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Judicial Interpretive Finality and the Constitutional Text

John Harrison

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Elephants leave traces when they pass by.[1] That is true about the Constitution as it is elsewhere. For example, once the Federal Convention had made the basic decision to propose a national government of three independent branches, it implemented that decision unmistakably. Much of the Constitution is concerned with the selection, tenure, and powers of the separated legislature, executive, and judiciary. One way to tell whether the Constitution adopts a principle is thus to look for its traces, and one way to do that is to ask: If the framers had planned to include the principle, or had assumed that other decisions they had made entailed the principle, where would it manifest itself?

The principle of *Cooper v. Aaron*,[2] according to which the Supreme Court's opinion in a case binds all other legal actors, whether parties or not, is a good-sized elephant. That fact suggests one way to determine whether it is a sound interpretation: Ask how the framers would have worked it into their system, and what they would have had to do in order to resolve the fundamental questions that came with including or assuming it. That question can be answered by taking guidance from similar principles that are clearly manifested, seeing how those manifestations work and in particular how the Constitution deals with the issues that must be resolved if the principle is present.

A careful examination of the text contradicts the hypothesis that the drafters meant to include, or assumed that their other

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1. "If there was an elephant in the snow, he's going to leave some tracks." BILL JAMES, THE BILL JAMES BASEBALL ABSTRACT 1983, 173 (1983).

2. 358 U.S. 1 (1958).

decisions entailed, the *Cooper* principle of judicial interpretive finality.[3] The elephant left no traces.

This focus on the particular supplies the answer to a natural question: What is the justification for one more article on judicial supremacy? The answer is that so far the debate on this subject has mainly focused on large principles rather than particular text and the absence thereof. *Cooper* itself relies on the fairly abstract principle that the courts have a special function when it comes to interpreting the law.[4] Two important defenders of *Cooper*, Schauer and Alexander, rely on the even more abstract principle that the rule of law is justified by the coordination function law plays.[5] A prominent critic, Michael Stokes Paulsen, relies on the principle that the branches of government are independent of one another, another high-level concept.[6] In an important recent contribution, Edward Hartnett argues against judicial finality by pointing to a range of practices that assume that the central function of courts is to resolve concrete disputes, not to decide abstract propositions of law.[7]

Indeed, to some extent the debate as it has proceeded so far makes my point. That debate has not been about particular provisions because there are no provisions for it to be about. In one place after another, where *Cooper* suggests that the Constitution should say something, it is silent.

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3. Although I refer to the Federal Convention, my argument centers on the text of the Constitution and its surrounding historical circumstances and does not rely on any information idiosyncratic to the specific individuals who framed or ratified the Constitution. The analysis here thus should be of interest both to textualists who reject inquiry into individuals' intentions and to intentionalists who believe that interpretation properly begins with the document itself.

4. The opinion cites Article VI and invokes *Marbury* v. *Madison*.

> [*Marbury*] declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system. 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."

Cooper, 358 U.S. at 18. The opinion then relies on the Article VI oath. *Id.*

5. Larry Alexander and Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359 (1997).

6. Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217, 228, 322 (1994).

7. Edward A. Hartnett, *A Matter of Judgment, Not a Matter of Opinion*, 74 N.Y.U. L. REV. 123 (1999).

Most fundamental of all is the absence of any equivalent to Article VI for judicial opinions.[8] The supremacy of federal law, and the oath-bound duty of state officers to recognize it, binds together the legal hierarchy established by the Constitution. Judicial interpretive finality attributes a functionally similar supremacy to judicial opinions, making them conclusive gloss on the law they interpret, including especially the law that is itself made supreme by Article VI. According to the judicial finality thesis, then, opinions have a very important place in the legal hierarchy, the creation of which was absolutely fundamental to the Constitution. While two centuries of experience may have dulled awareness of the radical nature of Article VI, it remains a remarkable measure, reaching into otherwise independent sovereignties and changing their rules on the most basic question of all. Moreover, the language of Article VI shows that the Federal Convention paid close attention to the precise contours of the supremacy rule it drafted; pre-existing treaties trump state law, but other actions of the United States under the Articles of Confederation do not.[9] Yet the Constitution does not give judicial opinions the interpretive supremacy that it gives to substantive federal law. Had the drafters meant to introduce this principle, thereby imposing judicial finality on the existing state constitutions, it is likely that opinions would have been dealt with explicitly.[10]

It is also likely that drafters planning on such a basic role for judicial opinions would have said something about when and how they are to be produced. Each of the authoritative texts on the Article VI list is generated by a process set out in the Constitution itself. Article VII governs that document's adoption, and Article V its amendment, while Article I, Section 7 controls the

8. "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." U.S. CONST. art. VI, para. 2. Paragraph 3 requires that Senators, Representatives, members of state legislatures, and all executive and judicial officers of the United States and the States be bound by oath or affirmation to support the Constitution.

9. *Id.*

10. It is not clear whether the framers would have included opinions on the Article VI list itself or would have provided for them elsewhere. As discussed below, American courts are not limited to construing the kinds of law listed in the Supremacy Clause, and the question of interpretive finality with respect to a kind of law is conceptually distinct from that of the status of that law in a legal hierarchy. The point is that conclusive gloss has a function in the system very similar to that of supreme substantive law and that the framers evidently thought that the function of the latter was central to their scheme.

production of federal laws and Article II, Section 2 does the same for treaties. Again, no mention is made of judicial opinions.

And again experience may let us lose sight of how odd that would be, were opinions as important as *Cooper* says they are. Consider the main focus of attention in this context: the Supreme Court of the United States. For decades the Court has followed a practice that may seem inevitable because of its familiarity but that is in fact only one way of doing things. According to that practice, a fully binding opinion of the Court is generated when a majority of the participating Justices votes in favor of it, thereby signifying that it speaks for them. History shows that there are other possibilities. Before John Marshall it was customary for opinions to be delivered seriatim, with each Justice who had something to say speaking for himself alone.[11] Holdings, and thus precedent, were distilled from those opinions, no one of which was uniquely authoritative. Under John Marshall the practice looked like the one we know but apparently was sometimes quite different. According to the leading scholar of the Marshall Court's inner workings, it was common for so-called opinions of the Court to reflect only the views of the author (usually the Chief Justice in constitutional cases), not even having been circulated to the other members of the majority.[12] They would have agreed on the outcome and perhaps on the broad rationale, but would not have reviewed the language before it was read from the bench.

If *Cooper*-style absolute authority is generated only when a majority of the Justices subscribes to an opinion as such, then it is entirely possible that *Marbury* and *McCulloch*[13] lack such authority. Chief Justice Marshall may not have run them by his colleagues in final form the way we can assume that Chief Justice Rehnquist ran *Seminole Tribe*[14] by his. As this observation illustrates, the details of the opinion-generating process are quite important, just as the details of the presidential veto are quite

11. *See, e.g.*, Chisholm v. Georgia, 2 U.S. (Dall.) 419 (1793).

12. In the Marshall Court, "opinions delivered by one Justice in court had not been subscribed to, in all their language, by the other Justices, not even the ones joining in the opinion." G. EDWARD WHITE, THE MARSHALL COURT AND CULTURAL CHANGE 1815-1835, 182 (1988). As White notes, this differs substantially from modern practice. "To imagine a comparable situation in a modern Supreme Court—the Chief Justice writing lengthy per curiam opinions on major cases that, although subscribed to by the Associate Justices, had not even been read by the subscribers—boggles the mind." *Id.* at 192.

13. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819).

14. Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996).

important. Yet if the conclusive gloss thesis is correct, drafters who went to the trouble of excepting Sundays from the President's ten-day review period for bills did not think it necessary to say anything about how to make a binding judicial interpretation.[15]

If they simply assumed that there was such a rule built into Article III, that assumption has been lost without a trace; the absence of a trace suggests that it was not there in the first place. More plausible is the response that the Constitution does deal with this problem, the same way it deals with other problems concerning judicial procedure: Congress has authority to pass laws that are necessary and proper to carry out the judicial power, and the rules governing the production of opinions are certainly that. Indeed, Congress has legislated on this general subject from the very beginning. The Judiciary Act of 1789 created a six-judge Supreme Court and made four a quorum.[16] Today six of nine is a quorum under 28 U.S.C. § 1. All authoritative acts of the Court take place according to the quorum rule. Congress thus has clearly legislated concerning the production of judgments; why could it not legislate concerning the production of authoritative opinions?

While this latter argument is more plausible than the pure appeal to unstated assumptions, it has serious difficulties. An absolutely authoritative opinion is much more powerful than a judgment because the opinion operates with the generality and prospectivity of a statute. A close examination of Article I suggests that the Constitution draws a line that is relevant here. House and Senate both have power to adopt their own rules of procedure, yet that power does not extend to all aspects of the most fundamental procedure of all, the procedure by which a statute is adopted.[17] On that score the essentials are set out in the Constitution itself and not left to either House. It is one thing to decide how many committees to have and how much debate to permit; it is another thing to decide whether the President is involved in the legislative process. A similar approach to authoritative judicial opinions would have the most important

15. U.S. CONST. art. I, § 7 (designating the time for the President to sign or veto a bill as ten days "(Sundays excepted)").

16. 1 Stat. 73 §1 (1789).

17. Under Article I, Section 5, para. 2, each house of Congress has power to determine its rules of proceedings. In addition to that general power, the Constitution itself sets out procedural rules for fundamental or important matters, such as the quorum rule, *id.* § 5, para. 1, and the method of passing laws, *id.* § 7.

questions about how to produce them answered by the Constitution itself, but they are not.

So far I have emphasized the functional similarity between authoritative judicial opinions and the sources of supreme federal law listed in Article VI. One response to my argument is that judicial opinions need not be mentioned because they are a side effect of a process that is dealt with in detail in Article III, the process of deciding cases. Article III is indeed the right place to look, for that is the place in which a drafter who wished to provide for judicial finality, or who believed that it followed naturally from providing for a judiciary, would have dealt with it. Yet while the judiciary article does provide the fundamental rules about deciding cases, it addresses none of the issues that arise if one believes that in the retail process of deciding cases courts are also producing legal interpretations that are good wholesale.

The Constitution creates a complicated judicial system to administer the complicated legal hierarchy that it establishes. Article III provides for one Supreme Court and authorizes Congress to create inferior federal courts. Article VI contemplates that there will be state courts, singling out their judges as obligees of the constitutional oath and federal supremacy. While the system is complex, the Constitution's rules about jurisdiction, which is to say for the resolution of particular cases, are explicit and quite adequate. Article III sets out the maximum range of federal court jurisdiction and sets out the default rule from which Congress may vary. Under the default, there are no inferior federal courts and the Supreme Court has all the Article III jurisdiction. A little of that jurisdiction is original and the rest appellate, implying that in the default configuration the Court has appellate jurisdiction over state courts with respect to all the cases on the menu, except those with respect to which it has original jurisdiction. Congress may depart from this structure by creating inferior federal courts with authority to decide some of the Article III cases and by making exceptions to the appeals the Court may entertain.

While Article III is thus all about the allocation of the case-deciding power among the courts, it says nothing about the allocation of the *Cooper* power among them; yet once again, if there is such a power, it raises many questions. Do the inferior federal courts have a share of it, and if so how does that work? It is reasonable to think that they must have some version of that power, for they are vested with the same judicial power of the United

States that the Supreme Court has.[18] But their complicated structure introduces knotty problems. Suppose for example that the Third Circuit has decided an issue of federal law that affects an individual who resides in Pennsylvania but does business in Maryland and so is subject to suit in a federal district court in either State. Perhaps the individual is absolutely bound by the Third Circuit's doctrine, because the issue could come before that court, but perhaps not, because the issue could come up in another court. Matters are more troublesome for such an individual if the Third and Fourth Circuits have an unresolved conflict on the point.

Then there is the question of the *Cooper* authority of federal district court decisions. For reasons that have never been clear, the district courts do not consider themselves precedentially bound even by their own prior decisions, let alone those of other district courts.[19] That suggests that what they say cannot be absolutely authoritative, yet they too are vested with judicial power.

Not only does the federal system have a complicated internal structure, it must share the country with the state courts, which also must construe and apply federal law. Thus the questions concerning overlapping jurisdictions arise with even greater force. What is true as between the Third and Fourth Circuits is true between the Fourth Circuit and the Supreme Court of Virginia: People undertake activity that could give rise to litigation in either one without knowing, at the time, where the litigation will take place.

In addition to that problem, the state courts create a more subtle and probably more difficult question: Do they have any of the *Cooper* power? It is natural to answer that this is a question of state law, just as their jurisdiction is a question of state law. Yet Article VI recruits the state courts to enforce federal supremacy. Within their jurisdiction, they perform an important federal function even though they remain state courts. Indeed, as history demonstrates they can have the last word on constitu-

18. Some judges of the inferior federal courts believe that opinions of the courts of appeals have *Cooper*-like status. *See, e.g.*, Hutchison for Hutchison v. Chater, 99 F.3d 286, 287 (8th Cir. 1996) (Wollman, J.) ("Regardless of whether the Commissioner [of Social Security] formally announces her acquiescence, however, she is still bound by the law of this Circuit and does not have the discretion to decide whether to adhere to it."). The issue is discussed at length in Samuel Estreicher and Richard L. Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 YALE L.J. 679, *passim* (1989).

19. *E.g.*, Howard v. Wal-Mart Stores, 160 F. 3d 358, 359 (7th Cir. 1998) ("[A] district court's decision does not have precedential authority.").

tional questions. From 1789 to 1914 the Supreme Court of the United States had no jurisdiction to review a state court decision that held a state law invalid because it conflicted with federal law.[20] In such cases the state courts were final. It is a plausible theory of judicial interpretive finality that the interpretations they reached in such cases should have been absolutely authoritative as a matter of federal law. If the point of conclusive gloss is to turn retail judicial decisions into wholesale decisions, and the state courts are exclusively performing the function of generating the gloss, then the Constitution should recruit the state courts wholesale as it recruits them retail.

Once again there is no equivalent to the Supremacy Clause that deals with state court opinions rather than their resolution of cases. That silence is especially striking because the Constitution generally is quite specific when it carves out a role for the state governments in the system it creates.[21] The care the Federal Convention took in that regard reflects the issue's delicacy. First, the role of the state governments in the system had profound implications for the balance of power between national and local interests, and striking that balance was the single trickiest problem the Convention faced. Second, it was especially tricky for the new Constitution to reach into the state constitutions, as it does in a few carefully selected ways. Any interference with the political autonomy of the States was a matter of great delicacy, and imposing on them the rule of *Cooper* would have been a significant interference.

The highly reticulated American judicial system administers a complex legal hierarchy; there is more law than just federal law that can be given a conclusive construction. The *Cooper* elephant would have visited the interpretation of state law. Indeed, drafters with judicial finality in mind would have realized that

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20. *See* Edward Hartnett, *Why Is the Supreme Court of the United States Protecting State Judges from Popular Democracy?* 75 TEX. L. REV. 907, 915-922 (describing jurisdictional structure between 1789 and 1914). As Hartnett explains, the Supreme Court's jurisdiction was expanded in 1914 largely in response to Ives v. South Buffalo Railway, 201 N.Y. 271 (1911), in which the New York Court of Appeals had held New York's workers' compensation statute unconstitutional on state and federal grounds, a decision that could not be reviewed by the Supreme Court of the United States because it held in favor of the party claiming under federal law. *Id.* at 949–56.

21. The Supremacy Clause, with its reference to state courts, is an example. U.S. CONST. art. VI, para. 2. Another is the carefully structured system in which the state militia are partially integrated into the federal military structure. The President commands the militia when they are called into federal service, U.S. CONST., art. II, § 2, para. 1, as they may be pursuant to an act of Congress in specified situations, *id.* at para. 15, but they remain under officers chosen pursuant to state law, *id.* at para. 16.

state law (and non-federal law more generally) presents an especially troublesome problem, because the most natural answer is not available. That answer, which perhaps could be taken as unstated with respect to federal law, is that only the court that can finally resolve all cases concerning the body of legal norms at issue can be absolutely authoritative with respect to that body of legal norms. But for American state law there is no such court.

Since the framing the Supreme Court of the United States has been the tribunal of last resort in a large class of diversity cases that turn wholly on state law. Issues of state law can also come up in cases under any of the other heads of Article III jurisdiction, as when a plaintiff brings claims under both state and federal law in a federal district court.[22] Yet there are and always have been many cases involving state law that do not come within the Article III jurisdiction. Neither the Supreme Court of Pennsylvania nor the Supreme Court of the United States has a monopoly on the interpretation of Pennsylvania law.

This is a notoriously difficult problem. For many decades the federal courts generally regarded themselves as bound by state-court precedents concerning state statutes but not by state-court precedents concerning unwritten law, or at least unwritten law that was not peculiarly that of any one State.[23] Then in 1938 the Justices decided that they and their predecessors had been committing a grievous error, indeed had been pursuing an unconstitutional course.[24] They should have been regarding themselves as absolutely bound by state-court precedents on state law, despite their jurisdiction over many cases turning on such law.

Neither before nor after *Erie* were the courts, state or federal, relying on any explicit guidance from Article III. The Constitution says nothing about whether the Supreme Court of the United States must follow the Supreme Court of Pennsylvania or

22. *See, e.g.*, United Mine Workers of America v. Gibbs, 383 U.S. 715 (1966) (state-law claims were properly decided by federal district court when pendent to federal claims that gave jurisdiction under 28 U.S.C. § 1331).

23. The leading case for the proposition that federal courts were not bound by state court interpretations of general, as opposed to peculiarly local, law, was Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842). A prominent decision in favor of deference to state court interpretation of state statutes was Green v. Neal's Lessee, 31 U.S. (6 Pet.) 291 (1832). The Court struggled with the latter principle in Gelpcke v. City of Dubuque, 68 U.S. (1 Wall.) 175 (1863), acknowledging its "settled rule" of deferring to state courts in the construction of state statutes, but finding that rule to be relaxed in "exceptional cases," as when the state courts themselves had wavered in their views. *Id.* at 206–07.

24. Erie Railroad v. Tompkins, 304 U.S. 64 (1938).

vice versa. If its drafters were not thinking about judicial opinions and their effects on non-parties, but rather about judicial decisions with respect to parties, this is not surprising. Article III does provide the rules that tell who can decide cases; it just lacks the rules that tell who can decide issues. If they were assuming that at least some courts would be conclusive in their pronouncements, it is a significant omission, as two hundred years of varying practice have demonstrated. Indeed, the terminology they chose indicates that they were thinking about the resolution of cases because it is with respect to cases that the Supreme Court of the United States is set up to be supreme, with appellate jurisdiction over all other American courts. Under both *Swift* and *Erie*, however, the Court is not final as to all the issues that can come before it; those cases differed as to the scope of state-court primacy, not its existence.

My approach involves looking for traces, but it may seem that the elephant is in the middle in the room, or in this case on display in the first sentence of Article III. Courts of the United States have the judicial power. Maybe that automatically brings with it the power to generate interpretations of the law that bind all other actors, and in particular all other branches of government. If the courts' judgments have that binding effect, their explanations do too.

In assessing this claim it is important to contrast it with one with which it is easily confused. Whatever else it entails, judicial power brings with it the authority to resolve concrete disputes with substantial finality. In the process of performing that function courts must interpret the law. It may be sound policy for the institution that produces such interpretation, and is supposed to produce it impartially, to be given primacy with respect not only to disputes but also abstract principles. On the other hand, it may not be; the debate over judicial interpretive finality is in large measure a debate on that subject. The point I wish to stress is that this argument, although easily confused with a conceptual argument about the judicial power, is not one.

Rather, the conceptual argument is that people generally understand that the case-deciding power and the law-glossing power are necessarily linked. That argument is much more difficult to sustain because it is easy to understand the judicial power as being limited to the resolution of cases. This is the kind of judicial power exercised by United States District Courts, whose opinions do not even have precedential authority on the court that issued them. All the district courts do is decide cases, and

they do it with judicial power. Hartnett has demonstrated that long-standing practice concerning the operation of courts accords best with this more limited conception.[25]

Courts that are limited to deciding cases were even more common in the early days under the Constitution because the mechanisms for the production, preservation, and dissemination of judicial opinions were primitive by our standards. That fact has important implications for a question that naturally arises at this point: Did people at the time of the framing believe that judicial power entailed the authority to bind all other legal actors to abstract interpretive conclusions rather than just the outcome of particular legal disputes?

As to the ultimate question of judicial finality, the framers seem to have been as divided as Americans are today.[26] Their conduct, however, makes it hard to believe that many of them believed that the power to decide cases necessarily brought with it the power to produce generally binding interpretation because they were so haphazard about the opinions in which interpretation would be found. According to *Cooper*, judicial opinions have a status almost equal to that of the Constitution itself. Yet the production and distribution of opinions was a fairly casual matter in the early days of the government. The transition from oral to written opinions was just beginning. As Surrency explained, the first state to require written opinions seems to have been Connecticut in 1784; Pennsylvania in 1806 required that opinions be reduced to writing if requested by counsel but did not impose a general mandate for written opinions until 1845.[27]

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25. Hartnett, *supra* note 7, at 146–48.

26. David Engdahl maintains that during the 1790s not only was judicial review widely accepted, so that *Marbury* was not a bolt from the blue, but so was judicial supremacy, the principle that judicial decisions concerning constitutional questions are binding on other government actors. John Marshall, though, believed in judicial review but not judicial supremacy. David Engdahl, *John Marshall's "Jeffersonian" Concept of Judicial Review*, 42 DUKE L. J. 279, 279–82 (1992). The evidence Engdahl presents, however, supports a widespread belief in judicial review much more strongly than it supports a similar belief in judicial supremacy. As he notes, the latter position was hardly universal among prominent political figures; James Madison and Thomas Jefferson never shared it. *Id.* at 298–99. Moreover, Engdahl explains that one source of confidence in the judiciary during the very early constitutional period was the participation of juries in finding the law as well as the facts. *Id.* at 291–94. Juries did not write opinions then any more than they do now, and hence it would take a series of adjudications involving juries to establish a point of constitutional law, as juries kept reaching the same result on varying facts. A jury-centered form of judicial supremacy, even if anyone believed in it, is very different from the form of judicial supremacy that is the subject of current debate. *Cooper v. Aaron* does not seem to contemplate a decisive role for Arkansas juries.

27. Erwin C. Surrency, *Law Reports in the United States*, 25 AM. J. LEGAL HIST. 48, 55 (1981).

The Supreme Court of the United States, the principal concern for most proponents of the *Cooper* principle, did not start out with written opinions, but rather adopted that practice after a few years. In his first volume of reports Cranch, the Court's second unofficial reporter, noted that he had been "relieved from much anxiety, as well as responsibility, by the practice which the court has adopted of reducing their opinion to writing, in all cases of difficulty or importance."[28] Dallas, Cranch's predecessor as unofficial reporter, apparently had no such luxury.[29] And even in Cranch's time and later, written opinions, when produced, were somewhat unofficial; they were not required to be filed with the Clerk of the Court until 1834.[30]

Dallas and Cranch themselves were not what one would hope for in a reporter of decisions today. Dallas' reports, at least when the Justices did not give him written opinions, are of doubtful accuracy and were often years late.[31] Cranch, as noted, had the advantage of getting something in writing from the Justices, but that did not keep him from being late too.[32] No doubt both unofficial reporters were responding to limited demand for Supreme Court opinions. If those opinions, when available, were one form of authority, that limited demand is understandable. If they were as powerful as the judicial finality thesis suggests, it is quite strange.

Whatever the view of the bar may have been, neither Congress nor the Justices seems to have been especially concerned about their opinions. Joyce reports that there are no known finished manuscript opinions, written in the hands of the Justices, from the Court's first decade.[33] Congress also treated the Court's opinions as documents of secondary importance. The First Congress, in its first session, provided for the preservation and distribution of its statutes, and in its second session made a similar provision for treaties.[34] More than a decade and a half later in

28. 1 Cranch iv-v (1804).

29. Craig Joyce, *The Rise of the Supreme Court Reporter: An Institutional Perspective on Marshall Court Ascendancy*, 83 MICH. L. REV. 1291, 1298 (1985).

30. *Id.* at 1298, n.46.

31. "Delay, expense, omission and inaccuracy; these were among the hallmarks of Dallas' work." *Id.* at 1305.

32. Joyce suggests that Cranch obtained from the Justices, not actual opinions, but their written notes from which oral opinions were delivered. *Id.* at 1310 n.110. For Cranch's delay, *see id.* at 1311.

33. *Id.* at 1304.

34. Congress directed the Secretary of State to keep and publish its statutes in 1789. Act of September 15, 1789, ch. xiv, 1 Stat. 68. Treaties were included in that mandate less than a year later. Act of June 14, 1790, Resolution II, 1 Stat. 187.

1817, Congress authorized an official Reporter of Decisions for the Supreme Court.[35] And even at that point, as noted above, opinions might or might not be for the Court in our sense; there was no obligation to prepare written opinions and no obligation to make sure that written opinions made their way to the Reporter of Decisions. Members of Congress apparently thought that the bar and country would profit from having whatever explanations the Justices decided to provide. If they had thought that those explanations had a status close to that of the Constitution itself, it is likely that Congress would have acted much sooner and more comprehensively to make sure that such an important part of the constitutional machinery was in working order.[36]

None of this is to suggest that lawyers at the time of the framing and in the early national period regarded judicial opinions as irrelevant. Rather, they seem to have regarded opinions, when they existed and were accurately reported, as authority of considerable importance.[37] That status is certainly respectable, but it is still a long way from the exalted position to which *Cooper* raises the courts' explanations of what they have done. If the framers and their immediate successors thought that so much flowed from the courts' possession of judicial power, they did not betray that belief through their actions.

No traces, no elephant.

35. Act of March 3, 1817, ch. 63, 3 Stat. 376.

36. Hartnett reviews much of this history in arguing for the primacy of judgments over opinions. Hartnett, *supra* note 7, at 128–30.

37. The acceptance, then and now, of the importance of judicial precedent does not imply judicial supremacy. Stare decisis is a principle that courts invoke with respect to their own cases; its existence does not imply that non-judicial actors are similarly bound. That is true even if the practice of respecting precedents is itself constitutionally derived. I have argued elsewhere that it is not, and that instead, the rules of precedent in federal court are, in contemporary terminology, federal common law. *See* John Harrison, *The Power of Congress Over the Rules of Precedent*, 50 DUKE L.J. 503 (2000).