# ARTICLES

## The Irrepressible Myth of *Cooper v. Aaron*

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*Despite its constitutional provenance and majestic grandeur, the Supreme Court of the United States operates like any other court. Although its judgments bind the parties before the Court, its precedents are not self-executing for nonparties. The distinction between the Supreme Court's judgments and precedents is often conflated due to* Cooper v. Aaron. *This landmark 1958 decision was spurred by the desegregation crisis in Little Rock, Arkansas.* Cooper *articulated two concepts under which the Supreme Court's precedents operate as binding judgments on everyone. First, the Justices announced the doctrine that came to be known as judicial supremacy: a simple majority of the Supreme Court could now declare, with finality, the "supreme Law of the Land." Second,* Cooper *asserted a principle this Article calls judicial universality: the Supreme Court's constitutional interpretations obligate not only the parties in a given case, but also other similarly situated parties in later cases.*

Cooper*, which was signed by all nine Justices, represented that these two doctrines were "basic" and premised on "settled doctrine." Not so. Rather, they were novel assertions of judicial power that were and remain entirely inconsistent with how all courts, including the Supreme Court, operate. Through a careful study of the papers of Justices Black, Brennan, Burton, Clark, Douglas, Frankfurter, Harlan, and Chief Justice Warren, this Article exposes the constitutional origins of this irrepressible myth.*

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* Associate Professor, South Texas College of Law Houston.  I am deeply grateful to my research assistants, who helped to locate, copy, and transcribe the papers of Justices Black, Brennan, Burton, Clark, Douglas, Frankfurter, Harlan, and Chief Justice Warren from 1958: Jonathon Austin, Aristotle Herbert, Devin Watkins, and Heidi Weelborg. This Article benefited greatly from comments by Seth Barrett Tillman, William Baude, Aaron-Andrew Bruhl, Arthur Hellman, Gerard Magliocca, Jonathan Mitchell, Richard Re, Jeffrey Schmitt, Howard Wasserman, and the Honorable William H. Pryor, Jr.

## INTRODUCTION

Despite its constitutional provenance and majestic grandeur, the Supreme Court of the United States operates like any other court. Each opinion begins with a caption, lists the affected parties, and ends with an order to affirm or reverse the lower court. For the named parties, ultimately, this *judgment* is the most critical portion of the decision. For virtually everyone else, however, what matters is the content between the caption and the conclusion. This analysis establishes legal *precedent*. The distinction between the Supreme Court's judgments and precedents is often conflated due to *Cooper v. Aaron*.[1] This landmark 1958 decision was spurred by the desegregation crisis in Little Rock, Arkansas. *Cooper* articulated two concepts under which the Supreme Court's precedents operate as binding judgments on everyone. First, the Justices announced the doctrine that came to be known as "judicial supremacy": a simple majority of the Supreme Court could now declare, with finality, the "supreme Law of the Land."[2] Second, *Cooper* asserted a principle this Article calls "judicial universality": the Supreme Court's constitutional interpretations obligate not only the parties in a given case but also other similarly situated parties, present and future.[3]

All nine Justices, each of whom signed the opinion, stated that these two doctrines were "basic" and premised on "settled doctrine."[4] However, a careful analysis of the papers of Justices Black, Brennan, Burton, Clark, Douglas, Frankfurter, Harlan, and Chief Justice Warren reveals a different story. Internally, there was a great debate: did the Court have the power to bind everyone who takes an oath to the Constitution by declaring its own decisions as the "supreme Law of the Land"? At first, the primary drafter—Justice Brennan—grounded these principles in Article VI of the Constitution and *Marbury v. Madison*. However, over the course of *Cooper*'s six drafts, and following reams of comments from the Justices, the Court softened the claim that these doctrines were "settled."[5] Ultimately, the Court had to acknowledge, at least tacitly, that *Cooper* effected a revolutionary change in the Court's own authority. This Article provides a comprehensive study that shines new light on *Cooper*'s irrepressible myth.[6]

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1. 358 U.S. 1 (1958).
2. *Id.* at 18–20.
3. *Id.*
4. *Id.* at 17.
5. *Id.*
6. I give all due credit to John Hart Ely, *The Irrepressible Myth of* Erie, 87 HARV. L. REV. 693 (1974), as well as Michael Stokes Paulsen, *The Irrepressible Myth of* Marbury, 101 MICH. L. REV. 2706 (2003), Adam N. Steinman, *The Irrepressible Myth of* Celotex: *Reconsidering Summary Judgment Burdens Twenty Years After the Trilogy*, 63 WASH. & LEE L. REV. 81 (2006), and Howard M. Wasserman, *The Irrepressible Myth of* Klein, 79 U. CIN. L. REV. 53 (2010).

Part I of this Article traces the history of the school desegregation process the Supreme Court ushered in with *Brown v. Board of Education I*,[7] and the follow-up decision, *Brown v. Board of Education II*.[8] These landmark decisions did not purport to desegregate all schools nationwide. They did not even require the four named respondents—school boards from Delaware, Kansas, South Carolina, and Virginia—to desegregate immediately. Rather, the Court ordered the school boards to act with "all deliberate speed."[9] The directors of the Little Rock, Arkansas Independent School District—the petitioners in *Cooper*—were not parties to *Brown*. Indeed, they were not bound by a desegregation order from the Supreme Court or any other court. However, shortly after *Brown* was decided, a federal district court in Little Rock approved a desegregation plan.[10] The school board was now bound by a federal court judgment. Subsequently, a state court ordered the school board *not* to desegregate its schools.[11] This conflict escalated when Arkansas Governor Orval Faubus ordered the national guard to prohibit black students from entering Central High School.[12] In one of the more dramatic moments of the so-called "massive resistance," President Eisenhower ordered federal troops to escort the Little Rock Nine into Central High School.[13]

In response to this chaos, the federal district court in Little Rock granted the school board a thirty-month extension to complete the desegregation process.[14] The Eighth Circuit Court of Appeals reversed that extension, and the Supreme Court affirmed.[15] The thirty-month delay, the Supreme Court held, was not consistent with *Brown II*'s "all deliberate speed" precedent.[16] This conclusion was "enough to dispose of the case."[17] But the Court did not stop there.

Part II dissects *Cooper*'s concluding section, which addressed whether the Arkansas Governor was "bound" by *Brown* even though he was not a party to that case. Here, the Court manifested *Cooper*'s irrepressible myth. First, the principle of judicial supremacy can be encapsulated in a single sentence from *Cooper*: "[T]he interpretation of the Fourteenth Amendment enunciated by this Court in the *Brown* case is the *supreme law of the land*."[18] Second, the Court declined to directly acknowledge the principle of judicial universality, though

7. 347 U.S. 483 (1954).

8. 349 U.S. 294 (1955).

9. *Id.* at 301.

10. Aaron v. Cooper, 143 F. Supp. 855, 866 (E.D. Ark. 1956), *aff'd*, 243 F.2d 361 (8th Cir. 1957).

11. Aaron v. Cooper, 257 F.2d 33, 35 (8th Cir. 1958); *see also Courts: State Court Action*, 2 RACE REL. L. REP. 931, 931–33 (1957) (reproducing petition for injunction against integration of Little Rock school district).

12. *Aaron*, 257 F.2d at 36.

13. *See* Cooper v. Aaron, 358 U.S. 1, 12 (1958); *see also* Aaron v. Cooper, 163 F. Supp. 13, 16–17 (E.D. Ark. 1958).

14. *Aaron*, 163 F. Supp. at 14, 20–26.

15. *Aaron*, 257 F.2d at 39–40; Aaron v. Cooper, 358 U.S. 1, 5 (1958) (per curiam); *see also infra* Section I.D.

16. *Cooper*, 358 U.S. at 7.

17. *Id.* at 17.

18. *Id.* at 18 (emphasis added).

Justice Stephen Breyer succinctly expressed *Cooper*'s implication: "[T]he Court in *Cooper*," he wrote, "actually decided that the Constitution obligated other governmental institutions to follow the Court's interpretations, not just in the particular case announcing those interpretations, but in *similar cases as well*."[19] Neither of these principles are consistent with traditional understandings of the judicial role. Under Article V, only an amendment can change the Constitution.[20] If a simple majority of the Supreme Court can declare the "supreme Law of the Land" on par with the Constitution itself, then a subsequent majority could change it absent a constitutional amendment. Further, under foundational principles of jurisdiction, courts only bind the parties in a given case. Basic tenets of fairness are violated when judges obligate nonparties, who were unable to defend their interests. The mere fact that the Supreme Court is a supreme court does not change these conclusions. And no case before *Cooper* had ever reached such sweeping results.

Part III traces the evolution of the doctrines of judicial supremacy and universality through the six drafts of *Cooper*. This Article draws on a carefully curated, digitized, and transcribed selection of the papers of Justices Black, Brennan, Burton, Clark, Douglas, Frankfurter, Harlan, and Chief Justice Warren.[21] These drafts, internal memoranda, and inter-chamber correspondences illustrate that the Justices grappled with the establishment of judicial supremacy and universality. Further, this judicial history[22]—akin to legislative history for courts—reveals a debate about whether these doctrines were supported by the Court's prior precedents, including *Marbury v. Madison*,[23] *United States v. Peters*,[24] *Ableman v. Booth*,[25] and *Sterling v. Constantin*.[26] None of these cases, however, stood for the propositions for which *Cooper* cited them. With each successive draft, Justice Brennan—the lead draftsman—decreased his reliance on these precedents. By making these changes, the Court acknowledged that it had never before claimed power over supremacy and universality but was in fact breaking new ground. Ultimately, these pronouncements had little effect. In the immediate aftermath of *Cooper*, the government evaded the ruling by leasing all public schools to private corporations. At once, the futility of judicial supremacy and the impotence of judicial universality were laid bare. No court, no matter how high in stature, can force people to accept the Justices' interpretation of the Constitution.

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19. STEPHEN BREYER, MAKING OUR DEMOCRACY WORK: A JUDGE'S VIEW 62 (2010) (emphasis added).

20. *See* U.S. CONST. art. V.

21. All of the papers are available at Josh Blackman, *Shared Papers in The Irrepressible Myth of* Cooper v. Aaron, GOOGLE DRIVE, http://bit.ly/2ohX8Rq (last visited Apr. 14, 2019). Justice Whittaker's private papers were donated to the University of Missouri-Kansas City School of Law in March 2017 by the Whittaker family. *UMKC Receives Private Papers of Alumnus Charles Evans Whittaker*, UNIV. MO.-KANSAS CITY (Mar. 1, 2017, 8:12 AM), https://law.umkc.edu/umkc-receives-private-papers-of-justice-charles-evans-whittaker/ [https://perma.cc/ETZ4-E6TK]. As of April 2019, the University has not released a schedule to publish these papers.

22. *See* Adrian Vermeule, *Judicial History*, 108 YALE L.J. 1311, 1311 (1999).

23. 5 U.S. (1 Cranch) 137 (1803).

24. 9 U.S. (5 Cranch) 115 (1809).

25. 62 U.S. (21 How.) 506 (1858).

26. 287 U.S. 378 (1932).

Part IV closes with a study of *Cooper v. Aaron*. Over the past half-century, the Court has not shied away from asserting the principle of judicial supremacy. In such cases, however, there was no meaningful resistance to the Court's interpretation of the Constitution. After each decision, the other branches of government or the states quietly fell into line. But for five years following *Cooper*, the Court was silent while the massive resistance openly disregarded its landmark decision. In contrast, the Supreme Court has never cited *Cooper* to support a claim of judicial universality—not even during the massive resistance to *Cooper* itself, where the segregationist game of whack-a-mole continued unabated. This history reinforces the axiom that the Supreme Court is still a court that follows the usual rules of courts: its precedents are persuasive to everyone, its judgments are only binding on the named parties, and it ultimately lacks the power to enforce those judgments.

## I. DESEGREGATION "WITH ALL DELIBERATE SPEED"

Contrary to common lore,[27] *Brown v. Board of Education I* did not overturn *Plessy v. Ferguson*'s doctrine of "separate but equal." Nor did this case end segregation in public schools nationwide. It did not even order the school districts that were party to the case—in Kansas, South Carolina, Virginia, and Delaware—to desegregate.[28] Rather, *Brown* began a process by which the lower courts would supervise the desegregation process with "all deliberate speed." However, government officials within the massive resistance refused to follow *Brown* as precedent. Ostensibly, they would only change course following a binding court judgment from a federal district court. This defiant framework traces its roots to President Lincoln's opposition to *Dred Scott v. Sandford*.[29] The segregationists in Little Rock, Arkansas, relied on the distinction between judgments and precedents to avoid complying with *Brown I* until forced to do so. This dynamic was further complicated in Arkansas: a state court issued an injunction halting integration at Central High School in Little Rock, whereas a federal district court ordered the integration of that same school. Only the Supreme Court could resolve that conflict. Or at least, it attempted to in *Cooper v. Aaron*.

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27. *Cf.* Linda Qiu, *In Gorsuch Confirmation Battle, Both Sides Spin and Mislead*, N.Y. TIMES (Apr. 3, 2017), https://www.nytimes.com/2017/04/03/us/politics/fact-check-neil-gorsuch-supreme-court.html [https://nyti.ms/2ou2s68] ("It was a seminal decision that got the original understanding of the 14th Amendment right and corrected one of the most deeply erroneous interpretations of law in Supreme Court history, Plessy v. Ferguson, which is a dark, dark stain on our court's history."); *Supreme Court Nominee Brett Kavanaugh Confirmation Hearing, Day 2, Part 2*, C-SPAN (Sept. 5, 2018), at 01:04:39, https://www.c-span.org/video/?449705-10/supreme-court-nominee-brett-kavanaugh-confirmation-hearing-day-2-part-2 [https://perma.cc/DP4F-JYAN] ("Well, Brown v. Board of Education, of course, overturned *Plessy*, and *Plessy* was wrong the day it was decided.").

28. Brown v. Bd. of Educ. (*Brown I*), 347 U.S. 483, 495 (1954) (declining to consider appropriate relief until the parties provide further argument). At least one school district in Prince Edward County, Virginia, "closed its public schools from the summer of 1959 until the fall of 1964," rather than desegregate. *See* Fisher v. Univ. of Tex., 570 U.S. 297, 322 (2013) (Thomas, J., concurring).

29. Abraham Lincoln, Speech on the Dred Scott Decision (June 26, 1857), https://www.virginia.edu/woodson/courses/aas-hius366a/lincoln.html [https://perma.cc/FGG5-SBT6] (last visited Mar. 22, 2019).

### A. *BROWN V. BOARD OF EDUCATION I* AND *II*

*Brown v. Brown of Education I* is often hailed as the landmark opinion that ended segregation in public schools. The 1954 decision did no such thing. *Brown I* arose from challenges to school segregation laws in the "States of Kansas, South Carolina, Virginia, and Delaware."[30] Chief Justice Warren wrote the majority opinion for a unanimous Court. Though the cases "are premised on different facts and different local conditions," he wrote, "a common legal question justifies their consideration together in this consolidated opinion."[31] Specifically, in these states, African-American children were "denied admission to schools attended by white children under laws requiring or permitting segregation according to race."[32]

*Brown I* did not overturn *Plessy v. Ferguson*.[33] Rather, *Brown I*'s holding was far more limited, confined only to the educational context: "[I]n the field of public education the doctrine of 'separate but equal' has no place."[34] The Court declared that "[s]eparate educational facilities are inherently unequal."[35] Specifically, "plaintiffs *and others similarly situated* for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment."[36] The emphasized portion suggested that *all* black children nationwide would be "deprived of the equal protection of the laws" if they were denied access to integrated public schools.[37] But two sentences later the Court reined in the scope of that holding: "Because these are class actions, because of the wide applicability of this decision, and because of the great variety of local conditions, the formulation of decrees in these cases presents problems of considerable complexity."[38] Rather than proclaiming educational equality nationwide—which would have amounted to an exercise of judicial universality—the opinion ended with more of a whimper than a bang: "[T]he cases will be restored to the docket, and the parties are requested to present further argument" on the "consideration of appropriate relief."[39]

Over the course of three days in April 1955, the Court heard further arguments on the case. On May 31, 1955, the Court handed down a short opinion that would come to be known simply as *Brown II*.[40] This all-important decision is omitted

30. *Brown I*, 347 U.S. at 486. A companion case, *Bolling v. Sharpe*, considered the segregation law in the District of Columbia. 347 U.S. 497, 498 (1954).

31. *Brown I*, 347 U.S. at 486.

32. *Id.* at 487–88.

33. *Id.* at 488 (describing the doctrine of "separate but equal" announced "by this Court in *Plessy v. Ferguson*, 163 U.S. 537 [(1896)]").

34. *Id.* at 495.

35. *Id.*

36. *Id.* (emphasis added).

37. *Id.*

38. *Id.*

39. *Id.*

40. Brown et al. v. Bd. of Educ. of Topeka, Shawnee Cty., Kan., et al., Briggs et al. v. Elliott et al., Davis et al. v. Cty. Sch. Bd. of Prince Edward Cty., Va., et al., Gebhart et al. v. Belton et al. (*Brown II*), 349 U.S. 294 (1955). Listed are all the parties to the case.

from leading constitutional law casebooks. Chief Justice Warren wrote once again for a unanimous Court. He announced that "[a]ll provisions of federal, state, or local law requiring or permitting such discrimination must yield to [the] principle" that "racial discrimination in public education is unconstitutional."[41] But *Brown II* recognized that *Brown I* was not self-executing. Thus, this follow-up case would decide "the manner in which relief is to be accorded."[42]

The Court acknowledged the "complexities arising from the transition to a system of public education freed of racial discrimination."[43] It further praised the "substantial steps" taken not only by "communities in which these cases arose"—that is, by those parties that were bound by *Brown I*—but also "in other states as well" who were not bound by the judgment.[44] These latter jurisdictions were following *Brown I* as precedent. The Court's bifurcated analysis distinguishes between judgment and precedent.

Yet, the Court recognized that "[f]ull implementation of these constitutional principles may require solution of varied local school problems."[45] Each school district presented specific conditions that required narrowly tailored remedies to address the facts on the ground. Therefore, the Supreme Court would not issue a one-size-fits-all judgment that was binding on everyone. Instead, it ruled that "the courts which originally heard these cases can best perform this judicial appraisal. . . . in accordance with the constitutional principles set forth" in *Brown I*.[46] The federal district courts "will retain jurisdiction," Chief Justice Warren announced.[47] By leaving jurisdiction with the lower courts, the Supreme Court declined to exercise, let alone acknowledge, the doctrine of judicial universality.

This decision was motivated by an important pragmatic concern: the nine Justices could not be expected to supervise thousands of school districts nationwide. It would be far easier to let local judges handle the details. But beyond logistical reasons, there was also an important legal principle at stake. The Court's consideration was limited to appeals from the "States of Kansas, South Carolina, Virginia, and Delaware."[48] Despite the lofty language of *Brown I* that "[s]eparate educational facilities are inherently unequal,"[49] the Court lacked the power to enforce this judgment in all other states—including Arkansas, which only "participated in the oral argument" as amicus curiae.[50] The Justices could only direct the outcome on remand regarding state officials in Kansas, South Carolina, Virginia, and Delaware. Neither *Brown I* nor *Brown II* advanced the

41. *Id.* at 298.
42. *Id.*
43. *Id.* at 299.
44. *Id.*
45. *Id.*
46. *Id.* at 299–300.
47. *Id.* at 301.
48. Brown v. Bd. of Educ. (*Brown I*), 347 U.S. 483, 486 (1954).
49. *Id.* at 495.
50. *Brown II*, 349 U.S. at 299.

principle of judicial universality that purported to bind officials beyond the "States of Kansas, South Carolina, Virginia, and Delaware."[51]

Though *Brown*'s judgment was limited, its precedent was revolutionary. Over the ensuing years, district courts from coast to coast could now rely on the analysis in *Brown I* and *II* to issue new desegregation orders that were binding on local officials. Though it is shorthand to say that the *Brown* decisions desegregated schools, in truth, it took a series of district court judgments to complete the job. The penultimate sentence of *Brown II* recognizes this decentralized approach: "[T]he cases are remanded to the District Courts to take such proceedings and enter such orders and decrees consistent with this opinion as are necessary and proper to admit to public schools on a racially nondiscriminatory basis with *all deliberate speed* the parties to these cases."[52]

Yet, in hindsight, the Court was overly optimistic about the lower courts' ability to ensure state officials complied with the principles articulated in *Brown I*. The massive resistance would put the Supreme Court's mettle—and judicial supremacy itself—to the test.

### B. MASSIVE RESISTANCE TO *BROWN I* AND *II*

In March 1956, nineteen Senators and seventy-seven members of the House of Representatives signed the so-called "Southern Manifesto," which attacked *Brown*'s legitimacy. The decision, they charged, "substitute[d] naked power for established law" and amounted to "a clear abuse of judicial power" that "encroach[ed] upon the reserved rights of the States and the people."[53] The Manifesto "commend[ed] the motives of those States which have declared the intention to resist forced integration by any *lawful means*."[54] Specifically, this aspect of resistance was premised on the distinction between judgment and precedent. The Manifesto "appeal[ed] to the States and people who [were] not directly affected by these decisions," that is, those parties not bound by *Brown I* and *II*, "to consider the constitutional principles involved against the time when they too, on issues vital to them, may be the victims of judicial encroachment."[55] In other words, unless required by a specific court order to desegregate, the Manifesto implored local government officials to maintain segregated public schools as if *Brown* never happened. Professor Justin Driver has described the Manifesto as "a document that, at bottom, offers an unusually articulate example of constitutional interpretation outside of the courts."[56]

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51. *Brown I*, 347 U.S. at 486.

52. *Brown II*, 349 U.S. at 301 (emphasis added).

53. 102 CONG. REC. 4459–60 (1956); *see also Expanding Civil Rights Primary Sources: Southern Manifesto on Integration (March 12, 1956)*, THIRTEEN MEDIA WITH IMPACT, https://www.thirteen.org/wnet/supremecourt/rights/sources_document2.html [https://perma.cc/UZ5L-98FS] (last visited Feb. 28, 2019).

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

55. *Id.*

56. Justin Driver, *Supremacies and the Southern Manifesto*, 92 TEX. L. REV. 1053, 1057 (2014).

Ironically, the segregationists' view of precedent traces its roots to the great abolitionist. A century earlier Abraham Lincoln opposed *Dred Scott v. Sandford*.[57] He admitted that the Supreme Court's judgments were binding but countered that its precedents were not. Alexander Bickel explained that "Lincoln never advocated disobedience of judicial decrees while they were in force," for such resistance "must lead to lawlessness of pestilential proportions."[58] Instead, Lincoln opposed *Dred Scott* in "a certain way" but would "offer no resistance to it."[59] During his first inaugural address in March 1861—one month before Fort Sumter was fired on—President Lincoln articulated his mode of resistance to the anticanonical case.[60] He conceded that judgments of the Supreme Court "must be binding in any case upon the parties to a suit as to the object of that suit."[61] As between Dred Scott and John F.A. Sanford,[62] the matter of emancipation was settled: Scott's sojourn into the free-soil federal territory did not change his status as a slave.[63] Beyond *Dred Scott*'s judgments, Lincoln acknowledged that *Dred Scott*'s precedent was "entitled to very high respect and consideration in all parallel cases by all other departments of the Government."[64] Lincoln was willing to tolerate this rule, even if "such decision may be erroneous in any given case," because the "evil effect" would be "limited to that particular case."[65]

But a different dynamic prevailed, Lincoln explained, when "vital questions affecting the whole people [are] to be irrevocably fixed by decisions of the Supreme Court."[66] When such wide-ranging decisions are "made in ordinary litigation between parties in personal actions"—as was the case in the emancipation dispute between Scott and Sanford—"the people will have ceased to be their own rulers, having to that extent practically resigned their Government into the hands of that eminent tribunal."[67] Courts, Lincoln stressed, have a "duty" to "decide cases properly brought before them."[68] Conversely, parties not properly before courts have no commensurate duty to comply. In this sense, Chief Justice Taney's ignominious decision only affected the relationship between Scott and

57. 60 U.S. (19 How.) 393 (1857). In *Dred Scott*, the Court declared unconstitutional the "act of Congress which prohibited [Sanford] from holding and owning [slave] property . . . in the territory of the United States." *Id.* at 452. Therefore, Dred Scott and his family—slaves who had travelled with their owner to free territory—"were [not] made free by being carried into this territory." *Id.*

58. ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 259 (1962).

59. *Id.* at 260 (emphasis omitted).

60. Abraham Lincoln, *First Inaugural Address*, AVALON PROJECT (Mar. 4, 1861), http://avalon.law.yale.edu/19th_century/lincoln1.asp [https://perma.cc/D3B3-L66P].

61. *Id.*

62. The Supreme Court's reporter misspelled the respondent's surname: it was John Sanford, not Sandford. RANDY E. BARNETT & JOSH BLACKMAN, CONSTITUTIONAL LAW: CASES IN CONTEXT 778 (3d ed. 2018).

63. Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 452 (1857).

64. Lincoln, *supra* note 60.

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

Sanford. The federal government, which was not a party to the case, did not even file an amicus brief. The United States could not conceivably ignore the decision. Lincoln, in particular, would have no occasion to hold another in bondage. Moreover, the argument goes, the federal government could not be not bound by Chief Justice Taney's declaration that the Missouri Compromise was unconstitutional. Notwithstanding *Dred Scott*, slavery could be prohibited in newly admitted states as well as in the federal territories.[69] Indeed, following *Dred Scott*, Congress enacted a territorial bill that regulated slavery and was indistinguishable from the provision declared unconstitutional in *Dred Scott*.[70]

A century later, the resistant segregationists took a page out of the great abolitionist's jurisprudential playbook. This irony should give one pause before a legal principle is dismissed simply because of the odiousness of its holder. It is easy enough to favor Lincoln's mode of opposition to a reviled decision like *Dred Scott*, but the calculus changes when the decision being resisted is a treasured case like *Brown*. At bottom, Lincoln's approach to *Dred Scott* provided the framework for the massive resistance to *Brown*: refuse to voluntarily comply with precedent until a federal court issues a binding injunction for each and every separate party. Leading this resistance to *Brown* was Governor Orval Faubus of Arkansas.

### C. DESEGREGATION IN LITTLE ROCK

In May 1955—shortly before *Brown II* was decided—the Little Rock Independent School District "approved a 'Plan of School Integration,' which provided for a gradual integration of all public schools, beginning with the high school level, in the fall of 1957."[71] The federal district court approved the plan, and it was affirmed by the Eighth Circuit.[72] That judgment was not appealed to the Supreme Court.[73] However, over the next three years the massive resistance spread. "According to [National Association for the Advancement of Colored People (NAACP)] estimates, *no* public schools in the eight southern states were actually desegregated in 1955."[74] Subsequently, voters in Arkansas approved

69. *See* Keith E. Whittington, *Extrajudicial Constitutional Interpretation: Three Objections and Responses*, 80 N.C. L. REV. 773, 785 (2002) ("Although the Taney Court may have denied the citizenship of Dred Scott for the purposes of jurisdiction in a federal lawsuit, the Lincoln administration felt free to ignore the Court's opinion in order to recognize black citizenship in the context of the regulation of coastal ships, passports and patents, as well as to pass laws abolishing slavery in the territories and the District of Columbia." (footnotes omitted)).

70. David P. Currie, *The Civil War Congress*, 73 U. CHI. L. REV. 1131, 1149–50 (2006) ("After all this the territorial bill was an anticlimax. Strikingly, no one so much as mentioned the *Dred Scott* case, which had struck down a provision indistinguishable from the one just proposed, let alone explained why the decision was wrong.").

71. Aaron v. Cooper, 257 F.2d 33, 35 (8th Cir. 1958).

72. Aaron v. Cooper, 143 F. Supp. 855, 856 (E.D. Ark. 1956), *aff'd*, 243 F.2d 361 (8th Cir. 1957).

73. Cooper v. Aaron, 358 U.S. 1, 8 (1958).

74. BREYER, *supra* note 19, at 52.

several measures—including an amendment to the state constitution—that opposed *Brown* and desegregation.[75]

Beyond the Southern Manifesto, the White Citizens' Council opened chapters throughout the south.[76] This latter organization consisted of "white segregationists and supremacists who opposed integration."[77] The Council argued that states could pass their own laws that nullified *Brown* and its resulting district court injunctions.[78] Thus, integration would never be permitted because there would not be "enough jails to punish all resisters."[79] Under the doctrine of nullification, a state can disregard—or interpose—federal law it deems unconstitutional. In such cases, it does not matter whether a party is bound by precedent or judgment of a federal court because the decision itself is illegitimate.[80] The Council's nullification argument went beyond the Manifesto's position that *Brown* by itself did not bind nonparties. The Council attacked judicial supremacy whereas the Manifesto only attacked judicial universality.[81]

The massive resistance also took advantage of the state judicial process. In the summer of 1957, citing the newly enacted amendment to the Arkansas Constitution, the Pulaski County Court issued an injunction "restraining any action towards integrating Little Rock Central High School during the school term beginning September 3, 1957."[82] In response, on August 29, 1957, the federal district court "entered an order enjoining the use of the state court injunction in an attempt to block the integration plan" the district court had approved.[83]

At this moment, state officials in Arkansas were subject to competing court orders. By virtue of the Supremacy Clause, "the Judges in every State shall be bound" to the Constitution, as are their federal counterparts.[84] But they are not bound to each other. State and federal courts are equal sovereigns, neither superior over the other, even with respect to interpreting federal law.[85] The Supreme

75. *See Aaron*, 257 F.2d at 35.

76. BREYER, *supra* note 19, at 52.

77. *White Citizens' Councils*, PBS, https://www.pbs.org/wgbh/americanexperience/features/emmett-citizens-council/ [https://perma.cc/X9RA-S8HR] (last visited Mar. 2, 2019).

78. BREYER, *supra* note 19, at 52.

79. *Id.* (citation omitted).

80. *Id.*

81. Driver, *supra* note 56, at 1058 ("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.").

82. Aaron v. Cooper, 257 F.2d 33, 35 (8th Cir. 1958); *see also Courts: State Court Action*, *supra* note 11.

83. *Aaron*, 257 F.2d at 35.

84. U.S. CONST. art. VI, cl. 2.

85. *See* Lockhart v. Fretwell, 506 U.S. 364, 376 (1993) (Thomas, J., concurring) ("In our federal system, a state trial court's interpretation of federal law is no less authoritative than that of the federal court of appeals in whose circuit the trial court is located."); *see also* Arizonans for Official English v. Arizona, 520 U.S. 43, 58 n.11 (1997) (citing Justice Thomas's *Lockhart* concurrence for the proposition that the "Supremacy Clause does not require state courts to follow rulings by federal courts of appeals on questions of federal law"); United States *ex rel.* Lawrence v. Woods, 432 F.2d 1072, 1076 (7th Cir. 1970) ("[B]ecause lower federal courts exercise no appellate jurisdiction over state tribunals, decisions of lower federal courts are not conclusive on state courts."); Daniel J. Meltzer, *State Court Forfeitures of*

Court of Texas recently recognized this principle. It held that a decision of the Fifth Circuit Court of Appeals, although "helpful and . . . persuasive for Texas trial courts" will not "bind the [state] trial court."[86] Texas trial courts, for example, are only bound by "higher Texas courts and the United States Supreme Court."[87]

This conflict presented members of the Little Rock Independent School District with a dilemma. If they complied with the federal court injunction and proceeded to desegregate Central High School, the Pulaski County Court could hold them in contempt. Conversely, if they complied with the state court injunction and refused to integrate Central High School, the federal district court could hold them in contempt. It was a judicial Catch-22. Critically, neither *Brown I* nor *Brown II* purported to bind *all* officers in Arkansas,[88] so the Supreme Court's judgment did not directly break this tie. It did, however, signal that the federal court's judgment would be upheld on appeal. That prediction, however, did not resolve the immediate crisis.

The district court's injunction only affected members of the school board.[89] Other elements of the Arkansas government were not bound by the order. The Governor, the National Guard, and the Little Rock Police Department exploited this principle in what became a game of constitutional whack-a-mole. An entity could maintain segregation until it was directly ordered to halt its actions. Even if one entity was so ordered, other entities could remain segregated until directly ordered to act otherwise. And so on. Alexander Bickel described this dynamic in *The Least Dangerous Branch*: regardless of what the Supreme Court held, state officials "could relitigate [*Brown*] at every opportunity that the judicial process offered, and of course it offers a thousand and one."[90] He added that these state officials "could reject as laughable statements that they were bound by their oaths to put the decision into effect in all situations in which it was applicable, without waiting for the constraint of litigation."[91] As a result, Bickel concluded, the officials had to obey "specific decrees ordering certain children to be admitted to certain schools," but other "children standing in the same position would be similarly treated, though only following litigation and more litigation."[92] Bickel made

*Federal Rights*, 99 HARV. L. REV. 1128, 1231 n.495 (1986) ("Decisions of lower federal courts on issues of federal law are not binding precedents for a state court, which may properly view such precedents as no more persuasive than the views of the state courts of a different jurisdiction."); David L. Shapiro, *State Courts and Federal Declaratory Judgments*, 74 NW. U. L. REV. 759, 771 (1979) ("[Lower] federal courts are no more than coordinate with the state courts on issues of federal law.").

86. Pidgeon v. Turner, 538 S.W.3d 73, 83 (Tex.), *cert. denied*, 138 S. Ct. 505 (2017).

87. Penrod Drilling Corp. v. Williams, 868 S.W.2d 294, 296 (Tex. 1993).

88. *See supra* notes 47–50 and accompanying text.

89. Aaron v. Cooper, 143 F. Supp. 855, 856–57 (E.D. Ark. 1956), *aff'd*, 243 F.2d 361 (8th Cir. 1957) ("On February 8, 1956, the minor plaintiffs between the ages of 6 and 21 years, through their legal representatives, filed their complaint in this court against the President and Secretary of the Board of Directors of Little Rock School District; the Superintendent of Little Rock School District; and the Little Rock School District itself.").

90. BICKEL, *supra* note 58, at 264.

91. *Id.*

92. *Id.*

a similar point in *Politics and the Warren Court*: "[G]enerally no one is under an obligation to carry out a rule of constitutional law announced by the Court until someone else has conducted a successful litigation and obtained a decree directing him to do so."[93]

On September 2, 1957, Governor Faubus ordered the Arkansas National Guard to prohibit black students from entering white schools, including Central High School in Little Rock.[94] At the time, neither Faubus nor the National Guard were subject to *any* court desegregation order.[95] The district court ordered the school board to proceed with the desegregation order, notwithstanding the presence of the state militia.[96] The following morning, the black students attempted to enter the school, but the "Arkansas National Guard 'acting pursuant to the Governor's order, stood shoulder to shoulder at the school grounds and thereby forcibly prevented the 9 Negro students . . . from entering,' as they continued to do every school day during the following three weeks."[97]

On September 7, "the District Court denied a petition of the School Board and the Superintendent of Schools for an order temporarily suspending continuance of the program."[98] Thirteen days later, after the Justice Department joined the case as amicus curiae, the district court entered a new order "enjoining the Governor and the officers of the [National] Guard from preventing the attendance of Negro children at Central High School, and from otherwise obstructing or interfering with the orders of the court in connection with the plan."[99] Up to this point, only school board officials were subject to the federal court's injunction. Now, the court also bound the Governor and the National Guard. Professor David Strauss points out that "Faubus had been careful never to defy such an order" that was "directed to" him.[100]

Subsequently, the Arkansas National Guard complied with this order and withdrew from Central High School.[101] However, the game of whack-a-mole did not end; it merely shifted. On the following school day, Monday, September 23, the

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93. ALEXANDER M. BICKEL, POLITICS AND THE WARREN COURT 11 (1965).

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

95. *See supra* notes 88–92 and accompanying text.

96. Cooper v. Aaron, 358 U.S. 1, 11 (1958).

97. *Id.* (quoting Aaron v. Cooper, 156 F. Supp. 220, 225 (E.D. Ark. 1957), *aff'd sub nom.* Faubus v. United States, 254 F.2d 797 (8th Cir. 1958)).

98. *Id.*

99. *Id.* at 11–12; *see Aaron*, 156 F. Supp. at 226–27.

100. David A. Strauss, *Little Rock and the Legacy of* Brown, 52 ST. LOUIS U. L.J. 1065, 1080 (2008) (footnote omitted); *see also* J. Harvie Wilkinson, III, *The Supreme Court and Southern School Desegregation, 1955–1970: A History and Analysis*, 64 VA. L. REV. 485, 519 (1978) ("[T]he Governor himself was not party to the proceedings before the Supreme Court and had been careful not to disobey a lower court injunction forbidding him from blocking black attendance at Central High."). In a related context, President Lincoln was not a party to the proceedings in *Ex parte Merryman*, 17 F. Cas. 144 (C.C.D. Md. 1861). Seth Barrett Tillman, Ex parte Merryman*: Myth, History, and Scholarship*, 224 MIL. L. REV. 481, 539–40 (2016). Therefore, Chief Justice Taney could not issue an injunction against him. Accordingly, Lincoln could conceivably ignore the court's order.

101. *Cooper*, 358 U.S. at 12.

black students entered the school.[102] Soon, an unruly mob formed to protest the integration process. In response, the students were removed by the Little Rock Police Department, which was having "difficulty controlling a large and demonstrating crowd [that] had gathered at the high school."[103] At this juncture, the Little Rock Police Department was not subject to the prior injunction. Instead, officers were following the Manifesto's jurisprudential playbook.[104]

Two days later, in one of the more dramatic moments of the Civil Rights Movement, President Eisenhower ordered federal troops to escort the "Little Rock Nine" into Central High School.[105] The 101st Airborne arrived in twenty-six vehicles and were dressed in fatigues.[106] The President was careful in his public statement. Eisenhower stressed that he was enforcing federal law as ordered by the federal district court's order, and not *Brown* standing by itself: "The Federal law and orders of a *United States District Court* implementing that law cannot be flouted with impunity by any individual or any mob of extremists."[107] Eisenhower added that "it was not his responsibility to keep order anywhere, but only to see that the orders of a federal judge were carried out."[108] Chief Justice Warren was troubled by the fact that "there was no direct appeal from the White House to obey the mandate of the Supreme Court."[109] Eisenhower's decision to ground his actions in the district court's judgment, rather than the Supreme Court's precedent, rebuts the notion that judicial supremacy and universality had been settled, or liquidated by our polity.[110]

Bickel offered an alternative, more cynical explanation for Ike's actions: "Eisenhower never once said that he considered the [Supreme] Court's [desegregation] decisions right."[111] A private correspondence from Eisenhower casts doubt on this allegation. His purpose was to "make people see" that "specific orders of our courts, taken in accordance with the terms of the Constitution as interpreted by the Supreme Court, must be upheld."[112]

Throughout the remainder of the school year, eight members of the Little Rock Nine remained at Central High School under the supervision of federalized

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102. *Id.*

103. *Id.*; *see also* Aaron v. Cooper, 163 F. Supp. 13, 16 (E.D. Ark. 1958).

104. *See supra* Section I.B.

105. *See Cooper*, 358 U.S. at 12; *see also Aaron*, 163 F. Supp. at 16–17.

106. Wilkinson, *supra* note 100, at 517.

107. Dwight D. Eisenhower, *Statement Regarding Occurrences at Central High School in Little Rock*, AM. PRESIDENCY PROJECT (Sept. 23, 1957), https://www.presidency.ucsb.edu/documents/statement-the-president-regarding-occurrences-central-high-school-little-rock [https://perma.cc/C88A-CR5S] (emphasis added).

108. JAMES F. SIMON, EISENHOWER VS. WARREN: THE BATTLE FOR CIVIL RIGHTS AND LIBERTIES 317 (2018).

109. *Id.* at 309.

110. *See generally* William Baude, *Constitutional Liquidation*, 71 STAN. L. REV. 1 (2019) (noting that, as James Madison observed, the Constitution's meaning can be "liquidated," or settled by practice); Josh Blackman, *Defiance and Surrender*, 59 S. TEX. L. REV. 157 (2017) (analyzing the role that interbranch relations and historical practice should play in interpreting the Constitution).

111. BICKEL, *supra* note 93, at 15.

112. SIMON, *supra* note 108, at 309.

National Guardsmen.[113] Eisenhower's decision suspended, at least temporarily, the game of whack-a-mole. Yet, following the 1957–1958 school year, the opposition to the federal desegregation plan remained strong. "[C]ertain of the white students," the Eighth Circuit recounted, "demonstrated their hostility to integration by overt acts of violence and misconduct, committed within the school building, as well as by destruction of school property through acts of vandalism."[114]

This violence led to the complicated fact pattern the Court considered in *Cooper*. The school board asked the district court for an extension to complete the integration plan. The government explained that "the maintenance of a sound educational program at Central High School, with the Negro students in attendance, would be impossible" given the "extreme public hostility, which they stated had been engendered largely by the official attitudes and actions of the Governor and the Legislature."[115] In June 1958, the district court—to the surprise of many—granted a thirty-month extension.[116] In granting the extension, the court cited the "chaos, bedlam and turmoil" that resulted from the prior desegregation order.[117]

The plaintiffs sought a petition for a writ of certiorari before judgment from the Supreme Court.[118] The petition was denied. However, their appeal to the Eighth Circuit was successful: with only three weeks before the start of the semester, in August 1958, the court of appeals reversed the district court's extension, finding that there was not a sufficient basis to suspend the school integration plans for thirty months.[119] Critically, the court of appeals stayed its decision thirty days.[120] However, the Eighth Circuit's decision, no more than the district court's judgment, could not resolve the conflict with the outstanding state court injunction. A circuit court of appeals has no greater authority to interpret the Constitution than does a state court.[121] Only one court, the Supreme Court of the United States, could resolve this logger jam.

### D. FAUBUS VERSUS SCOTUS

Due to the urgency of the desegregation crisis, the Supreme Court convened for a special term.[122] The Justices heard three hours of oral arguments in August

113. Cooper v. Aaron, 358 U.S. 1, 12 (1958).

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

115. *Cooper*, 358 U.S. at 12.

116. Aaron v. Cooper, 163 F. Supp. 13, 14, 20–26 (E.D. Ark. 1958).

117. *Id*. at 21.

118. Aaron v. Cooper, 357 U.S. 566, 567 (1958). The order was drafted by Justice Frankfurter. Dennis J. Hutchinson, *Unanimity and Desegregation*: *Decisionmaking in the Supreme Court*, *1948–1958*, 68 GEO. L.J. 1, 74 n.628 (1979).

119. *Aaron*, 257 F.2d at 39–40.

120. *See Cooper*, 358 U.S. at 13–14.

121. *See supra* note 84 and accompanying text.

122. *Cooper*, 358 U.S. at 4, 14. The term was not scheduled to begin until the first Monday of the following month, October 6. *See* Hutchinson, *supra* note 118, at 75 ("Because the October 1958 Term was not scheduled to begin until October 6, Warren convened a Special Term."). This special term was the only one convened during the Warren Court, and the first since Chief Justice Vinson convened a special term to consider *Rosenberg v. United States*, 346 U.S. 273 (1953). *See* Hutchinson, *supra* note

1958 and another three-and-a-half hours of arguments in September. During this period, Governor Faubus called the legislature into a special session to pass a "raft of bills."[123] One of the bills would allow the Governor to close any public school that was under a desegregation order and transfer its appropriated funds to a "private, segregated" school.[124] Faubus, however, did not sign the bills right away; he was waiting for the Supreme Court to act.[125]

On September 12, 1958, the Supreme Court affirmed the Eighth Circuit's judgment in a two-paragraph per curiam opinion. "In view of the imminent commencement of the new school year at the Central High School of Little Rock, Arkansas," the opinion began, "we deem it important to make prompt announcement of our judgment affirming the Court of Appeals."[126] With that decision, the stay entered by the Eighth Circuit was dissolved, resulting in an immediate enforcement of the desegregation plan. "The judgment of this Court shall be effective immediately," the Court concluded, obviating the possibility of a petition for rehearing.[127] The opinion noted that "[t]he expression of the views supporting our judgment will be prepared and announced in due course."[128]

In theory at least, the conflict between the state and federal court injunctions was now resolved. The school board officials in Little Rock were now directly bound by the Supreme Court's decision—regardless of what the Pulaski County Court had ordered—and were required to comply with the desegregation order. In reality though, Governor Faubus signed the pending segregationist legislation, citing the "domestic violence within the Little Rock School District [that] is impending."[129] Further, Faubus called for a special election to decide whether to either integrate all the schools or hand over the public schools to a private corporation that could keep them segregated.[130] The game of constitutional whack-a-mole leveled up: if the public schools were closed, they could not be integrated.

### E. THE *COOPER V. AARON* JUDGMENT

On September 29, 1958, after a lengthy internal deliberative process (discussed in Part II), the Supreme Court issued a fifteen-page opinion in *Cooper v. Aaron* explaining its reasoning. In an unprecedented showing of unanimity, the opinion was signed by each of the nine Justices.[131] Reporter Anthony Lewis observed in

118, at 75 n.634. Prior to that sitting, a special term was convened in 1942 for *Ex parte Quirin*, 317 U.S. 1 (1942). *See* Hutchinson, *supra* note 118, at 75 n.634.

123. Hutchinson, *supra* note 118, at 75.

124. *Id.*

125. *Id.*

126. Aaron v. Cooper, 358 U.S. 1, 5 (1958) (per curiam).

127. *Id.*

128. *Id.*

129. Hutchinson, *supra* note 118, at 78 (quoting J.W. PELTASON, 58 LONELY MEN: SOUTHERN FEDERAL JUDGES AND SCHOOL DESEGREGATION 195 (1961)).

130. *Id.* at 78–79.

131. EARL WARREN, THE MEMOIRS OF EARL WARREN 298 (1977) ("Mr. Justice Frankfurter called our attention to the fact that there had been a number of changes in the membership of the Court since *Brown v. Board of Education*. He suggested that in order to show we were all in favor of that decision, we should also say so in the Little Rock case, not in a *per curiam* or in an opinion signed by only one

the *New York Times* that during the hand-down, Chief Justice Warren "looked at each of the justices in turn as he read their names."[132] The opinion begins:

> As this case reaches us it raises questions of the highest importance to the maintenance of our federal system of government. It necessarily involves a claim by the Governor and Legislature of a State that there is no duty on state officials to obey federal court orders resting on this Court's considered interpretation of the United States Constitution. Specifically it involves actions by the Governor and Legislature of Arkansas upon the premise that they are not bound by our holding in *Brown v. Board of Education* . . . .[133]

The following ten pages trace the procedural posture of the case with meticulous detail, including a discussion of President Eisenhower's dramatic dispatch of federal troops to escort the Little Rock Nine into Central High School. Inexplicably, the opinion made no mention of the competing injunction issued by the Pulaski County Circuit Court—a critical issue addressed in the lower court proceedings.[134] However, this omission was harmless because the Supreme Court's affirmation of the federal district court's judgment vitiated the authority of the state court's contrary order.

The Court "accepted without reservation" that the school board officials "displayed entire good faith," notwithstanding the "unfortunate and distressing sequence of events," which "are directly traceable to the actions of legislators and executive officials of the State of Arkansas."[135] In a thinly veiled attack, the Court wrote that Governor Faubus and his allies were "determin[ed] to resist this Court's decision in the *Brown* case."[136] It is worth repeating that the Governor and executive officials were *not parties* in *Cooper*—the case only implicated the school board officials.[137] Yet for the Court, this dichotomy was a distinction without a difference: "[F]rom the point of view of the Fourteenth Amendment, [the school board officials] stand in this litigation as the agents of the State."[138] Specifically, "the constitutional rights of children not to be discriminated against in school admission on grounds of race or color," which had been "declared by this Court in the *Brown* case can neither be nullified openly and directly by state legislators or state executive or judicial officers, nor nullified indirectly by them

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Justice, but by an opinion signed by the entire Court. I do not recall this ever having been done before. However, in light of the intense controversy over the issue and the great notoriety given Governor Faubus' obstructive conduct in the case, we thought well of the suggestion, and it was done."); *see also* Hutchinson, *supra* note 118, at 82 ("The unprecedented signing of the opinion by all nine Justices dramatically underscored the unanimity of the decision.").

132. Anthony Lewis, *Supreme Court Forbids Evasion or Force to Balk Integration*, N.Y. TIMES (Sept. 30, 1958), https://www.nytimes.com/1958/09/30/archives/supreme-court-forbids-evasion-or-force-to-balk-integration-9-write.html [http://nyti.ms/2GqCdEk].

133. Cooper v. Aaron, 358 U.S. 1, 4 (1958).

134. *See supra* note 81 and accompanying text.

135. *Cooper*, 358 U.S. at 14–15.

136. *Id.* at 15.

137. *See supra* notes 88–92 and accompanying text.

138. *Cooper*, 358 U.S. at 16.

through evasive schemes for segregation whether attempted 'ingeniously or ingenuously.'"[139] As applied to this case, misconduct by other state officials did not relieve the school board of its obligation to comply with *Brown*.

This analysis was adequate to resolve the appeal. But the Court would go much further. The Justices attempted to thwart the massive-resistance game of whack-a-mole, whereby officials who were not directly bound by federal court judgments would sequentially refuse to voluntarily comply with the precedent. The Justices aimed to resolve this dilemma with two doctrines: judicial supremacy and judicial universality.

## II. THE CONSTITUTIONAL ORIGINS OF JUDICIAL SUPREMACY AND UNIVERSALITY

At the tail end of *Cooper v. Aaron*, after disposing of the situation in Little Rock, the Supreme Court established two principles: judicial supremacy and judicial universality. Under the former, a simple majority of the Supreme Court can manifest the "supreme Law of the Land."[140] Under the latter, a Supreme Court decision is binding on all parties in *similar* cases.[141] For decades, scholars have criticized these doctrines, which the Supreme Court labeled as "basic" and "settled."[142] They were neither, nor were they supported by prior precedent. Part II exposes the mythical origins of judicial supremacy and universality.

### A. "SOME BASIC CONSTITUTIONAL PROPOSITIONS WHICH ARE SETTLED DOCTRINE"

"What has been said," the Court acknowledged, "in the light of the facts developed, is enough to dispose of the case."[143] At this point, the integration of Central High School was to proceed without further delay. "However," the Court continued, "we should answer the premise of the actions of the Governor and Legislature that they are not bound by our holding in the *Brown* case."[144] To do so, the Court explained, "[i]t is necessary only to recall some basic constitutional propositions which are settled doctrine."[145] Then, the opinion provided two paragraphs of "basic constitutional propositions," which are included here in their entirety (with citations omitted):

> Article VI of the Constitution makes the Constitution the "supreme Law of the Land." In 1803, Chief Justice Marshall, speaking for a unanimous Court, referring to the Constitution as "the fundamental and paramount law of the nation," declared in the notable case of *Marbury v. Madison*, that "It is emphatically the province and duty of the judicial department to say what the law is." This decision declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since

139. *Id.* at 17 (quoting Smith v. Texas, 311 U.S. 128, 132 (1940)).
140. *Id.* at 18.
141. *Id.*
142. *Id.* at 17.
143. *Id.*
144. *Id.*
145. *Id.*

> been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system. It follows that the interpretation of the Fourteenth Amendment enunciated by this Court in the *Brown* case is the supreme law of the land, and Art. VI of the Constitution makes it of binding effect on the States "any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." Every state legislator and executive and judicial officer is solemnly committed by oath taken pursuant to Art. VI, cl. 3, "to support this Constitution." Chief Justice Taney, speaking for a unanimous Court in 1859, said that this requirement reflected the framers' "anxiety to preserve it [the Constitution] in full force, in all its powers, and to guard against resistance to or evasion of its authority, on the part of a State . . . ." *Ableman v. Booth*.
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> No state legislator or executive or judicial officer can war against the Constitution without violating his undertaking to support it. Chief Justice Marshall spoke for a unanimous Court in saying that: "If the legislatures of the several states may, at will, annul the judgments of the courts of the United States, and destroy the rights acquired under those judgments, the constitution itself becomes a solemn mockery . . . ." *United States v. Peters*. A Governor who asserts a power to nullify a federal court order is similarly restrained. If he had such power, said Chief Justice Hughes, in 1932, also for a unanimous Court, "it is manifest that the fiat of a state Governor, and not the Constitution of the United States, would be the supreme law of the land; that the restrictions of the Federal Constitution upon the exercise of state power would be but impotent phrases . . . ." *Sterling v. Constantin*.[146]

These two paragraphs announced for the first time the doctrines of judicial supremacy and judicial universality.

### B. JUDICIAL SUPREMACY

The principle of judicial supremacy can be encapsulated in a single sentence from *Cooper*: "[T]he interpretation of the Fourteenth Amendment enunciated by this Court in the *Brown* case is the supreme law of the land."[147] Without qualification, whatever a simple majority of the Supreme Court holds is the "supreme Law of the Land." If a different majority of the Court reaches a different holding, then that opposite conclusion becomes the "supreme Law of the Land." Alexander Bickel pithily framed this rule: "Whatever the Court lays down is right, even if [it is] wrong, because the Court and only the Court speaks in the name of the Constitution."[148]

This declaration has been subjected to decades of withering criticism.[149] Professor Daniel Farber wrote that "[t]he implication is that the [supremacy]

146. *Id*. at 18–19 (internal citations omitted).

147. *Id*. at 18.

148. BICKEL, *supra* note 58, at 264.

149. *See* Arthur S. Miller, *Constitutional Decisions as De Facto Class Actions: A Comment on the Implications of* Cooper v. Aaron, 58 U. DET. J. URB. L. 573, 574 (1981) (writing that *Cooper* "was a brave, even rash, grab for governmental power" and "[i]ts acceptance has meant an exponential jump in the jurisprudence of the high bench"); Michael Stokes Paulsen, *Lincoln and Judicial Authority*, 83

clause's reference to the Constitution also encompasses judicial decisions."[150] Professor David Strauss added that *Cooper* offered "perhaps the strongest statement[] in [the Court's] history in support of what is usually called judicial supremacy."[151] And the Court made that statement in an admitted dictum because everything before was "enough to dispose of the case."[152]

Professor Laurence Tribe observed that *Cooper* "has been criticized as wrongly equating the Constitution with the Court's interpretation of it."[153] Tribe, though, contends that *Cooper* "does not require so literal a reading of its invocation of absolute judicial supremacy."[154] Rather, he writes, *Brown* is "binding in the same way that any other judicial decision is binding, so that state officials who interfere with enforcement of a judgment, or act to undermine its goals, are acting unlawfully."[155]

Tribe's reading accounts for judicial supremacy but still does not address judicial universality. Without question, government officials who are bound by a judgment act unlawfully when they disregard that judgment. But what about other officials who are *not* bound by the judgment? Tribe offered an answer to this question: *Brown* should be viewed as a "constitutional judgment, an exercise of judicial power entitled to respect under the supremacy clause not because it *is* the Constitution but because it is an exercise of power *under* the Constitution."[156] Specifically, he wrote, "the Court's interpretations of the Constitution are binding on *other* government actors."[157] This explanation raises the question: Does the Supreme Court have this power "*under* the Constitution" to declare universal constitutional principles that bind everyone?

### C. JUDICIAL UNIVERSALITY

Justice Stephen Breyer succinctly articulated the principle of judicial universality in his book, *Making Our Democracy Work*. "[T]he Court in *Cooper*," he wrote, "actually decided that the Constitution obligated other governmental institutions to follow the Court's interpretations, not just in the particular case announcing those interpretations, but in *similar cases as well*."[158] (The *Cooper* Court never explicitly stated the full extent of its holding—for reasons that will be discussed in Part III). In other words, state officials who were not party to

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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"); Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217, 284–85 (1994) [hereinafter Paulsen, *The Most Dangerous*] (criticizing the Court for holding that "judges are the judges of their own jurisdiction and of their own powers"); Whittington, *supra* note 69, at 787–88.

150. Daniel A. Farber, *The Supreme Court and the Rule of Law:* Cooper v. Aaron *Revisited*, 1982 U. ILL. L. REV. 387, 404.

151. Strauss, *supra* note 100, at 1080.

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

153. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 3-4, at 34 (2d ed. 1988).

154. *Id.* at 35.

155. *Id.*

156. *Id.*

157. *Id.* (emphasis added).

158. BREYER, *supra* note 19, at 62 (emphasis added).

*Brown* were still bound to desegregate schools "in similar cases," such as in Little Rock. Justice Breyer highlighted the risk if the Court were to "hedge" on this point: segregationists would have had a "powerful legal and public relations weapon."[159] They could insist, in good faith, that they were only bound in a "single case" at a time, but not by the Supreme Court's initial precedent.[160] This approach would afford government officials the power to delay and frustrate integration efforts, he explained, by forcing civil rights groups to file a multitude of lawsuits in several jurisdictions.[161]

Professor Daniel Farber wrote that this dimension of *Cooper* established the "binding effects of judicial decisions."[162] It is not enough for parties to choose to comply with precedent—whether out of a fidelity to the "Law of the Land" or a fear of future litigation. Rather, under this doctrine, decisions of the Supreme Court are self-executing on all officers who are constitutionally obligated to comply with the Supremacy Clause—regardless whether they were parties to the litigation. Nothing in *Cooper* expressly established this point, though as I will discuss, earlier drafts of *Cooper* did make precisely this argument.[163]

Yet Justice Breyer's understanding of *Cooper* is not isolated. Professor Burt Neuborne articulated a vision of universality similar to that outlined by Justice Breyer: "[O]nce the Supreme Court, or a circuit court for that matter, enunciates a settled rule of law, constitutional or otherwise, in the context of resolving an article III case or controversy, our system of government obliges executive officials to comply with the law as judicially declared."[164] Neuborne added that "so long as the judicial precedent remains viable, the executive's duty is to conform its conduct to the Supreme Court's precedent, not merely as a matter of respect, prudence, expedience, or *realpolitik*, but as a matter of formal legal obligation."[165] Neuborne explained that a judicial constitution is preferable to a "cacophonous constitution that means different things to different branches, with each branch free to act consistently with its particular constitutional vision."[166] Further, this approach provides a single "authoritative voice" about the meaning of the Constitution.[167] Parties "with the resources and sophistication to challenge the executive's view will enjoy the option of invoking a judicial second opinion."[168]

159. *Id.*
160. *Id.* at 63.
161. *See id.* at 62–63.
162. Farber, *supra* note 150, at 403.
163. *See infra* Part III.
164. Burt Neuborne, *The Binding Quality of Supreme Court Precedent*, 61 TUL. L. REV. 991, 993 (1987). William H. Pryor, Jr., who would go on to serve as a judge on the Eleventh Circuit Court of Appeals, was the Editor in Chief for this issue of the Tulane Law Review. *See Tulane Law Hall of Fame to Honor Seven Alumni March 24*, TUL. U. L. SCH. (Jan. 27, 2017, 5:55 AM), https://law.tulane.edu/news/tulane-law-hall-fame-honor-seven-alumni-march-24 [https://perma.cc/QV7A-W93Y].
165. Neuborne, *supra* note 164, at 993.
166. *Id.* at 994.
167. *Id.*
168. *Id.* at 994–96.

Those "lacking the resources to invoke the judiciary [would] be forced to accept the executive's evaluation."[169]

Likewise, Professor Tribe acknowledged that *Cooper*'s holding discarded the Court's traditional role of "making constitutional determinations" by "simply resolv[ing] the claims of the parties before it."[170] Instead, under *Cooper*, when "rendering a constitutional decision," the Court in fact "announces a general norm of wide applicability."[171] Then-Professor and future Judge J. Harvie Wilkinson III wrote that if "[t]aken literally (and not merely as a rhetorical flourish)," *Cooper* would "imply that all state officials, whether or not party to a case, are obliged to immediately support, both in word and in deed, whatever the Court has said."[172] To Professor Arthur Miller, *Cooper* established the principle that "Supreme Court decisions, in constitutional cases at least, are de facto class actions."[173] With this constitutional approach, however, there is no need to certify a class pursuant to rules established by Congress. Nor is there a need to abide by the procedural protections afforded by Federal Rule of Civil Procedure 23 in federal district courts. Rather, the Supreme Court can simply achieve universal relief pursuant to its own inherent powers.[174] The present-day debate over the validity of "nationwide" injunctions focuses on the power of federal district courts to bind nonparties; this debate does not challenge the Supreme Court's authority to bind nonparties.[175]

Like judicial supremacy, judicial universality has been subjected to decades of withering criticism. Professor Herbert Wechsler demurred: the Court cannot "call[] for obedience by all within the purview of the rule that is declared."[176] Professor Philip Kurland objected that "[i]t had been the accepted learning that no one is bound by a court's judgment except parties to the litigation."[177] Professor Strauss questioned why government officials who were not party to a case "must instantly acquiesce in the principles established by Supreme Court

169. *Id.* at 996.

170. TRIBE, *supra* note 153, § 3-4, at 34.

171. *Id.*

172. Wilkinson, *supra* note 100, at 520.

173. Miller, *supra* note 149, at 574.

174. *See* Paulsen, *The Most Dangerous*, *supra* note 149, at 285 ("It also follows from the supremacy-of-judgments hypothesis that the judges may determine the scope of their own remedial powers: the judiciary may prescribe that its decisions have general prospective force with respect to all similar or analogous cases. That is, as a matter of remedy or equity, it may decide that all of its decisions should be deemed class actions, with floating class membership.").

175. *See* Trump v. Hawaii, 138 S. Ct. 2392, 2424–25 (2018) (Thomas, J., concurring) (noting that district courts "have begun imposing universal injunctions without considering their authority to grant such sweeping relief," and worry that the practice is "beginning to take a toll on the federal court system—preventing legal questions from percolating through the federal courts, encouraging forum shopping, and making every case a national emergency").

176. Herbert Wechsler, *The Courts and the Constitution*, 65 COLUM. L. REV. 1001, 1008 (1965).

177. Philip B. Kurland, *"*Brown v. Board of Education *Was the Beginning": The School Desegregation Cases in the United States Supreme Court: 1954–1979*, 1979 WASH. U. L.Q. 309, 327.

decisions interpreting the Constitution, especially when the Court itself remains free to overturn those decisions."[178]

Professor Bickel articulated the traditional limits of a court's judgment: "[S]pecific decrees ordering certain children to be admitted to certain schools had to be obeyed" but other "children standing in the same position would be similarly treated, though only following litigation and more litigation."[179] In *The Morality of Consent*, Bickel stated the issue more generally: "[Q]uite literally that no one is under any legal obligation to carry out a rule of constitutional law announced by the Supreme Court until someone else has conducted a successful litigation and obtained a decree directing him to do so."[180] Other academics posit that *Cooper* "simply ignores the well-settled law of *res judicata*."[181] That is, "until an actual enforcement order has been issued against them, non-parties have no duty to comply with the Court's pronouncements."[182]

Despite these criticisms, there have been efforts to extend the principle of judicial universality to the lower courts—what oxymoronically might be called "inferior universality." At various times, the U.S. government has asserted a policy known as "intracircuit nonacquiescence." Under this controversial doctrine, the Executive Branch directs agencies to disregard certain unfavorable circuit precedent, even if their decisions will ultimately be appealed in that circuit.[183] The courts have uniformly rejected this practice for flouting circuit law.[184]

Two courts have done so by relying on *Cooper v. Aaron*. In *Lopez v. Heckler*, the Ninth Circuit concluded that through the Social Security Administration's policy of intracircuit nonacquiescence, "the executive branch def[ied] the courts and undermin[ed] what are perhaps the fundamental precepts of our constitutional system—the separation of powers and respect for the law."[185] Judge Stephen Reinhardt, writing for the panel, did not see *Cooper* as limited to the Supreme Court's construction of constitutional law. Rather, he wrote, *Cooper*'s doctrine also applied to the circuit court's interpretation of "federal statutory law," which is part of the "supreme Law of the Land."[186] All Executive Branch officials, the panel concluded, are bound to "faithfully execute" this law as

178. Strauss, *supra* note 100, at 1080–81.

179. BICKEL, *supra* note 58, at 264.

180. ALEXANDER M. BICKEL, THE MORALITY OF CONSENT 111 (1975).

181. Farber, *supra* note 150, at 405.

182. *Id*. at 388–89.

183. *See, e.g*., Samuel Estreicher & Richard L. Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 YALE L.J. 679, 687 (1989) (defining "*intra*circuit nonacquiescence" as a circumstance "when the relevant venue provisions establish that [judicial] review will be to a particular court of appeals and [an administrative] agency nonetheless refuses to follow, in its administrative proceedings, the case law of that court"); Note, *Collateral Estoppel and Nonacquiescence: Precluding Government Relitigation in the Pursuit of Litigant Equality*, 99 HARV. L. REV. 847 (1986).

184. *See* Estreicher & Revesz, *supra* note 183, at 699–704; *see also Collateral Estoppel and Nonacquiescence*, *supra* note 183, at 856–57.

185. 725 F.2d 1489, 1497 (9th Cir.), *vacated,* 469 U.S. 1082 (1984) (mem.) (citing Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), and Cooper v. Aaron, 358 U.S. 1 (1958)).

186. *Id*. at 1497 n.5.

interpreted by the inferior courts.[187] Ultimately, the Supreme Court granted certiorari in *Lopez*, vacated the panel opinion, and remanded the case in light of the recently enacted Social Security Disability Benefits Reform Act of 1984.[188] The constitutional issue was not further discussed on remand.[189]

In *Stieberger v. Heckler*, the Southern District of New York likewise ruled that *Cooper*'s statement of judicial universality was not limited to the Supreme Court but also extended to the district courts.[190] The Second Circuit vacated the injunction issued in *Stieberger* in light of the Secretary's representation that it was modifying its policy of nonacquiesence.[191] The Supreme Court has a plausible—but unpersuasive—claim that its judgments have a constitutional nature because the Supreme Court itself is created by the Constitution.[192] The same cannot be said for the inferior courts, which Congress can "ordain and establish" or even abolish.[193] Their judgments have no claim to this source of constitutional authority.

Beyond these two isolated citations, the lower courts have mostly shied away from relying on judicial universality. Indeed, since *Cooper*, the Supreme Court itself has not exercised the power of judicial universality. Yet the Justices have shown no hesitation to declare their own decisions supreme.[194] Part III explores how the principles of judicial supremacy and universality evolved throughout the six drafts of *Cooper v. Aaron*.

## III. THE SIX DRAFTS OF *COOPER V. AARON*

The Court heard its second round of oral argument in *Cooper v. Aaron* on September 11, 1958.[195] The published opinion was handed down eighteen days later on September 29, 1958.[196] During the interim period, the Justices engaged in a deliberative process that was mostly collaborative but, at times, antagonistic. To recreate the judicial exchange, this Part analyzes the draft opinions, internal

187. *Id.*

188. Heckler v. Lopez, 469 U.S. 1082 (1984) (mem.), *remanded*, 106 F.R.D. 268 (C.D. Cal. 1984).

189. *Lopez*, 106 F.R.D. at 268–70.

190. 615 F. Supp. 1315, 1357–58 (S.D.N.Y. 1985) ("While the question of whether the decisions of lower federal courts and the Supreme Court are equally binding on administrative agencies is not as easily answered as plaintiffs appear to suggest, we nevertheless entertain serious doubts about the limiting construction on *Marbury* which defendants propose. While it is true that *Marbury v. Madison*, *Cooper v. Aaron*, and *United States v. Nixon* all dealt specifically with the duty and authority of the Supreme Court to render binding interpretations of the law, these decisions, fairly (and literally) read, do not hinge on this particular circumstance."), *vacated sub nom.* Stieberger v. Bowen, 801 F.2d 29 (2d. Cir. 1986).

191. *Bowen*, 801 F.2d at 38 ("This will minimize intrusion into the administrative process and at the same time accord the Secretary the opportunity to demonstrate his good-faith compliance with the law of this Circuit and his readiness to take appropriate action to see that law implemented throughout the administrative process that he supervises."). Four years later, the same district court ruled that the agency was still engaging in "*de facto* non-acquiescence." Stieberger v. Sullivan, 738 F. Supp. 716, 733, 754 (S.D.N.Y. 1990).

192. *See* U.S. CONST. art. III, § 1.

193. *See id.*

194. *See infra* Section IV.A.

195. Cooper v. Aaron, 358 U.S. 1, 4 (1958).

196. *Id.* at 1.

memoranda, and inter-chamber correspondences by Justices Hugo L. Black, William J. Brennan, Harold H. Burton, Tom C. Clark, William O. Douglas, Felix Frankfurter, John Marshall Harlan, and Chief Justice Earl Warren during those eighteen days in September 1958.[197] I was not able to find any record in the papers of the other eight Justices indicating that Justice Charles E. Whittaker commented on any of the draft opinions. Reproductions of these papers, sorted by date, are available online.[198] These papers illustrate that the Justices grappled with the establishment of judicial supremacy and universality. Further, they debated whether these doctrines were supported by the Court's prior precedents, including *Marbury v. Madison*,[199] *United States v. Peters*,[200] *Ableman v. Booth*,[201] and *Sterling v. Constantin*.[202] None of these cases, however, stood for the propositions for which *Cooper* cited them. With each successive draft, Justice Brennan—the lead draftsman—relied less and less on these precedents. These changes acknowledged that the Court had never before claimed power over supremacy and universality but was instead breaking new ground.

### A. THE DRAFTING PROCESS

Before *Cooper v. Aaron* was argued, Chief Justice Warren had asked Justice Brennan to prepare a memo about the case for the Court's consideration.[203] Professors Seth Stern and Stephen Wermiel recount an exchange between Brennan and Warren while they were travelling on a plane: "Well, Chief," Brennan began, "do you want me to try to turn something out? I'll be glad to do it."[204] Warren's trust led him to assign Brennan as the primary drafter of the majority opinion,[205] although as the process progressed, all nine Justices provided several rounds of detailed suggestions. Ultimately, Brennan became more of a "supervising editor."[206]

I was able to identify six entirely distinct drafts in Justice Brennan's files. The initial draft was undated but was prepared at some point prior to September 17, 1958—the date on which the third draft was circulated.[207] It was a sixteen-page

197. The papers of Justices Black, Brennan, Burton, Douglas, Frankfurter, and Harlan were copied from the Library of Congress. The papers of Justice Harlan were copied from Princeton University. The papers of Justice Clark were copied from the University of Texas, Austin.

198. Reproductions of these papers are available online at Josh Blackman, *Shared Papers from The Irrepressible Myth of* Cooper v. Aaron, GOOGLE DRIVE, http://bit.ly/2ohX8Rq (last visited Apr. 14, 2019) (compiling documents from *Cooper v. Aaron*).

199. 5 U.S. (1 Cranch) 137 (1803).

200. 9 U.S. (5 Cranch) 115 (1809).

201. 62 U.S. (21 How.) 506 (1858).

202. 287 U.S. 378 (1932).

203. SETH STERN & STEPHEN WERMIEL, JUSTICE BRENNAN: LIBERAL CHAMPION 143 (2010).

204. *Id.*

205. *Id.* at 145 (noting that the "groundwork laid between Warren and Brennan on the plane ride back to Washington and in a private meeting the morning before the oral argument had helped [Justice Brennan] land the assignment").

206. Hutchinson, *supra* note 118, at 79.

207. Justice William J. Brennan, Initial Draft Majority Opinion in Cooper v. Aaron (undated), https://perma.cc/WL98-6N53 [hereinafter Initial Draft Majority Opinion] (emphasis added).

typewritten document that lacked the usual formatting of a Supreme Court decision. It does not appear to have been circulated to any other Justices.

The first version of the draft ("1st draft")—also prepared at some point before September 17, 1958—appeared only in the papers of Chief Justice Warren. I surmise that Justice Brennan shared it with the Chief alone.[208] This thirteen-page document also lacked the usual formatting of a Supreme Court decision.

The document Justice Brennan labelled as his "2nd draft," an eighteen-page document including the usual formatting of a Supreme Court decision, also does not appear to have been circulated to the Court.[209] The document Justice Brennan labelled as his "3rd Draft" appears barely distinguishable from his "2nd draft."[210] The 3rd draft, an eighteen-page document was circulated to the entire Court on September 17, 1958, and appears to be the first version that the other Justices reviewed. Justice Harlan wrote on top of his received copy, "W.J.B. Draft No. 1"[211] (W.J.B. were the initials of William J. Brennan). Justice Clark provided immediate feedback on the third draft.[212] Justice Douglas—who was traveling during this time—reviewed the third draft at some point, as evidenced by his marginalia,[213] but did not circulate any comments. The following day, Justice Burton provided Justice Brennan with a fourteen-page memo that suggested numerous edits.[214] Chief Justice Warren's memo was only five pages long.[215] Shortly thereafter, Justice Harlan began drafting, unsolicited, an alternate version of an opinion for the Court. He apparently showed it only to his conservative colleagues, Justices Clark and Frankfurter.[216]

208. Justice William J. Brennan, First Draft of the Majority Opinion in Cooper v. Aaron (undated), https://perma.cc/895Z-KPDU [hereinafter First Draft Majority Opinion].

209. Justice William J. Brennan, Second Draft of the Majority Opinion in Cooper v. Aaron (undated), https://perma.cc/P7MR-QMXS [hereinafter Second Draft Majority Opinion].

210. *See* Justice William J. Brennan, Third Draft of the Majority Opinion in Cooper v. Aaron (Sept. 17, 1958), https://perma.cc/XA4P-CK7F [hereinafter Third Draft Majority Opinion].

211. Justice John Marshall Harlan II, Comments on the Third Draft of the Majority Opinion in Cooper v. Aaron (Sept. 17, 1958), https://perma.cc/EPP7-KM6P [hereinafter Harlan Comments on Third Draft].

212. *See* Justice Tom C. Clark, First Version of Comments on the Third Draft of the Majority Opinion in Cooper v. Aaron 1 (Sept. 17, 1958), https://perma.cc/5ZWP-NJMW [hereinafter Clark Comments on Third Draft Version 1].

213. *See* Justice William O. Douglas, Comments on the Third Draft of the Majority Opinion in Cooper v. Aaron (Sept. 17, 1958), https://perma.cc/C8CT-Z9BS [hereinafter Douglas Comments on Third Draft].

214. *See* Memorandum from Justice Harold H. Burton, U.S. Supreme Court, Responding to the Third Draft of the Majority Opinion in Cooper v. Aaron (Sept. 18, 1958), https://perma.cc/WW3T-DEAB [hereinafter Burton Memorandum on Third Draft].

215. *See* Memorandum from Chief Justice Earl Warren, U.S. Supreme Court, Responding to the Third Draft of the Majority Opinion in Cooper v. Aaron (Sept. 18, 1958), https://perma.cc/NG78-9KKX [hereinafter Warren Memorandum on Third Draft].

216. *See* STERN & WERMIEL, *supra* note 203, at 149.

On September 22, 1958, Justice Brennan circulated the document he labelled his "4th draft," which included substantial changes.[217] Later that day, Justice Black circulated line edits to the fourth draft.[218]

The following day, Justice Harlan informed his colleagues by letter that he proposed replacing the last five pages of Justice Brennan's fourth draft:[219]

> Dear Bill:
>
> I hope you won't mind my persisting with some further suggestions about the opinion in this case. I am led to what you may consider an unusually tenacious course by the belief that you feel, I am sure, as strongly as I do, that the Court's ultimate product should be the best which the combined thoughts of the individual members of the Court can achieve. On this assumption, I am venturing to enclose a proposed substitute for pages 10–15 of your recirculation, believing again that the full articulation of my views may be more helpful than merely indicating them by marginal notes on your revised draft. I think you will find that in this substitute I have omitted no thought of substance contained in your draft. My problem is basically one of organization of the opinion. In so far as there are also differences in phrasing between the two of us, I ventured to do it the way I did because in this case, surely form and substance are inseparable. If this were an opinion under your sole authorship, I would not think of pursuing this course. In that situation, I would have joined your draft.
>
> Since I think our Conference discussion tomorrow will be advanced by having everyone's thoughts on paper, I am taking the liberty of circulating my proposed substitute to the Brethren, together with a copy of this letter.
>
> . . .
>
> May I hope that you will consider none of this presumptuous on my part.
>
> Sincerely,
> J.M.H.[220]

Harlan included with this letter a "Suggested Substitute for Pages 10–15 of W.J.B.'s Draft."[221] The substitute was itself ten pages long.[222] Harlan's

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217. *See* Justice William J. Brennan, Fourth Draft of the Majority Opinion in Cooper v. Aaron (Sept. 22, 1958), https://perma.cc/8SQ8-QAZU [hereinafter Fourth Draft Majority Opinion]; *see also infra* Section III.C.3 (discussing differences in Justice Brennan's treatment of *Marbury v. Madison* in drafts three and four).

218. *See* Justice Hugo Black, Comments on the Fourth Draft of the Majority Opinion in Cooper v. Aaron (Sept. 22, 1958), https://perma.cc/KZ3E-24DA [hereinafter Black Comments on Fourth Draft].

219. Letter from Justice John Marshall Harlan II, U.S. Supreme Court, to Justice William J. Brennan, U.S. Supreme Court (Sept. 23, 1958), https://perma.cc/2EBJ-BGRD (Part I), https://perma.cc/2EBJ-BGRD (Part II) [hereinafter Harlan Letter to Brennan].

220. *Id.* at 1–2.

221. Suggested Substitute for Pages 10–15 of the Draft Majority Opinion in Cooper v. Aaron from Justice John Marshall Harlan II, U.S. Supreme Court, to Justice William J. Brennan, U.S. Supreme Court (Sept. 23, 1958), https://perma.cc/H5F6-NJKP [hereinafter Harlan Suggested Substitute].

222. *Id.*

biographer speculated that the Justice may have thought this "somewhat more moderate" approach could have helped more Justices to join the opinion.[223]

Harlan's proposal did not go over well at the conference held on September 23, 1958. Harlan's own notes record that Justice Burton "[l]ikes latest draft of WJB," and "[l]ikes W.J.B.'s '5' pages better than [John Marshall Harlan's] draft."[224] The next day, Justice Brennan circulated a letter that rejected Harlan's offering:[225] "In short," he wrote, "I personally prefer the treatment of pages 10 to 15 as revised in my present circulation."[226]

Justice Brennan's fifth draft was dated September 24, 1958.[227] And, on September 25, 1958, Justice Brennan circulated the document he labeled his "6th" and final draft.[228] Justice Brennan received comments from Chief Justice Warren,[229] and Justices Black,[230] Clark,[231] and Burton.[232] Justice Harlan provided edits. Despite his prior misgivings, Justice Harlan came to accept the general structure of the joint opinion.[233] The final opinion was published and released, with few stylistic changes, on September 29, 1959.[234]

To establish the principles of judicial supremacy and universality, the various drafts relied on five primary sources of authority: Article VI of the Constitution, *Marbury v. Madison*, *United States v. Peters*, *Ableman v. Booth*, and *Sterling v. Constantin*. The next section considers each source in turn as they were developed throughout the six drafts.

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223. TINSLEY E. YARBROUGH, JOHN MARSHALL HARLAN: GREAT DISSENTER OF THE WARREN COURT 168 (1992).

224. *See* Justice John Marshall Harlan II, Conference Meeting Notes in Cooper v. Aaron 1 (Sept. 23, 1958), https://perma.cc/GW8A-GUR9 [hereinafter Harlan Conference Meeting Notes].

225. *See* Memorandum from Justice William J. Brennan, U.S. Supreme Court, Responding to Suggested Substitute for Pages 10–15 of the Draft Majority Opinion in Cooper v. Aaron from Justice John Marshall Harlan II, U.S. Supreme Court (Sept. 24, 1958), https://perma.cc/A8JA-6MW4 [hereinafter Brennan Response to Harlan].

226. *Id.* at 2.

227. Justice William J. Brennan, Fifth Draft of the Majority Opinion in Cooper v. Aaron (Sept. 24, 1958), https://perma.cc/S5XW-XJYA [hereinafter Fifth Draft Majority Opinion].

228. Justice William J. Brennan, Sixth Draft of the Majority Opinion in Cooper v. Aaron (Sept. 25, 1958), https://perma.cc/422M-A3DJ [hereinafter Sixth Draft Majority Opinion].

229. *See* Chief Justice Earl Warren, Comments on the Sixth Draft of the Majority Opinion in Cooper v. Aaron (Sept. 25, 1958), https://perma.cc/9CWJ-9WML [hereinafter Warren Comments on Sixth Draft].

230. *See* Justice Hugo Black, Comments on the Sixth Draft of the Majority Opinion in Cooper v. Aaron (Sept. 25, 1958), https://perma.cc/6GRU-LVT2 [hereinafter Black Comments on Sixth Draft].

231. *See* Justice Tom C. Clark, Comments on the Sixth Draft of the Majority Opinion in Cooper v. Aaron (Sept. 25, 1958), https://perma.cc/6HVS-TTSG [hereinafter Clark Comments on Sixth Draft].

232. *See* Justice Harold Burton, Comments on the Sixth Draft of the Majority Opinion in Cooper v. Aaron (Sept. 26, 1958), https://perma.cc/T4ML-TZDS [hereinafter Burton Comments on Sixth Draft].

233. *See* Justice John Marshall Harlan II, Comments on the Sixth Draft of the Majority Opinion in Cooper v. Aaron (Sept. 25, 1958), https://perma.cc/2X24-EQQZ [hereinafter Harlan Comments on Sixth Draft].

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

### B. ARTICLE VI

In light of the expansive scope of the Supreme Court's final decision, it is very easy to lose sight of the actual legal controversy that gave rise to *Cooper v. Aaron*: whether the Little Rock School Board should be given a thirty-month extension to comply with the court-approved desegregation plan.[235] The federal district court ruled that an extension should be granted, in light of the "chaos, bedlam and turmoil" that resulted from the prior desegregation order.[236] The court of appeals reversed. An extension, the Eighth Circuit concluded, could not be reconciled with *Brown*'s command to integrate with "all deliberate speed."[237] The court of appeals majority opinion made no mention of the Supremacy Clause, nor did Chief Judge Gardner's dissent.[238] There was no assertion anywhere in the opinion that the Little Rock Independent School District was attempting to flout the Constitution, let alone *Brown*. Rather, there was a dispute about whether the district court judge abused his discretion by granting an extension.[239] Indeed, even the Supreme Court's decision in *Cooper* made no mention of the Supremacy Clause until the very end.[240]

Yet as the case was appealed to the Supreme Court, it evolved rapidly. The actions of Governor Faubus—who was *not* a party to the *Cooper* petition—compelled the Court to reassess the power of its own decisions. Specifically, throughout each of the six drafts, *Cooper* cited two provisions in Article VI to establish the principles of judicial supremacy: the Supremacy Clause and the Oaths Clause. The former provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.[241]

Without question, the "Constitution, and the Laws of the United States which shall be made in Pursuance" are the "supreme Law of the Land," and they preempt any state law "to the Contrary."[242] Additionally, "the Judges in every State

235. *See supra* Part I.

236. Aaron v. Cooper, 163 F. Supp. 13, 20–26 (E.D. Ark. 1958).

237. Aaron v. Cooper, 257 F.2d 33, 34, 40 (8th Cir. 1958) ("Mindful as we are that the incidents which occurred within Central High School produced a situation which adversely affected normal educational processes, we nevertheless are compelled to hold that such incidents are insufficient to constitute a legal basis for suspension of the plan to integrate the public schools in Little Rock.").

238. *See id.* at 41 (Gardner, C.J., dissenting).

239. *See id.* at 40 ("An impossible situation could well develop if the District Court's order were affirmed."); *see also id.* at 41 (Gardner, C.J., dissenting) ("The exercise of [the district court's] discretion should not, I think, be set aside as it seems to me it was not an abuse of discretion but rather a discretion wisely exercised under the conditions.").

240. Cooper v. Aaron, 358 U.S. 1, 18 (1958).

241. U.S. CONST. art. VI, cl. 2.

242. *Id.*

shall be bound" by that "supreme Law of the Land."[243] This provision by itself, however, does not establish that the Supreme Court's decisions are themselves the "supreme Law of the Land." The text of the Supremacy Clause does not even indicate that state executive or legislative branch officials are bound by the "supreme Law of the Land." Only state judges bear this additional responsibility. Nor does the Supremacy Clause bind state executive or legislative branch officials to Supreme Court decisions to which they are not parties.

The second relevant provision of Article VI is the Oaths Clause. It provides: "The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution."[244] Unlike the Supremacy Clause, this provision expressly mentions "Members of the several State Legislatures, and all executive" *as well as* "judicial Officers."[245] They are all "bound" to "support this Constitution."[246] But only Judges are "bound" by the "supreme Law of the Land."[247] Though subtle, there is a textual difference between these two obligations.

In *Printz v. United States*, Justice Scalia relied on this distinction to demonstrate "that the Constitution was originally understood to permit imposition of an obligation on state *judges* to enforce federal prescriptions," but a similar imposition on state executive branch officials was not permitted.[248] He added that "unlike legislatures and executives, [state courts] applied the law of other sovereigns all the time."[249] Thus, it made sense to assign more responsibilities to state judges.

Justice Stevens's dissent in *Printz* disputed this dichotomy as a matter of history, but he could not dispute it as a matter of text.[250] Professor Tribe observed that "[r]ead narrowly, the supremacy clause binds only state judges."[251] Whether you accept this distinction for purposes of *Printz*'s commandeering doctrine, there is no question that Article VI imposes some higher obligation on state judges than it does on state executive branch officials.[252] To remedy this shortcoming, in 2014, Justice Stevens proposed amending Article VI to expressly overturn the outcome in *Printz*: "Adding just four words—'and other public officials'— immediately after the word 'Judges' in the Supremacy Clause would, under the Court's reasoning, expressly confirm the power of Congress to impose

243. *Id.*
244. *Id.* art. VI, cl. 3.
245. *Id.*
246. *Id.*
247. *See* Josh Blackman, *State Judicial Sovereignty*, 2016 U. ILL. L. REV. 2033, 2039.
248. 521 U.S. 898, 907 (1997).
249. *Id.*
250. *Id.* at 969 (Stevens, J., dissenting).
251. TRIBE, *supra* note 153, § 3-4, at 33.
252. *See* Richard M. Re, *Promising the Constitution*, 110 NW. U. L. REV. 299, 342–44 (2016).

mandatory duties on public officials in every state."[253] Even if ratified, however, that amendment would only bind all "other public officials" to federal law, and not the Supreme Court's *decisions*.

Justice Harlan's proposed substitute opinion in *Cooper v. Aaron*—which was ultimately rejected—grounded its analysis of judicial universality principally on the basis of Article VI.[254] He did not even cite, as did Justice Brennan, *Marbury v. Madison*. Justice Harlan wrote:

> At the core of the issue before us is the Supremacy Clause of the Constitution, Art. VI, Cl. 2, . . . The constitutional oath required by Art. VI, Cl. 3 of every person holding state or federal executive, legislative or judicial office embraces *of course* both acts of Congress *and the judgments of this Court* which under our federal system has the final responsibility for constitutional adjudication.[255]

The emphasized portions reflect the shortcomings of an argument premised on Article VI: the Article says nothing about "the judgments of this Court."[256] Prefacing a conclusion with "of course" does not make it conclusive. Professor Farber noted that the Oaths Clause "can equally well be read as requiring an oath to support the Constitution as the oathtaker, not the Court, understands it."[257] That is, each person has an independent obligation to interpret the Constitution as he or she deems appropriate. It is little surprise, then, that Justice Harlan's colleagues sought to ground judicial supremacy and universality with a stronger—though not perfect—anchor: *Marbury v. Madison*.

### C. *MARBURY V. MADISON*

In a short space, Justice Brennan sought to articulate the principles of judicial supremacy and universality in *Cooper v. Aaron*. He did so by blending the new with the familiar. And no case is more familiar to lawyers than *Marbury v. Madison*.[258] Chief Justice Marshall asserted that the Constitution was "the fundamental and paramount law of the nation."[259] It was the role of the Supreme Court to "say what the law is."[260] However, this canonical case did not hold that the Supreme Court's decisions were the "supreme Law of the Land" for purposes of the Supremacy Clause. Justice Brennan's earlier drafts hinted at this conclusion,[261] but after comments from the Brethren,[262] the strength of that claim was

253. JOHN PAUL STEVENS, SIX AMENDMENTS: HOW AND WHY WE SHOULD CHANGE THE CONSTITUTION 29 (2014).
254. *See* Harlan Suggested Substitute, *supra* note 221, at 7–10.
255. *Id.* at 8 (emphases added).
256. *Id.*
257. Farber, *supra* note 150, at 404.
258. 5 U.S. (1 Cranch) 137 (1803).
259. *Id.* at 177.
260. *Id.*
261. *See, e.g.*, Third Draft Majority Opinion, *supra* note 210, at 9–10.
262. *See, e.g.*, Black Comments on Fourth Draft, *supra* note 218, at 13–14.

weakened. This section traces the development of how *Marbury* was discussed throughout each of *Cooper*'s six drafts.

1. Initial Draft (Prepared Before September 17, 1958)

Justice Brennan's initial draft sought to "recall some elementary constitutional propositions which are no longer open to question" about the "significance . . . [that] the states [must] attach to [*Brown*] under our constitutional system."[263] The draft noted that the "actions of [the] Arkansas Governor and Legislature have spread doubt and confusion as to [*Brown*'s] significance under our federal system."[264] He wrote:

> The great constitutional truth declared by Chief Justice Marshall over a century ago in Marbury v. Madison, 1 Cranch 137 is that the federal Constitution is "the fundamental and paramount law of the Nation." *Marshall also declared in that case the basic principle of the supremacy of the judicial power of the United States in the exposition of the Constitution*. He said, "it is emphatically the province and duty of the judicial department to say what the law is." *It follows from these principles that the interpretation of the Constitution enunciated by this Court in the* Brown *case is the supreme law of the land*, and is made by Article VI of the Constitution of binding effect on the states "anything in the Constitution or Laws of any State to the Contrary notwithstanding."[265]

The first emphasized sentence articulates the principle of judicial supremacy. That is, the Supreme Court is supreme in its interpretation of the Constitution. This position was most famously articulated by Senator Stephen Douglas, who, in debates with Abraham Lincoln, contended that "the Constitution is in the Supreme Court's keeping and must be supported as declared by the Court."[266]

First-year law students often read *Marbury* and simply assume that the decisions of the Supreme Court *are* the "supreme Law of the Land," as Brennan and Douglas contended. But *Marbury* said no such thing. Professor Herbert Wechsler succinctly stated the rule of *Marbury v. Madison*: "[T]he Court decides a case; it does not pass a statute calling for obedience by all within the purview of the rule that is declared."[267] Justice Breyer likewise observed that neither Chief Justice Marshall nor "the cases after *Marbury*" had articulated such a broad conception of judicial supremacy.[268]

To the contrary, Chief Justice Marshall concluded that "the framers of the constitution contemplated that instrument [the Constitution] as a *rule for the government of courts, as well as of the legislature*."[269] The penultimate sentence of

263. Initial Draft Majority Opinion, *supra* note 207, at 1.
264. *Id.*
265. *Id.* at 1–2 (emphases added).
266. BICKEL, *supra* note 58, at 261.
267. Wechsler, *supra* note 176, at 1008.
268. BREYER, *supra* note 19, at 62.
269. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 179–80 (1803) (emphasis added).

*Marbury* directly conflicts with Justice Brennan's assumption: "Thus, the particular phraseology of the constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the constitution is void; and that *courts*, *as well as other departments*, are bound by that instrument."[270] All "departments" of the government are bound by the Constitution,[271] and each officer takes an oath "to support this Constitution."[272] The Supreme Court does not have a monopoly on interpreting the Constitution. Rather, all officers—state and federal—take an oath to "support this Constitution"[273] and have the authority to determine its meaning within their own spheres of autonomy. This view of shared supremacy is commonly referred to as "departmentalism."[274] In *Making our Democracy Work*, Justice Breyer adopted a similar view. He conceded that "*Marbury* said more ambiguously that 'courts, as well as other departments, are bound by' the Constitution."[275]

Members of the executive and legislative branches—at both the state and federal levels—constantly make judgments about what is, and is not, constitutional without ever seeking a judicial declaration. For example, every time a police officer decides to make a traffic stop, she must decide whether doing so violates the Fourth Amendment. Only the most controversial or contested questions are submitted for resolution before a state or federal tribunal, and only the rarest cases are elevated to the Supreme Court. Professor Tribe noted that *Cooper* "ignores the reality" under which "a variety of actors must make their own constitutional judgments, and possess the power to develop interpretations of the Constitution which do not necessarily conform to the judicially enforced interpretation articulated by the Supreme Court."[276] This conclusion may come as a surprise to most law students—who do little except read common law cases[277]—but the overwhelming majority of constitutional law is developed outside the familiar confines of Article III.

The two emphasized sentences in the initial draft above most directly reflect Justice Brennan's personal views on the issues of judicial supremacy and universality. They would not stand for long. As the initial draft made its way through the editing process, this claim that supremacy and universality could be traced back to *Marbury* would be weakened. Eventually, the Court came to admit that this doctrine was not familiar, but quite novel.

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270. *Id.* at 180 (emphasis added).

271. *Id.*

272. U.S. CONST. art. VI, cl. 3.

273. *Id.*

274. *See generally* Kevin C. Walsh, *Judicial Departmentalism: An Introduction*, 58 WM. & MARY L. REV. 1713 (2017) (discussing the legal foundations of judicial departmentalism and why it matters).

275. BREYER, *supra* note 19, at 62.

276. TRIBE, *supra* note 153, § 3-4, at 34–35.

277. ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 7 (1997) ("It explains why first-year law school is so exhilarating: because it consists of playing common-law judge, which in turn consists of playing king—devising, out of the brilliance of one's own mind, those laws that ought to govern mankind. How exciting! And no wonder so many law students, having drunk at this intoxicating well, aspire for the rest of their lives to be judges!").

2. Second Draft (Prepared Before September 17, 1958)

In his second draft, Justice Brennan largely retained the discussion of *Marbury* from his initial draft.[278] There were some slight changes. For example, "the basic principle of the supremacy of the judicial power of the United States in the exposition of the Constitution"[279] became "the basic principle that the judicial power of the United States *is supreme* in the exposition of the Constitution."[280]

Justice Brennan never circulated his second draft to the Court. However, his third draft, which Brennan circulated to the Court with only minor revisions from the second draft, garnered significant comments.

3. Third Draft (September 17, 1958)

Justice Burton was troubled by the third draft. Justice Brennan wrote, "The *Brown* case nullified all state laws which required or permitted segregation of the public schools of the States and required the States to desegregate those schools 'with all deliberate speed.'"[281] That is, all laws—including those outside the four states that were party to the *Brown* litigation—were instantly "nullified." Justice Burton expressed his "difficulty" with the structure of this paragraph.[282] He wrote:

> The paragraph tends to jump from the supremacy clause, to dictum designed to invalidate laws such as pupil placement laws or "private school" evasions of Brown, to the affirmative duty of state officers to bring the segregation of state schools to an end, to the fact that state action is to be found in the acts of state officers. I can only read this paragraph as an attempted "catch-all" to show that Brown is here to stay and cannot be evaded by state officials, no matter the plan they adopt. I have no particular suggestions as to what should be done with this paragraph.[283]

Justice Clark also expressed difficulty with this draft. He scribbled in the margins, "What about Constitution[?]" and inquired about the "role of Ct. as interpreter."[284] Indeed, Justice Clark's law clerk, Max O. Truitt, expressed strong reservations about the entire analysis. He wrote a candid memo to his boss:

> The emphasis on Art. VI, para. 3 [the Oaths Clause] is too strong, especially when taken in conjunction with the statement concerning the self-executing nature of the 14th Amendment. The "duty" impressed by Brown can be said to be a duty to admit Negroes to previously segregated schools where the

278. *See* Second Draft Majority Opinion, *supra* note 209, at 9–11.
279. Initial Draft Majority Opinion, *supra* note 207, at 1.
280. Second Draft Majority Opinion, *supra* note 209, at 9.
281. Third Draft Majority Opinion, *supra* note 210, at 11.
282. *See* Burton Memorandum on Third Draft, *supra* note 214, at 9–10.
283. *Id.* at 10.
284. Justice Tom C. Clark, Second Version of Comments on the Third Draft of the Majority Opinion in Cooper v. Aaron 9 (Sept. 17, 1958), https://perma.cc/QR3H-ZXXT [hereinafter Clark Comments on Third Draft Version 2].

> Negroes seek admission. I have always taken the proposition that the 14th Amendment was self-executing to mean that the courts did not need to await Congressional action before they declare rights under the amendment. Throughout the opinion, that concept seems to be put to another use: namely that all state officials are under the positive Constitutional obligation to desegregate "with all deliberate speed." It seems to me that in the opinion some stress could be laid on the fact that these Negro children have undertaken (through court action) to secure the enforcement of their rights, and that it is because of the action of the State that the Board now asks a stay. I think it cannot be too strongly stated that state action may in no circumstances serve as a justification for the non-enforcement of integration — or of any other Constitutional right, for that matter.[285]

In other words, the student-plaintiffs in *Cooper* were entitled to relief from the School Board because they "ha[d] undertaken (through court action) to secure the enforcement of their rights."[286] They were entitled to relief because of their lawsuit, not because of *Brown*. Article VI, standing by itself, did not provide the rule of decision. Neither did *Marbury*.

Dismissing his clerk's weighty, substantive concerns, Justice Clark scribbled a proposed dissent by hand on a memo pad.[287] According to Bernard Schwartz, Clark likely never told any of his colleagues about the dissent, which focused on procedural grounds.[288] The dissent admonished the Court for hearing the case on an expedited basis, and not following the "regular course."[289] Justice Clark wrote:

> I know of no reason why we should set aside all procedural rules in this case and still require other litigants to comply with the same. The case should be considered in its regular course not by forced action. Of all tribunals this is one that should stick strictly to the rules. To do otherwise is to create the very situation that the constitution prohibits, the existence of a preferred class.[290]

Justice Clark made the point even more bluntly in another handwritten draft:

> The fact that there are those who by "massive resistance" are attempting to deprive some of our citizens of their constitutional rights is no justification for depriving respondents of their day in court. Our order did not contemplate

285. Letter from Max O. Truitt, Law Clerk to Justice Tom C. Clark, to Justice Tom C. Clark, U.S. Supreme Court 1–2 (Sept. 1958), https://perma.cc/68M6-P8S9 [hereinafter Truitt Letter to Clark].

286. *Id.*

287. Justice Tom C. Clark, First Draft of a Proposed Dissent in Cooper v. Aaron (undated), https://perma.cc/37WN-JACC [hereinafter Clark First Draft Proposed Dissent].

288. BERNARD SCHWARTZ, SUPER CHIEF: EARL WARREN AND HIS SUPREME COURT—A JUDICIAL BIOGRAPHY 294 (1983) (noting that Clark's draft "was never typed, much less circulated" and "[i]f Clark did talk over the matter with Warren, there is no doubt that the Chief used all his persuasive powers to induce the Texan not to break the Court's unanimity").

289. *See* Clark First Draft Proposed Dissent, *supra* note 287, at 2.

290. *Id.*

> "massive integration" but that it would be accomplished in good faith and in regular course.
>
> I would deny the stay and dispose of the case on its merits in regular course.[291]

Ultimately, Clark never circulated his dissent and joined the majority opinion.[292]

4. Fourth Draft (September 22, 1958)

Justice Brennan's fourth draft was quite different from the prior drafts. The earlier version discussed *Marbury* early on in the analysis on pages nine through ten.[293] The fourth draft pushed the discussion of *Marbury* back to page thirteen, after the merits had already been resolved.[294] Justice Brennan introduced the discussion of *Marbury* as a dictum, for it was admittedly not necessary to resolve this case:

> What has been said in the light of the facts developed disposes of the case, and compelled our unanimous affirmance of the judgment of the Court of Appeals. However, since the School Board says that the actions of the Governor and Legislature have spread doubt and confusion as to the significance of the *Brown* decisions under our federal system, it may be well to recall some elementary constitutional propositions which are no longer open to question.[295]

There were several other changes. Justice Brennan formerly described *Marbury* as a "great constitutional truth."[296] Now it was simply a "great case."[297] But unchanged were the two critical premises. First, he wrote, "Marshall also declared in that case the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution."[298] Second, Justice Brennan added, "It follows from these principles that the interpretation of the Constitution enunciated by this Court in the *Brown* case is the supreme law of the land, and is made by Art. VI of the Constitution of binding effect on the States."[299] It would be this last sentence that set the contours of judicial supremacy. Stern and Wermiel observed, "That phrase would become the opinion's most enduring source of controversy, attacked by conservative critics of the Court for decades as evidence of excessive judicial hubris."[300] Justice Brennan, they wrote, "insisted that [this]

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291. Justice Tom C. Clark, Second Draft of a Proposed Dissent in Cooper v. Aaron (undated), https://perma.cc/ZS9U-JN7G [hereinafter Clark Second Draft Proposed Dissent].
292. *See* SCHWARTZ, *supra* note 288, at 294.
293. *See* Third Draft Majority Opinion, *supra* note 210, at 9–10.
294. *See* Fourth Draft Majority Opinion, *supra* note 217, at 13.
295. *Id.*
296. Third Draft Majority Opinion, *supra* note 210, at 9.
297. Fourth Draft Majority Opinion, *supra* note 217, at 13.
298. *Id.*
299. *Id.* at 13–14.
300. STERN & WERMIEL, *supra* note 203, at 149.

expansive definition of judicial review was the only possible way to interpret the Court's decisions."[301]

Ultimately, Justice Brennan softened this claim. But at this juncture, Justice Black suggested that this point should be made *even more* explicitly. Rather than merely stating that "the Governor and Legislature have spread doubt and confusion as to the significance of the *Brown* decisions,"[302] Justice Black would have referred to the "duty of respondents to accept our interpretation of the 14th Amendment as the Law of the Land."[303] Further, he would have deleted all citations to *Marbury* and simply stated that "the interpretation of the 14th Amendment enunciated by this Court in the *Brown* case is the supreme law of the land, and Art. VI of the Constitution makes it [of] binding effect on the States."[304] That is, *Cooper*'s holding could stand solely on the basis of Article VI, without *Marbury* or any other case. Justice Harlan's proposed substitute took a similar tack as Justice Black's comments: it did not mention *Marbury v. Madison* but was grounded entirely in Article VI.[305] This view was in the minority, and Black's suggestion was not adopted.[306]

According to Justice Harlan's conference notes, Justice Burton "would elaborate the 'Marbury v. Madison' section of [the] opinion," stating that the "Court accepts its responsibility to construe [the] constitution."[307] In a September 24, 1958 letter, Justice Brennan criticized Justice Harlan's omission of *Marbury* as one of two "vital statement[s that are] very essential to the point we are making."[308] He wrote: "Secondly, [Harlan's] suggestions omit reference to Marbury v. Madison, and the detailed discussion in my draft of this Court's responsibility for exposition of the law of the Constitution. That too I think is a very essential part of what I believe our opinion should contain."[309]

Justice Brennan also objected to another one of Justice Harlan's substitutions. The latter proposed an alternative formulation: "Since the first Brown opinion three new Justices have come to the Court. They are at one with the Justices still on the Court who participated in the original decision as to the inescapability of that decision."[310] The three new members were Justices Harlan, Brennan, and Whittaker, who joined the Court in 1955, 1956, and 1957, respectively.[311] To this

301. *Id.*
302. Fourth Draft Majority Opinion, *supra* note 217, at 13.
303. Black Comments on Fourth Draft, *supra* note 218, at 13.
304. *Id.* at 13–14.
305. *See* Harlan Suggested Substitute, *supra* note 221, at 8–10; *see also supra* notes 220–24.
306. *See* Cooper v. Aaron, 358 U.S. 1, 18 (1958) (relying on *Marbury*).
307. Harlan Conference Meeting Notes, *supra* note 224, at 2.
308. Brennan Response to Harlan, *supra* note 225, at 1.
309. *Id.*
310. Harlan Suggested Substitute, *supra* note 221, at 9.
311. *See William J. Brennan, Jr., 1956–1990*, SUP. CT. HIST. SOC'Y, http://supremecourthistory.org/timeline_brennan.html [https://perma.cc/UJ4L-PB4A] (last visited Apr. 14, 2019); *John Marshall Harlan II, 1955–1971*, SUP. CT. HIST. SOC'Y, http://supremecourthistory.org/timeline_harlan_1955_1971.html [https://perma.cc/32T7-4PN6] (last visited Apr. 14, 2019); *Charles E. Whittaker,*

proposal, Justice Brennan wrote a revealing statement about the nature of judicial supremacy:

> The changes would substitute an emphasis upon the adherence of the three new members of the Court to the Brown principles. I feel that any such reference to the three new members would be a grave mistake. It lends support to the notion that the Constitution has only the meaning that can command a majority of the Court as that majority may change with shifting membership. Whatever truth there may be in that idea, I think it would be fatal in this fight to provide ammunition from the mouth of this Court in support of it.[312]

Justice Brennan was cognizant that the Court's composition affects the outcome of cases. Stern and Wermiel recount this now-famous anecdote:

> Brennan liked to greet his new clerks each fall by asking them what they thought was the most important thing they needed to know as they began their work in his chambers. The pair of stumped novices would watch quizzically as Brennan held up five fingers. Brennan then explained that with five votes, you could accomplish anything.[313]

Three is not five, to be sure, but the votes of the newly appointed members could change a unanimous *Brown* decision to one that is more closely divided. Why, then, was Brennan so opposed to including this message here? My theory: to avoid giving the massive resistance reinforcement that, as Brennan wrote, "the Constitution has only the meaning that can command a majority of the Court."[314] Such an observation would amount to kryptonite for judicial supremacy. The "supreme Law of the Land" can only be changed through the Article V amendment process.[315] If the addition of five new Justices can change the Constitution, then the decisions of the Supreme Court *cannot* be the "supreme Law of the Land." Justice Brennan implicitly recognized this conclusion. He even acknowledged that there may be "truth . . . in that idea."[316] However, a public declaration of this premise "would be fatal in this fight to provide ammunition from the mouth of this Court in support of it."[317] This assertion recognizes how weak the Court's judgments in fact actually are. It brings to mind Justice Robert H. Jackson's candid admission from five years before *Cooper v. Aaron* in the penultimate year of his life: "We are not final because we are infallible, but we are infallible only because we are final."[318]

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*1957–1962*, SUP. CT. HIST. SOC'Y, http://supremecourthistory.org/timeline_whittaker.html [https://perma.cc/CJ22-G7EW] (last visited Apr. 14, 2019).

312. Brennan Response to Harlan, *supra* note 225, at 1–2.

313. STERN & WERMIEL, *supra* note 203, at 196.

314. Brennan Response to Harlan, *supra* note 225, at 2.

315. *See* U.S. CONST. art. V.

316. Brennan Response to Harlan, *supra* note 225, at 2.

317. *Id.*

318. Brown v. Allen, 344 U.S. 443, 540 (1953) (Jackson, J., concurring).

On this argument, Harlan prevailed. Fittingly, Stern and Wermiel quipped that Brennan, who was a "keen vote counter," ultimately "relented in the interest of strong support."[319] The Court's final opinion, perhaps with a nod to judicial supremacy, stated that "[s]ince the first *Brown* opinion three new Justices have come to the Court. They are at one with the Justices still on the Court who participated in that basic decision as to its correctness, and that decision is now unanimously reaffirmed."[320] The "supreme Law of the Land" was safe, even after three more Eisenhower appointees joined the Court.[321]

5. Fifth Draft (September 24, 1958)

Justice Brennan's fifth draft, dated September 24, 1958, included five key modifications.[322] First, "the significance of the *Brown* decisions"[323] was changed to "the duty of obedience to the *Brown* decisions."[324] This claim was strengthened. Second, "elementary constitutional propositions which are no longer open to question"[325] became "basic constitutional propositions which are ordinarily accepted as settled doctrine."[326] This claim was weakened.

Third, instead of leading off with *Marbury*, Justice Brennan took a page from Harlan's suggestion, with this new, nuanced sequencing:

> Article VI of the Constitution makes the Constitution the "supreme law of the land." The Constitution does not specifically declare how the meaning of that Constitution is to be finally and authoritatively determined. That was a mooted question in the early days notwithstanding that Madison, generally referred to as the Father of the Constitution, said in Congress in 1789 that "independent tribunals of justice will consider themselves in a peculiar manner as the guardians of constitutional rights." 1 Annals of Congress 440.[327]

Now it was the Constitution itself, and not a decision of the Supreme Court, that formed the basis for judicial supremacy. Yet this analysis injected some uncertainty into the doctrine, as Justice Brennan acknowledged that the "Constitution does not specifically declare how the meaning of that Constitution is to be finally and authoritatively determined."[328] It was not a self-evident question how the "supreme Law of the Land" was to be determined. To Justice Brennan, it was Madison, not *Marbury*, that "mooted" this debate.[329] This quote from Madison, however, could not establish the principle of judicial supremacy.

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319. STERN & WERMIEL, *supra* note 203, at 149.
320. Cooper v. Aaron, 358 U.S. 1, 19 (1958).
321. *See supra* note 314 and accompanying text.
322. Fifth Draft Majority Opinion, *supra* note 227.
323. Fourth Draft Majority Opinion, *supra* note 217, at 13.
324. Fifth Draft Majority Opinion, *supra* note 227, at 13.
325. Fourth Draft Majority Opinion, *supra* note 217, at 13.
326. Fifth Draft Majority Opinion, *supra* note 227, at 13.
327. *Id*. at 13–14.
328. *Id*. at 13.
329. *See id*. at 13–14.

Not even close. Justice Brennan still needed *Marbury* to make the case. Accordingly, the other Justices did not agree with these changes. From the above-quoted excerpt, Chief Justice Warren struck the second and third sentences.[330] Justice Clark appeared to make the same suggestion.[331]

Fourth, Justice Brennan's draft on September 24 further modified the basis of the doctrine of judicial supremacy. He wrote:

> It was in 1803 that Chief Justice Marshall, speaking for a unanimous Court, referring to the Constitution as "the fundamental and paramount law of the nation," declared in the notable case of *Marbury v. Madison*, 1 Cranch 137, 177, that "It is emphatically the province and duty of the judicial department to say what the law is." *This established the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution*.[332]

The last sentence represented a subtle but significant weakening of the claim. The fourth draft stated, "It follows from these principles that the interpretation of the Constitution enunciated by this Court in the *Brown* case is the supreme law of the land, and is made by Art. VI of the Constitution of binding effect on the States."[333] In the fifth draft, no longer did *Marbury* stand for the proposition that the Supreme Court's decisions were the "supreme Law of the Land."[334] Now, the Supreme Court was merely "supreme in the exposition of the law of the Constitution."[335] This sentiment is much closer to what *Marbury* in fact held.[336] To this passage, Justice Brennan's colleagues were more forgiving. From the above-quoted excerpt, Chief Justice Warren suggested an addition to the second sentence: "and has ever since been accepted as a permanent and indispensable feature of our constitutional system."[337] However, Justice Clark would have struck that sentence altogether.[338]

Fifth, Justice Brennan articulated the principle of judicial supremacy, though in a more attenuated fashion than his earlier draft:

> This decision [*Marbury*] was not without its critics, then and even now, but it has never been deviated from in this Court. The country has long since accepted it as a sound, correct and permanent interpretation. It follows that the interpretation of the Fourteenth Amendment enunciated by this Court in the *Brown* case is the supreme law of the land, and Art. VI of the Constitution

330. *See* Chief Justice Earl Warren, Comments on the Fifth Draft of the Majority Opinion in Cooper v. Aaron 13 (Sept. 24, 1958), https://perma.cc/82TP-YWUR [hereinafter Warren Comments on Fifth Draft].

331. *See* Justice Tom C. Clark, Comments on the Fifth Draft of the Majority Opinion in Cooper v. Aaron 13 (Sept. 24, 1958), https://perma.cc/LY45-H9SA [hereinafter Clark Comments on Fifth Draft].

332. Fifth Draft Majority Opinion, *supra* note 227, at 14 (emphasis added).

333. Fourth Draft Majority Opinion, *supra* note 217, at 13–14.

334. *Id.*

335. Fifth Draft Majority Opinion, *supra* note 227, at 14.

336. *See supra* notes 268–79 and accompanying text.

337. Warren Comments on Fifth Draft, *supra* note 330, at 14.

338. Clark Comments on Fifth Draft, *supra* note 331, at 14.

> makes it of binding effect on the States "any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."[339]

Justice Brennan acknowledged that the rule in *Marbury*, or at least the rule as he reported it, was subject to criticism. That he felt compelled to add this line revealed the shifting sands on which the Court's landmark decision was resting. Yet, he wrote, the Court had not deviated from *Marbury*, and it had been accepted by the United States as a "sound, correct and permanent interpretation."[340] The next sentence should be parsed carefully. In the fourth draft, Brennan said the notion of judicial supremacy "follows from these principles" in *Marbury*.[341] Now, it simply "follows."[342] In other words, this doctrine does not find refuge in *Marbury* standing by itself, but it represents a logical extension of that decision. This critical move bridged the gap from *Marbury* to *Cooper*.

Justice Harlan, perhaps bitter that his proposed opinion was rejected, offered a blunt comment to this entire section. In the margin next to the discussion of *Marbury*, he wrote "Terrible!"[343] At the end of the document, he scribbled, "Overall this draft shows on its face a patchwork job."[344]

6. Sixth Draft (September 25, 1958)

On September 25, 1958, Justice Brennan circulated the sixth, and final, draft of the opinion.[345] This version was conciliatory; it attempted to accommodate competing comments received from the Brethren through two prominent changes.

First, Justice Brennan introduced the discussion of judicial supremacy in a different fashion. The previous draft tiptoed around the intergovernmental conflict in Little Rock.[346] However, the new version addressed the issue head on. Justice Brennan sought to "answer the premise of the actions of the Governor and Legislature that they are not bound by our holding in the *Brown* case."[347] Critically, these state executive and legislative branch officials were not parties to *Brown*, so they could only be bound by virtue of the Supremacy Clause, even under the majority's broad reading of that provision. This sentence served as an essential distillation of the principle of judicial universality, which Brennan felt compelled to explain. Yet his colleagues did not approve of this addition as

339. Fifth Draft Majority Opinion, *supra* note 227, at 14.

340. *Id.*

341. Fourth Draft Majority Opinion, *supra* note 217, at 13–14.

342. Fifth Draft Majority Opinion, *supra* note 227, at 14.

343. *See* Justice John Marshall Harlan II, Comments on the Fifth Draft of the Majority Opinion in Cooper v. Aaron 13–14 (Sept. 24, 1958), https://perma.cc/AG3A-78AQ [hereinafter Harlan Comments on Fifth Draft].

344. *Id.* at 19.

345. Sixth Draft Majority Opinion, *supra* note 228.

346. Fifth Draft Majority Opinion, *supra* note 227, at 13 ("However, since the School Board has emphasized its belief that the actions of the Governor and Legislature have spread doubt and confusion as to the duty of obedience to the *Brown* decisions under our federal system, it may be well to recall some basic constitutional propositions which are ordinarily accepted as settled doctrine.").

347. Sixth Draft Majority Opinion, *supra* note 228, at 14.

drafted. Chief Justice Warren,[348] as well as Justices Black,[349] Clark,[350] and Harlan,[351] each provided suggestions. This sentence would not appear in the published opinion. It seemed the other Brethren were not entirely comfortable with a clear articulation of the principle of judicial universality, notwithstanding the import of the remainder of the opinion.

Second, Justice Brennan largely followed the suggestions of the Chief Justice. Gone was his observation that "[t]he Constitution does not specifically declare how the meaning of that Constitution is to be finally and authoritatively determined."[352] This statement, which conceded ambiguity, was emphatically correct. But again, it could have undermined the certainty of the opinion. It had to go. Likewise, Justice Brennan deleted the citation to James Madison's remarks in the First Congress.[353] This case would not be resolved by James Madison's comments in 1789 but would begin with John Marshall's opinion in 1803. Now, the progression was direct from Article VI to *Marbury* to judicial supremacy:

> Article VI of the Constitution makes the Constitution the "supreme law of the land." In 1803, Chief Justice Marshall, speaking for a unanimous Court, referring to the Constitution as "the fundamental and paramount law of the nation," declared in the notable case of *Marbury v. Madison*, 1 Cranch 137, 177, that "It is emphatically the province and duty of the judicial department to say what the law is." This decision established the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and has ever since been acted upon as a matter of course by this Court, and, as such, has been accepted by the country as a permanent and indispensable feature of our constitutional system. It follows that the interpretation of the Fourteenth Amendment enunciated by this Court in the *Brown* case is the supreme law of the land, and Art. VI of the Constitution makes it of binding effect on the States "any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."[354]

Justice Burton praised the final draft: "The discussion of the principle of Marbury v. Madison ... is, in my opinion, greatly improved since the last draft."[355] Yet he offered "one minor suggestion" concerning Chief Justice Warren's addition, "and has ever since been acted upon as a matter of course by this Court."[356] Justice Burton wrote that "[t]his sounds like an argument based upon the doctrine of prescription" and believed "that the argument might be

348. *See* Warren Comments on Sixth Draft, *supra* note 229, at 14.
349. *See* Black Comments on Sixth Draft, *supra* note 230, at 14.
350. *See* Clark Comments on Sixth Draft, *supra* note 231, at 14.
351. *See* Harlan Comments on Sixth Draft, *supra* note 233, at 14.
352. Fifth Draft Majority Opinion, *supra* note 227, at 13.
353. *See id.* at 13–14.
354. Sixth Draft Majority Opinion, *supra* note 228, at 14–15.
355. *See* Burton Comments on Sixth Draft, *supra* note 232, at 2.
356. *Id.*

strengthened by deleting the phrase."[357] Justice Brennan ignored this suggestion, perhaps because at that time, Justice Burton had already announced his retirement from the Court.[358] Instead, Justice Brennan stuck with the language offered by the Chief Justice.[359]

Justice Clark suggested striking the phrase "acted upon as a matter of course by this Court, and as such."[360] Chief Justice Warren suggested another alternative: "[T]hat principle [from *Marbury*] has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system."[361] Once again, Brennan adopted Warren's proposal for the final, published opinion.[362]

From the first draft through the final draft, the Court softened its reliance on Article VI and *Marbury v. Madison* to support its claim to judicial supremacy and universality. By the end, the Court acknowledged, albeit reluctantly, that it was breaking new ground.

### D. *UNITED STATES V. PETERS*

The third source of authority cited by *Cooper* to establish the principles of judicial supremacy and universality was *United States v. Peters*.[363] Though Chief Justice Marshall's canonical decision in *Marbury* did not provide a sound basis for judicial universality, one of his lesser known decisions, *Peters*, came much closer. This now-obscure case had been only cited by the Supreme Court roughly twenty-five times between its issuance in 1809 and 1958. The facts that gave rise to the longstanding controversy in *Peters* actually arose before the ratification of the Constitution.[364] In September 1778, during the Revolutionary War, the British captured a Connecticut fisherman, Gideon Olmstead, and his three associates on the open seas. The quartet managed to subdue the British crew and locked them below deck. While the boat was in the waters off the coast of New Jersey, a fight for control of the ship erupted. Two other armed boats, both affiliated with the Pennsylvania government, arrived as that conflict was subsiding. Claims were made to the prize by Olmstead and the captains of the two Pennsylvania boats, Thomas Houston and James Josiah, respectively.[365]

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357. *Id.* Six decades later, Justice Scalia invoked the property doctrine of prescription, also known as adverse possession, in *NLRB v. Noel Canning*. 573 U.S. 513, 593 (2014) (Scalia, J., concurring) ("Moreover, the majority's insistence that the Senate gainsay an executive practice 'as a body' in order to prevent the Executive from acquiring power by adverse possession, . . . will systematically favor the expansion of executive power at the expense of Congress.").

358. *See* STERN & WERMIEL, *supra* note 203, at 138 (noting that "Burton came to the White House [in July 1958] with a resignation letter effective October 13").

359. *See* Cooper v. Aaron, 358 U.S. 1, 18 (1958).

360. *See* Clark Comments on Sixth Draft, *supra* note 231, at 15.

361. Warren Comments on Sixth Draft, *supra* note 229, at 14.

362. *See Cooper*, 358 U.S. at 18.

363. 9 U.S. 115 (1809).

364. Justice Douglas authored an eminently readable account of this complicated case two years before *Cooper v. Aaron* was decided. *See* William O. Douglas, *Interposition and the* Peters *Case, 1778–1809*, 9 STAN. L. REV. 3 (1956). My discussion of *Peters* is based, in part, on Justice Douglas's article.

365. *See id.* at 4.

After a trial before the Pennsylvania Court of Admiralty, the jury awarded only one-fourth of the proceeds to Olmstead, and the remainder to Houston and Josiah. Olmstead appealed the judgment to the Committee of Appeals. That body, which was appointed by the Articles of Confederation Congress, reversed the judgment of the Pennsylvania admiralty court and awarded the entire prize to Olmstead.[366] This judgment, however, created an immediate conflict. Chief Justice McKean of the Pennsylvania Supreme Court concluded in *Ross v. Rittenhouse*, *seriatim*, that the Committee of Appeals lacked "jurisdiction to investigate facts, after a trial and general verdict by a Jury, and to give a contrary decision, without the intervention of another Jury."[367] As a result, the state admiralty court would not award the prize to Olmstead and instead ordered the marshal of the court to sell the boat.[368] The Committee of Appeals ordered the marshal not to distribute the funds. The marshal ignored the Confederation Court and paid the funds to the state treasurer, David Rittenhouse.[369] The Confederate Congress and Pennsylvania tried to broker a compromise, but to no avail. Instead, the case lingered for two decades.[370]

In 1803, Olmstead brought suit in the United States District Court in Pennsylvania seeking his prize.[371] Judge Richard Peters, presiding, ruled that the proceeds of the sale should be paid to Olmstead.[372] In the *Stanford Law Review*, Justice Douglas recounted Pennsylvania's reaction:

> The Pennsylvania legislature, defying the decree of Judge Peters, passed a statute denouncing it as usurpation, requiring the funds in the hands of the executors of [Treasurer] Rittenhouse to be paid into the state treasury, and directing the Governor to protect "the just rights" of the state from any process issued out of any federal court.[373]

Therefore, beyond the dispute concerning vertical federalism, the state legislature was irate that a federal court was attempting to overturn a jury verdict.

Eventually, Olmstead sought mandamus from the Supreme Court against Judge Peters.[374] (Unlike William Marbury, who could not seek mandamus from the Supreme Court in its original jurisdiction, Olmstead could successfully seek

366. *Id.* at 5.

367. Ross v. Rittenhouse, 2 U.S. (Dall.) 160, 161 (Pa. 1792); *see* Eugene Volokh, *Little-Known Weird Legal Fact Leads to Glitch in Court of Appeals Opinion*, VOLOKH CONSPIRACY (May 8, 2006, 1:27 PM), http://volokh.com/posts/1147109231.shtml [https://perma.cc/TW8U-YW9F] ("Volume 1 of U.S. Reports is occupied entirely by cases from Pennsylvania . . . [because] Alexander Dallas, the entrepreneur who published the cases, included the other courts' cases to make the volumes [of Supreme Court cases] more salable, since the U.S. Supreme Court produced relatively few cases in its early years.").

368. *See* Douglas, *supra* note 364, at 5–6.

369. *See id.* at 6.

370. *See id.* at 6–7 (discussing the controversy during the intervening period).

371. *Id.* at 7.

372. *See id.* at 7–8.

373. *Id.* at 8.

374. *See id.*

mandamus from the Supreme Court in its appellate jurisdiction.[375]) Soon, the conflict would escalate. Judge Peters wrote a letter to the Supreme Court, stating "that an act of the legislature of Pennsylvania had commanded the governor of that state to call out an armed force to prevent the execution of any process to enforce the performance of the sentence."[376] With this background, Chief Justice Marshall delivered the opinion for the Court. In the second, third, and forth paragraphs of his opinion, Marshall laid down the rule that would be cited over a century later in *Cooper*:

> *If the legislatures of the several states may, at will, annul the judgments of the courts of the United States, and destroy the rights acquired under those judgments, the constitution itself becomes a solemn mockery*; and the nation is deprived of the means of enforcing its laws by the instrumentality of its own tribunals. So fatal a result must be deprecated by all; and the people of Pennsylvania, not less than the citizens of every other state, must feel a deep interest in resisting principles so destructive of the union, and in averting consequences so fatal to themselves.
>
> The act in question does not, in terms, assert the universal right of the state to interpose in every case whatever; but assigns, as a motive for its interposition in this particular case, that the sentence, the execution of which it prohibits, was rendered in a cause over which the federal courts have no jurisdiction.
>
> If the ultimate right to determine the jurisdiction of the courts of the union is placed by the constitution in the several state legislatures, then this act concludes the subject; but if that power necessarily resides in the supreme judicial tribunal of the nation, then the jurisdiction of the district court of Pennsylvania, over the case in which that jurisdiction was exercised, ought to be most deliberately examined; and the act of Pennsylvania, with whatever respect it may be considered, cannot be permitted to prejudice the question.[377]

Marshall is correct that it is the responsibility of the Supreme Court of the United States, and not the Pennsylvania state courts, to determine the jurisdiction of the District Court of Pennsylvania. It was in this sense that Marshall crafted the first, emphasized sentence, which was quoted in *all* of Justice Brennan's drafts. However, Justice Brennan quoted only the portion of that sentence that came *before* the semi-colon. The critical portion came afterwards. Pennsylvania state courts were purporting to reject the judgments of the federal courts by holding that the latter lacked jurisdiction to operate. In that sense, "the nation is deprived of the means of enforcing its laws by the instrumentality *of its own*

375. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 175 (1803) ("To enable this court then to issue a mandamus, it must be shewn [sic] to be an exercise of appellate jurisdiction, or to be necessary to enable them to exercise appellate jurisdiction.").

376. United States v. Peters, 9 U.S. (5 Cranch) 115, 115 n.* (1809).

377. *Id.* at 136 (emphases added).

tribunals."[378] That is, federal courts could not decide matters within the jurisdiction established by Congress. In short, *Peters* established the principle that states cannot interfere with a binding federal court judgment. Because there was a binding judgment against the state, *Peters* provides a stronger basis for the principle of judicial universality than *Marbury* does. However, Chief Justice Marshall's decision still did not establish the rule of universality.

Justice Brennan's first three drafts followed the citation to *Peters* with this sentence: "The same principle limits the power of a Governor who acts to nullify a federal court order."[379] There is nothing controversial about this conclusion because the Pennsylvania government was in fact bound by the federal court's order. That order they could not ignore. The fourth, fifth, and sixth drafts slightly modified the follow-up sentence: "A Governor who asserts a power to nullify a federal court order is similarly restrained."[380] This sentence is closer to what *Peters* held but ignores the question of whether the Governor was bound by the federal court order. In *Cooper*, Governor Faubus was not so bound.[381]

In the first draft opinion, Justice Brennan preceded this quotation from *Peters* with an admonition to state officers: "Every state legislator and executive and judicial officer is obligated to obey the relevant commands of the Constitution *as interpreted by this Court* and may not consider himself free to act at variance from those commands."[382] Without question, under Justice Brennan's reading of *Peters*, the officers were bound to follow "the Constitution as interpreted by this [Supreme] Court."[383] The second and third drafts amplified this claim:

> Every state legislator and executive and judicial officer is thus solemnly bound not to war against the Constitution. He is obligated, rather to obey its relevant commands *as defined by this Court*, and whatever his station, he may not consider himself free to act in his official capacity in a way at variance with those commands.[384]

Rather than merely imposing an obligation to "obey" the Constitution as "interpreted by this Court," now state officials could not "war against the Constitution" and must "obey its relevant commands as defined by this Court."[385] As between "interpreted" and "defined," the latter is far more certain. That is, an "interpretation" is susceptible to change; a "definition" is absolute. To disobey the Supreme Court is to wage war against the Constitution itself. But what if the

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378. *Id.* (emphasis added).

379. First Draft Majority Opinion, *supra* note 208, at 2; Second Draft Majority Opinion, *supra* note 209, at 10; Third Draft Majority Opinion, *supra* note 210, at 10.

380. Fourth Draft Majority Opinion, *supra* note 217, at 14; Fifth Draft Majority Opinion, *supra* note 227, at 15; Sixth Draft Majority Opinion, *supra* note 228, at 15.

381. *See supra* notes 88–92 and accompanying text.

382. First Draft Majority Opinion, *supra* note 208, at 9 (emphasis added).

383. *Id.*

384. Second Draft Majority Opinion, *supra* note 209, at 10 (emphasis added); Third Draft Majority Opinion, *supra* note 210, at 10 (emphasis added).

385. Third Draft Majority Opinion, *supra* note 210, at 10.

Supreme Court is waging war against the Constitution? For example, Lincoln contended that *Dred Scott v. Sandford* was such a case.[386]

The fourth draft eliminated the reference to the Supreme Court having the sole and final responsibility to "define" the Constitution's commands. Instead, it included mostly stylistic changes to this passage:

> No state legislator or executive or judicial officer can war against the Constitution and fulfill his undertaking to support it. He is obligated, rather, to obey its relevant commands as defined by this Court, and whatever his station, he may not consider himself free to act in his official capacity in a way at variance with those commands.[387]

This language was only slightly changed in the fifth draft.[388] However, Chief Justice Warren suggested striking the latter sentence.[389] Justice Clark offered the same revision.[390] Once again, for the sixth draft, Justice Brennan followed the lead of his Chief; he retained only the first sentence.[391]

Chief Justice Marshall's decision in *Peters* was resisted immediately by Pennsylvania.[392] The Governor called out the militia to prevent the federal marshal from enforcing the Supreme Court's mandate. The state legislature resolved that the Supreme Court could not infringe the Commonwealth's rights.[393] The aftermath of *Peters* illustrates at once Hamilton's observation in Federalist No. 78 that the "least dangerous" branch has neither the power of "the sword or the purse."[394] Chief Justice Marshall could neither fight off the militia nor mandate the payment of funds. The Governor of Pennsylvania appealed to President Madison, who as a Member of Congress had supported Pennsylvania in the original *Olmstead* case.[395] The ploy backfired. Madison wrote back, "[T]he Executive of the United States is not only unauthorized to prevent the execution of a decree sanctioned by the Supreme Court of the United States, but is expressly enjoined, by statute, to carry into effect any such decree where opposition may be made to

386. *See supra* notes 56–69 and accompanying text.

387. Fourth Draft Majority Opinion, *supra* note 217, at 14.

388. *See* Fifth Draft Majority Opinion, *supra* note 227, at 14.

389. Warren Comments on Fifth Draft, *supra* note 330, at 14.

390. Clark Comments on Fifth Draft, *supra* note 331, at 14.

391. Sixth Draft Majority Opinion, *supra* note 228, at 15.

392. Justice Bushrod Washington, while riding circuit in the Circuit Court for Pennsylvania, recounted the history of *Peters* following the remand from the Supreme Court. *See* United States v. Bright, 24 F. Cas. 1232, 1234 (C.C.D. Pa. 1809).

393. *See* 21 ANNALS OF CONG. 2265, 2266 (1810) ("[A]s a member of the Federal Union, the Legislature of Pennsylvania acknowledges the supremacy . . . of the General Government as far as that authority is delegated by the Constitution of the United States. But whilst they yield to this authority . . . they will not be considered as acting hostile to the General Government, when, . . . they cannot permit an infringement of those rights by an unconstitutional exercise of power in the United States courts."); *see also* Tillman, *supra* note 100, at 503 n.54 ("The Court insulates 'judgments' and 'orders,' not opinions, against 'interposition' by state officials, nullification, mob violence, and other lawlessness." (citing Cooper v. Aaron, 358 U.S. 1, 4 (1958)).

394. THE FEDERALIST NO. 78, at 433 (Alexander Hamilton).

395. Douglas, *supra* note 364, at 9–10.

it."[396] Soon thereafter, the Pennsylvania legislature withdrew the militia and appropriated the money to pay Judge Peters's judgment.[397] At long last, Olmstead prevailed, not because of Marshall or *Marbury* but because of Madison.

### E. *ABLEMAN V. BOOTH*

The fourth source of authority cited by *Cooper* to establish the principles of judicial supremacy and universality was *Ableman v. Booth*.[398] This Taney Court case is "widely recognized as one of the most historically significant Supreme Court decisions of the nineteenth century."[399] In the antebellum era, abolitionist Sherman Booth interfered with the capture of a runaway slave in Wisconsin.[400] At the time, Stephen Ableman, the federal marshal, held the slave in custody pursuant to a warrant issued by a federal district court.[401] Booth was arrested for violating the Fugitive Slave Act of 1850.[402] (This law was different from the Fugitive Slave Act of 1793, which was upheld in *Prigg v. Pennsylvania*.[403]) Even though Booth was in federal custody, the Wisconsin Supreme Court granted a writ of habeas corpus.[404] Justice Abram D. Smith expressly disagreed with Justice Story's opinion in *Prigg* and ruled that Congress lacked the authority to enact the Fugitive Slave Act of 1850.[405] The Wisconsin Supreme Court as a whole affirmed Smith's decision, although on narrower grounds.[406] One justice dissented because the issue had been "authoritatively decided by the supreme court of the United States, the last and final constitutional exponent."[407]

The Supreme Court of the United States unanimously reversed this judgment.[408] Chief Justice Taney wrote the majority opinion. He rejected the notion that the Wisconsin court could render its "decision [as] final and conclusive upon all the courts of the United States."[409] Once the state court knows the prisoner "is in custody under the authority of the United States," Taney wrote, it "can proceed no further" and must respect "the line of division between the two sovereignties."[410] The Wisconsin judges could not grant a writ of habeas corpus because

396. 21 ANNALS OF CONG. 2269, 2269 (1810).

397. Douglas, *supra* note 364, at 10–11.

398. 62 U.S. (21 How.) 506 (1858).

399. Jeffrey Schmitt, *Rethinking* Ableman v. Booth *and States' Rights in Wisconsin*, 93 VA. L. REV. 1315, 1315 (2007).

400. *Ableman*, 62 U.S. (21 How.) at 507.

401. Schmitt, *supra* note 399, at 1317.

402. *See Ableman*, 62 U.S. (21 How.) at 507; *see also* Fugitive Slave Act, 9 Stat. 462 (1850) (repealed 1864).

403. 41 U.S. (16 Pet.) 539, 613 (1842).

404. *In re* Booth, 3 Wis. 1, 4 (1854).

405. *Id.* at 3 ("[F]or the reason that the congress of the United States has no constitutional power or authority to punish the offense with which said *Booth* is charged, and for which he is detained by said warrant; for which reasons said warrant is of no force or validity whatever.").

406. *Id.* at 63–66.

407. *Id.* at 75–76 (Crawford, J., dissenting).

408. Ableman v. Booth, 62 U.S. (21 How.) 506, 526 (1858).

409. *Id.* at 514.

410. *Id.* at 523.

the federal prisoner is "within the dominion and exclusive jurisdiction of the United States."[411] If the state court should attempt to "interfere" with the federal marshal, the Chief Justice warned, "it would be his duty to resist it, and to call to his aid any force that might be necessary to maintain the authority of law against illegal interference," which is "nothing less than lawless violence."[412]

In short, the Wisconsin courts had no authority over a prisoner in federal custody who was held pursuant to a federal warrant. Were the structure otherwise, Chief Justice Taney wrote, "the powers granted to the Federal Government, would soon receive different interpretations in different States, and the Government of the United States would soon become one thing in one State and another thing in another."[413] Without separate federal tribunals, "the supremacy, (which is but another name for independence,) so carefully provided in the [Supremacy] clause . . . could not possibly be maintained peacefully, unless it was associated with this paramount judicial authority."[414] The Framers, Chief Justice Taney surmised, understood "that serious controversies would arise between the authorities of the United States and of the States, which must be settled by force of arms, unless some tribunal was created to decide between them finally and with out appeal."[415] And that unifying tribunal of last resort was created by Article III, Section 1: "The judicial Power of the United States, shall be vested in one supreme Court."[416] Taney described the Supreme Court as the "final appellate power" to "finally settle[]" all "controversies as to the respective powers of the United States and the States."[417]

*Ableman*'s holding focused exclusively on the role of state courts with respect to the enforcement of federal law. Towards the end of his opinion, however, Chief Justice Taney alluded to state officials in all three branches. He wrote that the people of the states chose to ratify the Constitution and assumed this system of dual sovereignties. Through this "voluntary act," the people "surrendered" the power of the states and "conferred" it on the central government "for their own protection and safety against injustice from one another."[418] Chief Justice Taney's next sentence would be quoted a century later in *Cooper*:

> And their anxiety to preserve [the Constitution] in full force, in all its powers, and to guard against resistance to or evasion of its authority, on the part of a State, is proved by the clause which requires that the members of the State Legislatures, and all executive and judicial officers of the several States, (as

411. *Id.*
412. *Id.* at 524.
413. *Id.* at 518.
414. *Id.*
415. *Id.* at 519–20.
416. U.S. CONST. art. III, § 1. The Supreme Court also has "supervisory authority over the federal courts," which grants it the "authority to prescribe rules of evidence and procedure that are binding in those tribunals." Dickerson v. United States, 530 U.S. 428, 437 (2000). This "supervisory authority," however, does not extend over the state courts. *Id.* at 438.
417. *Ableman*, 62 U.S. (21 How.) at 520.
418. *Id.* at 524.

> well as those of the General Government,) shall be bound, by oath or affirmation, to support this Constitution.[419]

It is easy enough to dismiss this discussion as a dictum.[420] The controversy in *Ableman* focused entirely on state judges and not on legislative officers. However, Taney's analysis is circular. Everyone who takes an oath to the Constitution is bound to support it, but who gets to decide the meaning of that Constitution? State courts are not disabled from interpreting the federal Constitution by any means. In the abstract, nothing would prevent state court judges, who take an oath to the Constitution, from determining that a federal law violates the federal Constitution. However, the Supreme Court is the ultimate tribunal of last resort. It retains the authority to affirm or reverse that state judgment.[421]

Such was the case in *Prigg v. Pennsylvania*.[422] The Supreme Court of Pennsylvania concluded that the Commonwealth could prosecute a slave catcher, notwithstanding the federal Fugitive Slave Act of 1793.[423] That judgment, though ultimately reversed by Justice Story's majority opinion, was rendered entirely consistent with the Supremacy Clause. The decision of the Wisconsin Supreme Court in *Ableman*, however, was different. The state court did not merely conclude that the Fugitive Slave Act of 1850 was unconstitutional. Rather, it granted a writ of habeas corpus for a federal prisoner who was held in federal custody pursuant to a federal warrant. That decision was simply beyond the court's jurisdiction. The Wisconsin court, Chief Justice Taney explained, "had no more power to authorize these proceedings . . . than it would have had if the prisoner had been confined in Michigan, or in any other State of the Union."[424] Five decades later, in *Mondou v. New York, New Haven, & Hartford Railroad Co.*, Justice Van Devanter cited *Ableman* for the proposition that the "sovereignties [between the state and federal courts] are distinct, and neither can interfere with the proper jurisdiction of the other."[425] This conclusion is not controversial in the least.

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419. *Id.*; *see also* Cooper v. Aaron, 358 U.S. 1, 18 (1958) ("Chief Justice Taney, speaking for a unanimous Court in 1859, said that this requirement [that state officers support the Constitution] reflected the framers' 'anxiety to preserve it [the Constitution] in full force, in all its powers, and to guard against resistance to or evasion of its authority, on the part of a State . . . .'" (quoting *Ableman*, 62 U.S. (21 How.) at 524)).

420. *See generally* Josh Blackman, Much Ado About Dictum; Or, How to Evade Precedent Without Really Trying: The Distinction Between Holding and Dictum (Dec. 19, 2008) (unpublished manuscript), https://ssrn.com/abstract=1318389 [https://perma.cc/54YY-PB76] (discussing how courts often treat a decision as "dictum" to avoid following precedent).

421. *See* Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 351–53 (1816) ("On the whole, the court are of opinion, that the appellate power of the United States [Supreme Court] does extend to cases pending in the state courts . . . .").

422. 41 U.S. (16 Pet.) 539 (1842).

423. *Id.* at 608–09.

424. *Ableman*, 62 U.S. (21 How.) at 516.

425. 223 U.S. 1, 58 (1912).

Yet, in *Cooper*, Justice Brennan invoked this final passage from *Ableman* for a slightly different effect. His initial draft established a close link between the Supremacy Clause and the Oaths Clause:

> It follows from these principles that the interpretation of the Constitution enunciated by this Court in the Brown case is the supreme law of the land, and is made by Article VI of the Constitution of binding effect on the states "anything in the Constitution or Laws of any State to the Contrary notwithstanding." And all state legislators and all executive and judicial officers of the several states are solemnly committed by the oath taken pursuant to Art. VI, § 3 "to support this Constitution" as so interpreted, for, as Chief Justice Taney said, that requirement reflects the framers "anxiety to preserve it [the Constitution] in full force, in all its powers, and to guard against resistance to or evasion of its authority on the part of any state." Ableman v. Booth, 21 How. 506, 524.[426]

According to Justice Brennan, the Supreme Court's "interpretation of the Constitution" is not only the "supreme law of the land" that is "binding" on state judges, but also on state executive and legislative branch officials who take an oath "'to support this Constitution' *as so* interpreted"[427]—that is, as the Court interprets the Constitution. But Chief Justice Taney said nothing of the sort; *Ableman* only concerned the proper scope of state court jurisdiction. In an early draft, Justice Brennan would soften this claim based on *Ableman*:

> A century ago in Ableman v. Booth, 21 How. 506, 524, Chief Justice Taney stressed the constitutional truth that the framers "anxiety to preserve it [the Constitution] in full force, in all its powers, and to guard against resistance to or evasion of its authority, on the part of a State, is proved by the clause [Article VI, § 3] which requires that the members of the State Legislatures, and all executive and judicial officers of the several States (as well as those of the General Government) shall, be bound, by oath or affirmation, to support this Constitution."[428]

Gone was any reference to the state officials being bound, at all times, by the Supreme Court's interpretation of the Constitution. This shift underscores a recognition that Chief Justice Taney's decision did not establish the principle of judicial universality. Yet the third draft restored this understanding: "All state legislators and all executive and judicial officers of the several States are solemnly committed by oath taken pursuant to Art. VI, ¶3 'to support this Constitution' *as so interpreted*."[429] This emphasized portion related back to the Court's interpretation of the Constitution: the state officers would always be bound by the Supreme Court's latest opinion. The fourth draft of *Cooper*,

426. Initial Draft Majority Opinion, *supra* note 207, at 1–2 (alteration in original).
427. *Id.* (emphasis added).
428. First Draft Majority Opinion, *supra* note 208, at 9.
429. Third Draft Majority Opinion, *supra* note 210, at 10 (emphasis added).

however, dropped this emphasized portion for good. Now, "[e]very state legislator and executive and judicial officer is solemnly committed by oath taken pursuant to Art. VI, ¶3 'to support this Constitution.'"[430] Full stop. There was no reference to the Supreme Court. And this phrasing would remain unchanged in the fifth and sixth drafts.[431]

### F. *STERLING V. CONSTANTIN*

The fifth and final source of authority cited by *Cooper* to establish the principles of judicial supremacy and universality was *Sterling v. Constantin*.[432] In this case, the Governor of Texas declared martial law in response to a crisis in the oil fields. Pursuant to this declaration, the Governor limited the production of oil from private wells.[433] This order was challenged in federal court. A federal judge issued a temporary restraining order to preserve the status quo while a three-judge district court was being convened to assess the constitutionality of the order.[434] The Governor contended that the district court was convened "during the continuance of the proclaimed state of war without jurisdiction over [his] action."[435] The Governor asserted that the district court "was powerless thus to intervene and that [his] order had the quality of a supreme and unchallengeable edict, overriding all conflicting rights of property and unreviewable through the judicial power of the federal government."[436]

On appeal, the Supreme Court stated the obvious: the Governor was bound by the federal court's injunction that was issued against him. Chief Justice Hughes wrote the majority opinion for a unanimous Court.[437] He rejected the contrary rule that an action taken pursuant to a proper declaration of martial law was insulated from federal court review.[438] He explained:

> If this extreme position could be deemed to be well taken, it is manifest that the fiat of a state Governor, and not the Constitution of the United States, would be the supreme law of the land; that the restrictions of the Federal Constitution upon the exercise of state power would be but impotent phrases, the futility of which the State may at any time disclose by the simple process of transferring powers of legislation to the Governor to be exercised by him, beyond control, upon his assertion of necessity. Under our system of government, such a conclusion is obviously untenable. There is no such avenue of escape from the paramount authority of the Federal Constitution. When there is a substantial showing that the exertion of state power has overridden private rights secured by that Constitution, the subject is

430. Fourth Draft Majority Opinion, *supra* note 217, at 14.
431. *See* Fifth Draft Majority Opinion, *supra* note 227, at 14; Sixth Draft Majority Opinion, *supra* note 228, at 15.
432. 287 U.S. 378 (1932).
433. *See id*. at 387–88.
434. *Id*. at 387.
435. *Id*. at 390.
436. *Id*. at 397.
437. *Id*. at 386.
438. *Id*. at 396–98.

> necessarily one for judicial inquiry in an appropriate proceeding directed against the individuals charged with the transgression. To such a case the federal judicial power extends (Art. III, s 2) and, so extending, the court has all the authority appropriate to its exercise.[439]

This passage recognizes a well-understood principle: state actors who violate the federal Constitution cannot disregard a federal court injunction. If the Governor could do so whenever the legislature approves the declaration of martial law through mere "fiat," the Governor would render the Constitution's restraints on state action "but impotent phrases."[440] This result cannot be supported because "the subject is necessarily one for judicial inquiry in an appropriate proceeding directed against the individuals charged with the transgression."[441] In other words, the federal courts retain the power to halt a state actor's unconstitutional conduct and those orders cannot be ignored.

*Sterling*'s precedential appeal to Justice Brennan was patent: the Governor of Texas sought to expressly disregard a federal court order, citing state law to the contrary. In his initial draft, with a not-too-subtle reference to the Governor of Arkansas, Justice Brennan wrote:

> The same principle limits the power of a Governor who acts to nullify a federal court order. "If this extreme position could be well taken", said Chief Justice Hughes, "it is manifest that the fiat of a state Governor, and not the Constitution of the United States, would be the supreme law of the land; that the restrictions of the Federal Constitution would be but impotent phrases." Sterling v. Constantin, 287 U.S. 378, 397–398.[442]

Of course, there was a significant difference between Governor Sterling and Governor Faubus: the former was bound by a court order; the latter was not. There is no question that it is unlawful for a state actor to disregard a binding "federal court order." The issue in *Cooper* was whether Governor Faubus—who was not bound by the district court's *order*—could still be bound by the Supreme Court's *opinion* in *Brown*. Professor Strauss noted that Governor "Faubus had been careful never to defy such an order."[443] That is, he rejected the assertion that the Court's judgment in *Brown* was universal in application. Nothing in *Sterling* speaks to this issue in the least. Justice Brennan maintained this same phrasing in

439. *Id*. at 397–98.

440. *Id.*

441. *Id*. at 398.

442. Initial Draft Majority Opinion, *supra* note 207, at 2–3.

443. Strauss, *supra* note 100, at 1080; *see also* SIMON, *supra* note 108, at 303 ("On the morning of September 20, Faubus's attorneys appeared before Judge Davies and formally requested that he recuse himself since, they asserted, he was biased against the governor. When the judge rejected their motion and issued an injunction against Faubus to prevent him from blocking the integration of Central High School, the governor's attorneys walked out in protest. Faubus announced that he would appeal Judge Davies's injunction. He also ordered National Guard troops to withdraw from the high school when school opened on Monday and asked the parents of the black students to keep their children home.").

the first, second, and third drafts, with only slight changes for the fourth, fifth, and sixth drafts.

### G. NEITHER "BASIC" NOR "SETTLED"

The *Cooper* Court prefaced its "answer [to] the premise . . . [that] the Governor and Legislature . . . are not bound by" *Brown* with a modest claim: "It is necessary only to recall some *basic* constitutional propositions which are *settled* doctrine."[444] The preceding discussion demonstrates that the "propositions" advanced in *Cooper* are not "basic." Never before had the Court asserted the novel power to define the "supreme Law of the Land" and to instantly bind government officials everywhere. Indeed, as evidenced by the six drafts, Justice Brennan and his colleagues watered down their reliance on these precedents. Nor was this doctrine "settled." None of the cases on which the *Cooper* Court relied—*Marbury v. Madison*, *United States v. Peters*, *Ableman v. Booth*, and *Sterling v. Constantin*—supported these novel claims. Justice Breyer acknowledged that *Cooper*'s holding—that "the Constitution obligated other governmental institutions to follow the Court's interpretations, not just in the particular case announcing those interpretations, but in similar cases as well"—was "a matter that both Hamilton and Marshall had left open."[445] This doctrine was far from basic, and it was in no sense settled. The doctrine announced in *Cooper* was without precedent.

### H. *COOPER*'S AFTERMATH

Professor Bickel observed that typically, after the Supreme Court announces its decision, "it becomes the duty of all persons affected, and especially of government officials, state or federal, to implement the Court's law."[446] This paradigm does not hold, however, "on occasions when the Court's judgments have been directed at points of serious stress in our society, and on such occasions that is not the way things should or conceivably could work."[447] Such was the case with *Cooper v. Aaron*. Before the Supreme Court's unanimous decision, members of the Little Rock Independent School District could plausibly argue that they were faced with an intractable dilemma: comply with a state court injunction or comply with a conflicting federal court injunction.[448] However odious that choice was as a matter of policy, the argument rested on a sound jurisprudential footing. Once the Supreme Court issued its decision, that dilemma dissipated. Now, those officials faced a single judgment from the highest court in the land: desegregate the schools. "In order that the School Board might know, without doubt, its duty in this regard before the opening of school," the Court explained, the judgment was issued "immediately."[449] There would be no opportunity to

444. Cooper v. Aaron, 358 U.S. 1, 17 (1958) (emphasis added).
445. BREYER, *supra* note 19, at 62.
446. BICKEL, *supra* note 93, at 10.
447. *Id.* at 10–11.
448. *See supra* Section I.C.
449. *Cooper*, 358 U.S. at 4–5.

petition for a rehearing or engage in any other dilatory tactics that were otherwise provided by the Supreme Court's rules.

The immediate aftermath of *Cooper* was bleak. Hours after the Supreme Court's decision was released on September 29, 1958, the Little Rock school board leased all of the public schools to a private corporation in an effort to evade the Court's judgment.[450] The game of whack-a-mole continued. But soon these efforts to resist desegregation would be halted by a temporary restraining order from the Court of Appeals.[451] Instead of desegregating, the schools shuttered. Notwithstanding orders from the Supreme Court and the Eighth Circuit, schools in Little Rock remained closed throughout the 1958–1959 school year.[452] *All* of the students in Little Rock—white and black—were denied access to a public education. Shutting down the schools brazenly flouted the Supreme Court's order. Professor Alexander Bickel wrote that *Cooper v. Aaron*, like *Brown v. Board of Education* itself, "made nothing happen."[453]

Faced with insurrection, the Supreme Court responded to this brazen flouting of *Cooper* with silence.[454] Having made its decision, the Court would wait nearly five years before hearing another school desegregation case.[455] In many cases, the Justices simply denied review—even when there was a circuit split.[456] In the years following *Brown*, the Supreme Court would only go so far as to affirm district court desegregation orders in a series of single-sentence, per curiam opinions.[457] These decisions, which were rendered without the benefit of briefing or oral argument, left academics "virtually apoplectic."[458] Professors Alexander Bickel and Harry Wellington wrote that these brief orders represented "the retreat from the obligation the Court has traditionally and necessarily felt to explain its conclusions, to justify them and to relate them to its past holdings."[459] Then-Professor Wilkinson queried: "Why [did] the Court . . . not seize the initiative

450. Hutchinson, *supra* note 118, at 85.

451. Aaron v. Cooper, 261 F.2d 97, 108 (8th Cir. 1958) (per curiam).

452. Hutchinson, *supra* note 118, at 85.

453. BICKEL, *supra* note 58, at 245.

454. MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 329 (2004) ("For several more years after *Cooper*, the justices continued to abstain as white southerners defied or evaded *Brown*.").

455. Wilkinson, *supra* note 100, at 521. Judge Wilkinson notes that the Court's next desegregation case was *Goss v. Board of Education* in 1963. *Id.* (citing Goss v. Bd. of Educ., 373 U.S. 683 (1963)).

456. KLARMAN, *supra* note 454, at 329.

457. *See, e.g.*, State Athletic Comm'n v. Dorsey, 359 U.S. 533, 533 (1959) (per curiam) ("The motion to affirm is granted and the judgment is affirmed."); New Orleans City Park Improvement Ass'n v. DeTiege, 358 U.S. 54, 54 (1958) (per curiam) ("The judgment is affirmed."); Holmes v. City of Atlanta, 350 U.S. 879, 879 (1955) (per curiam) ("The petition for writ of certiorari is granted, the judgments both of the Court of Appeals and the District Court are vacated and the case is remanded to the District Court with directions to enter a decree for petitioners in conformity with *Mayor & City Council of Baltimore City v. Dawson*."); Mayor & City Council of Balt. City v. Dawson, 350 U.S. 877, 877 (1955) (per curiam) ("The motion to affirm is granted and the judgment is affirmed.").

458. KLARMAN, *supra* note 454, at 321.

459. Alexander M. Bickel & Harry H. Wellington, *Legislative Purpose and the Judicial Process: The* Lincoln Mills *Case*, 71 HARV. L. REV. 1, 4 (1957).

after *Cooper*[?]"[460] He surmised that "[p]ossibly the Court felt more secure confronting direct, rather than subtle, challenges to its authority."[461] And so it was. The Supreme Court's desegregation jurisprudence would remain stagnant until at least 1968.[462] From 1955 to 1968—when *Green v. County School Board*[463] was decided—the Justices contributed "nothing significant in race relations" with respect to education.[464]

Fortunately, the situation in Little Rock would improve in time. Over the next year after *Cooper*, moderate members were elected to the Little Rock school board. They voted to reopen the schools for the 1959 school year.[465] It was the democratic process, following the unanimous judgment of the Supreme Court, that began the desegregation of schools in Little Rock in earnest. Wilkinson aptly stated the rule: "Democracy moves by consensus, or not at all."[466] Even President Eisenhower conceded that the integration process would have to be "slower" if it is "going to have any real acceptance in the United States."[467] How slow? The President who dispatched the 101st Airborne to Little Rock warned his Attorney General that it might take "30 or 40 years in reaching the ideal."[468] Ike was optimistic. In some places, the desegregation process is still ongoing.[469]

This episode illustrates all at once the limits of judicial supremacy and universality. No court, no matter how high in stature, can force people to accept its judges' interpretation of the Constitution. In difficult times, the Supreme Court's authority is, at best, persuasive. *Brown I* recognized this premise implicitly. Indeed, by the Court's own description, *Brown I* did not bind anyone. All nine

460. Wilkinson, *supra* note 100, at 521.

461. *Id.*

462. *Id.* at 537.

463. 391 U.S. 430 (1968).

464. J. HARVIE WILKINSON III, FROM *BROWN* TO *BAKKE*: THE SUPREME COURT AND SCHOOL INTEGRATION: 1954–1978, at 79 (1979); *see also* JUSTIN DRIVER, THE SCHOOLHOUSE GATE: PUBLIC EDUCATION, THE SUPREME COURT, AND THE BATTLE FOR THE AMERICAN MIND 263 (2018) ("Even allowing for some period of reluctance about returning to the race question following the Little Rock episode, however, cannot explain why the Warren Court watched idly during the whole of the John Kennedy administration and nearly the entirety of the Lyndon Johnson administration before its members began to flesh out the meaning of *Brown*.").

465. BREYER, *supra* note 19, at 65.

466. Wilkinson, *supra* note 100, at 520.

467. *Dwight D. Eisenhower: The President's News Conference, August 27, 1958*, AM. PRESIDENCY PROJECT, http://www.presidency.ucsb.edu/ws/index.php?pid=11188 [https://perma.cc/MJ9R-E3YU].

468. SIMON, *supra* note 108, at 317.

469. For example, in March 2017, a federal district court issued a desegregation order against the Cleveland, Mississippi School District. Cowan v. Bolivar Cty. Bd. of Educ., No. 2:65-CV-00031-DMB, 2017 WL 988411 (N.D. Miss. Mar. 13, 2017) (approving a modified version of a desegregation order the court approved on May 13, 2016); *see also* Camila Domonoske, *After 50-Year Legal Struggle, Mississippi School District Ordered to Desegregate*, NPR (May 17, 2016, 3:30 PM), https://www.npr.org/sections/thetwo-way/2016/05/17/478389720/after-50-year-legal-struggle-mississippi-school-district-ordered-to-desegregate [https://perma.cc/44GL-T2F8] ("The case on which the judge was ruling was originally brought during the summer of 1965. The first named plaintiff, 'Diane Cowan, minor,' was a fourth-grader at the time. Now she's Diane Cowan White, a 57-year-old clerk with the U.S. Postal Service. The legal saga that bears her name continues because, for 50 years, the Cleveland, Miss., school district has failed to integrate.").

Justices observed in *Cooper*, "[t]he Court postponed, pending further argument, formulation of a decree to effectuate" *Brown I*.[470] Nor did *Brown II* purport to bind nonparties. Rather, it instructed the district courts to "require that the *defendants*"—that is, the four states that were joined in the appeal—"make a prompt and reasonable start toward full compliance with [*Brown I*]."[471] It was up to the district courts to ensure "a prompt and reasonable start toward full compliance . . . with all deliberate speed."[472] The Court concluded that those subject to the district court's orders "were thus duty bound to devote every effort toward initiating desegregation and bringing about the elimination of racial discrimination in the public school system."[473] *Cooper* sought to go further than did *Brown II*, to no immediate effect.

## IV. *COOPER V. AARON* REVISITED

Despite its fraught precedential ground, the Supreme Court has affirmed and reaffirmed the principle of judicial supremacy. Yet such declarations of supremacy are hollow when there is no possibility their precedents will be disputed in any meaningful sense. Conversely, the Supreme Court has not relied on *Cooper v. Aaron* to promote the doctrine of judicial universality. Rather, it has consistently relied on the lower courts to convert—or "domesticate"—precedent into a binding judgment.[474] This process has worked remarkably well for six decades. Notwithstanding its constitutional provenance and majestic grandeur, the Supreme Court of the United States operates like any other court: its judgments are only binding on the parties before it; for everyone else, the precedents are merely persuasive. Choosing not to voluntarily comply with a Supreme Court opinion could give rise to civil damages—ordinarily an unwise decision—but such nonacquiescence cannot violate the "supreme Law of the Land."[475]

### A. JUDICIAL SUPREMACY REIGNS SUPREME, JUDICIAL UNIVERSALITY DISAPPEARS

In the six decades since the crisis in Little Rock, the Supreme Court has not shied away from the principle of judicial supremacy. It has asserted this authority with[476]

470. Cooper v. Aaron, 358 U.S. 1, 6 (1958).

471. Brown v. Bd. of Educ. (*Brown II*), 349 U.S. 294, 300 (1955) (emphasis added).

472. *Cooper*, 358 U.S. at 7 (internal quotations omitted).

473. *Id.*

474. William Baude, *The Court, or the Constitution?* (forthcoming) (manuscript at 3), *in* MORAL PUZZLES AND LEGAL PERPLEXITIES: ESSAYS ON THE INFLUENCE OF LARRY ALEXANDER, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2978208 [https://perma.cc/F8WF-W5R6] ("But the binding force of federal judgments is limited to the case and parties that are lawfully before the court. This means that the resolution of one dispute does not automatically bind others—not until they, too, properly come before the courts, are subject to the judicial power, and receive their own adjudication.").

475. U.S. CONST. art. VI, cl. 2.

476. *See, e.g.*, United States v. Morrison, 529 U.S. 598, 616 n.7 (2000); Miller v. Johnson, 515 U.S. 900, 922 (1995); Payne v. Tennessee, 501 U.S. 808, 855 (1991) (Marshall, J., dissenting); Florida v. Meyers, 466 U.S. 380, 383 (1984) (Stevens, J., dissenting); City of Rome v. United States, 446 U.S. 156, 221 (1980) (Rehnquist, J., dissenting); Oregon v. Mitchell, 400 U.S. 112, 205 n.86 (1970) (Harlan, J., concurring and dissenting); Griffin v. Cty. Sch. Bd. of Prince Edward Cty., 377 U.S. 218, 232 (1964); Bd. of Sch. Comm'rs of Mobile Cty. v. Davis, 84 S. Ct. 10, 11 (1963); Napue v. Illinois, 360 U.S. 264, 271–72 (1959).

and without[477] citations to *Cooper*. In each case, however, unlike with *Cooper*, there was no foreseeable resistance to the Court's interpretation of the Constitution. After each decision, the other branches of government or the states quietly fell into line. Stating the principles of judicial supremacy in the absence of antagonism is simple enough. As illustrated by *Cooper*'s aftermath, however, putting these doctrines into effect can be a much tougher matter.

The Court has also cited *Cooper* for several other far less controversial propositions than judicial supremacy: that all state officials are agents of the state for purposes of the Fourteenth Amendment's Equal Protection Clause;[478] that concerns about public safety, the public fisc, or public opposition to desegregation are not valid justifications to condone denials of equal protection;[479] that the Supreme Court will enforce orders from lower courts;[480] and miscellaneous

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477. *See, e.g.*, Dickerson v. United States, 530 U.S. 428, 437 (2000) ("Congress may not legislatively supersede our decisions interpreting and applying the Constitution."); City of Boerne v. Flores, 521 U.S. 507, 536 (1997) ("RFRA was designed to control cases and controversies, such as the one before us; but as the provisions of the federal statute here invoked are beyond congressional authority, it is this Court's precedent, not RFRA, which must control."); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 868 (1992) ("[T]he Court [is] invested with the authority to decide [its] constitutional cases and speak before all others for their constitutional ideals."); United States v. Nixon, 418 U.S. 683, 704 (1974) ("Deciding whether a matter has in any measure been committed by the Constitution to another branch of government . . . is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution." (quoting Baker v. Carr, 369 U.S. 186, 211 (1962))); Powell v. McCormack, 395 U.S. 486, 549 (1969) ("[I]t is the responsibility of this Court to act as the ultimate interpreter of the Constitution.").

478. *See, e.g.*, Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 270 n.21 (1985) (Brennan, J., dissenting); Milliken v. Bradley, 418 U.S. 717, 773 (1974) (White, J., dissenting); Gilmore v. City of Montgomery, 417 U.S. 556, 568 (1974); McGautha v. California, 402 U.S. 183, 253 n.2 (1971) (Brennan, J., dissenting); Oregon v. Mitchell, 400 U.S. 112, 246 (1970) (Brennan, J., dissenting); Avery v. Midland Cty., 390 U.S. 474, 479–80 (1968); Sailors v. Bd. of Ed. of Kent Cty., 387 U.S. 105, 108 n.5 (1967); Brown v. Louisiana, 383 U.S. 131, 148 & n.7 (1966); Lombard v. Louisiana, 373 U.S. 267, 282 (1963) (Douglas, J., concurring); Burton v. Wilmington Parking Auth., 365 U.S. 715, 722 (1961); United States v. Louisiana, 364 U.S. 500, 501 (1960) (per curiam); United States v. Raines, 362 U.S. 17, 25 (1960).

479. *See, e.g.*, United States v. Virginia, 518 U.S. 515, 599 (1996) (Scalia, J., dissenting); Swanner v. Anchorage Equal Rights Comm'n, 513 U.S. 979, 981 (1994) (Thomas, J., dissenting from denial of certiorari); Freeman v. Pitts, 503 U.S. 467, 504 n.1 (1992) (Scalia, J., concurring); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 522–23 (1989) (Scalia, J., concurring); Allen v. Wright, 468 U.S. 737, 772 (1984) (Brennan, J., dissenting); Bob Jones Univ. v. United States, 461 U.S. 574, 577, 593 (1983); City of Memphis v. Greene, 451 U.S. 100, 152 (1981) (Marshall, J., dissenting); Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 487 & n.6 (1979) (Powell, J., dissenting); *Id.* at 494 & n.2 (Rehnquist, J., dissenting); Norwood v. Harrison, 413 U.S. 455, 463–64 & n.7 (1973); Palmer v. Thompson, 403 U.S. 217, 226 (1971); Lemon v. Kurtzman, 403 U.S. 602, 632 (1971) (Douglas, J., concurring); Adickes v. S. H. Kress & Co., 398 U.S. 144, 234 (1970) (Brennan, J., concurring and dissenting); Dandridge v. Williams, 397 U.S. 471, 525 (1970) (Marshall, J., dissenting); Keyes v. Sch. Dist. No. 1, 396 U.S. 1215, 1217 (1969); Jones v. Alfred H. Mayer Co., 392 U.S. 409, 448 n.5 (1968) (Douglas, J., concurring); Green v. Cty. Sch. Bd. of New Kent Cty., 391 U.S. 430, 436 (1968); Bell v. Maryland, 378 U.S. 226, 311 (1964) (Goldberg, J., concurring); Watson v. City of Memphis, 373 U.S. 526, 535 (1963); Garner v. Louisiana, 368 U.S. 157, 172 n.24 (1961); Gomillion v. Lightfoot, 364 U.S. 339, 349 (1960) (Whittaker, J., concurring).

480. *See, e.g.*, Schuette v. Coal. to Defend Affirmative Action, 134 S. Ct. 1623, 1656 (2014) (Sotomayor, J., dissenting); Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701,

others.[481]

Yet the Supreme Court has never cited *Cooper* to support a claim to judicial universality. As a general matter, the Court would have no occasion to declare that its precedents are universal because parties tend to follow them without objection. However, the Court never returned to *Cooper*'s principle of universality during the massive resistance and the segregationist game of whack-a-mole. The Court's failure to do so speaks to the shaky footing on which this doctrine rests. The Supreme Court eagerly declares the "supreme Law of the Land" but is content to let the inferior courts do the grunt work of implementing those precedents.

### B. THE SUPREME COURT IS STILL A COURT

Notwithstanding the unanimous opinion in *Cooper*, the Supreme Court is, at bottom, a court like any other. It does not consider legal principles in the abstract. So-called "advisory opinions" are prohibited.[482] Instead, the Court can only resolve "cases" or "controversies" affecting injured parties. And the opinions published in the U.S. Reports resemble opinions published in any other reporter. Immediately below the bold headline, "**Supreme Court of the United States**," is the docket number. The majority opinion usually resolves the case or cases for which certiorari was granted. Even when a published opinion implicates another pending case, the Court will grant, vacate, and remand (GVR) in a separate order—that is, *grant* the petition, *vacate* the lower court decision, and *remand* for reconsideration in light of the new precedent.[483]

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868 (2007) (Breyer, J., dissenting); Grutter v. Bollinger, 539 U.S. 306, 345 (2003) (Ginsburg, J., concurring); United States v. Fordice, 505 U.S. 717, 755 (1992) (Scalia, J., concurring and dissenting); New York v. United States, 505 U.S. 144, 179 (1992); Payne v. Tennessee, 501 U.S. 808, 855 (1991) (Marshall, J., dissenting); Spallone v. United States, 493 U.S. 265, 302 & n.11 (1990) (Brennan, J., dissenting); Puerto Rico v. Branstad, 483 U.S. 219, 228 (1987); Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 695 (1979) ("State-law prohibition against compliance with the District Court's decree cannot survive the command of the Supremacy Clause of the United States Constitution.").

481. *See, e.g.*, Bush v. Gore, 531 U.S. 98, 140 (2000) (Ginsburg, J., dissenting); Planned Parenthood of Se. Pa. v. Casey, 510 U.S. 1309, 1310, 1312 (1994); Walters v. Nat'l Ass'n of Radiation Survivors, 473 U.S. 305, 351 n.31 (1985) (Brennan, J., dissenting); Cousins v. Wigoda, 409 U.S. 1201, 1204 (1972); Ala. State Teachers Ass'n v. Ala. Pub. Sch. & Coll. Auth., 393 U.S. 400, 402 n.2 (1969) (Harlan, J., dissenting); Travia v. Lomenzo, 381 U.S. 431, 435 (1965) (Harlan, J., dissenting); Ohio *ex rel.* Eaton v. Price, 364 U.S. 263, 269 (1960) (Brennan, J., concurring).

482. *See* Campbell-Ewald Co. v. Gomez, 136 S. Ct. 663, 678 (2016) (Roberts, C.J., dissenting) ("In 1793, President George Washington sent a letter to Chief Justice John Jay and the Associate Justices of the Supreme Court, asking for the opinion of the Court on the rights and obligations of the United States with respect to the war between Great Britain and France. The Supreme Court politely—but firmly—refused the request, concluding that 'the lines of separation drawn by the Constitution between the three departments of the government' prohibit the federal courts from issuing such advisory opinions." (citing 3 CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY 486–89 (H. Johnston ed. 1890–1893))); *see also* Paulsen, *The Most Dangerous*, *supra* note 149, at 302 (noting that "the traditional view [is that] Article III does not permit the federal judiciary to render 'advisory opinions'" and that such a doctrine is "a prohibition on Article III courts engaging in *extrajudicial* resolution of legal issues—of deciding legal questions outside of a litigated 'case' or 'controversy'").

483. *See* Aaron-Andrew P. Bruhl, *The Supreme Court's Controversial GVRs–And an Alternative*, 107 MICH. L. REV. 711, 712 (2009) (describing the Supreme Court's "'GVR' practice" as "the

Below the docket number is the name of the case: *Petitioner(s) v. Respondent(s)*. It is a well-established maxim of the law that all courts—including the Supreme Court—have jurisdiction only over the parties before them.[484] Thus, like with any other court, the analysis that appears between the caption and the conclusion affects only the named litigants. Indeed, a generalized prospective statement of law would be akin to a legislative act. As a result, the Court's judgment can only control the rights and remedies of the named litigants.[485] The converse of this principle is also true: parties who are not before the court cannot be bound.[486]

This doctrine makes sense as both a substantive and procedural matter. Substantively, although two cases may be similar, differences in facts could give rise to different legal rules. Drawing distinctions between precedents—a hallmark of legal reasoning—ensures that parties receive a judgment that fits the specifics of their case.[487] Often the Supreme Court prefers to lay down broader rules so the lower courts can figure out the nitty-gritty specifics in different factual scenarios.[488] Procedurally, nonparties were not given a chance to be heard or to object to a prior court's judgment.[489] A contrary rule would violate basic tenets of fairness if nonparties were subjected to what amounts to an ex parte judgment that they could not challenge.[490] For parties to be bound by a prior judgment, they

procedure for summarily *granting* certiorari, *vacating* the decision below without finding error, and *remanding* the case for further consideration by the lower court").

484. *See* Martin v. Wilks, 490 U.S. 755, 762 (1989) ("A judgment or decree among parties to a lawsuit resolves issues as among them, but it does not conclude the rights of strangers to those proceedings."); *see also* Trump v. Hawaii, 138 S. Ct. 2392, 2427 (2018) (Thomas, J., concurring) ("American courts' tradition of providing equitable relief only to parties was consistent with their view of the nature of judicial power.").

485. *See* Alemite Mfg. Corp. v. Staff, 42 F.2d 832, 832–33 (2d Cir. 1930) ("[N]o court can make a decree which will bind any one but a party . . . ."); 18A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4449 (3d ed. 2018) ("The basic premise of preclusion is that parties to a prior action are bound and nonparties are not bound." (footnote omitted)).

486. *See* Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 110 (1969) ("It is elementary that one is not bound by a judgment *in personam* resulting from litigation in which he is not designated as a party or to which he has not been made a party by service of process. . . . The consistent constitutional rule has been that a court has no power to adjudicate a personal claim or obligation unless it has jurisdiction over the person of the defendant."); Hansberry v. Lee, 311 U.S. 32, 40 (1940) ("It is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process.").

487. *See* Parklane Hosiery Co., Inc. v. Shore, 439 U.S. 322, 327 n.7 (1979) ("It is a violation of due process for a judgment to be binding on a litigant who was not a party or a privy and therefore has never had an opportunity to be heard.").

488. *See, e.g.*, MacDonald v. Moose, 710 F.3d 154, 165 (4th Cir. 2013) ("The *Lawrence* Court, as in *Heller*, struck down a specific statute as unconstitutional while reserving judgment on more carefully crafted enactments yet to be challenged.").

489. *See* Baker v. Gen. Motors Corp., 522 U.S. 222, 237 n.11 (1998) ("In no event, we have observed, can issue preclusion be invoked against one who did not participate in the prior adjudication.").

490. *See* 18A WRIGHT ET AL., *supra* note 485 ("Our deep-rooted historic tradition that everyone should have his own day in court draws from clear experience with the general fallibility of litigation and with the specific distortions of judgment that arise from the very identity of the parties." (footnote omitted)). The Supreme Court has suggested there may be circumstances in which a district court can enter new orders binding nonparties to give effect to its previous order. *See* Washington v. Wash. State

must be enjoined in a subsequent cause of action, in which they could raise any substantive distinctions or procedural objections.[491] Indeed, Congress even criminalized "interfer[ing] with . . . the performance of duties under any order, judgment, or decree of a court of the United States."[492]

The only operative portion of a Supreme Court opinion comes with the conclusion on its final page. The authoring Justice or per curiam court writes that "[t]he judgment of the" lower court is "affirmed," "reversed," "vacated," or "the case is remanded for further proceedings consistent with this opinion." After the Court announces its judgment, the opinion always ends with four critical words: "It is so ordered." Retired Chief Justice Burger even authored a book by this title.[493] Contrary to any myths about judicial universality—whereby the Supreme Court's decisions immediately permeate the rule of law from sea to shining sea—these four words trigger a far more mundane process that is typical to all courts.

Under Supreme Court Rule 44, both parties have "25 days after entry of the judgment or decision" to file a petition for rehearing.[494] In the event that the case is urgent, pursuant to Rule 45.2, the Court can direct the clerk "to issue the mandate in [the] case forthwith."[495] For example, the Court took this action in *Bush v. Gore*.[496] Indeed, the Court did so as well in *Cooper*, but its judgment was swiftly resisted in Little Rock. Alternatively, the prevailing party can file an application for the Court to issue the judgment forthwith.[497] The petitioner took this course in *Boumediene v. Bush*.[498]

If neither the Court nor the prevailing party seeks to expedite the mandate, the case takes a much more deliberate path. The final judgment is not issued during the twenty-five-day period following the issuance of the Court's decision. And,

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Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 692 n.32 ("In our view, the commercial fishing associations and their members are probably subject to injunction under either the rule that nonparties who interfere with the implementation of court orders establishing public rights may be enjoined, . . . or the rule that a court possessed of the res in a proceeding *in rem*, such as one to apportion a fishery, may enjoin those who would interfere with that custody." (citations omitted)), *modified sub nom.* Washington v. United States, 444 U.S. 816 (1979).

491. Alternatively, nonparties can be held in criminal contempt for frustrating a court's order. *See, e.g.*, United States v. Hall, 472 F.2d 261, 262 (5th Cir. 1972) ("This case presents the question whether a district court has power to punish for criminal contempt a person who, though neither a party nor bearing any legal relationship to a party, violates a court order designed to protect the court's judgment in a school desegregation case. We uphold the district court's conclusion that in the circumstances of this case it had this power, and affirm the defendant's conviction for contempt.").

492. 18 U.S.C. § 1509 (2012).

493. *See* WARREN E. BURGER, IT IS SO ORDERED: A CONSTITUTION UNFOLDS (1995). I was able to locate over 5,000 Supreme Court decisions that concluded with the phrase "it is so ordered." The first instance was in *Ex parte Garland*, 71 U.S. (4 Wall.) 333, 381 (1866).

494. SUP. CT. R. 44.1.

495. Bush v. Gore, 531 U.S. 98, 111 (2000); *see also* SUP. CT. R. 45.2.

496. 531 U.S. at 111.

497. *See* SUP. CT. R. 45.2.

498. *See* Application (07A1011) for Order to Issue Judgment Forthwith, Boumediene v. Bush, 553 U.S. 723 (2008) (No. 06-1195), https://www.supremecourt.gov/search.aspx?filename=/docketfiles/06-1195.htm [https://perma.cc/4US9-VQ75].

during this time, the lower court cannot take any action.[499] If a petition for rehearing is filed, the clerk of the Court takes no action until the Justices resolve the matter in conference. If a petition is filed after the conclusion of the term, it can be held over until the long conference.[500] A petition for rehearing is seldom granted following an argued case.[501]

Occasionally the Court grants a petition for rehearing after a petition for a writ of certiorari is denied; the case is then granted, vacated, and remanded (GVR'd). In effect, the Court tells the lower court to take another look at the decision in light of a new precedent. Were the Supreme Court's decision universal, there would be no need for the lower courts to take any action. However, in practice, the nature of the GVR process reflects a recognition that factual differences may justify different results in different cases. This reality undermines any claim to judicial universality. A single decision of the Court cannot instantly bind all parties in similar, related cases. Lower courts always take a first crack at applying a new precedent to the situations of new parties.

Only after all of these procedures are exhausted does Rule 45 permit the judgment to be issued to the lower court. For federal courts, "a certified copy of the judgment" is transmitted right away.[502] For state courts, the clerk is to issue the mandate "25 days after entry of the judgment."[503] But even at that juncture, the matter is not yet over. If the Supreme Court's decision resolved all of the issues, then following the remand, the court of first instance must issue a final judgment for the prevailing party. For purposes of attorney's fees and other

499. However, at least one court of appeals flagrantly ignored this rule. Hours after the Supreme Court issued its judgment in *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013), the Ninth Circuit dissolved a stay it had previously entered without waiting until the mandate issued, or even for the requisite twenty-five days to lapse. The petitioners in this case did in fact file a petition for rehearing, but it was denied by Justice Kennedy. At that point, even though the Ninth Circuit had improperly jumped the gun, the petition was mostly moot. *See* Josh Blackman, *Prop 8 Supports File Emergency Motion with Circuit Justice Kennedy to Stop SSM in California*, JOSH BLACKMAN'S BLOG (June 29, 2013), http://joshblackman.com/blog/2013/06/29/prop-8-supports-file-emergency-motion-with-circuit-justice-kennedy-to-stop-ssm-in-california/ [https://perma.cc/6A33-EPUT].

500. For example, *United States v. Texas* was "Affirmed by an equally divided Court" on June 23, 2016. *See* United States v. Texas, 136 S. Ct. 2271 (2016) (per curiam). Note, however, this decision was not a final "judgment." The Solicitor General filed a petition for rehearing on July 18, 2016. *See* Petition for Rehearing, United States v. Texas, 2016 WL 3902439 (2016) (No. 15-674). On August 31, 2016, it was "DISTRIBUTED for [the long] Conference of September 26, 2016." United States v. Texas, No. 15-674 (Aug. 31, 2016). The petition was formally denied on October 3, 2016. 137 S. Ct. 285 (2016) (mem.).

501. *See, e.g.*, Reid v. Covert, 354 U.S. 1, 5 (1957) ("Subsequently, the Court granted a petition for rehearing."); Porter v. Inv'rs' Syndicate, 287 U.S. 346, 347 (1932) ("As this question was not briefed or argued when the case was first heard, we granted a reargument; and the cause has again been presented on this point."); Broad River Power Co. v. South Carolina *ex rel.* Daniel, 282 U.S. 187, 192 (1930) (granting a motion for rehearing and dismissing for want of jurisdiction). More recently, in *Kennedy v. Louisiana*, the Supreme Court denied a petition for rehearing but used the occasion to correct an error in its opinion. 554 U.S. 945 (2008). The case was not reargued, nor was judgment altered. *See id.*

502. SUP. CT. R. 45.3.

503. *Id.* R. 45.2.

claims, the Supreme Court's order by itself is not sufficient—only the judgment from the court of first instance settles the matter.

If the Supreme Court's decision did not resolve all issues—as is often the case—and the parties do not settle, the case is remanded to the court of first instance for further proceedings "consistent with" the Supreme Court's new decision. Often, the litigation continues following the remand. In some cases, following a subsequent appeal, certiorari may be granted a second time.[504] In short, a lot has to happen before a Supreme Court's decision can be reduced to a final judgment—far more than stating "it is so ordered."

### C. THE SUPREME COURT'S JUDGMENTS AND PRECEDENTS

Long before this cumbersome judgment process is completed, the Supreme Court's opinion instantly sets a new precedent.[505] The distinction between judgment and precedent is poorly understood—especially with respect to the Supreme Court. This confusion is due, in no small part, to the myths perpetuated by *Cooper v. Aaron*. Professor Howard Wasserman and I have described the interaction between judgment and precedent with respect to the same-sex marriage litigation:

> A court's judgment and injunction compel conduct by the named defendants as to the named plaintiffs—in other words, only the named defendant officials had to issue marriage licenses to the named plaintiff couples. As to everyone else, the judgment functions merely as precedent—persuasive when from the district court, binding regionally when from the court of appeals, and binding nationally when from the Supreme Court. And precedent, whether binding or persuasive, does not directly control real-world conduct. It instead must be put into effect by a court issuing a new judgment and injunction compelling new named defendants to issue licenses to new named couples.[506]

Even before a lower court converts, or domesticates, a Supreme Court's precedent into a binding order, virtually everyone will choose to voluntarily comply with the majority opinion. For nonparties who are facing issues addressed in the

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504. *See* Richard M. Re, *Explaining SCOTUS Repeaters*, 69 VAN. L. REV. EN BANC 297, 300 (2016).

505. JOSH BLACKMAN, UNRAVELED: OBAMACARE, RELIGIOUS LIBERTY, AND EXECUTIVE POWER 309–10 (2016) ("On June 30, hours after the Supreme Court ruled in favor of Hobby Lobby, a panel of the Seventh Circuit Court ruled against Wheaton College with a two-sentence order. . . . Further, the court quoted from the hours-old decision in *Hobby Lobby*, which 'emphasizes that the accommodation provision (applicable in this case) "constitutes an alternative that achieves all of the Government's aims while providing greater respect for religious liberty."' (It is impressive that the panel [including former Judge Richard A. Posner] managed to digest the entire ninety-six-page *Hobby Lobby* decision and issue a ruling so quickly).").

506. Josh Blackman & Howard M. Wasserman, *The Process of Marriage Equality*, 43 HASTINGS CONST. L.Q. 243, 244 (2016) (citations omitted); *see also* DOUGLAS LAYCOCK ET AL., MODERN AMERICAN REMEDIES: CASES AND MATERIALS 217 (4th ed. 2012); Richard H. Fallon, Jr., *Fact and Fiction About Facial Challenges*, 99 CALIF. L. REV. 915, 923–24 n.31 (2011); Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third-Party Standing*, 113 HARV. L. REV. 1321, 1339–40 (2000); David Marcus, *The Public Interest Class Action*, 104 GEO. L.J. 777, 777 (2016).

opinion, this new legal precedent will likely affect their behavior. Nonparties who were taking actions that ran afoul of the new precedent will likely alter their conduct or attempt to settle any pending litigation. Nonparties whose actions comport with the new precedent will continue their conduct or litigate to vindicate their rights. Courts that have pending matters implicated by the precedent can now, with authority, enjoin the parties to act accordingly. The Supreme Court's analysis by itself does not directly bind nonparties. Rather, it is the collateral consequences of the Court's decision that alter the status quo.

Ostensibly, this compliance stems from an institutional respect for the Supreme Court. Practically speaking, however, such compliance avoids costly and futile litigation, and possibly sanctions.[507] Likewise, government officials in other jurisdictions would be prudent not to enforce a law similar to the challenged statute. This prudent course of action would avoid costly and potentially futile litigation.[508] Though not *bound* by a judgment, they *follow* the precedent.

*Lawrence v. Texas* illustrates this dynamic.[509] It is perhaps shorthand to say that the Supreme Court "struck down" Texas's criminal prohibition on sodomy.[510] However, this common usage is not correct. To be precise, the *Lawrence* majority opinion issued the following order: "[t]he judgment of the Court of Appeals for the Texas Fourteenth District is reversed, and the case is remanded for further proceedings not inconsistent with this opinion."[511] Not even the "transcendent dimensions" of Justice Kennedy's prose[512] could physically remove Section 21.06(a) from the Texas Penal Code. Indeed, the provision remains on the books, albeit appended by a notation from the Texas Legislature that "[Section 21.06] was declared unconstitutional by *Lawrence v. Texas*, 593 U.S. 558, 123 S. Ct. 2472 (2003)."[513] Jonathan Mitchell aptly described the dynamic: the Supreme Court does not "wield[] a writ of erasure that blots out unconstitutional legislation."[514] If Texas law enforcement officials attempted to arrest

507. *See* 18A WRIGHT ET AL., *supra* note 485 ("Finally, it may be noted that nonparties may be 'bound' by a judgment according to rules other than the rules of res judicata. The most important illustration arises from the power to enforce an injunction by contempt proceedings against a nonparty who acts in concert or participation with a party.").

508. United States v. Maine, 420 U.S. 515, 527 (1975) ("Of course, the defendant States were not parties to [the prior cases] . . . and they are not precluded by res judicata from litigating the issues decided by those cases. But the doctrine of stare decisis is still a powerful force in our jurisprudence.").

509. 539 U.S. 558 (2003).

510. *See* MacDonald v. Moose, 710 F.3d 154, 165 (4th Cir. 2013).

511. *Lawrence*, 539 U.S. at 579.

512. *See id.* at 562.

513. *See* TEX. PENAL CODE ANN. § 21.06 (West 2017).

514. Jonathan F. Mitchell, *Textualism and the Fourteenth Amendment*, 69 STAN. L. REV. 1237, 1298 (2017); *see* Jonathan F. Mitchell, *The Writ-of-Erasure Fallacy*, 104 VA. L. REV. 933, 933 (2018) ("But the federal judiciary has no authority to alter or annul a statute. The power of judicial review is more limited: It allows a court to decline to enforce a statute, and to enjoin the executive from enforcing that statute. But the judicially disapproved statute continues to exist as a law until it is repealed by the legislature that enacted it, even as it goes unenforced by the judiciary or the executive. And it is always possible that a future court might overrule the decision that declared the statute unconstitutional, thereby liberating the executive to resume enforcing the statute against anyone who has violated it. Judicial review is not a power to suspend or 'strike down' legislation; it is a judicially imposed non-enforcement

someone for violating this statute, under the judgment in *Lawrence*, they would be on the hook for damages under 42 U.S.C. § 1983 in a subsequent suit.[515]

Nor did the Court's judgment in *Lawrence* directly implicate the laws of any other state. Even after *Lawrence* and to this day, Virginia laws treat as a felon one who "voluntarily submits to such carnal knowledge," which includes sodomy.[516] Because this law has not been enforced since *Lawrence*, it remains on the books.[517] But any police officer who arrested a person for violating this section would likewise be on the hook for damages. Why? *Lawrence* clearly established the right, thereby overcoming the officer's qualified immunity.

*Roe v. Wade* provides another example of this dynamic. The Commonwealth of Massachusetts has long maintained criminal prohibitions on abortion. Of course, following *Roe*, enforcing such a statute would run afoul of the Fourteenth Amendment. So long as *Roe* remains in effect, in theory at least, state officials would not seek to enforce that statute. But what if *Roe* is overturned? In 2018, the Massachusetts legislature repealed the criminal prohibition on abortion.[518] Why? It was concerned that if *Roe* was overturned, the criminal statute would once again become enforceable. That is, the state law was never "struck down" but was merely unenforceable for several decades.

Former Attorney General Ramsey Clark supports *Cooper*'s pronouncements of judicial supremacy and universality. Yet he still acknowledged how the Supreme Court's opinions operate as judgments, as opposed to precedent: "A Supreme Court decision is not binding on everyone as if they were parties to the decree," he writes, "subject to direct sanctions by the Court."[519] That is, the Court's

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policy that lasts only as long as the courts adhere to the constitutional objections that persuaded them to thwart the statute's enforcement."); *see also* Steffel v. Thompson, 415 U.S. 452, 469 (1974) ("Of course, a favorable declaratory judgment . . . cannot make even an unconstitutional statute disappear." (quoting Perez v. Ledesma, 401 U.S. 82, 124–26 (1971) (Brennan, J., concurring and dissenting))); Winsness v. Yocom, 433 F.3d 727, 728 (10th Cir. 2006) ("There is no procedure in American law for courts or other agencies of government—other than the legislature itself—to purge from the statute books, laws that conflict with the Constitution as interpreted by the courts."); RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 171 (6th ed. 2009) ("[A] federal court has no authority to excise a law from a state's statute book.").

515. Section 1983 gives litigants a private cause of action when their constitutional rights have been violated by someone acting under color of state law. *See* 42 U.S.C. § 1983 (2012).

516. VA. CODE ANN. § 18.2-361(A) (West 2014).

517. In *MacDonald v. Moose*, the Fourth Circuit considered the validity of the provision on a collateral challenge—as applied to a petitioner who engaged in oral sex with a minor—but the case did not present a facial or as-applied challenge to the statute itself. 710 F.3d 154, 164 (4th Cir. 2013) ("The anti-sodomy provision, of course, prohibits the same sexual act targeted by the Texas statute that failed constitutional muster in *Lawrence*.").

518. Jamie Halper, *Mass. House OK's Repeal of 19th-Century Law that Criminalized Abortion*, BOS. GLOBE (July 19, 2018), https://www.bostonglobe.com/metro/2018/07/18/mass-house-repeal-century-law-that-criminalized-abortion/U4oPFiiGzrFbonn5Int8wM/story.html [https://perma.cc/LBQ6-NPS6] ("In passing the bill, many lawmakers cited concerns over whether Trump's most recent nominee to the Supreme Court, Brett Kavanaugh, might eventually tilt the court in favor of overturning its landmark decision on Roe v. Wade, allowing states to outlaw abortion again. And while a 1981 state high court decision strongly suggests the Massachusetts Constitution protects abortion rights, advocates say it's not explicit and needed clarification from Beacon Hill.").

519. Ramsey Clark, *Enduring Constitutional Issues*, 61 TUL. L. REV. 1093, 1093 (1987).

judgments are limited to the parties of the case. However, the opinion as precedent "should be violated only at one's peril, and it ought to be enforced by all executive officials at all levels of government."[520] The failure to comply, though perilous, would require subsequent litigation to bring the official into compliance. The opinion by itself is not self-executing. "The study of precedents and the role of stare decisis," Clark observed, "would have little meaning if precedents could be freely ignored"[521]—precedents, not judgments.

To Professor Farber, the argument that "non-parties are free to ignore Supreme Court rulings until issuance of a compliance order" is premised on a "mistaken view of remedies law."[522] The "availability of damages," he noted, either under 42 U.S.C § 1983 or through an implied cause of action under the doctrine announced in *Bivens v. Six Unknown Named Agents*, "would make this position untenable."[523] There are indeed "serious consequences" for declining to comply with a nonbinding judgment, but nothing *in the Constitution* makes that judgment binding.

Farber is correct about a basic proposition: a "public official would be foolish indeed to" ignore a nonbinding judgment and "wait[] to be sued."[524] The decision to disregard a Supreme Court precedent would eliminate the use of a "good faith" defense and could even result in "an award of attorneys' fees or punitive damages."[525] Ultimately, however, it will take a subsequent action, either under section 1983 or *Bivens*, to force a public officer into compliance. The "consequences" are all necessarily "collateral."[526]

The analysis in this section is premised on an unstated assumption: that the initial precedent is correct. If a future court disagrees and reverses that judgment, all of the "collateral consequences" of the original decision must necessarily be reversed. What should a party do if she is convinced that a precedent is wrong but a court has not yet had occasion to reverse that precedent? In some cases, the only means of challenging that prior precedent is to disregard it. Such resistance would deliberately invite subsequent litigation as a means to challenge the erroneously decided case.

Indeed, if plaintiffs were unwilling to disregard past precedents, then some of the Supreme Court's most ignoble decisions would remain on the books. Many acts of civil disobedience—especially during the Civil Rights Movement—were taken as part of express efforts to overturn old cases.[527] I take issue with Farber's

520. *Id.*
521. *Id.*
522. Farber, *supra* note 150, at 405.
523. *Id.*
524. *Id.* at 406.
525. *Id.*
526. *Id.* at 407.
527. *See, e.g.*, Brief for Appellants at 11, Brown v. Bd. of Educ. (*Brown I*), 347 U.S. 483 (1952) (No. 8), 1952 WL 47265, at *11 (arguing that "*Plessy* v. *Ferguson* is not applicable").

charge that an attorney who advises his client to continue engaging in some conduct until a court orders him to stop may be liable for "malpractice."[528] Changing the law often entails deliberately challenging a precedent, knowing that it will give rise to litigation. This conduct should not be considered a violation of the canons of ethics.

We should be grateful that the NAACP Legal Defense Fund did not treat *Plessy v. Ferguson* as the fixed "supreme Law of the Land." If that precedent was "cast in cement" and binding on all parties forever, then "Linda Brown of Topeka, Kansas, could not have challenged the segregated school system in her community."[529] Additionally, Brown's willingness to challenge *Plessy* teaches a different lesson about judicial supremacy and universality. First, the Supreme Court's ability to disavow prior precedents demonstrates that the Court's interpretation of the Constitution cannot be the same as the Constitution itself. Second, that nonparties are able to contest those precedents in subsequent cases demonstrates that the Supreme Court's interpretation of the Constitution cannot be binding on all parties.

## CONCLUSION

In 1987, then-Attorney General Edwin Meese admitted without hesitation that a judgment of the Supreme Court "binds the parties in a case and also the executive branch for whatever enforcement is necessary."[530] However, he rejected the assertion that the Court's judgment can "establish a supreme law of the land that is binding on all persons and parts of government henceforth and forevermore."[531] Meese's predecessor, former-Attorney General Ramsey Clark, disagreed. He contended that Meese's approach "cannot be acceptable to any person who aspires to live under constitutional government."[532] Clark wrote that "once pronounced, a decision of the Supreme Court is applicable *throughout the land* in all circumstances in which it applies."[533] Likewise, the *Washington Post*'s editorial page queried whether Meese's position might be "an invitation to constitutional chaos and an expression of contempt for the federal judiciary and the rule of law."[534]

Both sides of this debate raise valid points. Meese is correct that nothing in the text of the Constitution supports the doctrines of judicial supremacy and universality. Not until *Cooper* did the Court attempt to articulate such principles. Clark and the *Washington Post* are also correct that in the absence of judicial

528. Farber, *supra* note 150, at 406.
529. Edwin Meese III, *The Tulane Speech: What I Meant*, 61 TUL. L. REV. 1003, 1005 (1987).
530. Edwin Meese III, *The Law of the Constitution*, 61 TUL. L. REV. 979, 983 (1987).
531. *Id.*
532. Clark, *supra* note 519, at 1093.
533. *Id.*
534. Meese, *supra* note 529, at 1003.

supremacy and universality, our polity could quickly descend to chaos. Look no further than the chaos that unfolded in Little Rock. This tension can only be resolved through a recognition that judicial supremacy and universality are constitutional myths. Yet the fact they are irrepressible is a testament to their vitality.

Because these doctrines are not legal in nature, in the face of antagonism, the Supreme Court is utterly powerless to elevate a disputed precedent to the echelon of supremacy or universality. A case like *Brown* could achieve this status only through a unique confluence of political pressure and social change. But this ratchet cranks both ways. A different confluence of political pressure and social change ensured that *Dred Scott* was never accepted. With the exception of radical outliers like the situation in Little Rock, why, then, do we adhere to these norms?

In his famous debate with Abraham Lincoln, Stephen Douglas reasoned that "the Constitution of the United States created the Supreme Court for the purpose of deciding all disputed questions touching the true construction of that instrument, and when such decisions are pronounced, they are the law of the land, binding on every good citizen."[535] The first part of his observation is demonstrably false—the Constitution says nothing of the sort. The latter part, however, provides an insight: the Supreme Court's decisions are "binding on every *good citizen*." The doctrines of supremacy and universality can only be premised on a notion of civic virtue by good citizens. This principle, though, has its limits: If the judicial precedent itself is not virtuous, must good citizens still be bound? Lincoln argued *Dred Scott* was not virtuous, so it did not have the same binding effect. How, then, to account for the fact that one citizen's virtue (*Brown* and desegregation) is another citizen's vice (*Dred Scott* and slavery)?

Meese, who rejected *Cooper*'s "dictum," still concluded in his "judgment" that officials in "Arkansas and other states with segregated school systems *should* have changed those systems to conform with *Brown*"[536]—not based on a constitutional myth, but based on "[a]rguments from prudence, the need for stability in the law, and respect for the judiciary."[537] On these bases, the Attorney General concluded, government agents should "abide by a decision of the Court," for it "highly irresponsible . . . not to conform their behavior to precedent."[538] This conclusion was true for the "general principle laid down in *Brown v. Board of Education*," which "governed not only Kansas, whence the case arose, but also all other states that had segregated schools."[539] It was also true for a case Meese emphatically disagreed with: the "principle" of *Roe v. Wade* applied outside of

535. *Lincoln-Douglas Debates*, UNIV. MO.-ST. LOUIS, http://www.umsl.edu/virtualstl/phase2/1850/events/resources/documents/LincDougDebsExt.html [https://perma.cc/X4TR-H3UR] (last visited Apr. 14, 2019).

536. Meese, *supra* note 530, at 987 n.25 (emphasis added).

537. *Id.* at 987 n.26.

538. Meese, *supra* note 529, at 1004.

539. *Id.*

Texas, and "officials in other states were obliged to apply."[540] It is entirely consistent to follow these precedents as a normative matter while acknowledging that "Constitutional decisions by the Court are not 'the supreme law of the land' in the sense that the Constitution is."[541] With this understanding, the Supreme Court's role is only slightly diminished, for it is We The People, not a mythicized account of the Constitution, that fortifies the rule of law's precedential backbone.

540. *Id.*
541. *Id.*