LITTLE ROCK AND THE LEGACY OF *BROWN*

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Today, *Brown v. Board of Education*[1] is an icon. Its legal soundness is, for all practical purposes, beyond question. *Brown*, of course, was the Supreme Court decision holding unconstitutional state-enforced racial segregation in public schools. There are academic critics of *Brown*, but then there are academic critics of pretty much everything. As far as mainstream legal thought is concerned, the lawfulness of *Brown* is a fixed point. One can only imagine what would happen if, for example, a nominee for the Supreme Court testified, in his Senate confirmation hearings, that he thought *Brown* was wrong and should be overruled: The hearing would effectively end on the spot, because the nominee's chances of being confirmed would be zero. In fact it is doubtful that a nominee who was even equivocal in his or her support of *Brown* could survive. On the level of theory, too, it is understood all around that if a theory of constitutional interpretation is inconsistent with *Brown*, the theory goes and *Brown* stays. *Brown* is quite clearly inconsistent with the original understandings of the Fourteenth Amendment, for example. But defenders of the theory that the Constitution must be interpreted according to the original understandings contrive ways to explain how that theory, properly conceived, is consistent with *Brown*. With very rare exceptions, they do not question *Brown*.

The latest, impressive demonstration of *Brown*'s iconic status occurred last year, in the Supreme Court's decision in *Parents Involved in Community Schools v. Seattle School District No. 1*.[2] *Parents Involved* held unconstitutional the efforts of the local school boards in Seattle, Washington, and Louisville, Kentucky, to alleviate racial homogeneity in their schools. All of the Justices, on all sides of the issue, claimed to be faithful to the true

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1. 347 U.S. 483 (1954).

2. 551 U.S. ___, 127 S. Ct. 2738 (2007).

principles of *Brown*.[3] Justices on the current Supreme Court who are willing to overrule important precedents in almost any other area of constitutional law—the Establishment Clause, the Commerce Clause, the First Amendment, the Free Exercise Clause, the Due Process Clause, the Equal Protection Clause, the Cruel and Unusual Punishment Clause—those Justices not only leave *Brown* alone; they claim to venerate it. The battle over the proper interpretation of the Constitution's prohibition on racial discrimination has become a battle over the legacy of *Brown*.

Brown did not always have this untouchable status. Unsurprisingly, segregationists attacked *Brown* as a lawless act of judicial usurpation. But *Brown* also had serious, thoughtful critics among people who were opposed to segregation. Some of those critics, too, said that *Brown* was a lawless act or was misguided in other respects. Today, *Brown*'s iconic status has caused this good-faith, non-segregationist criticism of *Brown* to become a lost chapter, or at least an underappreciated chapter, in the intellectual history of constitutional law in the twentieth century.

That is unfortunate; these criticisms of *Brown*, offered by people who opposed racial segregation, deserve to be taken seriously. That is not because *Brown* should be anything less than a fixed point. The legality of *Brown* is, and should be, as solid a principle as anything in American constitutional law. The reason for coming to grips with these critics of *Brown* is precisely to understand what *Brown* stands for. *Brown*—or, more precisely, its status as a fixed point in American constitutional law—emerged from an intense, bitter struggle. That struggle had an intellectual dimension, as well as a political (and a brute force) dimension. At a time when there are competing views of the legacy of *Brown*, it is worth trying to understand which ideas prevailed in that struggle and which were rejected.

The fiftieth anniversary of *Cooper v. Aaron*[4] is an especially good time to ask these questions, because the Little Rock school integration crisis that led to *Cooper* was a turning point. In the decade following *Brown*, public opinion, particularly in the North, changed substantially. Immediately after *Brown*, while polls suggest that a bare majority of the population approved of what the Supreme Court had done, popular support for *Brown* and for desegregation generally was lukewarm, at best.[5] The halfhearted support of a narrow national majority was no match for the intense opposition to *Brown* in the region that was most affected. But during the next decade, support for the civil

3. *See id.* at 2767–2768; *id.* at 2782 (Thomas, J., concurring) ("[M]y view was the rallying cry for lawyers who litigated *Brown*."); *id.* at 2791 (Kennedy, J., concurring); *id.* at 2800 (Stevens, J., dissenting); *id.* at 2836 (Breyer, J., dissenting).

4. 358 U.S. 1 (1958).

5. *See, e.g.*, MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 343 (2004).

rights movement increased in the North in both numbers and intensity. That made possible the civil right legislation of the mid-1960s. In large part this change in Northern sentiment happened because the true nature of racial apartheid became more visible, and it became impossible for many Northerners to indulge the idea that racial segregation was an essentially benign system. It became too clear to be denied that segregation treated blacks as inferior in a way that was unacceptable.

Little Rock was a critical step in that development. The Court's reaction to Little Rock, in *Cooper v. Aaron*, suggested that the Court, too, had moved beyond the uncertainty about the soundness of *Brown* that some of the Justices felt when that case was decided. Little Rock was one of the first occasions on which Northerners could see, firsthand, the viciousness and brutality that was always latent in segregation. It was an important step toward the widespread acceptance of the civil rights movement and, concomitantly, of *Brown* itself.[6]

Little Rock showed the national audience that segregation was a part of a racial caste system that treated African Americans as an inferior race. That was why *Brown* was correct; that was why "separate" could not possibly be "equal." The defenders of *Brown* understood that: the Court said as much in its opinion in *Brown*.[7] The non-segregationist critics of *Brown* denied that the Court was entitled to draw that conclusion about segregation.[8] That is the position that was eventually repudiated in the decades following *Brown* and that led to the unquestioned status that *Brown* enjoys today.

In the immediate aftermath of *Brown*, when the debate over its legitimacy was still very much alive, everyone—defenders and critics alike—understood that it was not enough just to assert that lines cannot be drawn on the basis of race. You have to explain *why* race is an improper basis for classifying people. In the context of the American South in the mid-twentieth century, the explanation—accepted by some, rejected by others—was that segregation treated blacks as inferior.[9] That account—that explanation—is what prevailed in the next decade, as *Brown* moved toward its current iconic status.

Since affirmative action became an issue in the mid-1970s, a different account of *Brown* has started to emerge. On that account, *Brown* was not about racial subordination or oppression, or even about treating certain groups

6. *See generally* TONY A. FREYER, LITTLE ROCK ON TRIAL: *COOPER V. AARON* AND SCHOOL DESEGREGATION 1–3 (2007).

7. *See* Brown v. Bd. of Educ., 347 U.S. 483, 483, 493–94 (1954) ("To separate [children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.").

8. *See infra* Part I.B.

9. *See Brown*, 347 U.S. at 491–92 (noting that in contemporary cases, "inequality was found in that specific benefits enjoyed by white students were denied to Negro students of the same educational qualification").

as inferior. It was about using race as a criterion, at all. This view was urged with particular fervor by four Justices in the *Parents Involved* case.[10] One reason for trying to recover the history—the controversy over *Brown*'s correctness, the resolution of the controversy, and the role that violent incidents like Little Rock and the decision in *Cooper v. Aaron* played in the resolution of that controversy—is that it should enable us to see that these revisionist efforts to say that *Brown* was simply about the use of race are, in a word, indefensible.

I. THE *BROWN* DECISION AND ITS CRITICS

A. The Decision

Brown was the culmination of a systematic legal campaign by the NAACP.[11] When that campaign began, so-called Jim Crow laws, enforcing racial segregation, were ubiquitous in the South and not unknown elsewhere.[12] These laws were defended in court on the ground that while they separated the races, they did not treat anyone unequally; since the Constitution only required equality, segregation was not per se unconstitutional.[13] The object of the NAACP campaign was to abolish segregation by overturning this doctrine of "separate but equal."[14] *Plessy v. Ferguson*, an 1896 decision upholding a Louisiana statute that required segregation in public transportation, was the case most closely identified with the regime of separate but equal.[15]

The idea that separate could be equal was a sham, as we have come to recognize today. At the time, though, it was not treated as such by the Court: the Court accepted segregation but, formally at least, the Court did not accept inequality.[16] The idea that the races had to be treated equally was the law of the land throughout the time that Jim Crow segregation was practiced in the

10. *See* Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. ___, 127 S. Ct. 2738, 2767 (2007) (plurality opinion).

11. *See, e.g.*, McLaurin v. Okla. St. Regents for Higher Educ., 339 U.S. 637, 642 (1950); Sweatt v. Painter, 339 U.S. 629, 635 (1950); *see generally* RICHARD KLUGER, SIMPLE JUSTICE (1975); Eva Paterson et al., *Equal Justice— Same Vision in a New Day*, 115 YALE L.J. POCKET PART 22 (2005) (discussing the legal campaign waged by the NAACP).

12. *See, e.g.*, Olympia Duhart, *A Native Son's Defense: Bigger Thomas and Diminished Capacity*, 49 HOW. L.J. 61, 65–71 (2005) (addressing the Jim Crow Era in the United States); Paul Finkelman, *The Radicalism of* Brown, 66 U. PITT. L. REV. 35, 41–45 (2004) (discussing the pervasiveness of segregation laws and practices in the South).

13. Risa Lauren Goluboff, "*Let Economic Equality Take Care of Itself*"*: The NAACP, Labor Litigation, and the Making of Civil Rights in the 1940s*, 52 UCLA L. REV. 1393, 1473 (2005).

14. *Id.* at 1473–83 (discussing the NAACP's fight against the "separate but equal" doctrine).

15. 163 U.S. 537 (1896).

16. *See, e.g.*, Buchanan v. Warley, 245 U.S. 60 (1917); McCabe v. Atchinson, Topeka & Santa Fe Ry., 235 U.S. 151 (1914).

South. In 1880, in *Strauder v. West Virginia*,[17] the Court had held that West Virginia violated the Equal Protection Clause when it excluded blacks from jury service.[18] The Court said, among other things, that "the Fourteenth Amendment . . . was designed to assure to the colored race the enjoyment of all the civil rights that under the law are enjoyed by white persons."[19] As for the West Virginia statute, the Court concluded that

> [t]he very fact that colored people are singled out and expressly denied by a statute all right to participate in the administration of the law, as jurors, because of their color, though they are citizens, and may be in other respects fully qualified, is practically a brand upon them, affixed by the law, [and] an assertion of their inferiority . . . .[20]

Plessy did not overrule *Strauder*, or even question it. *Plessy* upheld segregation because, the Court concluded, so long as facilities were equal, separating the races in and of itself—unlike excluding blacks from jury service—did not brand African Americans as inferior.[21] The Court justified this conclusion in a passage that has become one of the most notorious in American constitutional law:

> We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it.[22]

As disingenuous as that passage is, it is worth thinking about what it says. The Court acknowledged that the issue is equality[23]: the Court did not deny that African Americans are entitled to be treated equally with whites.[24] The reason it rejected the attack on the Louisiana statute was that it did not believe (or at least it said it did not believe) that the statute treated blacks unequally.[25] In 1914, at a time when *Plessy* was firmly established as the law (and when American race relations were near their post-Civil War nadir), the Court invalidated an Oklahoma statute that mandated separate but equal facilities but allowed railroads to carry whites-only sleeping, dining, and chair cars.[26] Oklahoma's defense of the statute was that there was insufficient demand from

17. 100 U.S. 303 (1880).
18. *Id*. at 310.
19. *Id*. at 306.
20. *Id*. at 308.
21. Plessy v. Ferguson, 163 U.S. 537, 551 (1896).
22. *Id*.
23. *Id*. at 544.
24. *Id*.
25. *Id*. at 543.
26. McCabe v. Atchison, Topeka & Santa Fe Ry., 235 U.S. 151, 151, 164 (1914).

African Americans for those kinds of cars.[27] The Court struck this statute down on the ground that it did not give African Americans equal facilities.[28] So however blind the Court was to the nature of segregation, its commitment to equality was at least nominal, and at times a little more than that.

Brown did not formally overrule *Plessy*. Much of the discussion in the *Brown* opinion concerned education.[29] It was not obvious that the logic of *Brown* would extend to public transportation, although the Court soon made it clear that *Brown* was not limited to education but invalidated state-mandated segregation generally.[30] But although *Brown* did not formally overrule *Plessy*, it squarely took on the claim, central to *Plessy*, that segregation did not necessarily denote inferiority. The Court characterized the question in the case as: "Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other 'tangible' factors may be equal, deprive the children of the minority group of equal educational opportunities? We believe that it does."[31] And the *Brown* Court uttered its famous line, rejecting *Plessy*'s infamous claim: "To separate [grade school children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."[32]

B. The Critics

The most thoughtful critics of *Brown* took aim directly at the proposition that segregation denoted inferiority. Or, to be more precise, they took aim at the idea that the Court was entitled to strike down state legislation on the basis of the Court's own conclusion on this point. The most celebrated of these critics, in legal circles at least, was Herbert Wechsler, who attacked *Brown* in his 1959 essay *Toward Neutral Principles in Constitutional Law*.[33]

Wechsler's essay began with a defense of judicial review against even more radical attacks that questioned whether the courts are ever entitled to hold that a statute violates a substantive provision of the Constitution.[34] Wechsler's argument was that the courts did have the legitimate power to do so, but only if

27. *Id*. at 161.

28. *Id*. at 161–62.

29. *See, e.g.*, Brown v. Bd. of Educ., 347 U.S. 483, 492–93 (1954).

30. *See, e.g.*, Lee v. Washington, 390 U.S. 333, 333–34 (1968) (holding state statute requiring segregation of races in prisons and jails unconstitutional); Johnson v. Virginia, 373 U.S. 61, 62 (1963) (holding states may not constitutionally require segregation of public facilities).

31. *Brown*, 347 U.S. at 493.

32. *Id*. at 494.

33. Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959), *reprinted in* HERBERT WECHSLER, PRINCIPLES, POLITICS, AND FUNDAMENTAL LAW 3 (1961).

34. *Id*. at 4–15.

they acted in a principled fashion: if the basis of their decisions could be consistently applied to other cases in which the parties and interests at stake might be different.[35] If the Supreme Court did not act in a way that was consistent with "neutral principles," then it was merely a "naked power organ" that was not exercising legitimate authority. [36]

Wechsler's criticism of *Brown* has become infamous for being obtuse—which it is—but his criticism was neither superficial nor badly motivated. Wechsler went out of his way to say that *Brown* and other cases that struck at Jim Crow apartheid "have the best chance of making an enduring contribution to the quality of our society of any that I know in recent years."[37] These were not idle sentiments. Wechsler was a committed opponent of segregation; he had, among many other things, helped the NAACP lawyers prepare for the Supreme Court argument in *Brown* (asking many of the same questions that later formed the basis for his article).[38] Wechsler also distanced himself from those who criticized *Brown* because it was difficult to reconcile with the original understandings, because it overturned *Plessy v. Ferguson*, or because it aroused strident and widespread opposition among some members of the public.[39]

Wechsler said that the problem with *Brown* was that it could not be justified on the basis of "neutral principles."[40] Stated in that way, the criticism seems obscure, or even slightly ridiculous. Of course it is possible to state a principle that justifies *Brown* and that could be applied consistently in future cases. As John Hart Ely said, "How about 'No racial segregation, ever'?".[41] Wechsler did not help matters by celebrating the "enigmatic overtones" of the word "neutral."[42] As a number of people pointed out in response to Wechsler, it was never clear, in his account, what criteria were to be used in determining when a principle was neutral and when it was not.[43]

Wechsler's real criticism of *Brown*—the one that, mistaken though it is, deserves to be taken seriously—did not actually have much to do with principles. His point was that the defenders of *Brown* had to meet the challenge laid down by *Plessy*. They had to explain why segregation necessarily entailed inequality. The decision in *Brown*, Wechsler said, "must have rested on the view that racial segregation is, in principle, a denial of

35. *Id*. at 16–17, 21–23.

36. *Id*. at 17.

37. *Id*. at 37.

38. *See* KLUGER, *supra* note 11, at 529–30.

39. *See* WECHSLER, *supra* note 33, at 43–44.

40. *Id*. at 47.

41. JOHN HART ELY, DEMOCRACY AND DISTRUST 55 (1980).

42. WECHSLER, *supra* note 33, at xiii.

43. *See, e.g.*, Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781, 804–07 (1983).

equality to the minority against whom it is directed."[44] But what was the answer to *Plessy*'s (now-notorious) dictum, which Wechsler quoted, that the "badge of inferiority" exists only because members of the minority group "choose 'to put that construction upon it'?".[45]

Interpreted most charitably, Wechsler's criticism of *Brown* was that the Supreme Court was not in a position to make the judgment that segregation, as it was practiced at those times and in those places, branded blacks as inferior. This was in large measure an empirical judgment, a sociological and psychological judgment about the role that segregation played in a society.[46] *Brown*'s defenders responded in the same terms, arguing that the truth of that judgment was apparent to anyone acquainted with the institution of segregation in the South.[47] This was a debate worth having—not because there was any doubt, really, about the nature of segregation, but because it is worth asking the question about the capacity of courts to make judgments of that kind. In the specific case of *Brown*, the Court was entitled to be confident in its judgment about the nature of segregation. But Wechsler's more general concern—how far are we willing to go in licensing the courts to strike down laws on the basis of the judges' conclusions about those laws' social and psychological effects?—is a legitimate question to ask, even if the answer in *Brown* was clear.

In any event, the answer in *Brown was* clear, or at least so we all—the legal culture and society at large—came to conclude. *Brown* was right about the nature of segregation; Wechsler was wrong to suggest that this was a judgment that could not be justified.[48] The Court acted lawfully in making the judgment it did about segregation. The central point, though, is to be clear on what that judgment was—on what was at stake in the debate about the legal soundness of *Brown*. The question was whether segregation, of the kind practiced at the time, necessarily treated African Americans as inferior, and whether the Supreme Court was entitled to make that judgment. The answer was yes, to both. But *that* was what was wrong with segregation: it treated blacks as inferior. There was no other possible answer to *Plessy*, or to Wechsler.

Wechsler said that his own view was that the issue in *Brown* was freedom of association. If there was a constitutional problem with segregation, he said, it was that segregation prevented blacks and whites from associating with each

44. WECHSLER, *supra* note 33, at 45.

45. *Id*. at 46 (quoting Plessy v. Ferguson, 163 U.S. 537, 551(1896)).

46. *See id*. at 44–45.

47. *See, e.g.*, Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421, 424 (1960).

48. *See* WECHSLER, *supra* note 33, at 46–47.

other.[49] On the other hand, *Brown*'s abolition of segregation forced people to associate with others whom they would rather avoid, and that was also an infringement on freedom of association.[50] Wechsler said he could see no principled basis for choosing between these two outcomes, and that therefore *Brown* should not have disturbed the choice made by the states.[51] (Wechsler's argument about freedom of association actually anticipates the Supreme Court's decision, in *Boy Scouts of America v. Dale*, which held that New Jersey violated the Constitution when its civil rights laws forbade the Boy Scouts from discriminating against gays.[52] But that is another story.) Wechsler did conclude, consistent with his premises, that laws forbidding interracial marriage should be unconstitutional, since they necessarily forbade associations between willing individuals.[53] He criticized the Court for ducking that issue,[54] which the Court did—in essentially lawless fashion—in 1956[55] and only finally resolved more than a decade later.[56] But because school segregation infringed the associational rights of blacks and whites symmetrically, according to Wechsler, he saw no basis for *Brown* in any constitutional right to freedom of association.[57]

This argument about freedom of association was, in a way, just another echo of the *Plessy*-like claim that there is no basis for concluding that segregation imposed distinctive burdens on blacks. The widespread acceptance of *Brown* constituted a rejection of that position, too. So, to sum up, Wechsler advanced two related claims in his criticism of *Brown*: that segregation did not brand blacks as inferior, and that the burdens of segregation were distributed symmetrically between blacks and whites. The acceptance of *Brown* meant that both of those positions were rejected.

Wechsler's criticism of *Brown* came after the events at Little Rock, but he went out of his way to say that there was no justification for the "defiance of

49. *Id.* ("For me, assuming equal facilities, the question posed by state-enforced segregation is not one of discrimination at all. Its human and its constitutional dimensions lie entirely elsewhere, in the denial by the state of freedom to associate, a denial that impinges in the same way on any groups or races that may be involved.").

50. *Id.* at 47.

51. *Id.*

52. 530 U.S. 640, 659 (2000).

53. WECHSLER, *supra* note 33, at 46–47.

54. *Id.* at 46–47 ("I take no pride in knowing that in 1956 the Supreme Court dismissed an appeal in a case in which Virginia nullified a marriage on this ground, a case in which the statute had been squarely challenged by the defendant, and the Court . . . dismissed per curiam on procedural grounds that I make bold to say are wholly without basis in the law.").

55. Naim v. Naim, 350 U.S. 985, 985 (1956), *dismissing appeal from* Naim v. Naim, 90 S.E.2d 849 (Va. 1956). For a discussion, see KLARMAN, *supra* note 5, at 321–23.

56. Loving v. Virginia, 388 U.S. 1 (1967).

57. WECHSLER, *supra* note 33, at 47.

the courts"; that was "the antithesis of law."[58] An even more celebrated critic, though, took Little Rock as her starting point, and expressed considerable sympathy for those who defied the courts.[59]

Hannah Arendt was a philosopher who fled from Germany to escape Nazi persecution and later wrote extensively on issues of political authority and totalitarianism, among other things.[60] The central argument of Arendt's essay, *Reflections on Little Rock*, was that the schools should not have been the arena in which the battle for desegregation was fought.[61] Upon seeing the photographs in the newspapers of African American children being harassed for trying to attend school in Little Rock, Arendt said:

> My first question was, what would I do if I were a Negro mother? The answer: under no circumstances would I expose my child to conditions which made it appear as though it wanted to push its way into a group where it was not wanted. Psychologically, the situation of being unwanted (a typically social predicament) is more difficult to bear than outright persecution (a political predicament) because personal pride is involved.[62]

Then, Arendt said:

> My second question was: what would I do if I were a white mother in the South? Again I would try to prevent my child's being dragged into a political battle in the schoolyard. In addition, I would feel that my consent was necessary for any such drastic changes no matter what my opinion of them happened to be. . . . I would deny that the government had any right to tell me in whose company my child received its instruction.[63]

Her essay on Little Rock at times shows an astonishing degree of sympathy for whites in the segregated states: "To force parents to send their children to an integrated school against their will means to deprive them of rights which clearly belong to them in all free societies—the private right over their children and the social right to free association."[64]

Considering the source, especially, these sentiments are remarkable. But in its basic approach, Arendt's argument echoed both Wechsler's essay and the *Plessy* opinion. Like Wechsler, Arendt saw the issue in large part as one of

58. *Id.*

59. HANNAH ARENDT, *Reflections on Little Rock*, *in* RESPONSIBILITY AND JUDGMENT 193–213 (2003). *Refelctions on Little Rock* was originally published in 1959.

60. *See* Jerome Kohn, *A Note on the Text* to ARENDT, *supra* note 59, at xxxi; Jerome Kohn, *Introduction* to ARENDT, *supra* note 59, at xix.

61. *See* ARENDT, *supra* note 59, at 213 ("Hence it seems highly questionable whether it was wise to begin enforcement of civil rights in a domain where no basic human and no basic political right is at stake, and where other rights—social and private—whose protection is no less vital, can so easily be hurt.").

62. *Id.* at 193.

63. *Id.* at 195.

64. *Id.* at 212.

freedom of association, as her remarks about the schoolchildren suggest. She did not question that African Americans were entitled to be treated as equals. But she believed that equality was a norm that applied only in the public sphere[65] (and she apparently believed that the public schools were not part of the public sphere). In their private affairs, people were entitled to discriminate; they did not have to treat everyone equally, and indeed a requirement of equality would amount to an abolition of much of private life.[66] Freedom of association, in that sense, trumped equality.

Consistent with the view that the issue was freedom of association, Arendt, even more vehemently than Wechsler, denounced laws forbidding interracial marriage; she called them "the most outrageous law[s] of [the] Southern states"[67] and, somewhat implausibly, "what the whole world knows to be the most outrageous piece of legislation in the whole Western Hemisphere . . . ."[68] At the same time, though, Arendt said that "[t]he real issue is equality before the law of the country, and equality is violated by segregation laws, that is, by laws enforcing segregation, not by social customs and the manners of educating children."[69] She seemed to believe (and in this respect echoed another theme of *Plessy*) that the laws that segregated public schools were epiphenomena of social and cultural norms and so should not be regarded as acts of the government.

These, then, were the views of these thoughtful, well-intentioned critics of *Brown*: Segregation in the schools did not produce inequality—either no inequality at all, or no inequality of the kind that the courts should try to eliminate. Segregation did interfere with freedom of association, but in that respect its effects were symmetrical: both blacks and whites suffered. Moreover, putting aside interracial marriage, desegregation—*Brown* itself—was as much of a threat to associational freedom as the Jim Crow laws were.

To today's sensibilities these sentiments seem either naïve or morally obtuse. And these are the views that must be rejected if *Brown* is to be accepted. But one sentence of Arendt's encapsulates the reasons that it is worth revisiting this debate. In the wake of Little Rock, she endorsed the view that "enforced integration is no better than enforced segregation."[70] So baldly stated, that view seems shocking, especially coming from someone known for wisdom and perspicuity. But it is really just the position of the Supreme Court Justices who equated the integrationist efforts in *Parents Involved* with the enforced segregation struck down by *Brown*.

65. *Id.* at 199–200, 203, 205–06.
66. ARENDT, *supra* note 59, at 205–06.
67. *Id.* at 202.
68. *Id.* at 196.
69. *Id.* at 194.
70. *Id.* at 202.

II. LITTLE ROCK, *COOPER V. AARON*, AND THE EVOLUTION OF PUBLIC OPINION

The Little Rock school crisis began fifty years ago. It was a strange series of events in many ways. Neither the city of Little Rock nor the state of Arkansas was rigidly segregated, and neither was the site of particularly outspoken opposition to *Brown*.[71] African Americans had attended the University of Arkansas even before *Brown*.[72] In the years immediately after *Brown*, when whites in much of the Deep South were united in their defiance of the Supreme Court, several Arkansas school districts made plans to desegregate, and African Americans enrolled in five of the six previously all-white state colleges.[73] Little Rock itself had a reputation for being relatively progressive on racial issues.[74]

Consistent with that reputation, the Little Rock District School Board announced, just three days after *Brown* was decided, that it intended to comply with the Supreme Court's decision.[75] A year later, the School Board announced a plan for desegregation, beginning in the high school in the fall of 1957 and concluding with the complete desegregation of the school system by 1963.[76] The School Board announced this plan even before the Court's second *Brown* decision,[77] which specifically addressed the remedial issues left open by *Brown I* and which became famous (or notorious) for saying that school districts were to desegregate "with all deliberate speed."[78] African American groups challenged the Little Rock School Board's plan on the ground that it moved too slowly, but they lost their case in the district court and the court of appeals and did not seek Supreme Court review.[79] The School Board notified nine African American children that they were to be admitted to Central High School in Little Rock in September 1957.[80]

While the local authorities in Little Rock were proceeding in this cautious way toward desegregation, Governor Orval Faubus and the state legislature had other plans.[81] The state constitution was amended to require the

71. *See* J. HARVIE WILKINSON III, FROM *BROWN* TO *BAKKE*: THE SUPREME COURT AND SCHOOL INTEGRATION: 1954–1978 88–89 (1979) ("Arkansas, though opposed to integration was not the Deep South . . . . Little Rock, especially, did not seem the place for racial politics to prosper . . . . [and] nobody expected unusual trouble.").

72. *Id*.

73. *Id.* at 89.

74. *See id.* 88–89 ("And Little Rock, especially, did not seem the place for racial politics to prosper.").

75. *See* Cooper v. Aaron, 358 U.S. 1, 7 (1958).

76. *Id*. at 8.

77. *Id*.

78. Brown v. Bd. of Educ., 349 U.S. 294, 301 (1955).

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

80. *Id*. at 9.

81. For a definitive account of these events, see FREYER, *supra* note 6, at 13–134.

legislature to resist "in every Constitutional manner the Un-constitutional desegregation decisions" in *Brown I* and *Brown II*.[82] The Arkansas General Assembly rescinded school compulsory attendance laws to the extent that they required attendance at racially mixed schools.[83]

On September 2, 1957—the day before the African American children were to begin at the high school—Governor Faubus sent National Guard troops to the high school and announced that the school was "off limits" to the black children.[84] On September 3, the federal district court ordered the school board to proceed with the integration plan.[85] But the next day, when the children tried to enter the school, the National Guard troops "stood shoulder to shoulder at the school grounds" and prevented them from doing so.[86] The National Guard troops continued to do this for the next three weeks, until the district court, on the application of the federal government, entered an injunction forbidding the Governor from obstructing the desegregation plan.[87]

It was clear at the time, and has become even clearer in retrospect, that the confrontation was precipitated by Governor Faubus for reasons that were entirely opportunistic.[88] Faubus himself was, by the standards of Southern politicians at the time, a racial moderate who had defeated outright race-baiters in previous elections.[89] But he was afraid of another challenge from diehard segregationists, and he apparently did what he did at Little Rock for that reason. Faubus's justification for his actions—that it would "not be possible to restore or to maintain order if forcible integration is carried out" at Central High—was, by all the evidence, totally specious.[90] No local authorities asked for the Governor's help, and no state official consulted with the local authorities before dispatching the Guard.[91] The district court found, in subsequent proceedings, that before Faubus called out the National Guard, "no crowds had gathered about Central High School and no acts of violence or threats of violence in connection with the carrying out of the plan had occurred."[92]

But Faubus's actions released the evil genie. The Little Rock school board explained to the Supreme Court that

82. *Cooper*, 358 U.S. at 8–9.
83. *Id.* at 9.
84. *Id.*; *see* WILKINSON, *supra* note 71, at 89.
85. *Cooper*, 358 U.S. at 10–11.
86. *Id.* at 11.
87. *Id.* at 11–12.
88. *See, e.g.*, FREYER, *supra* note 6, at 142–43; WILKINSON, *supra* note 71, at 88–90.
89. WILKINSON, *supra* note 71, at 88.
90. *Id.* at 89–90.
91. *Cooper*, 358 U.S. at 10.
92. *Id.* at 9 (quoting Aaron v. Cooper, 156 F. Supp. 220, 225 (E.D. Ark. 1957)).

> [t]he effect of [Faubus's] action . . . was to harden the core of opposition to the Plan and cause many persons who theretofore had reluctantly accepted the Plan to believe that there was some power in the State of Arkansas which, when exerted, could nullify the Federal law and permit disobedience of the decree of [the] [District] Court, and from that date hostility to the Plan was increased and criticism of the officials of the [School Board] . . . bec[a]me more bitter and unrestrained.[93]

When the district court entered an injunction against the Governor, and the African American students were admitted to the school on September 23, they were met by a hostile mob. That same day the students were withdrawn from the school by the Little Rock police out of concern for their safety.[94]

Two days later, President Eisenhower ordered a thousand paratroopers to Little Rock and placed the National Guard under federal command.[95] The students were admitted to the school, and federal troops remained at the school for two months.[96] The federalized National Guard stayed there for the entire school year.[97] By all accounts, the year was a miserable one for the African American students. They were ostracized and abused, and "[g]angs of segregationist toughs" not only harassed the black students, sometimes violently, but threatened any white students who showed signs of befriending them.[98]

In February of 1958, the Little Rock school board asked the district court for permission to withdraw the African American students from the high school and to postpone the implementation of the desegregation plan for two and a half years.[99] The school board argued that the public hostility to desegregation made it impossible to operate the school.[100] The district court, after a hearing, found that conditions in Central High School were characterized by "chaos, bedlam and turmoil" and were marked by threats and violent incidents directed against the black students and, on occasion, school authorities.[101] The district court concluded that the situation was "intolerable" and granted the relief that the board had requested.[102] The court of appeals reversed,[103] and the Supreme Court heard the case—*Cooper v. Aaron*—on a highly expedited basis, holding a special session of the Court in mid-

93. *Id.* at 10.
94. *Id.* at 11–12.
95. *Id.* at 12; WILKINSON, *supra* note 71, at 90.
96. *Cooper*, 358 U.S. at 12.
97. *Id.*
98. WILKINSON, *supra* note 71, at 90–91.
99. *Id.* at 91.
100. *Cooper*, 358 U.S. at 12.
101. *Id.* at 13 (quoting Aaron v. Cooper, 163 F. Supp. 13, 21 (E.D. Ark. 1958)).
102. *Id.*
103. Aaron v. Cooper, 257 F.2d 33, 40 (8th Cir. 1958).

September 1958, so that the matter could be resolved before the school year began.[104]

The Supreme Court affirmed the court of appeals' judgment on the day after it heard argument, and then, two weeks later, rendered an extraordinary opinion.[105] The opinion was issued in the name of all nine Justices.[106] The Court said that the case

> raises questions of the highest importance to the maintenance of our federal system . . . . It necessarily involves a claim by the Governor and Legislature of a State that there is no duty on state officials to obey federal court orders resting on this Court's considered interpretation of the United States Constitution.[107]

On the specific legal issue before it, the Court ruled that the disorder in the school did not justify delaying the desegregation plan. "The constitutional rights of respondents are not to be sacrificed or yielded to the violence and disorder which have followed upon the actions of the Governor and Legislature."[108] Realistically, of course, no other ruling was possible. Governor Faubus was openly challenging the ruling in *Brown*; President Eisenhower, who had been lukewarm in his support of that decision, sent in troops to enforce desegregation. Especially after it had finally elicited support from the executive branch, the Court could not possibly have given any sign that it was backing away from *Brown*, and it did not.[109]

As far as the development of the law is concerned, *Cooper* arguably established, under the Equal Protection Clause, a principle parallel to one that is now fairly well established for freedom of speech. In First Amendment law, the idea is known as the "heckler's veto": people opposed to a speaker may not, by threatening or engaging in disruptive actions, create the harm that justifies the speaker's suppression.[110] *Cooper* was an easy case for the parallel principle because, on the facts of the case as it came to the Court, the harm was created by the government itself, in the person of Governor Faubus. The reach of this principle does raise potentially difficult questions, though, if the harms are significant and fall on innocent third parties (as they often will), and especially if there is an attenuated or questionable causal connection to the actions of those seeking to undermine constitutional rights. Be that as it may, the ruling in *Cooper* on this point was essentially as straightforward as a legal matter as it was as a matter of political reality.

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104. *Cooper*, 358 U.S. at 4–5.
105. *Id.*
106. *Id.* at 4.
107. *Id.*
108. *Id.* at 16.
109. *See* KLARMAN, *supra* note 5, at 328–29.
110. *See, e.g.*, Forsyth Cty. v. Nationalist Movement, 505 U.S. 123, 134–35 (1992).

Although the Court in *Cooper* explicitly noted that this principle "is enough to dispose of the case[,]" it went on to discuss "the premise of the actions of the Governor and Legislature that they are not bound by our holding in the *Brown* case."[111] The Court then delivered perhaps the strongest statements in its history in support of what is usually called judicial supremacy. This part of the *Cooper* opinion has become more famous, and it is highly controversial. The Court said that *Marbury v. Madison* had "declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution . . . . It follows that the interpretation of the Fourteenth Amendment enunciated by this Court in the *Brown* case is the supreme law of the land . . . ."[112] Further, the Court said, the Supremacy Clause of the Constitution made that interpretation of the Fourteenth Amendment "of binding effect on the States" and their officials, and "[n]o state legislator or executive or judicial officer can war against the Constitution without violating his [oath] to support it."[113] The Court added that "[t]he principles announced in [the *Brown*] decision and the obedience of the States to them, according to the command of the Constitution, are indispensable for the protection of the freedoms guaranteed by our fundamental charter for all of us."[114]

The Court seemed to be saying, in this passage, that state officials had an obligation not just to obey court orders directed to them—Faubus had been careful never to defy such an order[115]—but to accept as binding on them the decisions of the Supreme Court even in cases to which they were not parties. There is a robust tradition to the contrary.[116] Perhaps the most famous example is President Lincoln's response to the *Dred Scott* decision: He agreed that he had to accept the result in that specific case, but he denied that he had to accept the principle of the decision.[117] So while Dred Scott would be enslaved, Lincoln did not accept that he had to treat other people identically situated to Dred Scott as slaves until specific orders were entered in those cases as well.[118]

This issue of judicial supremacy is complex and difficult. The Court's position in *Cooper*, taken at face value, seems to go too far; it is difficult to see why the other branches of government (*Cooper*'s logic applies not just to the

111. *Cooper*, 358 U.S. at 17.

112. *Id*. at 18.

113. *Id*.

114. *Id*. at 19–20.

115. FREYER, *supra* note 6, at 142.

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

117. Abraham Lincoln, The Dred Scott Decision: Speech at Springfield, Illinois (June 26, 1857), *reprinted in* ABRAHAM LINCOLN: HIS SPEECHES AND WRITINGS 352–66 (Roy P. Basler ed., 1969).

118. *See* KRAMER, *supra* note 116, at 211–12.

states but to the President and Congress) must instantly acquiesce in the principles established by Supreme Court decisions interpreting the Constitution, especially when the Court itself remains free to overturn those decisions. On the other hand, the program of massive resistance to *Brown* undertaken by many Southern states also seems unacceptable, and Faubus's actions seem totally beyond the pale, even though he never placed himself in contempt of court.

But those are different issues from the ones surrounding *Brown*. *Cooper* reaffirmed *Brown* in the most unequivocal terms possible. More important, though, was the effect that the events in Little Rock—and subsequent events throughout the South—had on Northern public opinion about *Brown* and civil rights generally.

Defenders of Jim Crow laws portrayed segregation as two things. First, they urged that segregation was an organic component of Southern culture, entitled to respect as a traditional way of dealing with complex, difficult matters of race that outsiders could understand imperfectly or not at all.[119] Second, they suggested that segregation was essentially benign, an institution that operated in the best interests of both races.[120]

The criticisms of *Brown* made by Wechsler and Arendt, while not accepting these views entirely, reflect their influence. The linchpin of their criticisms of *Brown* was that segregation operated in a way that was essentially symmetrical; or at least (for Wechsler) the Court had no basis for concluding otherwise. Some blacks, and some whites, might oppose it, but there was no reason to say that segregation necessarily treated people unequally. The idea that segregation was an outgrowth of social norms, not imposed by the state, was central to Arendt's argument. And even Wechsler's account had to presuppose that segregation served some plausibly legitimate purpose.

It is difficult to see how these views could have survived Little Rock. The opposition to segregation in Little Rock was not deeply woven into the fabric of the society; Little Rock was prepared to live with desegregation. The intense opposition to segregation was the product of political opportunism, not a sanctified tradition. (C. Vann Woodward, in his classic book *The Strange Career of Jim Crow*,[121] had sounded similar notes in his account of the initial establishment of state-enforced segregation in the South.[122]) Of course the claim that segregation was a deeply rooted custom would have been more plausible for Mississippi than for Little Rock. But the point remained that

119. *See* KLARMAN, *supra* note 5, at 5–7; James W. Fox Jr., *Doctrinal Myths and the Management of Cognitive Dissonance: Race, Law, and the Supreme Court's Doctrinal Support of Jim Crow*, 34 STETSON. L. REV. 293, 321 (2005).

120. C. VANN WOODWARD, THE STRANGE CAREER OF JIM CROW 168–69 (3d ed. 1974).

121. *See id.*

122. *Id*. at 36–40.

opportunistic politicians, not just deep social norms, were often behind the Jim Crow institutions.

More important, Little Rock was a key step in the evolution of opinion in the North about the malignancy of Jim Crow segregation. The televised images of frenzied crowds of white adults abusing black schoolchildren were very dramatic. The effects of these scenes were, of course, reinforced over the next several years by even more violent and abusive actions in the Deep South in particular. By the mid-1960s, Northern opinion, no longer in any doubt that segregation treated African Americans unequally, swung firmly in support of civil rights legislation,[123] and *Brown*'s status as an icon solidified. Little Rock, as much as anything, began that progression.

In fact it is hard to understand how Wechsler, writing after Little Rock, and especially Arendt, writing in direct response to Little Rock, could have said the things they did about segregation. Arendt's point that schoolchildren had been recruited to fight the adults' battle for them—that point was legitimate, and troubling. But it is difficult to see how she could have entertained the idea that there was a symmetry between segregation and integration—that integrating Central High School was somehow as morally objectionable as what the mobs did.

Similarly, it was more than understandable for Wechsler to want to draw a principled line around the Court's capacity to make sociological judgments about the effects or significance of major social institutions. That question about judicial capacity, raised by Wechsler, remains a legitimate one. But Wechsler's skepticism about whether segregation really treated blacks as inferior—his obtuse insistence that the issue was a symmetrical one of freedom of association—is hard to understand in the aftermath of Little Rock.

Little Rock, in its effects on national opinion, began to solidify the legacy of *Brown*; it began to turn *Brown* into the unchallengeable icon it is today. It is not out of the question that a more accommodating reception of *Brown* in the South might have left Northern support for *Brown* in the lukewarm state it was in 1954.[124] While it is hard to believe that *Brown* would ever have been repudiated, the way in which events played out in Little Rock and, later, elsewhere in the South—as a conflict between courageous victims asserting their constitutional rights and the violent defenders of the status quo—helped make *Brown* inviolate.

123. WOODWARD, *supra* note 120, at 186.

124. *See* KLARMAN, *supra* note 5, at 421–42.

III. *PARENTS INVOLVED* AND THE LEGACY OF *BROWN*

But if *Brown* is inviolate, what does it stand for? That was the question that divided the Court in *Parents Involved*.[125] The answer from history should have been clear. *Brown*'s opponents, echoing *Plessy*, questioned why segregation constituted unequal treatment at all. Little Rock answered them: Segregation denied equal protection because segregation as it was then practiced in the United States was a malevolent device directed at African Americans. It did not harm blacks and whites equally. The people who witnessed Little Rock were not witnessing the equal oppression of blacks and whites. The suggestions to the contrary by Wechsler and, especially, Arendt, were thoroughly repudiated, and that is why *Brown* is so well established.

The four Justices in *Parents Involved* who took the most extreme position against the use of race claimed, portentously, that they were allowing history to be heard.[126] But their opinion actually says nothing about history. It does not talk about what segregation was like; it does not talk about Little Rock, or Selma, or Birmingham, or any of the other events that conveyed to a previously skeptical public the truth of what *Brown*, subtly but unmistakably, said about segregation.

There is in fact much to criticize in the approach taken by the four-Justice plurality in *Parents Involved*. To some extent, the problems in the plurality opinion were present in earlier affirmative actions cases as well. *Parents Involved* is notable, though, for several reasons. First, it goes significantly beyond those earlier decisions in limiting the power of governments to use racial classifications to overcome de facto segregation. As the dissenters in *Parents Involved* noted, for decades it had been taken for granted that the government could use racial classifications for that purpose if it chose; the only controversy was over whether the government was obligated to do so.[127] Second, the plurality in *Parents Involved* all but declared that racial classifications may never be used (although the plurality allowed an exception for racial classifications that are used to remedy unlawful discrimination by the government—more on that exception presently).[128] The Court has never before come so close to declaring the use of race unconstitutional across the board. And third, the tone of the plurality opinion—its overt hostility to the use of race and its claim of the moral high ground—are different from the more measured discussions in earlier opinions. In those respects the plurality opinion is closer to the angry separate opinions written, in earlier cases, by

125. 551 U.S. ___, 127 S. Ct. 2738, 2783 (2007).

126. *See id.* at 2767 ("[W]hen it comes to using race to assign children to schools, history will be heard.").

127. *See, e.g.*, *id.* at 2801 (Breyer, J., dissenting).

128. *See, e.g.*, *id.* at 2752, 2761 (plurality opinion).

Justices Thomas and Scalia, who have always taken the position that racial classifications are unconstitutional in all instances.[129]

Specifically, *Parents Involved* is written—in tone as well as substance—as if *Brown*'s importance is that it found in the Constitution a provision forbidding the government from using racial classifications. "It was not the inequality of the facilities but the fact of legally separating children on the basis of race on which the Court relied to find a constitutional violation in 1954."[130] Statements like these cry out for a dose of Wechsler's kind of skepticism, or Arendt's—not because those critics were right about *Brown*, but because the questions they asked led to an understanding of the basis of *Brown*. The Constitution does not contain a provision outlawing racial classifications. It contains a provision requiring equality in certain realms. The question asked by Wechsler and Arendt—why and when does the use of race produce inequality?—still requires an answer. In the aftermath of *Brown*, the events at Little Rock and elsewhere in the South showed what that answer was, when the question was asked about *Brown*: Jim Crow segregation was an engine of oppression of blacks. No one can plausibly claim that affirmative action measures like those challenged in *Parents Involved* (or any other case, for that matter) have a comparable effect on whites.

Enough is left, from the era of *Brown* and *Cooper v. Aaron*, to indict the plurality opinion on its own terms (and Justice Thomas's concurring opinion, too, which asserts much the same position even more unequivocally, and in even stronger language).[131] The plurality was careful to put aside the use of racial classifications to remedy past discrimination by the government. That use of racial classifications, the plurality said, is constitutional.[132] The Court has recognized that point, again and again, so the plurality had no choice but to acknowledge it. But the plurality just quarantines that "exception"; it does not try to explain why there is such an exception, or how it might fit with the principles that the plurality claims were discovered in the Constitution by *Brown*.

But if *Brown* stands for the principle that racial classifications are pernicious, no matter what, how can a racial classification possibly provide a remedy for the unlawful use of race? If, as the plurality said, "[t]he way to

129. *See, e.g.*, Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 239 (1995) (Scalia, J., concurring) ("In my view, government can never have a 'compelling interest' in discriminating on the basis of race in order to 'make up' for past racial discrimination in the opposite direction.") (citing Richmond v. J.A. Croson Co., 488 U.S. 469, 520 (1989) (Scalia, J., concurring in judgment)); *Adarand*, 515 U.S. at 241 (Thomas, J., concurring) ("[G]overnment-sponsored racial discrimination based on benign prejudice is just as noxious as discrimination inspired by malicious prejudice.").

130. *Parents Invovled*, 127 S. Ct. at 2767.

131. *Id*. at 2782–88 (Thomas, J., concurring).

132. *See, e.g.*, *id*. at 2752, 2761 (plurality opinion); *id*. at 2768–69 (Thomas, J., concurring).

stop discrimination on the basis of race is to stop discriminating on the basis of race[,]"[133] then a remedial exception to the prohibition against racial classifications, far from being appropriate, would be perverse.

The answer, of course, is that the wrong being remedied is not the use of a racial classification. That was precisely the point made by the critics of *Brown*: You cannot just assert that racial classifications violate the Constitution. You have to explain why. The point of *Brown* is that racial classifications of a certain kind, in a certain context, treat blacks as inferior. The so-called exception for the remedial use of racial classifications exists because when racial classifications are used to undo a racial caste system, then they do not violate the Constitution; indeed, as the Court held in the post-*Brown* era, they may be constitutionally required.[134] That supposed exception is not an exception at all; it is just an application of the basic principle that racial classifications are unconstitutional when they brand a group as inferior, and not otherwise.

Brown had a legacy for the nation—that Jim Crow segregation was unconstitutional and had to end. The Little Rock crisis tested whether that legacy would survive; in *Cooper v. Aaron*, the Court insisted on it; eventually, as the passage of the civil rights acts of the 1960s showed, the nation as a whole accepted it. But *Brown*—and Little Rock and *Cooper v. Aaron*—also left a legacy for the Supreme Court. Opinions differ about *Brown* and the Court's actions in the subsequent decade that elapsed before the Civil Rights Act[135] and Voting Rights Act[136] were passed. It can plausibly be argued that the Supreme Court, having made a mostly symbolic statement in *Brown*, stood on the sidelines and did not really try to play a role in abolishing Jim Crow, intervening—in *Cooper*—only to protect its own authority. Be that as it may, though, *Brown* created a great moral legacy for the Court. The Court came to be seen as the institution of the national government that stood up to segregation. The Court's justified confidence in the moral rightness of its position surely helped lead to the strong, and controversial, claims of judicial supremacy in *Cooper*.

That legacy, too, has persisted. Judicial supremacy, which was by no means accepted earlier in our history, has been at a high water mark since the Civil Rights Era. Today's Supreme Court is still, in a sense, living off the moral capital it accumulated in cases like *Cooper*. The image of the Supreme Court today, for many people, is still the Supreme Court of *Brown* and

133. *Id*. at 2768 (plurality opinion).

134. *See, e.g.*, McDaniel v. Barresi, 402 U.S. 39 (1971); *Parents Involved*, 127 S. Ct. at 2771 (Thomas, J., concurring) ("In such cases, race-based remedial measures are sometimes required.").

135. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964).

136. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (1965).

Cooper—not, for example, the Supreme Court of the New Deal Era, which obstructed popular legislation and was widely criticized. It is an irony, to say the least, when the Court uses the moral stature that it has acquired in no small part because of *Brown* and Little Rock to undermine the true legacy of that decision and that era.