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Cooper v. Aaron: The First in the Trifecta of Modern American Federalism Cases

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COOPER V. AARON: THE FIRST IN THE TRIFECTA OF MODERN AMERICAN FEDERALISM CASES

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Cooper v. Aaron is, indeed, still timely after sixty years. Not only has this 1958 decision of the Supreme Court of the United States had a continuing legacy in the development of civil rights in America, it has also played a significant role in the development of the modern relationship between the American federal government and the American states. The federal-state relationship, a product of this country's unique brand of federalism, has been in flux since the days before the adoption of the Constitution and the 10th Amendment. *Cooper v. Aaron*, along with the subsequent decisions in *New York v. United States* (1992) and *Printz v. United States* (1996), have established boundaries between federal supremacy and state sovereignty that have had significant relevance in 21st century America. While *Cooper* declared supremacy for federal judicial interpretations, *New York* and *Printz* placed limits on federal legislative supremacy. The framework, produced by this trifecta of decisions, is the basis of the contemporary view of American federalism. This federalism is evident in the politically charged decision in *National Federation of Independent Businesses v. Sebelius* (2012) as well as the recently decided case of *Murphy v. NCAA* (2018). Both *Sebelius* and *Murphy* are examples of the trifecta's federalism, a federalism that exhibits the judicial supremacy of *Cooper* as well as the commandeering limits of *New York* and *Printz*. While sixty years may seem to be a long time in the federalism years, *Cooper* is, indeed, still with us.

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I. INTRODUCTION

The 1958 *Cooper v. Aaron*[1] decision has taken its place in a long line of court cases decided over the years that have attempted to address racial discrimination in this country. While not all of the civil rights cases involved segregated schools, many of the earlier landmark cases were in the area of education e.g., *Gaines v. Canada*[2] invalidating Missouri's refusal to allow African Americans to attend the University of Missouri School of Law, *Sweatt v. Painter*[3] invalidating a Texas plan to force African American students to attend an inferior law school, and *McLaurin v. Oklahoma State Regents*[4] invalidating segregated classrooms in graduate classes at the University of Oklahoma. Following the 1954 and 1955 *Brown* I[5] and *Brown* II[6] decisions, the Civil Rights struggle of African Americans largely took place in the K-12 school houses of the country.[7]

The basic facts of *Cooper* illustrate the strife of that period of our history. In the fall of 1957, certain state officials in Arkansas took actions to forcibly prohibit African American children from entering and desegregating Central High School in the city of Little Rock.[8] This action was taken in direct contravention of a federal district court order and a local desegregation plan.[9] The beginning of the 1957 school year saw Arkansas National Guard troops deployed to prevent African American students from entering Central High School as well as the subsequent deployment of federal troops and federalized state troops to allow students, who have come to be known as the Little Rock Nine,[10] to attend the school. Eventually, Arkansas officials closed the high school as a means to foreclose integration in 1958.[11] This action was challenged in federal court.[12] The eventual result

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1. 358 U.S. 1 (1958).
2. 305 U.S. 337 (1938).
3. 339 U.S. 629 (1950).
4. McLaurin v. Okla. State Regents for Higher Educ., 339 U.S. 637 (1950).
5. Brown v. Bd. of Educ., 347 U.S. 483 (1954), *supplemented*, 349 U.S. 294 (1955).
6. Brown v. Bd. of Educ., 349 U.S. 294 (1955).
7. *See* J. HARVIE WILKINSON III, FROM BROWN TO BAKKE: THE SUPREME COURT AND SCHOOL INTEGRATION: 1954-1978 (1979).
8. *Desegregation of Central High School*, ENCYCLOPEDIA ARK. HIST. & CULTURE, http://www.encyclopediaofarkansas.net/encyclopedia/entry-detail.aspx?entryID=718 (last updated Nov. 13, 2018).
9. *Id.*
10. *Little Rock Nine*, ENCYCLOPEDIA ARK. HIST. & CULTURE, http://www.encyclopediaofarkansas.net/encyclopedia/entry-detail.aspx?entryID=723 (last updated Sept. 9, 2010) [hereinafter *Little Rock Nine*].
11. *Id.*
12. *Aaron v. Cooper*, ENCYCLOPEDIA ARK. HIST. & CULTURE, http://www.encyclopediaofarkansas.net/encyclopedia/entry-detail.aspx?search=1&entryID=741 (last updated Nov. 13, 2018) [hereinafter *Aaron v. Cooper*].

was the Supreme Court's unanimous decision in *Cooper v. Aaron* and the re-opening of the Little Rock school.[13] This was an important step along the long path toward desegregation in the United States and the overall application of the *Brown* decisions.

Not surprisingly, the *Cooper* decision was controversial. The obvious direct area of contention involved battles between integration and segregation proponents. The desegregation of American public schools went through a number of phases involving political resistance and such issues as busing and privatization.[14] An additional area of controversy involved questions concerning the role of the courts in addressing federal and state governmental relationships. Even after sixty years, the *Cooper* decision addresses serious questions regarding the very structure of the American system of government.

The unique American system of constitutional government is based on a structure established by the attendees of the constitutional convention held in the summer months of 1787. While not explicitly stated in the document, this system has three significant underlying and, in many ways, intertwined principles:

> 1. the separation of powers/checks and balances doctrine—which governs relations among the branches of the federal government,
>
> 2. federalism—which governs relations between the states and the federal government, and
>
> 3. individual rights and liberties—which governs relations between the government and the people.[15]

These principles are interrelated and have been defined and refined by amendments, war, and decisions of the courts—particularly the Supreme Court.[16] The federalism principle, in particular, has been shaped by the Supreme Court's *Cooper* decision.

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13. *See id.*; Cooper v. Aaron, 358 U.S. 1 (1958).

14. *See* WILKINSON, *supra* note 7, at 78–127.

15. *See* LEE EPSTEIN & THOMAS G. WALKER, CONSTITUTIONAL LAW FOR A CHANGING AMERICA: A SHORT COURSE 7–10 (7th ed. 2018).

16. The development of modern American federalism has been greatly affected by such factors as the 14th Amendment and the Civil War as well as the decisions of the Supreme Courts. *See e.g.,* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819) (holding that Maryland could not tax the Federal Government); Coyle v. Smith, 221 U.S. 559 (1911) (holding that the Federal Government could not dictate which city Oklahoma chose for its capital). For a broad view of the development of American federalism see DAVID M. O'BRIAN, CONSTITUTIONAL LAW AND POLICY 681–688 (7th ed. 2008); Edwin S. Corwin, *The Passing of Dual Federalism*, 36 VA. L. REV. 1 (1950); Harry N. Schreiber, *Federalism and Legal Process: Historical and Contemporary Analysis of the American System*, 14 L. & SOC'Y REV. 663 (1980).

II. AMERICAN FEDERALISM

A. History

Our nation's Constitution was crafted some 231 years ago in Philadelphia when fifty-five delegates from the states met to address deficiencies in the Articles of Confederation. What resulted was the creation of a new kind of federated government.[17] This new form—American federalism—was and still is a multifaceted political power relationship between governments and governmental units. Given the already existing states and the need to create an overarching central government, this federalism was the result of a complex[18] set of compromises.[19] These compromises produced a document that is only the basic outline of a two-government system.[20] One effect of this duality is that the American system consists of multiple layers of governments. Much of this American system was in a "to be determined" mode.[21] In this form of federalism, there are both state and federal laws as well as a dual court system state and federal.[22] This federal form of government coupled with the three-branch principle created what Madison's Federalist No. 51 characterized as a "double security" for the rights of the people.[23]

B. Different Federalisms and Different Eras

The development of American federalism has been an ongoing process characterized by swings between two basic views of the power relationship between the federal government and the state governments. One view holds that the federal government and the states are basically equal sovereigns each with their own separate powers.[24] This view has been called Dual

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17. *See generally* FORREST MCDONALD, NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION 276 (1985).

18. John Quincy Adams described the American system with its separate federal branches and its sovereignty shared by federal and state governments as "the most complicated government on the face of the globe." *See* John Quincy Adams, 6th President of the United States, Requested Address at the New York Historical Society: The Jubilee of the Constitution - A Discourse (Apr. 30, 1939), *available at* https://lonang.com/library/reference/jqadams-jubilee-constitution-1839/.

19. JOHN C. LIVINGSTON & ROBERT G. THOMPSON, THE CONSENT OF THE GOVERNED 151–53 (2d ed. 1963).

20. *Id.* at 150.

21. *See generally* KERMIT L. HALL, THE MAGIC MIRROR: LAW IN AMERICAN HISTORY 71 (1st ed. 1989).

22. *See* O'BRIAN, *supra* note 16, at 796–98.

23. THE FEDERALIST NO. 51, at 323 (James Madison) (Clinton Rossiter ed., 1961).

24. EPSTEIN & WALKER, *supra* note 15, at 192, 193 tbl.6-1.

Federalism[25] or Dual Sovereignty.[26] Dual Federalism relies on a strict view of the 10th Amendment's reserve powers provisions.[27] Under this view, Dual Federalism is characterized by such principles as:

- state and federal governments are coequal sovereigns each supreme in their own sphere;
- the Constitution is a compact between the states and the federal government;
- the 10th Amendment defines the state-federal relationship; and
- the necessary and proper clause is to be read narrowly.[28]

The other view of the federal-state power relationship, known as Cooperative Federalism[29] or Cooperative Sovereignty,[30] sees the federal government as generally controlling or supreme.[31] This view is largely based on the supremacy clause of Article VI of the Constitution.[32] Cooperative federalism is characterized by the view that:

- the federal government is supreme in all areas under its jurisdiction even if the state sphere is affected;
- the Constitution is a product of the people's consent and not the states;
- the 10th Amendment is not a source of power for the states; and

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25. *Id.*; *See also* Troy E. Smith, *Dual Federalism, in* FEDERALISM IN AMERICA: AN ENCYCLOPEDIA, http://encyclopedia.federalism.org/index.php/Dual_Federalism (last visited Dec. 31, 2018) [hereinafter *Dual Federalism*].

26. The term "dual sovereignty" has in some cases been used to describe the dual federalism concept. *See e.g., infra* note 98 and accompanying text (Justice Antonin Scalia's use of the term to describe the American constitutional system in Printz v. United States, 521 U.S. 898, 918 (1997)).

27. *See Dual Federalism*, *supra* note 25; EPSTEIN & WALKER, *supra* note 15, at 192, 193 tbl.6-1.

28. EPSTEIN & WALKER, *supra* note 15, at 192, 193 tbl.6-1.

29. *Id.* at 192; *see also* Mary Hallock Morris, *Cooperative Federalism*, *in* FEDERALISM IN AMERICA: AN ENCYCLOPEDIA, http://encyclopedia.federalism.org/index.php/Cooperative_Federalism (last visited Dec. 31, 2018) [hereinafter *Cooperative Federalism*].

30. The term "cooperative sovereignty" has in some cases been used to describe the cooperative federalism concept. *See, e.g.*, SHAILER MATHEWS, THE VALIDITY OF AMERICAN IDEAS 150–63 (1922).

31. *See Cooperative Federalism*, *supra* note 29; EPSTEIN & WALKER, *supra* note 15, at 192, 193 tbl.6-1.

32. *See Cooperative Federalism*, *supra* note 29; EPSTEIN & WALKER, *supra* note 15, at 192, 193 tbl.6-1.

- the necessary and proper clause is to be read broadly.[33]

These two alternate views of American federalism frequently collide when state and federal boundary questions arise. These questions first ask who has the authority to decide, and then ask where exactly the boundary between federal and state sovereigns is. Such issues have found their way to the Supreme Court on a regular and continuing basis, and the Court has struggled with them. In fact, some scholars who have tracked the Court's view over the years suggest that there has been a pendulum swing between the two. For example, political scientists Lee Epstein of Washington University and Thomas Walker of Emory University observed the following eras or doctrinal cycles:

Marshall Court (1801–1835)	Cooperative Federalism
Taney Court (1835–1864)	Dual Federalism
Civil War/Reconstruction Court (1865–1895)	Cooperative Federalism
Laissez-Faire Court (1896–1936)	Dual Federalism
Post-New Deal Court (1937–1975)	Cooperative Federalism
Burger Court (1976–1985)	Dual to Cooperative Federalism
Rehnquist Court (1986–2005)	Mild Dual Federalism
Roberts Court (2005–present)	Mild Dual Federalism[34]

C. Modern Federalism

As demonstrated by the swings from Dual to Cooperative Federalism and back, the question of where the boundary is between the federal government and the states is complicated. The answer to the question is, in some respects, tied to another aspect of the American system. The principle of separation of powers plays a role here. For where the

33. EPSTEIN & WALKER, *supra* note 15, at 193 tbl.6-1.

34. *Id.* at 193 tbl.6-2. For a background discussion of American federalism, see RICHARD H. LEACH, AMERICAN FEDERALISM 1–24 (1st ed. 1970). For opposing views of the general development of modern American federalism, see John Kinkaid, *The Eclipse of Dual Federalism by One-Way Cooperative Federalism*, 49 ARIZ. ST. L.J. 1061 (2017), http://arizonastatelawjournal.org/wp-content/uploads/2017/11/Kincaid_Pub.pdf (discussing limits of states in federal-state relations); John C. Yoo, *Sounds of Sovereignty: Defining Federalism in the 1990s*, 32 IND. L. REV. 27 (1998), https://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1777&context=facpubs (discussing a rise in modern dual federalism).

boundary lies often depends on which branch or branches of the federal government are involved with what aspect of the states. For example, in *Cooper,* the primary players were the federal courts and the state of Arkansas.[35] In the 1992 *New York v. United States*[36] case, the primary players were Congress and the state of New York.

Moreover, in the 1997 *Printz v. United States*[37] case, the primary players were Congress and the two county sheriffs. *Cooper, New York*, and *Printz* form a trifecta of cases that highlight and inform the ongoing debates that surround modern American federalism.[38] American federalism is a complex institution. In particular, this quality is apparent in the federal-state relationships concerning the issues of supremacy and commandeering.

Some might ask why use the term "trifecta" when discussing Supreme Court cases and federalism. What is a "trifecta?" For some in Little Rock, the term is quite familiar. Quite familiar since the Oaklawn Park Racetrack is just some fifty miles or so down the road from the University of Arkansas at Little Rock's William H. Bowen School of Law campus. And, while the horse racing season is over for Oaklawn Park this year, some are looking forward to the next season and the opportunity to speculate on the first, second, and third place finishers of the race with a trifecta wager. Aside from the horse racing betting, the term trifecta has, according to the Merriam-Webster Dictionary, come to mean a grouping of three things.[39] *Cooper*, *New York,* and *Printz* are three Supreme Court cases that have played a significant first, second, and third place role in shaping the interplay of constitutional principles in modern American society—particularly in the development of the contemporary application of American federalism.[40]

1. Cooper v Aaron*: States, the Court and Supremacy*

Cooper v. Aaron, first in the trifecta of modern federalism cases, dealt with a state's defiance of a federal court order to desegregate a public school in accordance with the *Brown* decision.[41] The *Cooper* decision, a unanimous *per curium* opinion signed by the nine justices, addressed the question of the location of the boundary between a state and the federal judicial branch as

35. *See* Cooper v. Aaron, 358 U.S. 1 (1958).
36. *See* New York v. United States, 505 U.S. 144 (1992).
37. *See* Printz v. United States, 521 U.S. 898 (1997).
38. *Cooper,* 358 U.S. at 1; *New York,* 505 U.S. at 144; *Printz,* 521 U.S. at 898.
39. *Trifecta*, MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/trifecta (last visited Feb. 2, 2019).
40. *Cooper,* 358 U.S. at 1; *New York,* 505 U.S. at 144; *Printz,* 521 U.S. at 898.
41. *Cooper*, 358 U.S. at 4; *see also Little Rock Nine*, *supra* note 10.

well as the question of who is to decide federalism issues.[42] As stated in the opinion, the *Cooper* case involved "actions by the Governor and Legislature of Arkansas upon the premise that they are not bound by our holding in *Brown v. Board of Education.*"[43] While the School Board of Little Rock formulated a desegregation plan for Central High School for the 1957 school year, the plan was thwarted by state legislation and Arkansas's Governor who ordered the intervention by state National Guard troops.[44] Eventually, federal and federalized troops were employed to restore order to Little Rock and to allow African American students to attend school.[45]

In defiance of *Brown* and desegregation, Governor Orval Faubus declared that "the Supreme Court decision is not the law of the land."[46] The *Cooper* case was filed in response to the local School Board's subsequent request for a two-and-a-half year delay in implementing segregation in Little Rock.[47] In offering a specific response to Governor Faubus's argument that the *Brown* decision was not the law of the land, the Supreme Court declared that "we should answer the premise of the actions of the Governor and Legislature that they are not bound by our holding in the *Brown* case."[48] The Court's rejection of the Faubus position was based on three sources:

> (1) Article VI Clause 2 of the U.S. Constitution that declares that the Constitution is the "supreme Law of the Land;"[49]
>
> (2) Article VI Clause 3 of the U.S. Constitution that requires every state legislator, executive, and judicial officer to take an oath to support the Constitution; and[50]
>
> (3) the *Marbury v Madison*[51] decision that identifies the Constitution as "the fundamental and paramount law of the nation;"[52] and affirms that "it is emphatically the province and duty of the judicial department to say what the law is."[53] The *Cooper* decision declares that:

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42. *Cooper*, 358 U.S. at 19.
43. *Id.* at 4.
44. *Little Rock Nine*, *supra* note 10.
45. *Id.*
46. Daniel A. Farber, *The Supreme Court and the Rule of Law:* Cooper v. Aaron *Revisited*, 1982 U. ILL. L. REV. 387, 397 (1982) https://scholarship.law.berkeley.edu/facpubs/328/ (citing NUMAN V. BARTLEY, THE RISE OF MASSIVE RESISTANCE: RACE AND POLITICS IN THE SOUTH DURING THE 1950'S, 273 (1st ed. 1969)).
47. *Aaron v. Cooper*, *supra* note 12.
48. Cooper, 358 U.S. at 17.
49. U.S. CONST. art. VI, cl. 2.
50. U.S. CONST. art. VI, cl. 3.
51. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).
52. *Id*. at 177.
53. *Id.*

> the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system. It follows that the interpretation of the Fourteenth Amendment enunciated by this Court in the *Brown* case is the supreme law of the land, and Art. VI of the Constitution makes it of binding effect on the States.[54]

In essence, the Court ruled that it was the decider of the boundary question and that the boundary in the case of desegregation was on the side of the federal government and the *Brown* decisions.[55] As a result of this reasoning, the Court ruled that desegregation in Little Rock should move forward, that the state should desist from further efforts to thwart the desegregation plan, and that the state was bound to action by federalism and the Constitution, as interpreted by the Court in *Brown*.[56]

a. Judicial Supremacy and its critics

While many recognize that the situation in Little Rock required firm action in the face of the action of the Arkansas officials, the *Cooper* decision and its claim of what has been called the concept of "judicial supremacy" has had its critics. Perhaps most notably, a number of Presidents, e.g., Jefferson, Jackson, Lincoln, and Roosevelt have indicated opposition to the concept of judicial supremacy.[57] Academic commentators such as Professors Alexander Bickel and Phillip Kurland have written extensively criticizing the Court's *Cooper* decision.[58] Others have argued that, rather than supreme, the Court's pronouncements should be viewed as part of a dialogue with the other branches.[59] Former Attorney General Edwin Meese has expressed the view that constitutional interpretation is independent for each branch.[60]

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54. Cooper, 358 U.S. at 18.

55. *Id.*; *see also Aaron v. Cooper*, *supra* note 12.

56. *Cooper*, 358 U.S. at 18; *see also Aaron v. Cooper, supra* note 12.

57. *See generally* Larry D. Kramer, *The Supreme Court 2000 Term Foreword: We the Court*, 115 HARV. L. REV. 5, 6 (2001); Dale Carpenter, *Judicial Supremacy and Its Discontents*, 20 CONST. COMMENT 405 (2003), http://scholarship.law.umn.edu/faculty_articles/144; Paul Moreno, *The Myth of Judicial Supremacy*, NAT'L REV. (June 26, 2015, 6:20 PM), https://www.nationalreview.com/2015/06/not-law-land/.

58. *See, e.g.,* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 263–65 (2d ed. 1962); PHILIP KURLAND, POLITICS, THE CONSTITUTION AND THE WARREN COURT 116, 185 (1970).

59. *See, e.g.,* Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577 (1993).

60. Edwin Meese III, *Law of the Constitution*, 61 TUL. L. REV. 979, 981 (1987).

Additionally, Mr. Meese has asserted that there is a distinction between the Constitution and constitutional law. And, more particularly, he has claimed that the Constitution "is a document of our most fundamental law" while constitutional law is what the Supreme Court, "in its limited role of offering judgment" says about the Constitution.[61] Given this distinction, Mr. Meese views Supreme Court decisions as only binding on "the parties in a case and also the executive branch for whatever enforcement is necessary. However, such a decision does not establish a supreme law of the land that is binding on all persons and parts of the government henceforth and forevermore."[62] With respect to *Cooper*, Mr. Meese argues that the Court's assumption of supremacy was based on a "flawed reading" of *Marbury* and that the equating of the Court's decisions with the Constitution itself was based on a faulty syllogism of legal reasoning.[63]

Professor Ashutosh Bhagwat of Hastings College of Law has argued that the view that state officials are obliged to support and cooperate with federal laws is "inconsistent with the constitutional vision of the Framers" and that the actions of Arkansas's governor and legislature were moral and not constitutional errors.[64] Citing Madison's double security in Federalist 51,[65] Professor Bhagwat argues that the judicial supremacy of the *Cooper* decision contradicts the role of federalism in the Framer's design.[66] In his view "federalism is as important a part of our system of limited and balanced powers as is the separation of powers at the national level."[67] And, in order for the design to work "state governments, no less than the branches of the national government, must have the ability to resist (to their minds) improper assertions of power from the center."[68] Professor Bhagwat goes so far as to conclude that "sometimes the role of state officials includes disagreement with, and even defiance of, the policies and meanings championed by federal officials, including the federal judiciary."[69] With respect to the judiciary, the Professor does note that such resistance is not applicable to the state courts in that the state judges are bound to treat

61. *Id.* at 981–82.
62. *Id.* at 983.
63. *Id.* at 986; *but see* Allan Ides, *Judicial Supremacy and the Law of the Constitution*, 47 UCLA L. REV. 491, 519 (1999) ("[W]hen the Supreme Court declares what the law of the Constitution is, the Constitution and the Court's interpretation of it become one, and the Court's interpretation of the Constitution is, therefore one with the supreme law of the land.").
64. Ashutosh Bhagwat, *Cooper v. Aaron and the Faces of Federalism*, 52 ST. LOUIS U. L.J. 1087, 1087–88 (2008).
65. *Id.* at 1097.
66. *Id.* at 1087.
67. *Id.* at 1097.
68. *Id.* at 1097–98.
69. *Id.* at 1113.

federal law as supreme over state law.[70] On the other hand, as seen by the cases of Chief Judge Roy Moore of the Alabama Supreme Court involving the application of Supreme Court decisions on Ten Commandment displays and same-sex marriage, some argue that federal court decisions do not bind state courts.[71]

Professor Larry Kramer, Professor of Law at New York University, in discussing his view of "the idea of judicial supremacy,"[72] notes that "The Supreme Court has made its grab for power. The question is will we let them get away with it?"[73] In subsequent work, Professor Kramer writes that the public should be the ultimate supreme decider of the judicial decisions.[74] His view of the proper balance in our system is that "the authority of judicial decisions formally and explicitly depends on reactions from the other branches and, through them, from the public."[75] He answers his earlier question by declaring that "[t]he Supreme Court is not the highest authority in the land on constitutional law. We are."[76]

b. *Cooper* and general acceptance

On the other hand, while Professor Kramer calls the *Cooper* claim of judicial supremacy "bluster and puff," he acknowledges that the concept has found "wide public acceptance."[77] Others have also noted *Cooper's* acceptance. For example, David Strauss of the University of Chicago argues that the "moral capital" accumulated from cases like *Cooper* have elevated the judicial supremacy concept to a high water mark.[78] Professors Larry Alexander and Fred Schauer argue that *Cooper's* judicial supremacy offers a crucial component of the American system—settlement of contested issues.[79] In effect, Alexander and Schauer suggest that someone has to be the

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70. Bhagwat, *supra* note 64, at 1099.

71. Campbell Robertson, *Roy Moore, Alabama, Chief Justice, Suspended over Gay Marriage Order*, N.Y. TIMES (Sept. 30, 2016), https://www.nytimes.com/2016/10/01/us/roy-moore-alabama-chief-justice.html.

72. Kramer, *supra* note 57, at 6.

73. *Id.* at 169.

74. *See* LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW (2004).

75. *Id.* at 252.

76. *Id.* at 248.

77. *Id.* at 221.

78. David A. Strauss, *Little Rock and the Legacy of Brown*, 52 ST. LOUIS U. L.J. 1065, 1085 (2008), https://chicagounbound.uchicago.edu/journal_articles/5885/.

79. Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359, 1371–81 (1997); *see also* Evan Bernick, *Cooper v. Aaron and Judicial Authority: Lessons from Little Rock*, HUFFINGTON POST (Oct. 2, 2015, 11:46 AM, updated Oct. 2, 2016) https://www.huffingtonpost.com/evan-bernick/cooper-v-

decider regarding how the Constitution is to be applied in any particular situation and that someone is the judiciary.[80] Constitutional interpretations are continuously made by any number of decision makers, e.g., members of Congress, the President, the cop on the beat, and the courts at various levels.[81] In the end, however, the buck stops with the Court.[82]

Professor Josh Blackman has written an innovative article regarding the development of *Cooper* that is pending publication in the Georgetown Law Journal.[83] Entitled: The Irrepressible Myths of *Cooper v. Aaron*, this work explores the *Cooper* case with a creative research methodology—a close study of the written papers of eight of the nine justices who decided *Cooper*: Justices Black, Brennan, Burton, Clark, Douglas, Frankfurter, Harlan, and Chief Justice Warren.[84] In particular, the work explores the concepts of judicial supremacy and universality. Professor Blackman describes the judicial supremacy concept as the view that whatever the Supreme Court holds is the supreme law of the land and the universality concept as the belief that the decisions of the Supreme Court apply broadly, i.e., to those not parties to the underlying lawsuit.[85] Professor Blackman concludes that judicial supremacy of Supreme Court rulings and their universal application are, in fact, myths—myths that are not supported by the Constitution but rather by social norms.[86] In the end, however, Professor Blackman recognizes that not following Supreme Court decisions like *Brown* would be irresponsible and that such obedience is "justified by prudence, the need for stability, and respect for the judiciary."[87]

2. *Boundaries: Congress, the Court and "Commandeering"*

While the *Cooper* decision dealt with the boundaries between the Court and state officials, another aspect of modern American federalism involves the boundary between actions of the federal government and the states. As history notes, this boundary has been the subject of debate since the inception of the Constitution.[88] A recent aspect of this debate has been the

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aaron-and-judici_b_8233796.html (arguing that the courts serve as a valuable final check on unconstitutional conduct).

80. *See* Alexander & Schauer, *supra* note 79, at 1362.

81. *Id.* at 1359–60.

82. *See generally id.* at 1387.

83. Josh Blackman, *The Irrepressible Myths of Cooper v. Aaron*, 107 GEO. L.J. (forthcoming 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3142846).

84. No written records regarding the case were available for the ninth Justice, Justice Charles Evans Whittaker. *See id.* at 30.

85. *Id.* at 16–17.

86. *Id.* at 53–54.

87. *Id.* at 54.

88. *See generally* EPSTEIN & WALKER, *supra* note 15, at 193; LEACH, *supra* note 34.

question of federal requisitioning of state policies and personnel. A significant development in this area has been the involvement of the Supreme Court in setting boundaries between legitimate cooperation between federal and state actors and the forced cooperation that has become known as federal commandeering.

What is this thing called "commandeering?" Where did it come from and what does it have to do with modern American federalism? According to the Merriam-Webster Dictionary, to commandeer means to "take arbitrary or forcible possession of."[89] The term has as its history the military taking control of civilian resources.[90] With respect to federalism, commandeering means the requiring by the federal government—particularly by Congress—of states or state officials to adopt or enforce federal law or policy.[91] More specifically, the term has come to mean imposing targeted, affirmative, coercive duties on state legislators or executive officials.[92] In response to such action, an anti-commandeering doctrine has developed.[93] This doctrine is largely based on the 10th Amendment and its reservation of unenumerated powers to the states or the people.[94] The constitutional limit on commandeering was established by the two remaining Supreme Court cases of our trifecta. These two cases have set in place a marker for the boundary between federal and states actions. This anti-commandeering marker prohibits the federal government from forcing states to do its bidding and has been called a "judicially-created federalism protection."[95]

a. *New York v. United States*

Second in the trifecta of modern federalism cases is the 1992 case of *New York v. United States*. This case involved the Low-Level Radioactive Waste Policy Amendments Act of 1985.[96] This Act was designed to address the difficult issue of the disposal of radioactive material generated by a number of sources, e.g., the government, hospitals, research institutions, and

89. *Commandeer*, MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/commandeer (last visited Feb. 2, 2019).

90. *Id.*

91. *See generally* Bhagwat, *supra* note 64, at 1098–99.

92. *See* Mathew D. Adler, *State Sovereignty and the Anti-Commandeering Cases*, 574 ANNALS 158, 163–64 (2001), https://doi.org/10.1177/000271620157400112.

93. *Id.* at 163–68; *see generally* Steven Schwinn, *Symposium: It's Time to Abandon Anti-Commandeering (But Don't Count on this Supreme Court to Do it)*, SCOTUSBLOG (Aug. 17, 2017, 10:44 AM), http://www.scotusblog.com/2017/08/symposium-time-abandon-anti-commandeering-dont-count-supreme-court/.

94. Schwinn, *supra* note 93.

95. *Id.*

96. 42 U.S.C. §§ 2021b–2021j (2012).

various industries.[97] Provisions of the Act offered a variety of incentives to the states, including financial incentives, for appropriate disposal of the wastes.[98] The Act also provided that, should a state not provide for the disposal of the wastes, the state would "take-title to" and possession of the wastes.[99] And, as a result, these states would be liable for any subsequent resultant damages from the wastes.[100]

Justice Sandra Day O'Connor wrote the six-justice majority opinion in *New York* that struck down the "take-title" section of the Act.[101] While addressing the modern problem of radioactive wastes, Justice O'Connor noted that federalism is an old question: "The constitutional question is as old as the Constitution: It consists of discerning the proper division of authority between the Federal Government and the States."[102] Continuing with a quote from *Hodel v. Virginia Surface Mining & Reclamation Association, Inc.*,[103] Justice O'Connor recognized that in some cases federalism imposes limits, not on the states, but the federal government: "As an initial matter, Congress may not simply 'commandee[r] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.'"[104] And declaring that "[s]tates are not mere political subdivisions of the United States,"[105] she found that "whatever the outer limits of that sovereignty may be, one thing is clear: The Federal Government may not compel the States to enact or administer a federal regulatory program."[106]

Justice O'Connor discussed *Cooper v. Aaron* in her consideration of commandeering and federalism.[107] She specifically addressed the role of the Court in deciding issues regarding federal power raised by the United States[108] in response to the federal government's claim based on a number of cases, including *Cooper*, that "the Constitution does, in some circumstances, permit federal directives to state governments."[109] Justice O'Connor

97. New York v. United States, 505 U.S. 144, 149 (1992).

98. *Id.* at 152–54; *see generally* Evan H. Caminker, *State Sovereignty and Subordinacy: May Congress Commandeer State Officers to Implement Federal Law*, 95 COLUM. L. REV. 1001, 1009–10 (1995).

99. 42 U.S.C. § 2021 (e)(d)(2)(C).

100. *Id.*

101. *New York*, 505 U.S. at 188.

102. *Id*. at 149.

103. *See* Hodel v. Va. Surface Mining & Reclamation Ass'n, Inc., 452 U.S. 264 (1981).

104. *New York*, 505 U.S. at 161 (citing *Hodel*, 452 U.S. at 288, where the Court found that the Act in question did not impermissibly commandeer the state).

105. *Id.* at 188.

106. *Id.*

107. *Id.*

108. *Id*. at 178–79.

109. *New York*, 505 U.S. at 178.

explained that the federal courts' power to command state officials to comply with federal law are not powers shared with Congress.[110] Justice O'Connor concluded:

In sum, the cases relied upon by the United States hold only that federal law is enforceable in state courts and that federal courts may in proper circumstances order state officials to comply with federal law, propositions that by no means imply any authority on the part of Congress to mandate state regulation.[111]

b. *Printz v. United States*

Third, in the trifecta of modern federalism cases, is the 1997 case of *Printz v. United States*. *Printz* is a case involving the Gun Control Act of 1968.[112] The Act prohibits firearms dealers from transferring firearms to a variety of individuals including convicted felons, unlawful users of controlled substances, fugitives, individuals judged to be mentally defective and persons dishonorably discharged from the military.[113] A 1993 amendment to the Act, the Brady Handgun Violence Prevention Act (Brady Act),[114] included a provision to establish a national database for instant background checks regarding firearms sales. An additional provision required local state law enforcement officers to conduct background checks until the national database became operational.[115] Certain county sheriffs challenged the constitutionality of the Brady Act's interim local check provisions as improper commandeering.[116]

Justice Antonin Scalia wrote the majority opinion in *Printz*, which affirmed the *New York v. United States* prohibition on congressional attempts to compel state actions and extended that prohibition to congressional efforts to compel actions of individual state officials.[117] In particular, Justice Scalia emphasized a constitutional commitment to a "dual sovereignty" view of modern American federalism based on the 10th Amendment.[118] Justice Scalia's view of federalism envisioned two separate spheres of authority as essential to the overall constitutional design:

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110. *Id.* at 179.
111. *Id.*
112. 18 U.S.C. § 921 *et seq*. (1995); s*ee* Printz v. United States, 521 U.S. 898, 902–04 (1997).
113. *Printz*, 521 U.S. at 902.
114. Brady Handgun Violence Prevention (Brady Law) Act, Pub. L. 103-159, 107 Stat. 1536 (1993).
115. 18 U.S.C. § 922(s)(2) (2018).
116. *Printz*, 521 U.S. at 898.
117. *Id.* at 935.
118. *Id.* at 918–919.

This separation of the two spheres is one of the Constitution's structural protections of liberty. "Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front."[119]

With respect to the judiciary, Justice Scalia drew a distinction between federal statutes imposing obligations on state courts and those directed to state executive officials. While the courts, as part of the federal legal system, can be compelled, Justice Scalia held that state officials are different and cannot be pressed into federal service.[120]

c. Development of anti-commandeering doctrine

Recent cases have continued the *New York* and *Printz* view of modern American federalism. In the 2012 case of *National Federation of Independent Business v. Sebelius*,[121] the various provisions of the 2010 Patient Protection and Affordable Care Act[122] were challenged under a number of grounds. Ultimately, the basic Act was upheld as valid under Article II Section 8—the Taxing and Spending Clause of the Constitution.[123] However, one challenged provision of the Act was declared an unconstitutional intrusion into state sovereignty and violative of the principles of federalism.[124] This provision stripped all federal Medicaid funding from states not participating in the Medicaid Expansion aspect of the Act. [125] The majority opinion of Chief Justice John Roberts regarding the rejection of the loss of funding provision rested largely on the *New York-Printz* view of federalism. Chief Justice Roberts summarized the limits on the federal government role in modern American federalism: "the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions."[126] And, while he recognized that "Congress may use its spending power to create incentives for States to act in accordance with federal policies,"[127] Chief Justice Roberts cautioned: "when 'pressure turns into compulsion,' the

119. *Id.* at 921 (quoting Gregory v. Ashcroft, 501 U.S. 452, 458 (1991)).
120. *Id.* at 907.
121. Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519 (2012).
122. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), as amended by Health Care and Education Reconciliation Act of 2010, Pub. L. 111-152, 124 Stat. 1029 (2010) (codified as amended in scattered titles of U.S.C.).
123. *Sebelius*, 567 U.S. at 575.
124. *Id.* at 577–79.
125. 42 U.S.C. § 1396c (2018); *Id.* at 581.
126. *Sebelius*, 567 U.S. at 577.
127. *Id.*

legislation runs contrary to our system of federalism."[128] Citing *New York*, he reaffirmed that "the Constitution simply does not give Congress the authority to require the States to regulate."[129]

Not surprisingly, this anti-commandeering doctrine has been questioned. For example, Professor Steven Schwinn argues that this "doctrine has no basis in the text and structure of the Constitution" and instead the Supremacy Clause and Oath Clause (Article VI Clause 4) bind state laws and officials to federal law.[130] Additionally, Professor Schwinn points out that the Constitution itself commandeers the states in various ways e.g., requiring state legislatures to provide for the election of federal representatives in Congress (Article I Sections 3 and 4), requiring state officials to deliver fugitives from justice (Article IV), setting militia appointment and training to federal standards (Article I Section 8) and requiring the granting of full faith and credit to the laws of other states (Article IV).[131] Professor Schwinn concludes that history does not support the anti-commandeering doctrine. More specifically, he cites Hamilton in Federalist No. 27 and Madison in Federalist No. 44, as evidence of the framer's expectancy that state officials would carry out federal laws.[132] Similarly, Professor Evan Caminker also claims that the anti-commandeering view of proper federal actions is a faulty view of dual sovereignty because "it relies on an unpersuasive originalist argument concerning the Framers' constitutional design."[133] Other scholars view the anti-commandeering doctrine as without real precedent.[134]

Despite these objections, the anti-commandeering doctrine is alive and well. Just this year, the Supreme Court decided another modern federalism

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128. *Id.* at 577–78 (quoting Steward Machine Co. v. Davis, 301 U.S. 548, 590 (1937)).

129. *Id.* at 577 (quoting New York v. United States, 505 U.S. 144, 178 (1989)).

130. Schwinn, *supra* note 93.

131. *Id.*

132. *Id.*

133. Caminker, *supra* note 98, at 1006.

134. *See generally* Vicki C. Jackson, *Federalism and the Uses and Limits of Law: Printz and Principle?,* 111 HARV. L. REV. 2180, 2192 (1998), https://www.jstor.org/stable/1342457 ?seq=1 - metadata_info_tab_contents (an examination of the basis for the *Printz* decision, reveals only the *New York v. United States* case as precedent for the anti-commandeering doctrine); Andrew B. Coan, *Commandeering, Coercion, and the Deep Structure of American Federalism*, 95 B.U. L. REV. 1, 8–9 (2015), http://www.bu.edu/bulawreview/files/2015/02 /COAN.pdf (noting that limited caselaw has applied the anti-commandeering doctrine); Elbert Lin & Thomas M. Johnson Jr., *Symposium: High Stakes for Federalism in Heavyweight Clash over the Anti-Commandeering Doctrine*, SCOTUSBLOG (Aug. 17, 2017, 2:44 PM), http://www.scotusblog.com/2017/08/symposium-high-stakes-federalism-heavy weight-clash-anti-commandeering-doctrine/ (in a discussion prior to the *Murphy* decision being handed down observing that the anti-commandeering doctrine will have been applied only three times in the Supreme Court's history should it be applied in *Murphy—New York*, *Printz*, and *Murphy*).

case involving sports gambling in the states. In the case of *Murphy v. NCAA*,[135] decided May 14, 2018, the Professional and Amateur Sports Protection Act,[136] which limited state and local sports gambling, was challenged as violative of the "anti-commandeering" principles of the Constitution. Justice Samuel Alito wrote the majority opinion that relied on a dual sovereignty view of federalism under the New York-Printz rationale:[137]

> The legislative powers granted to Congress are sizable, but they are not unlimited. The Constitution confers on Congress not plenary legislative power but only certain enumerated powers. Therefore, all other legislative power is reserved for the States, as the Tenth Amendment confirms. And conspicuously absent from the list of powers given to Congress is the power to issue direct orders to the governments of the States. The anticommandeering doctrine simply represents the recognition of this limit on congressional authority.[138]

Given these recent examples of the continued application of the "anti-commandeering" doctrine developed in the second and third trifecta cases, *New York and Printz*, the concept seems to have established itself as an important factor in the boundary determinations between Congress and the states that is enforced by the courts.

d. Recent modern federalism applications

The *Murphy* decision illustrates that debates regarding modern American federalism are ongoing. Another example of current debates concerning the continuing federal-state boundary line issue is seen in the context of federal immigration efforts that are countered by actions of certain states. Here we see the trifecta at play. In some cases, a state will want to go beyond federal immigration requirements and take action on its own. This situation was addressed in *Arizona v. United States*,[139] a Supreme Court case involving an Arizona state law that purported to give immigration law enforcement powers to local law enforcement. The case raised the question of the boundary between the federal and state governments and who decides.[140] The Supreme Court ruled several sections of the state law involved federal matters and were therefore preempted from Arizona's authority.[141] As a result, the Supreme Court limited Arizona from

135. *See* Murphy v. Nat'l Collegiate Athletic Ass'n, 138 S. Ct. 1461 (2018).
136. 28 U.S.C. § 3701 et. seq. (1992).
137. *See Murphy*, 138 S. Ct. at 1467.
138. *Id.* at 1476.
139. Arizona v. United States, 567 U.S. 387, 388 (2012).
140. *Id.* at 399–400.
141. *Id*. at 410.

taking certain actions in the immigration field.[142] This illustrates a flipped version of *Cooper*, which demanded the taking of actions by Arkansas officials regarding desegregation.

On the other hand, a commandeering situation has arisen when states do not want to assist in the enforcement of federal immigration laws. Several state and local governments have declared themselves as "sanctuaries" from the federal government's immigration law enforcement activities.[143] This sanctuary status can take a variety of forms. Generally, the sanctuary means that the local governments will not cooperate or assist with federal actions—especially immigration enforcement.[144] The movement stems from the 1980s when a number of groups, religious groups in particular, opposed federal asylum policy regarding Central American refugees.[145] Recently, President Trump issued an Executive Order that purported to withhold federal funds from localities that refused to support the Administration's immigration enforcement actions.[146] Not unexpectedly, this federalism issue has been taken to the courts. For example, in the case of *City of Chicago v. Sessions*, the United States Court of Appeals for the Seventh Circuit ruled that the Administration's effort to force assistance through the funding process goes beyond what the applicable statutes allow: "The Attorney General, in this case, used the sword of federal funding to conscript state and local authorities to aid in federal civil immigration enforcement" and characterized the approach as a "usurpation of power."[147]After a number of federal courts issued injunctions blocking the withholding of funds and the upholding of the injunctions at the federal appellate level, the Trump Administration has asked the Supreme Court to rule on the injunctions.[148] The situation pends.

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142. *Id*. at 416.

143. *See generally* Tal Kopan, *What are Sanctuary Cities, and Can They be Defunded*?, CNN (Mar. 26, 2018, 3:30 PM), https://www.cnn.com/2017/01/25/politics/sanctuary-cities-explained/index.html.

144. *Id.*

145. *Id.*

146. Exec. Order No. 13768, 82 Fed. Reg. 8799 (Jan. 25, 2017). For a discussion of this action by the President and its relation to the commandeering question, see Ilya Somin, *Why Trump's Executive Order on Sanctuary Cities is Unconstitutional*, WASH. POST (Jan. 26, 2017), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/01/26/constitutional-problems-with-trumps-executive-order-on-sanctuary-cities/?utm_term=.6a1f6980b718.

147. City of Chicago v. Sessions, 888 F.3d. 272, 277 (7th Cir. 2018).

148. Ariane de Vogue, *Trump Admin Asks Supreme Court to Lift Ban on Sanctuary City Policy*, CNN (June 18, 2018 10:37 PM), https://www.cnn.com/2018/06/18/politics/sanctuary-cities-supreme-court/index.html.

III. CONCLUSION

This discussion of the trifecta of modern American federalism cases has involved two important principles of the American system of government—separation of powers and federalism.[149] *Cooper's* pronouncements regarding judicial supremacy, in particular, have had a direct impact on these concepts. As noted previously,[150] the claim that the Court's interpretations of the Constitution are merely interpretations of constitutional law and not the Constitution has been debated. The reality is that the Court's interpretations bring about a settlement of the constitutional questions that come before it. The Court's interpretations may be challenged, but they are usually followed. In that respect, Supreme Court decisions are enforced through general acceptance. It is true that, over time, the Court's decisions may be modified or overturned or even subject to Article V amendment. As a result, the law is dynamic. This dynamism is part of the jurisprudence of the Supreme Court. There have always been changes in the boundaries between the states and the federal governments. We see this in the different eras of dual and cooperative federalism.[151]

Nonetheless, the Court's interpretations are followed by the states—perhaps grudgingly as seen in *Cooper*. And, as set out in *New York* and *Printz*, this also applies to the other branches of the federal government—perhaps grudgingly as well. *Cooper's* principles regarding judicial supremacy apply to both the federal and the state governments in cases involving the boundaries between the two.

The debate over modern American federalism, while in some ways a moving target, is bounded by our trifecta of modern American federalism cases: *Cooper*, *New York*, and *Printz*. As the first-place finisher in the trifecta, *Cooper* stands for the proposition that the Supreme Court is the "decider" in cases involving the principles of federal-state boundaries. In particular, *Cooper* deals with state actions in modern American federalism. And, with respect to federal actions regarding states in modern American federalism, the second and third place finishers of the trifecta, *New York* and *Printz*—address limits as well—applicable to actions of the federal government. Who decides is the key question in the debates over modern American federalism. The answer is found in a trifecta of cases, which begins with *Cooper v. Aaron*.

Recently, the University of South Alabama hosted Professor Michael Gerhardt of the University of North Carolina School of Law as part of the

149. *See supra* Part II.B.

150. *See supra* Part II.C.1.a.

151. *See supra* Part II.B. Our trifecta is a part of this dynamism. *Cooper* was decided during the era of the Post-New Deal Court's Cooperative Federalism while *New York* and *Printz* were decided during the era of the Rehnquist Court's Mild Dual Federalism.

2018 Constitution Day program. After discussing several of the docketed cases for the Supreme Court's upcoming 2018-2019 term, Professor Gerhardt, who has served as Special Counsel to the Senate Judiciary Committee regarding several Supreme Courts Justice nominations, offered commentary on the Supreme Court and the direction of the law. In his remarks, he emphasized that, in his view, the Court's future work would largely be in the areas of statutory interpretation and questions of federalism.[152] Professor Gerhardt is likely to be right and, as a result, *Cooper* is especially timely, even after sixty years.

152. Michael Gerhardt, Remarks at the Constitution Day Presentation of the University of South Alabama, Mobile, Alabama (Sept. 17, 2018) (heard by the author, who was in attendance).