

COOPER v. AARON AND THE FACES OF FEDERALISM

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The story of *Cooper v. Aaron*¹ and the Little Rock desegregation crisis has many dimensions, one of the most important of which relates to federalism. In particular, the consensus understanding is that Little Rock was a story of federalism gone spectacularly wrong. Cut to the core, in Little Rock state government officials were illegitimately resisting the enforcement of federal law which was both legally and morally correct, creating a crisis which ultimately had to be resolved through the barrel of a gun (to be specific, the guns of the 101st Airborne), and through the unprecedented intervention of the United States Supreme Court. Ultimately, however, Little Rock resulted in the triumph of federal law, including the Federal Constitution, as well as the reaffirmation of the supremacy of the Supreme Court as the ultimate expositor of the meaning of that law. Concomitantly, the Little Rock crisis demonstrated the fundamental illegitimacy and immorality of state, as well as private, efforts to resist the implementation of federal law and the Federal Constitution, as interpreted by the Supreme Court. That is the abiding lesson of Little Rock, a lesson which has substantially shaped background assumptions and political discourse in the subsequent half century.

It is the contention of this Article that this lesson is incorrect. There is, I will argue, absolutely nothing improper about state officials resisting, even actively, the implementation of federal law or the Federal Constitution. This is true as a matter of moral principle, and as a matter of constitutional obligation. Indeed, the contrary suggestion, that state officials are obliged to support and cooperate with the implementation of federal law, is inconsistent with the constitutional vision of the Framers. Ultimately, what was wrong with the actions of Governor Faubus and other Arkansas state officials during the Little Rock crisis was not the fact that they were resisting federal authority, or even

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

that they were resisting the Constitution, it was the fact that they were threatening children with violence, and all in the name of defending an evil system of racial segregation. In short, their error was a moral one, not a constitutional one.

I. THE LITTLE ROCK CRISIS

To understand the lessons and limits of Little Rock, some factual background is necessary.² On May 17, 1954, the Supreme Court announced its path-breaking decision in *Brown v. Board of Education*,³ holding that racial segregation of public schools violates the Equal Protection Clause of the Fourteenth Amendment. Soon thereafter, the Board of the Little Rock Independent School District in Arkansas announced its intention to voluntarily comply with *Brown*.⁴ The following year, the Little Rock School Board announced its desegregation plan, under which desegregation would begin in 1957 with the admission of a small number of African American students into Central High School, and culminate in complete desegregation in the early 1960s.⁵ Unhappy with the pace of desegregation under this plan, the NAACP (on behalf of African American parents) filed suit in early 1956.⁶ Their claims, however, were rejected by the district court,⁷ and in April of 1957 this holding was affirmed by the Eighth Circuit on appeal.⁸ As of the summer of 1957, Little Rock appeared prepared to proceed with desegregation, with little local resistance.

In the rest of Arkansas, however, the implementation of *Brown* met with more resistance. In the fall of 1956, Arkansas voters approved a state constitutional amendment requiring that state officials resist *Brown*.⁹ And in August of 1957, at the eve of the new school year, Governor Orval Faubus of Arkansas instigated a series of actions designed to prevent desegregation (Faubus had, until this time, adopted a relatively moderate position on *Brown*).¹⁰ First, Governor Faubus arranged for white parents to file suit in state court, seeking to enjoin the admission of the African American students to Central High—a request which the state court granted.¹¹ The next day,

2. The following description draws heavily upon Keith E. Whittington, *The Court as the Final Arbiter of the Constitution: Cooper v. Aaron* (1958), in *CREATING CONSTITUTIONAL CHANGE* 9–21 (Gregg Ivers & Kevin T. McGuire eds., 2004).

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

4. Whittington, *supra* note 2, at 10.

5. *Id.*

6. *See* *Aaron v. Cooper*, 143 F. Supp. 855, 866 (E.D. Ark. 1956).

7. *Id.* at 866.

8. *Aaron v. Cooper*, 243 F.2d 361, 364 (8th Cir. 1957).

9. Whittington, *supra* note 2, at 12.

10. *Id.*

11. *Id.*

however, at the school board's request the federal district court entered an order enjoining the state plaintiffs from enforcing the state order—a decision which the Eighth Circuit eventually affirmed.¹² His legal options exhausted, Governor Faubus turned to direct action.

On Monday, September 2, 1957, Governor Faubus ordered the Arkansas National Guard to Central High School, with orders to prevent the nine African American children designated to initiate desegregation from entering Central High.¹³ Faubus's decision was not based on any request by local officials, or any direct evidence of local unrest.¹⁴ The next day none of the children attempted to enter the school, but on September 4, after the district court ordered that desegregation proceed, the nine students appeared at Central High.¹⁵ They were turned back by the National Guard and a large and angry mob.¹⁶ On Monday, September 10, the district court requested that the federal government enter the case as *amicus curiae*, and seek an injunction against the Governor and officers of the Arkansas National Guard.¹⁷ Upon the federal government's compliance, the district court ordered the Governor and officers to be added as party defendants to the *Aaron v. Cooper* litigation, and on September 21, following a hearing, the court issued an injunction forbidding the Arkansas state officials from obstructing or preventing the African American students from attending Central High.¹⁸

The Governor complied, and from that point on he took no further actions which sought to physically resist the admission of the students.¹⁹ He, and other state officials, however continued to resist desegregation through other means, such as urging resistance to desegregation, adopting statutes which sought to interfere with desegregation efforts (for example, by passing a statute in January of 1957 eliminating the requirement of compulsory attendance in racially integrated schools),²⁰ and ultimately, in September of 1958, closing the Little Rock public schools in the face of imminent desegregation, pursuant to laws passed during a special session of the Arkansas legislature called by Governor Faubus in August of 1958.²¹

12. *Thomason v. Cooper*, 254 F.2d 808, 808, 811 (8th Cir. 1958); *see also* Whittington, *supra* note 2, at 12.

13. Whittington, *supra* note 2, at 12–13.

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

15. Whittington, *supra* note 2, at 13.

16. *Id.*

17. *Id.*

18. *Aaron*, 156 F. Supp. at 222. The Eighth Circuit affirmed this order on the same day it affirmed the injunction against the state court plaintiffs. *Faubus v. United States*, 254 F.2d 797, 799, 808 (8th Cir. 1958); *Thomason v. Cooper*, 254 F.2d 808, 808, 811 (8th Cir. 1958).

19. *See* Whittington, *supra* note 2, at 14.

20. *Aaron v. Cooper*, 163 F. Supp. 13, 15 (E.D. Ark. 1958).

21. Whittington, *supra* note 2, at 16–17. The state legislation was ultimately struck down by

On Monday, September 23, 1957, nine African American students entered Central High, under the protection of the local police department (necessary because a large and violent mob remained gathered in front of the school).²² At midday, the school sent the students home for safety reasons.²³ The following day, President Eisenhower issued an order federalizing the Arkansas National Guard (thereby removing Governor Faubus from command of those forces), and simultaneously ordered the 101st Airborne to immediately deploy in Little Rock.²⁴ On Wednesday, September 25, the African American students entered Central High under the protection of federal troops.²⁵ They attended Central High for the rest of the school year, first under the protection of the 101st Airborne, and then under the protection of the federalized National Guard.²⁶ Throughout the school year, the students (along with some school officials), were subjected to physical and verbal abuse and threats, both from fellow students and from adults.²⁷

In February of 1958, the Little Rock school board filed a petition with the federal district court, asking for permission to delay for several years implementation of its desegregation plan in light of the violent and unsettled conditions in and about the school.²⁸ In June, the district court granted the petition.²⁹ The plaintiffs appealed to the Eighth Circuit, but also filed a direct appeal to the Supreme Court seeking a stay of the district court order.³⁰ The Supreme Court denied the motion because the Eighth Circuit was the proper forum for an appeal, but concluded with the following thought: “[w]e have no doubt that the Court of Appeals will recognize the vital importance of the time element in this litigation, and that it will act upon the [appeal] in ample time to permit arrangements to be made for the next school year.”³¹ On August 18, 1958, a divided, en banc Eighth Circuit reversed the district court, concluding desegregation must proceed despite the disruption and violence.³² Two days later, President Eisenhower stated in a press conference that his feelings regarding Little Rock had not changed in the intervening year (i.e., that federal

the federal courts, resulting in the reopening of the Little Rock schools, and their eventual desegregation, beginning in August of 1959. *Id.* at 20.

22. Whittington, *supra* note 2, at 14–15.

23. *Id.* at 15.

24. *Id.*

25. *Id.*

26. Aaron v. Cooper, 257 F.2d 33, 36 (8th Cir. 1958).

27. *Id.*

28. Whittington, *supra* note 2, at 15.

29. Aaron v. Cooper, 163 F.Supp. 13, 32 (E.D. Ark. 1958).

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

31. *Id.*

32. Aaron, 257 F.2d at 40.

troops remained available to enforce judicial orders).³³ In the meantime, however, the Chief Judge of the Eighth Circuit (who had dissented from the en banc decision) stayed the Eighth Circuit decision, thereby maintaining the district court's order permitting the delay to remain in place.³⁴ The NAACP filed an immediate petition with the Supreme Court.³⁵ In response, Chief Justice Warren called a special session of the Court, and ordered hearings on August 28 and September 11.³⁶ On September 12, the Court issued a brief order affirming the Eighth Circuit, thereby permitting the Little Rock schools to open on September 15.³⁷ On September 29, the Court issued its full opinion.³⁸

II. WHAT THE COURT SAID

The Supreme Court's opinion in *Cooper v. Aaron* was important and unusual, both because of its format and its message. The format was unusual because the Court issued an opinion signed jointly by all nine Justices, an unprecedented event clearly designed to emphasize the institutional significance of the decision. The message was important both because it strongly reaffirmed the Court's commitment to its holding in *Brown*, and because it conveyed an extremely strong statement of judicial supremacy in constitutional interpretation. My focus is on the second of the Court's messages, and what it *meant*.

The conventional understanding of the judicial supremacy holding of *Cooper* is that *Cooper* represents the Court's strongest assertion of primacy in the power of constitutional interpretation, superior to that of all elected officials. The following quotation from the opinion captures this thought:

[*Marbury v. Madison*] declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system. It follows that the interpretation of the Fourteenth Amendment enunciated by this Court in the *Brown* case is the supreme law of the land, and Art. VI of the Constitution makes it of binding effect on the States "any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." Every state legislator and executive and judicial officer is solemnly committed by oath taken pursuant to Art. VI, ¶ 3 "to support this Constitution."³⁹

33. Whittington, *supra* note 2, at 16.

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.* at 17.

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

39. *Id.* at 18.

This passage appears to state the following syllogism (though not in this order). First, the Constitution is the supreme law of the land, binding on all officials. Second, the Supreme Court possesses the ultimate authority to interpret and give meaning to the Constitution. Therefore, all officials are bound to obey and support the Supreme Court's interpretations of the Constitution.

Needless to say, the understanding of judicial authority expressed in *Cooper* has proven highly controversial. In particular, the Court's equation, in *Cooper*, of the Constitution with the Court's interpretations of the Constitution has been heavily criticized.⁴⁰ Interestingly, however, this criticism has focused almost exclusively upon the relationship between the Supreme Court and other *federal* officials (notably Congress and the President) in the task of constitutional interpretation. Thus, the critics cite as evidence against *Cooper* Lincoln's First Inaugural rejecting the binding force of the *Dred Scott* case on the President,⁴¹ as well as the need for independent congressional authority to interpret the Civil War amendments in the course of enforcing them.⁴² The general (though not universally accepted) consensus seems to be that acceptance of the *Cooper* Court's vision of judicial supremacy vis-à-vis federal officials would strike a fundamental blow to our system of balance of powers, by removing all checks on the judiciary within its sphere of authority.

What is peculiar about this criticism of *Cooper* is not that it is wrong, but that it is beside the point. *Cooper* was not a case about inter-branch conflict within the federal government; it was about a conflict between the federal judiciary and a *state* government. Indeed, President Eisenhower had demonstrated rather clearly in Little Rock in 1957 that the executive branch would *not* contest judicial authority over desegregation,⁴³ and had orally reconfirmed that commitment just a month before *Cooper* was decided.⁴⁴ Nor had Congress taken any active steps to oppose the judiciary. Thus, the real question in *Cooper* was the relationship between judicial interpretations of the Constitution and *state* officials. Indeed, the critical passages in *Cooper*

40. See, e.g., MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* 8–9, 14–15, 22–23 (1999); Michael McConnell, *Institutions and Interpretation: A Critique of City of Boerne v. Flores*, 111 HARV. L. REV. 153, 194 (1997); Edwin Meese III, *The Law of the Constitution*, 61 TUL. L. REV. 979, 986 (1987); Michael Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217, 225 (1994). But see generally Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359 (1997) (defending judicial supremacy).

41. First Inaugural Address, 7 PUB. PAPERS 3210–11 (March 4, 1861).

42. See McConnell, *supra* note 40, at 174–81.

43. See Letter from Dwight D. Eisenhower, President, United States of America, to John C. Stennis, Senator (D., Miss.), United States Senate (Oct. 7, 1957), available at <http://www.eisenhower.utexas.edu/dl/LittleRock/littlerockdocuments.html>.

44. Whittington, *supra* note 2, at 16.

regarding judicial power say only that “[n]o *state* legislator or executive or judicial officer can war against the Constitution without violating his undertaking to support it.”⁴⁵ Furthermore, the Court relies in reaching this conclusion on the Supremacy Clause,⁴⁶ which is addressed to state, not federal law (leaving aside the doubtful argument that the Clause also supports the institution of judicial review of congressional legislation).⁴⁷

So, what the Court said in *Cooper v. Aaron* was that when the Supreme Court of the United States announces an authoritative interpretation of the Constitution, it is obligatory upon state officials to comply with, and support, that interpretation. This is a much more modest statement than the overarching claim of judicial supremacy for which *Cooper* is cited (including by the Supreme Court).⁴⁸ Indeed, many of the concerns expressed regarding judicial supremacy in constitutional exposition vis-à-vis the President and Congress do not generally arise in the context of state officials because the occasions in which state officials will have to interpret the Constitution in the course of their duties are inevitably more rare. Furthermore, there are sound structural reasons why one might wish to distinguish between state and federal officials in this area: the President and the members of Congress are national officials, chosen by the people of this nation to implement the general scheme of the Constitution. Each is subject to substantial institutional checks, internally, externally (notably from each other), and democratically, which are likely to constrain unreasonable constitutional positions. And both Congress and the President, as federal officials, have special expertise and experience regarding the meaning of the Federal Constitution. None of these things can be said about the myriad of state and local officials in this country, who are *not* nationally accountable, who do not face the special institutional checks and balances (themselves reflecting national pressures) set forth in the Constitution, and who have no special authority or expertise regarding the Constitution. As such, federal judicial supremacy over state officials on constitutional issues seems both more important, and less troublesome, than over federal officials—a thought reflected in Holmes’s famous comment regarding the need for federal judicial power over the states.⁴⁹ All of this

45. *Cooper v. Aaron*, 358 U.S. 1, 18 (1958) (emphasis added).

46. *Id.*

47. *Cf. Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 180 (1803) (arguing that the oath of office taken by officials requires them to remain loyal first and foremost to the Constitution, and then to the individual laws of each state).

48. *See, e.g., United States v. Morrison*, 529 U.S. 598, 616 n.7 (2000).

49. Oliver Wendell Holmes, Speech at a Dinner of the Harvard Law School Association of New York: Law and the Court (Feb. 15, 1913), in *COLLECTED LEGAL PAPERS* 291, 295–96 (1920) (“I do not think the United States would come to an end if we lost our power to declare an Act of Congress void. I do think the Union would be imperiled if we could not make that declaration as to the laws of the several States.”).

perhaps explains why, even though the broader implications of the statements in *Cooper* suggesting judicial supremacy over federal officials has proven controversial, few people in recent years have challenged the *Cooper* Court's more specific position regarding the obligations of state officials. Nonetheless, the Court's position is quite wrong.

III. WHAT THE COURT MEANT

To understand the difficulty with the Court's statements in *Cooper*, it is first necessary to parse out what the *Cooper* Court meant by its assertion of judicial supremacy. In particular, one must determine specifically what obligations the Court was asserting were imposed on state officials by its decision in *Brown*, because much turns on that question. As it turns out, *Cooper* is rather ambiguous on this question, but insofar as the Court did suggest some answers, they are sweeping and troubling.

At a minimum, the Court might have been saying that it was unlawful for Governor Faubus to order the National Guard to prevent the entry of African American students into Central High School in September of 1957. If so, that claim is surely correct and (today) uncontroversial. Faubus's actions may well have constituted contempt of court from the start,⁵⁰ and certainly could have been punishable as contempt after the district court enjoined them on September 21. Furthermore, as a general matter it seems unproblematic to assert that state officials may not, consistent with their oaths and the Supremacy Clause, physically obstruct the enforcement of federal law, including federal judicial orders. The problem with this narrow reading of *Cooper* is that it cannot explain the case. Faubus's troops were in place outside of Central High School for at most three weeks in September of 1957, and were removed immediately upon the district court's issuance of its injunction—as the Supreme Court acknowledged.⁵¹ These events occurred a full year before the Supreme Court's decision in *Cooper v. Aaron*, and nine months before the district court decision that the Court was reviewing. The issue before the Court was the Little Rock school board's request to delay implementation of desegregation because of disruption to the school which occurred during the school year, after the African American students had entered Central High.⁵² These events, by definition, occurred after the Governor had ended any direct interference with the district court's orders. Rather, as a perusal of the district court and appellate opinions on this issue make clear, the sources of the disruption complained of were fellow (white)

50. See *Roe v. Operation Rescue*, 54 F.3d 133, 140 (3d Cir. 1995); *United States v. Hall*, 472 F.2d 261, 268 (5th Cir. 1972) (both holding non-parties in contempt of court).

51. *Cooper*, 358 U.S. at 11–12. Indeed, some sources suggest that the troops were withdrawn before the injunction. See, e.g., Whittington, *supra* note 2, at 14.

52. *Cooper*, 358 U.S. at 4–5.

students, and other members of the public, who were engaged in a campaign of intimidation and violence. There was no evidence cited by either court suggesting that the Governor or other state officials were coordinating or supporting this action, other than by their public statements opposing desegregation and federal authority. In short, while Governor Faubus's behavior during the Little Rock crisis of 1957 was both appalling and illegal, it had little direct bearing on the issue before the Court in 1958.

Clearly, then, when the *Cooper* Court spoke of the obligations of state officials, it meant something more than simply desisting from physical interference with federal authority. Some hints of what the Court did mean can be found in the Court's description of the facts of the case, and in particular its (disapproving) descriptions of the actions of state officials.⁵³ Thus the Court notes that while the Little Rock school board was preparing its desegregation plan, "other state authorities . . . were actively pursuing a program designed to perpetuate in Arkansas the system of racial segregation" struck down in *Brown*, including enacting a constitutional amendment requiring the legislature to oppose *Brown* "in every Constitutional manner," and legislation which would interfere with desegregation by eliminating mandatory attendance at integrated schools.⁵⁴ The Court also notes that prior to the deployment of the National Guard on September 2, "no crowds had gathered about Central High School and no acts of violence or threats of violence . . . had occurred,"⁵⁵ and further that according to the school board itself, "[t]he effect of that action [of the Governor] was to harden the core of opposition to the Plan."⁵⁶ From all of this, the Court concludes that the conditions at Central High, and the disruption of the school year, "are directly traceable to the actions of legislators and executive officials of the State of Arkansas, taken in their official capacities, which reflect their own determination to resist this Court's decision in the *Brown* case and which have brought about violent resistance to that decision in Arkansas."⁵⁷ The Court goes on to quote the Little Rock School Board as saying that "[t]he legislative, executive, and judicial departments of the state government opposed the desegregation of Little Rock schools by enacting laws, calling out troops, making statements villifying [sic] federal law and federal courts, and failing to utilize state law enforcement agencies and judicial processes to maintain public peace."⁵⁸ Finally, the Court concludes that the constitutional rights recognized in *Brown* "can neither be nullified openly and directly by state legislators or state executive or judicial officers, nor nullified

53. *See id.* at 8–9.

54. *Id.* at 8–9.

55. *Id.* at 9 (quoting *Aaron v. Cooper*, 156 F. Supp. 220, 225 (E.D. Ark. 1957)).

56. *Id.* at 10 (second alteration in original).

57. *Cooper*, 358 U.S. at 14.

58. *Id.* at 15.

indirectly by them through evasive schemes for segregation whether attempted ‘ingeniously or ingenuously.’”⁵⁹

The import of these passages seems relatively clear. In the face of the *Brown* decision, the obligation of state officials went well beyond desisting from physically interfering with the enforcement of federal court orders. These obligations extended to not adopting legislation which would interfere with desegregation and to not engaging in actions which would “harden the core of opposition.” Indeed, the Court’s opinion strongly suggests that state officials violated their constitutional obligations in “villifying [sic] federal law and federal courts,” in a context where such speech would encourage private resistance, and further, that state officials had a positive obligation to “utilize state law enforcement agencies and judicial processes” to help enforce federal law.⁶⁰

The Court had to take such an aggressive stance because it was simply not feasible to claim that all of the lawlessness and chaos that ensued during the 1957–1958 school year was traceable solely to Governor Faubus’s short-lived deployment of the National Guard in September. The truth is that, as the Court’s opinion implicitly acknowledges, opposition to desegregation had been building steadily throughout the previous year, and had already taken the form of legislative actions and rising discontent. Faubus was at bottom a simple opportunist, albeit an especially distasteful one, who was riding a political wave (one in which his earlier record suggests he did not even personally believe⁶¹). He did nothing to aid the cause of law and order, and undoubtedly made matters worse by all of his actions, including but not limited to those of September, 1957; but, he was not the source of the problem.

The question is then posed: Was the Supreme Court correct to assert that in the wake of *Brown*, state and local government officials in Arkansas had a legal obligation to desist from enacting legislation, or taking other actions, which obstructed or encouraged others to obstruct the implementation of *Brown* in Little Rock? And further, did those officials have a positive obligation to deploy the resources of the state to maintain law and order as necessary to assist federal officials in implementing *Brown*? It is tempting to assert that the answer to both of these questions must be, “yes.” After all, the actions of officials in Arkansas and elsewhere in the South in the wake of *Brown* resulted in violence, massive human suffering, and the denial of

59. *Id.* at 17 (quoting *Smith v. Texas*, 311 U.S. 128, 132 (1940)).

60. Justice Frankfurter wrote a concurring opinion attempting to soften the Court’s rhetoric by recognizing that the duty to “abstain from resistance” to the Court’s decisions “does not require immediate approval of it nor does it deny the right of dissent. Criticism need not be stilled.” But even he concludes that “[a]ctive obstruction or defiance is barred.” *Id.* at 24 (Frankfurter, J., concurring).

61. *See* Whittington, *supra* note 2, at 11–12.

constitutional rights to thousands of African American school children. It is also tempting to agree with Justice Frankfurter that the rule of law, and basic democratic values, require that disagreement with decisions of the Supreme Court must be pursued through legal processes, and not through obstruction.⁶² Those temptations, however, should be resisted. The position of the Supreme Court in *Cooper* misapprehends the role of state governments in our federal system, and inappropriately seeks to channel a system of political checks and balances into legal mechanisms. To understand why this is so, it is necessary to go back to some first principles regarding the structure of our government.

IV. FEDERALISM AND BALANCED POWERS

In the debates over ratification of the Constitution during 1787 and 1788, the primary objection raised by the opponents of the new Constitution was the concern that the new, distant national government would act in an oppressive and undemocratic manner. Supporters of the Constitution had many responses to this concern, but one of the most prominent ones was that the division of powers within the new Republic obviated such concerns, because attempted usurpations by any single government actor would be countered by the actions of others.⁶³ That this principle explains and justifies the separation of powers within the federal government is of course well accepted and uncontroversial.⁶⁴ As Madison recognized in *Federalist No. 51*, however, federalism is as important a part of our system of limited and balanced powers as is the separation of powers at the national level:

In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each, subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will controul each other; at the same time that each will be controuled by itself.⁶⁵

Implicit in this argument is the assumption that as with each of the departments of the federal government, for the checks and balances of federalism to work, each different government must “have a will of its own” and “the necessary constitutional means, and personal motives, to resist encroachments of the others.”⁶⁶ In short, for federalism to work as designed, state governments, no

62. *Cooper*, 358 U.S. at 23–24 (Frankfurter, J., concurring).

63. THE FEDERALIST NO. 51 (James Madison) (Garry Wills ed., 1982).

64. See, e.g., *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004) (“[I]t was ‘the central judgment of the Framers of the Constitution that, within our political scheme, the separation of governmental powers into three coordinate branches is essential to the preservation of liberty.’”) (quoting *Mistretta v. United States*, 488 U.S. 361, 380 (1989)).

65. THE FEDERALIST NO. 51, at 264 (James Madison) (Garry Wills ed., 1982).

66. *Id.* at 261, 262.

less than the branches of the national government, must have the ability to resist the (to their minds) improper assertions of power from the center.

Nor is Madison silent about the *means* available to states in resisting national authority. In *Federalist No. 46* he discusses this point extensively. Responding to the argument that the federal government may seek to “extend its power beyond the due limits,” he says the following:

On the other hand, should an unwarrantable measure of the federal government be unpopular in particular States, which would seldom fail to be the case, or even a warrantable measure be so, which may sometimes be the case, the means of opposition to it are powerful and at hand. The disquietude of the people, their repugnance and, perhaps, refusal to co-operate with the officers of the Union, the frowns of the executive magistracy of the State, the embarrassments created by legislative devices, which would often be added on such occasions, would oppose, in any State difficulties not to be despised; would form, in a large State very serious impediments, and where the sentiments of several adjoining States happened to be in unison, would present obstructions which the federal government would hardly be willing to encounter.⁶⁷

Consider the implications of this passage. In it, Madison is explicitly endorsing the idea of state resistance to federal law, as a significant part of our constitutional structure. Moreover, he is accepting that state resistance will take the form not only of vocal opposition to federal policy, but also “refusal to co-operate” with federal officers and even “legislative devices,” which in combination might pose insurmountable obstacles to the enforcement of federal law. In short, Madison is saying that when state officials disagree with federal policy, they can and should be expected to take active steps to make life difficult for the federal officials charged with enforcing that policy.

Furthermore, modern constitutional law tends to support Madison’s position, and thereby undermine some of the more extreme claims regarding the obligations of state officials made by the *Cooper* Court. Most obviously, in *DeShaney v. Winnebago County Department of Social Services*, the Court held that states have no general, constitutional obligation to protect their citizens from the actions of other, private individuals.⁶⁸ This result seems entirely irreconcilable with the Court’s suggestion in *Cooper* that state officials had an obligation to “maintain public peace.” Recent decisions have also held that the federal government may not constitutionally “commandeer” state legislatures and state executive officials, by obligating them to enact congressionally

67. THE FEDERALIST NO. 46, at 240–41 (James Madison) (Garry Wills ed., 1982). Interestingly, Madison later comments that the “only refuge” left for those opposed to a strong central government was the argument that a federal military force would enable it to impose its will on the states, but he dismisses such concerns as “incoherent” and “[e]xtravagant.” *Id.* at 241.

68. 489 U.S. 189, 195–96 (1989).

mandated legislative programs, or to enforce federal law.⁶⁹ These holdings would be meaningless if state officials had some preexisting, independent obligation to cooperate with, or participate in, the enforcement of federal law. Therefore, it must be that there is no such obligation.

One objection against the above position might run as follows: Whatever the structure and background understandings of federalism in the framing era, the Civil War and the passage of the Fourteenth Amendment in 1868 so radically altered federal-state relationships as to make previous assumptions invalid. This argument, however, over-reads the impact of the Fourteenth Amendment on federalism. There is no doubt that the Amendment fundamentally altered the authority of the federal government over the states, by imposing significant, substantive constitutional limitations on state action. Absent those limitations, of course, there would have been no legal basis for *Brown v. Board*, or the district court orders commanding desegregation in Little Rock (and so concomitantly, for the actions of the 101st Airborne in enforcing those orders). But, the Fourteenth Amendment did not eliminate the role of states as separate sovereigns in our system of government, nor did it eliminate (or purport to eliminate) the role of those states as checks on federal power.⁷⁰ Rather, what the Civil War and Reconstruction Amendments did was to create a role for the federal government as a significant check on state power as well.

A more significant objection might be based on an alleged distinction between federal *judicial* orders and federal legislative or executive policies. Perhaps there is a difference between courts and the other branches of government, such that resistance to the latter is fine, but to the former is not. On its face, however, this distinction seems to make little sense. After all, generally the job of federal courts is to interpret and enforce federal law. Given this, there seems no apparent reason why, in general, the implementation of federal law through a court order should fundamentally alter the relative roles of state and federal actors in this area.

Two caveats are necessary here. First, the above argument should probably be limited to state executive and legislative officials. Under the Supremacy Clause, state judges, unlike other state officials, are bound to treat all federal law as supreme over state law.⁷¹ Furthermore, the Constitution, at least as interpreted in *Martin v. Hunter's Lessee*,⁷² creates a hierarchical

69. See, e.g., *Printz v. United States*, 521 U.S. 898, 925 (1997); *New York v. United States*, 505 U.S. 144, 161 (1992).

70. Cf. *EEOC v. Wyoming*, 460 U.S. 226, 259 (1983) (Burger, C.J., dissenting) ("The Tenth Amendment was not, after all, repealed when the Fourteenth Amendment was ratified; it was merely limited.").

71. U.S. CONST. art. VI, cl. 2; see also *Printz*, 521 U.S. at 907.

72. 14 U.S. (1 Wheat.) 304 (1816); see also *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264

relationship between state judiciaries and the United States Supreme Court, while state executive and legislative officials most assuredly are *not* subject to the direct supervision of any federal officials. Given this relationship, and given the need for judicial systems to function efficiently without imposing needless appeals and delays on litigants, a fairly persuasive argument can be constructed that state judges are bound to respect and follow (i.e., enforce) the precedents of the United States Supreme Court.⁷³ Of course, this argument may be incorrect. It may be that popularly elected state judges, like popularly elected state legislative and executive officials, have a legitimate role to play in resisting federal policies, including Supreme Court decisions, which they see as undesirable.⁷⁴ At minimum, however, it is clear that the reasons advanced for state judicial adherence to Supreme Court precedent have no application to nonjudicial state officials.

The second caveat is that when a federal court issues an order *directed* at nonjudicial state officials, it must be obeyed—or to be more accurate, refusal to obey may properly be punished as contempt. It is also probably true that indirectly evading a judicial order by soliciting third parties to accomplish what the judicial decree forbids should be punishable as contempt no less than direct defiance. Moreover, in this area, judicial orders are different from executive or legislative actions in that disobedience of the judiciary may be punished even if the order itself is later determined to be invalid.⁷⁵ That does not mean, however, that state officials cannot *criticize* judicial decrees with which they disagree, as the *Cooper* Court suggests. More fundamentally, there is no general obligation on the part of nonjudicial state officials to cooperate with the implementation of federal laws or decrees directed at *others*, much less to help enforce them. That is the task of federal officials.

Finally, and most potentially persuasively, an argument might be made that whatever the general status of court orders, when a court order is based on the Constitution of the United States, and in particular when a court order adjudicates individual constitutional rights, a special obligation might be imposed upon state officials to obey and help implement that decision. This argument might be buttressed by reference to the “Oath or Affirmation” Clause of Article VI of the Constitution, which imposes on all state officials an obligation to support the Constitution, but not other federal law.⁷⁶ Tempting as

(1821).

73. See James Pfander, *Federal Supremacy, State Court Inferiority, and the Constitutionality of Jurisdiction-Stripping Legislation*, 101 NW. U. L. REV. 191, 238 (2007).

74. For a fascinating account of state courts behaving in precisely this fashion, see Frederic M. Bloom, *State Courts Unbound*, 93 CORN. L. REV. 501 (2008).

75. *Walker v. City of Birmingham*, 388 U.S. 307, 315, 320–21 (1967).

76. U.S. CONST. art. VI, cl. 3. As noted above, the Supremacy Clause, by contrast, does make all federal law supreme; but it explicitly binds only state *judges*, not other officials, to that law. See *supra* notes 71–74 and accompanying text.

it is, however, ultimately this argument cannot stand. It is based on two separate fallacies, both of which are important legacies of *Cooper v. Aaron*.

The first of these fallacies is the error of equating the Constitution with the Supreme Court's interpretations of its terms. As noted above, this aspect of *Cooper* has been widely criticized in the literature, albeit primarily in reference to federal officials.⁷⁷ This criticism must be correct, because the contrary view would leave no room to argue that the Supreme Court has *erred* in its interpretation, as has obviously happened on innumerable occasions throughout our history. But the criticism applies equally to state officials. After all, once one acknowledges a gap between the Constitution and judicial expositions thereof, logically that gap informs the meaning of the Article VI requirement of loyalty to the Constitution. Moreover, there are strong practical reasons to permit state, as well as national, officials to adopt views of constitutional meaning that differ from the Court's. Failure to do so would leave national officials with a monopoly on contesting constitutional meaning. But national officials share certain biases in this regard—in favor of national power, in derogation of state authority, in derogation of local diversity—which state officials do not. More generally, it is easy to imagine times when certain aspects of our constitutional system become unpopular at the national level, and even in many parts of the country, but which might be championed by state officials in some regions. To silence those voices would be to substantially enervate constitutional dialogue.

The obvious response to the above argument is, of course, the principle of institutional settlement, championed most forcefully in recent years by Professors Larry Alexander and Frederick Schauer.⁷⁸ Alexander and Schauer defend *Cooper*'s assertion of judicial supremacy on the grounds that settlement is one of the basic functions of law generally, and of constitutionalism in particular, and that settlement is possible only through deference to the Supreme Court's constitutional interpretations.⁷⁹ While a full response to Alexander and Schauer is necessarily beyond the scope of this paper, a brief response can be sketched here. The difficulty with the Alexander and Schauer argument is that while settlement is generally a virtue within a *legal* system, it is not a universal virtue within a political system. In particular, it is difficult to reconcile a strong constitutional commitment to settlement with the system of divided and balanced powers that our Constitution creates. Divided powers envision disputation and political disagreement, the very opposite of settlement. As such, while the value of settlement might support adherence to Supreme Court interpretations within the *judiciary*, including state

77. See sources cited in *supra* note 40.

78. Alexander & Schauer, *supra* note 40.

79. *Id.* at 1362.

judiciaries,⁸⁰ its extension to executive and legislative officials seems in deep tension with the fundamentally political, rather than legal, functions of such officials.

The second fallacy, more subtle but even more insidious, is the modern tendency to equate federal law, and the federal Constitution, with morality.⁸¹ This tendency is clearly the legacy of *Cooper v. Aaron* and the Civil Rights Era more generally. The battle to implement *Brown* and desegregate the South was undoubtedly the most important legal, political, and moral battle of domestic American politics in the past century. And it was a battle in which, as essentially everyone now concedes, the Federal Constitution and (eventually) the federal government were on the *right* side. After all, the actions of Governor Faubus and others in Little Rock, in using military force and mob violence to intimidate children in the name of resisting *Brown*, were obviously and grotesquely *evil*. Federal troops restored justice, and eventually federal law (in the form of the Civil Rights Act of 1964 and the Voting Rights Act of 1965) succeeding in imposing morality on a recalcitrant South.⁸² The advancement of civil rights by the Warren and early Burger Courts, along with other generally popular decisions from that time such as *Reynolds v. Simms*,⁸³ *Brandenburg v. Ohio*,⁸⁴ and (perhaps) *Roe v. Wade*,⁸⁵ has lead the public to equate federal law and the Federal Constitution with morality. But it must be understood that this easy association of constitutional law with morality is an historical aberration. Americans of the New Deal Era, raised with the excesses of *Lochner*,⁸⁶ would surely have understood this point, as would Americans (or at least Northerners) of the late nineteenth century, who witnessed the Supreme Court demolish the accomplishments of Reconstruction in the name of the Constitution.⁸⁷ And, of course, the previous generation had *Dred Scott* as its prime example of the (im)moral force of constitutional law.⁸⁸ Finally, it must be recognized that a large number of contemporary Americans have grave

80. See *supra* notes 71–75 and accompanying text.

81. Cf. *Texas v. Johnson*, 491 U.S. 397, 420–21 (1989) (Kennedy, J., concurring) (expressing personal distaste at holding that First Amendment protects flag burning).

82. Civil Rights Act of 1962, 42 U.S.C. § 2000a (2000); Voting Rights Act of 1965, 42 U.S.C. § 1973 (2000).

83. 377 U.S. 533, 554–55, 561 (1964) (finding that vote dilution through legislative malapportionment violates the Equal Protection Clause).

84. 395 U.S. 444, 448–49 (1969) (striking down Ohio's Criminal Syndicalism Statute as violating the Free Speech Clause of the First Amendment).

85. 410 U.S. 113, 152–55 (1973) (finding a fundamental constitutional right to choose an abortion).

86. *Lochner v. New York*, 198 U.S. 45, 57 (1905).

87. See, e.g., *The Civil Rights Cases*, 109 U.S. 3, 21–23 (1883); *United States v. Harris*, 106 U.S. 629, 638–40 (1883); *United States v. Cruikshank*, 92 U.S. 542, 554–56 (1875); *United States v. Reese*, 92 U.S. 214, 217–18 (1875).

88. See *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).

doubts about the moral force of many decisions of the Supreme Court in areas including affirmative action,⁸⁹ privacy,⁹⁰ and free speech.⁹¹ Whatever one's ultimate conclusions about the legal and moral legitimacy of various Supreme Court decisions, the era of easy conflation of positive constitutional law with morality is surely over.⁹²

The Constitution, then, is not equivalent to constitutional law as enunciated by the federal courts. And federal law, including but not limited to constitutional law, does not consistently produce positive moral outcomes. Indeed, federal law can sometimes produce positively immoral outcomes. The question that remains open is what role state officials have to play in resisting, or at least reshaping, those outcomes. In the next Part, I briefly discuss a few examples, some contemporary and some historical, where state officials have played quite a significant such role.

V. SOME EXAMPLES

A. *Immigration and Sanctuary Cities*

Immigration policy is, of course, an area where the federal government enjoys plenary and unshared power. The Constitution explicitly grants to Congress the power to “establish an uniform Rule of Naturalization,”⁹³ and the Supreme Court has long recognized the primacy of federal authority vis-à-vis the states in this area.⁹⁴ Nonetheless, recent events demonstrate that even in this area of federal dominance, state and local governments can play an important role in shaping law and policy.

Immigration policy, and in particular the appropriate response to the existence of a very large population of undocumented aliens residing in the United States, has been one of the most contentious political and policy issues

89. See, e.g., *Parents Involved in Community Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. ___, 127 S. Ct. 2738, 2751–52 (2007) (holding that school districts may not consider a child's race in assigning him or her to schools within the district); *Adarand Constructors v. Peña*, 515 U.S. 200, 227 (1995) (holding that racial classifications imposed by the government in a federal program designed to provide contracts to minority businesses warrant strict scrutiny).

90. See, e.g., *Gonzales v. Carhart*, 550 U.S. ___, 127 S. Ct. 1610, 1628–29, 1632 (2007) (holding that the Partial-Birth Abortion Ban Act is not facially invalid as it is not overly vague, nor does it burden women's rights to abortion).

91. See, e.g., *Morse v. Frederick*, 551 U.S. ___, 127 S. Ct. 2618, 2622, 2629 (2007) (holding that the suspension of a student for displaying a banner that referenced drug use did not offend the First Amendment).

92. It must be admitted that for opponents of abortion, that conflation probably ended long ago.

93. U.S. CONST., art. I, § 8, cl. 4.

94. See, e.g., *Toll v. Moreno*, 458 U.S. 1, 10 (1982); *Plyler v. Doe*, 457 U.S. 202, 225 (1982); *Mathews v. Diaz*, 426 U.S. 67, 81 (1976).

facing the second Bush Administration. The debate over these issues largely reflects a divide between those supporting proposals, supported by the Administration, to provide a path to citizenship to these aliens,⁹⁵ and proposals to deal with this population punitively (including in one proposal through criminalization).⁹⁶ The resulting stalemate has led to essentially no meaningful congressional action in this area. But, of course, federal enforcement of existing immigration laws, including deportations, continues, and the Bush Administration has taken various steps to tighten enforcement of such laws, with mixed success.⁹⁷

In the face of this federal policy, a large number of cities, including New York City, Los Angeles, Washington, D.C., San Francisco, and Seattle, have taken the step of making themselves "Sanctuary Cities."⁹⁸ The essence of this designation is the adoption of policies, whether explicit or implicit, under which city employees are instructed not to cooperate with federal immigration officials, and to dispense city services regardless of immigration status (accomplished by declining to inquire about immigrant status).⁹⁹ The City of New Haven, Connecticut has taken such policies one step further, by issuing identification cards to undocumented aliens,¹⁰⁰ an approach which San Francisco is considering emulating.¹⁰¹

Needless to say, such policies have attracted vigorous criticism from the federal government¹⁰² and from political candidates.¹⁰³ And in a predictable twist, at least one commentator has likened sanctuary policies to the "nullification doctrine" espoused by slave states before the Civil War.¹⁰⁴

95. See, e.g., Comprehensive Immigration Reform Act of 2007, S. 1348, 110th Cong. (1st Sess. 2007).

96. See, e.g., Immigrant Enforcement and Border Security Act of 2007, S. 1984, 110th Cong. (1st Sess. 2007).

97. See *American Federation of Labor v. Chertoff*, No. C 07-04472, 2007 U.S. Dist. LEXIS 75233, at *7-13 (N.D. Cal. Oct. 10, 2007); Spencer S. Hsu, *Immigrant Crackdown Halted*, WASH. POST, Sept. 1, 2007, at A03.

98. See Jesse McKinley, *Immigrant Protection Rules Draw Fire*, N.Y. TIMES, Nov. 12, 2006, at 22.

99. *Id.*

100. Caitlin Carpenter, *City Opts to Validate Its Illegal Residents*, CHRISTIAN SCI. MONITOR, July 17, 2007, at 2.

101. Wyatt Buchanan, *S.F. Has a Plan for Immigrant ID Card*, SAN FRANCISCO CHRON., Sept. 7, 2007, at A1.

102. Audrey Hudson, *Chertoff Warns Meddling "Sanctuary Cities,"* WASH. TIMES, Sept. 6, 2007, available at <http://www.washingtontimes.com/apps/pbcs.dll/article?AID=/20070906/NATION/109060085/1001>.

103. See Alexander Mooney, *Romney Blasts "Sanctuary Cities" for Attracting Illegal Immigrants*, CNN, Aug. 21, 2007, <http://www.cnn.com/2007/POLITICS/08/21/romney.immigration.ad/index.html>; Fred Thompson, *Sanctuary Cities*, TOWNHALL.COM, Aug. 14, 2007, http://www.townhall.com/columnists/FredThompson/2007/08/14/sanctuary_cities.

104. Mark Krikorian, *Washington Needs to Act to Rein in those States and Cities that are*

Given the holding of *Printz v. United States*,¹⁰⁵ however, such policies would appear to be perfectly constitutional. Of course, jurisdictions adopting sanctuary policies cannot, and do not, directly interfere with the enforcement of federal law by federal officials.¹⁰⁶ Furthermore, a recent Department of Justice report suggests that in practice, local officials are avoiding direct conflict with federal officials by collecting and providing immigration information if required by federal law.¹⁰⁷ But there is no doubt that the systematic lack of cooperation by vast numbers of local officials in America's largest cities, including most importantly their failure to voluntarily share information with federal officials, must substantially hamper federal efforts to enforce federal immigration policy. As such, sanctuary policies are a prime example of effective resistance by state and local officials to federal laws which they find (to quote Madison) "unwarrantable."¹⁰⁸

B. Medical Marijuana

In November of 1996, California voters approved Proposition 215.¹⁰⁹ This provision amended California law to create an exemption from existing state drug laws for patients and caregivers to possess or cultivate marijuana for medical treatment, as recommended by a doctor (the law also protects doctors).¹¹⁰ Since 1996, eleven other states have also adopted provisions legalizing medical marijuana.¹¹¹ Notably, ten of the twelve states legalizing medical marijuana are in the West. Federal law, however, continues to prohibit the possession and cultivation of marijuana.¹¹² The Supreme Court

Attempting to Nullify Federal Policy, SAN FRANCISCO CHRON., Sept. 30, 2007, at E1.

105. *Printz v. United States*, 521 U.S. 898, 925 (1997) (holding that the federal government may not compel the states to implement federal regulatory programs).

106. See U.S. DEP'T OF JUSTICE, OFFICE OF THE INSPECTOR GENERAL AUDIT DIVISION, COOPERATION OF SCAAP RECIPIENTS IN THE REMOVAL OF CRIMINAL ALIENS FROM THE UNITED STATES 25–33 (2007), available at <http://www.usdoj.gov/oig/reports/OJP/a0707/final.pdf>.

107. *Id.* at 25–33. The landscape here is complicated by 8 U.S.C. § 1373 (1996), which bars state and local governments from prohibiting the maintaining or sharing with federal immigration officials of information regarding immigration status. This provision seems to be largely unenforced—perhaps because there is a strong argument to be made that it is unconstitutional under *Printz*. See 521 U.S. at 925.

108. THE FEDERALIST NO. 46 (James Madison) (Gary Wills ed. 1982).

109. See Proposition 215: Text of Proposed Law, <http://vote96.sos.ca.gov/BP/215text.htm> (last visited Jan. 15, 2008).

110. *Id.*

111. These states are Alaska, Colorado, Hawaii, Maine, Montana, Nevada, New Mexico, Oregon, Rhode Island, Vermont, and Washington. See Summary of State Medical Marijuana Laws, <http://www.medicalmarijuanaprocon.org/pop/StatePrograms.htm> (last visited Jan. 15, 2008) (describing state laws in detail).

112. 21 U.S.C. §§ 841(a), 844(a) (2000).

has upheld these laws as within Congress's power to regulate interstate commerce,¹¹³ and has rejected the claim that there is a "necessity" defense to federal law available to medical marijuana users.¹¹⁴ As such, federal law in this area is flatly inconsistent with the laws and policies of a very large number of states, encompassing almost an entire, significant, geographic region of this country.

There is, of course, no direct conflict between state laws legalizing medical marijuana, and federal laws prohibiting all marijuana possession. In practice, however, the implementation of these state laws will inevitably interfere, sometimes substantially, with the enforcement of federal law. For example, as part of its implementation of Proposition 215, the State of California issues identification cards to approved medical marijuana users,¹¹⁵ and numerous local officials have publicly supported the activities of cannabis clubs that have cropped up in California to distribute medical marijuana.¹¹⁶ None of this prevents federal officials from prosecuting (or enjoining) the activities of either medical marijuana users or clubs—as in fact they continue to do;¹¹⁷ but in practice such policies make enforcement of federal law far more difficult, given the obvious reality that federal officials lack the local presence and resources necessary to eliminate all cultivation or possession of marijuana, even that which is carried out openly.

Medical marijuana thus represents another contemporary example of state and local resistance to federal law. In contrast to immigration, the resistance here is more indirect, and its impact on federal policy is harder to determine. One thing suggesting that the impact *is* significant is that the Department of Justice itself has concluded that marijuana is widely available and consumed in Northern California, at least in part because of "abuse" of Proposition 215.¹¹⁸ It is hard to know how seriously to take this assessment, however, given that marijuana was hardly unavailable in Northern California prior to 1996.¹¹⁹ In any event, it can probably be said with some confidence that state medical

113. *Gonzales v. Raich*, 545 U.S. 1, 9 (2005).

114. *United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 494 (2001).

115. Press Release, California Department of Health Services, California Resumes Medicinal Marijuana ID Card Program (July 18, 2005), *available at* <http://www.applications.dhs.ca.gov/pressreleases/store/pressreleases/05-39.html>.

116. James Brooke, *Moving to Semantical High Ground*, N.Y. TIMES, Mar. 1, 1998, at 18.

117. *See, e.g.*, Phillip Matier & Andrew Ross, *Victims of Their Success*, SAN FRANCISCO CHRON., Nov. 5, 2007, at B1 (detailing the federal prosecution of owners of a county-licensed medical marijuana dispensary).

118. NAT'L DRUG INTELLIGENCE CTR., NORTH CALIFORNIA HIGH INTENSITY DRUG TRAFFICKING AREA DRUG MARKET ANALYSIS (June 2007), *available at* <http://www.usdoj.gov/ndic/pubs23/23934/drgovr.htm#foot2>.

119. *See* Steven Sydney, M.D., et al., *Marijuana Use and Mortality*, 87 AM. J. PUB. HEALTH 585, 585–86 (1997) (discussing a ten year study on thousands of marijuana users in California).

marijuana laws are to some, albeit uncertain, degree interfering with the implementation of federal law in this area.

C. Voluntary School Prayer

In the almost half century since 1962, the Supreme Court has created a powerful and consistent jurisprudence banning officially sponsored prayer from public schools and public school events. This line of cases begins with *Engel v. Vitale*, in which the Court held that a school's policy of having students recite state-written prayers (though permitting objecting students to remain silent) violated the Establishment Clause of the First Amendment.¹²⁰ The following year, in *School District of Abington Township v. Schempp*, the Court extended its holding in *Engel* to strike down a state law requiring the reading aloud of Bible verses at the opening of every school day.¹²¹ Then, in *Wallace v. Jaffree*, the Court struck down a state law permitting local schools to set aside a minute of silence at the beginning of the school day "for meditation or voluntary prayer."¹²² Finally, in two more recent cases the Court has extended its Establishment Clause jurisprudence to outside the classroom, holding unconstitutional the recitation of prayers at a school graduation ceremony,¹²³ and a high school football game.¹²⁴

Despite the force and consistency of the Court's jurisprudence in this area, the issue of voluntary school prayer remains highly contentious and controversial. Many proposals have been introduced in Congress, albeit unsuccessfully, to thwart the implementation of the Court's holdings, including proposals to strip the federal courts of jurisdiction over cases challenging voluntary school prayer,¹²⁵ and constitutional amendments permitting such prayer.¹²⁶ Moreover, voluntary school prayer was and continues to be supported by a large majority of the American population.¹²⁷ As such, the conditions for defiance of the Supreme Court are clearly present. And indeed,

120. *Engel v. Vitale*, 370 U.S. 421, 424 (1962).

121. *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 205 (1963).

122. *Wallace v. Jaffree*, 472 U.S. 38, 41–42, 53 (1985).

123. *Lee v. Weisman*, 505 U.S. 577, 599 (1992).

124. *See Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 317 (2000).

125. *See* Erwin Chemerinsky, *Parity Reconsidered: Defining a Role for the Federal Judiciary*, 36 UCLA L. REV. 233, 254, n.102 (1988) (discussing jurisdiction-stripping proposals); Eugene Gressman & Eric K. Gressman, *Necessary and Proper Roots of Exceptions to Federal Jurisdiction*, 51 GEO. WASH. L. REV. 495, 500–08 (1983).

126. *See, e.g.*, 152 CONG. REC. S37, 18–21 (daily ed. Apr. 27, 2006) (statement of Sen. Byrd) (proposing a constitutional amendment permitting voluntary school prayer).

127. *See* ALEC M. GALLUP & FRANK NEWPORT, *THE GALLOP POLL: PUBLIC OPINION 2005* 318 (2007); Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolutions*, 82 VA. L. REV. 1, 15, n.69 (1996); *Gallop Poll Says 81% Endorse School Prayer*, N.Y. TIMES, Sept. 11, 1983, at 55.

there is strong empirical evidence that despite the age and consistency of the Court's decisions in this area, local school officials have engaged in a consistent, and continuing, pattern of widespread defiance of the rules announced by the Court.¹²⁸ This defiance is most ubiquitous in the South, but is by no means limited to that area of the country.¹²⁹ Such defiance includes reciting prayers over loudspeakers, student prayer recitation, and most commonly, prayers said at graduation ceremonies and sporting events.¹³⁰ In short, in the area of school prayer, state and (primarily) local officials regularly continue to engage in practices that, according to the Supreme Court, are patently unconstitutional.¹³¹

What is one to make of this pattern of behavior? Scholars such as Michael Klarman cite it as evidence of the inefficacy of Supreme Court decisions in changing social patterns, absent support in society.¹³² But that seems to me to overstate the case—after all, as a consequence of the Court's decisions *most* school prayer and bible readings have been eliminated from *most* schools in the country, a profound change from conditions in 1962. But the continuing defiance, especially in the South, does demonstrate that there are limits to judicial authority. More interestingly, I would argue that the consequence of continuing defiance has been to keep this issue alive, and prevent the school prayer cases from becoming settled, and uncontroversial doctrine (as *Brown v. Board* has become). And, for better or for worse, that fact makes the overturning of at least some of those cases more likely, especially given recent changes in the composition of the Supreme Court.

D. *The Fugitive Slave Acts*

The three modern examples, set forth above, of state and local officials resisting federal authority together suggest such resistance remains an important part of the modern federal structure. Moreover, while the first two examples demonstrate resistance to federal statutory policy, the last involves resistance to the Supreme Court's constitutional doctrine, suggesting that despite *Cooper*, state resistance continues to play a role in the dynamic process

128. Kevin T. McGuire, *Public Schools, Religious Establishments, and the U.S. Supreme Court: An Examination of Policy Compliance 2*, available at <http://www.unc.edu/~kmcguire/papers/prayer.pdf>; see also Klarman, *supra* note 127, at 15–16.

129. McGuire, *supra* note 128, at 14–16.

130. *Id.* at 6, 16.

131. This is to say nothing of other state laws, such as Illinois's recently adopted "moment of silence" law, which while not patently unconstitutional, certainly push the limits of the Court's jurisprudence. See Editorial, *Forcing Silence on Schools*, CHI. TRIB., Oct. 29, 2007, at 20.

132. See Klarman, *supra* note 127, at 16–18. The most famous modern exposition of the idea of judicial ineffectiveness is, of course, GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (1991), but Rosenberg does not discuss school prayer in any detail.

through which the nation develops constitutional understandings. The greatest example of sustained, regional resistance to federal constitutional authority, however, is to be found not in the modern but in the Antebellum Era. It is the story of northern resistance to the Fugitive Slave Acts implementing the Fugitive Slave Clause of Article IV—a story with strong, though obviously perverse, parallels to the story of southern resistance to *Brown*.

Article IV, section 2, clause 3 of the Constitution, the Fugitive Slave Clause, was almost certainly the most troubling, and most despised, of the provisions of the original Constitution. It reads as follows:

No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.¹³³

While the Clause protected the delicate sensibilities of the Framers by avoiding the use of the word “slave,” it clearly and expressly committed northern states to assist in the perpetuation and strengthening of the institution of slavery. In 1793, Congress implemented the Fugitive Slave Clause through the Fugitive Slave Act of 1793. The Act allowed slave owners pursuing a fleeing slave to seize the person and bring him or her before any state or federal judge. The judge was then required to issue a certificate permitting the owner to remove the slave from the state (presumably after the judge was satisfied by the proof offered of ownership—though the Act was silent on this point).¹³⁴ Akhil Amar argues that the Act, by permitting owners to bypass state courts and officials, violated the compromise inherent in Article IV.¹³⁵ Regardless, in the early years following ratification northern judges appeared to generally cooperate in the enforcement of the Act (with isolated exceptions),¹³⁶ though in practice the lack of any federal enforcement mechanism and the obvious expense of pursuing escaped slaves appears to have hindered effective enforcement.¹³⁷

In the 1820s, however, northern attitudes towards the fugitive slave laws hardened, and northern states began enacting laws, called “personal liberty laws,” which prohibited the seizure or removal of African Americans from the state without a state court order, and—importantly—significantly increased the

133. U.S. CONST. art. IV, § 2, cl. 3, *repealed by* U.S. CONST. amend. XIII.

134. *See* Act of Feb. 12, 1793, ch. 7, 1 Stat. 302 (act respecting fugitives from justice, and persons escaping from the service of their masters), *repealed by* U.S. CONST. amend. XIII; *see also* Paul Finkelman, *The Roots of Printz: Proslavery Constitutionalism, National Law Enforcement, Federalism, and Local Cooperation*, 69 BROOK. L. REV. 1399, 1402–04 (2004) [hereinafter Finkelman, *The Roots*].

135. AKHIL REED AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* 260–61 (2005).

136. Finkelman, *The Roots*, *supra* note 134, at 1403–05.

137. Paul Finkelman, *Legal Ethics and Fugitive Slaves: The Anthony Burns Case, Judge Loring, and Abolitionist Attorneys*, 17 CARDOZO L. REV. 1793, 1797 (1996) [hereinafter Finkelman, *Legal Ethics*].

procedural protections accorded alleged fugitives from the bare minimum provided by federal law.¹³⁸ The stated (and undoubtedly partially true) purpose of these laws was to prevent fraudulent kidnappings of free African Americans, based on perjury by alleged owners.¹³⁹ But the practical effect (and undoubtedly also the partial purpose) of the laws was to render recovery of fugitive slaves vastly more difficult, because it forced southerners to provide substantial evidence in support of their claims of ownership before often hostile northern state judges.¹⁴⁰ According to Paul Finkelman, the practical effect of these laws was to render the Fugitive Slave Act “virtually unenforceable” in large parts of the North.¹⁴¹

The federal response to this situation came in the Supreme Court’s decision in *Prigg v. Pennsylvania*.¹⁴² In *Prigg*, the Court (by Justice Story) struck down Pennsylvania’s personal liberty law as an intrusion on Congress’s exclusive power to legislate to enforce the Fugitive Slave Clause.¹⁴³ The *Prigg* Court also recognized the inherent right of slave owners to engage in self-help by seizing (allegedly) escaped slaves without interference from, or obligation to conform with, state processes.¹⁴⁴ The only sop *Prigg* afforded to opponents of slavery was a suggestion in dictum that state officials, including judges, were under no legal obligation to, and could not be required to, assist in the enforcement of the Fugitive Slave Clause or Act.¹⁴⁵ After *Prigg*, state laws and state judges could no longer interfere with the return of fugitive slaves, so the constitutional rights of southern slave owners were seemingly secure.

The truth turned out to be more complex. The northern response to *Prigg* was to enact new laws, which prohibited state judges *and* other state officials such as jailors from participating in the enforcement of the Federal Fugitive Slave Act.¹⁴⁶ That fact, combined with the complete lack of any federal apparatus able to provide assistance to slave owners, meant that effective barriers to enforcement of the Act remained very high, especially in light of

138. See WILLIAM M. WIECEK, THE SOURCES OF ANTISLAVERY CONSTITUTIONALISM IN AMERICA, 1760–1848, 158–59 (1977); Finkelman, *The Roots*, *supra* note 134, at 1404–07 (describing the purpose and procedure of “personal liberty laws” in the northern states).

139. WIECEK, *supra* note 138, at 158–59 & n. 28.

140. *Id.* at 159.

141. Finkelman, *Legal Ethics*, *supra* note 137, at 1798; see also Gautham Rao, *The Federal Posse Comitatus Doctrine: Slavery, Compulsion, and Statecraft in Mid-Nineteenth Century America*, at 19 (2006), available at http://www.press.uillinois.edu/journals/lhr/rao26_1.pdf.

142. 41 U.S. 539 (1842).

143. *Id.* at 625–26.

144. *Id.* at 613.

145. See ROBERT M. COVER, JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS 167 (1975); Finkelman, *Legal Ethics*, *supra* note 137, at 1798 (both discussing this aspect of *Prigg*).

146. Finkelman, *Legal Ethics*, *supra* note 137, at 1799 & n. 42; Finkelman, *The Roots*, *supra* note 134, at 1411, n.43.

newly energized state resistance to the Act. The story of George Latimer demonstrates this point. Latimer, an African American living in Boston, was seized by his former master, who obtained an order from Justice Story himself permitting Latimer to be held pending proof of identity. The local sheriff, however, refused to permit Latimer to be held in the county jail, forcing the owner to sell Latimer to abolitionists for a low price, and Latimer went free.¹⁴⁷

Point, counterpoint continued. Faced with the unenforceability of the 1793 Act, southerners extracted from Congress, as part of the Compromise of 1850, the new Fugitive Slave Act of 1850.¹⁴⁸ That law went well beyond existing statutes, by creating a robust federal mechanism for the capture and return of fugitive slaves.¹⁴⁹ The Act created a new class of officials, federal commissioners, who were authorized to issue warrants for the seizure of allegedly escaped slaves, and after a pro forma hearing, grant a certificate of removal.¹⁵⁰ Most significantly, the commissioners were also authorized to order U.S. Marshals to assist in the seizure and return of fugitives, and both commissioners and marshals were authorized to raise a *posse comitatus*, a group of involuntarily deputized citizens, to assist in these measures.¹⁵¹ This new mechanism appeared to have finally shifted the balance of power in favor of slave owners, who were now able to successfully retrieve most escaped slaves.¹⁵²

Resistance, however, also continued. As Gautham Rao discusses, some northerners refused to participate in *posse comitatus* aimed at seizing fugitive slaves, even at the risk of a treason charge.¹⁵³ An even more telling example is the story, recounted by Paul Finkelman, of Anthony Burns.¹⁵⁴ Burns was an African American man who was seized in Boston in 1854 by his alleged former master, pursuant to the Fugitive Slave Act of 1850, and held by federal marshals pending the hearing required by the Act.¹⁵⁵ The chaotic proceedings that followed included a failed rescue attempt which resulted in the death of a deputy marshal,¹⁵⁶ and a federal courthouse which became occupied by an army of federal marshals and soldiers (some of whom were apparently

147. See Finkelman, *Legal Ethics*, *supra* note 137, at 1799, n.43; COVER, *supra* note 145, at 169–71.

148. Fugitive Slave Act, ch. 60, 9 Stat. 462, 463 (1850) (amending Act of Feb. 12, 1793, ch. 7, 1 Stat. 302) (repealed 1864).

149. See Finkelman, *Legal Ethics*, *supra* note 137, at 1800.

150. *Id.*

151. See *id.* at 1800–01; Rao, *supra* note 141, at 22–23.

152. Rao, *supra* note 141, at 24–25.

153. See *id.* at 3–4 (recounting the story of Castner Hanway).

154. The Burns incident is discussed generally in Finkelman, *Legal Ethics*, *supra* note 137, at 1794.

155. *Id.* at 1802–04.

156. *Id.* at 1818.

drunk).¹⁵⁷ Ultimately, the local, federal commissioner found against Burns, who was returned to slavery in Virginia under federal guard.¹⁵⁸ The consequences of the Burns case did not end there, however. For one thing, the federal commissioner who ruled against Burns, Edward Loring, lost his position as professor at the Harvard Law School,¹⁵⁹ and then in 1858 lost his position as a state probate judge,¹⁶⁰ both largely as a consequence of the Burns case. More significantly, after 1854 the Fugitive Slave Act ceased to be enforced in Massachusetts.¹⁶¹ But, the Act was enforced elsewhere in the North, and fugitive slaves continued to be returned to the South until 1861, when secession, then civil war, then emancipation mooted the issue.

There are several clear lessons that can be drawn from the story of northern resistance to the Fugitive Slave Acts. First, and most obviously, resistance to federal authority, including federal constitutional authority, is not only permissible, it is sometimes morally imperative. It must be remembered that when the *Prigg* Court recognized a constitutional right on the part of slave owners to seize and return fugitive slaves, it was, no less than in *Brown*, saying “what the law is.” Yet surely northerners were justified in continuing to resist this constitutional edict. Second, the story also illustrates the importance of state *officials*, and not just citizens, in resisting federal authority. When, during the 1820s, 1830s, and 1840s, state officials and legislatures were actively involved in resisting the enforcement of federal law, southern slave owners were effectively stymied. When, however, the Fugitive Slave Act of 1850 cut northern state governments out of the process, slave owners became far more successful.¹⁶² After all, George Latimer went free, but Anthony Burns did not. Finally, the saga also illustrates the many different forms of resistance that are possible, from refusals to cooperate with federal authorities (on the part of state judges and executive officials), to interfering legislation (in the form of the “personal liberty laws”), to outright physical defiance in the Burns case. Each played an important role in maintaining northern resistance

157. *Id.* at 1822–23.

158. *Id.* at 1825. In 1855, Burns was purchased and freed by northern abolitionists and African Americans. However, his barbaric treatment in the preceding year almost certainly shortened his life. *Id.* at 1829–30.

159. Finkelman, *Legal Ethics*, *supra* note 137, at 1794.

160. *Id.* at 1857–58.

161. *Id.*

162. In *Ableman v. Booth*, 62 U.S. (21 How.) 506, 515–16 (1858), the Supreme Court held that state courts lacked jurisdiction to issue writs of habeas corpus ordering the release of prisoners in federal custody as applied to an individual arrested and convicted of violating the fugitive slave laws by assisting in the escape of a fugitive slave. *Ableman* demonstrates that once federal enforcement of the fugitive slave laws were in force, all branches of state governments, including the judiciary, lost the ability to actively frustrate the enforcement of those laws.

and southern outrage, which in turn helped bring about ultimate emancipation (albeit after a notably bloody war).

CONCLUSION: THE FEDERALISM LESSONS OF LITTLE ROCK

Cooper v. Aaron was a case arising from one of the great constitutional crises in American history, generated by systematic resistance, in an entire region of the country, to federal authority in the form of a constitutional decision of the United States Supreme Court. It is now widely accepted that this resistance was morally reprehensible and ultimately self-destructive. As a consequence, it is unsurprising that one of the most significant lessons that has been drawn from *Cooper* and the Little Rock crisis—a lesson that has its roots in the language of the *Cooper* opinion itself—is that resistance by state officials to federal authority, especially federal constitutional authority, is illegal and contrary to our system of government. In this Essay, I have argued that that lesson is simply incorrect. That *Brown v. Board* was legally and morally correct, and southern “massive resistance” was not, does *not* mean that federal authority, including the constitutional decisions of the Supreme Court, are always, or even usually, morally or legally correct. The Warren Court and the civil rights struggle was a short, and atypical, era in our constitutional history, which is now long since past. Taking a longer-term view, it should be clear that just as constitutionalism is basic to our system of government, so is federalism. To reconcile those two aspects of our polity, it must be recognized that states and state officials have a role to play in shaping federal policy and in giving meaning to the Constitution. Further, sometimes the role of state officials includes disagreement with, and even active defiance of, the policies and meanings championed by federal officials, including the federal judiciary. There are, of course, limits to the scope of permissible defiance, which can be found in principles of contempt of court, supremacy, and the rule of law. But within those limits, the scope for resistance is in fact quite substantial. Of course, in retrospect it will turn out that sometimes state resistance is justified, and sometimes it is not, but there is nothing inherently immoral or constitutionally illegitimate in the concept of resistance. As usual, it all depends on the circumstances.

