

**COOPER'S QUIET DEMISE
(A SHORT RESPONSE TO PROFESSOR STRAUSS)**

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Change may be what law does best.¹ Law adapts. It adjusts. It “translates.”² Its enforcement varies as its enforcers change.³ Some may still favor less volatile legal features—doctrinal stability,⁴ decisional predictability,⁵ judicial restraint.⁶ Some may even believe that the “whole purpose” of the Constitution is to “*prevent*” broad legal swings—or at least to make them quite difficult.⁷ But change is one of law’s true constants, as common as jealousy and as inevitable as the grave.⁸

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1. See, e.g., Morton J. Horwitz, *The Supreme Court, 1992 Term—Foreword: The Constitution of Change: Legal Fundamentality Without Fundamentalism*, 107 HARV. L. REV. 30, 116 (1993) (“The central problem of modern constitutionalism is how to reconcile the idea of fundamental law with the modernist insight that meanings are fluid and historically changing.”); see also Lawrence Lessig, *Fidelity and Constraint*, 65 FORDHAM L. REV. 1365 (1997); David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 877 (1996) (“In fact, in the day-to-day practice of constitutional interpretation, in the courts and in general public discourse, the specific words of the text play at most a small role, compared to evolving understandings of what the Constitution requires.”).

2. Lawrence Lessig, *Understanding Changed Readings: Fidelity and Theory*, 47 STAN. L. REV. 395, 406 (1995) (“A literary translator’s practice is to construct a second text in a second (or ‘target’) language to mirror the meaning of a first text in the first (or ‘source’) language This is the practice of the translator in law as well. She constructs a *reading* in the second context to preserve the meaning of a *reading* within the first”).

3. See Richard H. Fallon, Jr., *How to Choose a Constitutional Theory*, 87 CAL. L. REV. 535, 570–72 (1999).

4. See, e.g., Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359, 1367 (1997).

5. See, e.g., Frank H. Easterbrook, *Stability and Reliability in Judicial Decisions*, 73 CORNELL L. REV. 422 (1988).

6. See, e.g., CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT (1999); CASS R. SUNSTEIN, RADICALS IN ROBES: WHY EXTREME RIGHT-WING COURTS ARE WRONG FOR AMERICA (2005); Cass R. Sunstein, *Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733 (1995).

7. Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 40 (Amy Gutmann ed., 1997) (emphasis added); see also Fallon, *supra* note 3, at 571–72 (“But while Justice Scalia resists the notion that the methodology

Nothing has changed quite so much, David Strauss argues, as *Brown v. Board of Education*.⁹ This claim may seem surprising. *Brown* is, after all, an icon among icons,¹⁰ a (seemingly) “fixed point in American constitutional law.”¹¹

But *Brown*’s “fixed point” has somehow moved. What was once an “unchallengeable”¹² triumph of anti-subordination has been turned, ironically and perversely, into an anti-classificationist’s victory.¹³ *Brown*’s “true legacy”

of constitutional adjudication should ideally evolve, even he accepts that constitutional theory must adapt in practice. . . . Justice Scalia acknowledges that courts must develop a theory that accommodates the timeless originalist ideal with respect for stare decisis.”) (citations and emphasis omitted).

8. See Strauss, *supra* note 1, at 935 (“Gradual innovation . . . has always been a part of the common law tradition, as it has been a part of American constitutionalism.”); Lessig, *supra* note 2, at 396 (“No theory that ignored these changes, or that presumed that constitutional interpretation could go on without these changes, could be a theory of our Constitution. Change is at its core.”); see also Fallon, *supra* note 3, at 572 (“Claims such as these may appear to verge on constitutional, or at least constitutional theoretical, nihilism. If the best constitutional theory may vary from era to era, why should it not also vary from case to case?”).

9. 347 U.S. 483 (1954).

10. See Craig Green, *Repressing Erie’s Myth*, 95 CAL. L. REV. (forthcoming 2008), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1009992.

11. David A. Strauss, *Little Rock and the Legacy of Brown*, 52 ST. LOUIS U. L.J. 1065 (2008).

12. *Id.* at 1065, 1082. In some ways, *Brown* still seems unchallengeable—in outcome, if not in rationale. As Professor Lessig has explained, “[n]o one questions *Brown*’s result (anymore). Indeed, so completely has the legal system reoriented itself after the decision that it may not even be possible to find the legal material with which to mount a serious challenge to its conclusion.” Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165, 1242 (1993) (citations omitted). “In a world where a conservative like Justice Scalia says the correctness of the decision ‘leaves no room for doubt,’” Professor Lessig adds, “it is difficult to reconstruct the world where liberals such as Professor Herbert Wechsler could worry that no principled opinion could be written to support it.” *Id.* (citation omitted); see also Mark V. Tushnet, *Reflections on the Role of Purpose in the Jurisprudence of the Religion Clauses*, 27 WM. & MARY L. REV. 997, 999 n.4 (1986) (“For a generation, one criterion for an acceptable constitutional theory has been whether that theory explains why [*Brown*] . . . was correct.”). But see John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385, 1463 n.295 (1992) (“I do not think that my theory of the 14th Amendment stands or falls with [its ability to accommodate *Brown*]. Man is not the measure of all things, as Socrates replied to the Sophists, and neither is [*Brown*]. . . . An interpretation of the Constitution is not wrong because it would produce a different result in *Brown*.”). Professor Lessig may well be right—even if, as Professor Strauss counsels, we should take Wechsler’s worries seriously. But true or not, the soundness of *Brown*’s result is only part of the matter. How the Court reached its outcome is of comparable concern—and no small measure of dispute.

13. Strauss, *supra* note 11, at 1083–86.

has been “undermine[d],”¹⁴ Professor Strauss tells us; its real meaning has been lost.¹⁵ And this, he says, is “indefensible.”¹⁶

Yet Professor Strauss’s prognosis is not entirely grim. With characteristic precision and elegance,¹⁷ Professor Strauss does more than recount *Brown*’s lamentable shift. He also sets a course for revival and reclamation. He asks us to look at *Brown* (and the Supreme Court’s recent decision in *Parents Involved in Community Schools v. Seattle School District*¹⁸) once more—not through the same tired glasses, but through the prism of 1950s Little Rock and the lens of *Cooper v. Aaron*.¹⁹

Why Little Rock’s prism? And why *Cooper*’s lens? Professor Strauss offers an alluring answer: Little Rock and *Cooper* provide special insight, he says, a unique perspective on *Brown*’s sacred promise. The “frenzied crowds” outside Central High School, the mobilized National Guard units, the federal paratroopers—these things helped reveal *Brown* for what it meant, not just for what it said.²⁰ They helped to expose, that is, *Brown*’s true anti-caste heart.²¹

These things also helped produce an extraordinary Supreme Court opinion in *Cooper*, a decision that posits the Court at the very center of our constitutional universe.²² *Cooper*’s resounding “judicial supremacy” call is

14. *Id.* at 1086.

15. *Id.*

16. Strauss, *supra* note 11, at 1068.

17. Professor Strauss’s excellent lecture also holds a bit of a surprise—not in its conclusion, but in its mode of analysis. Very little of Professor Strauss’s analysis incorporates post-*Brown* doctrine, looking instead at *Brown* as a kind of static text. This seems, to me, like a perfectly reasonable approach, but one at least somewhat unexpected from Professor Strauss himself. If *Brown* is our anchor text, after all, some may say that its meaning is informed not just by its own words, but by the “elaborate body of [*Brown*] law that has developed, mostly through judicial decisions, over the years.” Strauss, *supra* note 1, at 877. This is what Chief Justice Roberts seems to suggest, however tacitly, in his opinion in *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. ___, 127 S. Ct. 2738, 2751–61 (2007).

18. 551 U.S. ___, 127 S. Ct. 2738 (2007).

19. 358 U.S. 1 (1958).

20. Professor Strauss writes that “the Little Rock school integration crisis that led to *Cooper* was a turning point”—a kind of catalyst of cultural change. Strauss, *supra* note 11, at 1066. On the intricate interplay of law, culture, and civil rights, see especially MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY* (2004).

21. See Strauss, *supra* note 11, at 1067 (“Little Rock showed the national audience that segregation was a part of a racial caste system that treated African Americans as an inferior race. That was why *Brown* was correct . . .”).

22. See *Cooper*, 358 U.S. at 18–19 (“[T]he 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. . . . It follows that the interpretation of the Fourteenth Amendment enunciated by this Court in the *Brown* case is the supreme law of the land . . .”); see also Larry D. Kramer, *The Supreme Court 2000 Term—Forward: We the Court*, 115 HARV. L. REV. 5, 6 (2001) (“But here is the striking thing: in the years since *Cooper v. Aaron*, the idea of judicial supremacy—the

itself totemic—so much so that Professor Fallon uses it as the anchor of his “Pure Judicial Supremacy Model.”²³ It is also deeply controversial.²⁴ Judge Wilkinson deems *Cooper* “both unrealistic and undesirable.”²⁵ Professor Kurland calls *Cooper* the Court’s “Louis XIV’s notion of itself, ‘l’etat, c’est moi.’”²⁶ Professor Strauss, with greater reserve, says that *Cooper* may seem to “go too far,” at least with regard to Congress and the President.²⁷

And about this, Professor Strauss may well be right.

But this short Essay suggests—tentatively and tendentiously—that *Cooper* is both more and less than all of that. It suggests that *Cooper*’s emphatic declaration of judicial supremacy is a bluff, a bit of forced and overheated rhetoric informed less by grand notions of Court authority and more by the peculiar facts of Little Rock. Even more, this Essay suggests that significant holes in *Cooper*’s judicial supremacy armor could be seen well before the Court put pen to paper—and can still be seen today.

To that end, this Essay takes (or attempts to take) four related steps, some more novel than others. It first reconsiders *Cooper* itself, concentrating on Justice Frankfurter’s instructive—if long-ignored—concurring opinion.²⁸ This Essay then locates *Cooper* in slightly broader doctrinal context, calling particular attention to one of *Cooper*’s odd doctrinal contemporaries: *Williams v. Georgia*.²⁹ From there, this Essay examines the lessons we might learn

notion that judges have the last word when it comes to constitutional interpretation and that their decisions determine the meaning of the Constitution for everyone—has finally found widespread approbation.”).

23. Richard H. Fallon, Jr., *Executive Power and the Political Constitution*, 2007 UTAH L. REV. 1, 11 (2007). Professor Roosevelt’s thoughtful contribution to this Issue unpacks the idea of “judicial supremacy” more carefully than I do here. See generally Kermit Roosevelt III, *Judicial Supremacy, Judicial Activism: Cooper v. Aaron and Parents Involved*, 52 ST. LOUIS U. L.J. 1191 (2008). He is surely right that “judicial supremacy” has different foundations and different manifestations—and that these details improve our understanding of the core “judicial supremacy” concept. For the purposes of this Essay, however, even the crudest notion of “judicial supremacy” will do, so I leave the subtler definitions to Professor Roosevelt.

24. See, e.g., ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 259–64 (1962); ALEXANDER M. BICKEL, *THE MORALITY OF CONSENT* 105–11 (1975); see also Daniel A. Farber, *The Supreme Court and the Rule of Law: Cooper v. Aaron Revisited*, 1982 U. ILL. L. REV. 387, 388 (1982) (“*Cooper* has come under scathing attack . . .”).

25. J. Harvie Wilkinson III, *The Supreme Court and Southern School Desegregation, 1955–1970: A History and Analysis*, 64 VA. L. REV. 485, 520 (1978).

26. 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, 328 (1979); see also PHILIP B. KURLAND, *POLITICS: THE CONSTITUTION AND THE WARREN COURT* 116 (1970) (asserting that, in *Cooper*, the Court got “carried away with its own sense of righteousness”).

27. Strauss, *supra* note 11, at 1080.

28. *Cooper v. Aaron*, 358 U.S. 1, 20–26 (Frankfurter, J., concurring).

29. 349 U.S. 375 (1955).

from our slightly expanded perspective. And to close, this Essay argues that if we listen carefully to *Cooper*—as Professor Strauss suggests we should—we may hear something we don't quite expect. We may hear, in short, that the Court in *Cooper* never quite meant what it said.³⁰

I.

None of these steps does much good, of course, without a bit of background. So, at the risk of repeating what Professor Strauss³¹ and others³² have already carefully recalled, it makes sense to reset the basic scene.

It is mid-1950s Arkansas. The State's political-opportunist of a governor, Orval Faubus,³³ has mobilized the State's National Guard in the hope of blocking integration of Little Rock's public schools.³⁴ "[A]ngry white crowds" have descended on the city, "jeer[ing]" black schoolchildren and "attack[ing] reporters."³⁵ All involved are uneasy. Serious violence seems assured.

President Eisenhower, at best an ambivalent supporter of *Brown*,³⁶ has responded by deploying paratroopers to Little Rock.³⁷ These troops help avert

30. *Cooper* adherents and detractors alike seem to take the Court's words at face value. They believe, that is, that at least the Court in *Cooper* believed what it said. This Essay hopes to suggest just the opposite—that *Cooper* never quite meant what it said. Whether the *Cooper* Court *should* have meant what it said is clearly an important (and related) question, but it is not one I wish to engage here.

31. See Strauss, *supra* note 11, at 1076–82.

32. See Farber, *supra* note 24, at 390–96.

33. See *id.* at 393 ("Even today, the motives behind Governor Faubus's change of position are not completely clear. . . . Whatever his motives, his actions are clear.").

34. *Id.* (noting that Faubus "claimed merely to be preserving public order") (citation omitted).

35. *Id.*

36. *Id.* at 394 ("President Eisenhower previously had not taken a strong stand on civil rights. Even today his views on the merits of *Brown* remain unclear.") (citation omitted); see also Stephen Breyer, *Judicial Independence: Remarks by Justice Breyer*, 95 GEO. L.J. 903, 907 (2007) ("That President Eisenhower dispatched the troops even though his feelings about *Brown* were ambivalent only heightens the extent to which sentiments about the judiciary's independence had changed . . ."). As it happens, President Eisenhower's ambivalence helped give voice to some powerful "judicial supremacy" rhetoric. When asked if he agreed with *Brown*'s outcome, President Eisenhower extolled Court power, not Court prescience: "[I]t makes no difference whether or not I endorse [*Brown*]. The Constitution is as the Supreme Court interprets it . . ." 2 STEPHEN E. AMBROSE, *EISENHOWER: THE PRESIDENT* 338 (1984). For a more detailed study of President Eisenhower's reaction to *Brown*, see Joel K. Goldstein, *Justice O'Connor's Twenty-Five Year Expectation: The Legitimacy of Durational Limits in Grutter*, 67 OHIO ST. L.J. 83, 141 (2006) ("President Eisenhower did little to develop support for *Brown*.") (citing The President's News Conference, PUB. PAPERS 489, 491–93 (May 19, 1954); The President's News Conference, PUB. PAPERS 182, 186 (Jan. 25, 1956); The President's News Conference, PUB. PAPERS 263, 269–70 (Feb. 29, 1956); The President's News Conference, PUB. PAPERS 301, 304 (Mar. 14, 1956); The President's News Conference, PUB. PAPERS 732, 736 (Sept. 5, 1956)).

massive mob violence, but they do little to soften Faubus's segregationist stand.³⁸ By early 1958, in fact, Faubus and the Arkansas legislature have made public school integration effectively impossible; even more, by early 1958, Faubus and the Arkansas legislature have threatened to reinstitute official segregation.³⁹ *Brown v. Board*, they have decided, does not apply to them.⁴⁰ So they have thumbed their noses at the Court.

And in response the Supreme Court does not flinch.⁴¹ In *Cooper*, the Court finds against Faubus and the Arkansas legislature. It chides the State's behavior. And it toes *Brown*'s line firmly and emphatically—recounting the evils of discrimination, reasserting the rights of African American children, and rejecting the menace of “evasive” segregationist “schemes.”⁴²

But *Cooper* does much more than this—more than was necessary, as the Court candidly admits.⁴³ *Cooper* also sounds its familiar “judicial supremacy” call. It recites the (supposedly) “basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution”⁴⁴ It asserts that decisions “enunciated by th[e] Court” are themselves “the supreme law of the

37. As Professor Farber has explained, the story is a bit more complicated than my brief summary suggests. Before President Eisenhower deployed the troops, he met with Faubus personally—and the meeting left Eisenhower “with the impression” that Faubus would relent. Farber, *supra* note 24, at 395. But Faubus did no such thing. Instead, he removed the National Guard troops in a manner that “[left] no way of controlling the angry crowds [then] surrounding the school.” *Id.* (citations omitted). Only then did President Eisenhower respond directly, first with a (futile) proclamation and then with federal troops. *Id.* at 395–96 (adding that President Eisenhower was careful to state that “personal opinions about the [*Brown*] decision have no bearing on the matter of enforcement”) (citations omitted).

38. *Id.* at 396 (“Although the federal forces could control crowds . . . they could not control other forms of white resistance.”).

39. *Id.*

40. See Farber, *supra* note 24, at 395–96 (“[Faubus] declared that ‘the Supreme Court decision is not the law of the land.’”).

41. Nor could it, as Professor Strauss notes. Had the Court backed down in *Cooper*, it would have embarrassed more than itself. It would have embarrassed the entirety of the federal government, President Eisenhower included. See Strauss, *supra* note 11, at 1079 (“Especially after it had finally elicited support from the executive branch, the Court could not possibly have given any sign that it was backing away from *Brown*, and it did not.”); see also KLARMAN, *supra* note 20, at 328–29 (“*Cooper v. Aaron* was easy for the justices Now that the president had finally provided [political support for *Brown*], the justices had no choice but to back him up.”); Farber, *supra* note 24, at 402 (“In retrospect, it is hard to see how the Court could have avoided making such a plea for obedience to *Brown*”).

42. *Cooper v. Aaron*, 358 U.S. 1, 16–17 (1958).

43. See *id.* at 17 (“What has been said, in the light of the facts developed, is enough to dispose of the case. However, 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.”).

44. *Id.* at 18.

land.”⁴⁵ And it admonishes all who can hear it that the Supreme Court “must be *obeyed*.”⁴⁶

These are famous words—now banal to some,⁴⁷ still provocative to others.⁴⁸ These words will, no doubt, be admired *and* assailed for years to come. But just how seriously should we take *Cooper*’s “judicial supremacy” call? Is the Court’s supremacy “rule” as vigorous and categorical as it may seem? Or is it simply a handy dialectical tool, ready to be attacked or supported regardless of its real effect?

Justice Frankfurter suggests surprising answers to these questions. In his revealing—if long-overlooked—concurrence, in fact, Justice Frankfurter subtly hints that *Cooper* may not mean exactly what it says.⁴⁹

That Justice Frankfurter wrote separately at all was no small matter. Other Justices believed the Court should speak as a single, unified group in *Cooper*.⁵⁰—the better, they thought, to “dramatize the Court’s adherence to *Brown*.”⁵¹ But Justice Frankfurter wished to write separately. More than that, he wished to address a particular audience: “Southern lawyers and law professors”—those Southern “legal profession[als]” who might, over time, help the Court effect a “gradual thawing of the ice.”⁵² So against the forceful urging of his colleagues, Justice Frankfurter penned a rather strange concurrence in *Cooper*—though he delayed its announcement until days after the majority spoke.⁵³

Justice Frankfurter’s strange concurrence begins with an ode to cooperation: “By working together [and] by sharing in a common effort,” Justice Frankfurter writes, “men of different minds and tempers, even if they do not reach agreement, acquire understanding and thereby tolerance of their differences.”⁵⁴ Our goal, Justice Frankfurter suggests, is common and laudable, if still imperfect. We all wish, he says, to get along peacefully, even when we never quite agree. But this kind of broad social harmony requires

45. *Id.*

46. BICKEL, THE LEAST DANGEROUS BRANCH, *supra* note 24, at 264 (emphasis added).

47. *See, e.g.,* Kramer, *supra* note 22, at 6 (“But here is the striking thing: in the years since *Cooper v. Aaron*, the idea of judicial supremacy . . . has finally found widespread approbation.”).

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

49. 358 U.S. at 20–26 (Frankfurter, J., concurring).

50. *See* Dennis J. Hutchinson, *Unanimity and Desegregation: Decisionmaking in the Supreme Court: 1948–1958*, 68 GEO. L.J. 1, 79–83 (1979).

51. *See* Farber, *supra* note 24, at 401 (citation omitted).

52. *See* Hutchinson, *supra* note 50, at 84 (citing Letter from Justice Frankfurter, United States Supreme Court Justice, to C.C. Burlingham, at 2 (Nov. 12, 1958)).

53. *See* Farber, *supra* note 24, at 401 (“Although Justice Frankfurter had wanted to write a separate opinion, he was dissuaded from announcing it the same day as the main opinion.”) (citation omitted).

54. 358 U.S. at 20 (Frankfurter, J., concurring).

more than good intentions and a few pointed Supreme Court declarations. It requires “the constructive use of time”—something, Justice Frankfurter implies, that had been lacking since *Brown* was decided.⁵⁵

So Justice Frankfurter offers a kind of apologia to Southern States: Some Supreme Court decisions, he acknowledges, will stir “deep emotions.”⁵⁶ Some Supreme Court decisions, like *Brown*, will even involve painful and “drastic alteration[s] in the . . . communities . . . involved.”⁵⁷ This is an inevitable, if uncomfortable, consequence of our constitutional scheme.⁵⁸

But it is not an edict for “immediate” or “overnight” change.⁵⁹ Instead, it is an occasion for discourse, a constitutional dialogue that envisions both give and take.⁶⁰ States may have their say, Justice Frankfurter intimates. States may even *resist* Supreme Court edicts on occasion, provided they do so in appropriate ways.⁶¹ “[B]rute power,” mass violence, and “forcible interference”⁶²—these things are simply too much, Justice Frankfurter explains; they fall outside the boundaries of permissible constitutional resistance, not least because they threaten anarchy and the untangling of our social fabric.⁶³ But more careful, guarded, and subtle forms of resistance can fall *within* the bounds of acceptable debate and defiance. Some cautious bouts of state defiance, Justice Frankfurter quietly concedes, can even evade the Court’s *supreme* rebuke.⁶⁴

It is an odd concession, to be sure. It is especially peculiar to find this nod to state defiance in *Cooper*, a case long-thought to be preoccupied with unfettered Court authority. But it is a concession Justice Frankfurter knowingly rendered, and it carries an invitation he was particularly able to make. For Justice Frankfurter was not writing his concurrence in *Cooper* on a

55. *Id.* at 25.

56. *Id.*

57. *Id.*

58. *See id.*

59. 358 U.S. at 24–25 (Frankfurter, J., concurring).

60. For this proposition, Justice Frankfurter quotes a rather telling source: President Andrew Jackson’s Message to Congress of January 16, 1833. *See* 358 U.S. at 24. Students of Supreme Court history know that President Jackson was, at times, a rather vehement critic of notions of “judicial supremacy”—as was President Lincoln, who is quoted near the end of Justice Frankfurter’s concurrence. *Id.* at 26. It may be too much to suggest that Justice Frankfurter’s quotation selection sends its own powerful message about tolerable defiance. But it is not too much to suggest that Justice Frankfurter chose his sources carefully and intentionally.

61. *Id.* at 21–22.

62. *Id.* at 22–25.

63. *Id.* at 22; *see also* Norman R. Williams, *Executive Review in the Fragmented Executive: State Constitutionalism and Same-Sex Marriage*, 154 U. PA. L. REV. 565, 613 (2006) (“Significantly, . . . *Cooper* did not deny the power of state officials to enforce the Constitution, but rather only to disregard the Supreme Court’s interpretation once made.”).

64. 358 U.S. at 22.

clean slate. He was writing as the author of *Williams v. Georgia*,⁶⁵ a story of successful state defiance decided less than three years before.

II.

Williams v. Georgia is an odd case. It is also a nearly-forgotten case, one best considered by Del Dickson more than a decade ago.⁶⁶ And *Williams* is surely a hard case, though its core story can be quickly retold.

In October 1952, a liquor store clerk named Harry Furst was shot and killed in Atlanta.⁶⁷ Local police soon arrested Aubry Lee Williams, a twenty-seven-year-old African American man, and charged him with Furst's murder.⁶⁸ In time, Williams was tried by a state jury, one empanelled through a "colored ticket" system all would come to acknowledge as unconstitutional.⁶⁹ But Williams's attorney⁷⁰ failed to object to this selection process—"even though the Georgia Supreme Court had criticized [the] use of colored tickets" in *Avery v. State*,⁷¹ and even though "the U.S. Supreme Court had granted certiorari in [Avery] only the day before."⁷² Trial lasted less than a day.⁷³ Williams was convicted and sentenced to death.⁷⁴

65. 349 U.S. 375 (1955).

66. Del Dickson, *State Court Defiance and the Limits of Supreme Court Authority: Williams v. Georgia Revisited*, 103 YALE L.J. 1423 (1994).

67. *See id.* at 1426; *see also* BARRETT PRETTYMAN, JR., DEATH AND THE SUPREME COURT 258–63 (1961).

68. *See* Dickson, *supra* note 66, at 1426 (citing True Bill, *Williams v. State*, 78 S.E.2d 521 (Ga. 1953) (No. 18348), *reprinted in* Bill of Exceptions at 1–2, *Williams v. State*, 82 S.E.2d 217 (Ga. 1954) (No. 18548)).

69. Dickson, *supra* note 66, at 1427–28; Del Dickson's summary of this "colored ticket" system is especially helpful:

At the time, jury panels in Fulton County were selected on a weekly basis by a superior court judge, who drew tickets from a wooden box containing the names of all qualified men in the jurisdiction. The wooden container was called a traverse jury box, and those who were selected were called traverse jurors. The drawing was not a random process: white prospective jurors had their names written on white tickets, while everyone else had their names placed on yellow tickets. This allowed state officials to monitor—and presumably limit—the number of racial minorities allowed to serve as jurors in Fulton County. The yellow cards that were drawn were generally assigned to the criminal calendar, at least in part because the state could challenge black jurors more easily in criminal trials than in civil cases.

Id. at 1427 (citations omitted). Professor Dickson also notes that Williams confessed, somewhat reluctantly, to Furst's murder—though the details of this confession were never confirmed. *See id.* at 1426–27, 1427 n.11 (citations omitted). Neither the Georgia Supreme Court nor the U.S. Supreme Court devotes much, if any, attention to this confession. Whether it otherwise tacitly informed those courts' analyses is an open question.

70. Williams's defense attorney, the somewhat ironically-named Carter Goode, would eventually be named an assistant attorney general for the State of Georgia. *See id.* at 1471.

71. *Id.* at 1428 (citing *Avery v. State*, 70 S.E.2d 716, 722 (Ga. 1952)).

72. *Id.*

On direct and collateral appeal, the Georgia Supreme Court affirmed.⁷⁵ The state court did recognize the problem of colored tickets;⁷⁶ it even acknowledged that the Supreme Court had since declared the colored-ticket method of jury-selection unconstitutional in *Avery*.⁷⁷ But the state court still found against Williams, concluding that he had *abandoned* his constitutional claims: “When [Williams] failed to raise this question when the [jury] panel was put upon him,” the court wrote, “he waived the question once and for all.”⁷⁸

The Supreme Court granted certiorari five months later.⁷⁹ A difficult period of deliberation followed. So divided was the Court, in fact, that Justice Frankfurter “set to writing” his opinion without formal assignment from Chief Justice Warren.⁸⁰ But just one week after it issued its (in)famous “all deliberate speed” decision in *Brown II*,⁸¹ the Court rejected Georgia’s waiver conclusion, vacated Williams’s conviction, and remanded to Georgia’s courts—adding only the gentlest⁸² instructions to conduct a new trial.⁸³

73. *Id.*

74. Dickson, *supra* note 66, at 1428 (citation omitted).

75. For a more complete account of Williams’s unsuccessful walk through Georgia’s appellate process, see *id.* at 1429–32.

76. See *Williams v. State*, 82 S.E.2d 217, 219 (Ga. 1954).

77. *Id.*; see also *Avery v. Georgia*, 345 U.S. 559, 562 (1953).

78. *Williams*, 82 S.E.2d at 218–20 (citations omitted).

79. See Dickson, *supra* note 66, at 1432–36 (“This time Justices Douglas, Black, Warren, and Clark voted to grant certiorari . . .”). It was not an easy or uncontroversial vote. Professor Dickson’s careful review of primary sources helps tell this story best. See *id.* at 1432–37. For now, it is enough to note that Justices and clerks alike were concerned about the Court’s appellate jurisdiction and the (potentially) adequate and independent state ground for Georgia’s decision. *Id.*

80. See *id.* at 1447.

81. *Brown v. Bd. of Educ. (Brown II)*, 349 U.S. 294 (1955).

82. During the Court’s post-argument conference, Justice Frankfurter stressed the “Court’s duty to guard against undermining a state’s responsibility for enforcing its own criminal laws.” Dickson, *supra* note 66, at 1445. Justice Frankfurter also cautioned the Court against

impos[ing] federal standards of fair play on the states, [or] . . . let[ting] a hard case bring the federal judiciary into violence with state governments. Not only did the Court have a constitutional duty to respect state autonomy, Frankfurter explained, but the Court could not run roughshod over state law enforcement without damaging its own prestige and authority.

Id. (citations and internal quotation marks omitted). This seems a rather unmistakable preview of Justice Frankfurter’s concurrence in *Cooper*. See *Cooper v. Aaron*, 358 U.S. 1, 20–26 (1958) (Frankfurter, J., concurring); see also *supra* notes 50–65 and accompanying text (discussing Justice Frankfurter’s concurrence in *Cooper*).

83. See *Williams v. Georgia*, 349 U.S. 375, 389, 391 (1955); see also KLARMAN, *supra* note 20, at 324 (“The Court declined to reverse outright, but it strongly hinted that it might do so if Georgia refused to order a new trial.”).

The Georgia Supreme Court refused.⁸⁴ Not three days⁸⁵ after it received the Supreme Court's opinion the Georgia court reaffirmed its initial decision, telling the Supreme Court that it would not "supinely surrender sovereign powers of th[e] State" to an intermeddling federal court.⁸⁶ It would order no new trial. Nor would it delay Williams's execution. Indeed, it would do nothing the Supreme Court asked it or commanded it to do. Georgia simply decided to ignore binding Supreme Court precedent. Or, as Barrett Prettyman pithily summarized some time later, Georgia simply told the Supreme Court to "go to hell."⁸⁷

This may surprise us.⁸⁸ It may even astonish students of *Martin v. Hunter's Lessee*,⁸⁹ *Testa v. Katt*,⁹⁰ and *Cooper* itself. Even Georgia's Chief Justice expected to be called before the Supreme Court on contempt charges⁹¹—though he was prepared to issue contempt citations to Chief Justice Warren (and other Supreme Court Justices) right back.⁹²

But even more surprising is what happened next: the Supreme Court flinched. When Williams filed a second request for Supreme Court review, the Court denied certiorari—unanimously.⁹³ It allowed the Georgia Supreme Court to flout directly apposite precedent; even more, it allowed the state court to flout the law of that very case. Georgia's courts defied the Supreme Court and won. Williams was executed on March 30, 1956⁹⁴—just eighteen months before Orval Faubus mobilized the National Guard in Little Rock.⁹⁵

84. See *Williams v. State*, 88 S.E.2d 376, 377 (Ga. 1955).

85. Though the Supreme Court decided *Williams* on June 6, the opinion was not filed with the Georgia Supreme Court until July 13, 1955. The Georgia Supreme Court issued its response on July 15. Dickinson, *supra* note 66, at 1456.

86. *Id.* at 377. A dismissal of the Supreme Court's judgment accompanied the state court's decision. *Id.*

87. See PRETTYMAN, *supra* note 67, at 290.

88. It may also have surprised the Court. Professor Burt has argued that, "[w]hatever the Justices might have feared regarding elite or popular reception of any order for immediate school desegregation, they had no remotely comparable reason to anticipate resistance to an order for a new trial for Aubry Williams." Robert A. Burt, *Brown's Reflection*, 103 YALE L.J. 1483, 1484 (1993).

89. 14 U.S. (1 Wheat.) 304 (1816) (asserting the Supreme Court's authority to exercise appellate jurisdiction over state court judgments on questions of federal law).

90. 330 U.S. 386, 394 (1947) (holding that a state court must enforce federal law—provided it has "jurisdiction adequate and appropriate under established local law to adjudicate").

91. Dickson, *supra* note 66, at 1458.

92. *Id.*

93. *Id.* at 1464 ("All nine Justices voted to deny certiorari.") (citation omitted).

94. *Id.* at 1465.

95. See Farber, *supra* note 24, at 393.

III.

So *Williams v. Georgia* is an odd, awkward, and unsettling case. It is also a bad fit with *Cooper v. Aaron*, the Court's most emphatic assertion of its supposed supremacy. But *Williams* and *Cooper* are more than a curious doctrinal mismatch. They are an unexpectedly illuminating pair, and there are real lessons to be learned from juxtaposing the two.

One lesson might be that something—or *everything*—changed between 1955 and 1958. Perhaps the addition of Justice Brennan between *Williams* and *Cooper* dramatically altered the Court's sense of its own power.⁹⁶ Perhaps *Williams* itself induced more aggressive state defiance—for many states did view *Williams* as evidence of Court cowardice, real proof that they could “stand up to the . . . Court . . . and get away with it.”⁹⁷ And perhaps *Williams* embarrassed and emboldened the Supreme Court, teaching it that passivity and moral suasion of the type Justice Frankfurter envisioned would not work with obdurate Southern states.⁹⁸

A second lesson may be that *Brown* is simply different—and that *Cooper's* “judicial supremacy” rhetoric is more targeted than thoroughgoing. Professor Dickson makes this claim, arguing that the Court wished to sustain *Brown* specifically—and that it would tolerate “individual injustices” if necessary to do so.⁹⁹ Professor Strauss hints at this idea as well, noting that the Court could scarcely show “any sign that it was backing away from *Brown*.”¹⁰⁰

96. Justice Brennan joined the Court in late 1956, filling a seat vacated by Justice Sherman Minton. For a fuller account of Justice Brennan's nomination, see generally Stephen Wermiel, *The Nomination of Justice Brennan: Eisenhower's Mistake? A Look at the Historical Record*, 11 CONST. COMMENT. 515 (1994–1995). Wermiel begins: “The nomination of William J. Brennan, Jr. in 1956 to be an associate Justice of the U.S. Supreme Court occupies that familiar place in modern American legal history that is at once . . . a tangible event and a subject of considerable mythology and speculation.” *Id.* at 515.

97. Dickson, *supra* note 66, at 1469.

98. *Id.* at 1472 (“The Justices . . . adopted an informal strategy of seeking to avoid unnecessary confrontations with Southern governments over ancillary racial issues.”).

99. *Id.* at 1477–78 (“[A] clear pattern emerges here that the Justices sought to protect the Court's institutional authority and the integrity of *Brown* from Southern attack, even when their actions resulted in significant individual injustices.”); see also NEAL DEVINS & LOUIS FISHER, *THE DEMOCRATIC CONSTITUTION* 156 (2004) (discussing the Court's interest in “sidestepp[ing] . . . explosive confrontation[s] . . . rather than risk thwarting or seriously handicapping its decision in *Brown* . . .”) (internal quotation marks and citation omitted).

100. Strauss, *supra* note 11, at 1079. In some ways, of course, *Williams* and *Brown* are not especially far apart, so the concentration on one may have implicated the other anyway. See Burt, *supra* note 88, at 1491 (noting that both cases “attempted to combat the racial caste system while acknowledging uncertainty as to whether such action was permitted by positive law”); see also *id.* (adding that both cases “proclaimed the racial caste system immoral but did not purport to force this judgment on others; instead, they appealed to others' legal and moral capacities to reach independent judgments . . .”). But see *id.* at 1492–93 (claiming that because “*Williams*' conviction was not an especially outrageous application of Jim Crow”—since “there was no

And another related lesson may be that *Cooper's* "judicial supremacy" language is significantly overstated. At the least, *Williams* suggests that *Cooper* does not always mean what it says—and that the Court did not expect it would. *Williams* suggests, that is, that sometimes the Court will abide, even *invite*, dissent and defiance, so long as that defiance falls within the field of appropriate constitutional play.¹⁰¹ If states defy with violence and guns, the Court will push back vigorously, as it did in *Cooper*. But if states package their defiance more carefully—if they wrap it in more legalistic and proceduralist clothes—the Court may stand aside. Present a superficially compliant but fundamentally evasive "pupil placement" plan, as Birmingham did in *Shuttlesworth v. Birmingham Board of Education*,¹⁰² and the Court may blink. Mask direct state-court defiance in convoluted questions of waiver and adequate-and-independent-state-grounds doctrine, as Georgia did in *Williams*,¹⁰³ and the Court may flinch.

IV.

This is not to suggest, of course, that *all* legalist or proceduralist defiance will prevail. Far from it, as readers of *NAACP v. Alabama's* extended tale well know.¹⁰⁴ In the end, there is simply no easy line of defiance to track and no

plausible suggestion on the trial record that Williams was innocent"—*Williams* was only a "garden variety" episode of a racial caste system).

101. See Frederic M. Bloom, *State Courts Unbound*, 93 CORNELL L. REV. 501 (2008).

102. 358 U.S. 101 (1958); see also KLARMAN, *supra* note 20, at 330–31 ("By 1958, pupil placement had become a preferred method of avoiding desegregation; every southern state had adopted such a scheme. . . . Alabama officials were 'jubilant' over *Shuttlesworth*, which Governor Patterson saw 'as an indication that the Supreme Court is going to let us handle our own affairs.'") (citation omitted).

103. *Williams v. Georgia*, 349 U.S. 375, 389 (1955). Professor Burt has rightly noted that *Williams* was not a jurisdictional slam-dunk. "It is evident from the Justices' deliberations," he writes, "that most of them were convinced that the Georgia courts had not invoked their procedural ground as a ruse . . . ; accordingly, the Justices were troubled about the basis for their jurisdiction, in light of the apparently independent, adequate state procedural ground." See Burt, *supra* note 88, at 1484–85. But it is likewise true that the Court's jurisdictional concerns manifested in an unusual way: Rather than vacating their initial, jurisdictionally dubious decision, the Justices simply left it in place for Georgia to defy it outright. This is a significant difference. In the end, of course, the result is generally the same—at least for Aubry Williams. But if Justice Frankfurter is correct that "the fact that [the Court has] jurisdiction does not compel [the Justices] to exercise it," *Williams*, 349 U.S. at 389, he elides a critical point: Everything changes once the Justices *have* "exercise[d]" their jurisdiction. Put slightly differently, the choice to exercise jurisdiction is one thing. See, e.g., DEVINS & FISHER, *supra* note 99, at 156 (noting that the Court refused to hear a challenge to Virginia's anti-miscegenation law in 1955, despite the offensiveness of the law, because the Court wished to avoid conflict with potentially obdurate states). The choice to allow defiance of that jurisdiction is quite another.

104. That tale involved four trips to the Supreme Court. After trip four, the state relented. See *NAACP v. Alabama ex rel. Flowers*, 377 U.S. 288 (1964); *NAACP v. Gallion*, 368 U.S. 16

simple trend of supremacy to follow. If anything, in fact, the doctrine produces only a “patchwork without pattern”¹⁰⁵—not a clear pattern at all.

But that is precisely the point. *Cooper* would have us believe that there is a categorical rule of “judicial supremacy,” a clear pattern of obedience to the Supreme Court. There is no such rule, no such pattern. Instead, the Court has set a more intricate and nuanced field for constitutional debate. Some defiance is outside that field; it is, like the defiance in Little Rock, definitively out-of-bounds. But some defiance is permitted, even invited, however cryptically.¹⁰⁶ Put slightly differently, some holes exist in the Court’s “judicial supremacy” armor—and some states, like Georgia in *Williams*, occasionally find them.

So Orval Faubus’s mistake in *Cooper* was *not* that he entered the constitutional debate at all, attempting a kind of “popular constitutionalism”—to borrow Dean Kramer’s term.¹⁰⁷ His mistake was the means and the manner he used: His method of popular constitutionalism was too violent and too combative. His attempt at constitutional debate, that is, was simply too far out-of-bounds.

What’s left, then, is a somewhat surprising claim.¹⁰⁸ What’s left is the sense that *Cooper*’s “judicial supremacy” rhetoric substantially outstripped the Court’s real vision and the Court’s real plan.¹⁰⁹ For the Court does indulge,

(1961); *NAACP v. Alabama ex rel. Patterson*, 360 U.S. 240 (1959); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958).

105. JOHN HART ELY, *DEMOCRACY AND DISTRUST* 146 (1980).

106. See *Cooper v. Aaron*, 358 U.S. 1, 20 (1958) (Frankfurter, J., concurring).

107. See KRAMER, *supra* note 48. Orval Faubus may well be a popular constitutionalist of a sort. Even so, Dean Kramer omits Faubus from his seminal book on the topic—and some, most notably Professor Powe, have criticized Dean Kramer for the omission. See L.A. Powe, Jr., *Are the “People” Missing in Action (and Should Anyone Care)?*, 83 TEX. L. REV. 855, 869–70 (2005) (“Massive Resistance had forced the Court into a retreat of several years, and it produced the assertion of judicial supremacy that so infuriates Kramer. Yet he never even mentions it.”).

108. It seems especially surprising in this post-*Boerne v. Flores*, 521 U.S. 507 (1997), post-*Bush v. Gore*, 531 U.S. 98 (2000), world. See, e.g., Michael W. McConnell, *Institutions and Interpretation: A Critique of City of Boerne v. Flores*, 111 HARV. L. REV. 153, 163 (1997) (noting that *Boerne* represents a “startlingly strong view of judicial supremacy”).

109. See, e.g., DEVINS & FISHER, *supra* note 99, at 12. Professors Devins and Fisher make a comparable point in refreshingly direct—and humorous—terms:

The Court’s habit of declaring itself the ultimate arbiter of the Constitution must be read with caution. First, who does the Court say is the final word? Itself. Without being overly skeptical, isn’t there a bit of self-interest here, a claim that is patently self-serving? How would we respond if the President said that of all the people in the country it was his considered judgment that he is the most intelligent? Jay Leno and other late-night comics would have a field day.

Id. Dean Kramer makes a similar claim, calling *Cooper* “just bluster and puff” and accusing the Court of “not reporting a fact so much as trying to manufacture one.” KRAMER, *supra* note 48, at 221. It should be noted, of course, that Dean Kramer, Professor Devins, and Professor Fisher still take the Court’s words at face value; that is, they still assume that the Court means what it

even invite, some defiance of its decisions. It did then—both in *Williams* and, more quietly, in Justice Frankfurter's *Cooper* concurrence. And it does now:¹¹⁰ in *Roper v. Simmons*, where the Missouri Supreme Court ignored recent, seemingly binding Supreme Court precedent;¹¹¹ in *Lockyer v. Andrade*, where the California courts ignored apposite, seemingly controlling Supreme Court doctrine;¹¹² and almost again in Texas quite recently, where the Texas courts flirted with ignoring a Supreme Court stay of execution.¹¹³

These are all difficult stories—no easier than *Cooper* and *Williams* themselves. But difficult stories can be revealing, and sometimes they offer the greatest surprise. The stories of *Williams* and *Roper* and *Andrade* and (even) *Cooper* reveal something we might not expect: States can, and sometimes *do*, disobey binding Supreme Court precedent.¹¹⁴ It is a truth that runs directly contrary to *Cooper*'s famous call for state fealty. But it is a truth the Supreme Court allows all the same.

So is Professor Strauss correct that we benefit from reading *Brown* and *Parents Involved* through the prism of Little Rock and the lens of *Cooper v. Aaron*? Of course he is. We would do well to follow his able lead.

But if *Cooper* is our lens, we should also be careful to acknowledge where it is cracked. Orval Faubus deserved all that he got in *Cooper*, but the Supreme Court did not mean all that it said. Beneath *Cooper*'s noisy shouts of "judicial supremacy" are whispers of *Cooper*'s own quiet demise. We would do well to listen to those whispers too.

says—even if it should not. I hope to show the converse: that the Court did not mean what it said in *Cooper*—even if it should. (And I leave that "should" question unanswered here.).

110. See especially Bloom, *supra* note 101.

111. 543 U.S. 551 (2005); see also Bloom, *supra* note 101.

112. 538 U.S. 63 (2003); see also Bloom, *supra* note 101.

113. See, e.g., Ralph Blumenthal & Linda Greenhouse, *Texas Planning New Execution Despite Ruling*, N.Y. TIMES, Sept. 29, 2007, at A1; Ralph Blumenthal, *Texas Ruling Signals Halt To Executions Indefinitely*, N.Y. TIMES, Oct. 3, 2007, at A16.

114. See generally Bloom, *supra* note 101.

