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Those who oppose judicial supremacy follow in the footsteps of Abraham Lincoln himself.

Newt Gingrich's statements about the judiciary during the December 15, 2011, GOP debate and on Bob Schieffer's *Face the Nation* the following weekend ignited a firestorm over his view of American constitutionalism that has been smoldering in the media for several months now. His challenge to judicial supremacy—the idea that the Supreme Court has the last word on the meaning of the Constitution—has been much

condemned, particularly because Gingrich's argument also criticizes the declaration of judicial supremacy in the Court's 1958 desegregation decision, *Cooper* v. *Aaron*. Ian Millhiser of *Think Progress* was quick to accuse the former Speaker of siding with the white supremacists of the 1950s when Gingrich first released his position paper on the judiciary in October.

Although the media's breathless denunciations suggest otherwise, Gingrich is not the first public figure to challenge the *Cooper* Court's assertion of its supremacy over constitutional interpretation. Attorney General Edwin Meese did the same in a 1986 lecture at Tulane University. Meese's address elicited a similarly angry response from the press, especially from columnist Anthony Lewis, who made *Cooper* the centerpiece of his appraisal of Meese's speech. As was the case in 1986, the debate over *Cooper* in the past few months has been confused, epitomized by the *New York Times*' recent suggestion that Gingrich's critique of *Cooper* has "disturbing racial undertones." The *Times* and others misunderstand the history and law of that famous case. Those who argue that the Supreme Court is not the ultimate arbiter of the Constitution's meaning need not deny the fact that *Cooper* was rightly decided; they can and do celebrate the courage of that opinion.

Cooper v. *Aaron* came to the Supreme Court under extraordinary circumstances, the drama of which is matched by few instances in our constitutional history. On the day before black students were to be admitted to Central High School in Little Rock, Arkansas, in compliance with the local school board's desegregation plan and the Court's decision in *Brown* v. *Board of Education*, Governor Orval Faubus ordered the state national guard to surround the building and declare it "off limits" to blacks. The governor's actions precipitated a national crisis. President Eisenhower ordered in the Army to ensure desegregation moved forward. Months later, still in the midst of the crisis and at the request of the Little Rock School Board, the federal district court overseeing desegregation in Little

Rock halted implementation of *Brown*, reasoning that more time was needed before desegregation could proceed.

The stakes for the Supreme Court and the nation could not have been higher. The virulent racism of Governor Faubus and the violence his actions encouraged had led the district court to retreat from implementing *Brown*. If the Supreme Court went along with the district court, if it lost its nerve at this critical moment, the segregationists would win a crushing victory, having intimidated the nation's highest tribunal.

When the Supreme Court issued its opinion, it forcefully rejected the reasoning of the district court. All nine justices held that black students' constitutional rights "are not to be sacrificed or yielded to the violence and disorder which have followed upon the actions of the Governor and Legislature." Because that violence and disorder were the basis for the district court's decision, the Supreme Court's statement, as its opinion acknowledged, was "enough to dispose of the case" and require desegregation to continue.

But the Court went further. It sought to refute the constitutional theory that served as the legal foundation of Arkansas's resistance to *Brown*: nullification. When the school board asked the district court to delay implementation of desegregation, it did so in part because Governor Faubus's actions had led people to believe that "there was some power in the State of Arkansas which, when exerted, could nullify the Federal law." The Court recognized that the legal argument in the case was fundamentally about Arkansas's assertion that it was not bound by the Court's decision in *Brown* because it had the right to determine for itself what the Constitution meant.

Arkansas's position was hardly novel. Based on the idea that states retained their ultimate sovereignty when they agreed to the constitutional compact and were the final judges of whether that compact was being violated, nullification dates at least as far back as the Virginia and Kentucky

Resolutions of 1798 and 1799, which declared the Alien and Sedition Acts unconstitutional. South Carolina likewise asserted the power to nullify federal tariff laws in 1832. That effort was emphatically rejected by President Andrew Jackson in his Proclamation to the People of South Carolina. Jackson, as well as his nemesis Henry Clay, saw that the internal logic of nullification, once accepted, permitted secession and disunion.

Their concerns were borne out later by the Civil War. That harrowing conflict firmly established that the compact theory of the Constitution had been rejected, having been "tried by war and decided by victory," to quote Abraham Lincoln. In its place stood a theory of America as an indissoluble Union, as evidenced by historian James McPherson's observation that Americans ceased speaking of "the United States" in the plural and began referring to it in the singular. The Union theory left no room for states to judge for themselves whether to obey federal law. The Supreme Court recognized this post-war consensus in the 1869 case of *Texas* v*. White*, in which the Court held the following: "The act which consummated [Texas's] admission into the Union was something more than a compact; it was the incorporation of a new member into the political body. And it was final."

The relation of this history, especially Jackson's Proclamation and the decision of the Civil War, would have sufficed to settle the nullification question presented by Governor Faubus, a question that was itself extrinsic to the legal issue in *Cooper* and the judgment to proceed with desegregation.

But the Court instead chose to answer the nullifiers by making a far bolder and far less historically supportable claim: The justices made the striking assertion that *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." Because the judiciary is supreme in constitutional questions,

according to the *Cooper* Court, and because states are bound by the Constitution under Article VI, states must obey the judiciary's decisions. The Court's statement has been widely viewed by scholars as an assertion that the Court's constitutional interpretations bind all levels of government, including its co-equal branches of the federal government.

The scope of the Court's statement was not tailored to its end. *Cooper* was a case about enforcing federal law against the states. The Court need only have claimed the power to bind the states to its decisions; there was no need for the Court to assert its supremacy in constitutional interpretation against Congress and the president. The second sentence of the Court's opinion makes it clear that the case "involve[d] a claim by the Governor and Legislature of *a State* that there [was] no duty *on state officials* to obey federal court orders resting on this Court's considered interpretation of the Constitution." Moreover, the Court's statement was wholly superfluous to the legal issue in the case. Its rejection of Governor Faubus's intimidation tactics sufficed to require desegregation to go forward. But the Court chose to assert a far more sweeping power: the final word on the meaning of the Constitution for all levels of government.

It is this last claim—that the Court's decisions bind Congress and the president—to which Gingrich, Meese, and eminent scholars of varied political affiliation object. Nothing in this criticism tarnishes the courage or rightness of the Court's decision in *Cooper*. As the Court acknowledged, its statement on judicial supremacy had no bearing on the outcome of the case, and the history related above demonstrates that judicial supremacy was unnecessary to rebut the legitimacy of nullification.

The real question is not whether opponents of the Court's assertion of judicial supremacy in *Cooper* applaud the outcome of the case; it is whether supporters of judicial supremacy understand that their position places them on the other side of Abraham Lincoln. It was Lincoln who, in response to Chief Justice Roger Brooke Taney's opinion in *Dred Scott* v. *Sandford*,

rejected judicial supremacy in his first inaugural address. Lincoln believed that accepting judicial supremacy would mean that "the people will have ceased to be their own rulers, having to that extent practically resigned their government into the hands of that eminent tribunal." He followed through on his challenge to the Court by defying the *Dred Scott* decision and issuing passports to free black citizens. How odd that those who follow in the tradition of Lincoln should find themselves accused of the sins of Taney.

About the Author

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