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The Importance of Being Final

Daniel A. Farber

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The Supreme Court likes to bill itself as the definitive interpreter of the Constitution. In *Cooper v. Aaron*[1], all nine Justices individually signed an opinion proclaiming that the Court's constitutional doctrines were the supreme law of the land. More recently, the joint opinion in *Planned Parenthood v. Casey*[2] emphasized the Court's role in settling national controversies, arguing that such decisions must receive extraordinary respect lest the Court's authority be undermined.

The Court's self-proclaimed supremacy has not been without its critics. As early as 1819, Thomas Jefferson denounced what he viewed, even then, as the Court's pretensions to supremacy. He argued that if judges had the final word over the meaning of the Constitution, they could reshape the Constitution like wax to fit their own preferences. In contrast, Jefferson believed that all three departments were entitled to decide for themselves on the meaning of the Constitution.[3]

The debate over judicial supremacy has continued until today, at least among scholars. In Part I of this essay, I will attempt to clarify the issues in dispute. In my view, it is helpful to distinguish between three kinds of judicial supremacy. *Decisional supremacy* involves the power to issue coercive orders to state and federal officers, thereby overriding the constitutional judgments of those officers in particular cases. When such an order would be forthcoming later, *anticipatory supremacy* would require government officers to comply in advance with settled judicial doctrines rather than forcing the injured party to obtain a court or-

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1. 358 U.S. 1, 17-18 (1954). For background on the case, see Daniel A. Farber, *The Supreme Court and the Rule of Law:* Cooper v. Aaron *Revisited*, 1982 U. ILL. L. REV. 387.

2. 505 U.S. 833 (1992).

3. Letter from Thomas Jefferson to Judge Spencer Roane, September 6, 1819, *in* THOMAS JEFFERSON, WRITINGS 1426-27 (1984).

der against them. The broadest form of supremacy applies in situations where coercive judicial relief is not a possibility. *Precedential supremacy* means that government officials should treat settled judicial doctrine as binding precedent even when their actions are not subject to judicial review. Decisional supremacy has become an accepted feature of our legal system; anticipatory supremacy probably occupies an intermediate position; precedential supremacy is the most controversial.

In Part II of this essay, I will briefly summarize the Marshall Court's campaign to secure a foothold for decisional supremacy, a campaign that opened with the mandamus discussion in *Marbury* itself. These efforts were bitterly resisted at the time. Marshall's opponents were right to place so much importance on the issue. Decisional supremacy is ultimately the core form of judicial supremacy. As decisional supremacy has expanded with increases in jurisdiction and remedial powers, the other forms of supremacy have become progressively less important. Once the Court established decisional supremacy, its place as the ultimate constitutional authority was essentially secured. Another way of putting this is that, as a practical matter, whatever authority the Court claimed for its precedents in *Cooper v. Aaron* pales by comparison with power to settle presidential elections or to order an errant president to disclose incriminating evidence.

I. THREE KINDS OF JUDICIAL SUPREMACY

The Introduction divided claims of judicial supremacy into three subcategories. In this section, I will discuss how the debates over judicial supremacy play out with regard to each of the three. I will discuss them in reverse order, because the third form of supremacy (precedential supremacy) has received by far the most scholarly attention.

Precedential supremacy—the kind of supremacy the Court claimed in *Cooper v. Aaron*—has been strongly resisted by some leading scholars. Critics make three major attacks on precedential supremacy. The first attack is based on the separation of powers. The key here is the Jeffersonian claim that the three branches are coordinate and independent. Members of each branch swear to support the Constitution. Consequently, each branch must make its own independent judgment about the meaning of the Constitution. In particular, the president's duty to take care that the laws be faithfully executed requires that he

determine for himself what those laws (including the Constitution) actually require.[4]

The second attack on precedential supremacy is based on the nature of the judicial role. The core function of courts is not to issue opinions; it is to issue judgments. Issuing judgments in individual cases is the real business of the courts, while the accompanying opinions are merely explanations of the reasons for the decision. Although the point is usually not put quite so strongly, the argument is that judicial opinions really have the same status as press releases accompanying a presidential veto. They may be useful for lawyers and lower court judges who want to predict later judicial rulings, but they are not actually "law."[5]

A final argument against precedential supremacy is based on the need for dialogue about critical constitutional issues. Everyone concedes that the Justices' views are not infallible. If our entire society defers to the Court's views of the moment, there will be no later litigation to provide the Court with an opportunity to reconsider. It is healthier for the three branches of government to pursue their own diverse constitutional views, leaving to the system of checks and balances to maintain an overall equilibrium.[6]

The most powerful counter-argument is based on the settlement function of the Court. It is important for society to have some authoritative method for settling disputes. Critics of judicial supremacy seem sanguine about the possibility of head-on collisions between the branches. But one of the key functions of courts is to provide a peaceful, orderly method of resolving such disputes. Even if those decisions are sometimes wrong (as they assuredly are), it is better to resolve issues of constitutional interpretation so that society can move on.[7] A supporting argument is that the courts are uniquely well-suited to serve as interpreters of the Constitution, because of their insulation from

4. This argument is made with particular force in Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217, 228-62 (1994).

5. *See* Edward A. Hartnett, *A Matter of Judgment, Not a Matter of Opinion*, 74 NYU L. REV. 123 (1999); Thomas W. Merrill, *Judicial Opinions as Binding Law and as Explanations for Judgments*, 15 CARDOZO L. REV. 43 (1993).

6. *See* Gary Lawson & Christopher D. Moore, *The Executive Power of Constitutional Interpretation*, 81 IOWA L. REV. 1267, 1329-1330 (1996)(emphasizing the checks and balances argument); Mark Tushnet, *The Supreme Court, The Supreme Law of the Land, and Attorney General Meese: A Comment*, 61 TULANE L. REV. 1017 (1987) (emphasizing the dialogue point).

7. *See* Larry Alexander & Frederick Schauer, *Defending Judicial Supremacy: A Reply*, 17 CONST. COMMENT. 455 (2000) (summarizing this argument).

political pressures, their legal expertise, and the deliberative nature of the adjudicatory process.[8]

In terms of precedential authority, both sides seem to have fairly strong arguments. In the end, we must balance the advantages of poly-centric constitutional interpretation against the risks of disruption and constitutional crisis. My own view is that judicial precedents are entitled to a high degree of deference by the other branches, even when judicial review is not a possibility. This deference may come to an end when judicial decisions seem to be unreasoned fiats or the stakes are so high that deference is outweighed by compelling national interests. But the appropriate degree of precedential supremacy is essentially a pragmatic judgment, about which reasonable people may find room for disagreement.

We now turn to anticipatory supremacy. Like precedential supremacy, anticipatory supremacy requires officials to defer to judicial doctrines, but in a different context. Precedential supremacy is most important regarding government actions, such as presidential vetoes or pardons, that are outside the domain of judicial review. Anticipatory supremacy involves actions that are subject to judicial review, and the question is whether the officials have a duty to anticipate an adverse ruling and comply in advance. For this type of supremacy, I believe that the arguments are considerably stronger.

One argument for anticipatory supremacy is based on the common-law nature of our legal culture. Many of the rules of law in our society are based on judicial precedents. This is true not only in avowedly common law areas like contracts, torts, and property, but also in statutory areas. Law-abiding people obey laws—including established interpretations of those laws—without waiting for judicial sanctions. Thus, law-abiding business people do not make their own decisions about whether the Sherman Act, properly construed, prohibits all price-fixing conspiracies. Instead, even if they do not expect to be caught, they defer to the interpretation of the courts. The same should be true for executive officers, at least in cases where their actions are subject to judicial review.

Another argument for anticipatory supremacy is that executive officers should not take advantage of friction in the enforcement system at the expense of the rights of citizens. For ex-

8. *See* Burt Neuborne, *The Binding Quality of Supreme Court Precedent*, 61 TULANE L. REV. 991, 999-1000 (1987).

ample, because of Eleventh Amendment immunity, a state government is immune from damages for violating many federal statutes although subject to injunctive relief. It seems wrong, however, for officials who are sworn to uphold the law to deliberately violate statutes until such time as they are sued. By the same token, if officials know in advance that courts will certainly declare their actions unconstitutional, it seems unfair for them to take advantage of the fact that judicial enforcement cannot be instantaneous.

Anticipatory supremacy serves important rule of law values, and does so to a greater extent than precedential supremacy. Even if judicial opinions are not technically law, they may provide very clear notice of how the courts will ultimately act. Citizens may properly complain when officials knowingly exploit the delays and expense of litigation as a shield for actions that have no hope of being upheld in court. The fact that a court cannot instantly issue an injunction to the injured individual creates an opportunity for foot-dragging, but exploiting this opportunity harms the rule of law.

On the other hand, the arguments against judicial supremacy have less bite for anticipatory supremacy than they do for precedential supremacy. Officials may maintain dialogue through actions that are not subject to judicial review, such as use of the pardon power, or by taking actions where the application of precedent is unclear. Moreover, the officials' constitutional judgment cannot in any event be completely autonomous in a case subject to judicial review, so Jeffersonian's concept of departmentalism is not really an option.

Anticipatory supremacy is more firmly grounded than precedential supremacy largely because individuals rights are more directly involved. When the president vetoes a bill on the ground that it is unconstitutional, even though the courts would rule otherwise, he may be blocking a desirable policy but he is not violating the rights of any individual. At the other extreme, if the warden deliberately carries out an execution during a brief delay in issuing a stay, knowing that a court would surely reverse the sentence on constitutional grounds, his effort to evade ultimate judicial resolution is a direct invasion of the rights of the individual involved. Depending on one's theory of rights, this may only be a difference of degree. But even so, it is an important difference of degree

We turn to the narrowest and least controversial form of judicial supremacy, decisional supremacy. Decisional supremacy is the power of a court to issue a coercive order to a public official. Almost everyone agrees that the president, lower federal officials, and state officials have a duty to obey court orders. In our entire history, there has been only one apparent violation (by President Lincoln in the *Merryman* case).[9] For reasons that are too complex to go into here, I do not believe that *Merryman* is a genuine counter-example against decisional supremacy.[10] In any event, with the single prominent exception of Michael Paulsen, no one seriously argues against decisional supremacy.[11]

And for good reason. One core function of the courts is to ensure that individual legal rights are not violated by government officials. This function is a critical feature of constitutionalism. If the President can authorize his subordinates to ignore judicial decrees, those decrees become nothing more than advisory opinions. This is all well and good if we fully trust the executive branch to interpret and apply the Constitution. Suffice it to say that, as a historical matter, presidentialism has not been a popular constitutional theory. If we wish to hold the executive accountable to the law, whether statutory or constitutional, we cannot afford to make compliance with judicial decrees optional.

But, a critic might ask, what if a decree is utterly unjustified and disastrous? Suppose that the Court announces that it has decided a crucial case by flipping a coin, or suppose that a ruling is a blatantly unconstitutional, disastrous interference with the President's control of foreign relations. Surely, we would not expect the president to comply with the decree. That's probably right—but neither would we expect the military to obey the president's own orders if he announced that he had flipped a coin to decide whether to start a war or if he ordered all of his political opponents arrested. The possibility that such lunatic orders would be disobeyed does not detract from the fact that the president is the commander-in-chief. Neither does the possibility of disobedience to lunatic decrees disprove decisional judicial supremacy.

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9. *See* Merrill, *supra* note 5, at 46-48.
10. *See* DANIEL A. FARBER, LINCOLN'S CONSTITUTION ch. 8 (2003).
11. *See* Paulsen, *supra* note 4, at 276-88.

II. DECISIONAL SUPREMACY AND *MARBURY*

We celebrate *Marbury* today because it is generally seen as the fountainhead of judicial review. But the judicial review holding in *Marbury* was not particularly controversial at the time. Instead, criticism focused on Marshall's claim that the executive was subject to mandamus, rather than on his exercise of judicial review over the legislature.[12] I think that the early critics were right about the grave importance of the mandamus holding, which established the Court's decisional supremacy. For in the end, it is decisional supremacy that really matters the most. In the modern world, the other forms of supremacy are just icing on the cake.

Decisional supremacy over high federal officials was not immediately established. It was not until the Nixon tapes case that the judiciary's coercive power over the president himself was confirmed. Such power over lower officials was established much earlier. And the Marshall Court itself undertook a strenuous campaign to assert decisional supremacy over state government. It is probably no coincidence that the Court also asserted such authority over the federal executive in the discussion of mandamus in *Marbury*.

Decisional supremacy was the theme of several major rulings by the Marshall Court. In *Martin v. Hunter's Lessee*,[13] the Court rebuffed the claim of the Virginia Supreme Court to interpretative autonomy. The Virginia judges had argued that subjecting them to the Supreme Court's writs was an unconstitutional form of what we would call commandeering. In reversing the Virginia court, Justice Story emphasized the importance of uniformity to the constitutional scheme. A few years later, the Court was faced with another challenge to its appellate jurisdiction over state courts. In *Cohens v. Virginia*,[14] the state claimed that Supreme Court review of a state criminal conviction violated the Eleventh Amendment, because the appeal was technically a writ issued against the state in its capacity as prosecutor. In a staunchly nationalist opinion, Marshall rebuffed this effort to invoke sovereign immunity. Finally, in *Osborn v. Bank of the United States*,[15] the Court established the power of the federal

12. *See* CHARLES WARREN, 1 THE SUPREME COURT IN UNITED STATES HISTORY 233-34, 3 246-52 (1922).
13. 14 U.S. 304 (1816).
14. 19 U.S. 264 (1821).
15. 22 U.S. 738 (1824).

courts to coerce state executive officials. Unpersuaded by the Court's earlier ruling in favor of the constitutionality of the Bank, Ohio had seized the assets of the local branch. The federal district court issued an injunction requiring the funds to be returned. The Court upheld the injunction, stressing the need to maintain the supremacy of federal law.

The common theme of the Marshall Court cases from *Marbury* to *Osborn* is that, under our constitutional scheme, when a court has jurisdiction to decide a constitutional issue, it also has the power to coerce state and federal officials to comply with its rulings. Federal jurisdiction was limited in those days, and so were the remedial instruments available to a court. But all of that would change.

To understand the historical shift in judicial power, it may be helpful to think about judicial supremacy in two different, hypothetical worlds. In both worlds, officials must obey a properly issued court order. But the two worlds are different in other respects.

In World One, federal courts have limited jurisdiction. It is difficult to bring litigation. There are many barriers to effective relief: it is difficult to join parties or different causes of action, injunctions are limited to negative prohibitions, attorneys fees are not available, many violations of individual rights are not subject to damage actions. In addition, many forms of official action are not subject to judicial review at all—either because they are considered to involve political questions, or because of standing, ripeness, or mootness problems. In this world, the cases heard by courts will be only the tip of the constitutional iceberg. Thus, the extent to which officials will follow judicial precedents without the threat of litigation is a pressing concern; such situations arise often. Also, since the litigation process provides only partial relief, officials can often game the system, to a large extent succeeding in acting contrary to judicial precedent even if some limited remedy is later imposed. So anticipatory supremacy is also important.

Now consider World Two. In World Two, the political question doctrine has been eliminated, and other doctrines such as standing, mootness, and ripeness are no longer much of a problem for litigants. Class actions are readily available, so everyone who might be threatened by an official's interpretation of the Constitution can be joined in one action. Remedies are sweeping: structural injunctions, damage awards to the entire affected

class, and attorneys' fees. Officials who violate judicial precedent are personally liable for compensatory damages, and for punitive damages if the violation is deliberate. No official or governmental entity is immune from suit. In this world, officials will hesitate to game the system because of the personal repercussions. In addition, precedential supremacy makes little difference—often, everyone will be a member of a successful class anyway, and few cases will arise where an official's interpretation of the Constitution is beyond judicial review. In this world, litigated cases are not the tip of the iceberg in terms of constitutional disputes; instead, almost the entire iceberg looms above water. So in World Two, anticipatory and precedential supremacy are peripheral issues. Issues about these kinds of supremacy do not arise very often, and when they do arise, the Court's opinions are generally given the deference that people are apt to give truly powerful institutions.

The upshot is that, the more powerful the litigation system, the less important are precedential and anticipatory supremacy. Decisional supremacy is capable of doing all the work of forcing officials to comply with judicial interpretations of the Constitution. But where the litigation system is weak in terms of remedies or limited in terms of coverage, these other forms of supremacy become more important.

We do not live in either World One or World Two. But our legal system is much more like World Two than it is like World One. Concepts of justiciability are very wide, and remedies are often sweeping. For this reason, in our world, decisional supremacy is the main point. When courts can nearly always hear constitutional disputes and provide effective remedies against officials, the duty of officials to follow judicial doctrine voluntarily becomes relatively unimportant. Thus, much of the debate over "judicial supremacy" is tangential to the real operation of today's legal system.

In short, the Jeffersonian critics of *Marbury* were right. Give the courts the power to order other government officials around, and the judges someday will dominate the business of constitutional interpretation. It took a long time for the judiciary's coercive power over other officials to reach its apex. Yet the mandamus holding in *Marbury* carried within it the seeds of practical, if not theoretical, judicial supremacy.

Other officials have their own views of the Constitution, views that may or may not get a respectful judicial reception. But

at the end of the day, the Supreme Court gets the last word. In short, to paraphrase Justice Jackson, the judiciary's views of constitutional doctrine are not final because the judiciary is supreme. Rather, its doctrines are supreme because its decisions are final.[16]

16. Brown v. Allen, 344 U.S. 443, 540 (1953) (Jackson, J., concurring) ("We are not final because we are infallible, but we are infallible only because we are final").