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Cooper Supremacy

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I. INTRODUCTION

In *Cooper v. Aaron*,[1] the Supreme Court of the United States articulated a doctrine of judicial supremacy to justify the role of federal courts as protectors of the rights of minorities.[2] In *Cooper*, the Court reaffirmed its opinion in *Brown v. Board of Education*[3] that state laws mandating racial segregation in public schools violate the Equal Protection Clause of the Fourteenth Amendment.[4] *Cooper* responded to State of Arkansas officials who had rejected that mandate and flouted the Court's influence. Prior to *Brown* and *Cooper*, progressives had been wary of the Court's approach to individual rights. During the early part of the nineteenth century, the Court had primarily used its power to strike down laws that progressives supported. In *Cooper*, the Court asserted two propositions that were essential to protecting civil rights: that the Court was committed to protecting those rights, and that it would assert all of its power to do so.[5]

In the ensuing decade, the Warren Court issued numerous rulings expanding minority rights,[6] increasing access to the federal courts for civil rights plaintiffs,[7] and upholding the constitutionality of federal civil rights statutes.[8] As a result, liberals embraced the doctrine of judicial supremacy and the view that the federal courts were the primary protectors of minority rights. Liberals' embrace of judicial supremacy in the 1960s stood in sharp contrast to the attitudes towards the Court held by progressives since the Reconstruction Era—viewing the Court as a threat to individual rights, not a

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1. 358 U.S. 1 (1958).
2. *Id.* at 18.
3. 347 U.S. 483 (1954).
4. *Cooper*, 358 U.S. at 17.
5. *Id.*
6. *See infra* Section IV.A.
7. *See infra* Section IV.A.1.
8. *See infra* Section IV.A.2.

champion of those rights.[9] By contrast, progressives viewed the Warren Court as a champion of minority rights.[10] However, in recent years, the Court has reverted to its previous role, using its supreme power to strike down laws that protect minority rights.[11] Indeed, with the Court's new entrenched conservative majority, *Cooper* supremacy presents a threat to the rights of minorities with few limits on the Court's power.

Cooper supremacy is marked by two themes. First, the Court is the supreme expositor of constitutional law. Second, the Court uses that power to enforce the civil rights of minorities. In *Cooper*, the Warren Court provided an answer to the counter-majoritarian difficulty posed by the unelected judiciary overturning acts of the politically elected branches.[12] The Warren Court used *Cooper* supremacy to protect the rights of minorities against the tyranny of the majority.[13] Following *Cooper*, Warren Court rulings enforcing the civil rights of minorities appeared to vindicate liberal support of expansive Supreme Court power. The Warren Court expanded access to federal courts by civil rights plaintiffs and broadly enforced those rights. Using *Cooper* supremacy, members of the Court acted as "counter-majoritarian heroes," protecting the rights of minorities and opening the federal courts as sites of redress for minority plaintiffs seeking to vindicate their rights.[14] At the same time, the Warren Court deferred to the acts of the coordinate federal branches as they also enforced the civil rights of minorities.[15]

Since the Warren Court, *Cooper* supremacy has governed the Court's exercise of judicial review. Unfortunately, the Court no longer relies on that supremacy to protect minority rights. Instead, the Court has backed away from protecting the rights of minorities, restricting the federal courts' authority to protect civil rights and narrowing the meaning of those rights. First the Burger Court and then the Rehnquist Court invoked federalism and

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9. *See* LAURA WEINRIB, THE TAMING OF FREE SPEECH: AMERICA'S CIVIL LIBERTIES COMPROMISE 53 (2016) (discussing the National Civil Liberties Board's, a successor to the American Civil Liberties Union, reluctance to resort to the federal courts during the post-*Lochner* era); REBECCA E. ZIETLOW, ENFORCING EQUALITY: CONGRESS, THE CONSTITUTION AND THE PROTECTION OF INDIVIDUAL RIGHTS 69–71 (2006) (discussing the progressive's campaign to limit federal jurisdiction).

10. *See infra* Section IV.A.2.

11. *See infra* Sections IV.B, IV.C.

12. *See* ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (2d ed. 1986).

13. *See* JOHN HART ELY, DEMOCRACY AND DISTRUST 87 (1980).

14. *See* Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolutions*, 82 VA. L. REV. 1, 2 (1996).

15. *See* Rebecca E. Zietlow, *The Judicial Restraint of the Warren Court (And Why It Matters)*, 69 OHIO ST. L. J. 255, 274–87 (2008).

separation of powers to limit access to courts for civil rights litigants,[16] and adopted substantive doctrines that made it harder for those litigants to prevail on their claims.[17] Today, the Roberts Court, rather than invoking judicial supremacy to protect civil rights against infringement by the majority, has invoked it to restrict the ability of the political branches to do so.[18] What remains of the *Cooper* legacy is pure judicial supremacy without its counter-majoritarian justification. Regardless of the Court's good intentions in *Cooper*, *Cooper* supremacy is a cautionary example of the dangers of one branch of government assuming too much power.

II. THE SUPREME COURT AND MINORITY RIGHTS

Prior to the landmark case *Brown v. Board of Education*,[19] the Supreme Court of the United States provided little protection for racial minorities. In its early cases interpreting the Fourteenth Amendment, the Court largely rejected the claims of freed slaves and their descendants to protection under that Amendment.[20] For example, in the 1896 case of *Plessy v. Ferguson*,[21] the Court upheld a Louisiana law which required railroad cars to be segregated on the basis of race.[22] The Court held that state laws that required "separate but equal" accommodations for people of different races did not violate the Equal Protection Clause of the Fourteenth Amendment.[23] A few years later, the Court upheld a Kentucky state law which prohibited universities from providing desegregated education to blacks and whites.[24] Clearly, the federal courts provided scant recourse for African Americans seeking racial justice.

During the early twentieth century, progressives advocated for the doctrine of judicial deference and decried judicial activism, which they

16. *See infra* Section IV.B.1.
17. *See infra* Section IV.B.2.
18. *See infra* Section IV.C.
19. 347 U.S. 483 (1954).
20. The Court struck down a West Virginia law excluding blacks from jury service in *Strauder v. West Virginia*, 100 U.S. 303 (1880). However, the Court rejected the civil rights claims of blacks who had been injured in the Colfax massacre, a race riot in Louisiana, holding that congressional enforcement of the Fourteenth Amendment did not extend to addressing private action in *United States v. Cruikshank*, 92 U.S. 542 (1876). The Court reaffirmed its state action doctrine in the *Civil Rights Cases*, 109 U.S. 3 (1883) striking down the 1875 Civil Rights Act, which prohibited race discrimination in privately owned places of public accommodation, as beyond Congress's power to enforce the Fourteenth Amendment.
21. 163 U.S. 537 (1896).
22. *Id.* at 552.
23. *Id.* at 548.
24. Berea Coll. v. Kentucky, 211 U.S. 45 (1908).

viewed as protecting the powerful against the powerless.[25] Progressives accused the Court of judicial activism and attacked the institution of judicial review. They argued that it was inappropriate for unelected federal courts to strike down measures enacted by democratically elected legislatures.[26] Some progressives called for the abolition of judicial review.[27] Others supported measures to curtail the Court's power and introduced numerous bills in Congress which would have limited federal jurisdiction.[28] In 1932, progressive allies of labor succeeded with the passage of the Norris-LaGuardia Act, which prohibits federal courts from issuing injunctions in labor disputes.[29] However, other activists sought to use the courts to enforce individual rights. The National Association of Colored People (NAACP) formed in 1909 and began a legal campaign to overturn *Plessy v. Ferguson*.[30] A change in the Court's approach to rights during the New Deal Era opened the door for their success.

A. The Right to Contract and the Progressive Campaign Against Judicial Activism

At the beginning of the twentieth century, the only individual right that the Supreme Court of the United States enforced was the "right to contract" of workers and employers. For example, in *Lochner v. New York*,[31] the Court struck down a state law limiting the working hours of bakers as violating their right to contract to work more hours.[32] In *Coppage v. Kansas*,[33] the Court struck down a law prohibiting employers from forcing their employees to pledge not to join unions as a condition of employment.[34] In *Hammer v. Dagenhart*,[35] the Court struck down a federal law limiting the use of child labor on federalism grounds.[36] These rulings sparked the

25. *See* WILLIAM G. ROSS, A MUTED FURY: POPULISTS, PROGRESSIVES, AND LABOR UNIONS CONFRONT THE COURTS, 1890–1937, at 13–14 (1994).

26. *Id.* at 131. For example, progressives supported the Norris-LaGuardia Act, which prohibited federal courts from issuing injunctions in labor-management disputes and established a process of expedited review of federal court decisions striking down state laws as unconstitutional. *See* ZIETLOW, *supra* note 9, at 71.

27. ROSS, *supra* note 25, at 49–56.

28. *Id.*

29. Norris-LaGuardia Act, 29 U.S.C. §§ 101–115 (2018); *see* Zietlow, *supra* note 15, at 71.

30. *See* MARK V. TUSHNET, THE NAACP'S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925–1950, at 1 (1987).

31. 198 U.S. 45 (1905).

32. *Id.* at 64–65.

33. 236 U.S. 1 (1915).

34. *Id.* at 26.

35. 247 U.S. 251 (1918).

36. *Id.* at 277.

progressive attacks on the federal courts.[37] During the New Deal Era, the Court further angered progressives, including President Franklin D. Roosevelt, by striking down popular measures regulating the economy.[38] By 1936, *Lochner* and its progeny were widely viewed as an inappropriate use of judicial power, examples of harmful judicial activism intruding upon progressive reform legislation.[39] After he was re-elected in a landslide that year, President Roosevelt proposed a plan to expand the Court's membership so that he could appoint judges who were sympathetic to his New Deal measure.[40] Although Roosevelt's court-packing plan failed,[41] the Court began to back away from its activist approach to economic legislation.[42]

In the late 1930s, the Court abandoned its "right to contract" jurisprudence. In the 1936 case of *West Coast Hotel Co. v. Parrish*,[43] the Court upheld a Washington law establishing a minimum wage over the objections that it violated the right to contract.[44] In the 1937 case of *NLRB v. Jones*,[45] the Court did not even mention the right to contract when it upheld the constitutionality of the National Labor Relations Act, a progressive New Deal measure which established a federal right to organize into unions and bargain collectively.[46] In the 1938 case of *United States v. Carolene Products Co.*,[47] the Court abandoned its right to contract jurisprudence and declared a new approach of deference to economic legislation.[48] In subsequent cases, the Court made it clear that it would no longer intervene in the legislative process to protect the "right to contract."[49] The Court's turn

37. ROSS, *supra* note 25, at 167.

38. *See, e.g.*, A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935) (striking down the National Industrial Recovery Act as an invalid use of Congress's commerce powers); *see also* Carter v. Carter Coal Co., 298 U.S. 238 (1936) (striking down the Bituminous Coal Conservation Act, which regulated the hours and wages of coal miners, as an invalid use of Congress's commerce powers).

39. *See* ZIETLOW, *supra* note 9, at 84; *see also* RISA GOLUBOFF, THE LOST PROMISE OF CIVIL RIGHTS 34 (2007).

40. KEVIN J. MCMAHON, RECONSIDERING ROOSEVELT ON RACE: HOW THE PRESIDENCY PAVED THE ROAD TO *BROWN* 61 (2004).

41. *Id.* at 83.

42. *Id.* at 86.

43. 300 U.S. 379 (1937).

44. *Id.* at 400.

45. 301 U.S. 1 (1937).

46. *Id.* at 49.

47. 304 U.S. 144 (1938) (upholding a federal law barring the sale of "filled milk").

48. *Id.* at 153–54.

49. *See W. Coast Hotel Co.*, 300 U.S. 379 (1937) (upholding minimum wage legislation for women and casting doubt on the existence of a right to contract). *West Coast Hotel Co.* overruled an earlier precedent, *Adkins v. Children's Hospital*, 261 U.S. 525 (1923), in which the Court struck down minimum wage legislation as violating the right to contract. 300 U.S. 379.

away from the right to contract and its embrace of judicial deference left open the question of when, if ever, the Court would intervene in the political process to protect individual rights.[50] In a footnote to his majority opinion in *Carolene Products*, Justice Harlan F. Stone suggested a new approach to rights, one in which courts would intervene to protect the rights of minorities.[51]

B. *Carolene Products* and Judicial Protection of "Discrete and Insular Minorities"

In *Carolene Products*, the Court rejected a challenge to a federal law which prohibited the sale of "filled milk."[52] The challengers argued that the law violated their right to contract, but the Court disagreed.[53] In his majority opinion, Justice Stone expressed great deference to Congress and indicated a reluctance to overturn democratically enacted legislation.[54] However, Stone admitted that sometimes the Court's deference to the political process might not be warranted. In footnote four, Stone suggested that legislation that harms "discrete insular minorities," or that infringes on expressly enumerated constitutional rights, indicates that the political process is not working and would not be entitled to the same presumption of constitutionality that the Court extends to legislation in general.[55]

The *Carolene Products* rule of deference reflected the presumption that the political process usually worked.[56] Moreover, courts should defer to legislatures because they are elected by the people and therefore accountable to the people in a way that judges are not.[57] The Court's overall approach to evaluating legislation assumed that the political process generally functioned well. However, footnote four suggested that legislation *restricting* the political process might be subject to "more exacting" judicial scrutiny.[58] Footnote four also acknowledged the fact that prejudice against "discrete and insular minorities" tends to "curtail the operation of those political processes" and thus may also be subject to a more searching inquiry.[59] Stone's footnote thus laid out a persuasive justification for the Court to act to protect minority rights.

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50. *See* GOLUBOFF, *supra* note 39, at 16.
51. *Carolene Prods.*, 304 U.S. at 152 n.4.
52. *Id.* at 148.
53. *Id.* at 147.
54. *Id.* at 153.
55. *Id*. at 152 n.4.
56. *See* ELY, *supra* note 13, at 86.
57. *Id.*
58. *Carolene Prods.*, 304 U.S. at 152 n.4.
59. *Id.*

In the late 1930s, African Americans were the textbook example of "discrete and insular minorities" that the political process had failed repeatedly. In the North, blacks were a minority of voters, and their political clout was limited by racial discrimination.[60] In the South, blacks were excluded from voting.[61] Despite the fact that the Fifteenth Amendment expressly prohibits states from denying the franchise on the basis of race, blacks faced violence, even death, if they even attempted to exercise their political rights.[62] Jim Crow laws and brutal violence in the South, coupled with the lack of protections from race discrimination in the North, evidenced that blacks were truly "discrete and insular minorities"[63] who needed protection from the tyranny of the majority. In subsequent years, members of the Court cautiously embraced its role of enforcing constitutional rights and protecting the rights of minorities.

In a 1943 case striking down a law that required children who were Jehovah's Witnesses to recite the pledge of allegiance in school, Justice Robert Jackson opined, "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts."[64] The Court began to protect the voting rights of African Americans in a series of cases invalidating racially restrictive election practices.[65] In the 1948 case of *Shelley v. Kramer*,[66] the Court held that a racially restrictive covenant violated the Equal Protection Clause of the Fourteenth Amendment.[67] With these opinions, the Court signaled its willingness to tackle race discrimination.

The most significant of the Court's early rulings protecting the rights of minorities was the landmark case of *Brown v. Board of Education*.[68] In *Brown*, the Court held that state mandated segregation of public education violated the Equal Protection Clause of the Fourteenth Amendment.[69] *Brown* was the culmination of a decades-long strategy by the NAACP Legal

60. *See* MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 291 (2004).

61. *Id.*

62. *Id.* at 374.

63. *Carolene Prods.*, 304 U.S. at 152 n.4.

64. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943).

65. *See, e.g.*, Terry v. Adams, 345 U.S. 461 (1953) (holding that a racially exclusionary primaries held by a private organization that functioned as the Democratic Party violated the Fifteenth Amendment); Smith v. Allwright, 321 U.S. 649 (1944) (holding that racially exclusionary primaries violated the Fifteenth Amendment).

66. 334 U.S. 1 (1948).

67. *Id.* at 13–14.

68. 347 U.S. 483 (1954).

69. *Id.* at 495.

Defense Fund to overturn *Plessy v. Ferguson*.[70] In a series of per curiam rulings following *Brown*, the Court established that *Brown* had overruled *Plessy* and held that all state mandated segregation violated the Equal Protection Clause.[71]

In *Shelley*, *Brown*, and cases following *Brown*, the Court intruded on the political process and overturned laws supported by the majority. Though progressives had condemned the Court's activism during the *Lochner* era, many applauded the Court's ruling in *Brown*.[72] Supporters of civil rights agreed that protecting discrete and insular minorities justified Court rulings upholding the civil rights of blacks.[73] Fixing the political process justified the Court's intervention in the political process in the South, where blacks had historically been denied the right to vote.[74] Repeat losers in the political process, African Americans needed the Court to intervene on their behalf and correct that imbalance. Over time, many scholars came to view the Justices on the Warren Court as counter-majoritarian heroes in the fight for civil rights.[75] The Court asserted that role most strongly in *Cooper v. Aaron*.[76]

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70. The NAACP had scored incremental victories, laying the groundwork for *Brown*, in a series of cases challenging racially segregated law schools. *See, e.g.*, Sweatt v. Painter, 339 U.S. 629 (1950) (holding that a separate law school for blacks established by the University of Texas violated the Equal Protection Clause); Missouri *ex rel* Gaines v. Canada, 305 U.S. 337 (1938) (holding as unconstitutional a Missouri law that excluded blacks from its state law school).

71. *See* Johnson v. Virginia, 373 U.S. 61 (1963) (invalidating segregation of courtroom seating); Turner v. City of Memphis, 369 U.S. 350 (1962) (public restaurants); Gayle v. Browder, 352 U.S. 903 (1956) (municipal bus system); Balt. City v. Dawson, 350 U.S. 877 (1955) (public beaches and bathhouses); Holmes v. City of Atlanta, 350 U.S. 879 (1955) (public golf courses).

72. Klarman, *supra* note 14, at 19.

73. *Id.* at 1 ("It is common wisdom that a fundamental purpose of judicial review is to protect minority rights from majoritarian over-reaching.").

74. ELY, *supra* note 13, at 116.

75. A recent Lexis search uncovered 506 law review articles written in the past twenty years advocating the proposition that courts should protect minorities against the will of the majority. For just a few of the many prominent scholars supporting this view, see JUDITH BAER, EQUALITY UNDER THE CONSTITUTION 281 (1983); CHARLES L. BLACK, JR., A NEW BIRTH OF FREEDOM 125 (1997); ELY, *supra* note 13, at 7; KENNETH L. KARST, BELONGING TO AMERICA: EQUAL CITIZENSHIP AND THE CONSTITUTION 9 (1989); see also JOHN J. DINAN, KEEPING THE PEOPLE'S LIBERTIES: LEGISLATORS, CITIZENS, AND JUDGES AS GUARDIANS OF RIGHTS, at x (1998) (stating that "the nation's leading law faculty are nearly unanimous" in believing the judiciary is best suited to protecting liberties). *But see* Frank B. Cross, *Institutions and Enforcement of the Bill of Rights*, 85 CORNELL L. REV. 1529 (2000) (questioning this assumption).

76. 358 U.S. 1 (1958).

III. JUDICIAL SUPREMACY AND *COOPER V. AARON*

In *Cooper*, the Court addressed a direct conflict between state majorities and the rights of minorities over essential constitutional values—the equal protection of the law.[77] The Court's opinion was signed by all of the members of the Court, a highly unusual, if not unprecedented, step.[78] The Court's opinion in *Cooper* asserted its absolute commitment to protecting the civil rights of African Americans and proclaimed its legitimacy when doing so.[79]

A. Historical Background

The facts underlying *Cooper* began in Little Rock, Arkansas, shortly after the Supreme Court's decision in *Brown*.[80] The state of Arkansas, like other Southern states, had required the segregation of public schools.[81] Responding to *Brown*, members of the Little Rock School Board met and formulated a plan to desegregate the public schools.[82] Under the plan of gradual desegregation adopted by the school board, the process would begin in the fall of 1957 and be completed by the fall of 1963.[83] Desegregation would begin in the high school and eventually extend to Little Rock's elementary schools.[84] A group of black school children and their parents filed a lawsuit challenging the plan and asking for faster action.[85] However, the district court approved the plan,[86] and the court of appeals affirmed.[87]

While the local school board was incalcitrant, Arkansas state officials went much further in their resistance to the *Brown* ruling. In November 1956, the Arkansas constitution was amended, "commanding the Arkansas General Assembly to oppose 'in every Constitutional manner the Unconstitutional desegregation decisions of [*Brown* and *Brown II*].'"[88] In February of 1957, the Arkansas General Assembly enacted a law relieving school children from compulsory attendance at racially mixed schools[89] and

77. *Id.* at 16–19.
78. *Id.* at 4.
79. *Id.* 16–19.
80. *Id.* at 4.
81. *Id.*
82. *Cooper*, 358 U.S. at 7.
83. *Id.* at 8.
84. *Id.*
85. *Id.*
86. Aaron v. Cooper, 143 F. Supp. 855 (E.D. Ark. 1956).
87. Aaron v. Cooper, 243 F.2d 361 (8th Cir. 1957).
88. *Cooper*, 358 U.S. at 8–9 (quoting ARK. CONST. amend. XLIV (repealed 1990)).
89. *Id.* at 9 (citing ARK. STATS. §§ 80-1519 to 80-1524 (1957)).

adopted a measure establishing a "State Sovereignty Commission."[90] These laws defied the *Brown* decision and created a direct conflict between state and federal law. The conflict exploded on the ground in Little Rock.[91]

On September 2, 1957, the day before nine black students were scheduled to attend their first day at Little Rock Central High, Arkansas Governor Orval Faubus dispatched the Arkansas state militia to the school grounds and block the black students' access to the school.[92] The governor's actions sparked increased opposition to the desegregation plan by Little Rock residents.[93] The school board asked the district court to postpone the desegregation plan, citing the stationing of military guard by state authorities.[94] However, the district court rejected the board's petition and ordered it to proceed.[95] For three weeks, the Arkansas National Guard prevented the schoolchildren from entering the school.[96] The district court issued an injunction prohibiting the governor and the National Guard from preventing the attendance of the black children at Central High School, but the federal judge could not implement his decision without help from the United States military.[97]

On September 25, 1957, President Dwight D. Eisenhower dispatched federal troops to Central High to protect the black students against the angry mobs which surrounded the school and to effectuate the federal judge's order.[98] Federal troops stayed in Little Rock until November 27, escorting the students to and from school and protecting them while they attended school.[99] On February 20, 1958, the school board petitioned the district court again, asking the judge to postpone their desegregation program due to the extreme hostility against the black students.[100] School board officials sought to withdraw the students from Central High and send them to their former segregated school.[101] This time, the judge granted the petition due to the conditions of "chaos, bedlam and turmoil."[102] The court of appeals reversed the district court, and the school board appealed that ruling to the Supreme Court of the United States.[103]

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90. *Id.* (citing ARK. STATS. §§ 6-801 to 6-824 (1957)).
91. KLARMAN, *supra* note 60, at 326–27.
92. *Id.* at 326.
93. *Id.* at 327; *see Cooper*, 358 U.S. at 9–10.
94. *Cooper*, 358 U.S. at 10.
95. *Id.* at 11.
96. *Id.*
97. KLARMAN, *supra* note 60, at 326–27.
98. *Id.* at 326.
99. *Cooper*, 358 U.S. at 12.
100. *Id.*
101. *Id.* at 12–13.
102. *Id.* at 13.
103. *Id.* at 14.

B. Supreme Court Proceedings

Cooper arrived at the Supreme Court of the United States at the end of the summer of 1958.[104] As school was scheduled to begin in Little Rock on September 15, the Court placed the case on a fast-track docket and issued its preliminary ruling immediately after the hearing.[105] The case presented a dramatic challenge to the Court's legitimacy and to the legitimacy of lower federal courts tasked with enforcing the Court's *Brown* ruling.[106] Moreover, the case involved not only a direct conflict between state and federal law, but a conflict that state officials had instigated by directly defying the Court's interpretation of the United States Constitution.[107] President Eisenhower had backed the Court by sending federal troops to Arkansas, but even after that assertion of federal power, state officials remained defiant.[108] In this context, the Court's signed per curiam decision dramatically asserted its authority to interpret the Constitution and to protect minority rights.[109]

According to the Court, the case "raise[d] questions of the highest importance to the maintenance of our federal system of government," including most notably whether state officials were bound by the rulings of the Supreme Court of the United States.[110] The answer, said the Court, was in the United States Constitution itself, which declares the Constitution the "supreme law of the land" and requires elected state officials to swear an oath to uphold it.[111] Quoting *Marbury v. Madison*,[112] the Court asserted, "[i]t is emphatically the province and duty of the judicial department to say what the law is."[113] Thus identifying itself with the Constitution, the Court held that the logical consequence was that state officials had to adhere to its rulings. Said the Court, "the interpretation of the Fourteenth Amendment enunciated by this Court in the *Brown* case is the supreme law of the land," is binding on state officials as the written Constitution itself.[114]

In *Marbury*, Chief Justice John Marshall had been more circumspect, concluding that "a law repugnant to the constitution is void; and that courts, as well as other departments, are bound by that instrument."[115] Marshall thus left open the possibility that other government officials might share the

104. *Id.*
105. *Cooper*, 358 U.S. at 14.
106. *Id.* at 4.
107. *Id.*
108. *Id.*
109. *Id.*
110. *Id.*
111. U.S. CONST. art. VI, cl. 3.
112. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).
113. *Cooper*, 358 U.S. at 18 (quoting *Marbury*, 5 U.S. (1 Cranch) at 177).
114. *Id.*
115. *Marbury*, 5 U.S. (1 Cranch) at 180.

responsibility to interpret constitutional meaning.[116] However, in *Cooper*, the Court resolved any ambiguity. When opinions differed, the Court's opinion was supreme, trumping all other government officials.[117] The Court's assertion of absolute authority made sense in the face of open defiance by state officials. Moreover, the Court asserted its power in defense of the rights of those who needed protection from those officials.[118] *Cooper* was an assertion of raw power nonetheless.

In the *Cooper* decision, the Court explained that state officials had to follow the Court's ruling in *Brown*, even though they had not been parties to the case, because "the federal judiciary is supreme in the exposition of the law of the Constitution."[119] State officials are bound to follow the United States Constitution, and the Court's interpretation of the Constitution had the same authority as the Constitution itself.[120] It follows that "the interpretation of the Fourteenth Amendment enunciated by this Court in the *Brown* case is the supreme law of the land."[121] The Court concluded,

> [T]he principles announced in [*Brown v. Board of Education*] and the obedience of the States to them, according to the command of the Constitution, are indispensable for the protection of the freedoms guaranteed by our fundamental charter for all of us. Our constitutional ideal of equal justice under law is thus made a living truth.[122]

In this unanimous per curiam opinion, signed by all of the Justices on the Court, those Justices embraced their roles as "counter-majoritarian heroes"[123] and champions of racial justice.[124]

IV. EVOLUTION OF *COOPER* SUPREMACY

In *Cooper*, the Supreme Court expressed two important themes. First, the Court claimed a unique relationship with the United States Constitution.

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116. *See* Keith E. Whittington, *Extrajudicial Constitutional Interpretation: Three Objections and Responses*, 80 N.C. L. REV. 773, 775 (2002).

117. *Cooper*, 358 U.S. at 18.

118. *Id.* at 19.

119. *Id.* at 18.

120. *Id.*

121. *Id.*

122. *Id.* at 19–20.

123. *See* Michael J. Klarman, Brown*, Originalism and Constitutionalism Theory: A Response to Professor McConnell*, 81 VA. L. REV. 1881, 1933–34 (1995) (referring to the "myth of the Court as 'counter-majoritarian hero'").

124. Klarman questions whether the members of the Court really acted as "counter-majoritarian heroes." *Id.* Other scholars have followed suit. *See, e.g.*, Corinna Barrett Lain, *Countermajoritarian Hero or Zero? Rethinking the Warren Court's Role in the Criminal Procedure Revolution*, 152 U. PA. L. REV. 1361 (2004); Zietlow, *supra* note 15.

All federal and state officials are required to swear an oath to the Constitution and must engage in constitutional interpretation as part of their official duties.[125] However, in *Cooper*, the Court made it clear that of all of those officials, the Supreme Court of the United States is the supreme interpreter of the Constitution, and its interpretations trump those of all other officials.[126] Second, the Court made it clear that it would use that position to protect individual constitutional rights, especially the rights of those who were vulnerable to the oppression of the majoritarian, elected, political branches.[127] Thus, the Court not only reaffirmed its ruling in *Brown* but reaffirmed the federal judiciary's commitment to protecting minority rights.

After an initial expansion of the Court's protection of minority rights post-*Cooper*, the Court began to retreat from civil rights enforcement and place new procedural limits upon civil rights cases. More recently, the Court has adhered only to the first theme of *Cooper* supremacy—the Court's special role interpreting the Constitution, and its supremacy over the states and coordinate branches when doing so.[128] The Court has largely abandoned the second prong of *Cooper* supremacy, the Court's rights protecting role.[129] Instead, the Court has restricted the ability of federal courts and Congress to protect civil rights.[130]

A. Expansion and Deference: The Warren Court (1953–1969)

Following *Cooper*, the Warren Court issued many rulings expanding the meaning of minority rights under the Equal Protection Clause. For example, the Court struck down state laws which discriminated on the basis of race,[131] and broadly interpreted voting rights under the Equal Protection Clause and the Fifteenth Amendment.[132] Perhaps the most important Warren Court rulings were those which opened up the lower federal courts to civil rights lawsuits and enabled those courts to remedy rights violations by state

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

126. *See Cooper*, 358 U.S. at 18 ("[T]he federal judiciary is supreme in the exposition of the law of the Constitution. . . . [T]he interpretation of the Fourteenth Amendment as enunciated by this Court in the *Brown* case is the supreme law of the land . . . .").

127. *Id.* at 19–20 ("The principles announced in [*Brown v. Board of Education*] and the obedience of the States to them, according to the command of the Constitution, are indispensable for the protection of freedoms guaranteed by our fundamental charter for all of us.").

128. *See infra* Section IV.C.

129. *See infra* Section IV.C.

130. *See infra* Section IV.C.

131. *See, e.g.*, Green v. Cty. Sch. Bd., 391 U.S. 430 (1968); Loving v. Virginia, 388 U.S. 1 (1967); Evans v. Newton, 382 U.S. 296 (1966).

132. *See, e.g.*, Reynolds v. Sims, 377 U.S. 533 (1964).

officials.[133] In addition, and despite its assertion of supreme constitutional authority in *Cooper*, the Warren Court generally deferred to the other federal branches when they also acted to protect minority rights.[134] This deference was undoubtedly due to the fact that federal officials in the 1960s agreed with the Court's mission of protecting minority rights against state infringement.[135] Thus, even as the Warren Court relied on *Cooper* to strike down state laws discriminating against minorities, it deferred to the coordinate federal branches as they also sought to advance the cause of civil rights.

1. *Opening Courts to Civil Rights Claims*

The most notable Warren Court decision expanding civil rights litigation was its 1961 ruling in *Monroe v. Pape*.[136] In *Monroe*, the plaintiff sued police officers in the city of Chicago, arguing that the officers had violated his rights under the Fourth Amendment when they searched him and his apartment without probable cause.[137] The lawsuit was brought pursuant to the Reconstruction Era civil rights statute, 42 U.S.C. § 1983, which provides a cause of action to enforce constitutional rights against officials acting under color of state law.[138] Though enacted in 1871, the statute had largely lain dormant until the Court's opinion in *Monroe*.[139] At issue was the question of whether police officers who violated state law were acting under color of law and thus subject to suit under § 1983.[140] The police officers argued for a narrower interpretation of the statute—that it would only apply to state officials following state law.[141] The Court adopted the broader interpretation—a state official was acting under state law, thus subject to suit under § 1983, whenever he was on duty.[142]

The Court's ruling in *Monroe* had a revolutionary impact on civil rights litigation. Before *Monroe*, state officials throughout the country had violated the federal rights of individuals without much fear of being sued.[143] The Court's expansive interpretation of § 1983 opened up the federal courts for

133. *See infra* Section IV.A.1.
134. *See infra* Section IV.A.2.
135. *See infra* Section IV.A.2.
136. 365 U.S. 167 (1961).
137. *Id.* at 168.
138. *Id.* at 171.
139. *See* Crawford-El v. Britton, 523 U.S. 574, 611 (1998) (Scalia, J., dissenting).
140. *Monroe*, 365 U.S. at 172.
141. *Id.*
142. *Id.* at 185–86.
143. *See* William W. Schwarzer & Russell R. Wheeler, *On the Federalization of Civil and Criminal Justice*, 23 STETSON L. REV. 651, 697 (1994).

broad enforcement of federal rights.[144] The Warren Court also overturned previous court rulings and held that almost the entire Bill of Rights was incorporated, and thus enforceable, against state governments.[145]

In other cases, the Warren Court articulated a broad test for courts to imply private rights of action to enforce federal statutes. The issue arises when Congress creates federal rights without clarifying how they are to be enforced, and the executive branch promulgates federal regulations enforcing those statutes. In *J. I. Case v. Borak*,[146] the Court held that individual plaintiffs could sue to enforce federal statutes whenever such a suit was necessary to make effective a congressional purpose.[147] This wide-open test allowed the Court to use its discretion in determining congressional purpose, making it relatively easy for individual plaintiffs to sue to enforce statutes when Congress had not made it clear that it intended plaintiffs to do so.[148]

In another series of cases, the Warren Court narrowly interpreted justiciability doctrines, such as standing and political question doctrines, which could otherwise have served as barriers to civil rights litigation. For example, in *Flast v. Cohen*,[149] the Court held that taxpayers had standing to argue that congressional authorization of the payment of federal funds to religious schools violated the Establishment Clause of the First Amendment.[150] The *Flast* opinion created an exception to the longstanding rule that taxpayers could not sue the government for violating the Constitution by spending their money.[151] Similarly, in *Baker v. Carr*,[152] the Court allowed a challenge to voting districts under the Equal Protection Clause, finding that it was not barred by the long-standing rule that similar reapportionment cases based on the Article IV Guaranty Clause were non-justiciable political questions.[153] *Baker* set the stage for the Court's ruling in *Reynolds v. Sims*,[154] where the Court ruled that districts for United States

144. *Id.*

145. *See, e.g.*, Duncan v. Louisiana, 391 U.S. 145 (1968) (listing Warren Court cases incorporating provisions of the Bill of Rights).

146. 377 U.S. 426 (1964).

147. *Id.* at 435.

148. The Court later restricted the test for private rights of action. *See infra* Part IV.B.2.

149. 392 U.S. 83 (1968).

150. *Id.* at 105–06.

151. *See* Massachusetts v. Mellon, 262 U.S. 447 (1923). However, the Court later interpreted the *Flast* ruling as establishing a very narrow exception to the rule against taxpayer standing. *See, e.g.*, Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, 454 U.S. 464, 481 (1982) (holding that taxpayers did not have standing to challenge the Department of Health, Education and Welfare to transfer federal property for use by religious schools).

152. 369 U.S. 186 (1962).

153. *Id.* at 228–29.

154. 377 U.S. 533 (1964).

and state representatives must be apportioned equally.[155] In *Reynolds*, the Court intervened directly in the Alabama state political process, fully embracing its mission to make the process fairer and more just for minorities, as well as other voters.[156] Thus, the Warren Court's flexibility on justiciability issues furthered its mission to protect minority rights.

In the private right of action and justiciability cases, the Court made it clear that separation-of-powers limitations would not prevent it from enforcing individual rights. Thus, many Warren Court rulings following *Cooper* reinforced *Cooper*'s message that the federal courts were open for business in enforcing civil rights. The Warren Court actively embraced the first prong of *Cooper* supremacy—the Court's commitment to protecting minority rights.

2. *Deference to Other Federal Branches*

However, the Warren Court was circumspect about its other *Cooper* message—that of judicial supremacy. Despite the Warren Court's activist reputation, the Court set a highly deferential baseline evaluating economic legislation which did not infringe on minority rights.[157] Moreover, the Warren Court used its *Cooper* supremacy largely to strike down *state* laws that discriminated against minorities but shied away from striking down federal legislation.[158] The Court was especially deferential to Congress and the executive branch when those federal branches acted to protect minority rights.[159] Even when Congress arguably entered the Court's realm of constitutional interpretation, the Court applied a deferential rational basis review and upheld that legislation.[160]

Responding to civil rights activists, the 1960s Congress enacted numerous measures defining and protecting equality rights. For example, Congress outlawed race discrimination by privately owned places of public accommodation with the enactment of the 1964 Civil Rights Act.[161] Prior to the Act, members of the Court disagreed about whether it was a violation of the Equal Protection Clause when private businesses called on the police to arrest blacks for trespass, enforcing private segregation.[162] In 1883, the Court ruled that Congress's power to enforce the Fourteenth Amendment

155. *Id.* at 535.
156. *Id.*
157. *See* Ferguson v. Skrupa, 372 U.S. 726 (1963); Zietlow, *supra* note 15, at 276.
158. *See* Zietlow, *supra* note 15, at 274–75.
159. *See infra* notes 161–197 and accompanying text.
160. *See Id.*
161. Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 2 U.S.C., 28 U.S.C., 42 U.S.C. (2018)).
162. *See, e.g.*, Bell v. Maryland, 378 U.S. 226 (1964).

did not reach private discrimination,[163] and some members of the Court were reluctant to overturn that precedent.[164] Congress sidestepped that issue by relying on the Commerce Clause as well as the Equal Protection Clause as sources of its power to outlaw private race discrimination.[165] In *Heart of Atlanta Motel, Inc. v. United States*,[166] the Court upheld the Act as a valid Commerce Clause measure.[167] The Court applied a deferential rational basis review to uphold the statute protecting minority rights.[168] The Court's majority opinion sidestepped the Equal Protection issue and addressed only the Commerce Clause question, thereby avoiding a potentially awkward confrontation with Congress over constitutional meaning.[169]

The Court was even more deferential to Congress in evaluating the constitutionality of another landmark civil rights measure, the Voting Rights Act of 1965 (VRA).[170] The VRA outlawed the states' use of discriminatory barriers to voting, including literacy tests.[171] Many Southern states had required voters to take a literacy test as a condition of voting and discriminated against blacks when administering those tests.[172] In the 1959 case of *Lassiter v. Northhampton County Board of Elections*,[173] the Court had held that literacy tests did not violate the Equal Protection Clause unless plaintiffs could prove that state officials intentionally discriminated when administering the tests.[174] However, with Section 4(b) of the 1965 Act, Congress prohibited the use of literacy tests in all congressional districts which had a disproportionately low level of minority voters.[175]

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163. The Civil Rights Cases, 109 U.S. 3 (1883).

164. *See* Robert C. Post, *The Supreme Court 2002 Term Foreword: Fashioning the Legal Constitution: Culture, Courts and Law*, 117 HARV. L. REV. 4, 5–6 (2003).

165. 42 U.S.C. § 2000e (2018).

166. 379 U.S. 241 (1964).

167. *Id.*

168. *Id.* at 258 ("The only questions are: (1) whether Congress had a rational basis for finding that racial discrimination by motels affected commerce, and (2) if it had such a basis, whether the means it selected to eliminate that evil are reasonable and appropriate.").

169. *See id*. at 252 (concluding that the *Civil Rights Cases* was not relevant to the case at hand because Congress relied on its commerce power to enact the 1964 Act). In his concurrence to the opinion, Justice Douglas criticized his peers for failing to address the issue and to overturn the *Civil Rights Cases*, and he argued that the Act should be upheld as an exercise of Congress's power to enforce the Fourteenth Amendment. *Id.* at 280 (Douglas, J., concurring).

170. Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 52 U.S.C. §§ 10301–10314 (2018)).

171. 52 U.S.C. § 10303.

172. *See* KLARMAN, *supra* note 60, at 31.

173. 360 U.S. 45 (1959).

174. *Id.* at 53.

175. Section 4(b) prohibited the use of literacy tests in districts where the Attorney General determines that fewer than fifty percent of its residents are registered to vote and

Notwithstanding the Court's ruling in *Lassiter*, Section 4(b) did not require plaintiffs to prove that local officials had intentionally discriminated against minority voters.[176] Congress expressly relied on its power to enforce the Fifteenth Amendment and Fourteenth Amendment's Equal Protection Clause when enacting the VRA.[177] Thus, the Court was forced to confront the issue of whether Congress could interpret the Amendment more expansively than the Court did.

In *South Carolina v. Katzenbach*,[178] the Court upheld the constitutionality of Section 4(b).[179] South Carolina argued that the law intruded on the Court's power to interpret the Constitution because it prohibited practices that no court had found to be unconstitutional.[180] In his majority opinion, Chief Justice Earl Warren rejected the argument that only the Court could determine the meaning of the Fourteenth Amendment.[181] To the contrary, the framers of the Amendment had intended Congress to be "chiefly responsible for implementing the rights created in Section One."[182] Citing *McCulloch v. Maryland*,[183] the Court held that the only role for the Court was to determine whether the legislation was a rational means to effectuate the Equal Protection Clause.[184] The Court deferred to congressional findings that literacy tests had in all likelihood been used with a discriminatory purpose in the states most affected by the statute and held that Section 4(b) was a rational means to address state officials' discriminatory use of literacy tests.[185]

Katzenbach was a relatively easy case because it involved the type of discrimination which Congress had found to be widespread in Southern states.[186] Even in *Lassiter*, the Court agreed that if such discrimination existed, it would violate the Equal Protection Clause.[187] Arguably, Congress had not usurped the Court's role of articulating constitutional meaning, but

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authorized the appointment of federal electoral examiners in those districts. 52 U.S.C. § 10303(b).

176. *Id.*

177. *Id.* § 10302.

178. 383 U.S. 301 (1966).

179. *Id.* at 308.

180. No court had found South Carolina to have used literacy tests to intentionally discriminate which would have violated the Court's ruling in *Lassiter*. *See id.* at 314–15.

181. *Id.* at 326.

182. *Id.*

183. 17 U.S. (4 Wheat.) 316 (1819).

184. *Katzenbach*, 383 U.S. at 326 ("Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." (quoting *McCulloch*, 17 U.S. (4 Wheat.) at 421)).

185. *Id.*

186. *Id.* at 309.

187. *See* Lassiter v. Northampton Cty. Bd. of Election, 360 U.S. 45, 53 (1959).

only augmented it. In *Katzenbach v. Morgan*,[188] however, the Court evaluated a measure which went well beyond any court rulings.[189] At issue in *Morgan* was Section 4(e) of the VRA, which provided that no person who has successfully completed the sixth grade in a public school accredited by the Commonwealth of Puerto Rico in which the language of instruction was other than English could be denied the right to vote on account of his or her failure to read English.[190] Section 4(e) remedied discrimination which had never been identified by any court, because no court had ever held that New York state officials had used the literacy tests to discriminate on the basis of race.[191] Hence, the case directly raised the question of whether Congress had the autonomous authority to identify violations of the Equal Protection Clause, arguably challenging the Court's role to do so.[192]

In his majority opinion, Justice William Brennan rejected the state's argument that the statute exceeded Congress's power to enforce the Fourteenth Amendment under Section Five of that Amendment. The Court stated, "[a] construction of Section Five that would require a judicial determination that the enforcement of a state law precluded by Congress violated the Amendment, as a condition of sustaining the congressional enactment, would depreciate both congressional resourcefulness and congressional responsibility for implementing the amendment."[193] As in *South Carolina v. Katzenbach*, the Court cited *McCulloch*, holding that Section Five was intended to give Congress the "same broad powers expressed in the Necessary and Proper Clause."[194] The Court's only role was to determine whether Congress was rational when it identified discrimination and enacted a law to remedy that discrimination. "It is not for us to review the congressional resolution of these factors. It is enough that we be able to perceive a basis upon which the Congress might resolve this conflict as it did."[195] Thus, in *Morgan*, the Court appeared to defer to congressional judgment about the meaning of the Constitution.

The other branches of the federal government responded to the Court with mutual support. In the 1964 Civil Rights Act, Congress included provisions prohibiting recipients of federal funds from discriminating on the basis of race and empowering the Attorney General to bring suits to enforce

188. 384 U.S. 641 (1966).

189. *Id.*

190. Voting Rights Act of 1965 § 4(e), 52 U.S.C. § 10303(e) (2018). The provision was sponsored by New York Senators Jacob Javits and Robert Kennedy, and it was intended to supersede a New York state law which required the ability to read and write in English as a condition of voting. *Morgan*, 384 U.S. at 645 n.3.

191. *Morgan*, 384 U.S. at 648.

192. *Id.*

193. *Id.* at 648–49.

194. *Id.* at 650–51 (citing McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819)).

195. *Id.* at 653.

the Act.[196] In a speech in support of the Civil Rights Act, Senator Hubert Humphrey explained that Congress intended those measures to enable further enforcement of the *Brown* ruling.[197] Thus, both federal branches acted with respectful deference to advance the cause of civil rights and avoided potentially awkward conflicts over the scope of each branch's authority.

During the Warren Court years, Presidents John F. Kennedy and Lyndon B. Johnson largely supported the Court's effort to enforce minority rights. Though initially reluctant, like President Eisenhower, President Kennedy sent federal troops to guard black students attempting to attend public universities in Mississippi and Alabama over state and local resistance.[198] President Johnson helped to lead the successful fight for the 1964 Civil Rights and 1965 Voting Rights Acts,[199] and after they were enacted his administration actively enforced their provisions.[200]

Nonetheless, liberals viewed the federal courts as "counter-majoritarian heroes" and celebrated the judicial supremacy of *Cooper* as a necessary means to a crucially important end.[201] This viewpoint was bolstered by state officials' continued resistance to federal court oversight, from Alabama Governor George Wallace's declaration of "segregation now, segregation tomorrow, segregation forever" on the steps of the state capitol to state courts adoption of novel interpretations of state procedural laws to evade Supreme Court review of their interpretations of federal law.[202] I was taught this model when I was a student at Yale Law School in the late 1980s. Many of my professors reminisced about where they were and what they were doing, when the Court decided *Brown*. It is only a slight exaggeration to say that my professors viewed the Justices in *Cooper* as white knights fending off the unruly racist mobs who would resist federal courts' civil rights

196. *See* 42 U.S.C. §§ 2000d to 2000d-6 (2018).

197. CHARLES WHALEN & BARBARA WHALEN, THE LONGEST DEBATE: A LEGISLATIVE HISTORY OF THE 1964 CIVIL RIGHTS ACT 197 (1985); *see also* Rebecca E. Zietlow, *To Secure These Rights: Congress, Courts and the 1964 Civil Rights Act*, 57 RUTGERS L. REV. 945, 972 (2005).

198. KLARMAN, *supra* note 60, at 432–33.

199. WHALEN & WHALEN, *supra* note 197, at 83, 96, 125–26, 173–77; ZIETLOW, *supra* note 9, at 107; Klarman, *supra* note 14, at 436, 440–41.

200. ARCHIBOLD COX, THE WARREN COURT: CONSTITUTIONAL DECISIONS AS AN INSTRUMENT OF REFORM 139 (1968); ZIETLOW, *supra* note 9, at 157.

201. *See supra* note 75 and accompanying text.

202. *See, e.g.*, NAACP v. Alabama *ex rel* Patterson, 357 U.S. 449 (1958) (holding that a novel state rule that petitions for review in the Alabama Supreme Court could only be brought by certiorari rather than mandamus was not an adequate state ground barring Supreme Court review of the state court's ruling that the NAACP had no First Amendment right to refuse to share its membership list with Alabama state officials).

enforcement. Many scholars have expressed similar views.[203] Thus, liberals lauded both prongs of the *Cooper* ruling—judicial supremacy and support for minority rights—as essential to the expansion of civil rights.

B. Reaction and Retrenchment: The Burger (1969–1986) and Rehnquist (1986–2005) Courts

Though liberals lauded the Warren Court, conservatives harshly criticized the Court and accused it of judicial activism.[204] In 1968, Richard Nixon ran for president with a "tough on crime" platform and attacked the Warren Court's rulings that enforced the rights of criminal defendants.[205] Chief Justice Warren resigned in 1968, and when Nixon was elected, he appointed conservative Warren E. Burger to replace him.[206] President Nixon also made another key appointment to the Supreme Court—Justice William Rehnquist.[207] Under Chief Justice Burger, and due largely to Rehnquist's influence, the Court backed away from the active civil rights enforcement of the Warren Court.[208] The Burger Court continued to use *Cooper* supremacy over the other federal branches, but no longer to protect minority rights.[209]

Warren Burger retired as Chief Justice in 1986.[210] To replace him, President Ronald Reagan elevated the chief architect of the Court's retrenchment on civil rights, Justice Rehnquist, to be Chief Justice.[211] Reagan then appointed an outspoken conservative, Antonin Scalia, to take Rehnquist's place as Associate Justice.[212] Under Rehnquist's leadership, and with Scalia as the most outspoken champion, the Court engaged in a full-

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203. *See, e.g.*, Owen Fiss, *A Life Lived Twice*, 100 YALE L.J. 1117, 1118 (1991); Michael J. Gerhardt, *The Rhetoric of Judicial Critique: From Judicial Restraint to the Virtual Bill of Rights*, 10 WM. & MARY BILL RTS. J. 585, 618 (2002); David Luban, *The Warren Court and the Concept of a Right*, 34 HARV. C.R.-C.L. L. REV. 7, 7 (1999); *see also* Klarman, *supra* note 14, at 19 (pointing out that many scholars view members of the Warren Court as "counter-majoritarian heroes").

204. *See, e.g.*, BICKEL, *supra* note 12, at 16–23; LEARNED HAND, THE BILL OF RIGHTS: THE OLIVER WENDELL HOLMES LECTURES 73–74 (1958); Philip B. Kurland, *The Supreme Court 1963 Term, Foreword: "Equal in Origin and Equal in Title to the Legislative and Executive Branches of the Government*," 78 HARV. L. REV. 143 (1963).

205. Walker Newell, *The Legacy of Nixon, Reagan, and Horton: How the Tough on Crime Movement Enabled a New Regime of Race-Influenced Employment Discrimination*, 15 BERKELEY J. AFR.-AM. L. & POL'Y 3, 14–15 (2013).

206. Jack M. Balkin & Sanford Levinson, *Constitutional Revolution*, 87 VA. L. REV. 1045, 1071–72.

207. *Id.*

208. *See infra* Section IV.B.1.

209. *See infra* Section IV.C.

210. *See* Balkin & Levinson, *supra* note 206, at 1051.

211. *Id.* at 1052.

212. *Id.*

scale retrenchment from the role of protector of the rights of minorities.[213] The Rehnquist Court revitalized principles of state sovereignty that the Warren Court had downplayed.[214] The Rehnquist Court also adopted a race blind approach to race discrimination cases and struck down race-based affirmative action measures.[215] Ironically, in the Court's affirmative action cases, the Court has imposed barriers to majoritarian political branches adopting remedial measures to advance minority rights.[216]

1. *Retreating from Civil Rights Enforcement*

The Burger Court had a mixed record on civil rights. In its desegregation decisions, the Burger Court authorized the supervision of local school boards by district courts and approved bussing and other affirmative measures to remedy race discrimination in public schools.[217] The Burger Court also ruled in favor of plaintiffs in a series of cases asserting sex equality rights under the Equal Protection Clause.[218] In addition, the third Nixon appointee, Justice Harry Blackmun, wrote the opinion in *Roe v. Wade*,[219] establishing a constitutional right for a woman to choose to have an abortion.[220] All of these cases were consistent with the Warren Court's rulings protecting minority rights.

On the other hand, the Burger Court also began a retrenchment in civil rights cases. In *Milliken v. Bradley*,[221] the Court struck down a Michigan district court's order mandating a multi-district remedy for the segregation of public schools in Detroit, Michigan.[222] The Court's ruling in *Milliken* greatly limited the power of federal courts to remedy segregation in the face of white flight to the suburbs.[223] Lower federal courts continued to exercise oversight over local school districts and to implement desegregation plans through the 1980s, but the Rehnquist Court restricted the scope of the

213. *Id.* at 1067 ("William Rehnquist has for thirty years now proved to be a patient but persistent defender of the constitutional values of the right wing of the Republican Party.").

214. *See infra* Section IV.B.1.

215. *See infra* Section IV.B.2.

216. *See infra* Section IV.B.1.

217. *See, e.g.*, Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971).

218. *See, e.g.*, Craig v. Boren, 429 U.S. 190 (1976); Frontiero v. Richardson, 411 U.S. 677 (1973); Reed v. Reed, 404 U.S. 71 (1971).

219. 410 U.S. 113 (1973).

220. *Id.* at 154.

221. 418 U.S. 717 (1974).

222. *Id.* at 752–53.

223. *See* Denise C. Morgan, *The New School Finance Litigation: Acknowledging that Race Discrimination in Public Education Is More than Just a Tort*, 96 NW. U. L. REV. 99, 117 (2001); *see also* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 35 (1973) (rejecting the claim that education is a fundamental right).

courts' remedial power. In the 1991 case of *Board of Education v. Dowell*,[224] the Rehnquist Court ruled that district courts could cease supervision of local school districts once they had achieved a "unitary" status of non-segregation.[225] In the 1995 case of *Missouri v. Jenkins*,[226] the Court clarified that once a local school district had complied with a court's desegregation order, the district court was required to dismiss the case.[227] These rulings ended the federal courts' decades-long attempts to enforce *Brown*, decimating the civil rights legacy of *Cooper*.[228]

In addition, the Court issued key rulings making it more difficult for minority plaintiffs to win race discrimination cases. In *Washington v. Davis*,[229] the Burger Court held that in order for plaintiffs to bring a cause of action for race discrimination under the Equal Protection Clause, they had to prove that the state had purposely discriminated against them on the basis of race.[230] The *Davis* ruling makes it extremely difficult for plaintiffs to prevail in race discrimination cases, especially in Northern states lacking a record of de jure discrimination.[231] In *McCleskey v. Kemp*,[232] a challenge to the State of Georgia's use of the death penalty, the Court held that statistical evidence alone is insufficient to prove that the government discriminated on the basis of race.[233] The Court ruled against McCleskey even though it acknowledged the history of race discrimination within the Georgia criminal justice system.[234] In order to prevail, McCleskey needed to show that government officials had intentionally discriminated against him as an individual, or that the state had adopted the death penalty because of, not merely in spite of, the racially discriminatory impact of the death penalty system.[235] The Court's ruling in *Davis* and *McCleskey* signaled a significant retrenchment from the Court's commitment to minority rights.

In another series of rulings, the Court struck down measures intended to benefit minorities. In *Regents of the University of California v. Bakke*,[236]

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224. 498 U.S. 237 (1991).
225. *Id.* at 249–50.
226. 515 U.S. 70 (1995).
227. *Id.* at 101.
228. Under Chief Justice Roberts, the Court further restricted the authority of local school officials to combat segregation in *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701 (2007). *See* discussion in *infra* Section IV.C.1.
229. 426 U.S. 229 (1976).
230. *Id.* at 239.
231. *See, e.g.*, Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252 (1977).
232. 481 U.S. 279 (1987).
233. *Id.* at 292.
234. *Id.* at 292–93.
235. *Id*. at 298.
236. 438 U.S. 265 (1978).

the Court held that a white man could bring a race discrimination challenge to the university's affirmative action plan.[237] In cases following *Bakke*, the Court debated whether to apply a lower level of scrutiny to affirmative action measures intended to benefit minorities than the strict scrutiny that it applies to laws discriminating against minorities.[238] In *Adarand Constructors, Inc. v. Pena*,[239] the Court held that strict scrutiny would apply to all race-based classifications.[240] In his concurrence to *Adarand*, Justice Clarence Thomas argued that all race-based classifications violate the Equal Protection Clause, regardless of how well-intentioned they might be. Said Justice Thomas, "In my mind, government-sponsored racial discrimination based on benign prejudice is just as noxious as discrimination inspired by malicious prejudice."[241] Dissenting, Justice John Paul Stevens ridiculed the Court's equivalency, accusing the Court of disregarding the difference between a "No Trespassing Sign" and a welcome mat.[242] Reflecting the continuing division on the Court, the Court issued divided rulings on the University of Michigan's two affirmative action programs, upholding the law school program but striking down the undergraduate admissions program.[243] Disputes over race-based affirmative action programs continued into the Roberts Court.[244] While the Court's rulings on discriminatory intent make it difficult for minority plaintiffs to win civil rights cases, the Court's rulings on affirmative action programs, however, have turned the Court's commitment to minority rights on its head.

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237. *Id.* at 299.

238. *See*, *e.g.*, Metro Broad. v. FCC, 497 U.S. 547 (1990) (applying intermediate scrutiny and upholding an FCC policy that gave a preference to minority-owned businesses in broadcast licensing). *But see* Fullilove v. Klutznick, 448 U.S. 448 (1980) (containing a divided opinion with a three-Justice concurrence applying intermediate scrutiny, upholding a federal contracting program in which ten percent of contracts were reserved for minority businesses); City of Richmond v. J. A. Croson Co., 488 U.S. 469 (1989) (applying strict scrutiny to strike down a local minority set-aside program which was virtually identical to federal program upheld in *Fullilove*).

239. 515 U.S. 200 (1995).

240. *Id.* at 226; *see also* Johnson v. California, 543 U.S. 499 (2005) (holding that strict scrutiny should apply to race-based assignment of prisoners, notwithstanding the Court's long-held deference to decisions of prison officials).

241. *Adarand*, 515 U.S. at 241 (Thomas, J., concurring).

242. *Id.* at 245.

243. *See* Gratz v. Bollinger, 539 U.S. 244 (2003) (striking down the undergraduate admissions program because race was a decisive factor in the decision-making process); Grutter v. Bollinger, 539 U.S. 306 (2003) (upholding the law school admissions program because race was not the decisive factor).

244. *See infra* Section IV.C.1.

2. *Procedural Limits on Civil Rights Litigation*

At the same time that the Court has retreated from its commitment to the substantive rights of minorities, it has also imposed numerous procedural barriers to civil rights plaintiffs. The Warren Court had thrown the door open to the federal courts, welcoming challenges to discriminatory state action. Since then, the Court has slowly closed the door, with rulings limiting private rights of action, enforcing justiciability limits and sovereign immunity, and adopting standards for official immunity which make it virtually impossible for civil rights plaintiffs to prevail.

As with the substantive cases, the Burger Court had a mixed record on procedural issues. In the notable case of *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*,[245] the Court found an implied private right of action to enforce the Fourth Amendment against federal officials.[246] The Court had identified a similar right of action in 42 U.S.C. § 1983 against state officials in *Monroe v. Pape*.[247] However, § 1983 does not extend to federal officials.[248] Nevertheless, in an opinion written by Justice William Brennan, the Court held that federal courts had inherent power to enforce constitutional rights.[249] Although Justice Brennan identified some exceptional circumstances in which the federal courts would lack such power,[250] his *Bivens* opinion articulated a blanket rule generally authorizing suits against federal officials.[251]

The Court applied the *Bivens* rule to authorize sex discrimination cases under the Equal Protection Clause against members of Congress[252] and to enforce the Eighth Amendment's prohibition against cruel and unusual punishment.[253] However, the Court soon backed away from *Bivens*, finding other causes of action to fall within the exceptions identified by Justice Brennan in *Bivens*,[254] claims involving sensitive contexts and those in which

245. 403 U.S. 388 (1971).
246. *Id.* at 397.
247. 365 U.S. 167, 191–92 (1961).
248. 42 U.S.C. § 1983 (2018).
249. *Bivens*, 403 U.S. at 389.
250. *Id.* at 396–97.
251. *Id.* at 389. In his concurrence, Justice John Harlan argued that the Court's ruling was consistent with its broad approach to private rights of action to enforce statutes in *J. I. Case Co. v. Borak*, 377 U.S. 426 (1964). *Bivens*, 403 U.S. at 402 (Harlan, J., concurring). S*ee* discussion *supra* Section IV.A.1.
252. *See* Davis v. Passman, 442 U.S. 228 (1979). Members of Congress had exempted themselves from suits under Title VII of the 1964 Civil Rights Act, which prohibits sex discrimination in employment. *See* 42 U.S.C. § 2000e-16(a) (2018).
253. *See* Carlson v. Green, 446 U.S. 14, 17–18 (1980).
254. 403 U.S. at 396–97,

Congress has authorized a different remedy.[255] In *Schweiker v. Chilicky*, the Court established a presumption against a *Bivens* remedy whenever Congress has enacted legislation creating any kind of remedy.[256] The *Schweiker* presumption effectively precludes the Court from identifying any new cause of action to enforce constitutional rights against federal officials, undermining *Bivens*.

The Burger and Rehnquist Courts also restricted private rights of action to enforce federal statutes. In *Cort v. Ash*,[257] the Court articulated a four-part test to determine whether Congress intended to authorize a private right of action, and congressional purpose was only one element of the test.[258] In *Alexander v. Sandoval*,[259] the Rehnquist Court held that a private right of action would only be authorized if the text of the statute made it clear that Congress intended it to do so.[260] At issue in *Sandoval* was the enforceability of a federal regulation implementing Title VI of the 1964 Civil Rights Act, which prohibits race discrimination by recipients of federal funds.[261] The Court invalidated a regulation which authorized suits to challenge government practices that had a discriminatory impact without requiring plaintiffs to prove discriminatory intent.[262] The *Sandoval* test, which requires statutory language authorizing a private right of action, effectively undermines the concept of implied private rights of action.[263] *Sandoval* thus reduced the authority of federal courts to enforce federal statutes and had a devastating impact on civil rights litigation.[264]

Along with limiting access to federal courts by civil rights plaintiffs, the Burger and Rehnquist Courts erected new barriers to those claims. Those Courts vigorously enforced the justiciability limits on federal litigation, reversing the Warren Court's trend towards loosening those requirements. For example, in *Allen v. Wright*,[265] the Court held that black school children lacked standing to sue the Internal Revenue Service for its failure to enforce

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255. *E.g.*, Schweiker v. Chilicky, 487 U.S. 412 (1988) (examining a due process claim of Social Security recipient whose benefits were wrongfully terminated); Bush v. Lucas, 462 U.S. 367 (1983) (examining a First Amendment claim by federal civil service employee); Chappell v. Wallace, 462 U.S. 296 (1983) (examining a race discrimination claim by enlisted men against a Naval officer).

256. 487 U.S. at 429.

257. 422 U.S. 66 (1975).

258. *Id.* at 80–84.

259. 532 U.S. 275 (2001).

260. *Id.* at 292–93.

261. *Id.* at 278.

262. *Id.* at 289.

263. *See* Pamela Karlan, *Disarming the Private Attorney General*, 2003 U. ILL. L. REV. 183, 195.

264. *Id.*

265. 468 U.S. 737 (1984).

laws denying tax-exempt status to private schools that discriminated on the basis of race.[266] Racially discriminatory private schools facilitated white flight out of desegregated public schools, undermining the desegregation effort and denying the school-children plaintiffs the access to a desegregated education to which they were entitled under *Brown*.[267] However, the Court held that the plaintiffs had not established the causation required for them to have standing to bring the suit.[268] In other cases, the Court imposed barriers to Congress establishing standing by authorizing citizen suits,[269] and made it virtually impossible for plaintiffs to seek injunction relief against abusive police practices.[270] Finally, the Court developed a broad doctrine of official immunity which bars recovery by a significant number of civil rights plaintiffs.[271]

Suits brought by private individuals are crucial to the adequate enforcement of federal law.[272] Private enforcement is especially critical to civil rights enforcement.[273] Due to the sheer volume of civil rights violations, even the most avid Department of Justice (DOJ) is unable to meet even a fraction of the need for lawsuits enforcing those rights.[274] Depending on who the President selects as Attorney General, the DOJ might not bring any civil rights suits at all.[275] Court rulings restricting private rights of action and imposing enhanced justiciability barriers thus severely undermine the enforcement of civil rights, betraying the promise of *Cooper*.[276]

However, perhaps the most consequential Supreme Court rulings restricting civil rights litigation were those enforcing sovereign and official immunity. The Eleventh Amendment prohibits federal courts from exercising their diversity jurisdiction over states as defendants.[277] Since the

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266. *Id.* at 740.

267. *See id.*; Morgan, *supra* note 222, at 122–23.

268. Recently, the Roberts Court applied a similarly stringent test for causation in *Clapper v. Amnesty International USA*, 568 U.S. 398, 422 (2013), dismissing a case brought by human rights attorneys who were likely targets of federal intelligence surveillance.

269. *See, e.g.*, Lujan v. Defs. of Wildlife, 504 U.S. 555 (1992).

270. *See* City of Los Angeles v. Lyons, 461 U.S. 95 (1983).

271. *See, e.g.*, Pearson v. Callahan, 555 U.S. 223 (2009); Brosseau v. Haugen, 543 U.S. 194 (2004).

272. *See* Karlan, *supra* note 263, at 186.

273. *See* Newman v. Piggie Park Ents., 390 U.S. 400 (1968) (per curiam) (discussing the importance of the private attorney general).

274. Rob Arthur, *Exclusive: Trump's Justice Department Is Investigating 60% Fewer Civil Rights Cases than Obama's*, VICE NEWS (Mar. 6, 2019), https://news.vice.com/en_us/article/bjq37m/exclusive-trumps-justice-department-is-investigating-60-fewer-civil-rights-cases-than-obamas.

275. *Id.*

276. *See* Karlan, *supra* note 263, at 186.

277. *See* U.S. CONST. amend. XI.

late nineteenth century case of *Hans v. Louisiana*,[278] the Court has read the Eleventh Amendment more broadly, as prohibiting all suits for damages against states.[279] However, the Court established a huge exception to sovereign immunity in the 1908 case of *Ex parte Young*,[280] holding that the Eleventh Amendment does not bar suits for injunctive relief against state officials.[281] In cases such as *Brown* and *Cooper*, the Warren Court relied in part on *Ex parte Young* and simply glossed over sovereign immunity issues.[282] In the 1970s, however, members of the Court began to express concern that civil rights lawsuits were intruding on state sovereignty. Both the Burger and Rehnquist Courts relied on sovereign immunity to restrict the scope of civil rights suits against state governments.

In the 1974 case of *Edelman v. Jordan*,[283] the Court held that sovereign immunity barred courts from awarding retroactive relief, such as the payment of welfare benefits wrongly denied to plaintiffs.[284] In *Pennhurst State School and Hospital v. Halderman*,[285] the Court held that sovereign immunity barred federal courts from awarding injunctive relief based on state law.[286] *Edelman* and *Pennhurst* significantly restricted the remedies available to plaintiffs suing state governments, including civil rights cases.

Moreover, the Rehnquist Court expanded the doctrine of sovereign immunity well beyond anything the Court had ever recognized before. Until 1996, Congress had broad power to make federal rights enforceable against state governments by abrogating sovereign immunity.[287] In *Seminole Tribe of Florida v. Florida*,[288] the Court struck down a provision of the Indian Gaming Regulatory Act which authorized Indian tribes to sue states in disputes over gambling on tribal lands.[289] The Court held that Congress could not use its power under the Commerce Clause to abrogate sovereign immunity.[290] In his majority opinion, Chief Justice Rehnquist articulated a broad view of state sovereignty, stating that "the background principle of

278. 134 U.S. 1 (1890) (holding that the Eleventh Amendment bars suits for damages arising from federal law against state governments).

279. *See, e.g.*, Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996) (holding that the Eleventh Amendment bars Congress from using its Section One power to abrogate the sovereign immunity of states).

280. 209 U.S. 123 (1908).

281. *Id.* at 151–52.

282. Cooper v. Aaron, 358 U.S. 1 (1958); Brown v. Bd. of Educ., 347 U.S. 483 (1954).

283. 415 U.S. 651 (1974).

284. *Id.* at 662–63.

285. 465 U.S. 89 (1984).

286. *Id.* at 113.

287. *See* Pennsylvania v. Union Gas Co., 491 U.S. 1, 18 (1989) (Commerce Clause); Fitzpatrick v. Bizer, 427 U.S. 445, 456 (1976) (Fourteenth Amendment enforcement power).

288. 517 U.S. 44 (1996) (overruling *Union Gas Co.*, 491 U.S. 1).

289. *Id.* at 47.

290. *Id.* at 72.

state sovereign immunity embodied in the Eleventh Amendment is not so ephemeral as to dissipate when the subject of the suit is an area . . . under the exclusive control of the federal government."[291] State sovereignty trumped the federal rights at issue in the case, and Congress could not do anything about it. In a series of cases following *Seminole Tribe*, the Court struck down provisions of several civil rights statutes authorizing suits against state governments.[292] In these remarkable rulings, the Court no longer relied on judicial supremacy to protect civil rights. Instead, the Court relied on judicial supremacy to limit Congress's power to define and protect federal rights.

In addition, the Burger and Rehnquist Courts established a broad rule on official immunity which poses a significant barrier to civil rights litigation. In *Scheuer v. Rhodes*,[293] the Court held that officials could not be sued for some discretionary acts because they had immunity from such suits.[294] In subsequent cases, the Court clarified that officials are immune from suit if they reasonably relied on clearly established legal rules when making the decisions that were the subject of the suit.[295] Moreover, official immunity applies unless a plaintiff can show with particularity that the official's action was clearly unreasonable and violated clearly established law.[296] The Court's qualified immunity doctrine imposes a significant barrier to plaintiffs prevailing in civil rights actions, greatly limiting the authority of federal courts to remedy civil rights violations.[297]

C. Superior and Skeptical: *Cooper* Supremacy and the Roberts Court (2005 to present)

The second prong of *Cooper* supremacy is the view that the Supreme Court has a special relationship with the Constitution that makes its constitutional interpretation superior to that of state officials. While the Warren Court was reluctant to invoke judicial supremacy against the other

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291. *Id.*

292. *See, e.g.*, Bd. of Trs. of Univ. of Ala. v. Garrett, 531 U.S. 356, 360 (2001) (Americans with Disabilities Act); Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 66 (2000) (Age Discrimination in Employment Act). *But see* Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 724–25 (2003) (upholding a provision of the Family Medical Leave Act authorizing suits against state governments).

293. 416 U.S. 232 (1974).

294. *Id.* at 247–48.

295. *See* Crawford-El v. Britton, 523 U.S. 574, 589 (1998); Anderson v. Creighton, 483 U.S. 635, 638–39 (1987).

296. *See* Brousseau v. Haugen, 543 U.S. 194, 198 (2004); Hope v. Pelzer, 536 U.S. 730 (2002).

297. *See* John C. Jeffries, Jr., *The Liability Rule for Constitutional Torts*, 99 VA. L. REV. 207, 269 (2013).

federal branches, the current Supreme Court is not so reluctant. Unfortunately, rather than invoking judicial supremacy to protect civil rights, the Court now invokes it to restrict the ability of the political branches to do so. In its affirmative action cases, this Court has overturned political measures intended to remedy past discrimination against discrete and insular minorities.[298] In cases restricting Congress's power to enforce the Fourteenth Amendment, the Court has struck down federal legislation protecting minorities and made it more difficult for Congress to enact further legislation.[299] These cases prevent the political branches from using the law to remedy the historical impact of prejudice against discrete and insular minorities.

1. *Curtailing Affirmative Action*

Under the current leadership of Chief Justice John Roberts, the Supreme Court has subjected all measures intended to benefit minorities to the most stringent strict scrutiny and to the highest level of skepticism.[300] Perhaps the most significant such case was *Parents Involved in Community Schools v. Seattle School District No. 1*,[301] in which the Court struck down policies of local school boards that took race into account to prevent the segregation of public schools.[302] In an opinion written by Chief Justice Roberts, the Court applied strict scrutiny to the plans.[303] The Court rejected the arguments of the local school boards of Seattle, Washington and Louisville, Kentucky, that the plans could be justified as a means to prevent segregation in the schools.[304] Chief Justice Roberts ended the opinion with the observation that "[b]efore *Brown*, schoolchildren were told where they could and could not go to school based on the color of their skin."[305] Roberts equated the segregationist laws of the Jim Crow South with the Seattle and Louisville school officials who hoped to combat segregation, concluding, "The way to stop discrimination on the basis of race is to stop discriminating on the basis of race."[306]

The Court's decision in *Parents Involved* turned the principles of *Brown* and *Cooper* on their heads. As Justice Stevens observed in his

298. *See infra* Section IV.C.1.
299. *See infra* Section IV.C.2.
300. *See, e.g.*, Fisher v. Univ. of Tex. at Austin, 136 S. Ct. 2198, 2207 (2016) (applying strict scrutiny and expressing skepticism of affirmative action in college admissions).
301. 551 U.S. 701 (2007).
302. *See id.* at 709–11.
303. *Id.* at 720.
304. *Id.*
305. *Id.* at 747.
306. *Id.* at 748.

dissent, "There is a cruel irony in the Chief Justice's reliance on [*Brown*]. . . . The Chief Justice fails to note that it was only black schoolchildren who were so ordered; indeed, the history books do not tell stories of white children struggling to attend black schools."[307] In *Brown* and *Cooper*, the Court's intervention in democratically elected state and local governments was justified by the fact that the Court was protecting minorities against the tyranny of the majority.[308] In *Parents Involved*, however, the majority had elected to act to protect minorities, and the Court used its power to stop them.

2. *Restricting Congressional Power to Protect Civil Rights*

The Warren Court generally treated the other federal branches with deference. Most problematically, however, the current Court has relied on judicial supremacy to prevent the other federal branches from acting. The Court's skepticism about congressional power to protect civil rights dates back to the Rehnquist Court's ruling in the case of *City of Boerne v. Flores*.[309] In *Boerne*, the Court struck down a provision of the 1993 Religious Freedom Restoration Act which authorized suits against state governments.[310] Congress had relied on its Section 5 power to enforce the Fourteenth Amendment to enact that provision.[311] In *Katzenbach v. Morgan*,[312] the Warren Court had applied a deferential rational basis test to evaluate Congress's use of its Section 5 power.[313] In *Boerne*, however, the Rehnquist Court articulated a new test, a restrictive "congruence and proportionality" test to limit congressional attempts to remedy discrimination by enforcing the Fourteenth Amendment.[314] Anything else would intrude on the Court's power to articulate constitutional meaning. As in *Cooper*, the Court cited *Marbury v. Madison*, saying that "[t]he judicial authority to determine the constitutionality of laws . . . is based on the premise that the 'powers of the legislature are defined and limited. . . .'"[315]

In *Morgan*, the Court expressed a willingness to defer to Congress when it upheld a provision of the VRA that was arguably inconsistent with the Court's interpretation of the Fourteenth Amendment.[316] However, in

307. *Parents Involved*, 551 U.S. at 798–99 (Stevens, J., dissenting).
308. *See supra* notes 68–76 and accompanying text.
309. 521 U.S. 507 (1997).
310. *Id.* at 536.
311. *Id.* at 516–17.
312. 384 U.S. 641 (1966).
313. *Id.* at 656.
314. *Boerne*, 521 U.S. at 530.
315. *Id.* at 516 (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176 (1803)).
316. *Morgan*, 384 U.S. at 648–49.

Boerne, the Court said, "If Congress could define its own powers by altering the Fourteenth Amendment's meaning, no longer would the Constitution be 'superior paramount law, unchangeable by ordinary means.'"[317] While not expressly overruling *Morgan*, the Court in *Boerne* imposed the strictest test to evaluate Congress's power to define and protect civil rights. In cases applying the congruence and proportionality test, the Court made it clear that Congress is prohibited from creating broader rights than those established by the Court.[318]

Following *Boerne*, the Roberts Court issued one of the Court's most regressive rulings in years relating to minority rights since the *Brown* era, *Shelby County v. Holder*.[319] In *Shelby County*, the Court struck down a key provision of the VRA. At issue was Section 5 of the Act, which required electoral districts that had a history of discriminating against minorities to obtain federal preclearance before adopting voting regulations which might limit the voting rights of minorities.[320] The Court held that Section 5 was no longer justified because it was based on past history, not current reality.[321] Almost immediately after the Court issued its ruling, the North Carolina and Texas legislatures enacted voter identification legislation that had previously failed the preclearance process.[322] Instead of improving the political process that had repeatedly failed minorities, the Court's opinion in *Shelby County* created barriers to congressional attempts to fix that process. In *Shelby County*, the Roberts Court used *Cooper* supremacy to limit the power of majorities to enact legislation protecting minorities. In the hands of the Roberts Court, *Cooper* supremacy poses a threat, not a promise, to minorities seeking political empowerment and racial justice.

3. *Politicizing the Court*

When the Warren Court decided the cases of *Brown* and *Cooper*, many Southern politicians, and some scholars, accused the Court of engaging in inappropriate political activism.[323] In 1968, Richard Nixon capitalized on the criticism of Warren Court rulings in his successful campaign for the presidency, and he appointed judges who retreated from the Warren Court's

317. *Boerne*, 521 U.S. at 529 (quoting *Marbury*, 5 U.S. (1 Cranch) at 177).

318. *See supra* note 292 and accompanying text.

319. 570 U.S. 529 (2013).

320. *Id.* at 535.

321. *Id.* at 547 ("Nearly 50 years later, things have changed dramatically.").

322. *See* Vann R. Newkirk II, *How* Shelby County v. Holder *Broke America*, THE ATLANTIC (July 10, 2018), https://www.theatlantic.com/politics/archive/2018/07/how-shelby-county-broke-america/564707/; *see also* Vann R. Newkirk II, *The Battle for North Carolina*, THE ATLANTIC (Oct. 27, 2016), https://www.theatlantic.com/politics/archive/2016/10/the-battle-for-north-carolina/501257/.

323. *See* KLARMAN, *supra* note 60, at 320.

"judicial activism."[324] Over time, however, *Brown* and *Cooper* have gained supporters. *Brown* is now widely revered as one of the high marks in the history of the Court.[325] Indeed, it is difficult to imagine a successful nominee to the Supreme Court who does not embrace the Court's ruling in *Brown*. However, since *Brown* and *Cooper*, it is undeniable that judicial nominations, especially those to the Supreme Court of the United States, have been increasingly politicized.

The 2000 case of *Bush v. Gore*[326] was a landmark case in the politicization of the Court. In that case, the Court decided the 2000 election on a partisan vote, electing the candidate who won a minority of the popular vote.[327] The Court ignored the provision of the Constitution that authorized the House of Representatives to decide such elections.[328] The outcome would likely have been the same, since Republicans held the House at the time, but the Court's decision politicized the Court and damaged its legitimacy.[329]

More recently, the Court has increased in its continued pattern of politicization. When Justice Scalia died in the last year of Barack Obama's presidency, the Republican Senate refused to consider the President's nominee Merrick Garland.[330] Despite the fact that Judge Garland was eminently qualified, the Senate left the seat open for over a year.[331] When President Donald J. Trump was elected, the Senate dropped the filibuster for Supreme Court nominees, and for the first time a Supreme Court Justice, Neil Gorsuch, was confirmed on a narrow party-line vote.[332] In 2018, after Justice Kennedy retired from the Court, the Senate rushed through a controversial nominee, Brett Kavanaugh, without a chance to thoroughly vet him.[333] Like Gorsuch, Kavanaugh was confirmed on a narrow party-line vote.[334] Today, the Supreme Court is widely viewed as a political court

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324. Balkin & Levinson, *supra* note 206, at 1085.

325. *See* Klarman, *supra* note 14, at 19 (citing scholars who argue that *Brown* proves that courts are "counter-majorotarian heroes").

326. 531 U.S. 98 (2000).

327. *Id.*

328. *Id.* at 153–55 (Breyer, J., dissenting).

329. *See* Balkin & Levinson, *supra* note 206, at 1053.

330. *See* Ron Elving, *What Happened with Merrick Garland in 2016 and Why It Matters Now*, NPR (June 29, 2018, 5:00 AM), https://www.npr.org/2018/06/29/624467256/what-happened-with-merrick-garland-in-2016-and-why-it-matters-now.

331. *Id.*

332. *See* Seung Min Kim, Burgess Everett & Elana Schor, *Senate GOP Goes "Nuclear" on Supreme Court Filibuster*, POLITICO (Apr. 6, 2017, 3:01 PM), https://www.politico.com/story/2017/04/senate-neil-gorsuch-nuclear-option-236937.

333. *See* Sheryl Gay Stolberg, *Kavanaugh Is Sworn in After Close Confirmation Vote in Senate*, N.Y. TIMES (Oct. 6, 2018), https://www.nytimes.com/2018/10/06/us/politics/brett-kavanaugh-supreme-court.html.

334. *Id.*

without limits on its power.[335] Sadly, the politicization of the Court may be an unintended consequence of *Cooper* supremacy.

V. CONCLUSION

Footnote four in *Carolene Products* justified Court intervention in the political process to protect the rights of minorities. The rationale behind footnote four suggests that when minorities win in the political process, their victories are entitled to deference. These two principles define *Cooper* supremacy and guided the Warren Court. Over the years, however, judicial supremacy has evolved, threatening the attempts of elected officials to defend and protect minority rights. Notwithstanding the good faith of the Court that decided *Cooper v. Aaron*, the judicial supremacy that it established is a troubled legacy at best, and at worst, a dangerous legacy for the cause of racial justice in this country.

335. *See* Amelia Thomson-DeVeaux & Oliver Roeder, *Is the Supreme Court Facing a Legitimacy Crisis?*, FIVETHIRTYEIGHT (Oct. 1, 2018, 6:00 AM), https://fivethirtyeight.com/features/is-the-supreme-court-facing-a-legitimacy-crisis/.