Articles

Supremacies and the Southern Manifesto

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In March 1956, the overwhelming majority of senators and congressmen from the former Confederate states joined forces to issue the Southern Manifesto. That document marshaled a series of constitutional arguments contending that the Supreme Court incorrectly decided Brown v. Board of Education. *Legal scholars initially lavished considerable attention on the Manifesto. Today, however, the Manifesto no longer occupies a central place in the American legal imagination. No law review article, or any other work written by a law professor, has appeared in more than fifty years that examines the Manifesto in a sustained fashion. This Article contends that the Manifesto should be restored to a prominent position in legal scholarship because the document serves to recast two prominent debates that have occupied constitutional law scholars for decades. First, analyzing the Manifesto reveals that many southern politicians were far more legally sophisticated, calculating, and shrewd in defending white supremacy than legal scholarship generally suggests. Second, examining the remarkable public debates generated by the Manifesto demonstrates that, contrary to popular constitutionalism's account, widespread support for judicial supremacy predated the Supreme Court's articulation of the concept in* Cooper v. Aaron. *Although it may be tempting to view the Manifesto as promoting ideas that have no connection to current conditions, the document continues to have resonance within the modern constitutional order.*

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Introduction

On March 12, 1956, United States Senator Walter George read aloud a document on the Senate floor formally labeled the "Declaration of Constitutional Principles."[1] Despite that imposing official title, just about everyone—including the document's drafters—called it the "Southern Manifesto."[2] The room must not have contained much suspense about the content of George's statement, as that morning's edition of many newspapers had already printed the document's full text, alongside the names of the nineteen senators and seventy-seven congressmen who had endorsed it.[3] These politicians, all from the former Confederate states, had joined together to denounce the Supreme Court's two-year-old decision invalidating racially segregated public schools in *Brown v. Board of Education*.[4] George, with more than three decades of senate experience representing Georgia, had been tapped to deliver the address on account of his senior status among the southern delegation.[5] When George concluded, his most junior colleague—Strom Thurmond of South Carolina—stepped forward to grasp the glory he felt was rightfully his as the person who conceived of the joint statement.[6] But before Thurmond explained his aims for the Manifesto, he paused to honor the moment's significance. "I am constrained to make a few remarks at this time because I believe a historic event has taken place today in the Senate," Thurmond said.[7] Thurmond was far from alone in deeming the occasion momentous. Even several senators who applauded *Brown* acknowledged that the Manifesto's recitation was no ordinary event. Senator Patrick McNamara of Michigan—one of the many elected officials who would feel compelled to discuss the Manifesto in the coming weeks—allowed that the moment was "historic."[8] Nevertheless, he insisted "it was not the kind of history of which Americans can be proud."[9]

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1. 102 CONG. REC. 4459–61 (1956) (statement of Sen. Walter George); William S. White, *Manifesto Splits Democrats Again*, N.Y. TIMES, Mar. 13, 1956, at 1.

2. *See* 102 CONG. REC. 5445 (1956) (statement of Sen. Strom Thurmond) (discussing the "manifesto of the southern Senators"). For insightful biographical treatments of Thurmond, see JACK BASS & MARILYN W. THOMPSON, STROM: THE COMPLICATED PERSONAL AND POLITICAL LIFE OF STROM THURMOND (2005); NADINE COHODAS, STROM THURMOND AND THE POLITICS OF SOUTHERN CHANGE (1993); JOSEPH CRESPINO, STROM THURMOND'S AMERICA (2012).

3. *See, e.g.*, *Text of 96 Congressmen's Declaration on Integration*, N.Y. TIMES, Mar. 12, 1956, at 19 (indicating that the document had been issued one day earlier).

4. 347 U.S. 483 (1954).

5. *See* ALBERTA LACHICOTTE, REBEL SENATOR: STROM THURMOND OF SOUTH CAROLINA 128 (1966) (noting that George was the South's senior senator).

6. *See The Southern Manifesto*, TIME, Mar. 26, 1956, at 25 (acknowledging Thurmond conceived the Manifesto).

7. 102 CONG. REC. 4461 (1956) (statement of Sen. Strom Thurmond).

8. *Id.* at 4687 (statement of Sen. Patrick McNamara).

9. *Id.*

Constitutional law professors initially agreed that the Manifesto's denunciation of *Brown* marked an important development on the legal landscape. Many figures who were considered among the most distinguished legal scholars of their era—including Alexander Bickel, Charles Fairman, and Paul Freund—wrote articles in a range of publications responding to the Manifesto's core contentions.[10] As late as 1962, the Manifesto and its meaning still so preoccupied Bickel that he dedicated several passages in *The Least Dangerous Branch* to grappling with its significance.[11]

Today, it is safe to say that the Southern Manifesto no longer occupies a central place in the minds of legal scholars. Indeed, it risks only mild exaggeration to contend that the Manifesto no longer occupies any place there at all. Following the initial flurry of activity, no law review article has appeared in more than five decades that either primarily examines the Manifesto or even subjects the document to extended analysis. Instead, within the legal literature, the Southern Manifesto invariably appears in passing, on the way to some other destination. Surveying these fleeting invocations of the Manifesto, moreover, yields the nagging suspicion that the document has been cited a good deal more frequently than it has been read.

The Manifesto's marked diminution is lamentable because that document and the debate that it generated contain essential lessons for legal audiences. Examining the Manifesto does nothing less than recast dominant scholarly understandings of *Brown v. Board of Education* and *Cooper v. Aaron*,[12] two Supreme Court decisions that stand among the most closely scrutinized in the nation's history. Intriguingly, the Manifesto reveals how each decision involved a different type of supremacy: the attempt to maintain white supremacy after *Brown* and the articulation of judicial supremacy before *Cooper*. The Manifesto occupies an unusually strong position for exploring these two supremacies, not in isolation, but in concert—an approach that aims to provide a less fragmented assessment of the modern American constitutional order.

This Article makes two principal contributions to ongoing debates among legal scholars. First, bringing the Manifesto to center stage illuminates the sophistication of efforts taken by southern senators and congressmen to preserve white supremacy in the form of racially segregated schools during the immediate post-*Brown* era. Law professors have

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10. *See, e.g.*, Alexander M. Bickel, *Ninety-Six Congressmen Versus the Nine Justices*, NEW REPUBLIC, Apr. 23, 1956, at 11; Charles Fairman, *The Supreme Court, 1955 Term—Foreword: The Attack on the Segregation Cases*, 70 HARV. L. REV. 83 (1956); Paul A. Freund, Editorial, *Understanding the School Decision*, CHRISTIAN SCI. MONITOR, Mar. 26, 1956, at 18.

11. *See* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 76, 78, 92, 263–67 (1962).

12. 358 U.S. 1 (1958).

lavished a tremendous amount of attention on examining—re-examining, and examining once more—*Brown* and its progeny from the perspective of lawyers and citizens who were, one way or another, dedicated to eradicating racial hierarchy.[13] That rich attention is doubtless merited, as it strengthens scholarly understanding of a defining legal moment during the nation's history.[14] What seems to be vastly less appreciated among law professors, however, is that examining white resistance to racial equality also strengthens understanding of that critical era. Law professors have, with a negligible number of exceptions,[15] approached the legal materials advocating white resistance to *Brown* as though they contained some sort of racial contagion and that the best way to avoid contracting racial prejudice is to keep materials exhibiting such prejudice at bay.[16] But, at the risk of

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13. For only a few of the many prominent works in this vein, see generally KENNETH W. MACK, REPRESENTING THE RACE: THE CREATION OF THE CIVIL RIGHTS LAWYER (2012); TOMIKO BROWN-NAGIN, COURAGE TO DISSENT: ATLANTA AND THE LONG HISTORY OF THE CIVIL RIGHTS MOVEMENT (2011); MARK V. TUSHNET, THE NAACP'S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925–1950 (1987); Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470 (1976).

14. *See* Richard A. Posner, *The Spirit Killeth, But the Letter Giveth Life*, NEW REPUBLIC, Sept. 13, 2012, at 18, 19 (calling *Brown* "the most esteemed judicial opinion in American history").

15. *See* Ariela J. Gross, *From the Streets to the Courts: Doing Grassroots Legal History of the Civil Rights Era*, 90 TEXAS L. REV. 1233, 1249–51 (2012) (noting the paucity of legal scholars studying white resistance). Bucking the trend among law professors, Michael Klarman and Anders Walker have written important and illuminating works examining white resistance to *Brown*. Klarman argued that *Brown* eliminated the space for racially moderate politicians in the South and succeeded in producing an environment of racial extremism. MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 389–408 (2004). Walker's identification and examination of three racially moderate southern governors during the post-*Brown* era can be understood as modifying Klarman's account. *See* ANDERS WALKER, THE GHOST OF JIM CROW: HOW SOUTHERN MODERATES USED *BROWN V. BOARD OF EDUCATION* TO STALL CIVIL RIGHTS (2009) (examining the efforts of Mississippi Governor J.P. Coleman, North Carolina Governor Luther Hodges, and Florida Governor LeRoy Collins to limit *Brown*). Those three governors might also be construed, however, as merely the moderate exceptions that prove the extremist rule. Focusing on the Southern Manifesto—which Klarman mentions only in passing, and Walker omits altogether—shifts the focus from state capitals to the nation's capital, permitting insight into the perspectives of pro-segregation elected officials from the South, who served in the federal government from Washington, D.C. This shift in focus reveals that some southern politicians who would normally be deemed racial "extremists" in fact periodically drew upon the language of racial moderation. Rather than labeling all southern politicians either "moderates" or "extremists," it may be more helpful to view them as drawing upon a wide array of racial rhetoric and tactics, depending upon their shifting motivations and their shifting audiences.

16. In recent years, historians have done a considerably better job than law professors of attempting to puncture the myth of the ignorant southern racist. For a few of the exemplary efforts in this area that have deeply influenced my approach, see KEVIN M. KRUSE, WHITE FLIGHT: ATLANTA AND THE MAKING OF MODERN CONSERVATISM (2005); MATTHEW D. LASSITER, THE SILENT MAJORITY: SUBURBAN POLITICS IN THE SUNBELT SOUTH (2006); JASON SOKOL, THERE GOES MY EVERYTHING: WHITE SOUTHERNERS IN THE AGE OF CIVIL RIGHTS, 1945–1975 (2006). Yet perhaps because of modern historians' commitment—critics might say

stating the obvious, examining racial prejudice is not the same thing as championing racial prejudice. It is an excellent indication of how thoroughly legal scholars have overlooked materials promoting white resistance to desegregation that the Manifesto—a document that, at bottom, offers an unusually articulate example of constitutional interpretation outside of the courts—continues to suffer from such intense scholarly neglect.[17] A close examination of the Manifesto adds some sorely needed complexity to the caricatured treatment that typifies legal scholarship's scant references to the document and its drafters. Recovering the complexity that the Manifesto's drafters displayed in resisting *Brown* belies the pervasive stereotype that reads southerners as enraged, unsophisticated bumpkins. To the contrary, in their efforts to preserve segregation, many senators and congressmen demonstrated the ability to be considerably more calculating, self-aware, and legally sophisticated than is commonly appreciated. While it may be tempting to view this inquiry as merely an academic exercise designed to examine history's losers, Manifesto supporters in fact presaged recent contours in the Supreme Court's Equal Protection Clause jurisprudence.

Second, focusing upon the Manifesto helps to reconceptualize the debate among legal scholars regarding judicial supremacy. Many prominent law professors have contended that broad acquiescence to judicial authority over matters of constitutional interpretation emerged only after the Supreme Court issued its expansive proclamation of judicial

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obsession—with writing history about "ordinary" citizens, some of these same historians have continued to propagate the myth as applied to political leaders. Somewhat oddly, then, leading historians have produced a considerably richer conception of resistance to school desegregation on the local level than resistance at the federal level, the latter of which sometimes verges on the cartoonish. Thus, Kevin Kruse, who has written perhaps the most widely celebrated of these recent histories, frames his study of post-*Brown* Atlanta as an effort to capture the ingenuity and sophistication of white resistance, qualities that Kruse contends were lacking among political elites. "If we shift our attention away from politicians and focus on the lives of ordinary segregationists, the flexibility and continuity of white resistance becomes clear," Kruse writes. KRUSE, *supra*, at 8. "While national politicians waged a reactionary struggle in the courts and Congress to preserve the old system of de jure segregation, those at the local level" were, according to Kruse, "incredibly innovative in the[ir] strategies and tactics." *Id.* at 7–8. But, as will become apparent, we need not shift our attention away from politicians in order to see flexibility and innovation among white southerners attempting to preserve the racial order during the post-*Brown* era. Consistent with historians' generally more inquisitive approach to white resistance, some historians have explored the Southern Manifesto in extended fashions. Brent Aucoin, Anthony Badger, and John Kyle Day have each written extraordinarily insightful historical treatments of the Manifesto that influence my analysis throughout this Article. *See, e.g.*, ANTHONY J. BADGER, NEW DEAL/NEW SOUTH 72–101 (2007); Brent J. Aucoin, *The Southern Manifesto and Southern Opposition to Desegregation*, 2 ARK. HIST. Q. 173 (1996); John Kyle Day, The Southern Manifesto: Making Opposition to the Civil Rights Movement (2006) (unpublished Ph.D. dissertation, University of Missouri-Columbia).

17. *See* Bruce Ackerman, *Revolution on a Human Scale*, 108 YALE L.J. 2279, 2280 (1999) (contending that "[t]he constitutional understandings of political and social leaders have been given very short shrift").

supremacy in *Cooper v. Aaron* in 1958.[18] But that contention is false. The rollicking debate generated by the Manifesto demonstrated that widespread adherence to notions of judicial supremacy emerged at least as early as 1956, more than two years before the Court decided *Cooper*. In response to the Manifesto, a wide variety of locations—ranging from the halls of Congress, to the Oval Office, to law school faculty lounges, to newsrooms, to ordinary citizens' homes—witnessed testaments to judicial supremacy in nearly identical formulations to those that subsequently appeared in *Cooper*. Indeed, acceptance of judicial supremacy was already so widespread when the Manifesto appeared that even the document's signatories typically did not question the Supreme Court's authority to issue decisive constitutional interpretations. Understanding that widespread notions of judicial supremacy actually preceded *Cooper* complicates the account offered by popular constitutionalists who assert that broad acquiescence to judicial authority flowed from a Supreme Court power grab.[19] Concentrating on the Manifesto enables that overly tidy narrative to be replaced by a subtler account, one that highlights the importance of nonjudicial actors' attitudes toward judicial supremacy. This context not only transforms a dominant understanding of *Cooper*, one of the Court's most significant pronouncements regarding judicial authority, but also challenges the historical foundations of popular constitutionalism, one of the most significant developments in constitutional law to have emerged in recent decades.

Scholars have traditionally treated these two questions of supremacy as utterly distinct. Law professors who write primarily about judicial supremacy have tended to avoid scrutinizing white supremacy. Conversely, law professors who write primarily about racial equality have not evinced much interest in deeply exploring the phenomenon of judicial supremacy. Even law professors who have written about both racial equality and courts' authority to determine constitutional meaning have too often treated white supremacy as though it were unrelated to judicial supremacy.[20] This bifurcated approach, however, is misguided. It is difficult to understand modern American attitudes toward law without contemplating how these two supremacies intersect and interact. For many Americans, the refusal to acknowledge judicial supremacy is personified by advocates of white supremacy during the post-*Brown* era. The most exuberant of those advocates are now widely viewed as having fought on the wrong side of history, and many citizens are reluctant to reenact what they regard as the

18. *See infra* notes 263–73 and accompanying text.

19. *See infra* notes 276–79 and accompanying text.

20. Mark Tushnet has made numerous indelible contributions to the legal literatures involving racial equality and judicial supremacy. But it seems noteworthy that his book extolling constitutional interpretation outside of the courts does not mention the Manifesto. *See* MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (1999).

nation's anti-Court cautionary tale. Thus, these two core principles—an aversion to white supremacy and an adherence to judicial supremacy—have become inextricably connected in the American legal imagination. Treating these two supremacies jointly rather than separately should, accordingly, pave the way toward a more accurate and coherent understanding of the nation's constitutional order.

The balance of this Article unfolds as follows. Precisely because so much confusion surrounds what the Manifesto says—and, importantly, what it does not say—Part I begins with an analytical overview of the document's text. Contrary to the widespread assumption, the Manifesto did not predominantly consist of sharp invective. Instead, the document primarily advanced a series of measured legal arguments, contending that the Court incorrectly decided *Brown* as a matter of constitutional law. Drawing upon the fundamental modalities of constitutional interpretation, the Manifesto claimed that *Brown* could not be squared with the Constitution as a matter of originalism, text, precedent, structure, prudence, or tradition. After examining the Manifesto's text, it becomes possible to appreciate more fully the document's context. Although recent commentators have criticized the document for what they regard as its enraged tone, many contemporaneous observers applauded the document for voicing its judicial criticisms in a restrained manner. The Manifesto was designed to strike a temperate tone, Part I contends, because doing so would help to garner support from the largest possible bloc of the South's congressional delegation. The Manifesto backers sought broad southern support, in turn, because such support would increase the likelihood of reaching their primary audience. While many commentators have assumed that the Manifesto was targeted at white southerners, considerable evidence suggests that it was primarily geared toward white northerners.

Part II examines the tactically shrewd approach to maintaining white supremacy that the Manifesto and its supporters advanced during the immediate post-*Brown* era. Instead of deploying the crude racial rhetoric that was common even among the most sophisticated defenders of racial segregation during the 1950s, the Manifesto's drafters understood that the document would be more effective in dampening integrationist sentiment if it eschewed such unvarnished appeals. Beginning with the very earliest of Senator Thurmond's drafts of the Manifesto, the document's authors demonstrated remarkable self-awareness and self-control in declining to detail the many racially inflected ills that segregationists typically asserted would follow school desegregation. Relatedly, some Manifesto backers understood that, if segregationists resorted to either violence or outright defiance of judicial authority in resisting *Brown*, such actions would hinder the effort to preserve racially segregated public schools. Demonstrating impressive foresight, some southern politicians expressly warned their constituents to forgo racial violence and lawlessness because of the negative

reaction that northerners would have in response. In issuing such warnings, Manifesto backers managed to anticipate the sequence of events during the 1960s that legal academia would subsequently label the "counter-backlash" phenomenon.[21] Southern senators and congressmen during the mid-1950s, rather than consistently goading white southerners into defying the law, instead far more frequently sought to define the law. Capitalizing upon the legal uncertainty stemming from the Court's infamously nebulous implementation decree in *Brown II*,[22] Manifesto supporters advocated several innovative strategies that they hoped would forestall school desegregation. These alternative strategies reveal how Manifesto backers resisted desegregation not primarily with obstinacy and intransigence, but instead with creativity and flexibility.

Part III recovers the central debate that the Manifesto elicited about judicial supremacy. The most notable portions of that debate unfolded on the floors of both houses of Congress, where members of the Senate and the House of Representatives engaged in perhaps the most searching discussions of the judiciary's role in constitutional interpretation that occurred among elected officials during the entire twentieth century. These occasionally heated discussions demonstrate that, some two years before the Court decided *Cooper*, many politicians had already adopted even that opinion's most expansive conceptions of judicial authority. The debates also underscore how even some of the most ardent backers of the Manifesto nevertheless often espoused surprisingly robust notions of judicial supremacy. President Dwight Eisenhower echoed legislators' strong embrace of judicial supremacy in response to the Manifesto, as did leading law professors, journalists, and even ordinary citizens. This broad embrace of judicial supremacy before the Court's decision in *Cooper* unsettles a core claim within popular constitutionalism. Rather than unilaterally taking something away from "the people" in *Cooper*, it may be more accurate to understand that decision's embrace of judicial supremacy as articulating the notion of constitutional interpretation that many citizens desired.

Part IV steps back to examine three of the Manifesto's most prominent modern implications, demonstrating that the document's import is far from confined to the past. First, the strategies that Manifesto drafters developed for containing *Brown*'s meaning for school desegregation would eventually overlap with the Supreme Court's understanding of that foundational opinion. Second, the legal vision elevating individual liberty above federal government authority that was espoused in the Manifesto continues to hold

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21. *See* Michael J. Klarman, *How* Brown *Changed Race Relations: The Backlash Thesis*, 81 J. AM. HIST. 81, 116 (1994) ("*Brown* produced a southern political environment that encouraged public officials to use violent tactics to put down civil rights demonstrations, to the horror of northern television audiences, who in turn mobilized in support of national legislation to eradicate Jim Crow.").

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

sway in American constitutional law. Third, the Manifesto's linkage with the Little Rock desegregation crisis suggests that the document forms one part of a sort of national cautionary tale that exemplifies the dangers of extrajudicial constitutional interpretation.

The overarching aim here is to offer neither absolution nor an apology for the Manifesto's signatories. During a period when national figures began in earnest to march toward racial justice, Manifesto signatories rushed headlong in the opposite direction. Their attempt to sustain the nation's racial caste system was, I believe, an atrocity. But vehement disagreement with the underlying views of Manifesto backers should not prevent scholars from understanding what arguments they advanced, why they framed those arguments as they did, and how those arguments resonated within the context of their times. This work is vital not only for appreciating one of the nation's most significant legal transformations in all of its rich complexity, but also for appreciating the contemporary continuities that stem from that earlier era.

I. What Was the Southern Manifesto?

Today, the Southern Manifesto and the men who shaped it are enshrouded in the mist of mythology. The primary element in this mythology holds that, provoked by *Brown*, a group of southern politicians' segregationist fervor caused them to take leave of their senses and issue an enraged attack against *Brown*—a screed that sounded like nothing so much as a latter-day rebel yell.[23] When describing the Manifesto and its signatories, commentators have consistently invoked the language of fear, anger, and mental illness—just about any emotion or condition that drastically reduces or altogether eliminates the possibility for rational, coherent thought. Thus, the document's drafters are called "fanatic segregationists"[24] and a "band of fanatics"[25] who were motivated by "a deep spring of primitive, sub-rational fears."[26] And the Manifesto itself is purported to "seeth[e] with anger,"[27] and to "bristle[] with angry words,"[28]

23. *See* JAMES M. MCPHERSON, BATTLE CRY OF FREEDOM: THE CIVIL WAR ERA 344 (1988) (describing a "rebel yell" as attacking Confederate soldiers' "strange, eerie scream" and "unearthly wail").

24. L.A. Powe, Jr., *The Politics of American Judicial Review: Reflections on the Marshall, Warren, and Rehnquist Courts*, 38 WAKE FOREST L. REV. 697, 709–10 (2003).

25. Garrett Epps, *The Littlest Rebel: James J. Kilpatrick and the Second Civil War*, 10 CONST. COMMENT. 19, 35 (1993).

26. Paul A. Freund, *Storm over the American Supreme Court*, 21 MOD. L. REV. 345, 354 (1958).

27. Joe R. Feagin, *Heeding Black Voices: The Court,* Brown, *and Challenges in Building a Multiracial Democracy*, 66 U. PITT. L. REV. 57, 71 (2004).

28. HAYNES JOHNSON & BERNARD M. GWERTZMAN, FULBRIGHT: THE DISSENTER 143 (1968).

"ugly vehemence,"[29] and "righteous indignation."[30] Richard Kluger's *Simple Justice*—a book some law professors view as the definitive narrative history of the legal fight against Jim Crow[31]—describes the Southern Manifesto as an "ejaculation of bile" and an "orgiastic declaration[] of defiance."[32]

A secondary, but nevertheless noteworthy, element in the mythology surrounding the Manifesto is a belief that its signatories generally lacked intellectual sophistication. This notion stems from the misperception that advocates of racial bigotry are almost invariably crude, inarticulate, and dull-witted. Although commentators sometimes come right out and label these southern politicians from the 1950s "simple,"[33] this notion may be viewed most readily in the context of Senator J. William Fulbright of Arkansas, the intelligent exception that theoretically proves the vulgar rule.[34] Viewed through the spectacles of urban and educated northerners, it was simply inconceivable that Fulbright—a Rhodes Scholar, University President, and founder of the eponymous scholarship for study abroad—actually held the racial attitudes they associated with a rube. Thus, upon Fulbright losing his Senate seat in 1974, the *New York Times* editorialized: "A sophisticate and a cosmopolite, he signed the segregationist 'Southern Manifesto' and in years past expressed a good deal more loyalty to old Southern attitudes than he surely felt."[35] Three years later, an article in the *New Yorker* identified Fulbright as someone "who, despite his signing of the Southern Manifesto against the Supreme Court decision, was always suspected of being too worldly to be an authentic bigot."[36] As to the remaining Manifesto signatories, few people entertained such suspicions.

A close examination of the Manifesto, however, undermines the perception that southern politicians were universally blinded by either rage

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29. Barry Friedman, *Neutral Principles: A Retrospective*, 50 VAND. L. REV. 503, 507–08 (1997).

30. ROBBINS L. GATES, THE MAKING OF MASSIVE RESISTANCE: VIRGINIA'S POLITICS OF PUBLIC SCHOOL DESEGREGATION, 1954-1956, at 118 (1964); *see also* Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947, 1133–34 (1995) (connecting the Manifesto to "the enraged tones" of resistance to *Brown*).

31. *See, e.g.*, Randall Kennedy, *Schoolings in Equality*, NEW REPUBLIC, July 5 & 12, 2004, at 29, 33, 36 (praising the book as "learned," "illuminating," and even "magisterial").

32. RICHARD KLUGER, SIMPLE JUSTICE 752 (1975).

33. *See, e.g.*, NUMAN V. BARTLEY, THE RISE OF MASSIVE RESISTANCE: RACE AND POLITICS IN THE SOUTH DURING THE 1950'S, at 118 (1969) ("Like Harry F. Byrd, Eastland was a simple man who found the past more attractive than the future."); Robert G. Sherrill, *James Eastland: Child of Scorn*, NATION, Oct. 4, 1965, at 154, 155 (describing Senator James Eastland as "a rather simple man").

34. For a comprehensive biography of Fulbright, see RANDALL BENNETT WOODS, FULBRIGHT: A BIOGRAPHY (1995).

35. *Mr. Fulbright Loses*, N.Y. TIMES, May 30, 1974, at 36.

36. Calvin Trillin, *Remembrances of Moderates Past*, NEW YORKER, Mar. 21, 1977, at 85, 86–87.

or stupidity. To the contrary, the drafters of the Manifesto often advanced legal arguments opposing integration that contained considerably more nuance, subtlety, and sophistication than their detractors have allowed. Recovering those arguments in detail enables one to understand how the Manifesto is, in significant ways, the photographic negative of *Brown*.

A. Text

The harshest language that appears in the entire Manifesto arrives in its very first sentence: "The unwarranted decision of the Supreme Court in the public school cases is now bearing the fruit always produced when men substitute naked power for established law."[37] When scholars bother to quote from the document at all, this opening passage supplies many of those quotations.[38] The fixation of legal scholars on the Manifesto's overture is regrettable for at least two reasons. First, as will become clear, many contemporaneous observers did not perceive that language as unusually condemnatory. Indeed, contrary to the impression of some prominent scholars, such language was by no means foreign even to that era's most sober, buttoned-down academic critics. Second, the fixation invites the misimpression that the Manifesto sounded themes that resonated primarily in politics rather than in law. In fact, though, the inverse is true: the Manifesto chiefly consisted of lawyerly arguments about constitutional meaning. The Manifesto contended that *Brown* was incorrectly decided under the Constitution as a matter of originalism, text, precedent, structure, prudence, and tradition.[39] Recovering the Manifesto's constitutional dimensions is vital not least because it provides legal scholarship with an all-too-rare concrete example of extrajudicial constitutional interpretation.

The Manifesto's central critique asserted that the decision violated the original understanding of the Fourteenth Amendment.[40] In doing so, the Manifesto placed in the foreground precisely the argument that the Court's opinion in *Brown* sought to force into the background.[41] "The debates preceding the submission of the [Fourteenth A]mendment clearly show that there was no intent that it should affect the system of education maintained

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37. 102 CONG. REC. 4460 (1956).

38. *See, e.g.*, WOODS, *supra* note 34, at 210 (quoting a portion of the Manifesto's first sentence); Bruce Ackerman, *2006 Oliver Wendell Holmes Lectures: The Living Constitution*, 120 HARV. L. REV. 1737, 1789 n.163 (2007) (quoting the Manifesto's first sentence in its entirety); Feagin, *supra* note 27, at 70 (same).

39. On constitutional law's six modalities, see PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION 11–22 (1991).

40. For an important argument contending that *Brown* can be understood as compatible with originalism, see McConnell, *supra* note 30. *But see* Michael J. Klarman, Brown, *Originalism, and Constitutional Theory: A Response to Professor McConnell*, 81 VA. L. REV. 1881 (1995) (critiquing McConnell's position).

41. *See* Brown v. Bd. of Educ., 347 U.S. 483, 492 (1954) ("In approaching this problem, we cannot turn the clock back to 1868 when the Amendment was adopted . . . .").

by the States," the Manifesto noted. "The very Congress which proposed the amendment subsequently provided for segregated schools in the District of Columbia."[42] The great majority of states that ratified the Fourteenth Amendment during the 1860s, the Manifesto observed, either already had public schools in operation that were segregated or started a segregated school system thereafter.[43] Why would the states have so acted, the Manifesto asked, if they believed that Jim Crow education could not peacefully coexist with the Equal Protection Clause?[44] Bolstering its original meaning argument with a textual claim, the document further noted that the word "education" appeared nowhere in the Constitution.[45]

The Manifesto further criticized *Brown* for reversing important, longstanding Supreme Court precedents upon which society was organized. In a decision dating back six decades, the Supreme Court had in *Plessy v. Ferguson*[46] authorized "separate but equal" facilities,[47] a constitutional doctrine that the Manifesto appeared to delight in noting "began in the North, not in the South."[48] Since that time, the document continued, *Plessy* "has been followed in many other cases," including *Gong Lum v. Rice*,[49] where the Court, "speaking through Chief Justice Taft . . . unanimously declared in 1927 . . . that the 'separate but equal' principle is 'within the discretion of the State in regulating its public schools and does not conflict with the [Fourteenth A]mendment.'"[50] Drawing upon principles of stare decisis, the Manifesto contended that *Plessy* articulated a fundamental rule around which citizens had ordered their affairs: "This interpretation, restated time and again, became a part of the life of the people of many of the States and confirmed their habits, customs, traditions, and way of life."[51]

The Court's decision in *Brown*, according to the Manifesto, also violated various structural components of the Constitution. Most prominently, the document repeatedly appealed to principles of federalism

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42. 102 CONG. REC. 4460 (1956).

43. *Id.*

44. *See id.*

45. *Id.* This wooden constitutional interpretation drew considerable fire from contemporary critics. *See, e.g.*, Bickel, *supra* note 10, at 13 ("Of course the Constitution does not mention education. Nor does it mention an Air Force, but the President's title to the commander-in-chief in the air as well as on land is not consequently the less."); Herbert Brownell, Jr., *The United States Supreme Court: Symbol of Orderly, Stable and Just Government*, 43 A.B.A. J. 595, 599 (1957) ("[T]he Constitution [also] does not refer to agriculture. Does that mean that the Congress may not provide price supports for cotton, soy beans or wheat? Obviously not.").

46. 163 U.S. 537 (1896).

47. *See id.* at 550–51.

48. 102 CONG. REC. 4460 (1956) (tracing the doctrine to *Roberts v. City of Boston*, 59 Mass. (5 Cush.) 198 (1849)).

49. 275 U.S. 78 (1927).

50. 102 CONG. REC. 4460 (1956) (quoting *Gong Lum*, 275 U.S. at 87).

51. *Id.*

by invoking the Tenth Amendment. Where northern states that eventually rejected racially segregated schools had validly "exercis[ed] their rights as States through the constitutional processes of local self-government," the southern politicians explained that, in opposing *Brown*, they aimed to eliminate "the Supreme Court's encroachments on rights reserved to the States and to the people, contrary to established law, and to the Constitution."[52] In one of its more emotive passages, the Manifesto elevated its defense of federalism into a defense of an ideal that had made the nation great.[53] "Even though we constitute a minority in the present Congress," the document allowed, "we have full faith that a majority of the American people believe in the dual system of government which has enabled us to achieve our greatness and will in time demand that the reserved rights of the States and of the people be made secure against judicial usurpation."[54] In another argument invoking constitutional structure, the Manifesto contended that, in order to prohibit states from segregating pupils by race, proponents of integration should have pursued a constitutional amendment through Article V rather than simply filing a lawsuit.[55] The document further appealed to separation of powers principles by contending: "The Founding Fathers gave us a Constitution of checks and balances because they realized the inescapable lesson of history that no man or group of men can be safely entrusted with unlimited power."[56]

In addition, the Manifesto advanced a few consequentialist arguments in contending *Brown* was incorrectly decided. Seeking to claim the mantle of stability, the Manifesto criticized the Court's decision for being "contrary to the Constitution, [and] creating chaos and confusion in the States principally affected."[57] Moreover, if "outside agitators" persisted in their "threat[s]" to seek "immediate and revolutionary changes in our public-school systems," the Manifesto alleged that they would be "certain to destroy the system of public education in some of the States."[58] The Manifesto maintained that the Justices had already succeeded in exacting a heavy toll on southern race relations: "[*Brown*] is destroying the amicable

52. *Id.*; *see also id.* (bemoaning "encroach[ment] upon the reserved rights of the States and the people").

53. For an examination of the nation's federalism principles at the time they were initially being forged, see ALISON L. LACROIX, THE IDEOLOGICAL ORIGINS OF AMERICAN FEDERALISM (2010). For a recent comprehensive overview of federalism, see VICKI C. JACKSON & SUSAN LOW BLOCH, FEDERALISM: A REFERENCE GUIDE TO THE UNITED STATES CONSTITUTION (2013).

54. 102 CONG. REC. 4460 (1956).

55. *See id.* ("They framed this Constitution with its provisions for change by amendment in order to secure the fundamentals of government against the dangers of temporary popular passion or the personal predilections of public officeholders.").

56. *Id.*

57. *Id.*

58. *Id.*

relations between the white and Negro races that have been created through 90 years of patient effort by the good people of both races. It has planted hatred and suspicion where there has been heretofore friendship and understanding."[59]

The Manifesto further contended that *Brown* represented a rupture with the nation's constitutional tradition of protecting parental rights.[60] *Plessy*'s separate-but-equal principle, the Manifesto argued, "is founded on elemental humanity and commonsense, for parents should not be deprived by Government of the right to direct the lives and education of their own children."[61] The Manifesto did not explicitly cite the Supreme Court's decision in *Pierce v. Society of Sisters*,[62] but it bears mentioning that its language here maps almost perfectly onto that canonical opinion. In 1925, the Court in *Pierce* invalidated an Oregon law requiring children to attend public school, rather than private or parochial school, because it held such laws violate "the liberty of parents and guardians to direct the upbringing and education of children under their control."[63] It is unclear whether the Manifesto's drafters intentionally echoed *Pierce*. But it would hardly be surprising if some Manifesto supporters knew of the case, given the national media attention it received and that the case was decided when many southern senators were either law students or newly minted lawyers.[64]

Finally, the Manifesto closed by attempting to enlist broad support from across the nation for the constitutional values it defended. "We appeal to the States and people who are not directly affected by these decisions to consider the constitutional principles involved against the time when they too, on issues vital to them, may be the victims of judicial encroachment," the Manifesto urged.[65] In its concluding passages, the Manifesto signatories repeatedly stated that their aim—to reverse *Brown*—should be sought only within legal bounds. "We reaffirm our reliance on the Constitution as the fundamental law of the land," they wrote, apparently alluding to the Supremacy Clause contained in Article VI.[66] The signatories further explained: "We pledge ourselves to use all lawful means to bring about a reversal of this decision which is contrary to the Constitution and to prevent

59. *Id.*

60. *Id.* *See also* BOBBITT, *supra* note 39, at 20 (describing appeals to the "ethical" constitutional modality as arguments that frequently emphasize the notion of limited government).

61. 102 CONG. REC. 4460 (1956).

62. 268 U.S. 510 (1925).

63. *Id.* at 530, 534–35.

64. For national news coverage that analyzed *Pierce*'s oral argument, see *Supreme Court: Oregon and Oregonians*, TIME, Mar. 30, 1925, at 5.

65. 102 CONG. REC. 4460 (1956).

66. *Id.*; *see also* U.S. CONST. art. VI (noting that "[t]his Constitution . . . shall be the supreme Law of the Land").

the use of force in its implementation."[67] This same emphasis on legality also appeared when the Manifesto commended actions taken by states up to that point in resistance to *Brown*.[68] The last line of the Manifesto instructed southern citizens in responding to the Court's decision "to scrupulously refrain from disorder and lawless acts."[69]

B. Context

The most illuminating way to conceptualize the Southern Manifesto is to view it as the mirror image of the Supreme Court's opinion in *Brown v. Board of Education*. On a superficial level, of course, where *Brown* sought to dismantle Jim Crow, the Manifesto sought to reinforce it. Yet the links between the two documents extend much deeper, as the processes that led to the creation of *Brown* and the Manifesto contain at least three related, striking similarities. First, in drafting *Brown*, Chief Justice Warren aimed to achieve a tone that was "unemotional," "non-rhetorical," and "non-accusatory" in an effort to avoid alienating white southerners.[70] Although the Manifesto is now widely misunderstood on this score, its drafters also intentionally adopted a mild tone. Second, Warren kept his draft opinion in *Brown* "short" so that it would be "readable by the lay public" and could be reproduced in newspapers around the country.[71] The Manifesto's drafters shared these same goals, limiting the final version of the document to fewer than 1000 words, in an effort to plead their case directly to a nationwide audience. Third, and perhaps most famously, Warren worked diligently to achieve unanimity.[72] Similarly, while not every southern politician in Congress signed the document, Manifesto backers went to considerable lengths to make the southern delegation as solid as possible.[73]

1. Tone.—Although commentators in recent decades have frequently derided the Manifesto for brimming with anger, the immediate reaction to the document was quite distinct. Rather than construing its tone as irate, many contemporary observers instead praised the document for demonstrating moderation, restraint, and also for avoiding inflammatory and emotional rhetoric. Such words often recur in the initial descriptions of

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67. 102 CONG. REC. 4460 (1956).

68. *See id.* ("We commend the motives of those States which have declared the intention to resist forced integration by any lawful means.").

69. *Id.*

70. *See* KLUGER, *supra* note 32, at 696.

71. *See id.*; LUCAS A. POWE, JR., THE WARREN COURT AND AMERICAN POLITICS 29 (2000).

72. KLUGER, *supra* note 32, at 698. *See generally* Dennis J. Hutchinson, *Unanimity and Desegregation: Decisionmaking in the Supreme Court, 1948-1958*, 68 GEO. L.J. 1, 34–44 (1979) (describing the process that led to the unanimous decision in *Brown*).

73. *See, e.g.*, ALBERT GORE, LET THE GLORY OUT: MY SOUTH AND ITS POLITICS 104 (1972) (detailing efforts to secure Gore's signature).

the Manifesto's tone and were used by the document's detractors and supporters alike.

Two senators who expressed deep opposition to the Manifesto from the Senate floor nevertheless applauded its mild tenor. Senator Alexander Smith of New Jersey developed this theme at length. "I commend the signers of the manifesto for the moderation of the language they used in questioning the validity of the Supreme Court decision and in urging a quiet, unemotional approach to the solving of the problem which troubles them," Smith said. "There is no evidence in this document of rebellion; there is no evidence of any intention to divide our country. The spirit of the manifesto is moderate and is respected by all of us, even those of us who completely disagree with its substance and purpose."[74] Senator Herbert Lehman of New York agreed that the document was "certainly not inflammatory in tone."[75]

Commentators outside of the Senate, including those from the worlds of academia and journalism, shared this assessment. Professor Alpheus Mason of Princeton, who expressed admiration for the document, contended that the Manifesto communicated its ideas in "a dignified and effective way."[76] A Manifesto critic writing in the *Kentucky Law Journal* nevertheless called its approach "relatively moderate."[77] The *Wall Street Journal*'s editorial page observed that the Manifesto "is not the voice of any gallused demagogue" and elaborated: "[T]he words were not inflammatory; there was a tone of restraint throughout and a cautious admonition to extremists on both sides of the segregation question."[78] Liberal magazines echoed these sentiments from the conservative newspaper, as the *New Republic* found the Manifesto "notable for its restraint,"[79] and even the *Nation* allowed that the document's text was "non-inflammatory."[80]

Despite these early tonal appraisals, Bruce Ackerman recently asserted that the Manifesto was unusually strident in its criticism of the Court's decision in *Brown*—even as assessed against the prevailing standards of the 1950s. Ackerman—in writing of Herbert Wechsler's Holmes Lectures that he delivered in 1959 at Harvard Law School[81]—noted in his own set of

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74. 102 CONG. REC. 5625 (1956) (statement of Sen. H. Alexander Smith).

75. *Id.* at 4940 (statement of Sen. Herbert Lehman).

76. *Law Professor Backs Manifesto*, N.Y. TIMES, Mar. 18, 1956, at 87.

77. Paul Oberst, *The Supreme Court and States Rights*, 48 KY. L.J. 63, 73 (1959).

78. Editorial, *Statement from the South*, WALL ST. J., Mar. 14, 1956, at 12.

79. *Southern Democrats*, NEW REPUBLIC, Mar. 19, 1956, at 4, 5.

80. Carey McWilliams, *The Heart of the Matter*, NATION, Mar. 31, 1956, at 249. McWilliams did express the concern that, despite its placid tone, the document by its very existence may nevertheless lead to lawlessness and perhaps even violence. *See id.* For some critical analysis of these claims, see *infra* section II(B)(1).

81. Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

Holmes Lectures: "Wechsler's [*Neutral Principles*] critique was mild, even tentative, compared to the extravagant constitutional claims made in the Southern Manifesto."[82] In a similar vein, Ackerman contended that Wechsler's lectures communicated the message that "continuing dissent to *Brown* was not the monopoly of segregationist bitter-enders, but was a serious option for mainstream professionals."[83] The only support from the Manifesto that Ackerman cited to accompany these assertions is its well-worn opening line, which in its sharpest terms called *Brown* "unwarranted" and a manifestation of "naked power."[84]

As it turns out, though, the gap separating Wechsler's criticisms from the Manifesto's criticisms may not be as vast as Ackerman posited. Indeed, the documents contain several notable similarities. The central claim in *Neutral Principles* suggested, after all, that *Brown* was not legally warranted—a claim that both documents made by affirming *Plessy*'s legitimacy.[85] In perhaps the most arresting rhetorical similarity, Wechsler used an even more provocative phrase than the Manifesto's usage of "naked power" when he contended that the Court must not act as "a naked power organ"—a phrase that appears twice in *Neutral Principles*.[86] In elite lawyer circles during the 1950s, it would seem that the term "naked power" was, if not quite ubiquitous, then exceedingly well-traveled.[87]

But the similarities extended beyond the Manifesto's first sentence. In a move reminiscent of the Manifesto's *Pierce*-inflected appeal, Wechsler prioritized the views of white parents who wished to avoid sending their children to schools with black students. "[I]f the freedom of association is denied by segregation," Wechsler wrote, "integration forces an association upon those for whom it is unpleasant or repugnant. Is this not the heart of the issue involved, a conflict in human claims of high dimension, not unlike many others that involve the highest freedoms . . . ."[88] Although it is

82. Ackerman, *supra* note 38, at 1789.

83. *Id.* at 1790.

84. *Id.* at 1789 n.163 (quoting the Manifesto as arguing that "[t]he unwarranted decision of the Supreme Court in the public school cases is now bearing the fruit always produced when men substitute naked power for established law" (internal quotation marks omitted)).

85. *See* Wechsler, *supra* note 81, at 33 ("[I]s there not a point in *Plessy* in the statement that if 'enforced separation stamps the colored race with a badge of inferiority' it is solely because its members choose 'to put that construction upon it'?").

86. *Id.* at 12, 19.

87. *See, e.g.*, George H. Dession & Harold D. Lasswell, *Public Order Under Law: The Role of the Advisor-Draftsman in the Formation of Code or Constitution*, 65 YALE L.J. 174, 184 n.12 (1955) ("Naked power is not law . . . ."); Philip B. Kurland, *The Supreme Court and Its Judicial Critics*, 6 UTAH L. REV. 457, 466 (1959) (criticizing judicial activism as "the exercise of such naked power"); Myres S. McDougal & William T. Burke, *Crisis in the Law of the Sea: Community Perspectives Versus National Egoism*, 67 YALE L.J. 539, 588–89 (1958) (twice using the phrase "naked power"); Eugene V. Rostow, *The Democratic Character of Judicial Review*, 66 HARV. L. REV. 193, 205 (1952) (using the phrase "naked power").

88. Wechsler, *supra* note 81, at 34.

commonly believed that Wechsler originated the argument that *Brown* contradicted the freedom of association, southern politicians had been articulating that argument for several years before Wechsler got around to doing so.[89] Only days after the Court decided *Brown*, Senator James Eastland of Mississippi stated: "All free men have the right to associate exclusively with members of their own race, free from governmental interference, if they so desire."[90] Shortly after the Manifesto's unveiling, Senator Sam Ervin of North Carolina similarly contended that opposition to *Brown* "results from the exercise of a fundamental American freedom—the freedom to select one's associates. Whenever Americans are at liberty to choose their own associates, they virtually always select within their own race."[91] Finally, Wechsler, like the Manifesto three years earlier, closed by urging lawfulness: "Having said what I have said, I certainly should add that I offer no comfort to anyone who claims legitimacy in defiance of the courts."[92]

There are, to be sure, significant differences between the two documents. Not the least of those differences is Wechsler's contention that segregation harms both blacks and whites,[93] a claim that one would search the Manifesto for in vain. Unlike Manifesto signatories, moreover, Wechsler professed a desire for school desegregation as a policy matter—even if he found it difficult to conclude that segregation was unconstitutional.[94] Nevertheless, the point remains that, as judged by the standards of the day's leading legal commentators, the Manifesto was not an exercise in constitutional extravagance. The document initially received so much attention perhaps less for what it said than for who was saying it—and to whom it was addressed.

2. Audience.—Leading authorities have consistently suggested that the Manifesto's primary audience was white southerners. Anthony Lewis, in what is perhaps the most oft-quoted line about the document, ventured in

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89. Many years ago, Barry Friedman perceptively portrayed Wechsler's freedom-of-association critique of *Brown* as echoing an argument made by southern elected officials. *See* Barry Friedman, *Neutral Principles: A Retrospective*, 50 VAND. L. REV. 503, 508 n.34 (1997).

90. 100 CONG. REC. 7255 (1954). Eastland continued: "Free men have the right to send their children to schools of their own choosing, free from governmental interference, and to build up their own culture, free from governmental interference." *Id.*

91. Sam J. Ervin, Jr., *The Case for Segregation*, LOOK, Apr. 3, 1956, at 32, 32. For helpful biographical examinations of Ervin, see KARL E. CAMPBELL, SENATOR SAM ERVIN, LAST OF THE FOUNDING FATHERS (2007); PAUL R. CLANCY, JUST A COUNTRY LAWYER: A BIOGRAPHY OF SENATOR SAM ERVIN (1974); DICK DABNEY, A GOOD MAN: THE LIFE OF SAM J. ERVIN (1976).

92. Wechsler, *supra* note 81, at 35.

93. *See id.* at 34 ("I think, and I hope not without foundation, that the Southern white also pays heavily for segregation, not only in the sense of guilt that he must carry but also in the benefits he is denied.").

94. *See id.* at 31–34.

1964: "The true meaning of the Manifesto was to make defiance of the Supreme Court and the Constitution socially acceptable in the South—to give resistance to the law the approval of the Southern Establishment."[95] The passage of time has done little to soften this perception. Thus, Anthony Badger recently suggested the drafters of the Manifesto "aimed above all to persuade white southerners that school desegregation could be prevented, for they were concerned that white southerners were too fatalistic on the race issue."[96] Giving greater specificity to this general claim, Badger has also contended that "[w]hen Strom Thurmond drafted the Southern Manifesto, his aim was . . . to stir up popular segregationist feeling."[97] Lewis and Badger enjoy considerable support in contending that the Manifesto was essentially a regional document.[98]

Although this theory claims many adherents, it nevertheless misconstrues the Manifesto. That document was not primarily designed with a focus on whipping up segregationist sentiment among southerners but instead on tamping down integrationist sentiment among northerners. It is odd that such a profound misperception surrounds the Manifesto's main audience because so much evidence suggests that its drafters intended to send a clear signal to the North about southern opposition to integration. Whatever the cause of this audience misperception, though, it has distorted understanding of the document itself. The claim here should not be viewed, of course, as contending that northerners were the Manifesto's *only* audience; as with most documents written by politicians, the Manifesto surely spoke to multiple audiences simultaneously. This multiplicity of audiences does not mean, however, that it is impossible to ascertain a document's primary audience, or that it is fruitless to do so. It is awfully difficult to know whether a message is received, after all, if you do not know to whom it is centrally addressed.

The Manifesto's sponsors repeatedly explained that their statement was principally targeted at a nonsouthern audience. In Senator George's very brief introductory remarks on the Senate floor, he began by explaining that southerners aimed to communicate "the increasing gravity of the situation following [*Brown*], and the peculiar stress in sections of the country where this decision has created many difficulties, unknown and unappreciated, perhaps, by many people residing in other parts of the

95. ANTHONY LEWIS, PORTRAIT OF A DECADE 45 (1964).

96. BADGER, *supra* note 16, at 93.

97. Tony Badger, Brown *and Backlash*, *in* MASSIVE RESISTANCE: SOUTHERN OPPOSITION TO THE SECOND RECONSTRUCTION 39, 46–47 (Clive Webb ed., 2005).

98. *See, e.g.*, KLUGER, *supra* note 32 (contending that the Manifesto aided "the more rabid elements in the region"); JIM NEWTON, JUSTICE FOR ALL: EARL WARREN AND THE NATION HE MADE 340 (2006) (contending that, from Warren's perspective, the Manifesto was "provocative—annoying, even—but unthreatening, as long as its complaints were regional").

country."[99] Following George, Thurmond echoed this theme, noting that they sought "to make clear there are facts that opposing propagandists have neglected in their zeal to persuade the world there is but one side to this matter."[100] Congressman Howard Smith, who introduced the Manifesto in the House of Representatives, likewise explained, "We're just hopeful it might have a sobering effect on the rest of the country and make them stop, look, and listen."[101]

The initial media accounts—in outlets ranging from small southern newspapers to elite magazines—likewise understood the Manifesto as being pitched to northerners. An editorial in the *Greenville News* of South Carolina contended: "First and foremost, the statement is an appeal to the thinking people all over the United States to understand the southern point of view on the issues involved."[102] A leading newspaper in South Carolina, the *State*, agreed with this assessment, and elaborated:

> The sooner the rest of the country takes a realistic view of the situation that exists, the better it will be for everybody. And such pronouncements as the congressional manifesto serve to notify the people of other sections of the firm intention of the white South to use every legal means to circumvent [*Brown*].[103]

At the opposite end of journalism's spectrum, an article in the *New Republic* concluded of the Manifesto's endorsers: "Their purpose undoubtedly was to check the extremists in the North by showing them the difficulty and danger attending the eradication of any long-established social pattern."[104]

Motivating this desire to reach a national audience directly was the strong sense among southerners that the national news media covered the issue of segregation in a biased manner. Writing in *Harper's* shortly before the Manifesto appeared, Thomas R. Waring, a prominent journalist from South Carolina, contended: "[T]he metropolitan press almost without exception has abandoned fair and objective reporting of the race story. For fact it frequently substitutes propaganda."[105] The absence of

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99. 102 CONG. REC. 4459 (1956) (statement of Sen. Walter George).

100. *Id.* at 4461 (statement of Sen. Strom Thurmond).

101. Guy Friddell, *3 Senators Criticize Manifesto*, RICHMOND NEWS LEADER, Mar. 12, 1956, at 1, 2.

102. *Statement Is an Appeal to Reason*, GREENVILLE NEWS, Mar. 13, 1956, at 4.

103. *Will Have Effect*, STATE (Columbia), Mar. 14, 1956, at 4A.

104. Gerald W. Johnson, *Southern Manifesto*, NEW REPUBLIC, Apr. 9, 1956, at 8. Professor Alpheus Mason of Princeton similarly told the *New York Times* that the Manifesto "is calculated to give the court and the country pause." *Law Professor Backs Manifesto*, *supra* note 76, at 87.

105. Thomas R. Waring, *The Southern Case Against Desegregation*, HARPER'S, Jan. 1956, at 39, 39; *see also id.* at 39–40 ("[W]ith the exception of a small coterie of Southern writers whom Northern editors regard as 'enlightened,' spokesmen for the southern view cannot gain access to Northern ears."). In an editorial note explaining the decision to run Waring's defense of segregation, *Harper's* suggested that the segregationist refrain alleging media bias was not wholly

straightforward coverage communicating the intensity of segregationist sentiment, Waring and others agreed, had misled northerners into believing that widespread public-school desegregation was just around the corner.[106] Apart from underreporting the aversion to integration, though, segregationists also contended that the media's coverage had prevented nonsoutherners from grasping even the most basic facts. In a letter to Senator Richard Russell praising the Manifesto, one writer living in Hollywood, California, noted: "The South really needs to get its case before the people untainted by the prejudice of the non-Southern Press. I find that the average person here believes that negroes are given NO SCHOOLS AT ALL."[107]

After surveying responses to the Manifesto, signatories contended that the document had successfully reached its intended audience. Senator Harry F. Byrd of Virginia said that the Manifesto had "made a profound impression on the country because of its sincerity of statement," and that the northern newspapers' generally fair treatment of the document revealed "a feeling of moderation on the part of those who have been attempting to bring about enforced integration."[108] Congressman Watkins Abbitt, a fellow Virginian, detected a similar trend: "It is heartening . . . to see that gradually there is an awakening on the part of a large part of the American people, particularly the editors, to the awareness of our problem in the South and the necessity for combating, overriding and changing the dreadful decision referred to heretofore."[109]

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without foundation. *See Personal and Otherwise: Man Here Wants to Be Heard*, HARPER'S, Jan. 1956, at 22, 22 (noting that southern segregationists "believe—with some reason—that they have been denied a hearing in the national press"). Notably, Thomas Waring was the nephew of J. Waties Waring, a federal district court judge in South Carolina who sought to end school segregation after *Brown*. *See generally* TINSLEY E. YARBROUGH, A PASSION FOR JUSTICE: J. WATIES WARING AND CIVIL RIGHTS (1987) (discussing, among other things, Judge Waring's role in school desegregation and his relationship with his nephew).

106. *See* James F. Byrnes, *The Supreme Court Must Be Curbed*, U.S. NEWS & WORLD REP., May 18, 1956, at 50, 50 ("The suppression of that viewpoint outside the South has caused much of the nation to suppose that such dissatisfaction as existed with the Supreme Court's decision was due to petty prejudice and would soon disappear."); Waring, *supra* note 105, at 39 ("Many white Northerners are unable to understand the depth of feeling in the Southern states . . . .").

107. Letter from John Jones to Senator Richard B. Russell (Mar. 12, 1956) (on file with the University of Georgia Libraries, Richard B. Russell, Jr. Collection [hereinafter Russell Collection]). For an extremely illuminating biography of Russell, see GILBERT C. FITE, RICHARD B. RUSSELL, JR., SENATOR FROM GEORGIA (1991).

108. *Senator Byrd Sees Trend to Moderation*, WASH. POST, Mar. 20, 1956, at 14. For biographical examinations of Byrd, see JAMES W. ELY, JR., THE CRISIS OF CONSERVATIVE VIRGINIA: THE BYRD ORGANIZATION AND THE POLITICS OF MASSIVE RESISTANCE (1976); RONALD L. HEINEMANN, HARRY BYRD OF VIRGINIA (1996); J. HARVIE WILKINSON III, HARRY BYRD AND THE CHANGING FACE OF VIRGINIA POLITICS 1945-1966 (1968).

109. 102 CONG. REC. 12232 (1956) (statement of Rep. Watkins Abbitt). Writing two months after the Manifesto appeared, Governor Byrnes of South Carolina similarly noticed that the media had recently started displaying a more receptive attitude toward southern views of desegregation: "Only now is an effort being made in the Northern press to give thoughtful, balanced and

Although it is tempting to dismiss such statements as mere idle legislator boasting, other accounts corroborate that the Manifesto succeeded in draining enthusiasm for school desegregation. Proponents of racial equality agreed with the Manifesto's backers that the document had proven effective in reaching its targeted audience. Four days after the Manifesto's publication, A. Philip Randolph, who headed the Brotherhood of Sleeping Car Porters, wrote a letter to NAACP Executive Secretary Roy Wilkins suggesting that the document had already made an impact. "In my opinion, the manifesto of the 100 Southern Congressmen is not to be taken lightly so far as its probable influence in weakening the liberal forces in the North in their support of the fight for desegregation," Randolph wrote. "Already, influential publications in the North are beginning to dilute and greatly water-down their expression of interest in the fight for desegregation and civil rights."[110] Two weeks later, Randolph remained sufficiently alarmed by the Manifesto that he sent a letter to the leaders of several labor and civil rights groups announcing a meeting to coordinate strategy. "The purpose of this manifesto is to break away from the cause of desegregation, its north allies and to mobilize public opinion against the Supreme Court, in order that [*Brown*] may be reversed," Randolph explained. Accordingly, he contended that the organizations must "develop and strengthen public opinion in support of" *Brown* and counteract "the force and effect to this manifesto."[111] In 1957, Carl Rowan identified the Manifesto as "part of a calculated effort to convince the nation that the Supreme Court decision cannot be enforced, should not be enforced, and had better not be enforced."[112] Worse, in Rowan's view, the effort seemed to be working: "How did the nation react to this [Manifesto]? It shuddered—just the way the southerners had hoped."[113]

Randolph and Rowan were not simply imagining that the appetite for desegregation diminished in liberal circles after the Manifesto's appearance. Rowan pointed to a perceptible shift in the *Christian Science Monitor*'s coverage, particularly in the column written by Editor-in-Chief Erwin Canham.[114] "This statement, it seems to me, is a climax in the battle against integration," Canham wrote. "The South will not be coerced, and it has

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reasonably impartial presentation of what might be called 'the Southern point of view.'" Byrnes, *supra* note 106.

110. Letter from A. Philip Randolph, Int'l President, Bhd. of Sleeping Car Porters, to Roy Wilkins, Exec. Sec'y, NAACP (Mar. 16, 1965), *microformed on* Black Studies Research Sources, Papers of the NAACP, Part 20: White Resistance and Reprisals, 1956–1965, Reel 7, Slide 00893 (Univ. Publ'ns of Am.) [hereinafter Papers of the NAACP, Part 20].

111. Letter from A. Philip Randolph, Int'l President, Bhd. of Sleeping Car Porters, to Roy Wilkins, Exec. Sec'y, NAACP (Mar. 30, 1965), *microformed on* Papers of the NAACP, Part 20, *supra* note 110, Reel 7, Slide 00901.

112. CARL T. ROWAN, GO SOUTH TO SORROW 213–14 (1957).

113. *Id.*

114. *Id.*

rallied into a phalanx of formidable proportions."[115] This "eminent and responsible group" of Manifesto backers had convinced Canham that pursuing desegregation was unrealistic: "I do not see how laws can be enforced against so substantial a minority, which, of course, is a majority as far as representation goes in about one-fourth of our states."[116] Similar evidence appeared elsewhere. In June 1955, the *Washington Post* editorial page initially read the Court's decision in *Brown II* as brooking no delays whatsoever based on southern whites' disdain for desegregation.[117] But three days after the Manifesto appeared, the newspaper adopted a far more equivocal tone: "It is of the utmost importance to recognize, we believe, that while the moral and constitutional issues involved in the extension of full civil rights and political equality to Negroes admit of no compromise, the tactics and timing of that extension need to be conditioned by wisdom and realism."[118]

The Manifesto's drafters also received a strikingly large amount of correspondence directly from citizens all across the nation who wrote indicating that the segregationist cause enjoyed ample support well beyond the confines of the old confederacy.[119] Ten days after the document appeared, a married couple from Kansas City, Missouri, drove this point home in a letter to Senator Russell: "Thought you would be interested in knowing that the manifesto prepared by you Southern gentlemen is indeed heartening to many people outside of the Solid South. Although our 'suppressed press' has given little indication of it, there is much opposition to this horrible crime of integration."[120] A resident of Goshen, Indiana, seconded this notion: "As a word of encouragement to all of you, I want to say that there are plenty of people who live north of the Mason-Dixon line who concur with your stand wholeheartedly. . . . Your host of friends in the

115. Erwin D. Canham, *'Southern Manifesto' Issued*, CHRISTIAN SCI. MONITOR, Mar. 12, 1956, Second Section, at 1.

116. *Id.*

117. *See Making Integration Work*, WASH. POST, June 3, 1955, at 20 (asserting that "understanding of local conditions does not mean the countenancing of evasions" and "local attitudes" cannot serve as "cause[] for delay").

118. *Oil on Troubled Waters*, WASH. POST, Mar. 15, 1956, at 18.

119. *See, e.g.*, Letter from Dale Duckworth to Senator John C. Stennis (Mar. 27, 1956) (on file with the Mississippi State University Libraries, John C. Stennis Collection [hereinafter Stennis Collection]) ("You may rest assured that there are many, many northerners who believe in segregation."); Letter from Thomas J. Larkin to Senator Richard Russell (Mar. 12, 1956) (on file with Russell Collection) ("People of the north should never forget this magnificent exhibition of friendship and loyalty of our good friends in the south."); Letter from Charles H. Schwab II to Senator Richard Russell (Mar. 13, 1956) (on file with Russell Collection) ("I am a native born Chicagoan . . . and am in full accord with the southern point of view regarding segregation! I am grateful to you and your colleagues! Please keep up your good work and save America for Americans!"); Letter from H.E. Winters to Senator Richard Russell (Mar. 14, 1956) (on file with Russell Collection) (writing in praise of the Southern Manifesto).

120. Letter from Mr. and Mrs. C.A. Schoor to Senator Richard Russell (Mar. 22, 1956) (on file with Russell Collection).

North admire your courage in standing for right principles."[121] A resident of Langley, Washington, similarly informed Senator John Stennis of Mississippi that the Manifesto "reflect[ed] the position of a great many thinking people in the North," even if they were "afraid or at least reticent about boldly stating their convictions out in public, during this time when every effort is being made to ram over 'integration.'"[122] Echoing Stennis's own thoughts on the question of interracial sex, the Washingtonian concluded the letter by playing the anti-*Brown* trump card: "We would ask these avidly pro-'integration' people; just how many daughters have you to contribute to the fullest interpretation of 'Integration'?"[123]

3. Seeking Unity.—Many commentators have incorrectly suggested that Strom Thurmond's initial drafts of the Manifesto breathed fire and that the document was dramatically modulated by more restrained senators in subsequent iterations.[124] This misperception dates all the way back to the Manifesto's release. Because Thurmond's rhetoric did so much "arm-waving," *Time* reported, Senate colleagues "pushed Thurmond aside" and "ordered the paper rewritten by more temperate Senators."[125] Only after the real work had been accomplished, *Time* contended, "Thurmond elbowed his way back onto the scene, posed for photographers dictating the final draft—with which he had nothing to do—to his wife seated at a typewriter."[126] This account, while vivid, is complicated by the archival records.[127] The final version of the Manifesto is strikingly similar to the earliest versions in terms of substance, tone, and even its underlying language. Beginning with his very first draft, it appears that Thurmond designed the document not to articulate his independent, intemperate views of school segregation, but instead to provide an anti-*Brown* statement that could elicit support from as many southern members of Congress as possible. Thurmond's drafting of the document so as to attract broad southern support underscores how even some of the most racially inflammatory politicians possessed sufficient self-awareness to make shrewd tactical determinations in order to advance the segregationist cause.

Thurmond's first two drafts of the Manifesto contained all of the essential arguments that ultimately appeared in the final version. Like the

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121. Letter from Albert Penn to Senator Richard Russell (May 3, 1956) (on file with Russell Collection).

122. Letter from John Metcalf to Senator John Stennis (Mar. 27, 1956) (on file with Stennis Collection).

123. *Id.*

124. *See, e.g.*, JOHNSON & GWERTZMAN, *supra* note 28, at 147 (contending that because of Fulbright's efforts "the Manifesto was rewritten" and toned down).

125. *The Southern Manifesto*, *supra* note 6.

126. *Id.*

127. Clemson University's Strom Thurmond Collection [hereinafter Thurmond Collection] contains all Manifesto drafts.

published Manifesto, Thurmond highlighted the claim that *Brown* violated the Fourteenth Amendment's original understanding[128] and also made appeals to textualism,[129] precedent,[130] structure,[131] prudence,[132] and even the *Pierce*-inflected appeal to constitutional tradition.[133] In making these arguments, moreover, Thurmond extolled the importance of using "lawful means" to resist *Brown*, affirmed reliance on the Constitution, and pitched the appeal to the entire nation.[134] With respect to tone, Thurmond's initial drafts may have been even more subdued than the published Manifesto. Consider Thurmond's draft opening in contrast to the final version: "On May 17, 1954, the Supreme Court of the United States handed down a decision of far-reaching implications as to the future of constitutional government. The people of this nation cannot afford to ignore the threat posed by this decision to the rights of the States and the Congress."[135] Those two sentences accurately reflect the tone that Thurmond's drafts struck throughout.

Senator George appointed a three-person committee—made up of Senator Sam Ervin of North Carolina, Senator Richard Russell of Georgia, and Senator John Stennis of Mississippi—to solicit ideas and to transform Thurmond's draft into a final document.[136] That trio undoubtedly produced some meaningful changes to the document. In addition to stylistic modifications, the Ervin–Russell–Stennis draft also added the suggestion that *Brown* had actually harmed the South's harmonious race relations and

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128. *See* Strom Thurmond, Statement Regarding the Supreme Court Decision of May 17, 1954, in the School Cases 1 (Feb. 6, 1956) [hereinafter Thurmond's First Draft] (unpublished manuscript) (on file with Thurmond Collection) (contending that "[o]nly by following the intent of the framers of the [Fourteenth A]mendment and the people who ratified it could the Court hope to arrive at a constitutional decision").

129. *See id.* at 2 ("The Constitution does not mention education.").

130. *See* Strom Thurmond, Statement on the Supreme Court Decision of May 17, 1954, in the School Cases 1 (n.d.) [hereinafter Thurmond's Second Draft] (unpublished manuscript) (on file with Thurmond Collection) (citing *Plessy* and *Gong Lum* and contending that "[t]he people accepted" the separate-but-equal "doctrine through the years").

131. *See* Thurmond's First Draft, *supra* note 128, at 2 (contending *Brown* ignored federalism principles).

132. *See id.* (suggesting *Brown* would lead to other unwarranted judicial decisions that should be left to elected officials).

133. *See id.* (contending that "under the decision of the Court, parents would be deprived of the right to guide and regulate the lives of their own children").

134. *See* Thurmond's Second Draft, *supra* note 130, at 2 ("We pledge the States our support in using every lawful means of resistance against the Court."); Thurmond's First Draft, *supra* note 128, at 3 ("We affirm our reliance on the Constitution as the fundamental law of the land."); *id.* at 2 ("If the Court can legislate by judicial decree in school cases, it follows that the Court could and likely would again exercise the same self-assumed power in other matters.").

135. Thurmond's First Draft, *supra* note 128.

136. *See* Strom Thurmond et al., Origin of "Declaration of Constitutional Principles," Commonly Known as the Southern Manifesto 1 (1956) [hereinafter Thurmond, Origin] (unpublished manuscript) (on file with Thurmond Collection).

deleted Thurmond's relatively demure discussions of interposition[137] and jurisdiction stripping.[138] But George's decision to have this committee assume responsibility for the document may well have been motivated by a desire to dissociate Thurmond as much as possible from the effort. After serving in the Senate for nearly five decades when he died in 2003 at the age of 100, Thurmond is now remembered by many people as the consummate Senate insider.[139] But in 1956, Thurmond's fellow senators regarded him as an upstart who either did not know his place, or knew his place and refused to occupy it.[140] For a period of several weeks before the Manifesto was issued, Thurmond sought to gain support for a joint statement opposing *Brown* and was met with extremely modest success.[141] When George removed Thurmond as the Manifesto's point person, the document's chances of attracting broad southern support increased dramatically.

Despite considerable efforts to draft the document in a way that would elicit the broadest feasible support from southern elected officials, Thurmond and his likeminded compatriots nevertheless needed to lobby some of their colleagues to get them to sign the document. Recalling the events surrounding the Manifesto more than three decades later, Senator Fulbright contended in 1989 that he and Senator Daniel objected to portions of the initial draft they received. "But in the southern caucus, through several meetings, our colleagues went to great lengths to get our agreement, stressing the importance of unanimity," Fulbright wrote.[142] "We hated very much to stand out against our colleagues from the South. There was a sense

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137. *See* Thurmond's First Draft, *supra* note 128, at 2. Thurmond wrote:

> Several of the States have now acted to interpose their objections to the decision of the Court in the school cases because of the clear violation of the Constitution by the Court. The Legislatures of these States have approved resolutions stating their intention to interpose the sovereignty of the States between the decision of the Court and the enforcement of its decree by the use of every lawful means at their disposal.

Id. These sentences from Thurmond's draft approximate the message of the interposition resolutions that some state legislatures adopted after *Brown*.

138. *See id.* at 3 ("We cite to the Court the provisions of the Constitution circumscribing the duties of the Court and remind the Court that the Congress is granted authority by the Constitution to limit the appellate jurisdiction of the Court.").

139. *See, e.g.*, Adam Clymer, *Strom Thurmond, Foe of Integration, Dies at 100*, N.Y. TIMES, June 27, 2003, at A1.

140. *See* John H. Averill, *Thurmond Joins Insiders at Last*, L.A. TIMES, Apr. 25, 1982, at A12 (noting that some of Thurmond's southern colleagues accused him of "grandstanding"). Albert Gore referred to Thurmond as "a busybody" and contrasted Thurmond unfavorably with "respectable senators" like Byrd and Russell. GORE, *supra* note 73, at 103.

141. *See* Thurmond, Origin, *supra* note 136 (detailing the difficulties of getting support for the Manifesto from southern senators). Senator Byrd's decision to support Thurmond's initiative proved critical in getting the issue on the southern lawmakers' agenda. *See The Southern Manifesto*, *supra* note 6 (noting Thurmond "enlisted the powerful aid of Virginia Senator Harry Byrd").

142. J. WILLIAM FULBRIGHT, THE PRICE OF EMPIRE 93 (1989).

that we were the poor part of the country, that we had historic reasons to band together against northerners who were again imposing on us."[143] Although Senators Fulbright and Daniel received some requested modifications in exchange for signing the Manifesto, nearly all of those changes were more superficial than foundational.[144] In the end, the bid for regional unity proved remarkably successful, as the overwhelming majority of the South's congressional delegation signed the Manifesto.

It is mistaken to view the politicians who opted not to sign the Manifesto as making that decision because they necessarily held more egalitarian racial ideals than those who did sign the document. It is surely no coincidence that the only three southern senators who did not sign—Albert Gore and Estes Kefauver of Tennessee, and Lyndon Johnson of Texas—all harbored presidential aspirations.[145] Signing the document would diminish their chances of joining a major party's national ticket.[146] At least some politicians who refused to sign the document, moreover, expressed disagreement not with the Manifesto's aims but with its tactics. Congressman W.R. Poage's homespun explanation of his decision not to sign the Manifesto exemplified this idea. "I'm for segregated schools, but the way to retain it is not by going around yelping like a band of coyotes on a midnight hill," Poage said. "If we sit tight and tend to our business we will be more help in maintaining the status quo than by inviting a lot of people to come into our area."[147] Laying low is, of course, not the same thing as standing up for racial equality.

II. White Supremacy

Drafters of the Manifesto aimed to preserve the prevailing racial order, which at bottom was animated by an ideology that the Supreme Court has accurately labeled "White Supremacy,"[148] the bedrock belief that whites are better than blacks. Their efforts to maintain white supremacy were often considerably more sophisticated, self-aware, and nuanced than the cartoonish depiction of southern stupidity and hostility would admit. Manifesto supporters displayed these attributes in their resistance toward racial integration in three particularly important fashions. First, they crafted

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143. *Id.* at 94.

144. *See infra* notes 313–325 and accompanying text.

145. *See* RICHARD C. BAIN & JUDITH H. PARRIS, CONVENTION DECISIONS AND VOTING RECORDS 296–97 (2d ed. 1973) (noting that all three politicians received consideration for the Democratic Party's national ticket in 1956).

146. ROBERT MANN, THE WALLS OF JERICHO: LYNDON JOHNSON, HUBERT HUMPHREY, RICHARD RUSSELL, AND THE STRUGGLE FOR CIVIL RIGHTS 165 (1996).

147. Elizabeth Carpenter, *Three from State Sign 'Manifesto' After 'Softening,'* ARK. GAZETTE, Mar. 18, 1956, at 5F.

148. Loving v. Virginia, 388 U.S. 1, 11 (1967); *see also* POWE, *supra* note 71, at 39 (calling segregated schools "the cornerstone of white supremacy").

the Manifesto to avoid the racial rhetoric of black inferiority and white supremacy that typically accompanied even the most restrained defenses of school segregation. Second, many Manifesto signatories overwhelmingly eschewed exhortations to violence and defiance of judicial authority because they understood that such rhetoric could hinder their efforts. Third, in lieu of violence and defiance, Manifesto signatories proposed numerous innovative—and sometimes influential—strategies that aimed to preserve racially segregated schools without running afoul of the law.

A. Avoiding Racial Rhetoric

The Southern Manifesto is often understood as a document brimming with racial invective. Thus, in addition to Kluger's contention that the Manifesto spewed "bile,"[149] other reputable authorities have derided it as a "thinly disguised racist attack"[150] and a "cheap appeal to racism."[151] Despite these claims, the Manifesto's most striking racial feature is the scarcity of anti-black animus that almost invariably accompanied arguments against school desegregation during the 1950s. By the time that the Manifesto was issued, establishment segregationists had developed a common vocabulary and a host of standard arguments that they regularly drew upon in opposing racially integrated public schools. Given this vast menu of items available to express white segregationist sentiment, the Southern Manifesto is a model of asceticism.

Placing the Manifesto within the wider context of racial attitudes among elite white segregationists is a vital task. An appreciation of the many arguments against integration that the Manifesto eschewed makes it possible to gauge the document's intended goals and its intended audience. In order to understand what the Southern Manifesto *was*, in other words, it is necessary to understand what the Southern Manifesto *was not*. In addition, dispelling the notion that the Manifesto fully articulated the views of the racial rearguard during the 1950s should help to underscore the real progress that has occurred on the racial front since that time. Detailing the often unpleasant racial rhetoric of yore, rhetoric that circulated even among the most respected segregationists, helps to challenge the all-too-common claim among legal scholars that racial dynamics in this nation are more notable for continuity than for change.[152]

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149. KLUGER, *supra* note 32.

150. A. Leon Higginbotham, Jr., *An Open Letter to Justice Clarence Thomas from a Federal Judicial Colleague*, 140 U. PA. L. REV. 1005, 1019 (1992).

151. GORE, *supra* note 73, at 104–05.

152. For a prominent example of such thought, see DERRICK BELL, RACE, RACISM, AND AMERICAN LAW 211 (5th ed. 2004) (stating that "[t]he difference in the condition of slaves in one of the gradual emancipation states and black people today is more of degree than of kind").

None of the following should be taken as arguing that the Manifesto altogether avoided lapsing into objectionable racial notions. Even contemporaneously, a few commentators howled at the Manifesto's assertion that *Brown* had "destroy[ed] the amicable relations between the white and Negro races" and "planted hatred and suspicion where there has been heretofore friendship and understanding."[153] Sociologist St. Clair Drake wrote a letter to the *New York Times* criticizing the suggestion that blacks actually enjoyed Jim Crow. "This declaration reveals a dangerous ignorance of the current state of opinion and attitude among Southern Negroes," Drake wrote. "'Amicable relations' between whites and Negroes have been secured through an elaborate caste system."[154] A broad smile should not be mistaken for contentment with second-class status, Drake insisted: "They may seem 'amicable' on the outside, but even the meekest carry deep-seated resentments against their assigned 'place' deep down inside."[155] Senator McNamara also took issue with the Manifesto on this point from the Senate floor: "The Negro who is denied the right to vote; the Negro who is murdered by white men; the Negro who is barred from educational facilities because of the color of his skin—he understands the system . . . but he has no friendship. It is the system he seeks to destroy."[156]

It should hardly be surprising that the Manifesto gave voice to the notion that black citizens preferred racially segregated schools. Blinded by racial paternalism, many white segregationists deluded themselves into believing that "our Negroes" genuinely supported the racial status quo,[157] a notion that Judge J. Harvie Wilkinson has accurately called "a gross but not uncommon deception."[158] Indeed, among white southerners during the 1950s, it had reportedly become clichéd to contend: "The Negroes don't want integration—my cook told me."[159] The marvel of the Manifesto is not, however, that a racially troubling conceit did manage to find its way into the document but, rather, that so many others did not.

1. Purity, Nature, and Religion.—The most important argument for maintaining segregation that the Southern Manifesto excluded was the notion that integrated classrooms would inexorably lead to integrated bedrooms. During the mid-1950s, southern politicians frequently cited their

153. 102 CONG. REC. 4460 (1956).

154. St. Clair Drake, Letter to the Editor, N.Y. TIMES, Mar. 18, 1956, at 190.

155. *Id.*

156. 102 CONG. REC. 4687 (1956) (statement of Sen. Patrick McNamara).

157. *See* DAVID L. CHAPPELL, A STONE OF HOPE: PROPHETIC RELIGION AND THE DEATH OF JIM CROW 175–76 (2004) ("Most segregationists continued to embrace the illusion that 'their' Negroes were . . . too contented . . . to organize effectively.").

158. J. HARVIE WILKINSON III, FROM *BROWN* TO *BAKKE*: THE SUPREME COURT AND SCHOOL INTEGRATION: 1954–1978, at 36 (1979).

159. Gladwin Hill, *Louisiana*, N.Y. TIMES, Mar. 13, 1956, at 19 (calling the statement "cliché").

desire to prevent interracial sex—and the negative consequences that they suggested would flow from such contact—as their principal justification for continuing racial segregation. Among senators, James Eastland advanced this argument in its most unvarnished form, making plain that he was concerned solely with preserving whites' racial heritage. "Generations of Southerners yet unborn will cherish our memory because they will realize that the fight we now wage will have preserved for them their untainted racial heritage, their culture, and the institutions of the Anglo-Saxon race," Eastland stated.[160] Eastland's Senate colleague from Mississippi, John Stennis, offered a softer version of this argument, contending that he sought to preserve the racial integrity of both blacks and whites alike. "[O]ne of the most compelling reasons is the deep realization that placing the children side by side over the years, in primary, grammar and high-school grades, is certain to eventually destroy each race," Stennis said. "I don't know how many generations that would take. And we all believe that the bloodstream—the racial integrity of each group—is worth saving. And this is one of the main, basic reasons why our people will oppose the mixed schools."[161]

Stennis's usage of the term "mixed schools" highlights how the Manifesto also omits this prominent anti-miscegenation euphemism, one that segregationists often invoked.[162] In a magazine article that he wrote shortly after the Manifesto appeared, Senator Ervin used the term twice, warning of people "who seek immediate mixing of races in public schools" and aim "to force the involuntary mixing of the races."[163] In his statement on the Senate floor accompanying the Manifesto, Strom Thurmond also invoked the term. Black students sought admission to white schools in Clarendon County, South Carolina, even though, according to Thurmond, that locale's black schools were actually better than the white schools.[164] The push for integration in the face of these facts, Thurmond said, demonstrated that the lawyers representing black South Carolinians "are

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160. Dan Wakefield, *Respectable Racism*, NATION, Oct. 22, 1955, at 339, 339.

161. *The Race Issue: South's Plans, How Negroes Will Meet Them*, U.S. NEWS & WORLD REP., Nov. 18, 1955, at 86, 89 [hereinafter *The Race Issue*]. James Byrnes, the governor of South Carolina and a former United States Supreme Court Justice, endorsed this same idea:

> Southerners fear that the purpose of those who lead the fight for integration in schools is to break down social barriers in childhood and the period of adolescence, and ultimately bring about intermarriage of the races. . . . Because the white people of the South are unalterably opposed to such intermarriage, they are unalterably opposed to abolishing segregation in schools.

Byrnes, *supra* note 106, at 56.

162. *See* WALTER SPEARMAN & SYLVAN MEYER, RACIAL CRISIS AND THE PRESS 47 (1960) (noting that the term "mix" conjures "a picture of thousands of persons being stirred with sticks until completely amalgamated" and that "its implications make it a genuine scare word").

163. Ervin, *supra* note 91, at 32–33.

164. 102 CONG. REC. 4461 (1956) (statement of Sen. Strom Thurmond).

interested in something else. The 'something else' they are interested in is the mixing of the races."[165]

Relatedly, although southern politicians frequently defended segregation by appealing to laws of both the natural and the divine, the Manifesto conspicuously contains no such references. Speaking on the Senate floor ten days after the Court decided *Brown*, Senator Eastland explained: "[I]t is the law of nature, it is the law of God, that every race has both the right and the duty to perpetuate itself."[166] And those fundamental laws, Eastland contended, could not coexist with the law according to *Brown*.[167] Even Senator Ervin, a southern politician who was widely viewed as a racial "moderate,"[168] invoked these same terms in his defense of segregation. "It is not strange that" Americans typically associate with members of "their own race," Ervin explained, because doing so followed "a basic law of nature—the law that like seeks like."[169] In case people wondered what Jesus would do about segregation, Ervin supplied a ready answer: "Although He knew both Jews and Samaritans and the relations existing between them, Christ did not advocate that courts or legislative bodies should compel them to mix socially against their will."[170] Even though such religion-based arguments had been (and would continue to be) articulated by judges in defense of school segregation,[171] the Manifesto was limited to more traditional legal arguments.

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165. *Id.* As events after his death would reveal, Thurmond had not always been quite so pertinacious in honoring this opposition to racial mixing. When Thurmond was in his twenties, he fathered a child with a black young woman who worked in his parents' home—a fact that was concealed until after his death. In a fascinating turn of events, Thurmond's daughter from that relationship, Essie Mae Washington-Williams, accepted Thurmond's invitation to visit the Senator in his Washington office shortly after the Manifesto appeared. *See* ESSIE MAE WASHINGTON-WILLIAMS & WILLIAM STADIEM, DEAR SENATOR: A MEMOIR BY THE DAUGHTER OF STROM THURMOND 171 (2005) ("His whole staff at the Old Senate Office Building knew I was coming in, though I assume they thought I was an old family friend from Edgefield. They gave me a royal welcome . . . ."). Perhaps more fascinating still is the pride that Washington-Williams reported feeling toward Thurmond. *See id.* at 173 ("Whatever he stood for, however he segregated me from his real life, I couldn't help but like having a senator for a father.").

166. 100 CONG. REC. 7255 (1954) (statement of Sen. James Eastland); *see also id.* at 7251 (contending that interracial relationships violated "the laws of nature, and the law of God").

167. *See id.* at 7255 (declaring that "[a]ll free men have the right to associate exclusively with members of their own race, free from governmental interference").

168. Ervin, *supra* note 91, at 33.

169. *Id.* at 32. Ervin voiced similar ideas on other occasions. *See The Race Issue*, *supra* note 161, at 90, 95 (quoting Ervin as stating that "men segregate themselves in society according to race in obedience to a basic natural law, which decrees that like shall seek like").

170. Ervin, *supra* note 91.

171. *See, e.g.*, Loving v. Virginia, 388 U.S. 1, 3 (1967) (quoting the trial judge in 1959 in *Loving* as saying "almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents" and deducing "[t]he fact that he separated the races shows that he did not intend for the races to mix" (internal quotation marks omitted)); Hayes v. Crutcher, 108 F. Supp. 582, 585 (M.D. Tenn. 1952) ("Nature has produced white birds, black birds, blue birds, and red birds, and they do not roost on the same limb or use the same nest. Such

2. *Sex, Crime, and Intelligence.*—The Manifesto also omitted several additional arguments that enjoyed wide circulation among mainstream, respected opponents of school desegregation. Indeed, these arguments became so familiar that those who sought to preserve segregation sometimes seemed to be reading from a common playbook. At least one insightful opponent of Jim Crow comprehended the sophisticated segregationists' playbook at the time. Writing just one year after the Manifesto became public, Carl Rowan identified the main elements in this playbook as featuring references to the supposed black propensity toward: nonmarital children, venereal disease, crime, and ignorance.[172] Consider how Thomas Waring and James J. Kilpatrick—two prominent authors writing contemporaneously with the Manifesto—struck each of these themes.[173]

Both Waring and Kilpatrick cited statistics that demonstrated an allegedly casual approach among blacks toward children born outside of wedlock—a cultural weakness that they feared may be transmitted to whites in integrated schools.[174] "On the average one Southern Negro child in five is illegitimate," Waring wrote. "It is possible the figure may be even higher, since illegitimate births are more likely to go unrecorded. Even among Negroes who observe marriage conventions, illegitimacy has little if any stigma."[175] Kilpatrick similarly bemoaned the incidence of what he quaintly termed "Negro bastardy" and noted: "The rate of Negro illegitimacy . . . is not improving: It grows worse."[176]

Both authors also suggested that purportedly high rates of venereal disease among blacks made integrating public schools unwise. "That such promiscuity [among Negroes] must result in widespread venereal disease is as predictable as the case histories are demonstrable," Kilpatrick argued. "In areas where Negroes make up less than one-third of the population,

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recognition and preference for their own kind prevails among other animals. It prevails also among all people, among the yellow, black and red skinned races."). For analysis of how segregationists used religion to justify racial separation in the legal sphere and beyond, see Jane Dailey, *Sex, Segregation and the Sacred After* Brown, 91 J. AM. HIST. 119 (2004). For a claim that white organized religion did not meaningfully aid the forces opposing the civil rights movement, see CHAPPELL, *supra* note 157, at 107.

172. *See* ROWAN, *supra* note 112, at 105 (noting that the sophisticated segregationists "cite statistics on venereal disease, illegitimate births, the 'cultural lag' and crime among Negroes in the Deep South").

173. *See* JAMES JACKSON KILPATRICK, THE SOVEREIGN STATES: NOTES OF A CITIZEN OF VIRGINIA 279–80 (1957); Waring, *supra* note 105, at 41–42.

174. For a historical examination of how the debate about race and illegitimacy unfolded in the context of the Moynihan Report, see JAMES T. PATTERSON, FREEDOM IS NOT ENOUGH (2010). For an examination of illegitimacy's racialized underpinnings, see Melissa Murray, *What's So New About the New Illegitimacy?*, 20 AM. U. J. GENDER SOC. POL'Y & L. 387, 413–17 (2012).

175. Waring, *supra* note 105, at 41–42.

176. KILPATRICK, *supra* note 173, at 279.

colored patients account for 90 per cent of all reported syphilis and gonorrhea."[177] Waring cited high rates of venereal disease as part of a larger contention that black parents were generally less diligent than whites "in looking after the health and cleanliness of their children."[178] "Fastidious parents do not favor joint use of school washrooms when they would not permit it at home—and there's no use to tell them that it is unlikely that anyone will catch venereal disease from a toilet seat," Waring explained.[179]

Racially integrated southern schools, both authors warned, would also unwisely subject white pupils to blacks' alleged propensity for crime. "For many years, crime in the South has been more prevalent among Negroes than among white people," Waring contended. "Though the Northern press no longer identifies criminals by race, white Southerners have reason to believe that much of the outbreak of crime and juvenile delinquency in Northern cities is due to the influx of Negro population."[180] Given that "[m]aintaining order is a first concern of southerners," Waring contended that integrating schools was unthinkable.[181] Kilpatrick went so far as to suggest that blacks, driven by the same "undisciplined passion[]" that they demonstrated toward sex, lived by a distinct criminal code from whites.[182] Murders within the black community, Kilpatrick explained, "follow[ed] a constant and elemental pattern: The unfaithful woman, the triflin' man; a fancied wrong, a bloody vengeance. Yet as often as not, the evidence discloses no reason—no white man's reason—that conceivably might justify murder."[183]

Finally, both authors warned that southern blacks lacked the basic academic training, and perhaps the underlying aptitude, enabling them to keep pace with their white peers. Blacks were, according to Kilpatrick, "pathetically ill-equipped to compete with whites in public school education. As the experience of every Southern State has made vividly clear, Negro pupils *as a group* are woefully less educable than white pupils as a group."[184] While Waring was unconvinced that exposing black students to white students would remedy any existing racial gap in education, he was certain that the costs of such an experiment were too

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177. *Id.*

178. Waring, *supra* note 105, at 41.

179. *Id.* As Martha Nussbaum has explained, such concerns were not limited to uneducated whites: "I was brought up by a father (from the deep South)—a highly educated man, a partner in a large Philadelphia law firm—who seriously believed that it was unclean and contaminating for a white person to drink from a glass that had previously been used by a black person, or to use a toilet that had been used by a black person." MARTHA C. NUSSBAUM, FROM DISGUST TO HUMANITY: SEXUAL ORIENTATION AND CONSTITUTIONAL LAW 204–05 (2010).

180. Waring, *supra* note 105, at 42.

181. *Id.*

182. KILPATRICK, *supra* note 173, at 279.

183. *Id.* at 279–80.

184. *Id.* at 280 (emphasis omitted).

great. "Some advocates of integration say the way to cure these differences is to let the children mingle so that the Negroes will learn from the whites," Waring wrote. "The trouble with this theory is that even if it works, a single generation of white children will bear the brunt of the load. While they are rubbing off white civilization onto the colored children, Negro culture will also rub off onto the whites."[185]

Neither Waring nor Kilpatrick were regarded as advancing particularly aggressive or outlandish arguments in defense of segregation. To the contrary, nonsoutherners thought of both authors as unusually thoughtful and articulate spokesmen for the segregationist cause. Waring's essay appeared in *Harper's* magazine, which took pains to make clear that Waring was decidedly not a part of "the lunatic fringe of White Supremacy fanatics," but was instead "a conservative, and a gentleman."[186] Kilpatrick was an intimate of Senator Byrd's, and the book in which he articulated these views received respectful, if critical, reviews in serious academic publications.[187] Some members of the segregationist camp thought that Kilpatrick was, if anything, too reserved and intellectual in the arguments that he advanced against integration.[188] Although reading their ideas within today's racial context may make it difficult to believe, the claims advanced by Waring and Kilpatrick were, in comparison to the most aggressive from the era, notably restrained.[189] The omissions of these arguments—arguments that northern audiences thought came not from the racial gutter, but from on high—demonstrate the lengths to which the Manifesto's drafters went in order to prevent racially inflammatory rhetoric from appearing in the document.

B. Avoiding Extremes

Commentators have repeatedly asserted that the Manifesto urged white southerners to preserve segregation through violence and defiance of judicial decisions. But Manifesto signatories typically avoided promoting

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185. Waring, *supra* note 105, at 42.

186. *Personal and Otherwise: Man Here Wants to Be Heard*, *supra* note 105.

187. *See* Robert J. Harris, Book Review, 20 J. POL. 229, 231 (1958); Walter F. Murphy, Book Review, 67 YALE L.J. 1505, 1505–07 (1958).

188. *See* CHAPPELL, *supra* note 157, at 170–71 (noting that segregationist Carlton Putnam thought that Kilpatrick's defense of Jim Crow was excessively intellectual and insufficiently emotional).

189. Tom P. Brady's *Black Monday* offered a particularly spirited defense of school segregation. *See* TOM P. BRADY, BLACK MONDAY 64 (1955) ("Very few negroes have true respect and reverence for their race. They sense their racial limitations. If there is a short cut they want it.... [T]hey desire a much shorter detour, via the political tunnel, to get on the intermarriage turnpikes. These Northern negroes are determined to mongrelize America!"). Brady, a graduate of the Lawrenceville School and Yale University, was hailed as "the intellectual leader of the [segregationist] movement." JOHN BARTLOW MARTIN, THE DEEP SOUTH SAYS "NEVER" 16 (1957).

violence and defiance because they realized that such tactics would hinder, rather than help, the segregationist cause. The misperception that many southern senators and congressmen implored violent and defiant actions distracts scholars from focusing on the actual methods that those elected officials typically advocated. And those less sensational methods deserve greater attention than they generally receive because it was through the softer forms of resistance that segregationist senators and congressmen mounted their most effective defenses of white supremacy.

1. Violence?—Although the Manifesto expressly counseled against "disorder and lawless acts" to counteract *Brown*, many observers have criticized the document for fomenting violence. In 1964, Anthony Lewis contended that the Manifesto's claim that *Brown* contradicted the Constitution effectively meant that no "measure to fight [the Court's] decision"—including "violence"—could "be termed philosophically unlawful."[190] Writing one decade later in the *Notre Dame Lawyer*, Reverend Theodore Hesburgh agreed, reasoning that the "Southern officials encouraged the worst elements in Southern society to take any steps perceived necessary, including violence, to stop desegregation."[191] Several thoughtful commentators, including C. Vann Woodward, have even gone so far as to blame the Manifesto for resuscitating the Ku Klux Klan.[192]

Despite the steady stream of causal claims linking the Manifesto to violence, at least some evidence complicates that account. Critics and supporters of the Manifesto alike contemporaneously credited the antiviolence plea as sincere and applauded it for departing from common practice. Among critics, Alexander Bickel noted: "The Declaration enters, on the part of the South, a universe of discourse different from that in which the South's men of violence and demagoguery dwell, and into which they have been trying to draw us."[193] Princeton Professor Alpheus Mason, who expressed sympathy for the document, commended it for "specifically repudiat[ing] force. This approach represents a salutary shift from the violence that has recently characterized the integration effort."[194] One perceptive commentator even noted at the time that southern segregationist politicians had an extremely powerful incentive to hope that the anti-*Brown*

190. LEWIS, *supra* note 95, at 44–45; *cf.* JOHNSON & GWERTZMAN, *supra* note 28 ("Although they added the qualifying phrase 'by any lawful means,' their statement was taken as a call to arms.").

191. Theodore M. Hesburgh, *Preface: Fiftieth Anniversary Volume*, 50 N.D. LAW. 6, 9 (1974).

192. *See* DANIEL M. BERMAN, IT IS SO ORDERED: THE SUPREME COURT RULES ON SCHOOL SEGREGATION 125 (1966) (suggesting that the Manifesto prompted the Klan's revival); C. VANN WOODWARD, THE BURDEN OF SOUTHERN HISTORY 240–41 (3d ed. 1993) (contending that the Manifesto was "interpreted in lower ranks as authorizing revivals of Ku Kluxery").

193. Bickel, *supra* note 10.

194. Alpheus Thomas Mason, Letter to the Editor, N.Y. TIMES, Mar. 27, 1956, at 34.

movement did not descend into violence: because it would damage the cause. As Gerald Johnson explained, "The honorable members who signed that manifesto certainly did not believe that they were putting their names to an incendiary document, for they have everything to lose by an explosion."[195]

Some politicians' contemporaneous statements also lend support to the notion that the document's signatories were not winking when they urged white southerners to forsake violence. Southern senators themselves perceived that violent resistance to school desegregation would bring adverse consequences, and they communicated that awareness when addressing their constituents. Speaking about the Manifesto on a radio show that aired in his native Louisiana, Senator Allen Ellender called the document "a sober warning," and contended:

> What the South must avoid at all costs is violence, lawlessness, hatred and bloodshed. The outside agitators who seek the subjugation of both the white and Negro races in the South are hovering like greedy vultures for the time when racial antagonisms lead to chaos, the breakdown of governmental authority, and general lawlessness.[196]

Failure to heed this advice, Ellender cautioned, would bring the "use of force" by the federal government and would result in "a repetition of the reconstruction regimes which brought the South only oppression and self-seeking exploitation."[197] Surprisingly, Senator Eastland at least periodically sang a similar tune, as the senator perhaps best known for his unvarnished racism sometimes voiced convincing arguments contending that violent resistance to desegregation would serve to catalyze pro-integration sentiment among northerners. "Violence hurts the cause of the South," Eastland said in a speech to the White Citizens Council. "Violence and lawlessness will hurt this organization. These acts are turned against us by our enemies. They are effectively used to mould public sentiment against us in the North. It is imperative that we be looked upon with favor and have the best wishes of the average American."[198]

These statements do not establish, of course, that the Manifesto definitively played no role in spurring whites to defend segregation by violent means. Even though the Manifesto itself contained antiviolence rhetoric and some signatories warned about the vices of violence, legal texts

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195. Johnson, *supra* note 104.

196. *Ellender Warns South Not to Use Violence in Resisting Integration*, N.Y. TIMES, Mar. 18, 1956, at 87.

197. *Id.*

198. Senator James O. Eastland, Address Before the Statewide Convention of the Association of Citizens' Councils of Mississippi: We've Reached Era of Judicial Tyranny 8–9 (Dec. 1, 1955). Some southern politicians, thus, seem to have anticipated the counter-backlash portion of Professor Klarman's backlash thesis.

frequently obtain meanings that their drafters either did not intend, or that they even affirmatively opposed.[199] Some white segregationists may have *received* a proviolence message from the Manifesto, even if that message was not one that the document's drafters meant to convey. But before agreeing too readily with the notion that the Manifesto was a principal spark for white violence during the post-*Brown* era, it merits pausing to recollect that white southerners had a long, if not exactly glorious, history of greeting perceived threats to the prevailing racial order with violence. That history, of course, stretched back well before the Manifesto ever appeared.[200]

The antiviolence warnings that southern politicians issued surrounding the Manifesto do, however, reveal that southern politicians did not all react to *Brown* by simply jumping up and down, and screaming, "Never!" Many southern politicians were, rather, sophisticated political actors capable of making complex assessments about what reaction would likely occur if a particular action unfolded. Anticipating several moves ahead to identify the negative public reaction that anti-integration violence would ultimately generate reveals that Manifesto signatories were often reflective, self-aware, and calculating—traits seldom on display in the caricatures that typify depictions of southern elected officials, who are rendered both red-faced and red-necked. Such antiviolence sentiments also raise the important possibility that white southerners who did use violence to resist segregation acted not at politicians' behest, but at their own.

2. Defiance?—If the Manifesto did not encourage violence, did it nevertheless seek to promote nonviolent defiance of judicial decisions? On this front, as well, commentators have consistently questioned the sincerity of the Manifesto's stated goal of urging southerners "to resist forced integration by any lawful means."[201] That line must have been disingenuous, the thinking goes, because all methods of resisting *Brown* were unlawful. In 1956, a prominent group of legal academics and practitioners issued a statement arguing that the Manifesto, on this score at least, advocated an oxymoron: "To appeal for 'resistance' to decisions of

199. *See* J.M. Balkin, *Deconstructive Practice and Legal Theory*, 96 YALE L.J. 743, 780 (1987) (noting that "once the signifier leaves the author's creation and is let loose upon the world, it takes on a life of its own in the other contexts in which it can be repeated").

200. *See generally* RANDALL KENNEDY, INTERRACIAL INTIMACIES: SEX, MARRIAGE, IDENTITY, AND ADOPTION 203–05 (2003) (describing Emmett Till's murder in Mississippi one year before the Manifesto appeared); KLARMAN, *supra* note 15, at 258, 390 (describing riots in response to Autherine Lucy's attempt to integrate the University of Alabama in February 1956); CHARLES LANE, THE DAY FREEDOM DIED: THE COLFAX MASSACRE, THE SUPREME COURT, AND THE BETRAYAL OF RECONSTRUCTION (2008) (describing the Colfax Massacre). I do not mean to suggest, of course, that white violence in response to perceived black encroachments was a peculiarly southern phenomenon.

201. *See* 102 CONG. REC. 4460 (1956).

the Court 'by any lawful means' is to utter a self-contradiction, whose ambiguity can only be calculated to promote disrespect for our fundamental law."[202] The intervening decades have done little to erode this impression. Apart from Kluger calling the Manifesto an "orgiastic declaration[] of defiance,"[203] Anthony Lewis labeled it "the most influential single document of defiance."[204] No less an authority than Chief Justice Earl Warren contended in his memoir that the Manifesto "urged all [southern] states to defy the Supreme Court decision."[205] Many scholars have also wholeheartedly signed onto the notion that the Manifesto called for defiance.[206]

As with the claims about violence, though, the claims that the Manifesto urged defiance are complicated by the actual record. The document itself did not counsel defiance as a legitimate response to *Brown*, a point that commentary appearing in southern newspapers often emphasized. "Although some already have tried to make the statement out to be a declaration of defiance of the United States Supreme Court and the Constitution, and others will follow suit, it is nothing of the sort," noted a *Greenville News* editorial. "The signers . . . believe the antisegregationist decision of the Court to be wrong, legally and otherwise. They pledge themselves to try to get it changed, but they do not say they will defy or attempt to nullify it. There is a vast difference between the two courses of action."[207] An article in the *Nashville Tennessean* similarly noted: "Close study of the Manifesto has shown that it contains not even a veiled threat of defiance of the Supreme Court. It outlines no program of political action to nullify the court's decision."[208] Even President Eisenhower, speaking at a news conference shortly after the Manifesto's release, disagreed with a

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202. *Recent Attacks upon the Supreme Court: A Statement by Members of the Bar*, 42 A.B.A. J. 1128, 1128 (1956).

203. KLUGER, *supra* note 32.

204. LEWIS, *supra* note 95, at 44.

205. EARL WARREN, THE MEMOIRS OF EARL WARREN 288 (1977).

206. *See* BADGER, *supra* note 16, at 72 (contending that the Manifesto aimed "to ensure that all white southerners united behind moves to defy the Supreme Court"); J.W. PELTASON, FIFTY-EIGHT LONELY MEN: SOUTHERN FEDERAL JUDGES AND SCHOOL DESEGREGATION 41–42 (1961) (contending that the Manifesto enabled segregationists to make "a major breakthrough in their campaign to dignify defiance of the federal judiciary"); POWE, *supra* note 71, at 61 ("Not surprisingly, [the Manifesto] did not say how there could be 'lawful' means to oppose a Supreme Court decision."); William G. Ross, *Attacks on the Warren Court by State Officials: A Case Study of Why Court-Curbing Movements Fail*, 50 BUFF. L. REV. 483, 495 (2002) ("Of course, the signers of the Manifesto knew that there were no lawful means . . . ."); *see also* ROY REED, FAUBUS: THE LIFE AND TIMES OF AN AMERICAN PRODIGAL 348–49 (1997) (referring to the "defiant Southern Manifesto"); WOODS, *supra* note 34, at 210 ("The Southern Manifesto was angry and defiant.").

207. *Statement Is an Appeal to Reason*, *supra* note 102.

208. Peter Edson, *Manifesto Brushed Off in Capital*, NASHVILLE TENNESSEAN, Mar. 22, 1956, at 16.

reporter's suggestion that the Manifesto counseled defiance: "I don't believe they expressed their defiance. I believe they expressed their belief that [*Brown*] was in error, and they have talked about using legal means to circumvent or to get it, whatever the expression they have used."[209]

The belief that the Manifesto urged defiance stems in large part from a misperception that the South was represented in Congress by one hundred versions of Senator Eastland, a man who sometimes espoused defiant language. On the day that the Court decided *Brown*, Eastland was quick to contend: "The South will not abide by nor obey this legislative decision by a political court."[210] Eastland's defiant rhetoric only intensified during the coming months. "I know that Southern people, by and large, will neither recognize, abide by nor comply with [*Brown*]," Eastland said during his senate campaign in 1954. "We are expected to remain docile while the pure blood of the South is mongrelized by the barter of our heritage by Northern politicians in order to secure political favors from Red mongrels in the slums of the East and Middle West."[211] Three months after the Court decided *Brown II* in 1955, Eastland told his constituents in Senatobia, Mississippi: "On May 17, 1954, the Constitution of the United States was destroyed because the Supreme Court disregarded the law and decided that integration was right. . . . You are not required to obey any court which passes out such a ruling. In fact, you are obligated to defy it."[212]

But Eastland's stance of rhetorical defiance was not representative of the attitudes of most southern members of Congress during the mid-1950s. To the contrary, his defiant comments were aberrant, as contemporary press accounts repeatedly emphasized that Eastland's outright defiance of *Brown* was extremely unusual among southern politicians in Washington.[213] The response to *Brown* from Eastland's junior senate colleague from Mississippi, John Stennis, makes for an enlightening juxtaposition, and was more indicative of the general southern congressional response. Stennis urged "deliberation and caution," and suggested that this issue would play out over a long time, maybe even a period of years.[214] "Before we abolish our public school system in Mississippi, I hope that all of our leaders and thinking people will fully confer and study all phases of the problem and all possibilities of a solution," Stennis commented.[215] Thus, although some

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209. *The Transcript of Eisenhower News Conference on Foreign and Domestic Issues*, N.Y. TIMES, Mar. 22, 1956, at 20.

210. William S. White, *Ruling to Figure in '54 Campaign*, N.Y. TIMES, May 18, 1954, at 1.

211. Sherrill, *supra* note 33, at 193.

212. *The South vs. the Supreme Court*, LOOK, Apr. 3, 1956, at 23–24.

213. *See* Robert C. Albright, *Southerners Assail High Court Ruling*, WASH. POST, May 18, 1954, at 1 (noting that Eastland's response was extreme compared to other southern senators); White, *supra* note 210 (noting that the openly defiant faction of southern senators was small).

214. Albright, *supra* note 213.

215. *Id.*

white supremacy groups attempted to anoint Eastland "the Voice of the South,"[216] many Manifesto signatories spoke in a decidedly different register.

Aaron Henry, a Mississippi civil rights activist, offered an unusually insightful comparison of how Eastland-style defiance and Stennis-style deliberation played out in practice:

> The difference between Eastland and Stennis is that Stennis is a segregationist, Northern-style. He uses subtlety. Eastland would say, point blank, "Get the hell out of here, I ain't going to serve you because you're black." Stennis would say, "You don't have a reservation." But either way, you still haven't eaten. One is shrewd and sophisticated in promulgating segregation, the other is blatant—and maybe more honest.[217]

Henry made those comments in 1969 for a *New York Times* profile of Senator Stennis. But the rhetorical divide among segregationists that Henry identified extends back at least to the mid-1950s. If nothing else, the Manifesto makes it apparent that by 1956—to borrow a term from Congressman Adam Clayton Powell—"Eastlandism"[218] was waning and Stennisism was waxing.

Claims that the Manifesto urged defiance of the judiciary are also predicated on the document's invocation of the interposition movement that swept southern states beginning in 1956. This movement, the brainchild of James J. Kilpatrick, saw legislatures throughout the South pass resolutions condemning the Court's decision in *Brown*.[219] Given that the Manifesto "commend[ed] the motives of those states which have declared the intention to resist forced integration by any lawful means,"[220] some commentators have suggested that the Manifesto encouraged states simply to dust off the old, discredited doctrine of nullification associated with John Calhoun.[221] Segregationists during the mid-1950s, however, went to sometimes elaborate lengths to assert the difference between nullification and interposition.[222] When one examines the text of the underlying interposition

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216. FRANCIS M. WILHOIT, THE POLITICS OF MASSIVE RESISTANCE 82 (1973) (internal quotation marks omitted).

217. James K. Batten, *Why the Pentagon Pays Homage to John Cornelius Stennis*, N.Y. TIMES MAG., Nov. 23, 1969, at 44, 175 (internal quotation marks omitted).

218. *See* ROBERT FREDERICK BURK, THE EISENHOWER ADMINISTRATION AND BLACK CIVIL RIGHTS 169 (1984).

219. *See* POWE, *supra* note 71, at 58–60 (identifying Kilpatrick as interposition's intellectual leader).

220. 102 CONG. REC. 4461 (1956).

221. *See* WARREN, *supra* note 205 (linking the Manifesto to Calhoun and nullification).

222. *See* GATES, *supra* note 30, at 108 (offering Kilpatrick's effort to contrast nullification with interposition). Strom Thurmond wrote a letter to the editor of *Time* complaining that the magazine inaccurately suggested that his initial Manifesto draft mentioned "nullification." *See* Strom Thurmond, Letter to the Editor, TIME, Apr. 23, 1956, at 12.

measures, moreover, it becomes apparent that different states' interposition measures expressed extremely different attitudes toward judicial authority.[223] Some states—including South Carolina and Virginia—framed their resolutions in manners that can be viewed as compatible with demonstrating respect for the Supreme Court's authority. These comparatively restrained measures can be understood as participating in the segregationist effort to win the battle for public opinion during the post-*Brown II* era. Other states, however, adopted hardline measures that can be understood only as embracing judicial defiance. Alabama and Georgia, for instance, proclaimed that the two *Brown* opinions were "null, void, and of no force or effect" within their jurisdictions.[224] It is far from certain whether the Manifesto's drafters were aware of the linguistic differences separating these various state measures and the disparate poses they struck toward the judiciary. What can be said with certainty, though, is the Manifesto's eschewal of language claiming that the *Brown* decisions were without effect bolsters the notion that the document did not expressly disavow judicial authority and implore defiance. But even if the Manifesto is viewed as implicitly condoning judicial defiance, that view still succeeds in complicating the dominant understanding of the document. Implicit encouragement of judicial defiance, after all, suggests a far more subtle approach than the nakedly reflexive, vehemently antijudicial attitude that the Manifesto is typically understood as articulating.

One important reason that many Manifesto signatories would have generally avoided preaching such overt defiance of judicial authority was that they devised several different schemes for forestalling school desegregation that stopped well short of that extreme method. Instead of defying the law, they typically set about defining the law.

C. *Strategizing Segregation*

Southern senators and congressmen openly entertained several different means of either delaying public school desegregation or minimizing what they regarded as its adverse effects. Recovering the wide range of tactics that various Manifesto signatories advocated underscores how southern anti-integration efforts during the post-*Brown* era were more often characterized by creativity and flexibility than by obstinacy and intransigence. Although some of these specific plans proved short-lived, others proved remarkably durable. Indeed, some of the plans contemplated

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223. *See South Carolina*, 1 RACE REL. L. REP. 443, 445 (1956) (urging "legal steps" to prevent federal encroachment on states' authority); *Virginia*, 1 RACE REL. L. REP. 445, 447 (1956) (pledging "to take all appropriate measures honorably, legally, and constitutionally available to us," and contending that school desegregation proponents should seek an Article V amendment).

224. *See Alabama*, 1 RACE REL. L. REP. 437, 437 (1956) (asserting that the Court's *Brown* decisions were "null, void, and of no effect" in Alabama); *Georgia*, 1 RACE REL. L. REP. 438, 440 (1956) (same in Georgia).

by Manifesto supporters continue to play a role today in maintaining the paucity of meaningful racial integration in the nation's public schools.[225] But even more important than grasping the particulars of the plans is appreciating the lawyerly thoroughness and thoughtfulness that animated them. Without understanding intimately how southern elected officials demonstrated these qualities during the immediate post-*Brown* era, it is difficult to understand how pro-segregation forces were able to stave off utter defeat for so long.

In contemplating the various plans that southern politicians considered for preserving segregation when the Manifesto was introduced, it is essential to remember the legal backdrop that existed during that particular historical moment. In 1956, the Court's two-year-old decision in *Brown* had yet to acquire the sacrosanct status that it now occupies both in legal circles and in the broader world.[226] To the contrary, *Brown* remained an intensely divisive decision throughout the country.[227] The Court's most recent word on school desegregation in March 1956, moreover, was not *Brown* itself, but the implementation decree articulated in *Brown II*. That decision, as will soon become clear, appears to have buoyed the belief among southern politicians that school desegregation could effectively be resisted. Far from being delusional, ample evidence supported the notion that school desegregation could be evaded. Thus, before abruptly dismissing any of the proposals as harebrained and doomed to failure, it would be wise to recall the central lesson of historical contingency: Just because matters are a particular way today in no way means that they were predestined to turn out that way.[228]

1. Reversal.—A primary strategy that Manifesto supporters contemplated, as revealed in the document itself, was attempting to have *Brown* "revers[ed]."[229] They hoped to do so through two different routes. First, supporters suggested that the document could serve as one part of a larger effort to mobilize public opinion against school desegregation, a development that could inspire the Justices to backtrack. Second, some southern senators aspired to prevent Supreme Court nominees who approved of *Brown* from receiving confirmation.

Several Manifesto signatories suggested that the Justices could be indirectly motivated to reverse *Brown* if a sufficiently large segment of the public opposed the decision. A few weeks after the Manifesto appeared, a

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225. *See* James E. Ryan, *The Supreme Court and Voluntary Integration*, 121 HARV. L. REV. 131, 132–33 (2007).

226. *See* Brad Snyder, *How the Conservatives Canonized* Brown v. Board of Education, 52 RUTGERS L. REV. 383, 439–47 (2000).

227. *See* Justin Driver, *The Consensus Constitution*, 89 TEXAS L. REV. 755, 804–19 (2011).

228. *See id.* at 819–21 (criticizing scholars for claims of historical inevitability).

229. 102 CONG. REC. 4460 (1956).

columnist writing in the *Los Angeles Times* underscored that southern politicians believed the Justices' attitudes toward *Brown* were malleable:

> You won't hear it shouted from the rooftops, but one of the main purposes of the Southern Manifesto is to reform and resuscitate the Supreme Court. "Those political justices over there," a southern Congressman told me with a jerk of his chin toward the Supreme Court Building, "are going to get the point of what we're doing."[230]

Senator Eastland also advocated this public-opinion angle. "We can only win this fight through favorable public opinion," Eastland said. "The greatest danger is not in the Court. They are politicians who can change their minds."[231] A public-opinion campaign could succeed, Eastland suggested, because northern support for *Brown* was a good deal softer than had widely been portrayed: "We must carry the message to every section of the United States. Our position is righteous. The great majority of the rank and file of the people of the North believe exactly as we do. . . . We must place our case at the bar of public opinion."[232]

Several senators expressed the hope that they could, in the alternative, have *Brown* reversed by blocking the confirmation of Justices who thought that the case was correctly decided. The *New York Times*'s initial coverage of the Manifesto noted that some signatories contemplated "a boycott of candidates favorable to the court's ruling."[233] On the day of the Manifesto's release, Senator Stennis intimated to reporters that the Senate's southern bloc aimed to prevent the confirmation of new Supreme Court Justices who thought that the Fourteenth Amendment prohibited segregation.[234] Senator Thurmond had been advocating an aggressive use of the Senate's confirmation role since August 1955. "I also propose to consider carefully every nomination made by the Chief Executive to the courts and to other positions of power," Thurmond stated. "If I find the appointee, by his actions and statements, to be disqualified for the trust he would assume, I shall vote against his confirmation."[235]

2. Amendment.—The second major anti-*Brown* strategy involved the constitutional amendment procedures detailed in Article V.[236] Two

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230. Holmes Alexander, *Southern View*, L.A. TIMES, Mar. 30, 1956, at A5.

231. Eastland, *supra* note 198, at 11–12.

232. *Id.* at 10.

233. *See* Alvin Shuster, *96 in Congress Open Drive to Upset Integration Ruling*, N.Y. TIMES, Mar. 12, 1956, at 1.

234. *Bloc Hints Trouble on Nominees*, DALL. MORNING NEWS, Mar. 13, 1956, at 1.

235. Senator Strom Thurmond, Speech Before the Virginia State Bar Association: The Constitution and the Supreme Court (Aug. 6, 1955), *reprinted in* VITAL SPEECHES OF THE DAY, Oct. 15, 1955, at 29, 32.

236. *See* Shuster, *supra* note 233 (noting that the Manifesto's signatories were contemplating "proposals for constitutional amendments").

different proposed constitutional amendments received support from Manifesto backers. One proposal sought to take advantage of the "Lost Amendment," a proposal that Congress had submitted to the states in the 1860s that pledged not "to abolish or interfere within any state with domestic institutions thereof, including that of persons held to labor or service by the laws of said state."[237] Although the measure was initially designed to protect slavery, some senators thought that the language promising noninterference with "domestic institutions" could be interpreted to include public schools.[238] Reviving the Lost Amendment held some appeal because three states—Illinois, Maryland, and Ohio—had already ratified it, and it could be argued that no time limitation applied for ratification.[239]

The other amendment proposal, formally introduced in 1956, would have permitted states to determine for themselves whether they preferred segregated schools or integrated schools.[240] Although such a proposal never appeared to be on the cusp of garnering the high threshold of support necessary to amend the Constitution, the notion was also not nearly as farfetched as it may seem from today's vantage point. When Gallup conducted a nationwide poll on the question in 1959, a majority of respondents supported amending the Constitution to allow states to resolve the school integration question on their own terms.[241] This polling data suggests that, even five years after the Court decided *Brown*, support for integrated education in the North was far less pervasive than legal scholars often suggest.

3. Doctrine.—Manifesto supporters also offered several different approaches that aimed to preserve racial segregation in public schools, but did so within the existing doctrinal framework.

a. Influence District Courts.—The Manifesto's drafters encouraged district court judges to exploit the broad latitude regarding implementation that the Court adopted in *Brown II*. Senator Stennis of Mississippi helped to forge the southern response to *Brown* that sought to preserve school

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237. *"Lost Amendment" Now Provocative*, N.Y. TIMES, Mar. 11, 1956, at 122; *see also* Editorial, *South's Men of Conviction Stand Up to Be Counted*, NASHVILLE BANNER, Mar. 13, 1956, at 4. Senator Russell was particularly enamored of the idea. *See* David Daniel Potenziani, Look to the Past: Richard B. Russell and the Defense of Southern White Supremacy 130 (1981) (unpublished Ph.D. dissertation, University of Georgia) (on file with author).

238. *"Lost Amendment" Now Provocative*, *supra* note 237.

239. *Id.*

240. *See* 102 CONG. REC. 1215 (1956) (proposing to "eliminate limitations upon[] the power of the States to regulate health, morals, education, marriage, and good order therein").

241. 51 percent favored the amendment, 43 percent opposed, and 6 percent expressed no opinion. *The Gallup Poll #610*, GALLUP BRAIN, http://brain.gallup.com/documents/questionnaire.aspx?STUDY=AIPO0610&p=2.

segregation while simultaneously acknowledging judicial authority. In November 1955, when an interviewer asked Stennis whether district court judges could realistically do anything to implement *Brown* if the South simply refused to integrate, Stennis's crafty answer began by conceding the authority of courts. But he then quickly pivoted and attempted to shape the implementation decrees that the district courts would offer by providing an extraordinarily close reading of *Brown II*:

> I'm not going to attempt to tell the trial judge what his rulings should be, but, in the words of the Supreme Court decision, the trial judge must give weight to local conditions, reconciling public and private needs.
>
> The Court also recognized that there are "a variety of obstacles in making the transition to school systems operated in accordance with the constitutional principles set forth in our May 17, 1954, decision."
>
> The trial court, I quote again, "may properly take into account the public interest in the elimination of such obstacles in a systematic and effective manner." The Supreme Court did not attempt to say what the lower court could and would do.[242]

Stennis's response vividly encapsulates how closely some southern senators parsed judicial opinions in an effort to mold legal doctrine that remained quite malleable.

b. Nonracial Classifications.—In a similar vein, Manifesto supporters advocated substituting nonracial classifications to achieve the goals of race-based segregation. In August 1955, Thurmond delivered an address to the Virginia State Bar Association, where he suggested working within the law to maintain racially segregated schools by using nonracial classifications. Rather than counseling outright defiance, Thurmond instead noted that *Brown*, and the implementation decree embodied in *Brown II*, afforded segregationists substantial room to maneuver without violating the law. "[T]he States and school districts must construct laws and regulations with the principles stated by the Court," Thurmond instructed.[243] But complying with those principles, Thurmond continued, did not necessarily require racial integration: "Not even the edict of the Court prevents the adoption of systems of classifying pupils other than that of race."[244] In making this point, Thurmond cited a judicial opinion written by Judge John Parker only three weeks earlier that offered a narrow interpretation of the relief ordered by *Brown II*. "Let me emphasize Judge Parker's statements that 'the Constitution does not require integration,'" Thurmond said, "and that 'it merely forbids the use of governmental power to enforce segregation.' These words are extremely important to the officials of the States and the

242. *The Race Issue*, *supra* note 161, at 86.

schools, as we consider means of maintaining our way of life under the Constitution."[245]

c. Voluntary Segregation.—Another Manifesto framer suggested the document endorsed the establishment of voluntarily segregated schools. Immediately upon the Manifesto's release, Senator Sam Ervin argued that such a plan was perfectly consistent with *Brown*. "While the [S]upreme [C]ourt decision is deplorable from the standpoint of constitutional law and ought to be reversed for that reason, it is not as drastic as many people think," he explained.[246] Explicitly referencing Judge Parker's lower-court opinion, Ervin maintained that advocates of racial integration had badly misinterpreted *Brown*. "This decision does not require immediate integration of the public schools of the South," Ervin wrote. "It does not even require integration."[247] The Court continued to "permit[] the races to attend separate schools on a voluntary basis," which Ervin maintained was "the best course to follow at this time."[248] Just as people of different races could elect to attend separate churches without violating the Constitution, Ervin suggested, that same elective approach could be employed by school districts without violating the Constitution.[249]

d. Attendance Zones.—Some Manifesto signatories intimated during the mid-1950s that southern school districts could maintain racial segregation by establishing boundary lines in a way that yielded single-race schools. They often obliquely pressed this point by contending that such practices were not exactly unknown north of the Mason–Dixon Line. Senator Ervin chided that northerners who "think the South is cruel to its children when it segregates them on the basis of race in the public schools[] simply ignore the hundreds of thousands of Negro children who are actually segregated in schools in Northern cities by gerrymandered school districts embracing the ghettos where Negroes live."[250] Senator John Sparkman of Alabama similarly speculated after *Brown* that whatever mechanism achieved school segregation in Harlem schools would also work in the South.[251]

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243. Thurmond, *supra* note 235, at 31.

244. *Id.*

245. *Id.* (quoting Briggs v. Elliot, 132 F. Supp. 776, 777 (E.D.S.C. 1955)).

246. Margaret Kernodle, *'Lawful Means' Pledged to Reverse Court Decision*, NEW ORLEANS TIMES-PICAYUNE, Mar. 12, 1956, at 22.

247. Ervin, *supra* note 91, at 33.

248. Kernodle, *supra* note 246.

249. Ervin, *supra* note 91, at 33 (quoting *Briggs*, 132 F. Supp. at 777).

250. *Id.* at 32.

251. *See* Albright, *supra* note 213 ("[Sparkman] predicted that in many areas of the United States 'segregation by choice' will continue. He said Harlem, N.Y. is an example of this kind of 'voluntary segregation.'").

e. Tracking.—Some segregationist politicians also worked within legal doctrine by contending that *Brown*'s theoretical goals would not be realized within the reality of desegregated schools. In the hypothetical event that schools enrolled both black and white children, educators could still separate students into different classrooms according to aptitude. Elected officials were confident that such sorting would result in black pupils overwhelmingly if not uniformly being assigned to remedial classes. That eventuality, segregationists suggested, may not be doctrinally permissible, because it would intensify the racial stigma that *Brown* was designed to eliminate.[252] South Carolina Governor James Byrnes, who was also a former United States Supreme Court Justice, expressed this notion in a magazine article shortly after the Manifesto's publication. "If the Negro students are not able to do the work of the white students, can the races be segregated in the classroom and assigned different class work?" Byrnes wrote. "Would not the scars inflicted upon the Negro child by such segregation be far deeper than the harm done him by associating with only Negro students in segregated schools?"[253] Byrnes's fellow South Carolinian Strom Thurmond had earlier advanced a version of this argument, contending: "Certainly differences of inferiority and superiority would be emphasized greatly by close proximity."[254]

f. Sex Segregation.—Finally, Manifesto signatories also devised contingency plans meant to salvage as much of the old regime as possible. Given that resistance to *Brown* was driven in large part by concerns about interracial sex, some Manifesto signatories broached the possibility of integrating public schools by race, but simultaneously separating them by gender.[255] Congressman Brooks Hays suggested, for instance, that the "establishment of schools segregated by sex" may be one way to accomplish racial integration "without loss of values deemed vital by the white majority."[256] Communities that separated schools by sex would be able to avoid the dreaded spectacle of seeing white girls come into contact with black boys, who were thought to be hypersexual.[257]

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252. *See* Brown v. Bd. of Educ., 347 U.S. 483, 494 (1954) (contending segregation "generates a feeling of inferiority as to [blacks'] status in the community that may affect their hearts and minds in a way unlikely ever to be undone").

253. Byrnes, *supra* note 106, at 56.

254. Thurmond, *supra* note 235, at 31.

255. For a thoughtful analysis of this strategy, see Serena Mayeri, *The Strange Career of Jane Crow: Sex Segregation and the Transformation of Anti-Discrimination Discourse*, 18 YALE L.J. & HUMAN. 187 (2006).

256. BROOKS HAYS, A SOUTHERN MODERATE SPEAKS 228 (1959).

257. *See, e.g.*, LOUIS E. DAILY, THE SIN OR EVILS OF INTEGRATION 38 (1962) ("White people of the South know that a large number of Negro teenage boys are nearly sex maniacs. . . . Only under the protection of a school heavily guarded by police officers would [parents] have any peace of mind for the safety of their daughters from the attacks of such Negro boys."); FULBRIGHT,

4. Abolition.—Manifesto signatories also discussed the possibility of evading *Brown* by simply abolishing public schools altogether, expanding upon an idea broached in the Manifesto itself.[258] "If this matter is pressed it will result in some states going out of the public school business," Senator George said to the press after introducing the Manifesto. "Unless there is a reasonable approach to this problem by men and women of good will that may be the result."[259] Senator Stennis had likewise suggested that, in the face of actual efforts to bring about integration, southerners "will regretfully and reluctantly abolish their public school systems if necessary to avoid enforced destruction of their own race."[260] A system of racially segregated private schools, their thinking ran, would fall beyond the reach of the Equal Protection Clause. Going further, Senator Eastland suggested that starting private schools may even be unnecessary, as states could delay integration by first abolishing their public school districts when they faced court-ordered integration and then establishing new districts. "The state, if necessary, can abolish school districts, create other ones and thus remove the corpus or basis of a suit," Eastland contended. "This would mean the whole case must start over, with years' delay."[261]

The wealth of strategies that Manifesto signatories identified as potentially forestalling school desegregation demonstrates that southern politicians diligently surveyed their available options. There was at least one theoretically available option, though, that Manifesto signatories typically avoided. In their effort to preserve white supremacy, southern senators and congressmen during the mid-1950s evinced broad agreement that mounting a frontal assault on judicial supremacy was a strategic stone best left unturned.[262]

III. Judicial Supremacy

Focusing upon the Southern Manifesto complicates the prominent view among constitutional law professors regarding the emergence of

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supra note 142, at 90 (recalling "what used to really bother [his constituents] was the prospect of their young daughter marrying a black man" and adding "[t]hey couldn't tolerate the thought of it"); PELTASON, *supra* note 206, at 38 (quoting an Alabama State Senator as saying shortly after *Brown* that if a black man is given "the opportunity to be near a white woman, . . . he goes berserk" (internal quotation marks omitted)).

258. *See* 102 CONG. REC. 4460 (1956) (entertaining the possibility of closing public schools); Shuster, *supra* note 233 (noting one Senator said that "lawful means" could include the establishment of private school systems).

259. Jack Bell, *Humphrey Suggests Countermove to Southern 'Manifesto,'* LOUISVILLE TIMES, Mar. 13, 1956, at 1 (internal quotation marks omitted).

260. *The Race Issue*, *supra* note 161.

261. *The Authentic Voice*, TIME, Mar. 26, 1956, at 26, 29.

262. *See infra* subsection (III)(A)(1)(b).

judicial supremacy.[263] On this conventional view, one most often associated in academic circles with Larry Kramer, judicial supremacy became a widely accepted notion on the American constitutional scene only after 1958.[264] Before that time, Kramer contends, popular constitutionalism flourished, as everyday citizens and elected officials alike routinely advanced their own constitutional visions—even (and sometimes especially) in the face of competing constitutional visions articulated by the judiciary.[265] From the nation's founding through at least the late 1950s, Kramer asserts, Americans did not widely understand the Supreme Court as enjoying a dominant role in determining constitutional meaning.[266]

What happened in 1958 that ushered in the modern era of judicial supremacy and marked the beginning of the end for popular constitutionalism? In Kramer's narrative of decline, the free fall is unmistakably inaugurated by the Supreme Court's decision in *Cooper v. Aaron*.[267] Thus, Kramer has repeatedly, and ruefully, identified acquiescence to the judiciary's constitutional authority as a development that broadly appeared only after the Court issued its well-known decision espousing judicial supremacy against the backdrop of the Little Rock desegregation crisis.[268] On Kramer's telling, the Court's decision in *Cooper* amounted to a power grab that the Justices simply foisted upon the American people and their unsuspecting elected officials. "The Justices in *Cooper* were not reporting a fact," Kramer writes, "so much as trying to manufacture one."[269] What seems considerably more disheartening, from Kramer's vantage point, is that this effort at judicial usurpation proved

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263. The term "judicial supremacy" is a protean one, carrying different connotations for different scholars. *See* Robert Post & Reva Siegel, *Popular Constitutionalism, Departmentalism, and Judicial Supremacy*, 92 CALIF. L. REV. 1027, 1030 (2004) (acknowledging contested notions of judicial supremacy). I use the term here in a relatively standard fashion, meaning that in order to subscribe to at least a minimal understanding of judicial supremacy, in instances of contested constitutional meaning, the judiciary's interpretation of the Constitution is accepted as decisive. *Cf.* Larry D. Kramer, *The Supreme Court, 2000 Term—Foreword: We the Court*, 115 HARV. L. REV. 4, 6 (2001) (describing judicial supremacy as "the notion that judges have the last word when it comes to constitutional interpretation and that their decisions determine the meaning of the Constitution for everyone").

264. *See, e.g.*, LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 221 (2004).

265. *See id.* at 162–64.

266. *Id.* at 221.

267. 358 U.S. 1 (1958).

268. *See* KRAMER, *supra* note 264 (stating that judicial supremacy became prominent "after *Cooper v. Aaron*" and broadly accepted "sometime in the 1960s"); Larry D. Kramer, *Popular Constitutionalism, Circa 2004*, 92 CALIF. L. REV. 959, 963 (2004) (contending judicial supremacy found "active and widespread public acceptance" only "[a]fter *Cooper*"); Kramer, *supra* note 263 (contending that "in the years since *Cooper v. Aaron*, the idea of judicial supremacy . . . has finally found widespread approbation"); *id.* at 13 (suggesting it was not "until some time after *Cooper*" that judicial supremacy "achieve[d] acceptance").

269. KRAMER, *supra* note 264.

successful: "[H]ere is the striking thing: after *Cooper v. Aaron*, the idea of judicial supremacy seemed gradually, at long last, to find wide public acceptance."[270]

Kramer's historical account of popular constitutionalism's demise and judicial supremacy's rise is in no way viewed as idiosyncratic. Prominent law professors from across the ideological spectrum have claimed that *Cooper* initiated the era of widespread adherence to judicial supremacy.[271] This sequencing contention about *Cooper* even arose during the most recent campaign for the Republican presidential nomination, as former presidential candidate Newt Gingrich emphasized his opposition to the constitutional world that *Cooper* supposedly initiated.[272] Gingrich's constitutional views generated extensive news coverage, some of which relied uncritically upon Kramer's account of *Cooper*.[273]

Yet for all of its adherents, the claim that *Cooper* preceded the broad embrace of judicial supremacy gets matters exactly backward. Rather than securing the notion that judges enjoyed a privileged role in interpreting the Constitution, the Court's decision in *Cooper* instead merely amplified what at least by 1958 had become a notion that enjoyed wide circulation. Indeed, the debate generated by the Manifesto's release provides a vivid snapshot of the ample support that judicial supremacy enjoyed in March 1956, more than two years before the Court decided *Cooper*. After the Manifesto's release, members of both houses of Congress, President Eisenhower, leading law professors, journalists, and, yes, even a few ordinary citizens all offered hearty endorsements of judicial supremacy.

Tellingly, individuals from these various walks of life often articulated their support for judicial supremacy in terms that were strikingly, almost eerily, similar to the terms that the Justices themselves would eventually use in *Cooper*. The Supreme Court's particular formulation of judicial supremacy in *Cooper* has, of course, been roundly characterized as resting on no fewer than four claims that are dubious as a matter of constitutional

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270. *Id.*

271. *See* Rachel E. Barkow, *More Supreme Than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237, 241 (2002) ("The seeds for this vision of [judicial supremacy] can be found in *Cooper v. Aaron* and its proclamation that the Court is 'supreme in the exposition of the law of the Constitution.'"); John C. Yoo, *Choosing Justices: A Political Appointments Process and the Wages of Judicial Supremacy*, 98 MICH. L. REV. 1436, 1458–59 (2000) (suggesting that *Cooper* inaugurated the era of judicial supremacy at a time when that view was heavily criticized).

272. Gingrich's campaign document articulating his views stated: "[F]ollowing *Cooper v. Aaron*, the executive and legislative branches have largely acted as if the Constitution empowered the Supreme Court with final decision making authority about the meaning of the Constitution." NEWT 2012, BRINGING THE COURTS BACK UNDER THE CONSTITUTION 4 (2011), *available at* http://www.newt.org/sites/newt.org/files/Courts.pdf.

273. *See, e.g.*, Adam Liptak, *Among Legal Ranks, Shrugs for Gingrich's Tough Talk*, N.Y. TIMES, Dec. 18, 2011, at A24 (quoting Kramer's contention that "[t]he justices in *Cooper* . . . were not reporting a fact so much as trying to manufacture one" (internal quotation marks omitted)).

history, a matter of constitutional theory, or both.[274] It is necessary to recount these oft-critiqued statements from *Cooper* in order to lay the groundwork for establishing that these statements were already in wide circulation by 1958. First, *Cooper* claimed that *Marbury v. Madison*[275] had declared that "the federal judiciary is supreme in the exposition of the law of the Constitution."[276] Second, *Cooper* claimed that "ever since" *Marbury* the federal judiciary's constitutional supremacy had "been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system."[277] Third, *Cooper* interprets Article VI's statement that the Constitution is "the supreme Law of the Land" to apply with equal force to Supreme Court interpretations of the Constitution.[278] Fourth, *Cooper* suggests that state officials are—by virtue of taking an oath "to support this Constitution" as required by Article VI—also bound to support the Court's interpretations of the Constitution.[279]

The goal here is not to demonstrate that the Justices in *Cooper* were somehow correct in advancing any of these four notions. Instead, the goal is simply to demonstrate that these statements, whatever their veracity, were broadly embraced before the Court memorialized them in *Cooper*. Even allowing that these statements were in fact misperceptions, they were nevertheless extremely common misperceptions in 1956—subscribed to by esteemed constitutional law professors and ordinary folk, opinion journalists, and elected officials. Contrary to the conventional understanding, then, *Cooper* did not inaugurate the era of widespread judicial supremacy; instead, that era was already well under way.

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274. *See* ROBERT G. MCCLOSKEY, THE AMERICAN SUPREME COURT 276 (Sanford Levinson ed., 5th ed. 2010) (calling *Cooper* "quite preposterous in its depiction of American history"); Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217, 225 (1994) ("At least since . . . *Cooper* . . . the Court has repeatedly asserted that its opinions are 'the supreme law of the land' and that the other branches are bound by them. It is the burden of this article to show that this self-interested assertion is wrong as a matter of constitutional first principles.").

275. 5 U.S. (1 Cranch) 137 (1803).

276. Cooper v. Aaron, 358 U.S. 1, 18 (1958). *Marbury* might more readily be understood, however, to mean merely that the judiciary is not altogether excluded from constitutional interpretation. *See* KRAMER, *supra* note 264, at 126 ("What [*Marbury*] said was 'courts too, can say what the Constitution means.'").

277. 358 U.S. at 18. In fact, though, at some points in American history national figures seem to have denied the judiciary a special role in constitutional interpretation. *See* KRAMER, *supra* note 264, at 183 (describing President Andrew Jackson's vetoing of an act to recharter the Bank of the United States on constitutional grounds even though it had received the Court's constitutional validation).

278. U.S. CONST. art. VI, cl. 2; 358 U.S. at 18. Those two items need not be conceived as coextensive.

279. *See* 358 U.S. at 18–19. Again, those two items need not be conceived as coextensive.

Constitutional law professors have derided these various statements regarding judicial authority in *Cooper* as mere "bombast,"[280] the "boasting of the weak,"[281] and "just bluster and puff."[282] The animating idea behind these skeptical appraisals is that the Supreme Court ratcheted up its rhetoric, claiming an outsized constitutional role for itself, only after President Eisenhower dispatched federal troops to guarantee the desegregation of Little Rock Central High School. After the coast was clear, this critique runs, the Court decided to flex its judicial muscles, issuing its ostentatious and exaggerated assertions of constitutional authority. Admittedly, *Cooper* appears to have been the first time that the Supreme Court ever articulated these robust notions of judicial supremacy in these terms.[283] Simply because the Court said these things for the first time in *Cooper*, however, does not mean that *Cooper* introduced them to the constitutional mainstream. But in order to appreciate how widespread testaments to judicial authority were by 1958, professors need not scour more Supreme Court opinions. Instead, they should examine understandings about constitutional authority that were articulated outside of the courts during the period leading up to *Cooper*. Doing so makes it evident that the Justices in *Cooper* were engaged less in constitutional puffery than they were in expressing widely articulated constitutional understandings.[284]

It may initially seem both strange and strained to use an examination of the Manifesto as an occasion to argue that notions of judicial supremacy were commonplace in the pre-*Cooper* era. After all, the Manifesto offers a counter-interpretation of the Fourteenth Amendment's bearing on segregated schools that clashes with the Court's interpretation in *Brown*. At first blush, it may seem that the Manifesto exemplifies a pre-*Cooper* rejection of judicial supremacy, not a manifestation. But among the more remarkable aspects about the Southern Manifesto are the extent to which even many Manifesto signatories adhered to conceptions of judicial supremacy and how they voiced these convictions while crafting the document. There may well be no stronger indication of how prevalent notions of judicial supremacy were before *Cooper* than the fact that some of

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280. ROBERT A. BURT, THE CONSTITUTION IN CONFLICT 309–10 (1992); *see also id.* at 293 (calling *Cooper* an "atavistic rhetorical demand for absolute submission").

281. Powe, *supra* note 24, at 713; *see also id.* at 713–14 (calling *Cooper*'s language "bravado substituting for an inability to do anything").

282. KRAMER, *supra* note 264.

283. Some pre-*Cooper* statements of broad judicial authority to determine constitutional meaning do, of course, reside in the U.S. Reports. *See, e.g.*, Brown v. Allen, 344 U.S. 443, 540 (1953) (Jackson, J., concurring) ("We are not final because we are infallible, but we are infallible only because we are final.").

284. Kramer contends that *Cooper*'s "declaration of judicial interpretive supremacy evoked considerable skepticism at the time." KRAMER, *supra* note 264. But Kramer does not reveal either where such criticisms appeared or who articulated them.

the very people who would seem most likely to have vilified judicial supremacy in its entirety actually embraced the concept to a surprising degree. The claim here should not be mistaken for an assertion that Manifesto signatories invariably embraced judicial supremacy in its more robust formulations. Such a claim would be risible. Yet if one conceives of adherence to judicial supremacy not as something absolute but instead as running along a spectrum, then it becomes possible to understand that the Manifesto did not offer the no-holds-barred, frontal assault on judicial supremacy that it is sometimes viewed as presenting.

A. Electoral

1. Legislative.—After Senator Thurmond completed his statement claiming intellectual ownership of the Manifesto, Senator Wayne Morse of Oregon immediately rose and offered an impassioned response to the document. Although Morse briefly mentioned the underlying legal issue of racial segregation in public schools, he dedicated the lion's share of his remarks toward a defense of judicial supremacy—an ideal that he believed the Manifesto had undermined.[285] Intriguingly, Morse's defense of judicial supremacy was predicated on the same expansive reading of *Marbury*'s holding that *Cooper* would deploy two years later. "[I]n Marbury against Madison, decided in 1803, there was established the authority and the jurisdiction of the Supreme Court to determine for all Americans . . . rights under the Constitution," Morse contended. "The supremacy of the Supreme Court in passing on constitutional questions was determined by that decision."[286] In his extraordinary summation, Morse reiterated that interpretation of *Marbury* in the course of calling upon his colleagues to engage in an extended discussion about their conceptions of the judicial role:

> A historic debate must take place on the floor of the Senate in the not too distant future, because in the weeks immediately ahead the Congress will have to determine whether or not we and the people of the United States shall follow the Supreme Court decision, and recognize, as was laid down in Marbury against Madison, the supremacy of the Court in protecting the American people in their constitutional rights.[287]

That debate did, indeed, unfold. Morse was only the first among many elected officials, from both houses of Congress, who stepped forward in the shadow of the Manifesto to offer their constitutional understandings of judicial authority. Those debates received extensive news coverage at the

285. *See* 102 CONG. REC. 4462 (1956) (statement of Sen. Wayne Morse).
286. *Id.*
287. *Id.*

time.[288] Recovering these forgotten debates is vital, as they serve to illuminate congressional attitudes regarding judicial authority to interpret the Constitution.

a. Floor Debate.—Senator Paul Douglas of Illinois spoke on the Senate floor one day after Morse issued his call. Unlike Morse, Douglas did not detect in the Manifesto anything resembling an all-out assault on the Supreme Court. Indeed, Douglas repeatedly emphasized that the southern senators were well within the bounds of legality and propriety in criticizing *Brown*.[289] Nevertheless, Douglas, like Morse before him, also expressed a firm adherence to notions of judicial supremacy. "[U]nder our American system of government, the Supreme Court was established to settle disagreements over the interpretation of the basic law and the Constitution," Douglas said.[290] "[A]s long as the decisions of the Court represent the law of the land," Douglas insisted, those decisions must be obeyed.[291]

When the Manifesto was introduced, Senator Herbert Lehman of New York made a short statement on the floor expressing his disapproval and vowing that he would have more to say at a later date.[292] A few days later, on March 16, Lehman weighed in again and this time offered an enthusiastic endorsement of judicial supremacy. Given that "[t]he Supreme Court is, as every schoolboy knows, the keystone of the arch of the judiciary," Lehman contended, there "can be no supportable challenge to the supremacy or competency of the Supreme Court in deciding what is . . . constitutional, as strongly as some might disagree with the High Court's findings. It would be absurd, if it were not so deadly serious and so highly dangerous, to hold otherwise."[293] Lehman further offered a grim consequentialist assessment of the costs that would accompany any widespread rejection of judicial supremacy: "Shall each individual in our Nation have the right to say that he disagrees with the Supreme Court's

288. *See, e.g.*, Robert E. Baker, *Anti-Court Manifesto Stirs Row: Senate Fireworks Follow Attack by Southerners on Desegregation*, WASH. POST, Mar. 13, 1956, at 1; Robert E. Baker, *Manifesto Hit by 3 Speakers in Congress: High Court Ruling Called 'Exemplary' by Rep. Keating*, WASH. POST, Mar. 16, 1956, at 1; Allen Drury, *Senate Liberals Score Manifesto: McNamara Calls Southern Stand 'Shameful'—Parley at White House Urged*, N.Y. TIMES, Mar. 15, 1956, at 18; Friddell, *supra* note 101; William S. White, *Moderation Urged by Case of Jersey in Reply to South*, N.Y. TIMES, Mar. 16, 1956, at 1.

289. 102 CONG. REC. 4550 (1956) (statement of Sen. Paul Douglas) ("Criticism of the Court and its decision is . . . both legal and proper."); *id.* ("No doubt it is the legal right of those who disapprove the law as thus interpreted to seek . . . to change it.").

290. *Id.* Douglas's usage of the term "settle," thus, offers an adumbration of the well-known argument that Larry Alexander and Fred Schauer have made defending *Cooper*. *See* Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359, 1377 (1997) (extolling the Court's "settlement function").

291. 102 CONG. REC. 4550 (1956) (statement of Sen. Paul Douglas).

292. *Id.* at 4461 (statement of Sen. Herbert Lehman).

293. *Id.* at 4940.

interpretation of the Constitution and, therefore, will not abide by the . . . Supreme Court? Obviously, that would be anarchy, and our Nation would collapse in chaos and disorder."[294]

It should come as no surprise that several members of the House of Representatives took to the floor to make similar statements supporting judicial supremacy in the wake of the Manifesto. On March 15, 1956, three days after Senator George recited the Manifesto, Congressman Morris Udall of Arizona stated: "Unless we adopt the argument that the Supreme Court is really not supreme under the Constitution, there is one honorable and patriotic course open to those aggrieved by a decision of our highest tribunal."[295] That sole available course, according to Udall, resided in Article V's procedures for constitutional amendment.[296] Later that day, Congressman Laurence Curtis of Massachusetts advanced that same notion: "Under the Constitution the Supreme Court is the final authority in interpreting the Constitution. When the Court has spoken, that ends it, unless the Constitution is amended."[297] Nor were these statements the only statements supporting judicial supremacy in the House.[298]

But perhaps the most fascinating exchange about judicial authority that occurred in either house of Congress took place on the Senate floor on March 23, 1956, eleven days after the Manifesto had been introduced.[299] That debate revealed widespread adherence to the foundational notion of judicial supremacy in the Senate, even as the senators evinced some disagreement in the particulars about what actions should be deemed an affront to that notion. Further, the debate demonstrated that at least some southern senators had a considerably richer appreciation for the wide range of ways that constitutional meaning is sometimes shaped than did their northern counterparts.

Senator Willis Robertson of Virginia initiated the remarkable discussion by suggesting that Senator Lehman's record on federalism smacked of inconsistency. The Manifesto's signers should be understood, Robertson insisted, as working in the tradition of the effort to repeal Prohibition—a cause that Lehman had championed when he served as New York's Governor.[300] "New York and other Northern States objected to national prohibition," Robertson said. "The Southern States now object to a

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294. *Id.*

295. *Id.* at 4846 (statement of Rep. Morris Udall).

296. *See id.*

297. *Id.* at 4865 (statement of Rep. Laurence Curtis).

298. *See, e.g.*, *id.* at 6384 (statement of Rep. Noah Mason) (contending that "under the Constitution, the United States Supreme Court is the final arbiter as to the meaning of the Constitution" and that "[a]ny and all decisions of the Court become the law of the land").

299. For only one of the many articles chronicling this particular day's senatorial debate, see *South's Fight Seen Akin to 'Dry' Battle*, N.Y. TIMES, Mar. 24, 1956, at 15.

300. 102 CONG. REC. 5443 (1956) (statement of Sen. Willis Robertson).

prohibition against separate but equal schools. The constitutional principle involved is the same."[301] While allowing that the Manifesto's cause currently seemed to face long odds, Robertson reminded his colleagues that the same had once been said of the anti-Prohibition cause. Here, Robertson offered a colorful quotation of ill-fated overconfidence from former Senator Morris Sheppard, one of the Eighteenth Amendment's drafters, who had said: "There is as much chance of repealing the [Eighteenth] [A]mendment as there is for a hummingbird to fly to the planet Mars with the Washington Monument tied to its tail."[302] Robertson noted that things had not turned out precisely as Sheppard anticipated.[303] Just as Prohibition's opponents had prevailed by successfully courting public opinion, Robertson said, "It is before the bar of public opinion that we of the South now hope to make our case."[304]

In response to Robertson's assertion of inconsistency, Senator Lehman contended that the underlying circumstances in the two situations were themselves inconsistent.[305] While anti-Prohibition forces channeled their energy into repealing the Eighteenth Amendment, Lehman noted that the Manifesto contained no analogous proposal to repeal the Fourteenth Amendment—an effort that Lehman thought would surely end in defeat. Given these different underlying facts, Lehman stated that he stood by every word he had uttered one week earlier. "I consider my speech on that occasion one of the most important statements of my long public career," Lehman explained, not "because the speech was eloquent," but because it contained what he "believe[d] to be an incontrovertible principle and a statement of truth which cannot be denied."[306] The undeniable principle that Lehman's prior speech defended was, of course, judicial supremacy—a principle that he defended once more. "[R]egardless of our personal sentiments . . . the ruling by the Supreme Court on a constitutional question constitutes the supreme law of the land," Lehman said, and "no one is justified in defying the Constitution of the United States as interpreted by the Supreme Court."[307]

Senator Thurmond seized on Lehman's last point to question whether the Senator from New York construed the Manifesto as advocating defiance of the Constitution. When Lehman allowed that he did, Thurmond replied: "I challenge the Senator from New York to cite the section of the manifesto that is in defiance of the Constitution."[308] After Lehman failed to cite any

301. *Id.*
302. *Id.* (internal quotation marks omitted).
303. *Id.*; *see also* U.S. CONST. amend. XXI (repealing Prohibition).
304. 102 CONG. REC. 5443 (1956) (statement of Sen. Willis Robertson).
305. *Id.* at 5444 (statement of Sen. Herbert Lehman).
306. *Id.*
307. *Id.*
308. *Id.* at 5445 (statement of Sen. Strom Thurmond).

specific Manifesto provision as urging defiance (despite having a copy of the document at hand), Thurmond pulled rank, forcing Lehman to admit that he lacked legal training. "I am sure that if the Senator from New York would read the manifesto carefully and would ask any good lawyer to construe it, he would not place any such construction upon it," Thurmond advised. "The manifesto uses the words 'all legal means.' Those words were cautiously used, and do not imply defiance, but mean within the law."[309]

Witnessing this scene unfold, Senator Morse entered the fray seeking to bolster Lehman's position. "[N]o matter what phraseology they use in their manifesto . . . they are aiding and abetting defiance of the law," Morse said.[310] In addition, Morse echoed Lehman's call for the southern politicians to introduce a constitutional amendment to repeal the Fourteenth Amendment if they truly sought to rid themselves of *Brown*.[311] Finally, and most importantly, Morse threw down the gauntlet of judicial supremacy:

> I say on the floor of the Senate today that I think every Member of the Senate ought to have an opportunity to stand up and be counted by giving him an opportunity to put his John Henry on a manifesto as to whether or not he believes in the supremacy of the Supreme Court, as was laid down by that great Virginian, John Marshall, in Marbury against Madison, as being the supreme tribunal for the determination of the constitutional rights of all Americans, irrespective of race, color, or creed.[312]

No record indicates that Morse, or anyone else for that matter, ever produced a document resembling a Judicial Supremacy Manifesto for senators to sign. Perhaps more significantly, though, neither Senator Robertson nor Senator Thurmond responded that they would withhold their John Henrys from such a document on grounds of principle. Nor did any other senator subsequently make a statement from the floor directly rejecting Senator Morse's articulation of judicial supremacy.

It would be mistaken, of course, to construe the silence that greeted Morse's averment as constituting universal assent. There are many reasons that senators may have declined to answer Morse's challenge. But one important reason for that silence appears to have been broad assent with at least some attenuated vision of Morse's depiction of judicial authority. Indeed, substantial evidence suggests that, even as many senators signed the Manifesto, they nevertheless simultaneously endorsed notions of judicial supremacy to a surprisingly large extent. It is, of course, quite possible that some southern politicians spoke in the language of judicial supremacy less

309. *Id.*
310. *Id.* at 5454 (statement of Sen. Wayne Morse).
311. *Id.*
312. *Id.*

out of deep-seated conviction than a determination that rejecting judicial supremacy entirely would damage the segregationist cause. But even such calculated articulations of judicial supremacy are noteworthy because they stem from assessments regarding the broad acceptance of judicial authority to settle constitutional meaning throughout the nation. It seems difficult, moreover, to dismiss southern senators' embrace of judicial supremacy as wholly insincere. Indeed, it does not go too far to say that actual concern for respecting judicial supremacy even shaped the Manifesto itself.

b. Attitudes of Manifesto Supporters.—Although an early draft of the Manifesto called the Court's decision in *Brown* both "unconstitutional" and "illegal," a small group of senators led by Price Daniel of Texas and J. William Fulbright of Arkansas predicated their signing the statement on having the terms removed.[313] They contended that these watchwords communicated insufficient respect for the Supreme Court's ultimate constitutional authority, an idea that both Daniel and Fulbright repeatedly sought to preserve in similar terms. Before he was elected to the Senate, Daniel had, as Attorney General of Texas, written a brief defending the separate but equal regime when the Court decided *Sweatt v. Painter*[314] in 1950.[315] When the Court decided *Brown* four years later, Daniel delivered a lengthy statement on the Senate floor, parsing obscure Supreme Court opinions in an effort to demonstrate that the recent school decision departed from precedent.[316] Despite expressing keen disappointment with the opinion, Daniel in no way questioned the Court's authority to issue it. "No matter how much some of us may disagree with the reasoning and result of the Court's decisions, we must look to the future with patience, wisdom, and sound judgment to live under the law as it has now been written . . . ," Daniel said.[317] Even two years later, Daniel could not abide joining a Manifesto that accused the Court of acting unconstitutionally or illegally in issuing *Brown*. "That just isn't true and I won't sign it," Daniel said. "You can't call any action of the Supreme Court unconstitutional or illegal."[318]

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313. *See* Carpenter, *supra* note 147 (noting that "[f]our senators refused to sign the document and Senator Long, who had already signed, chimed in supporting their objections"). That Senator Long supported the movement to eliminate the term "unconstitutional" is far from surprising. Immediately after *Brown*, Senator Long indicated that his constitutional oath required him to accept the decision: "Although I completely disagree with the decision, my oath of office requires me to accept it as law. Every citizen is likewise bound by his oath of allegiance to his country." Albright, *supra* note 213 (internal quotation marks omitted).

314. 339 U.S. 629 (1950).

315. Brief for Respondents, *Sweatt*, 339 U.S. 629 (No. 44).

316. *See* 100 CONG. REC. 6750 (1954) (statement of Sen. Price Daniel) (expressing "disappoint[ment]" in *Brown*'s treatment of *Gong Lum*).

317. *Id.* at 6742; *see also id.* at 6743 ("The opinions of yesterday are new law. They are the law for today and for the future. But they did not follow the law as former opinions had stated it in the past.").

318. Carpenter, *supra* note 147.

These same terms also stuck in Fulbright's constitutional craw. After the Manifesto had circulated among the southern delegation, Fulbright drafted a statement expressing his qualms. "I fear the statement holds out the false illusion to our own southern people that there is some means by which we can overturn the Supreme Court's decision," Fulbright wrote. "Our duty to our own people in their hour of travail is one of candor and realism. It is not realistic to say that a decision of the Supreme Court is 'illegal and unconstitutional,' and to imply, thereby, that it can be overturned by some higher tribunal."[319] Only five days before the Manifesto appeared, Fulbright wrote a letter to a constituent where he adopted an even stronger stance on judicial supremacy. While agreeing that *Brown* was "wrong" and "untimely," Fulbright emphasized the lack of constitutional recourse and echoed Daniel's post-*Brown* statement in urging a forward-looking outlook.[320] "The great problem facing all of us in the South is no longer how to prevent the decision, but what to do about it now that we have it," Fulbright explained. "[U]nder our system of government the Supreme Court is specifically given the authority to interpret the Constitution, and no matter how wrong we think they are, there is no appeal from their decision unless you rebel as the South tried to do in 1860."[321] In May 1958, more than two years after signing the Manifesto, Fulbright continued to stress that the document had not formally contested the Court's authority to issue definitive constitutional interpretations. In an anguished letter responding to his sister—who had written Fulbright to chastise him for inaction during the Little Rock desegregation crisis—the Senator drew a sharp distinction between the Manifesto's approach toward law and that of Arkansas Governor Orval Faubus.[322] "You will recall that I joined other Southerners in expressing our disapproval of the Supreme Court's decision shortly after it occurred, but also in the same document, tacitly

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319. J. William Fulbright, Statement of Fulbright to Southern Senators 2 (n.d.) (unpublished manuscript) (on file with the University of Arkansas Libraries, J. William Fulbright Papers [hereinafter Fulbright Papers]). Fulbright appears not to have circulated this draft statement.

320. Letter from Senator J. William Fulbright to Les Gibbs (Mar. 7, 1956) (on file with Fulbright Papers).

321. *Id.* Fulbright did proceed to modulate this seemingly absolute statement somewhat in writing that "there is, of course, the appeal to the public opinion of the whole nation for them to try to understand the problem, to be patient with it, and to permit the individual school districts to work it out in their own time." *Id.*

322. *See* Letter from Senator J. William Fulbright to Anne Teasdale (May 27, 1958) (on file with Fulbright Papers). Fulbright wrote that he continued to think that *Brown* was "very wrong," and contended that Judge Learned Hand's *The Bill of Rights* went "pretty far in supporting this position." *Id.* Fulbright and Hand, it seems worth noting, were correspondents. *See* Letter from Senator J. William Fulbright to Judge Learned Hand, U.S. Court of Appeals for the Second Circuit (Mar. 14, 1958) (on file with Fulbright Papers) ("As a representative of Arkansas, perhaps I feel more deeply on the subject than most of our citizens, but I am convinced that the Court must bear a large share of the responsibility for the tragic conditions which now engender deep bitterness among our people.").

acknowledged that it was the law of the land," Fulbright wrote. "We certainly did not recommend the kind of actions taken by the Governor of Arkansas."[323]

Daniel and Fulbright were eventually vindicated in their concern that calling a Supreme Court decision "unconstitutional" would subject them to ridicule. There can be no question here because, while they succeeded in excising that term (along with "illegal") from the final document, the Manifesto nevertheless received some criticism on precisely that ground.[324] This charge doubtless arose because the Manifesto, while eschewing the term "unconstitutional," did call *Brown* "contrary to the Constitution."[325] Whatever the basis for that extraordinarily fine distinction, it was one that eluded commentators at the time. Nevertheless, that some senators evidently viewed it as impossible for the Court to issue an "unconstitutional" decision indicates desire to avoid launching what they perceived as a frontal assault upon judicial authority.

Daniel and Fulbright were far from the only Manifesto signatories who thought that signing the document did not amount to a wholesale repudiation of judicial supremacy. In a race for a congressional seat representing Arlington, Virginia, for instance, Congressman Joel Broyhill addressed challengers who criticized his recent decision to sign the Manifesto.[326] "In no way does the manifesto imply that any signer is not a loyal supporter of the Constitution as the supreme law of the land," Broyhill contended. "Nor does it repudiate the Supreme Court as the proper body to interpret it. It says only that we feel the nine members erred in this case. They are human and can err like other humans."[327] Congressman Brooks Hays of Arkansas would also suggest that, even though he signed the Manifesto, he "never strayed from [his] settled conviction that the national government was pre-eminent and that the Supreme Court was the final judge of what the Constitution meant."[328]

Some readers will surely dismiss these acknowledgements of judicial supremacy as camouflaging the views of the Manifesto's most committed signatories. These statements, after all, come largely from politicians who were contemporaneously understood as articulating generally "moderate"

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323. Letter from Senator J. William Fulbright to Anne Teasdale, *supra* note 322. Governor Faubus baldly asserted that *Brown* was "not the law of the land." BARTLEY, *supra* note 33, at 273.

324. *See supra* text accompanying notes 292–294.

325. 102 CONG. REC. 4460 (1956).

326. One challenger even claimed that signing the Manifesto would violate the oath to support and defend the Constitution. *See Three Friendly Enemies*, WASH. POST, June 8, 1956, at 43.

327. Richard L. Lyons, *Broyhill Tells Why He Signed Manifesto*, WASH. POST, June 10, 1956, at B4.

328. HAYS, *supra* note 256, at 94.

views on racial segregation. All of the southern politicians quoted above, moreover, represented states on the South's periphery. Some may believe that those areas enjoyed greater flexibility in racial dynamics that would have enabled politicians to absorb the blow inflicted by *Brown*, without calling into question their underlying acquiescence to judicial authority. Conversely, politicians more vehemently opposed to desegregation, especially those from the Deep South, may have been expected to eliminate all willingness to recognize judicial authority in the racial arena after the Court's decision in *Brown*. Even in the 1950s, in other words, Arlington, Virginia, was in no danger of being confused for Senatobia, Mississippi.[329]

But even the southern politicians who supported the Manifesto with the greatest fervor also seemed to indicate that the Supreme Court's interpretations of the Constitution ultimately determined constitutional meaning. Predictably, *Brown*'s most hardline opponents shouted from neither the rooftops nor the Senate floor about the joys of submitting to judicial authority. Sometimes, hardliners even engaged in tough talk deriding the Court, its authority, or the Justices. Despite occasionally using pointed language, however, the Manifesto's most ardent backers frequently emphasized that they sought to influence what they acknowledged were the judiciary's controlling constitutional interpretations. They did not, in other words, typically attempt to issue authoritative constitutional interpretations in their own right.

A careful reading of Senator Thurmond's remarks from the Senate floor following the Manifesto's introduction suggested that he voiced acceptance of the judiciary's constitutional interpretations as decisive. Thurmond's statement, to be sure, contained some sharply critical and charged rhetoric. "I do not and cannot have regard for the nine Justices who rendered [*Brown*]," Thurmond stated. He further contended that "bow[ing] meekly to the decree of the Supreme Court" would constitute "the submission of cowardice."[330] Despite the intermittent usage of such language, Thurmond's floor statement accompanying the Manifesto indicated that he viewed the Manifesto as an effort to motivate the Court to reverse the constitutional interpretation it offered in *Brown*. "I respect the Court as an institution and as an instrument of Government created by the Constitution," he allowed.[331] Thurmond expressly contended that the tactics he advocated for achieving judicial reversal did not differ appreciably from those deployed by the opponents of *Plessy v. Ferguson*. "For more than half a century the propagandists and the agitators applied

329. *Cf.* V.O. KEY JR., SOUTHERN POLITICS IN STATE AND NATION 229 (1949) ("Northerners, provincials that they are, regard the South as one large Mississippi. Southerners, with their eye for distinction, place Mississippi in a class by itself.").

330. 102 CONG. REC. 4461 (statement of Sen. Strom Thurmond).

331. *Id.*

every pressure of which they were capable to bring about a reversal of the separate-but-equal doctrine," Thurmond said. "They were successful, but they now contend that the very methods they used are unfair. They want the South to accept the dictation of the Court without seeking recourse. We shall not do so."[332] As in the Manifesto's text, moreover, Thurmond repeatedly noted that, in seeking "to have the decision reversed," he would use only "lawful" means.[333]

Thurmond's floor statement should not be dismissed as a single isolated incident. In August 1955, Thurmond delivered an important precursor of this senate speech in an address to the Virginia State Bar Association, which also suggested that Thurmond accepted the Supreme Court as the Constitution's authoritative interpreter.[334] One such indication arose in the context of a mild but revealing joke. "A friend has written me suggesting, facetiously, that I should introduce a bill making all legislation by the Supreme Court subject to review by the Congress," Thurmond said. "I agree this would be just as constitutional as what the Court itself has done."[335] That Thurmond thought that it would be patently unconstitutional, even laughable, to have Congress review Supreme Court decisions serves only to underscore how prevalent notions of judicial supremacy were during the mid-1950s. Apart from the ultimate aim of achieving *Brown*'s outright reversal, Thurmond's address also urged segregationists to work within the existing legal doctrine to negate the decision's impact.[336] Thurmond explicitly advocated only lawful approaches in attempting to have *Brown* reversed: "If propaganda and psychological evidence are effective for our opponents, they can be effective for us."[337]

Senator Stennis articulated even stronger respect for judicial supremacy than Thurmond. Throughout his interview with *U.S. News & World Report* in November 1955, Stennis made clear that, while he opposed desegregated schools, he did not oppose the judiciary's ultimate authority to determine constitutional meaning. "I don't think a State can nullify the Supreme Court decision merely by 'passing a law,' but a State can and should enact laws which will enable a community to provide the type of schools desired by the overwhelming majority of its people," Stennis explained. "These laws are subject to review, of course, by the courts, but

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332. *Id.*

333. Thurmond used the term "lawful" no fewer than three times in his statement. *See id.* at 4461–62.

334. *See* Thurmond, *supra* note 235, at 30 (arguing that the Court usurped Congress's legislative power).

335. *Id.* at 31.

336. *See id.* at 32 (advocating the use of "every legal weapon at their disposal").

337. *Id.*

they represent the politics of the people."[338] Along similar lines, Stennis stated: "I don't intend to demean the Supreme Court, although I think their decision unwise and completely unsound."[339] Stennis's avowed respect for judicial authority even filtered down to inferior courts. Recall that on the heels of *Brown II*, he began his assessment of the district court judge's role in the desegregation process with an acknowledgment of judicial authority. "I'm not going to attempt to tell the trial judge what his rulings should be . . . ," Stennis explained.[340] While the remainder of Stennis's answer certainly provided district court judges with strong indications of what he thought the best reading of *Brown II* required, he in no way suggested that he rejected judicial supremacy.

Senator Ervin, who served along with Stennis on the Manifesto's revision committee, adopted an anti-integration strategy in the Manifesto's wake that broadly resembled the model espoused by Mississippi's junior Senator. While Ervin certainly pushed back against the idea that his oath of office required him to support all Supreme Court decisions,[341] he did not reject the judiciary's authority to issue decisive constitutional interpretations. Ervin instead combined anti-*Brown* rhetoric with an insistence that the decision could be defanged while working within the law.[342] Thus, Ervin simultaneously maintained that *Brown* was deplorable but also, as a practical matter, virtually meaningless in light of the implementation readings available to lower court judges. Again, rather than directly threatening to flout judicial decisions, Ervin resolved to shape them.

None of the foregoing should be misconstrued as suggesting that the Manifesto's drafters and signatories invariably steered clear of language that impugned the Court's constitutional authority. That claim, of course, could not be supported. What is true today was also true during the mid-1950s: politicians spoke to their various constituencies in various registers. That southern politicians sometimes challenged judicial authority is not in the least surprising. But it is genuinely stunning that, even in the Southern Manifesto's wake, frontal assaults on judicial supremacy did not constitute the dominant approach taken by southern senators and congressmen. Instead, southern senators and congressmen during the mid-1950s generally voiced surprisingly robust—if grudging—conceptions of judicial supremacy.

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338. *The Race Issue*, *supra* note 161, at 86, 88–89.

339. *Id.* at 90.

340. *Id.* at 86.

341. *See* Ervin, *supra* note 91, at 33 (questioning why the politicians' "oaths to support the Constitution compel them to accept what Chief Justice Warren and his associates said about the Fourteenth Amendment," but that "the oaths of Chief Justice Warren and his associates to support the Constitution permit them to reject what their judicial predecessors said on the same subject").

342. *Id.*

2. *Executive.*—President Eisenhower's response to the Manifesto also demonstrates that, well before the Court decided *Cooper*, strong notions of judicial supremacy extended to the Executive Branch. Indeed, Eisenhower consistently equated the Supreme Court's constitutional interpretations with the Constitution itself. At a press conference shortly after the Manifesto's release, Eisenhower noted that the southern politicians indicated they would rely upon only legal means to resist *Brown* and warned that abandoning that strategy would lead "to a very bad spot for the simple reason I am sworn to defend and uphold the Constitution of the United States and, of course, I can never abandon or refuse to carry out my own duty."[343] Eisenhower—prefiguring one of *Cooper*'s controversial rationales—thus understood his oath to support the Constitution as also requiring him to support the Supreme Court's interpretations of the Constitution. "[W]e are simply going to uphold the Constitution of the United States," Eisenhower said, "see[ing] that the progress made as ordered by [the Supreme Court] is carried out."[344] At Eisenhower's press conference one week later, he again contended that Supreme Court opinions constitute the fundamental word on the Constitution.[345] Revisiting a suggestion from the press corps that the Manifesto had counseled defiance of *Brown*, Eisenhower gestured toward the Supremacy Clause in responding that any such stance was constitutionally untenable. "I do not believe that anyone . . . used the words 'defy the Supreme Court,' because when . . . we carry this to the ultimate, remember that the Constitution, as interpreted by the Supreme Court, is our basic law," Eisenhower explained.[346]

Over the next year, Eisenhower continued to articulate strong notions of judicial supremacy, including in explaining his decision to dispatch federal troops to integrate Little Rock Central High School in September 1957.[347] Intriguingly, Eisenhower thought that such a decision would never become necessary because he seemed to believe that American citizens had so deeply internalized notions of judicial authority. Speaking only two months before he dispatched military forces to Arkansas, Eisenhower explained: "I can't imagine any set of circumstances that would ever induce me to send federal troops . . . into any area to enforce the orders of a Federal court, because I believe that common sense of America will never require

343. *Transcript of Eisenhower News Conference on Foreign and Domestic Issues*, N.Y. TIMES, Mar. 15, 1956, at 16.

344. *Id.*

345. *Transcript of Eisenhower News Conference on Foreign and Domestic Issues*, *supra* note 209.

346. *Id.*; *see also Text of President Eisenhower's News Conference on Foreign and Domestic Affairs*, N.Y. TIMES, Sept. 6, 1956, at 10 ("[T]he Constitution is as the Supreme Court interprets it; and I must conform to that and do my very best to see that it is carried out in this country.").

347. *See Eisenhower Address on Little Rock Crisis*, N.Y. TIMES, Sept. 25, 1957, at 14.

it."[348] However common such common sense actually was, subsequent events would unmistakably demonstrate that these values were not uniformly embraced. Evincing absolutely no enthusiasm for what would eventually be called popular constitutionalism, Eisenhower conceived the rejection of judicial supremacy as an invitation to anarchy. "There must be respect for the Constitution—which means the Supreme Court's interpretation of the Constitution—or we shall have chaos," Eisenhower wrote in a letter during 1957.[349] "We cannot possibly imagine a successful form of government in which every individual citizen would have the right to interpret the Constitution according to his own convictions, beliefs and prejudices. Chaos would develop. This I believe with all my heart—and shall always act accordingly."[350] After dispatching the troops to Little Rock, Eisenhower's national address explained his decision in ways that resonated with judicial supremacy. "As you know, the Supreme Court of the United States has decided that separate public educational facilities for the races are inherently unequal and therefore compulsory school segregation laws are unconstitutional," Eisenhower explained. "Our personal opinions about the decision have no bearing on the matter of enforcement; the responsibility and authority of the Supreme Court to interpret the Constitution are very clear."[351]

Eisenhower was not alone in believing that his presidential responsibilities constitutionally required him to support federal judicial decisions. Like Eisenhower, Senator Lehman's floor statement about the Manifesto contended that the president's alleged responsibility to support Supreme Court opinions stemmed from his having taken the oath of office. "I ask [Eisenhower] only to execute the obligations of his office and to defend the Constitution, as interpreted by the Supreme Court," Lehman stated.[352] Similarly, Attorney General Herbert Brownell—perhaps the individual most responsible for informing Eisenhower's constitutional vision—frequently linked the notions of judicial supremacy and executive constitutional duty surrounding the school desegregation cases.[353] When Brownell wrote about the Manifesto in his memoir, for instance, he

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348. *Transcript of the President's News Conference on Foreign and Domestic Affairs*, N.Y. TIMES, July 18, 1957, at 12.

349. Letter from President Dwight Eisenhower to Captain Hazlett (July 22, 1957), *in* DWIGHT D. EISENHOWER, THE WHITE HOUSE YEARS: WAGING PEACE, 1956–1961, at 157 (1965).

350. *Id.*

351. *Eisenhower Address on Little Rock Crisis*, *supra* note 347.

352. 102 CONG. REC. 4941 (1956) (statement of Sen. Herbert Lehman). Lehman contended that Eisenhower's responsibility stemmed from his obligation to "see that the laws are faithfully executed." *Id.* at 4939.

353. *See* HERBERT BROWNELL WITH JOHN P. BURKE, ADVISING IKE: THE MEMOIRS OF ATTORNEY GENERAL HERBERT BROWNELL 190–91 (1993) (detailing how Brownell often linked these notions in discussing *Brown* with Eisenhower).

explained that "for Eisenhower, his duty, first and foremost, was to see that the Constitution, and by implication the Supreme Court's interpretation of it, was upheld."[354]

B. Non-Electoral

1. Academics.—In response to the Manifesto, many law professors rose to defend the principle of judicial supremacy. Paul Freund, among the most esteemed Harvard Law School professors of his time, played a particularly active role in beating back the challenge to judicial supremacy that he perceived in the Manifesto. Writing two weeks after the Manifesto appeared, Freund contended that the document posed "not only a crisis in race relations but—what could in the long run be even more shattering—a crisis in the role of the Supreme Court as *the* authoritative voice of our highest law."[355] Later that year, Freund drafted a statement on behalf of 103 prominent members of the bar and legal scholars—including Charles Black and Eugene Rostow, both of Yale Law School—that repudiated the Manifesto and also offered an even stronger affirmation of judicial supremacy.[356] While some members of the group did not believe that *Brown* was correctly decided, they were nevertheless united in understanding the judiciary to hold ultimate authority for determining constitutional meaning.[357] Indeed, the group's statement almost perfectly anticipated the series of moves that the Justices would make two years later in *Cooper*, where they concluded that their own constitutional interpretations stood on equal footing with the Constitution. As in *Cooper*, Freund started the crucial passage by gesturing toward the Supremacy Clause. "The Constitution is our supreme law," Freund began. "In cases of disagreement we have established the judiciary to interpret the Constitution for us. The Supreme Court is the embodiment of judicial power," he continued.[358] In Freund's estimation, all of this meant: "The privilege of criticizing a decision of the Supreme Court carries with it a corresponding obligation—a duty to recognize the decision as the supreme law of the land as long as it remains in force."[359]

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354. *Id.* at 200.

355. Freund, *supra* note 10 (emphasis added).

356. *See Recent Attacks Upon the Supreme Court: A Statement by Members of the Bar*, *supra* note 202, at 1128–29; Morrey Dunie, *Stern Renunciation of Dixie Manifesto*, WASH. POST, Nov. 18, 1956, at E3 (stating that Freund drafted the document).

357. *See* Dunie, *supra* note 356 (noting that some signatories opposed *Brown*).

358. *Recent Attacks upon the Supreme Court: A Statement by Members of the Bar*, *supra* note 202.

359. *Id.* The statement also concluded that the Manifesto "foment[ed] disrespect for our highest law" and ought "to be repudiated by the legal profession and by every thoughtful citizen." *Id.*

Similarly, Yale's Alexander Bickel wrote an article in the *New Republic* embracing the notion that no legally significant difference separated the Court's constitutional interpretation from the Constitution itself. "The signers reaffirm their 'reliance on the Constitution as the fundamental law of the land'—a statement which in context is pregnant with the suggestion, tenable only academically or by force but not in law, that there exists a Constitution distinct from the one the Supreme Court expounds," Bickel wrote.[360] It was *Cooper*'s avowal of roughly this same idea that academics now often deride as the most excessive of *Cooper*'s many excesses.[361]

Academic expressions of judicial supremacy were not confined to those inhaling New England's rarefied air. Virginia's George Spicer also contended that the Manifesto's suggestion that *Brown* was at odds with the Constitution was simply delusional: "[T]o characterize the decision of the Supreme Court as unconstitutional is fantastically absurd. . . . The decision may be characterized as wrong, improper, or unwise, but under the American theory of constitutional law it may not be characterized as unconstitutional."[362] George Stumberg of Texas likewise derided such contentions as "unlawyer-like" and further criticized the Manifesto by linking judicial supremacy to constitutional law's foundational case.[363] "Every lawyer knows, or should know, that as long ago as 1803, in the case of *Marbury v. Madison*, the Supreme Court declared an act of Congress to be unconstitutional," Stumberg explained. "Its power to determine the constitutionality of state and federal law has long since become so thoroughly imbedded in our system of government that for it now to become otherwise, a constitutional amendment or a revolution would be necessary, neither of which is likely to occur."[364]

2. Journalists & Citizens.—The Manifesto also elicited several claims of judicial supremacy from journalists and ordinary citizens alike. Writing in the *New Republic* shortly before Bickel's article ran there, Gerald Johnson criticized the Manifesto for seeming to suggest that it was somehow possible for a Supreme Court opinion to be unconstitutional. "In

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360. Bickel, *supra* note 10.

361. *See, e.g.*, Trevor W. Morrison, *Constitutional Avoidance in the Executive Branch*, 106 COLUM. L. REV. 1189, 1223–24 (2006) (noting that the "conventional view" stops short of *Cooper*'s claim "that when the Court decides a constitutional question, the decision effectively becomes the Constitution itself"); Michael Stokes Paulsen, *Lincoln and Judicial Authority*, 83 NOTRE DAME L. REV. 1227, 1298 (2008) (contending that equating "decisions of the Supreme Court with the Constitution itself" presents an instance of "stunning wrongness").

362. George W. Spicer, *The Supreme Court and Racial Discrimination*, 11 VAND. L. REV. 821, 847 (1958).

363. George W. Stumberg, *The School Segregation Cases: Supporting the Opinion of the Supreme Court*, 42 A.B.A. J. 318, 318 (1956).

364. *Id.* (citation omitted).

this respect [the Manifesto] bears some resemblance to the famous bill introduced by a legislator of the last generation which provided that in the state of Missouri the value of *pi* should be 3, instead of the conventional, but inconvenient, 3.1416," Johnson wrote.[365] Syndicated columnist Roscoe Drummond expressed disapproval of the Manifesto's effort to "undermine the authority of the court as the ultimate adjudicator of the Constitution."[366]

Even outlets that adopted a somewhat more sympathetic view of the Manifesto nevertheless often acknowledged that judicial supremacy formed a major obstacle to undoing *Brown*. In an editorial called *Responsible Southerners Take over the Problem*, the *Baltimore Sun* allowed that "any hope of ultimate success" was doubtful. "It is all very well to talk about 'Supreme Court encroachment,' 'abuse of judicial power,' etc., etc.," the editorial noted, "but the fact remains that our system supplies no recourse after the court has made a clear-cut decision on a basic constitutional question, save the remote and almost impossible one of amending the document itself."[367]

Citizens without any apparent specialized legal training also joined the ranks of those articulating notions of judicial supremacy well before the Court's decision in *Cooper*. In a letter to Senator Fulbright written shortly after the Manifesto appeared, Anne Ferrante admonished: "The Southern Manifesto is a direct blow to the very core of our government—the Constitution."[368] Ferrante further suggested, in a move *Cooper* would echo, that Fulbright violated his oath of office by signing the document: "As citizens, we are all obligated to uphold the Constitution. As a legislator, you have sworn to do so. How can you repudiate the Constitution you have taken an oath to uphold?"[369] Writing in a letter to the *Montgomery Advertiser*'s editor, Juliette Morgan expressed a similar idea: "I believe the Constitution and the Supreme Court of the United States constitute the supreme law of the land."[370]

Just as southern elected officials sometimes engaged in hostile rhetoric about the Supreme Court without actually going so far as to reject judicial supremacy, this same dynamic also emerged among southerners who did not hold elective office. B.L. McCord, school superintendent of Clarendon County, South Carolina, captured these dueling sentiments in responding to how his district might negotiate the Court's desegregation decisions. "No nine men in these United States are going to dictate who our children are

365. Johnson, *supra* note 104.

366. Roscoe Drummond, *Change by Amendment*, CHATTANOOGA TIMES, Mar. 19, 1956, at 6.

367. *Responsible Southerners Take over the Problem*, BALT. SUN, Mar. 13, 1956, at 18.

368. Letter from Anne Ferrante to Senator J. William Fulbright (Mar. 15, 1956) (on file with Fulbright Papers).

369. *Id.*

370. ROWAN, *supra* note 112, at 122–23.

going to associate with, even if it comes to the place where we don't have public schools," McCord explained.[371] Vehement as this response is, though, it may not best be viewed as casting doubt on the Supreme Court's constitutional authority. Although he marched through many of the stock reasons that rendered school integration unwise in particularly animated fashion, McCord nevertheless made clear his intention to locate an innovative solution within the parameters established by the Court's constitutional interpretations: "We're going to study and work out some plan. Court didn't say how long we had, but it didn't implement the decree either."[372]

C. *Upshot*

It may be tempting to think that discovering the notion of judicial supremacy had already attained widespread acceptance before the Court decided *Cooper* is a point of exceedingly modest significance. After all, what really hinges on whether broad acceptance of judicial supremacy already existed in 1956, or whether it was something that did not emerge until shortly after 1958? In the grand scheme of constitutional law, this point might be dismissed as, at best, pedantic—and perhaps even petty. But, as it turns out, understanding that the widespread acceptance of judicial supremacy actually preceded *Cooper* is a point that yields substantial insight into ongoing scholarly debate.

The widespread and enthusiastic articulations of judicial supremacy before *Cooper* upset the account depicting the Justices as power-hungry scoundrels who arrogated constitutional authority unto themselves while the nation was preoccupied. The judicial power grab narrative certainly adds drama, as every good story needs a villain. But as with most monocausal explanations for complex phenomena, the judicial power grab makes for a better story than for a satisfying account of our current constitutional order. It seems odd that legal scholars who have advocated popular constitutionalism have not dedicated greater intellectual energy to identifying with precision how nonjudicial actors conceived of judicial supremacy during the 1950s. For law professors who bemoan what they regard as an obsession with courts, the *Cooper*-driven explanation of judicial supremacy appears awfully judge-centric.

It seems deeply improbable that popular constitutionalists will be cheered to know that many Americans articulated robust notions of judicial supremacy even before the Court formally did so. On a superficial reading, popular constitutionalists may appear to draw solace from the fact that the Court did not act unilaterally and simply usurp judicial supremacy. This

371. Julian Scheer, *The White Folks Fight Back*, NEW REPUBLIC, Oct. 31, 1955, at 9, 10.
372. *Id.*

pre-*Cooper* history could at least theoretically be welcomed by popular constitutionalists because it would mean that the Court was not the behemoth that they sometimes seem to fear. But on another, perhaps more plausible, reading of popular constitutionalist sympathies, the discussions that the Manifesto elicited could be viewed as the unkindest cut of all. The broad embrace of judicial supremacy would mean that elected officials and at least some of their constituents agreed that the Supreme Court should have the final word in determining constitutional meaning—and that is, of course, precisely what popular constitutionalists oppose. If "the people" in some meaningful sense acceded to judicial supremacy before the Court articulated that notion, that assent may place popular constitutionalists in the uncomfortable position of saying the people simply do not know what they want.

IV. Implications

When observers have attempted to assess the Southern Manifesto's ongoing significance, they have generally concluded that the document has no substantial relevance to the modern world. The southern politicians who shaped and signed the Manifesto might, on this telling, be viewed roughly as reenacting the fate of their nineteenth-century forbearers. Like the southerners who fought to defend slavery during the 1860s, the battle to preserve racial segregation should be understood as the twentieth century's lost cause.[373] Eisenhower Attorney General Herbert Brownell has argued that signs of the Manifesto's demise appeared as early as 1957: "I can only conclude that Eisenhower's decisive action at Little Rock crushed the forces behind the Southern Manifesto. Eventual Federal enforcement of the *Brown* case was assured."[374] Scholars have shared this general assessment, even if they would date the Manifesto's death a few years later. In 1973, less than twenty years after the Manifesto appeared, Francis Wilhoit contended that the document had already been proven a massive failure:

> How well did the Manifesto realize the framers' goals? An honest answer would have to be not very well. Certainly it provided a boost to the morale of the South's segregationists, and on the surface it seemed to endow southern resistance with a new legitimacy and aura of respectability. Yet these gains were ephemeral, for in the long run the Manifesto simply did not achieve the decisive or dramatic impact its creators envisioned. Most important, it did not succeed in either

373. *See* KRUSE, *supra* note 16, at 6 (complicating the notion that the battle to maintain segregation presented another "lost cause").

374. Herbert Brownell, *Eisenhower's Civil Rights Program: A Personal Assessment*, 21 PRESIDENTIAL STUD. Q. 235, 242 (1991).

> repealing or discrediting [*Brown*], nor did it seriously retard the slow march of tokenism.[375]

Since Wilhoit wrote that assessment, the intervening four decades would seem only to reinforce its conclusions. As has often been remarked, after all, anyone who now claims to be even remotely within mainstream legal thought agrees that the Court correctly decided *Brown*.[376] On this view, an extended analysis of the Manifesto—which at its heart denounces an opinion that has become almost universally celebrated—may seem to hold some interest for antiquarians, but to merit attention from few others.

In an important sense, commentators are correct to contend that the nation the Manifesto aimed to preserve has changed in meaningful ways. The Manifesto's drafters did not succeed in their attempt to maintain state-sponsored Jim Crow, and it would be foolish to assert otherwise. This change, moreover, should not be dismissed as merely superficial, but instead should be understood as representing a profound racial transformation. Despite this transformation, it would be severely mistaken to believe that the Manifesto and its drafters' views are utterly disconnected from current conditions. Asserting that the forces behind the document were "crushed," and that any victories they achieved were "ephemeral," impedes appreciating how the views articulated by the Manifesto's drafters continue to have modern resonance.

A. Equal Protection

Although the drafters' foremost goal of absolutely preventing racial desegregation in public schools went unrealized, it may be more accurate to view their loss on that score in terms partial rather than total. The Manifesto's text certainly expressed strong opposition to *Brown*. But southern politicians quickly realized that the meaning of that decision—and the Court's implementation decree in *Brown II*—still provided ample room to maneuver in order to prevent the widespread integration of public schools. Even well after Congress gave *Brown* some sorely needed teeth by threatening to deny public school funding in 1964,[377] southern communities continued to implement various strategies proposed by Manifesto backers during the 1950s that yielded extremely modest amounts of racial integration in school classrooms. With methods ranging from tracking

375. WILHOIT, *supra* note 216, at 54.

376. *See, e.g.*, Richard A. Posner, *Bork and Beethoven*, 42 STAN. L. REV. 1365, 1374 (1990) (noting that "[n]o constitutional theory that implies that *Brown* . . . was decided incorrectly will receive a fair hearing nowadays").

377. GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 47 (2d ed. 2008).

students by perceived ability,[378] to segregating public schools by sex,[379] to creating white-only private schools widely called "segregation academies,"[380] southern localities repeatedly availed themselves of the anti-integration tactics prominently advanced by Manifesto supporters. If the Court's opinion in *Brown* was a lemon, desegregation opponents deftly refocused their attention on producing legal lemonade.

Perhaps more significant than any particular anti-integration tactic, though, was the way that Manifesto backers succeeded in their larger effort to control the meaning of *Brown*. While the Manifesto was rhetorically positioned as opposing the Court's decision, southern politicians in other contexts had already begun to argue in the alternative. Even though *Brown* was unwarranted, they contended, it should not be misconstrued as the dreaded decision that compelled racial integration.[381] This alternative argument may have debuted as an understudy, but over time it assumed a starring role. Manifesto supporters, as early as 1955, had laid the groundwork for adopting a curtailed conception of *Brown*, one that stopped well short of requiring government actors to facilitate racial integration. After it became clear that reversing *Brown* was highly implausible, southern segregationists shifted their emphasis from opposing the decision to defanging it.[382] Manifesto drafters eventually insisted that the proper understanding of *Brown* not only did not require localities to take affirmative steps to integrate schools, but actually forbade such efforts—if those underlying efforts involved racial classifications. Although southern politicians came to view this feeble conception of *Brown*'s reformatory power as clashing with Supreme Court doctrine, their view would ultimately prevail. Thus, far from comprising losers' history, the intellectual milieu that produced the Manifesto contained the origins of modern equal protection doctrine.

The trajectory of southern segregationists' attitudes toward *Brown* can be traced by examining the evolving approach of Senator Ervin, who sat on

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378. *See, e.g.*, Martha Minow, *Surprising Legacies of* Brown v. Board, 16 WASH. U. J.L. & POL'Y 11, 25 (2004) (noting that in *Hobson v. Hansen*, 269 F. Supp. 401 (D.C. Cir. 1967), the D.C. Circuit revealed "how any one school can use tracking to segregate internally by race").

379. *See, e.g.*, Moore v. Tangipahoa Parish Sch. Bd., 304 F. Supp. 244, 249 (E.D. La. 1969) ("Plaintiffs contend that this proposal is racially motivated, and point out that separate education on the basis of sex was not considered until the schools were ordered to desegregate."). *See generally* Comment, *The Constitutionality of Sex Separation in School Desegregation Plans*, 37 U. CHI. L. REV. 296 (1970).

380. *See* SOKOL, *supra* note 16, at 171 (discussing segregation academies).

381. *See supra* notes 246–248 and accompanying text.

382. *Cf.* David A. Strauss, *Discriminatory Intent and the Taming of* Brown, 56 U. CHI. L. REV. 935, 946–54 (1989).

the Manifesto's revising committee.[383] After initially claiming that *Brown* was both "deplorable" and "not as drastic as many people think,"[384] Ervin eased away from the first part of that formulation, leaving only the second. In August 1963, Ervin made a concerted effort to limit *Brown*'s reach during hearings about the Kennedy administration's civil rights bill held by the Senate Commerce Committee. Rather than railing against *Brown* during his questioning of Attorney General Robert Kennedy, Ervin instead heaped scorn on "educators who want racially balanced schools," and posed the following loaded question:

> Do you not agree with me that denying a school child the right to attend his neighborhood school and transferring him by bus or otherwise to another community for the purpose of racially mixing the school in that other community is a violation of the Fourteenth Amendment as interpreted by the Supreme Court in Brown versus Board of Education?[385]

Kennedy responded that he did not quite understand the question and, according to one reporter in attendance, "twisted a bit in his chair" as Ervin repeated the precisely worded query.[386] "You could make an argument along those lines," Kennedy weakly and noncommittally responded.[387] "I don't see how you can disagree with me," Ervin replied with a grin.[388]

By the time that his autobiography *Preserving the Constitution* appeared in 1984, Ervin was prepared to acknowledge that he had changed his mind about *Brown*: He now agreed, exactly three decades after the Court issued the opinion, that it had been correctly decided in the first instance. After "[t]he high tide of opposition" embodied by the Manifesto had receded, Ervin explained, he "gave priority of study and thought to the Constitution in general, the three Civil War Amendments and their history in particular, and relevant Supreme Court decisions."[389] As a result of his constitutional immersion, Ervin "gradually became inseparably wedded to certain abiding convictions" and concluded: "The Constitution is . . . color-blind as the first Justice John Marshall Harlan maintained in his dissent in *Plessy v. Ferguson*, and requires the States to ignore the race of school children in assigning them to their public schools."[390]

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383. For an extremely insightful examination of Senator Ervin's evolution with respect to *Brown* that has shaped my assessment, see KARL E. CAMPBELL, SENATOR SAM ERVIN, LAST OF THE FOUNDING FATHERS 158–60 (2007).

384. Kernodle, *supra* note 246.

385. James E. Clayton, *Sam and Bob Show Enters Fourth Week*, WASH. POST, Aug. 9, 1963, at A4.

386. *Id.*

387. *Id.*

388. *Id.*

389. SAM J. ERVIN, JR., PRESERVING THE CONSTITUTION 145–46 (1984).

390. *Id.*

Ervin's account of events on the road to Damascus did not appear, however, to transform his bottom-line views of what *Brown* actually required of school districts. Where Ervin advocated "voluntary segregation" when the Manifesto appeared in 1956,[391] he advocated "freedom of choice" plans nearly three decades later: "There is, I submit, no more effective way for a state to ignore race in determining what schools their children attend than by establishing 'freedom of choice' plans which extend to all children of all races equal rights to attend the schools of their choice."[392] Ervin also continued to insist that pro-integration forces misconstrued *Brown*: "'Freedom of choice' plans are nevertheless anathema to compulsory integrationists and activist Supreme Court Justices because they know that free school children may not exercise their freedoms in ways pleasing to them."[393] Ervin complained that while he now embraced the true colorblind vision of *Brown*, the Court had illegitimately disowned that vision in decisions dating back to the 1960s. In Ervin's estimation, the Court had taken a wrong turn in several leading cases—*Green v. County School Board of New Kent*,[394] *Swann v. Charlotte-Mecklenburg Board of Education*,[395] and *Keyes v. School District No. 1*[396]—because those opinions "decreed that the Constitution is color conscious, and sanctions the use of race to bestow special privileges on members of racial minorities and to deprive other Americans of fundamental rights to make such special privileges effective."[397] Thus, according to Ervin, "[n]otwithstanding the lip service they pay" to *Brown*, the Justices "actually repudiate" that opinion.[398] Indeed, by "compel[ling] the States to make race the major consideration in assigning children to their schools and to mix children in their schools in racial proportions pleasing to them," Ervin contended that the Court had succeeded in "rob[bing] the States of the power to assign children to their schools on a non-racial basis as required by the equal protection clause."[399]

Although the Supreme Court long avoided this understanding of *Brown*, Ervin's vision found voice in the Court's decision seven years ago in *Parents Involved in Community Schools v. Seattle School District No. 1*.[400] In that case, the Court invalidated plans that local school districts had voluntarily enacted in order to achieve greater amounts of racial

391. Ervin, *supra* note 91.
392. ERVIN, *supra* note 389, at 148.
393. *Id.*
394. 391 U.S. 430 (1968).
395. 402 U.S. 1 (1971).
396. 413 U.S. 189 (1973).
397. ERVIN, *supra* note 389, at 146–47.
398. *Id.* at 179.
399. *Id.*
400. 551 U.S. 701 (2007).

integration because those plans realized their goal by using racial classifications. Like Ervin, the Court derided these voluntary plans as efforts to achieve mere racial balancing.[401] Writing for a plurality, moreover, Chief Justice Roberts sounded like Ervin when he asserted that invalidating these integration plans represented a vindication of *Brown*. "Before *Brown*, school children were told where they could and could not go to school based on the color of their skin," Roberts wrote.[402] And that old evil, Roberts concluded, found uncomfortable echoes in these new plans: "[W]hen it comes to using race to assign children to schools, history will be heard."[403] That line has already drawn substantial scholarly criticism.[404] Critics have contended that Roberts's opinion offered a severely decontextualized understanding of *Brown* and virtually ignored the caste system that the decision challenged. Viewed through that prism, this criticism surely hits the mark. In an important sense, though, Roberts was correct in contending that his opinion articulated the views of the *Brown* era. But rather than embracing the views of those who initially proposed *Brown*, Roberts's opinion may more closely resemble the views of those who initially opposed it.[405]

B. Federalism & Autonomy

The Southern Manifesto is almost invariably examined as a document involving only racial considerations. That focus, while understandable, has blinded scholars to the document's other significant implications for the modern legal world, as the Manifesto intervened in foundational debates that had long been smoldering and that even today remain intensely contentious. In order to appreciate the Manifesto's nonracial implications, it is necessary to analyze the legal vision that southern segregationists *advanced* rather than the legal vision that they *rejected*. Admittedly, segregationist politicians themselves sometimes appeared to prioritize the condition that they opposed (which was, at bottom, racial equality) above the ideals they aimed to defend—a characteristic evident in Senator Byrd's decision in 1956 to label the segregationist cause "massive *resistance*."[406] Nevertheless, segregationist politicians also articulated an affirmative view

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401. *See id.* at 716, 722–23 (noting that "effort[s] to achieve racial balance" are impermissible).

402. *Id.* at 747 (plurality opinion).

403. *Id.* at 746.

404. *See, e.g.*, Pamela S. Karlan, Lecture, *What Can* Brown® *Do For You?: Neutral Principles and the Struggle over the Equal Protection Clause*, 58 DUKE L.J. 1049, 1068–69 (2009) (criticizing Roberts's line as "wrench[ing] *Brown* free of its original context").

405. For insightful accounts of how the judiciary came to limit *Brown*'s reach, see Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over* Brown, 117 HARV. L. REV. 1470 (2004); Strauss, *supra* note 382.

406. PELTASON, *supra* note 206, at 208 (emphasis added) (internal quotation marks omitted).

of the world, and they sometimes even explicitly objected to being characterized only in terms of their negative views. Congressman Brooks Hays, a Manifesto signatory, made this very point before a congressional committee weighing the creation of a national commission to counter employment discrimination in 1950. "I know that emphasis is often given to things we oppose," Hays said.[407] "I would prefer that emphasis be given to things I favor. It is inevitable in any issue as controversial as this that the negative attitude will receive the high lights, but I would much prefer that the committee remember the things I favor rather than the things I object to."[408] In remembering those ideas that southern segregationists favored, it becomes possible to identify the Manifesto's modern resonances.

In this vein, the Southern Manifesto is framed, above all, as a defense of three related rights that it portrays *Brown* as violating. First, the Manifesto urged that *Brown* infringed upon the liberty of individuals to direct the education and upbringing of their children.[409] Second, it warned about the dangers of an all-powerful federal government that conceives of no sphere as beyond its reach.[410] Third, the document defended the state government and local government as the appropriate levels for making important determinations.[411]

Manifesto supporters repeatedly struck these three legal themes—individual liberty, wariness of the national government, and federalism—in the period surrounding the document's debut and well afterward. Regarding the liberty theme, when Senator Lister Hill of Alabama explained his decision to sign the Manifesto to a disapproving constituent, he claimed that he "acted to protect two fundamental rights: to choose one's associates and to determine the educational destinies of one's children."[412] Senator Ervin similarly complained after the Manifesto's release that, with racial desegregation, southerners "would be forced to associate by legal formula rather than by personal preference."[413] The aversion to federal authority and the embrace of subfederal government were, not surprisingly,

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407. HAYS, *supra* note 256, at 53; *see also* KRUSE, *supra* note 16, at 9 (contending that "like all people, [segregationists] did not think of themselves in terms of what they opposed but rather in terms of what they supported").

408. HAYS, *supra* note 256, at 53.

409. *See* 102 CONG. REC. 4460 (1956) (claiming "parents should not be deprived by Government of the right to direct the lives and education of their own children").

410. *See id.* (warning that "no man or group of men can be safely entrusted with unlimited power" and extolling "the dual system of government which has enabled us to achieve our greatness").

411. *See id.* (defending the ability of subfederal governments to "exercis[e] their rights as States through the constitutional processes of local self-government" and criticizing "encroach[ment] upon the reserved rights of the States").

412. VIRGINIA VAN DER VEER HAMILTON, LISTER HILL: STATESMAN FROM THE SOUTH 213, 214 & n.7 (1987) (citing Letter from Senator Lister Hill to Jo Richardson (Mar. 19, 1956)).

413. Ervin, *supra* note 91.

constant companions, as they formed opposite sides of the same coin. Thus, Senator Stennis criticized *Brown* in 1955 because the decision brought the federal government into a realm "that [was] entirely new."[414] And the consequences of the federal government's latest venture were, in Stennis's view, staggering; the Court's logic allowed it "to destroy the last vestige of the powers expressly reserved to the States by the Constitution. This includes the States' powers of local taxation, States' powers as to health and morals, the States' power to classify teachers and pupils, as well as the States' general police power."[415]

Drafters of the Manifesto continued to draw upon these three legal arguments well after the immediate post-*Brown* era had closed. In 1973, when bussing to achieve racial integration was a hot-button issue, Senator Ervin touched upon all three items in rapid succession:

> [W]e will not fool history as we fool ourselves when we steal freedom from one man to confer it on another. When freedom for one citizen is diminished it is in the end diminished for all. Nor can we preserve liberty by making one branch of Government its protector, for, though defense of liberty be the purpose, the perversion of it will be the effect. The whole fabric of our Constitution—the Federal system and the separation of powers doctrine—is designed to protect us against such centralization; but even the language and lessons of the Constitution cannot stop a people who are hell-bent on twisting the document to the will of a temporary majority.[416]

By the end of the 1970s, of course, such arguments could be heard across the nation, as opponents of court-ordered bussing denounced the practice in venues that extended beyond the southern states.[417]

Quite apart from the context of racial integration in public schools, these legal arguments continue to resonate powerfully with many Americans today. Indeed, two notable movements that have flourished during the Obama presidency were based in large part upon appealing to individual autonomy and a limited role for the federal government. The Tea Party has in a short period of time obtained a remarkable amount of success with its libertarian-inspired emphasis on reducing individuals' tax rates and reducing governmental expenditures.[418] Similarly, the nearly

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414. *The Race Issue*, *supra* note 161, at 90.

415. *Id.*

416. James M. Naughton, *Constitutional Ervin*, N.Y. TIMES, May 13, 1973, at 13 (internal quotation marks omitted).

417. *See, e.g.*, J. ANTHONY LUKAS, COMMON GROUND: A TURBULENT DECADE IN THE LIVES OF THREE AMERICAN FAMILIES 244 (1985) (chronicling examples of antibussing activities in Boston).

418. *See* Christopher W. Schmidt, *Popular Constitutionalism on the Right: Lessons from the Tea Party*, 88 DENV. U. L. REV. 523, 531–33 (2011) (analyzing the Tea Party's rise).

successful opposition to the Affordable Care Act's individual mandate in *National Federation of Independent Business v. Sebelius*[419] centered upon the notion that permitting the legislation to stand would authorize the federal government to require its citizens to do anything that it wished.[420]

To be clear: The claim here is not that the Manifesto's drafters somehow invented the legal arguments that Tea Party members and opponents of the Affordable Care Act's individual mandate recently articulated. Each of these issues, of course, enjoys a life that extends back well before the Manifesto was ever conceived. Nor is the claim that recent articulations of these themes draw inspiration either consciously or subconsciously from the Manifesto. Very few people have even heard of the document. I do contend, however, that the continuing salience of these arguments in our contemporary legal culture heightens the need to understand how these arguments have been deployed throughout American history. And few eras can claim a greater need for legal scholars to explore these fields of legal argumentation than the post-*Brown* era.

C. *Adherence to Judicial Authority*

Perhaps the Manifesto's most significant modern implication is the indirect and unintended role that it has played in solidifying the belief that acquiescence to judicial authority forms a fundamental tenet of American civil religion.[421] Notions of judicial supremacy, as I demonstrated in Part III, were already flourishing when the Manifesto appeared. But in the wake of the Manifesto, as the nation witnessed several high-profile standoffs over the integration of educational institutions, these norms became even more deeply ingrained. Those standoffs provided up-close portraits of individuals who rejected the idea that courts played a decisive role in constitutional interpretation. Many Americans, in turn, found these portraits nothing less than repulsive.[422] And Americans who learned about these events in civics textbooks would find such images all the more

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419. 132 S. Ct. 2566 (2012).

420. *Id.* at 2643 (Scalia, J., dissenting). During oral argument in *National Federation of Independent Business v. Sebelius*, Justice Scalia asked the Solicitor General whether the government could force people to buy broccoli. Transcript of Oral Argument on March 27, 2012 at 13, *Nat'l Fed'n of Indep. Bus.*, 132 S. Ct. 2566 (No. 11-398), *available at* http://www.supremecourt.gov/oral_arguments/argument_transcripts/11-398-Tuesday.pdf. Relatedly, Justice Alito wondered why healthy young people should be forced to subsidize unhealthy older people. *Id.* at 7–8.

421. *See* SANFORD LEVINSON, CONSTITUTIONAL FAITH 9–12 (1988) (exploring the Constitution's role in American civil religion).

422. Michael Klarman has emphasized how media images of southern resistance played an important role in catalyzing northerners to support integration with greater fervor. *See* KLARMAN, *supra* note 15, at 385 ("It was the brutality of southern whites resisting desegregation that ultimately rallied national opinion behind the enforcement of *Brown* and the enactment of civil rights legislation."). I contend that these images shaped American attitudes not only toward race, but also toward the rule of law more generally.

repulsive in later years.[423] Thus, just as *Brown* obtained canonical status within the legal profession and beyond, the images of individuals who blocked the path of black students seeking to enter white schools have conversely become embedded within law's anticanon.[424]

These profiles in judicial defiance now form a synecdoche for the entire segregationist movement that resisted racial desegregation, even though segregationists approached law in a variety of different ways. Where the Manifesto counseled working within legal constraints to resist integration, some elected officials adopted tactics far less solicitous of judicial authority. Perhaps most famously, during the Little Rock Central High School desegregation controversy, Arkansas Governor Orval Faubus made the unadorned statement: "[T]he Supreme Court decision is not the law of the land."[425] But such distinctions among the varied approaches to maintaining segregation have become blurred. Indeed, the Manifesto is now widely viewed as having called for the formation of segregationist mobs.[426]

In 1990, Robert Bork, a former professor at Yale Law School, vividly demonstrated how the American legal imagination has effectively mashed together the Manifesto with Little Rock's unruly scenes into a single, largely undifferentiated mass of segregationist sentiment:

> Those of us of a certain age remember the intense, indeed hysterical, opposition that *Brown* aroused in parts of the South. Most Southern politicians felt obliged to denounce it, to insist that the South would continue segregation in defiance of any number of Supreme Court rulings. We remember the television pictures of adult whites screaming obscenities at properly dressed black children arriving to attend school. We remember that at one point President Eisenhower had to send in airborne troops to guarantee compliance with the Court's rulings.[427]

Similarly, in 1964, Anthony Lewis asserted a strong link between the Manifesto and mob violence: "The first phase of the South's response to the

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423. *See* DAVID HALBERSTAM, THE FIFTIES 667 (1993) (describing the "indelible images" of white southerners with "pure hatred contorting their faces, as they assaulted nine young black students who dared to integrate Little Rock Central High"); David A. Strauss, *Little Rock and the Legacy of* Brown, 52 ST. LOUIS U. L.J. 1065, 1082 (2008) ("The televised images of frenzied crowds of white adults abusing black schoolchildren were very dramatic.").

424. *See* J.M. Balkin & Sanford Levinson, *The Canons of Constitutional Law*, 111 HARV. L. REV. 963, 1018–19 (1998); Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 386–87 (2011); Richard A. Primus, Essay, *Canon, Anti-Canon, and Judicial Dissent*, 48 DUKE L.J. 243, 245 (1998).

425. BARTLEY, *supra* note 33, at 273.

426. *See supra* notes 23–32 and accompanying text.

427. ROBERT H. BORK, THE TEMPTING OF AMERICA 76–77 (1990).

School decision ended in 1956 with statesmen sowing the wind of defiance. The next year, at Little Rock, they reaped the whirlwind."[428]

If *Brown* represents the Supreme Court's finest hour,[429] the rowdy mobs in Little Rock—and many other cities in subsequent years—represent something like the converse: the lowliest moments brought about by blatant disrespect for judicial authority. To the extent that citizens today are inclined to express vehement disagreement with judicial decisions after they are initially issued, it would not be surprising if they often muted their reactions in order to avoid resembling the widely reviled opponents of racial integration during the post-*Brown* era—not only in their own eyes, but also in the eyes of others. Thus, these two strongly held principles—an aversion to white supremacy and an adherence to judicial supremacy—have become fused in the minds of many Americans.

Popular constitutionalists may underestimate how these events influence American legal understandings, as they routinely criticize what they regard as citizens' overly acquiescent approach toward judicial supremacy. In the declinist narrative that popular constitutionalists identify as marring twentieth-century legal history, the nadir arrives with the Supreme Court's opinion in *Bush v. Gore*[430] in 2000. Popular constitutionalists have criticized that decision not so much for the outcome, but for the broader legal culture that enabled the electoral dispute to find its way into a courthouse in the first instance. It never would have dawned on Americans of an earlier era, Kramer has contended, to permit the judiciary to resolve a deadlocked presidential election—an event that occurred in the 1876 contest between Rutherford Hayes and Samuel Tilden. "[Nineteenth century Americans] surely would have done something: something other than submissively yield while explaining that to challenge the Court would look unpatriotic," Kramer wrote. "Which is why, of course, no one at the time of this earlier election—on or off the Court—ever dreamed of trying to resolve it in litigation."[431]

Kramer's reproach of "submissive[ness]" to judicial authority in the name of patriotism is, of course, a thinly disguised dig at Vice President Al Gore. After the Court issued the opinion effectively awarding the presidency to George W. Bush, Gore's concession speech repeatedly appealed to national pride in urging his supporters to accept the decision. "I know that many of my supporters are disappointed," Gore said. "I am too.

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428. LEWIS, *supra* note 95.

429. *See* Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 867 (2007) (Breyer, J., dissenting) (calling *Brown* the Supreme Court's "finest hour"). For an earlier articulation of this view, see JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL 330 (1994).

430. 531 U.S. 98 (2000).

431. KRAMER, *supra* note 264, at 231.

But our disappointment must be overcome by our love of country."[432] Gore elaborated: "Now the U.S. Supreme Court has spoken. Let there be no doubt, while I strongly disagree with the court's decision, I accept it. . . . This is America. Just as we fight hard when the stakes are high, we close ranks and come together when the contest is done."[433]

Whatever one makes of those sentiments as matters of either legal theory or political oratory, their substance should not have been greeted as any great surprise. In December 1999, during his campaign for the Democratic presidential nomination, Al Gore told New Hampshire voters that his father "was a man of great courage" because he was "one of only two senators in the whole South who refused to sign the Southern Manifesto."[434] Gore can thus be viewed as having gestured toward the acquiescent approach to judicial authority that he would fully articulate one year later.[435] It is popular constitutionalism's penchant for overlooking or minimizing the Manifesto that allows Gore's "submissive" approach to judicial supremacy to be regarded as puzzling.

This lesson, though, extends well beyond Al Gore and even beyond the extraordinary decision that bears his name. For many Americans, the disorder in Little Rock during the 1950s encapsulates what the nation could look like if citizens rejected judicial supremacy. And it does not make for a pretty picture. If popular constitutionalists want their movement to gain steam, they need to acknowledge more forthrightly that many Americans identify the resistance to judicial supremacy primarily with segregationists during the post-*Brown* era. Pining for the good old days of "defiance" of judicial authority may be unlikely, in all events, to convince many liberals to adopt the popular constitutionalist cause.[436] That cause enjoys a lower likelihood of success still if it fails to provide some explanation for how defying judicial decisions would not render its adherents the rightful heirs of Orval Faubus's legacy. That is an awfully heavy and awkward burden to bear. Either ignoring this conspicuous issue or treating it with disregard, however, will not succeed in making it disappear.

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432. *In His Remarks, Gore Says He Will Help Bush 'Bring America Together,'* N.Y. TIMES, Dec. 14, 2000, at A26.

433. *Id.*

434. *At a Meeting with Voters, Gore Talks About His Plans, His Family and Himself*, N.Y. TIMES, Dec. 2, 1999, at A28.

435. My colleague Sandy Levinson ventured a guess on this front that may have proved accurate. *See* Sanford Levinson, Bush v. Gore *and the French Revolution: A Tentative List of Some Early Lessons*, LAW & CONTEMP. PROBS., Spring 2002, at 7, 26 n.86 ("It would surely not be surprising if the younger Gore had been strongly socialized during his childhood years to accept the supremacy of the Supreme Court with regard to constitutional meaning.").

436. *See* KRAMER, *supra* note 264 (lamenting that "sometime in the 1960s, these incidents of noncompliance [with judicial decisions] evolved into forms of protest rather than claims of [constitutional] interpretive superiority" and that "[o]utright defiance, in the guise of denying that Supreme Court decisions define constitutional law, seemed largely to disappear").

Conclusion

In 1956, when Ralph Ellison was in Rome on a writing fellowship, he received a letter from a childhood friend soliciting his reactions to the recently issued Southern Manifesto. "Are you keeping up with what's happening here at home?" the friend inquired. "Have you read about those cracker senators cussing out the Supreme Court and all that mess? Let me hear what a home-boy done gone intellectual thinks . . . . Tell a man how it is."[437] Ellison responded to the letter, and then attempted to set out his thoughts about the Manifesto in an essay for a general audience. That initial effort proved, in Ellison's own estimation, a failure.[438] As Ellison would eventually explain:

> [F]or me it was by no means a simple task to "tell it like it is"—even when the subject was desegregation and the Southern Congressmen's defiance of the Supreme Court. I was outraged and angered by the event, but the anger was not isolated or shallowly focused, rather it suffused my most non-political preoccupations. More unsettling, I discovered that there lay deeply within me a great deal of the horror generated by the Civil War and the tragic incident which marked the reversal of the North's "victory," and which foreshadowed the tenor of the ninety years to follow.[439]

Despite the powerful emotions that the Manifesto elicited and the feelings of failure that the essay generated, Ellison could not completely set the matter aside. In 1965, nearly a decade after Walter George's recitation on the Senate floor, Ellison again attempted to write an article that addressed the Manifesto. The passage of time and the attendant racial changes, Ellison intimated, had inspired him to take another crack. "Since I attempted the essay, some nine years ago now, the power of the Southern Congressmen has been broken and the reconstruction of the South is once more under way," Ellison wrote.[440] Whatever the veracity of that rosy assessment, though, Ellison found that the old agonies remained. "[T]he psychic forces with which I tried to deal . . . are still there," he explained.[441] Unlike Ellison's first attempt, his second effort resulted in publication, as the piece ran in the *Nation*'s centennial issue. But the published piece amounted to little more than recorded fragments of Ellison's dreams, and the author also adjudged his latest literary effort a failure. "So I confess defeat," he wrote, "it is too complex for me to 'tell it like it is.'"[442]

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437. Ralph Ellison, *"Tell It Like It Is, Baby,"* NATION, Sept. 20, 1965, at 129.

438. *See id.* (noting "the essay failed").

439. *Id.*

440. *Id.*

441. *Id.* at 129–30.

442. *Id.* at 136.

Ellison was quite correct to sense that the Manifesto raised profound questions about American society. In no domain are those questions of greater urgency, moreover, than in the legal domain. Regrettably, law professors today demonstrate none of Ellison's fascination with the document and its deeper meaning. Indeed, law professors have overwhelmingly turned a blind eye to the Manifesto. Worse still, when legal scholars have not altogether ignored it, they have severely distorted our understanding by recycling a mass of misconceptions about the document, its signatories, and their tactics. A sustained examination of the Manifesto is long overdue not only to correct these misperceptions, but also because focusing upon the Manifesto serves to recast two longstanding and high-profile scholarly discussions involving the legal quest for racial equality and the origins of judicial authority over constitutional interpretation. More importantly, the Manifesto highlights better than any other single document how these two scholarly discussions about white supremacy and judicial supremacy should no longer be permitted to unfold in utter isolation from each other. Rather than running along parallel tracks, the Manifesto reveals how the intersections of these two supremacies inform contemporary attitudes toward law.

The Southern Manifesto was produced by men who held views about racial equality that many people today regard as loathsome. That loathing, however, must no longer be allowed to prevent legal scholars from seriously analyzing this pivotal document, the historical moment that it represents, and its continuing relevance. The refusal of legal scholars to confront the Manifesto invites the perhaps comforting, but certainly mistaken, notion that the document comes from a distant world that has no connection to our own. The Southern Manifesto is quite simply too significant to be deemed beneath scholarly scrutiny. It is well past time for anger, in other words, to give way to analysis.

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