole life. Even so, I wasn’t too scared, because all the time I kept thinking the [guards] would protect me.

“When I got in front of the school, I went up to a guard again,” she continues. “He just looked straight ahead and didn’t move to let me pass. I didn’t know what to do . . . Just then the guards let some white students through . . . I walked up to the guard who had let [them] in. He too didn’t move. When I tried to squeeze past him, he raised his bayonet, and then the other guards moved in and raised their bayonets . . . Somebody started yelling, ‘Lynch her! Lynch her!’”

“I tried to see a friendly face somewhere in the mob . . .” Elizabeth recalls. “I looked into the face of an old woman, and it seemed a kind face, but when I looked at her again, she spat on me.”

The young woman heard someone snarl, “No nigger bitch is going to get in our school. Get out of here.” The guards looked on impassively; Eckford was on her own. “I looked down the block and saw a bench at the bus stop. Then I thought, ‘If I can only get there, I will be safe.’” She ran to the bench and sat down, but a cluster of ruffians had followed her. “Drag her over to the tree,” said one of them, calling for a lynching.

Then Benjamin Fine, an education writer for the New York Times, put his arm around Elizabeth. “He raised my chin and said, ‘Don’t let them see you cry.’” she recalls. Finally a white woman named Grace Lorch, whose husband taught at a local black college, guided Elizabeth away from the mob. The two tried to enter a nearby drugstore to call a cab, but someone slammed the door in their faces. Then they spotted a bus coming and quickly boarded it. Lorch accompanied Elizabeth home safely, but the experience had left its mark.



issue "now is whether or not a head of a sovereign state can exercise his constitutional powers and discretion in maintaining peace and good order within his jurisdiction . . . ."61

Federal Judge Ronald Davies, presiding over the case, on September 5th requested that the Justice Department investigate the disruption of the desegregation plan,<sup>62</sup> and on September 7th turned down the school board's request to suspend the desegregation plan.<sup>63</sup> On September 9th, Judge Davies received the Justice Department's report and directed the department to file a petition for injunction against Governor Faubus.<sup>64</sup> A hearing on the matter was set for September 20.<sup>65</sup> Negotiations in the meantime with federal officials, including the President, resolved nothing except that Faubus would obey the decision of the federal district court.<sup>66</sup>

At the hearing on Friday, September 20th, no evidence was presented that showed a concern for violence before September 3rd, and as a result an order ensued enjoining the governor's actions.<sup>67</sup> In response Faubus withdrew the Guard but claimed that a "crucifixion" would be coming.<sup>68</sup> When the following Monday came, Faubus turned out to be nearly correct, for a nearly rioting crowd outside the school caused the withdrawal of the Black students before the day was finished.<sup>69</sup> The following day, none of the Black students

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Afterwards, the fifteen-year-old sometimes woke in the night, terrified, screaming about the mob.

EYES ON THE PRIZE, *supra* note 2, at 101-02. The call for a lynching was not necessarily rhetorical. Barely two years before, in August 1955 a fifteen-year old Black boy was lynched in Money, Mississippi. *Id.* at 37-57. See also S. WHITFIELD, A DEATH IN THE DELTA: THE STORY OF EMMETT TILL (1988). One of the last recorded racial lynchings in the nation occurred two years after the Little Rock crisis, in 1959 in Lumbarton, Mississippi. See H. SMEAD, BLOOD JUSTICE: THE LYNCHING OF MACK CHARLES PARKER xi (1986).

61. Telegram, September 4, 1957, Orval Faubus to President Eisenhower, *printed in* Southern School News October, 1957, at 1-2, excerpted at W. RECORD & J. RECORD, *supra* note 28, at 39. FREYER, *supra* note 10, at 105.

62. *Id.*

63. *Id.* Aaron v. Cooper, Civil Action No. 3113 (E.D. Ark. Septemeber 7, 1957). Order, *re-printed in* 2 RACE REL. LAW REP. 941; oral statement in support thereof, *Id.* at 940. FREYER, *supra* note 10, at 105.

64. FREYER, *supra* note 10 at 106.

65. *Id.*

66. *Id.* Federal officials failed to take a strong stand against Governor Faubus. "Negotiations came to focus on finding some means for Faubus to retreat without making it seem that he was backing down willingly." *Id.* See also Governor Faubus' description of his meeting on September with President Eisenhower. FAUBUS, DOWN FROM THE HILLS *supra* note 5, at 255-58. No public pressure was put on Faubus to change his stance. President Eisenhower, for example, after meeting with Faubus stated that he was "gratified by [the Governor's] constructive and cooperative attitude. . . [and] was pleased to hear from the Governor of the progress already made in the elimination of segregation in other activites in the State of Arkansas." D. Eisenhower, Statement September 14, 1957, 1957 PUBLIC PAPERS, *supra* note 1, at 674. Brooks Hays, a representative in Congress representing Little Rock, suggested that the President federalize the National Guard and neutralize the governor's authority, but this suggestion was disallowed by federal negotiators. FREYER, *supra* note 10, at 106.

67. FREYER, *supra* note 10 at 107. Aaron v. Cooper, 156 F. Supp. 220 (E.D. Ark. 1957).

68. FREYER, *supra* note 10, at 107.

69. *Id.* at 107, 108. See EYES ON THE PRIZE, *supra* note 2, at 105, 106.

The black journalists arrived at Central seconds before the students. As the four got out of their car, the 8:45 school bell rang. Suddenly, someone in the throng of hundreds of whites yelled, "Look, here they come!" The reporters had apparently been mistaken for parents escorting their children to school. About twenty whites began to chase the men down the street; others soon followed. Newsman Alex Wilson chose not to flee and was savaged. "Somebody had a brick in his hand," remembers James Hicks, another of journal-

attended, but another crowd was present at the school, bent on preventing the desegregation of Central High School.<sup>70</sup>

President Eisenhower took action in response to the two days' events. On September 23, 1957, he released a statement promising to use "the full power of the United States including whatever force may be necessary to prevent any obstruction of the law and to carry out the orders of the Federal Court."<sup>71</sup> On September 24th, Eisenhower ordered regular army troops to Little Rock to protect the students, and federalized the Arkansas National Guard as well, as much to prevent their use for any contrary purpose as to aid in the protection of the students.<sup>72</sup>

The soldiers of the 101st Airborne Division left Little Rock on November 27, 1957 and were replaced at Central High School by the federalized National Guard.<sup>73</sup> By this time opposition to desegregation was fixed, and there was still a good deal of unrest at the school.<sup>74</sup> As a result the school board

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ists, "and instead of throwing the brick, 'cause he was too close, he hit Alex Wilson up the side of his head . . . Wilson was more than six feet tall, an ex-Marine—he went down like a tree."

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With the students out of reach, the mob turned its anger on white journalists on the scene. *Life* magazine reporter Paul Welch and two photographers, Grey Villet and Francis Miller, were harrassed and beaten. The photographers' equipment was smashed to the ground. The crowd began to chant to the white students now staring out of Central's windows, "Don't stay in there with them."

Before noon the mob had swelled to about a thousand people, and Police Chief Gene Smith felt compelled to quell the rioting by removing the black students from the school.

70. FREYER, *supra* note 10, at 108. On September 24, "11 persons [were arrested], including two youths who appeared to be of high school age. All were white men. That brought the number of arrests for the two days to 44, including both whites and Negroes." R. Morin, *Sacramento Bee*, September 24, 1957, at 1, A6., *reprinted in* W. RECORD & J. RECORD, *supra* note 28, at 67, 68.

71. D. Eisenhower, Statement, September 23, 1957, 1957 PUBLIC PAPERS, *supra* note 1, at 689.

72. FREYER, *supra* note 10, at 108. Technically, Eisenhower merely directed the Secretary of Defense to take "appropriate steps" to enforce the court's order in Little Rock, and to federalize units of the Arkansas guard "as he may deem appropriate." Executive Order 10,730, *supra* note 1.

73. *Cooper v. Aaron*, 358 U.S. 1, 13 (1958).

74. *See, e.g.*, the notes of Arkansas Gazette reporters in *Southern School News*, January 1958, *reprinted in* W. RECORD & J. RECORD, *supra* note 28, at 84:

considerable amount of remarks, "Hey, nigger" when the Negroes walk around the corridors. Several have been run into "on purpose" and their books knocked out of their arms. Most of this seems to be done by sophomores and juniors, not the seniors.

\* \* \*

Reportedly the most unpopular [Negro] is Minnie Brown—known as "The Big M" because of her size. Termed "the type who would cause a fight," Minnie, it seems, talks back (the others don't) and reportedly sometimes not in a very lady-like manner. Minnie is supposed to have asked a white boy in a classroom to move his foot. He refused. She stepped on his foot and he slapped her. She went rushing outside for her 101st guard, the teacher told him to stay outside, that that was her classroom and that she would take care of the situation. He did and she did.

*Id.* Minnie Brown's tendency to retaliate led to disciplinary action against her:

Shortly before Christmas, one of the Little Rock Nine decided to fight back. "For a couple of weeks there had been a number of white kids following us," recalls Ernest Green, "continuously calling us niggers. 'Nigger, nigger, nigger' —one right after the other. Minniejean Brown was in the lunch line with me, and there was this white kid who was much shorter than Minnie . . . he reminded me of a small dog yelping at somebody's leg.

"Minnie had just picked up her chili, and before I could even say . . . 'Minnie, why don't you tell him to shut up?' Minnie . . . turned around and took that chili and dumped it on the dude's head." For a moment, the cafeteria was dead silent, Green remembers, "and then the help, all black, broke into applause. And the white kids there didn't know what to do. It was the first time that anybody [there] had seen somebody black retaliate."

The incident led to Minniejean's suspension. Then, in February, she was expelled from

sought to postpone desegregation.

The Supreme Court resolved the status of desegregation in Little Rock by ruling on September 12, 1958, that desegregation would not be suspended and must proceed apace.<sup>75</sup> Before this event, however, several other events took place. Central High School graduated its first Black student,<sup>76</sup> and Orval Faubus won the nomination of the Democratic Party to a third term as governor by an unprecedented sixty-nine percent of the vote.<sup>77</sup> Brooks Hays, the congressman who had counseled moderation, beat a segregationist candidate in the Democratic primary, normally tantamount to election,<sup>78</sup> but lost in November to a segregationist write-in candidacy initiated two weeks before the election.<sup>79</sup> James Johnson parlayed his high profile on segregation into a seat on the Arkansas Supreme Court.<sup>80</sup>

In these events are two lessons. The first is that desegregation, as the law of the land, was inevitable. The second is that political success in the South often coincided with fervent opposition to desegregation. The crisis in Little Rock was not caused by constitutional theories in conflict, but rather by political surrender to racism.

## II. THE PAST AS PROLOGUE

Arkansas politicians were not the only ones who surrendered to racism. The United States Supreme Court surrendered or at least compromised with racism in rendering the implementation formula of *Brown II*. While *Brown I*'s 1954 pronouncement that "[s]eparate educational facilities are inherently unequal"<sup>81</sup> represented a major step forward, the pronouncement of *Brown II* in 1955 that desegregation of schools should be implemented "with all deliberate speed,"<sup>82</sup> represented at least a half step back. District judges were to implement the rule of *Brown I* "by dealing with 'varied local problems,' according to 'equitable principles' that were guided by 'practical flexibility' in 'adjusting and reconciling public and private needs.'" <sup>83</sup> *Brown II*, it has been correctly

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Central after a white girl called her a "nigger bitch" and she in turn denounced the young woman as "white trash."

EYES ON THE PRIZE, *supra* note 2, at 117. Southern School News, March 1958, at 1, *reprinted in* W. RECORD & J. RECORD, *supra* note 28, at 89, reported Brown's reaction to her expulsion:

I just can't take everything they throw at me without fighting back.

I don't think people realize what goes on at Central, she said. "You just wouldn't believe it. They throw rocks, they spill ink on your clothes, they call you "nigger," they just keep bothering you every five minutes.

After Brown's expulsion, students circulated printed cards saying "One Down, Eight to Go." *Id.* EYES ON THE PRIZE, *supra* note 2, at 117.

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

76. EYES ON THE PRIZE, *supra* note 2, at 118. Even at this point racism disrupted the peace of the school. After the baccalaureate service a graduating senior spat in the face of a black leaving the ceremony, but was arrested for his deed. Perhaps as a result no incidents were recorded at the graduation ceremony two days later. Southern School News, June 1958, at 10, *reprinted in* W. RECORD & J. RECORD, *supra* note 28, at 95.

77. FREYER, *supra* note 10, at 147. EYES ON THE PRIZE, *supra* note 2, at 118.

78. FREYER, *supra* note 10.

79. *Id.* at 157, 158.

80. *Id.* at 147.

81. *Brown*, 347 U.S. at 494.

82. *Brown*, 349 U.S. at 300.

83. FREYER, *supra* note 10, at 9, (quoting *Brown II*, 349 U.S. at 298-99).

stated, "reflected compromise and equivocation in virtually every line."<sup>84</sup> *Brown II*, in effect, represented a pact between the Supreme Court and the South: desegregation would occur, but slowly and with delay ample for the South to win battles even though it had lost the war.<sup>85</sup>

The Supreme Court in *Brown II* failed to consider the implications of the pre-*Brown* higher education desegregation decisions, and this failure of vision had unfortunate consequences for the point the Court attempted to make clear in *Brown I*. For these decisions and other cases involving the desegregation of higher education constitute a clear suggestion that no matter how forthright and lacking in compromise and equivocation such a mandate might be, the South would find ways to avoid and otherwise minimize the effect of court mandates respecting desegregation.<sup>86</sup>

*Missouri ex rel. Gaines v. Canada*<sup>87</sup> alone makes this suggestion. Decided in 1938, *Gaines* was the first of a series of desegregation decisions by the Supreme Court before *Brown*. *Gaines* found if not its genesis, certainly its impetus, in the efforts of the NAACP to overcome the legacy of *Plessy v. Ferguson*.<sup>88</sup> While *Plessy* had dealt specifically with segregation in public accommodations, the Supreme Court approved segregation in higher education in 1908 in *Berea College v. Kentucky*,<sup>89</sup> and by 1927 the Supreme Court described the doctrine of separate but equal in education as "many times decided."<sup>90</sup> The NAACP strategy for overcoming separate but equal was to at-

84. Hutchinson, *Unanimity and Desegregation: Decision-making in the Supreme Court, 1948-1958*, 68 GEO. L.J. 4, 56 (1979).

85. This pact was completely at odds with the previous understanding that the constitutional right to equality of treatment "is a personal one." *McCabe v. Atchison, Topeka, and Santa Fe Railway Co.*, 235 U.S. 151, 161 (1914). The Supreme Court had long since held that "[i]t is the individual who is entitled to equal protection of the laws . . ." *Id.* at 161, 162. Even if the individual might still "properly complain that his constitutional privilege has been invaded[.]" *id.* at 162, under *Brown II* an individual whose right to an equal education had been violated might never come to experience desegregation. *Brown II* recognized that "the personal interest of the plaintiffs" was at stake, but stated that this interest was only in achieving an equal education "as soon as practicable." *Brown II*, 349 U.S. at 299 (emphasis added). The brief in *Brown* filed in December 1952 by the U.S. Department of Justice, was the first suggestion ever of such a position, and even its chief architect, Phillip Elman, thought it was "entirely unprincipled, it was just plain wrong as a matter of constitutional law, to suggest that someone whose personal constitutional rights were being violated should be denied relief." Elman, *The Solicitor General's Office, Justice Frankfurter, and Civil Rights Litigation, 1946-1960: An Oral History*, 100 HARV. L. REV. 817, 827 (1987). His reason for making this "unprincipled" suggestion was to assure that the Supreme Court would issue a unanimous opinion in *Brown* overruling *Plessy*. From his discussions with Justice Frankfurter, Elman viewed the issuance of a unanimous opinion as important, the alternative to which he viewed as "an incredible godawful mess: possibly nine different opinions, nine different views on the Court. It would have set back the cause of desegregation; and it would have damaged the Court." *Id.* at 828, 829.

86. This is a clear inference to be made from M. TUSHNET, *THE NAACP'S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925-1950* (1987).

87. 305 U.S. 337 (1938).

88. 163 U.S. 537 (1896). While Lloyd Gaines may have wanted to attend the University of Missouri, there was no guarantee that the NAACP would support him simply on this account. The NAACP took care to properly screen the applicants it supported. They had not only to be "qualified," but "of outstanding scholarship . . . neat, personable, and unmistakably a Negro." William Hastie, staff counsel to the NAACP, quoted in TUSHNET, *supra* note 86, at 36, 37. The attack on segregated education began with graduate and professional education; such challenges found plaintiffs more readily available and were more easily litigated since the problem to be resolved generally was not "separate but equal" but instead "separate and non-existent." *Id.* at 36, 42.

89. 211 U.S. 45 (1908).

90. *Gong Lum v. Rice*, 275 U.S. 78, 86 (1927).

tack the "equal" part of the separate but equal equation. In 1936, in *Pearson v. Murray*,<sup>91</sup> the NAACP convinced the Maryland Supreme Court that an out-of-state scholarship program did not provide for Blacks a legal education equal to that provided for Whites at the University of Maryland. In 1937, in *Gaines* the NAACP made a similar attempt before the Missouri Supreme Court, and failed.<sup>92</sup>

The case was appealed to the United States Supreme Court, where, in 1938, the NAACP won the case.<sup>93</sup> While the Supreme Court did not challenge the doctrine of separate but equal, the Court did recognize as unconstitutional the legislative scheme which allowed Whites to attend law school at the University of Missouri but forbade Blacks to do the same, in the absence of an equal law school for Blacks.<sup>94</sup> The fact that the legislature had provided that the state's university for Blacks, Lincoln University, had the discretion to open a law school was not adequate to overcome the constitutional objection; the mere legislative purpose to establish the separate but equal facility was not enough.<sup>95</sup> The case was remanded to the Missouri Supreme Court for proceedings "not inconsistent" with the United States Supreme Court opinion.<sup>96</sup>

The Supreme Court's opinion in *Gaines* may well have been thought by detractors of segregation as a great victory,<sup>97</sup> and perhaps the principle established did constitute such a victory. But the authorities in Missouri saw to it that Gaines himself never saw the fruits of that victory.

The Missouri Supreme Court rendered its decision on the remanded case in August 1939.<sup>98</sup> Gaines failed in his attempt to achieve entrance to the University of Missouri. The state legislature, between the United States Supreme Court opinion and the second state court opinion, had enacted into law a provision making mandatory the establishment of a law school for Blacks at Lincoln University.<sup>99</sup> The United States Supreme Court had ruled Gaines "entitled to be admitted to the State University *in the absence of other and proper provision for his training.*"<sup>100</sup> Since that absence had been redressed, the state court held that Gaines had no right to attend the University of Missouri.

Lincoln University, thus, would go on to establish a law school, a school with limited funds,<sup>101</sup> only a small number of books,<sup>102</sup> located in a building

91. 182 A. 595 (Md. 1936).

92. 113 S.W.2d 783 (Mo. 1937).

93. 305 U.S. 337 (1938).

94. *Id.* at 349, 350.

The basic consideration is not as to what sort of opportunities other states provide, or whether they are as good as those in Missouri, but as to what opportunities Missouri itself furnishes to white students and denies to negroes solely on the ground of color. The admissibility of laws separating the races in the enjoyment of privileges afforded by the state rests wholly upon the equality of the privileges which the laws give to the separate groups within the state.

*Id.* at 349.

95. *Id.* at 346, 347.

96. *Id.* at 352.

97. The Nation, for example, carried an article which termed the decision "a milestone, epoch-making," and cause for "unlimiting rejoicing." 147 THE NATION 696 (1938).

98. 131 S.W.2d 217 (Mo. 1939).

99. 1939 Mo. Laws 635. See 131 S.W. 2d at 218, 219.

100. *Id.* at 218 (emphasis supplied by the Missouri Supreme Court).

101. The legislature appropriated \$200,000. TUSHNET, *supra* note 86, at 73, but the university

shared with a motion picture theater whose sound system treated the law school's students each day to a distraction from study in the sounds of the latest in movie entertainment.<sup>103</sup> Whether Gaines might have successfully challenged the new law school's equality to the law school at the University of Missouri, as the NAACP had planned to test<sup>104</sup> and as the Missouri Supreme Court had suggested as Gaines' remedy,<sup>105</sup> is unknown. During the litigation, Lloyd Gaines had received a master's degree from the University of Michigan and sometime in 1939 had disappeared.<sup>106</sup> By the end of 1939, the NAACP was forced to accept a dismissal of the case.<sup>107</sup>

In effect, the *Gaines* case represented a formula for the frustration of attempts to desegregate educational institutions. The first element of the formula was delay. Gaines had applied to law school in 1935 and was finally denied admission in 1939, by which point he had apparently lost interest in law, at least at the institution he had chosen originally. The second element was a willingness on the part of state officials to overlook the intent of Supreme Court pronouncements on the subject of desegregation and instead to look for loopholes which might allow the choice of segregation to survive. The third element was state legislative and administrative authority responsiveness to less enlightened themes dominating the state's political will, authority determined to place every available obstacle between its people and its schools on the one hand, and desegregation on the other.

Each of these elements was at work in the crisis surrounding the desegregation of Little Rock's Central High School. The Little Rock school board initially proposed only a modest plan of desegregation, then retreated to a minimalist plan when the promise of *Brown II* was anticipated. In short, the Little Rock school authorities took what the Supreme Court gave them, and they took the good along with the bad.

While the response of the school board is not so different from that of state authorities in *Gaines*, the response of Arkansas' governor and legislature and of Arkansas' people, who sought to nullify the judicial mandate of desegregation, is. Part of this difference may well be allayed to the emotional impact of schooling for children as opposed to graduate and professional education for adults. But part of the difference also must be in an unintended effect of *Brown II*. Given suggestions by the Court itself that its own decision in *Brown I* might legally be circumvented, state authorities in Little Rock looked for excuses to believe that the mandate of desegregation was merely an unwelcome suggestion and not the law of the land.

Whether the Supreme Court should have anticipated the resistance of the South in the form of physical violence cannot be ascertained and is not suggested. Nonetheless, the Supreme Court may well have been on notice that the all deliberate speed implementation formula of *Brown II* was merely a call

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only controlled a fraction of that amount. N. Barksdale, *The Gaines Case and Its Effect in Negro Education in Missouri*, 51 SCHOOL AND SOCIETY 309, 312 (1940).

102. Bluford, *The Lloyd Gaines Story*, 32 J. OF EDUC. SOC. 242, 244 (1958).

103. "Jim Crow" Law School, 14 NEWSWEEK 32 (1939); TUSHNET, *supra* note 86, at 73.

104. TUSHNET, *supra* note 86, at 74.

105. *Gaines*, 131 S.W.2d at 219.

106. Bluford, *supra* note 102, at 245, 246; TUSHNET, *supra* note 86, at 74.

107. TUSHNET, *supra* note 86, at 74.

for and an encouragement to official state opposition, even though desegregation under *Brown I* should have been recognized to be inevitable.

Notice of the South's political will to avoid desegregation is suggested by the *Gaines* case. How much weight this suggestion should bear can only be determined by examining the entire history of pre-*Brown* higher education desegregation. If the suggestion bears the weight indicated by *Gaines*, then the riddle as to why the Little Rock crisis took place finds part of its answer in the refusal of the Supreme Court to have been more forthright in the manner of implementing the moral and constitutional precepts of *Brown I*.

### III. THE SOUTHERN FAILURE OF JUSTIFICATION

Part II of this Article suggests that the implementation formula of *Brown II* gave encouragement to the White South in its die-hard enthusiasm for segregated schools and in its desire for elected officials to resist desegregation. In the Little Rock crisis, Arkansas public officials went beyond the *Gaines* opposition formula of delay, determination, and cleverness within the opportunities allowed by law, and actually defied the law. The actions of Arkansas' public officials in turn encouraged White opposition to desegregation.

This point, however, begs the question of whether there is any constitutional rather than political justification for the official actions taken by Arkansas officials. Whatever the justification, it cannot lie in the first amendment,<sup>108</sup> which certainly shields the speech of parties private and public who would resist or even advocate resistance to desegregation. The first amendment, in effect, guarantees the right to disagree, a not inconsiderable right; but the official state actions precipitating the Little Rock crisis went beyond disagreement with the mandate of desegregation, subsuming active frustration of that mandate instead.

#### A. *The Call of Localism*

The political justification offered by Arkansas authorities was that of localism, in effect a skewed reading of states' rights and constitutional federalism.<sup>109</sup> The idea that local concerns might take precedence over a national mandate was not a completely outrageous one. This in fact was the point of

108. Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.  
U.S. CONST. AMEND. I.

109. In his inaugural speech for his second term, Governor Faubus stated his opposition "to any forcible integration of our public schools. These matters . . . must be left to the will of the people in the various districts. The people must decide on the basis of what is best as a whole for each particular area." BARTLEY, MASSIVE RESISTANCE, *supra* note 10, at 261, (quoting Faubus' inaugural address as reprinted in the Arkansas Gazette, January 16, 1957). In September 1957, Governor Faubus reiterated desegregation to be a "local problem . . . best . . . solved on the local level according to the peculiar circumstances and conditions of each local school district." Southern School News, October 1957, 2-5, quoted in FREYER, *supra* note 10, at 80. State Education Commissioner Ford thought interpositionist measures had virtue in that "it would help [local] districts which wanted to keep their segregated schools." Southern School News, December 1956, p.8, reprinted in W. RECORD & J. RECORD, *supra* note 26, at 27. Eight Little Rock aldermen released a statement approving the calling of the Arkansas National Guard to halt desegregation, as this was "the desire of the overwhelming majority of the citizens of Little Rock." Southern School News October 1957, at 2, reprinted in W. RECORD & J. RECORD, *supra* note 28, at 42.

the all deliberate speed formula of *Brown II*. But in *Brown II*, the Supreme Court had cited localism only as a factor to be considered by federal district courts when implementing the federal mandate, not as an excuse for state authorities to override the federal mandate. Localism, as the state obstructionists invoked it, was a concept in conflict with the Supremacy Clause of the Constitution, which states clearly that the "Constitution . . . shall be the supreme Law of the Land . . . anything in the Constitution or laws of any State to the contrary notwithstanding."<sup>110</sup>

In the case of Little Rock, the call to localism is an ironic one, for local governmental interest in Little Rock favored desegregation, and the voices of resistance in Little Rock originated from outside Little Rock<sup>111</sup> and indeed, outside Arkansas.<sup>112</sup> The local school board had found a way to live with the mandate of desegregation, and in this was the will of the local community. Thus, for Governor Faubus and the Arkansas legislature to truly represent local interests, they would have given political and administrative support to the desegregation plan, and not argued localism while in fact frustrating it.<sup>113</sup>

In calling out the National Guard, the governor had not consulted with any of the local authorities in Little Rock, who, a federal district court found, "were prepared to cope with any incidents which might arise . . ."<sup>114</sup> Instead of furthering local interests, the actions of Governor Faubus were quite to the contrary. The Little Rock school board expressed it well:

The effect of [calling out of the National Guard,] was to harden the core of opposition to the Plan and cause many persons who theretofore had reluctantly accepted the Plan to believe that there was some power in the State of Arkansas which, when exerted, could nullify the Federal law and permit disobedience of the decree of [the District] Court, and from that date hostility to the Plan was increased and criticism of the officials of the [School] District has become more bitter and unrestrained.<sup>115</sup>

110. U.S. CONST. art. IV, cl. 2.

111. Segregationist spokesman and activist James Johnson, a 1957 gubernatorial candidate, hailed from Crossett in southeastern Arkansas. FREYER, *supra* note 10, at 68. For a description of his not inconsiderable influence on the Little Rock crisis, see FREYER, *supra* note 10, at 64-66, 68-74 & 78-82. Governor Faubus himself was from Huntsville in Madison county. FAUBUS, DOWN FROM THE HILLS, *supra* note 5, at 1, 3. Even though he resided in Little Rock as a state government official in 1949-53 and after taking office as Governor in 1955, Faubus was nonetheless a state official and not a local one. FREYER, *supra* note 10, at 23. 11 WHO'S WHO *supra* note 30, at 325. *C.f.* the desegregation of Hoxie, Arkansas. See FREYER, *supra* note 10, at 63-68. See also note 111 *infra*.

112. *E.g.*, Rev. J. A. Lovell of Dallas, Texas was a guest speaker before the Little Rock Capital Citizens' Council, FREYER, *supra* note 10, at 93. Marvin Griffin, Governor of Georgia, on August 22, 1957 delivered in Little Rock a speech which is credited by Freyer and also Governor Faubus as being responsible for generating a major change of opinion in Little Rock and as being the impetus for Faubus' dispatch of the National Guard to prevent desegregation. FREYER, *supra* note 10, at 100-01, 103. See also Southern School News, September 1957 at 7, reprinted in part in W. RECORD & J. RECORD, *supra* note 28, at at 32-33, for a report of Griffin's speech.

113. See FREYER, *supra* note 10, at 116 and citations therein. When the governor called out the National Guard to prevent desegregation, the mayor of Little Rock noted that "[t]he people of Little Rock recently had a school board election and elected by an overwhelming vote the school board members who advocated [gradual integration]." In exasperation he offered that "were [it] not for my own respect for due process of law, I would be tempted to issue an executive order interposing the city of Little Rock between Gov. Faubus and the Little Rock school board." Southern School News October 1957 p. 1, reprinted in W. RECORD & J. RECORD, *supra* note 28, at 37.

114. *Cooper v. Aaron*, 358 U.S. at 10, (citing *Aaron v. Cooper*, 156 F. Supp. 220 at 225).

115. *Cooper v. Aaron*, 358 U.S. at 10, (quoting the school board's petition before the district court).



In short, the call to localism was not only misplaced, but hypocritical as well.

Additionally, in Little Rock the call to localism was self-serving. Whether local interests were argued to predominate depended on the federal interests at stake. In the South, "[l]ocalism, manifested as a general distrust of outsiders and mixed with a touch of paranoia, whether anti-Communist, anti-semitic, or anti-big business, was a dynamic element in southern attitudes."<sup>116</sup> Similarly and yet by contrast, "at times, [southern politicians] appealed fervently to the Constitution as the touchstone of benign national strength; but on other occasions they attacked the evil of the federal octopus with all the resolutions of demagogues."<sup>117</sup> Where federal power brought economic benefit, it was extolled; but when federal power threatened the Southern way of life, it was villified. "In such an environment political expediency gave words such as *federal, state's rights, and Constitution* a manifestly symbolic meaning."<sup>118</sup>

This framework belies but also explains the assertion of localism as a justification for the official actions taken opposing desegregation in the Little Rock crisis. Localism, states' rights, and federalism were concepts that could not be divorced from the context in which they were raised, and thus offered no independent justification for any activity undertaken in Little Rock by official actors opposing desegregation. The bottom line is that official resistance in Little Rock was simply political. The best politics became the politics of obstruction and resistance.

### B. *The Doctrine of Interposition*

To be sure, this resistance had a purportedly legal basis. The basis was the doctrine of interposition. Simply put, according to the doctrine, when the federal government or some facet thereof undertook an unconstitutional act, a state could interpose itself between its citizens and the federal government, thereby nullifying the power of the federal government to act. By the time of the Little Rock crisis, however, the doctrine had been completely scuttled as an acceptable facet of constitutional law.

The doctrine of interposition did not rise fully formed from the heads of Southern obstructionists, as did Athena rise from the head of Zeus in classical Greek mythology.<sup>119</sup> The classical origin of interposition lies instead in the writings of such early American giants as James Madison and John C. Calhoun. Madison saw the power of state governments in this light:

[I]n case of a deliberate, palpable and dangerous exercise [by the federal government] of other powers not granted by the said compact, the States who are parties thereto have the right, and are in duty bound, to interpose for arresting the progress of the evil, and for maintaining, within their respective limits, the authorities, rights, and liberties appertaining to them.<sup>120</sup>

116. FREYER, *supra* note 10, at 10-11.

117. *Id.* at 11.

118. *Id.*

119. See E. HAMILTON, MYTHOLOGY 29-30 (1940).

120. Resolution of Dec. 24, 1798 VA. STAT. AT LARGE 192 (1806). Authored by Madison, the resolution is quoted in part in 1 RACE REL. LAW REP. 468. Thomas Jefferson authored the corresponding Kentucky resolution of 1798, dated November 16, 1798, reprinted in E. WARFIELD, KENTUCKY RESOLUTIONS OF 1798 75-85 (1894). K. ANDRESEN, THE THEORY OF STATE INTERPOSITION TO CONTROL FEDERAL ACTION 49 (1960) (University Microforms Inc.) (hereinafter cited as ANDRESEN, STATE INTERPOSITION). Jefferson's draft can be found at P. FORD, 7 THE

The powers of the federal judiciary were particularly suspect in Madison's view. He wrote in 1799:

However true, therefore, it may be that the judicial department is, in all questions submitted to it by the forms of the Constitution, to decide in the last resort, this resort must necessarily be deemed the last in relation to the authorities of the other departments of the Government; not in relation to the rights of the parties to the constitutional compact, from which the judicial as well as the other departments hold their delegated trusts.

On any other hypothesis the delegation of judicial power would annul the authority delegating it; and the concurrence of this department with the others in usurped powers might subvert forever, and beyond the possible reach of any rightful remedy, the very Constitution which all were instituted to preserve.<sup>121</sup>

Calhoun emphatically agreed. "This right of interposition . . . I conceive to be the fundamental principle of our system."<sup>122</sup> Yet, as Calhoun recognized, on the matter of interposition there were two sides to the tale.<sup>123</sup>

The contrary argument was put by Chief Justice Marshall in *McCulloch v. Maryland*:

[T]he constitution and the laws made in pursuance thereof are supreme; . . . they control the constitutions and laws of the respective states and cannot be controlled by them. . . . It is of the very essence of supremacy, to remove all obstacles to its action within its own sphere, and so to modify every power vested in subordinate governments, as to exempt its own operations from their own influence.<sup>124</sup>

Since in *Marbury v. Madison* it had already been established that "the province and duty of the judicial department [is] to say what the law is,"<sup>125</sup> the case for those opposing interposition could with *McCulloch* be considered to have been closed.

But the arguments over interposition had preceded *Marbury* and *McCulloch*, and they continued beyond these cases as well. The first expositions of the doctrine of interposition in the nation's history under the Constitution came a scant ten years after the Constitution's ratification, with the enactment of the Alien and Sedition Acts of 1798.<sup>126</sup> Objecting to these acts on the ground that they violated the strictures of the first amendment, Kentucky and Virginia passed resolutions of interposition and urged other states to do the same.<sup>127</sup> A constitutional confrontation was spared when the Alien and Sedition Acts expired in 1801.

WRITINGS OF THOMAS JEFFERSON 289-309 (1892-99). For more on the views of Jefferson and Madison, see ANDRESEN, STATE INTERPOSITION 69-78.

121. Committee report to Virginia House of Delegates, Session of 1799-1800, authored by Madison, quoted at 1 RACE REL. LAW REP. 469, also reprinted in E. POWELL, NULLIFICATION AND SECESSION IN THE UNITED STATES 100-04 (1897).

122. J. Calhoun, Address of July 26, 1831, printed in 6 WORKS OF JOHN C. CALHOUN 61 (1831), quoted in 1 RACE REL. LAW REP. 487.

123. *Id.*

124. 17 U.S. (4 Wheat) 316, 426-27 (1819).

125. 5 U.S. (1 Cranch) 137, 177 (1803).

126. Act of June 25, 1798, ch. 58, 1 Stat. 570 (1798); Act of July 14, 1798, ch. 74, 1 Stat. 596 (1798).

127. *Supra* note 119:

Actually, there were four sets of resolutions, each of the two state legislatures passing one set in 1798, with Kentucky passing a second set the next year, followed by Virginia in 1800. . . . Copies of the first sets of resolutions were sent to the other states by Kentucky and Virginia. Nine states replied to Virginia and eight to Kentucky, all disagreeing with the

The Supreme Court first passed directly on the doctrine of interposition in the 1809 case of *United States v. Peters*.<sup>128</sup> In *Peters*, the Supreme Court issued a writ of mandamus to a federal judge to enforce a judgment against the state of Pennsylvania. The Pennsylvania legislature had passed an act which had defied an order of the federal circuit court requiring the governor "to demand for the use of the state of Pennsylvania, the money which [was the subject of the judgement in federal court],"<sup>129</sup> asserting that the federal court had had no jurisdiction to hear the case in question as a result of the eleventh amendment.

The Supreme Court in *Peters* disposed of the eleventh amendment question against the interest of the state, and in doing so rejected the legislature's resolution of interposition:

If the legislatures of the several states may at will, annul the judgments of the courts of the United States, and destroy the rights acquired under those judgments, the constitution itself becomes a solemn mockery, and the nation is deprived of the means of enforcing its laws by the instrumentality of its own tribunals. . . . If the ultimate right to determine the jurisdiction of the courts of the Union is placed by the constitution in the several state legislatures, then this act concludes the subject; but if that power necessarily resides in the supreme judicial tribunal of the nation, then the jurisdiction of the District Court of Pennsylvania, over the case in which that jurisdiction was exercised, ought to be most deliberately examined; and the act of Pennsylvania, with whatever respect it may be considered, cannot be permitted to prejudice the question.<sup>130</sup>

The "Pennsylvania Rebellion" did not end, however, with the opinion in *Peters*, for the state continued in the rhetoric and the exercise of interposition. The governor sent a message to the legislature stating his intention to call out the militia to prevent enforcement of the court decree. The legislature responded with resolutions maintaining "a most exteme statement of State-rights and Nullification" and denying the power of the Supreme Court to have adjudicated the case.<sup>131</sup> In the end, when a federal marshal sought to serve process in connection with the case, he was met with the state militia, and the general of the militia was ultimately indicted, arrested, and convicted for his deeds, all with the support of James Madison,<sup>132</sup> then President of the United States. By this time, however, the troops had been withdrawn and judgment had been executed in pursuance of the decree in *Peters*, and within a month of the general's conviction, he received a pardon from President Madison.<sup>133</sup> The point had been made, however — the state had no power to oppose the

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interposition ideas expressed in the interposition resolutions of the two protesting states.

These replies caused the issuance of the second sets of Resolutions.

ANDRESEN, STATE INTERPOSITION, *supra* note 119, at 48, 49 (footnotes omitted). These resolutions are reprinted together in J. ELLIOT, 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS 528-29, 540-44 (1876).

128. 9 U.S. (5 Cranch) 115 (1809).

129. *Id.* at 135.

130. *Id.* at 136.

131. 1809 Pa. Laws 200, approved April 3, 1809.

132. 1 RACE REL. LAW REP. 476-77 (1956).

133. *Id.* The Pennsylvania Rebellion is discussed in ANDRESEN, STATE INTERPOSITION, *supra* note 120, at 28-30, and C. WARREN, 1 THE SUPREME COURT IN UNITED STATES HISTORY 96-101 (1926).

authority of the courts of the federal government, and the federal government was entirely capable of enforcing this position.

Each new incident of interposition following *Peters* resulted in political or constitutional rejection of interposition. In 1816, in *Martin v. Hunter's Lessee*,<sup>134</sup> the Supreme Court rejected the position that Virginia's highest court could refuse to obey a Supreme Court decision rendered on appeal from the Virginia court.<sup>135</sup> The Hartford Convention of 1814, involved New Englanders who opposed the War of 1812, resented the advantages the South accrued as a result of the three-fifths clause of the Constitution<sup>136</sup> and feared southern and westward expansion, defended interposition by the states in cases of "deliberate, dangerous and palpable" infractions of the Constitution.<sup>137</sup> The convention resulted in "the complete annihilation from the American political scene of the Federalist party . . ."<sup>138</sup> In 1819, *McCulloch v. Maryland*<sup>139</sup> rejected Maryland's attempt to oppose the institution and continued operation of the Bank of the United States.

South Carolina's Ordinance of Nullification<sup>140</sup> declaring the federal tariffs of 1828<sup>141</sup> and 1832<sup>142</sup> void within the state met with President Jackson's quick dispatch of the navy to Charleston Harbor,<sup>143</sup> four companies of artillery and five thousand muskets to Fort Moultrie outside of Charleston,<sup>144</sup> and

134. 14 U.S. (1 Wheat) 304 (1816).

135. A bad idea, like bad grass, is hard to kill. This same notion that the Supreme Court was without power to override a state court was afoot when the California Supreme Court refused to allow a writ of error to the United States Supreme Court in *Johnson v. Gordon*, 4 Cal. 368 (1854). The California legislature responded in 1855 by making it a crime for a state judge or clerk of court not to comply with the Federal Judiciary Act of 1789. Warren, *Legislative and Judicial Attacks on the Supreme Court*, 47 AM. U.L. REV. 161, 176 (1913). Later, but over a strong dissenting opinion, the California Supreme Court acceded to the validity of the act in *Ferris v. Cooper*, 11 Cal. 176 (1858).

136. U.S. CONST. art I, § 2 read, in part,

Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free persons, including those bound to Service for a Term of Years, excluding Indians not taxed, three-fifths of all other Persons. . .

By the terms of the three-fifths clause, all free persons, whether Black or White, would be counted. Slaves, who did not vote and who could not govern, were counted as sixty percent of a person in the state in which they resided for purposes of federal apportionment. The South primarily benefited as the overwhelming number of slaves resided in that region of the country. In 1790, 658,000 of the nation's 698,000 slaves resided in the South; in 1800, 857,000 of 893,000; and in 1810, 1,161,000 of 1,191,000. DEPARTMENT OF COMMERCE, BUREAU OF THE CENSUS, NEGRO POPULATION, 1790-1915 at 55 (1918).

137. REPORT OF THE HARTFORD CONVENTION, printed in T. DWIGHT, HISTORY OF THE HARTFORD CONVENTION 352, 361 (1833).

138. 1 RACE REL. LAW REP. 479-80. See J. BANNER, JR., TO THE HARTFORD CONVENTION (1970) and D. ROBINSON, SLAVERY IN THE STRUCTURE OF AMERICAN POLITICS, 1765-1820, at 278-82 (1971).

139. 17 U.S. (4 Wheat) 316 (1819).

140. S. C. Ordinance of November 24, 1832, reprinted in STATE PAPERS ON NULLIFICATION 28 (1854).

141. Act of May 19, 1828, ch. 55, 4 Stat. 270 (1828).

142. Act of July 14, 1832, ch. 227, 4 Stat. 583 (1832).

143. Letter of Andrew Jackson to Joel R. Poinsett, December 2, 1832, printed in W. GOLDSMITH, 1 THE GROWTH OF PRESIDENTIAL POWER 268, 269 (1974) (hereinafter cited as PRESIDENTIAL POWER). 1 RACE REL. LAW REP. 486.

144. 1 PRESIDENTIAL POWER, *supra* note 143, at 285. Letter of Andrew Jackson to Joel R. Poinsett *supra* note 143. Jackson was determined to end the South Carolina threat. In a letter to Poinsett dated December 9, 1832, Jackson boasted that if need be, he could place 100,000 armed men

a request to Congress for the enactment of a bill allowing him to enforce the federal law by use of the military as he saw fit.<sup>145</sup> A compromise ensued. A less onerous tariff passed Congress on March 2, 1833,<sup>146</sup> simultaneous to the grant of authority Jackson sought,<sup>147</sup> and South Carolina withdrew the Statute of Nullification.<sup>148</sup>

In *Worcester v. Georgia*,<sup>149</sup> the Supreme Court in 1832 heard the appeal of a conviction in the Georgia courts for failure to obtain a state license to enter Cherokee Indian territory, permission for which entry had already been granted under federal authority. The state did not appear before the Supreme Court to defend the conviction, its legislature having declared any attempt by the Supreme Court at reversal of any state conviction to be "unconstitutional and arbitrary," and any appearance before the Supreme Court a compromise to the dignity of Georgia's sovereignty.<sup>150</sup> The men convicted were released from state custody after the Supreme Court rejected the state's position, calling it "repugnant to the constitution, laws, and treaties of the United States."<sup>151</sup>

The intersectional battle over slavery represented the occasion for numer-

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in South Carolina within eighty days. 1 PRESIDENTIAL POWER 269, 270. In a January 13, 1833 letter to Vice-President Martin Van Buren, Jackson explained that with troops from North Carolina, Tennessee and the western states he could march with 40,000 men; from Pennsylvania alone he could depend on 50,000 men, and additionally from North Carolina he could depend on an entire regiment. 1 PRESIDENTIAL POWER 285, 286.

145. 1 RACE REL. LAW REP. 486. See also A. Jackson, *Proclamation*, December 10, 1832, in 1 PRESIDENTIAL POWER, *supra* note 143, at 271-85, in which Jackson stated in no uncertain terms the necessity and his determination to put down the nullification crisis.

146. Act of March 2, 1833, ch. 55, 4 Stat. 629 (1833).

147. Act of March 2, 1833, ch. 57, 4 Stat. 632 (1833).

148. S. C. Ordinance of March 15, 1833, reprinted in STATE PAPERS, *supra* note 140, at 352. This was not South Carolina's first step of conciliation and/or capitulation. Within three weeks of Jackson's December 10 proclamation, the Ways and Means Committee of the U.S. House of Representatives proposed to reduce tariffs, and on January 21, 1833, South Carolina suspended the nullification statute. C. BOUCHER, THE NULLIFICATION CONTROVERSY IN SOUTH CAROLINA 271-275 (1916) (reprinted 1968). S. MORRISON and H. COMMAGER, THE GROWTH OF THE AMERICAN REPUBLIC 484 (1942) (hereinafter MORRISON and COMMAGER). The state was not wholly chastened by the episode. When the state repealed the statute of nullification, it also passed another nullifying the "force bill." S. C. Ordinance of March 18, 1833, reprinted in STATE PAPERS at 373. The need to test the new statute was not anticipated, because the state was pleased with the compromise tariff. MORRISON and COMMAGER 484.

149. 31 U.S. (6 Pet.) 515 (1832).

150. 1830 Ga. Laws 282, approved Dec. 22, 1830. The summary of arguments by counsel at 31 U.S. (6 Pet.) 534, 535 reveals no argument by the state of Georgia. See also 1 RACE REL. LAW REP. 490.

151. *Worcester v. Georgia*, 31 U.S. (6 Pet.) at 561. Andrew Jackson, then President, is reputed to have said of this decision, "Well, John Marshall has made his decision, now let him enforce it." A. McLAUGHLIN, A CONSTITUTIONAL HISTORY OF THE UNITED STATES 429 (1936). This statement may have given the state some comfort, but Jackson "did not in fact, refuse to aid in enforcing the Court's decision; and the charge . . . that Jackson actually defied the Court's decrees is clearly untrue." C. WARREN, 1 SUPREME COURT 769. Instead, Jackson negotiated a settlement of the dispute underlying the case, obtaining the release of the men who had been imprisoned for failure to obtain the state license, and in so doing secured the support of Georgia in the South Carolina nullification crisis. R. REMINI, ANDREW JACKSON 129-40 (1966). Georgia Resolution of November 29, 1832, reprinted in STATE PAPERS 271. See E. Miles, *After John Marshall's Decision: Worcester v. Georgia and the Nullification Crisis*, 39 JOURNAL OF SOUTHERN HISTORY 539 (1973). This did not resolve the state's recalcitrance on the issue of the authority of the U.S. Supreme Court. In 1854, the Georgia Supreme Court considered itself "co-equal and co-ordinate with the Supreme Court of the United States, and not inferior and subordinate to that Court." *Padelford, Fay & Co. v. Mayor and Aldermen of Savannah*, 14 Ga. 438, 506 (1854).

ous conflicts between the authorities of free states and the federal government,<sup>152</sup> which, under the Fugitive Slave Clause of the Constitution and the acts passed by Congress to enforce it, had a position on this matter in line with that of the Southern states.<sup>153</sup> By and large, Northern judges respected the supremacy of the federal government, even when they engaged in legal gymnastics to maintain the freedom of those who might otherwise be slaves.<sup>154</sup>

But *Ableman v. Booth*,<sup>155</sup> a case decided by the Supreme Court in 1859, represents an instance in which the Wisconsin Supreme Court, because of the political nature of a case dealing with slavery, did not so respect the federal prerogative, releasing by writ of habeas corpus a federal prisoner accused of illegally freeing from federal custody a fugitive slave. The Wisconsin court directed its clerk of court to make no return to the writ of error to the United States Supreme Court.<sup>156</sup> Writing for the Court, Chief Justice Roger Taney rejected the Wisconsin court's position, stressing the need for one final voice to decide all federal issues. The Wisconsin legislature nonetheless passed a resolution questioning the need for a supreme judicial voice when the nation was constituted as a union of separate sovereigns.<sup>157</sup> The reaction in other Northern states to this resolution was approval for the position of Wisconsin.<sup>158</sup> By contrast, in the slave South there was approval for Justice Taney's position and criticism for that of Wisconsin.<sup>159</sup>

The irony of *Abelman v. Booth* is that commentators in slave states such as Virginia and Georgia, states which had previously taken strong stands in favor of interposition, were now applauding the rejection of this doctrine.<sup>160</sup> This irony suggests that positions on interposition develop and change in accordance with whose ox is being gored and whether the pain involved is per-

152. See P. FINKELMAN, AN IMPERFECT UNION (1981); R. COVER, JUSTICE ACCUSED (1975).

153. D. FEHRENBACHER, THE DRED SCOTT CASE 36-47 (1978).

154. R. COVER, JUSTICE ACCUSED, *supra* note 152, at 159-191.

155. 62 U.S. (21 How.) 479 (1856). See T. MORRIS, FREE MEN ALL: THE PERSONAL LIBERTY LAWS OF THE NORTH, 1780-1861, at 173-180 (1974) (hereinafter cited as FREE MEN ALL) for a discussion of this case.

156. 62 U.S. (21 How.) at 512.

157. 1859 Wis. Laws Joint Resolution IV, p. 247, March 19, 1859.

158. See MORRIS, *supra* note 155, at 186-199.

159. *Id.* at 199-201, 203-204. See also 1 RACE REL. LAW REP. 495; and note 157, *infra*.

160. Consider the views of Robert Toombs, Senator from Georgia:

On January 24, 1860, Senator . . . Toombs . . . launched a vitriolic attack on the legislation of the free states and on the recent efforts to obtain laws preventing slave-hunting. On the floor of the United States Senate he taunted the "Black Republicans" who "mock at constitutional obligations, jeer at oaths." In every state where they held power the Fugitive State Law was a dead letter. It had been nullified, he explained in a later speech, by "higher-law" teachings, acts passed under the fraudulent pretense of preventing kidnapping, and "new constructions" such as with the writ of habeas corpus. He was indignant particularly about the judgments of the Wisconsin Supreme Court, and the effort to obtain a new Personal Liberty Law in New York. Wisconsin, said Toombs, "who got rotten before she got ripe, comes to us even in the first few years of her admission, with her hands all smeared with the blood of a violated Constitution, all polluted with perjury." The law introduced in New York exceeded those in other states "in iniquity, in plain, open, shameless, and profligate perfidy."

FREE MEN ALL, *supra* note 155, at 199-200 (footnotes deleted). William Smith, representing Virginia in the House of Representatives, called for a special House committee to be instructed to consider the policy of expelling from the union of states any state "which shall, by her legislation, aim to nullify an act of Congress." CONG. GLOBE, 36th Cong. 2d Sess., Dec. 17, 1860, 107 quoted in FREE MEN ALL, *supra* note 151, at 203, 204.

ceived to be acceptable.<sup>161</sup> This suggestion explains the willingness of those same states who applauded *Ableman v. Booth* barely a year later to engage in secession, the ultimate act of interposition.

In the Civil War that followed, secession was crushed. By implication, interposition was rejected, both constitutionally and in terms of national politics. As one Georgia court stated in 1890, "[a]fter the State has yielded to the federal army, it can well afford to yield to the federal judiciary. . . ."<sup>162</sup> The stand of interposition by Orval Faubus and the Arkansas legislature was thusly based on grounds other than the thoroughly reprobated doctrine of interposition. Like the call to localism itself, the Arkansas claim to interposition stands as misplaced, and in the end hypocritical and self-serving.

#### IV. AFTERMATH: THE AVOIDANCE OF ANARCHY

##### A. *Cooper v. Aaron*

By the end of the 1957-58 school year, Little Rock's Central High School had seen not only the appearance of nine Black children on a previously all-White campus, but also regular army troops, National Guardsmen, shouting crowds, and scores of news personnel. The school had become the center of national attention, and what the nation saw was "chaos, bedlam and turmoil."<sup>163</sup> There had been "repeated incidents of more or less serious violence directed against Negro students and their property,"<sup>164</sup> the entire educational program had been compromised by "tension and unrest,"<sup>165</sup> and in short, "the situation was 'intolerable.'"<sup>166</sup>

This was what the Little Rock school board perceived when it petitioned the federal district court in February 1958 to postpone for two and one-half years the desegregation of Central High School. The board's position was that "because of extreme public hostility, . . . engendered largely by the official attitudes and actions of the Governor and the legislature, the maintenance of a sound educational program at Central High School, with the Negro students in attendance, would be impossible."<sup>167</sup> In June the district court ruled in the school board's favor, and after the Eighth Circuit reversed the district court in mid-August, the school board appealed to the Supreme Court.<sup>168</sup> In a fast paced and highly unusual series of moves, the Supreme Court set September 8th as the day on or before which a petition for certiorari might be filed.<sup>169</sup> It set September 11th as the date for argument, decided the case per curiam on September 12th,<sup>170</sup> and released an extended opinion on the matter on September 29, 1958, under the names of each of the nine justices.<sup>171</sup>

161. This suggestion is made further by James Madison's stand as President of the United States against interposition during the Pennsylvania rebellion as opposed to his stand in its favor during the time of the Alien and Sedition Acts. See, *supra* note 120 and text at n. 118 and 126-131.

162. *Wrought Iron Fence Co. v. Johnson*, 84 Ga. 754, 759, 11 S.E. 233, 235 (1890).

163. *Cooper v. Aaron*, 358 U.S. at 13 (quoting the district court at 163 F. Supp. 20-26).

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.* at 10.

168. *Id.* at 13-14.

169. *Id.* at 14.

170. *Id.* See also 358 U.S. at 5.

171. 358 U.S. 1 (1958).

In the September 29th opinion, under the name *Cooper v. Aaron*, the Supreme Court emphasized two main points. The first was that the implementation formula of *Brown II*, while it did not necessarily call for immediate and/or total desegregation in every circumstance, would not countenance delay on the basis of opposition engendered, allowed, implemented, and incited by state officials:<sup>172</sup>

[I]n many locations, obedience to the duty of desegregation would require the immediate general admission of Negro children, otherwise qualified as students for their appropriate classes, at particular schools. On other hand, a District Court, after analysis of the relevant factors (which, of course, excludes hostility to racial desegregation), might conclude that justification existed for not requiring the present nonsegregated admission of all qualified Negro children. . . . the courts should scrutinize the program of the school authorities to make sure that they had developed arrangements pointed toward the earliest practicable completion of desegregation, and had taken appropriate steps to put their program into effective operation. . . . only a prompt start, diligently and earnestly pursued, to eliminate racial segregation from the public schools could constitute good faith compliance.<sup>173</sup>

Thus, three years after *Brown II*, the Supreme Court recognized the obstructionist gloss that might be put on *Brown II* and sought to overcome that interpretation. Whatever the compromise intended by the words "all deliberate speed," the Supreme Court served notice in *Cooper v. Aaron* that it intended no equivocation about the message of *Brown I*.

The Supreme Court emphasized also that *Brown I* had been reached by a unanimous court after "the most serious consideration," and even with the advent of three new justices replacing members of the *Brown I* court, the Supreme Court was yet unanimous in reaffirming *Brown I*.<sup>174</sup> With this emphasis, the Supreme Court reached toward its second main point in *Cooper v. Aaron*. No matter how distasteful, *Brown I*'s stricture that "separate facilities . . . are inherently unequal"<sup>175</sup> was not simply an unpalatable demand of the Supreme Court to be ignored by states at their pleasure and for the false protection of their citizens. It was instead part of the "supreme law of the land," binding under the supremacy clause not only on the federal government but on the states as well.<sup>176</sup>

The Supreme Court found a firm basis for this second point in as fundamental an opinion as *Marbury v. Madison*, wherein "Chief Justice Marshall, speaking for a unanimous court, referr[ed] to the Constitution as 'the fundamental and paramount law of the nation,' declar[ing] also that 'It is emphatically the province and duty of the judicial department to say what the law is.'"<sup>177</sup> The Court also found support even in the words of Chief Justice Taney, a defender of the law of White supremacy,<sup>178</sup> when he wrote in *Ableman*

172. *Id.* at 6-7.

173. *Id.* at 7.

174. *Id.* at 19.

175. *Brown I*, *supra* note 6, at 494.

176. *Cooper v. Aaron*, 358 U.S. at 18.

177. *Id.* (quoting *Marbury*, 5 U.S. (1 Cranch) 137, 177 (1803)).

178. Chief Justice Taney delivered the opinion of the Supreme Court in *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393 (1856), which concluded that blacks "are not included and were not intended to be included, under the word 'citizens' in the Constitution, and therefore claim none of the rights and privileges which that instrument provides for and secures to the citizens of the United States." *Id.* at 404. Historically, and by implication at the time of the decision, Blacks were "regarded as beings of



*v. Booth* that the supremacy of the federal government as stipulated in the Constitution "reflected the framers 'anxiety to preserve it in full force, in all its powers, and to guard against resistance to or evasion of its authority, on the part of a State.'" <sup>179</sup> As Chief Justice Marshall put it in *United States v. Peters*, and as the Court in *Cooper v. Aaron* quoted with approval, "If the legislatures of the several states may, at will, annul the judgments of the courts of the United States, and destroy the rights acquired under those judgments, the constitution itself becomes a solemn mockery. . . ." <sup>180</sup>

Thus, this second point by the Supreme Court, that its interpretation of the Constitution is supreme law, was meant to hopefully lay to final rest the moribund but undead doctrine of interposition. By exposing to the light of constitutional scrutiny the strategy of state officials in Arkansas, the Court hoped to ease the course of desegregation throughout the South, and not incidentally reiterate what *Marbury v. Madison* made clear a century and a half earlier, the duty of all to follow the law as established by the federal judiciary, in general, and the Supreme Court, in particular.

### B. *A Cautionary Note*

The events which led to *Cooper v. Aaron* sound a cautionary note about the anarchy which can ensue when federal authority is treated by the states as less than what the supremacy clause says, "the supreme Law of the Land."<sup>181</sup> That is an anarchy that Attorney General Edwin Meese III then invited in his October 21, 1986 speech at Tulane University.<sup>182</sup>

Meese argued that *Cooper v. Aaron* cannot mean what it says, when it states that the Supreme Court's interpretation of the Constitution is the supreme law of the land.<sup>183</sup> If the *Cooper v. Aaron* court were right, Meese argues, then each decision by the Supreme Court would be immutably fixed for all time. *Plessy v. Ferguson*, for example, could not have been overruled by *Brown I*.<sup>184</sup> *Batson v. Kentucky*,<sup>185</sup> which guaranteed for each individual defendant the right to be free from racial discrimination in petit jury selection by allowing proof of discrimination in each case, could not have overruled *Swain v. Alabama*,<sup>186</sup> which made "peremptory challenges to persons on the basis of race virtually unreviewable under the Constitution."<sup>187</sup> And the position of Abraham Lincoln that the *Dred Scott*<sup>188</sup> decision was unconstitutional would be just as wrong as Lincoln presumed *Dred Scott* to have been decided incorrectly.<sup>189</sup>

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an inferior order . . . so far inferior, that they had no rights which the white man was bound to respect. . . ." *Id.* at 407.

179. *Cooper v. Aaron*, 358 U.S. at 18 (quoting *Abelman*, 62 U.S. (21 How.) 506, 524 (1859)).

180. *Id.* (quoting *Peters*, 9 U.S. (5 Cranch) 115, 136 (1809)).

181. U.S. CONST., art. vi, cl. 2.

182. Meese, *The Law of the Constitution*, 61 TUL. L. REV. 979 (1987) (hereinafter cited as Meese).

183. *Id.* at 986.

184. *Id.* at 983.

185. 476 U.S. 79 (1986).

186. 380 U.S. 202 (1965).

187. Meese, *supra* note 182, at 983.

188. *Dred Scott v. Sanford*, 60 U.S. (19 Haw.) 393 (1856).

189. Meese, *supra* note 182, at 984, 985. Attorney General Meese has not chosen these examples by happenstance. They are meant to tug at our sense of racial equity, to emotionally predispose and manipulate his audience toward his position. This is a cheap shot on Meese's part. Conspicuous by

Professor Neuborne has summarized the Meese position better than Meese has put it himself:

The Attorney General and his executive branch predecessors derive the executive's asserted legal right to "nonacquiesce" in settled judicial precedent from a rigid reading of *Marbury v. Madison*. In *Marbury*, Chief Justice Marshall justified the judiciary's power over both Congress and the President as a necessary incident to the process of resolving a pending judicial proceeding. According to Marshall, judicial review is merely the *ex necessitate* selection by a judge of a governing rule of law from among the competing candidates put forth by the parties. Even if *Marbury* establishes that such an *ex necessitate* selection is valid within the confines of the judicial branch, why, the Attorney General asks, should it have self-executing impact on the future activities of the executive branch as they affect non-parties? While doctrines of *stare decisis* or preclusion will often make the outcome of future judicial proceedings involving the same issues highly predictable, the Attorney General argues that strict adherence to Marshall's analysis in *Marbury* entitles the executive branch to adhere to its view of the governing law at the administrative level unless and until the matter once again reaches the courts, where the judiciary decides the issue. Of course, given the predictability of the ultimate judicial outcome, the executive might, as a matter of respect, prudence, or *real politik*, elect to recede voluntarily from its legal position, but according to the Attorney General's theory, the executive is under no legal obligation to do so.<sup>190</sup>

This position of Attorney General Meese is not inherently unreasonable,<sup>191</sup> but it is dangerous. If the Supreme Court is not the final arbiter of the Constitution, then each branch of the federal government under the Meese theory of authoritativeness can act alone and at odds with the other. This idea of a "cacophonous constitution" lacks the virtues of clarity, finality, practicality, and the capability of guidance.<sup>192</sup> Only if one locks the Constitution into

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its absence from Meese's speech and even the footnoted publication is any reference to other decisions having nothing to do with race in which the Supreme Court has overruled itself on constitutional issues. See, e.g., *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985) (overruling *National League of Cities v. Usery*, 426 U.S. 833 (1976)); *Brandenburg v. Ohio*, 395 U.S. 444 (1969), (overruling *Whitney v. California*, 274 U.S. 357 (1927)); *Baker v. Carr*, 369 U.S. 186 (1962), (effectively overruling *Colegrove v. Green*, 328 U.S. 549 (1946)); *Mapp v. Ohio*, 367 U.S. 643 (1961), (overruling *Wolf v. Colorado*, 338 U.S. 25 (1949)); *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943), (overruling *Minersville School Dist. v. Gobitis*, 310 U.S. 586 (1940)); and *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938) (overruling *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842)).

190. Neuborne, *The Binding Quality of Supreme Court Precedent*, 61 TUL. L. REV. 991, 993-94 (1987).

191. See, e.g., Levinson, *Could Meese Be Right This Time?*, 243 THE NATION 689 (1986), reprinted in 61 TUL. L. REV. 1071 (1987); Tushnet, *The Supreme Court, the Supreme Law of the Land, and Attorney General Meese: A Comment*, 61 TUL. L. REV. 1017 (1987); Colby, *Two Views on the Legitimacy of Nonacquiescence in Judicial Opinions*, 61 TUL. L. REV. 1041 (1987).

192. Neuborne, *supra* note 190, at 994. The troublesome nature of a constitution without a single authoritative voice to construe it is not merely recently considered. In *Ferris v. Cooper*, the California Supreme Court declared:

That there should be a central tribunal, having power to give authoritative exposition to the Constitution, and laws, and treaties of the United States, and which should also possess the power to secure every citizen the rights to which he is entitled under them, seems to us highly expedient. The value of uniformity of decisions where the Constitution and laws of the Federal Government are to be expounded in cases of individual rights, and the importance of the principle that every citizen of the United States know the extent, and be protected by a tribunal of the highest authority and free from local prejudices or passions in the enjoyment of all the rights, exemptions, and privileges with which the Constitution and laws of the Union invest him, cannot easily be exaggerated. Indeed, in order to render the Constitution and laws of the Federal Government the same things to the people of the United

the jurisprudence of original intention does the Meese position on authoritativeness bear virtue, and then only because the Constitution is thought not to be a living document but instead shackled by the perceptions and limitations of its framers and the framers' times. By contrast, a Constitution not so shackled is susceptible of different readings over time, in accordance with changing levels of sophistication and sensibilities. Under such an interpretation of the Constitution, Lincoln might well argue for a change in the understanding of the law of the Constitution underlying the *Dred Scott* case, and *Brown I* might legitimately overrule *Plessy v. Ferguson*, all without undermining the authoritative nature of Supreme Court pronouncements.

The opposite tack which Attorney General Meese has taken ignores the danger that underlies *Cooper v. Aaron*, the very case whose statement respecting authoritativeness of Supreme Court pronouncements Meese seeks to question. If the Supreme Court is not the final arbiter of constitutional law, then the inference may be had that anyone can be an authoritative arbiter of the Constitution, the position of the Supreme Court notwithstanding. Meese's position gives comfort to those who would revive the corpse of interposition, and that specter is an ugly one, as demonstrated by the Little Rock crisis. Out of this crisis a caution is issued and a warning is sounded, one especially compelling for a document over 200 years old.

The warning is this: the Constitution must be the supreme power, and no local interest can be allowed to predominate over its mandate, no matter how important the local interest nor how stubborn its supporters. For there is no power in a law that is not obeyed, and no beauty in a Constitution whose power dissipates even as it is spoken.

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States, it is necessary that they receive their ultimate construction from the same tribunal; for there is but little practical difference between two or more different Constitutions and one Constitution variously and differently construed.

11 Cal. at 180. See also *United States v. Peters*, 9 U.S. (5 Cranch) 115, at 135-36; *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 385 (1821); *Ableman v. Booth*, 62 U.S. (21 Haw.) 506, at 514-16 (1858).