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**JUDICIAL SUPREMACY, JUDICIAL ACTIVISM: *COOPER v. AARON*
AND PARENTS INVOLVED**

KERMIT ROOSEVELT III*

INTRODUCTION

*Cooper v. Aaron*¹ is a notable decision for many reasons. It presents dramatic facts and occupies an important place in the history of the struggle for racial equality.² But its role in the constitutional canon is largely as an exemplar of judicial supremacy.³ *Cooper* announced that “the federal judiciary is supreme in the exposition of the law of the Constitution” and further that an “interpretation of [the Constitution] enunciated by th[e] Court . . . is the supreme law of the land.”⁴

The consequence of judicial supremacy is generally taken to be that, as Matthew Adler puts it, “a Supreme Court ruling on constitutional matters binds the world, not just the parties to the case.”⁵ When the Supreme Court announces the meaning of the Constitution, that is, everyone else must accept its word. But what precisely *that* means—how far the obligation of acceptance extends—depends on how much of a Supreme Court decision consists of announcing constitutional meaning.

This is a question that has received relatively little attention in the literature on judicial supremacy. To the extent that scholars distinguish among the different elements of a judicial decision, they tend to focus on the

* Professor of Law, University of Pennsylvania Law School. I thank David Strauss for an insightful and enlightening lecture, the organizers of the Childress Symposium for their efforts and hospitality, and my fellow panelists for their excellent contributions.

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

2. For a stirring retelling of the tale of *Cooper*, see David A. Strauss, *Little Rock and the Legacy of Brown*, 52 ST. LOUIS U. L.J. ____ (2008).

3. See, e.g., Richard H. Fallon, Jr., *Executive Power and the Political Constitution*, 2007 UTAH L. REV. 1, 11 (2007) (“The Pure Judicial Supremacy Model endorses all of the claims of judicial power asserted by the Supreme Court in *Cooper v. Aaron*.”); LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 221 (2004).

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

5. Matthew D. Adler, *Popular Constitutionalism and the Rule of Recognition: Whose Practices Ground U.S. Law?*, 100 NW. U. L. REV. 719, 760 (2006).

difference between the judgment and the opinion.⁶ With respect to the opinion, as Richard Fallon puts it, “[s]ince *Marbury v. Madison* . . . we have tended to equate judicial pronouncements with constitutional meaning.”⁷ However, as Fallon goes on to note, “this is a position that cannot be sustained.”⁸ This Article will start with a closer examination of the structure of constitutional decision-making, which separates it into three distinct stages. It will then proceed to assess the arguments for and against judicial supremacy at each of these stages, and to consider what form resistance to judicial decisions might take and how successful such resistance might be. Last, the Article will use this model to describe the relationship between *Cooper v. Aaron* and other decisions dealing with racial discrimination, both older cases, such as *Plessy v. Ferguson*⁹ and *Brown v. Board of Education*,¹⁰ and more recent ones, such as *Adarand Constructors v. Peña*¹¹ and *Parents Involved in Community Schools v. Seattle School District No. 1*.¹²

I. THE STRUCTURE OF A CONSTITUTIONAL DECISION

The conventional view of constitutional decision-making is captured in a famous statement by Justice Owen Roberts: The Court’s task in a constitutional case is “to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former.”¹³ On this view, constitutional decision-making is a straightforward one-step process. The Court simply determines whether a governmental act is consistent with the Constitution.

But how is that determination made? Roberts’s suggestion cannot, of course, be taken literally—laying an article of the Constitution beside a statute achieves nothing in any but the most trivial case.¹⁴ The next thought—that the Court interprets the Constitution and compares the statute to that

6. See, e.g., Saikrishna Prakash & John Yoo, *Against Interpretive Supremacy*, 103 MICH. L. REV. 1539, 1541–42 (2005) (distinguishing between judgment and opinion).

7. RICHARD H. FALLON, JR., *IMPLEMENTING THE CONSTITUTION* 39 (2001).

8. *Id.* Somewhat surprisingly, Fallon’s recent discussion of the executive obligation to obey judicial judgments does not explore the implications of this insight in that context. See Fallon, *supra* note 3.

9. 163 U.S. 537 (1896).

10. 347 U.S. 483 (1954).

11. 515 U.S. 200 (1995).

12. 551 U.S. ___, 127 S. Ct. 2738 (2007).

13. *United States v. Butler*, 297 U.S. 1, 62 (1936).

14. Laying Article II, Section 1, next to a statute providing that the President need only have attained the age of thirty years might suffice to establish unconstitutionality. But laying down the Equal Protection Clause will not take a court very far, while laying down an “ink blot” such as the Ninth Amendment or the Privileges and Immunities Clause may make things worse. See ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 166 (1990).

interpretation—might seem plausible until one actually reads a Supreme Court opinion. Consider actual Supreme Court practice and it will quickly become clear that the Court very seldom tests statutes against either the plain text of the Constitution or some interpretation of that text. Instead, statutes are tested by tests—the notorious multi-pronged, multi-factor judicial creations that implement the meaning of the Constitution.¹⁵

What this means is that constitutional decision-making is not a one-step process (compare the statute to the Constitution) or even a two-step one (interpret the Constitution and compare the statute to the interpretation). A more accurate picture describes a three-step process.¹⁶ First, the Court must decide what the Constitution means. It might decide, for instance, that the meaning of the Equal Protection Clause is that states may not discriminate in ways that stigmatize or contribute to the existence of a caste system. How it reaches this account of meaning is not my concern right now, nor is the accuracy of the interpretation relevant to the argument. The structure of constitutional decision-making I describe here neither requires nor prohibits a particular method of constitutional interpretation; nor does it depend on views as to the meaning of particular provisions.

Second, the Court must create a doctrinal test to implement this meaning. It might decide, for instance, that discrimination against racial minorities will survive review only if narrowly tailored to serve a compelling governmental interest, while discrimination against people with disabilities will survive if rationally related to a legitimate government interest. Again, how it decides that a particular doctrinal test is appropriate is not my present concern—it might consider how trustworthy other governmental actors are, or what history

15. For a taxonomy of constitutional tests, as well as an explanation of the distinction between meaning and doctrine, see FALLON, *supra* note 7.

16. The view that constitutional decision-making has the structure I describe is a consequence of the basic insight that there is a difference between doctrine—the tests that courts apply to determine whether rights have been violated or powers exceeded—and meaning. The insight can be traced back virtually as far as American legal scholarship. See, e.g., James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 144 (1893). Some decades ago, the idea regained prominence in articles by Paul Brest and Larry Sager. See Paul Brest, *The Conscientious Legislator's Guide to Constitutional Interpretation*, 27 STAN. L. REV. 585 (1975); Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212 (1978). More recently, Richard Fallon and Mitchell Berman have worked to develop and apply the insight. See, e.g., FALLON, *supra* note 7; Mitchell N. Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1, 9 (2004). I have pursued similar targets in KERMIT ROOSEVELT III, *THE MYTH OF JUDICIAL ACTIVISM: MAKING SENSE OF SUPREME COURT DECISIONS* (2006) [hereinafter ROOSEVELT, ACTIVISM]; Kermit Roosevelt III, *Constitutional Calcification: How the Law Becomes What the Court Does*, 91 VA. L. REV. 1649 (2005) [hereinafter Roosevelt, *Calcification*]; and Kermit Roosevelt III, *Forget the Fundamentals: Fixing Substantive Due Process*, 8 U. PA. J. CONST. L. 983 (2006).

shows about the use of certain kinds of discrimination, or various other factors.¹⁷ But somehow, it arrives at a doctrinal test. Last, it applies this test to a particular set of facts—it decides, for instance, whether a particular act of racial discrimination is narrowly tailored to serve a compelling interest.

One might quibble with this description, perhaps on the grounds that Supreme Court decisions tend not to feature an explicit three-step analysis.¹⁸ Certainly it is true that in many cases the Court will not consider meaning at all but simply apply tests established by prior decisions. But in such cases the initial task of creating doctrine has already been performed and is implicitly endorsed—or at least accepted on *stare decisis* grounds—by the current Court. In cases when the Court is creating a new test, it frequently either goes through a relatively explicit three-step analysis or at least acknowledges the distinction between doctrine and meaning.¹⁹

Still, refining the taxonomy of constitutional law is worthwhile only if it bears fruit in insight. The claim of this Article is that the distinction between doctrine and meaning will give us a more nuanced understanding of what is at stake in debates about judicial supremacy. In particular, once we have divided constitutional adjudication into the three steps described above, we see that it is possible to accept or reject a claim for judicial supremacy at each one. The claim will have different degrees of persuasiveness at the different steps. It will also have different consequences, in that actors outside the federal judiciary will face different constraints and have different methods of responding available. Last, we can gain a deeper understanding of cases by considering the stage at which they assert claims of judicial supremacy.

17. For an exposition of some relevant factors, see Roosevelt, *Calcification*, *supra* note 16, at 1658–67.

18. The most notable critique is probably Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857 (1999). As I have explained elsewhere, Levinson's article actually reads better as a contribution to the literature developing this model than a critique of it—that is, it provides a cogent argument that the consequences of awarding particular remedies are a factor that goes into the construction of doctrinal rules, but no reason to think that the distinction between doctrine and meaning is either theoretically incoherent or lacking in utility. See Kermit Roosevelt III, *Aspiration and Underenforcement*, 119 HARV. L. REV. F. 193, 194–96 (2006).

19. A recent example of such decisions is *Vieth v. Jubelirer*, 541 U.S. 267 (2004), which self-consciously considers the importance of manageable standards in the creation of doctrine. See generally Richard H. Fallon, Jr., *Judicially Manageable Standards and Constitutional Meaning*, 119 HARV. L. REV. 1274 (2006) (discussing *Vieth*). Others include the plurality opinion in *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973), and *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440 (1985), which discuss when heightened scrutiny is appropriate in equal protection cases, and even *United States v. Carolene Products*, 304 U.S. 144, 152 n.4 (1938), whose famous footnote four gives an explanation of when doctrinal tests should be non-deferential.

II. STAGES OF SUPREMACY

This Part will examine the arguments for judicial supremacy at each stage of the process I have described. The question of judicial supremacy, put generally, is whether the Supreme Court is the ultimate authority on constitutional questions. I will be asking more particularly whether it ought to be considered the ultimate authority at each of the three stages.

It is worth first explaining what is at stake in a claim to judicial supremacy, or what it means to be the ultimate authority.²⁰ One can consider this issue from two perspectives—that of a non-Article III actor and that of the Court. I will be focusing on the latter, and the basic question I ask is how the Court should treat the views of non-Article III actors—with deference, neutrally, or with suspicion.

A conclusion in favor of judicial supremacy from the judicial perspective does not determine the duties of non-Article III actors. In particular, it does not suggest that Supreme Court decisions should be above criticism, nor that non-Article III actors must express agreement or refrain from trying to persuade the Court, through appointments or arguments in the course of litigation, to change its mind. The Court can make mistakes. It is not even to say that non-Article III actors must obey the Court, for there may be times when law-breaking or constitutional violations are appropriate. It is merely to say that when a non-Article III actor has expressed a view contrary to that of the Court—as when Congress and the President pass a law the Court deems unconstitutional—the Court owes no deference to that view.

In taking only the judicial perspective, I am, of course, omitting an analysis from the perspective of the non-Article III actor. How such actors should understand their duty to the Constitution (their oath, if they are government officials) is an interesting question. But its practical significance may be relatively slight compared to that of the judicial perspective. On the one hand, judicial supremacy in anything but its most hypertrophied form does not bar non-Article III actors from expressing contrary views and urging them in litigation, so acceptance of judicial supremacy will not prevent the Court from being faced with the question of how to treat those views. (And even if it did, the Court would confront that question with issues of first impression.)

On the other, even if judicial supremacy is rejected, virtually no one argues that a non-Article III actor can defy a Supreme Court *judgment* on the grounds that her view as to the correct result differs.²¹ As the assertion of a contrary

20. For a useful taxonomy of different possible views, see Larry Alexander & Lawrence B. Solum, *Popular? Constitutionalism?*, 118 HARV. L. REV. 1594 (2005) (reviewing LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004)).

21. Lincoln conceded this in his rejection of *Dred Scott*. See generally Abraham Lincoln, First Inaugural Address (Mar. 4, 1861), reprinted in ABRAHAM LINCOLN: HIS SPEECHES AND

view will, if litigated,²² end in a judgment, it is again the Court's assessment of what weight to give that view that matters. Since the Court's view thus turns out to be generally dispositive no matter what the non-Article III actor thinks, I believe a focus on the judicial perspective is adequate, even if not comprehensive.

A. *Stage One*

The first step of the process I have described requires the Court to determine constitutional meaning. At this step, the argument for judicial supremacy is straightforward. The Constitution is a legal text. Interpreting legal texts is the work of lawyers and judges, and in the ordinary case, the decision of a highest court is a definitive statement of the law. This is the point of John Marshall's memorable definition of the judicial province,²³ and it is a major theme of later commentators defending judicial supremacy.²⁴

So phrased, the argument for judicial supremacy is fairly plausible. Judges probably are at least as good as non-Article III actors at interpreting legal texts, and quite likely better. They are also probably just as trustworthy in most cases, and more trustworthy in some. The security of life tenure, professional norms urging judges to separate law and politics, the need for reason-giving, and the existence of a paper trail of opinions that can expose inconsistency provide a combination of independence and constraint that makes judges well suited to constitutional interpretation.²⁵

Indeed, the most notable arguments against judicial supremacy tend not to assert that judges are either worse at construing legal texts or systematically less worthy of trust. Instead, they focus on the unique nature of the Constitution, arguing that the Constitution's status as higher law means that

WRITINGS 579 (Roy P. Basler ed., 1969). On the difference between judgments and opinions, see generally Edward A. Hartnett, *A Matter of Judgment, Not a Matter of Opinion*, 74 N.Y.U. L. REV. 123 (1999).

22. This is an important qualification, and it may be relevant to the analysis whether the non-Article III actor is acting in an area where the Constitution seems to preclude judicial review—as, for instance, the Senate's power to try impeachments. See *Nixon v. United States*, 506 U.S. 224, 226 (1993); Frank I. Michelman, *Living With Judicial Supremacy*, 38 WAKE FOREST L. REV. 579 (2003). Because I focus on the judicial perspective, I do not consider this question.

23. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (“It is emphatically the province and duty of the judicial department to say what the law is.”).

24. See, e.g., Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359, 1361 (1997). For a counterargument based on the premise that the Constitution differs from ordinary law, see Larry Kramer's remarkable book. KRAMER, *supra* note 3.

25. This is of course not to say that judges are perfect interpreters, a supposition disproved by the amount of disagreement among them. The question is how they can be expected to perform relative to non-Article III actors.

non-Article III—and particularly popular—interpretation must be given some weight.²⁶

I sympathize with the popular constitutionalist concern, vividly expressed by Abraham Lincoln, that “if the policy of the government . . . is to be irrevocably fixed by decisions of the Supreme Court . . . the people will have ceased to be their own rulers, having to that extent practically resigned their government into the hands of that eminent tribunal.”²⁷ But I believe that, as we shall see, this concern can be largely addressed by moderating claims to judicial supremacy at later stages of decision-making, and I see no harm in conceding supremacy with respect to pure interpretation.

Aside from popular constitutionalism, the main academic argument in support of judicial deference to non-Article III constitutional interpretation focuses on particular provisions of the Constitution, notably Section Five of the Fourteenth Amendment. The grant of enforcement power to Congress, scholars have argued, suggests that the Court should defer to the congressional interpretations upon which enforcement legislation is based.²⁸

As with the popular constitutionalists, I will suggest that most of the results these scholars seek are consistent with judicial supremacy at the level of meaning and deference at a later stage. But even if we grant that deference is warranted, that is an exception that proves the rule—if the Court should defer because the Constitution specially indicates Congress as the enforcer, then it should not defer in the absence of such indication.²⁹

If practice is relevant, history does not disclose many examples of non-Article III resistance at this first stage. The one most cited is doubtless Abraham Lincoln’s refusal to accept the *Dred Scott* opinion as a binding statement of the law,³⁰ though if this were truly based on a vision in which the Court was not supreme on constitutional questions it is hard to see why it did

26. The most recent extended statement of this argument is found in KRAMER, *supra* note 3, at 7–8. *See also, e.g.*, Hartnett, *supra* note 21, at 160 (“With a Constitution made in the name of ‘We the People,’ all of us are legitimately interested in the meaning of the Constitution—all of us must be welcome participants in the conversation.”). Justice Scalia has expressed a contrary view. *See, e.g.*, Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 1000 (Scalia, J., concurring in the judgment and dissenting in part) (describing the task of the Supreme Court in constitutional cases as the “essentially lawyers’ work” of “ascertaining an objective law”).

27. LINCOLN, *supra* note 21, at 585–86.

28. *See, e.g.*, Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 YALE L.J. 1943, 1947 (2003).

29. One might actually make a similar argument that any grant of legislative authority to Congress indicates that deference is appropriate. *See* United States v. Lopez, 514 U.S. 549, 604 (1995) (Souter, J., dissenting) (noting that the commerce power is “expressly assigned to [Congress] by the Constitution”). This argument is less prevalent in the literature.

30. LINCOLN, *supra* note 21, at 585–86.

not extend to defiance of the judgment as well.³¹ Other Presidents—notably Franklin Roosevelt and Andrew Jackson—clashed with the Supreme Court, but neither asserted that they or anyone else had the power to overrule a Supreme Court constitutional decision.³² As for Congress, though the Religious Freedom Restoration Act did unwisely assert that its purpose was to “overturn” *Employment Division v. Smith*,³³ it is also intelligible as an attempt to assert a contrary view at the second stage. In any event, once the Court struck down the Act, Congress acquiesced.³⁴

My conclusion is that claims of judicial supremacy are most persuasive at this first stage. The conclusion is a relative one. It does not require judicial exclusivity; it may be desirable for the Court to give respectful consideration to the views of non-Article III actors as to constitutional meaning. And if arguments for supremacy become weaker at later stages, those for independence remain strong. I will not end up arguing that the Court should be bound by the views of a non-Article III actor at any stage. But the arguments for deference become increasingly plausible at later stages. That is the point this Article seeks to establish and whose implications it seeks to explore.

B. Stage Two

At the second stage, the Court constructs doctrinal rules to implement constitutional meaning. Here, the arguments for judicial supremacy seem a good deal weaker. The construction of doctrine is not a task, like interpretation of legal texts, that falls squarely within the judicial competence. Rather, it is a process that requires the Court to consider a wide and open-ended array of factors. No listing is likely to be exhaustive, and different factors will assume

31. For an excellent analysis of Lincoln’s position, see Michelman, *supra* note 22, at 593–96.

32. Even Jackson’s possibly apocryphal response to *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832), is not an assertion of superior interpretive authority. For Jackson’s response, see GERARD N. MAGLIOCCA, *ANDREW JACKSON AND THE CONSTITUTION: THE RISE AND FALL OF GENERATIONAL REGIMES* 49 (2007) (“John Marshall has made his decision; now let him enforce it[.]”). Indeed, both it and Lincoln’s defense of arguably unconstitutional actions during the Civil War seem to concede that the Supreme Court is the highest decision-maker on constitutional questions—final, if not infallible. LINCOLN, *supra* note 21, at 600 (“[A]re all the laws *but one* to go unexecuted, and the Government itself to go to pieces, lest that one be violated?”). Larry Kramer argues against this perspective, suggesting that the Justices should instead “see themselves in relation to the public somewhat as lower court judges now see themselves in relation to the Court: responsible for interpreting the Constitution according to their best judgment, but with an awareness that there is a higher authority out there with power to overturn their decisions[.]” KRAMER, *supra* note 3, at 253.

33. S. REP. NO. 103-111, at 12 (1993), *reprinted in* 1993 U.S.C.C.A.N. 1892, 1902 (“[T]he purpose of this act is only to overturn the Supreme Court’s decision in *Smith*”) (discussing *Employment Div. v. Smith*, 494 U.S. 872 (1990)).

34. *City of Boerne v. Flores*, 521 U.S. 507, 511 (1997).

greater or lesser prominence in different situations, but the Court must, at the least, ask how workable a doctrinal rule is in terms of judicial implementation; what sort of guidance it provides for non-Article III actors; how easy it is for badfaith actors to circumvent; how good a job it does at getting the right answers in constitutional cases; how frequently the sort of government action under review will be constitutionally sound; and how the costs of different sorts of errors (false positives versus false negatives) compare.³⁵ On at least some of these issues, non-Article III actors will have greater competence than judges.

Greater competence may not be relevant if the Court decides that there are reasons to distrust the non-Article III actor, such as historical evidence of bad faith, legislative self-dealing, or a distribution of burdens and benefits favoring the politically powerful. Nor will it be relevant if the constitutional provision being implemented is straightforward. In such cases, the appropriate doctrinal rule is relatively obvious. To ensure that no one under the age of thirty-five is elected president, the Court should ask whether it is convinced (most likely by a preponderance of the evidence) that a candidate has attained the requisite age. But when the relevant constitutional provision requires implementation through a doctrinal rule that varies significantly from the meaning of the provision (consider due process, equal protection, or the First Amendment), non-Article III actors may well be better than the courts at fashioning doctrine, and in some circumstances, deference will be appropriate.³⁶

History and practice bear out this observation. The Court has, on occasion, given weight to the views of non-Article III actors in constructing doctrine. In *Frontiero v. Richardson*, for instance, the Court confronted the question of what level of scrutiny should apply to sex-based discrimination—that is, what doctrinal rule should implement the Constitution’s equality norm³⁷ in a

35. For a more detailed discussion of some of these factors, see Roosevelt, *Calcification*, *supra* note 16, at 1658–67. I have not attempted to rank these factors or prescribe solutions when they point in different directions; different rankings and solutions are defensible, and moderate consistency is probably the most we can demand of judges.

36. This observation is consistent with the views of some critics of judicial supremacy that the Court may have the last word when enforcing clear constitutional requirements—such as that the President must be thirty-five years old—but that popular sentiments should be heeded in the implementation of more open-textured provisions such as the Equal Protection Clause. This is a theme of Robert C. Post, *Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 8 (2003). To somewhat similar effect, though couched in terms of rules and standards, is the analysis set out in Alexander & Solum, *supra* note 20, at 1633–34.

37. 411 U.S. 677, 682–88 (1973). *Frontiero* deals with federal discrimination, so the relevant provision was the Fifth Amendment’s Due Process Clause. Distinguishing between state and federal discrimination might make good sense, and it was contemplated by the Court with respect to race. See, e.g., *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 522–23 (1989) (Scalia, J., concurring) (suggesting greater deference to federal government). But it does not seem to have been considered with respect to sex discrimination, so *Frontiero*’s analysis applied

particular context. In opting for heightened scrutiny, the plurality gave weight to the apparent congressional conclusion that sex-based discrimination is inherently invidious. This sort of result is what the popular constitutionalists or proponents of deference to congressional interpretation in enforcing Section Five hope for, and thus it is an illustration of how deference at later stages can produce much the same thing that some seek by arguing for deference with respect to meaning.

Of course, the Court does not always defer to non-Article III actors in crafting doctrine. If there was one distinctive motif of the Rehnquist Court, it was the assertion that such deference is never appropriate—an assertion founded, I have argued, on the mistaken equation of meaning with doctrine, of the Constitution with what the Court does.³⁸ Thus, in *City of Boerne v. Flores*,³⁹ the Court rejected the congressional suggestion that it restore the doctrinal test for Free Exercise claims used in *Sherbert v. Verner* but discarded in *Employment Division v. Smith*.⁴⁰ And in *Dickerson v. United States*, it rejected a similar suggestion that it return to the test used to evaluate coerced confession claims before *Miranda v. Arizona*.⁴¹

Even more striking, in Section Five cases like *Board of Trustees of the University of Alabama v. Garrett*⁴² and *Kimel v. Florida Board of Regents*,⁴³ the Rehnquist Court did more than refuse to change its own doctrine in response to evident congressional conclusions that state discrimination on the basis of age and disability was highly likely to be invidious. It actually struck down congressional enforcement legislation on the grounds that Congress had gone beyond the Court's doctrine—an approach that makes sense only if the distinction between doctrine and meaning is forgotten.⁴⁴

Yet even the Rehnquist Court was willing on some occasions to accept the suggestions of non-Article III actors. In *Smith v. Robbins*,⁴⁵ the Court accepted

to states as well. (As blackletter law, *Frontiero* has of course been superseded by later cases such as *Craig v. Boren*, 429 U.S. 190 (1976), and *United States v. Virginia*, 518 U.S. 515 (1996); I use it only to illustrate Supreme Court consideration of the views of non-Article III actors in creating doctrine.).

38. See Roosevelt, *Calcification*, *supra* note 16, at 1651; see also Larry D. Kramer, *Foreword: We the Court*, 115 HARV. L. REV. 5, 6 (2001).

39. 521 U.S. at 546 (1997).

40. How to view *Boerne* depends in part on whether we think that *Smith* differed from *Sherbert* in its view of the meaning of free exercise, or whether it simply differed on the question of what was an appropriate doctrinal rule. *Smith* itself was equivocal on this point, perhaps because different Justices held different views. See Roosevelt, *Calcification*, *supra* note 16, at 1685.

41. 530 U.S. 428, 444 (2000).

42. 531 U.S. 356, 374 (2001).

43. 528 U.S. 62, 92 (2000).

44. See Roosevelt, *Calcification*, *supra* note 16, at 1710–12.

45. 528 U.S. 259, 285 (2000).

a procedure that California courts had developed for appointed attorneys to follow when declining to file a frivolous appeal as a permissible substitute for the procedure it had outlined in *Anders v. California*.⁴⁶ Deference at this second stage frequently makes sense, and if the Court regains sight of the distinction between doctrine and meaning, we can expect more examples in the future.

C. Stage Three

Last, we have the step of applying the doctrinal test to a particular set of facts. Here, the argument for superior judicial competence reappears. The question is who is better at applying a doctrinal test, and one of the factors going into the creation of the test is its workability for judges. One would expect that judges will usually be fairly good at applying tests created with that issue in mind.

Still, if we look at some common tests, it is apparent that in some cases the views of non-Article III actors might have substantial value. The tiers of scrutiny, in their different forms, require the Court to assess both the significance of particular state interests and the feasibility of alternative methods of attaining those interests. On each of these issues, non-Article III actors may have a much better vantage point than the Court.

The claim is weakest with respect to rational basis review, for the standards there (the legitimacy of the interest and the rationality of the means-end fit) are so capacious that the Court is generally just as good at deciding whether a state actor has exceeded them. In that sense, rational basis review is somewhat like the age requirement for the presidency. The views of non-Article III actors may have their greatest relevance in rational basis cases when society's view of what is a legitimate interest is shifting. When it overruled *Bowers v. Hardwick*⁴⁷ in *Lawrence v. Texas*,⁴⁸ the Court was undoubtedly reacting to the greater social acceptance of homosexuality, reflected in both the general social climate and concrete data such as state court decisions striking down sodomy bans on state constitutional grounds.⁴⁹

With respect to heightened scrutiny, the argument for superior non-Article III competence is easier. How important an interest is and how feasible it is to promote that interest through other means are both questions on which a representative legislature or expert administrative body are likely better. Heightened scrutiny thus presents a situation in which one factor supporting

46. 386 U.S. 738, 744 (1967).

47. 478 U.S. 186 (1986).

48. 539 U.S. 558 (2003).

49. *Id.* at 573 (“The 25 States with laws prohibiting the relevant conduct referenced in the *Bowers* decision are reduced now to 13, of which 4 enforce their laws only against homosexual conduct.”).

deference—superior institutional competence on the part of a non-Article III actor—is present. However, heightened scrutiny is frequently adopted because the Court distrusts the actor whose conduct is being reviewed.⁵⁰ Thus, deference to non-Article III actors in terms of the application of heightened scrutiny typically makes sense only in somewhat unusual circumstances. First, if heightened scrutiny is not a reaction to distrust, or if government motive is entirely irrelevant, deference and heightened scrutiny may be compatible. Second, the Court may defer to a non-Article III actor other than the one whose conduct is under review.

Again, history and practice support this account of occasions for deference. I will argue that *Grutter v. Bollinger*⁵¹ is an example of the first of these circumstances, where distrust is absent or motive irrelevant. For the second, we might consider congressional authorization of state economic protectionism that would otherwise violate the Dormant Commerce Clause.

III. *COOPER V. AARON AND PARENTS INVOLVED*

The previous Part has suggested that the argument for judicial supremacy is strongest at the first stage and weaker at the latter two. At the second and third stages it will be weak indeed in some circumstances, though stronger in others. This Part will investigate where the race discrimination cases make their claims, and what that tells us about them.

A. *Early Cases*

To see *Cooper* and *Parents Involved* in proper context, we need to go back to earlier race discrimination cases, *Plessy v. Ferguson* and *Brown v. Board of Education*. *Plessy* and *Brown* are both at least consistent with judicial supremacy at the first stage. They seem to take the meaning of the Equal Protection Clause as a matter for judicial determination; there is no suggestion that some non-Article III actor has influenced the Court's view. And in fact, they seem to agree on the meaning: Discrimination is forbidden if it is stigmatizing or intended to oppress, if it affixes victims "with a badge of inferiority."⁵² This interpretation emerges very early in the Supreme Court's

50. See, e.g., Jed Rubenfeld, *Affirmative Action*, 107 YALE L.J. 427, 438–39 (1997) (describing cost-benefit and smoking-out functions of strict scrutiny).

51. 539 U.S. 306 (2003).

52. *Plessy v. Ferguson*, 163 U.S. 537, 551 (1896); see *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954) ("To separate [black schoolchildren] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."); *Plessy*, 163 U.S. at 550 ("[E]very exercise of the police power must be reasonable, and extend only to such laws as are enacted in good faith for the promotion of the public good, and not for the annoyance or oppression of a particular class.").

interpretation of the Equal Protection Clause—notably in *Strauder v. West Virginia*,⁵³ and it continues unchanged through *Plessy* and *Brown*.

Plessy and *Brown* are likewise consistent in their creation of a doctrinal test: in each case the Court essentially asks “is this discrimination stigmatizing or oppressive?”⁵⁴ In neither case is there evidence that any non-Article III actor had input in the creation of that test. This is not surprising, as the test simply attempts to track constitutional meaning, a hallmark of the early stages of doctrinal development.⁵⁵

Where *Plessy* and *Brown* differ, of course, is at the third stage, their application of that test to particular facts. If you think Louisiana’s segregation of railroad cars is stigmatic, *Plessy* says, that’s your problem—it’s only because you choose to place that construction on it.⁵⁶ *Brown*, by contrast, takes a more realistic view of social meaning. Segregation of schoolchildren, *Brown* says, *is* stigmatic; it “generates a feeling of inferiority as to their status in the community . . .”⁵⁷ *Brown* backs this assertion up with a citation to social science studies⁵⁸ that have since been criticized,⁵⁹ but regardless of the soundness of the science, we now agree that *Brown* was right and *Plessy* wrong on this.

How the decisions relate in terms of judicial supremacy is harder to say. It is not clear whether the *Plessy* Court is being deferential to the Louisiana legislature or just disingenuous. It is also hard at this historical remove to say how plausible *Plessy*’s characterization of segregation as a reasonable, good faith attempt to promote the public interest was at the time.

Certainly some people thought that. On the other hand, Justice Harlan’s dissent is fairly damning. “Every one knows,” Harlan wrote, “that the statute in question had its origin in the purpose, not so much to exclude white persons from railroad cars occupied by blacks, as to exclude colored people from coaches occupied by or assigned to white persons.”⁶⁰ Its “real meaning” is that “colored citizens are so inferior and degraded that they cannot be allowed to sit

53. 100 U.S. 303, 308 (1880) (striking down law excluding blacks from jury service as “practically a brand upon them, affixed by the law, an assertion of their inferiority”).

54. See *Brown*, 347 U.S. at 493.

55. See Roosevelt, *Calcification*, supra note 16, at 1675–76.

56. See *Plessy*, 163 U.S. at 551 (identifying “the underlying fallacy of the plaintiff’s argument” as “the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it.”).

57. *Brown*, 347 U.S. at 494.

58. *Id.* at 494 n.11.

59. See, e.g., Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

60. *Plessy*, 163 U.S. at 557 (Harlan, J., dissenting).

in public coaches occupied by white citizens[.]”⁶¹ If the true meaning of segregation was so obvious to Harlan, it seems likely it was obvious to others, and that the *Plessy* majority was more disingenuous than deferential.

Be that as it may, in its form *Plessy* departs from *Brown* at this third stage: *Plessy* purports to turn on deference. With respect to the question of whether the law is a reasonable attempt to promote the public good, or an invidious classification designed to annoy or oppress, *Plessy* says, “there must necessarily be a large discretion on the part of the legislature.”⁶² *Brown*, in contrast, contains no language avowing deference to the southern legislatures or boards of education.⁶³

Where *Brown* remains deferential is at the remedial stage. *Brown II* famously orders desegregation “with all deliberate speed.”⁶⁴ Relative institutional competence provides some justification for this—how to dismantle segregation while minimizing disruption is certainly something state officials know better than federal courts. But the Southern response featured more deliberation than speed, and some outright defiance. *Cooper v. Aaron* announces that the Court will no longer defer on this remedial question.

What the progress from *Plessy* to *Brown* and from *Brown* to *Cooper* shows, then, is the overwhelming of the institutional competence factor (which suggested deference) by evidence of bad faith (which suggests suspicion). This progress is justified, of course: At the time of *Brown*, it was clear that segregation was stigmatic,⁶⁵ and at the time of *Cooper* it was clear that the Arkansas government was trying to frustrate desegregation.

B. Parents Involved as a Successor to *Brown*

The place of *Parents Involved* is harder to identify. A first step is to try to read it as a successor to *Brown* and *Cooper*. Assume, then, that the constitutional meaning is unchanged: It is that stigmatic or oppressive discrimination is forbidden. The doctrinal rule, of course, has changed. Rather than asking whether a particular act of racial discrimination is stigmatic (as *Brown* did), or applying strict scrutiny to discrimination against racial minorities (which would be a sensible reaction to the fact that such

61. *Id.* at 560.

62. *Id.* at 550 (majority opinion).

63. It might be argued that *Brown* contains some deference to the social scientists whose work it cites, but these studies are offered merely as “support” for conclusions drawn by district judges on the basis of direct evidence. See *Brown*, 347 U.S. at 494.

64. *Brown v. Bd. of Educ. (Brown II)*, 349 U.S. 294, 301 (1955).

65. See Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421, 425–26 (1960).

discrimination had proved almost invariably invidious), the Court has begun to use strict scrutiny for all racial discrimination.⁶⁶

That presents an immediate problem for the analysis: Why is the Court using this rule? Certainly it makes sense to strictly scrutinize discrimination against racial minorities: History and process considerations both suggest that such discrimination is very likely to be oppressive, and there are no obvious legitimate reasons for it. But discrimination that benefits minorities is quite different, and discrimination that neither systematically injures nor benefits any group is different, too. The factors that support a demanding doctrinal test for discrimination against minorities do not support a similar test for discrimination in their favor.

Why, then, might the Court be using strict scrutiny? There is no way to be completely confident in the answer to this question, but I think the distinction between doctrine and meaning—or rather, its disappearance—is relevant. If we lose sight of the distinction, as the Court tends to do after a certain period of time, and if we accept strict scrutiny for discrimination against racial minorities, we will conclude that the Constitution—not historical or process considerations, or any of the other factors that go into the creation of doctrine—demands that scrutiny. If this demand comes directly from the Constitution, it is natural to read it as something like a rule that racial discrimination is constitutionally disfavored. And if that is so, it is natural to ask why racial discrimination in favor of minorities should be any less problematic.

This is, in fact, the path that the jurisprudence follows, beginning with Justice Powell's opinion in *Regents of the University of California v. Bakke*,⁶⁷ and culminating in Justice O'Connor's majority opinion in *Adarand Constructors, Inc. v. Peña*.⁶⁸ The doctrinal test of strict scrutiny has been mistaken for part of the meaning of the Constitution, and logic then seems to demand that it operate equally with respect to all types of racial discrimination. The ultimate consequence is that the Court's view of constitutional meaning has changed. Rather than prohibiting invidious or stigmatizing discrimination (the view sometimes called anti-subordination), the Equal Protection Clause is now understood to prohibit, or at least strongly disfavor, racial discrimination (the view sometimes called anti-classification or color blindness).

This changed view of meaning, I have suggested, gets some of its appeal from the conflation of doctrine and meaning, but I do not mean to argue that the conflation is either a necessary or a sufficient explanation. Color blindness

66. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. ___, 127 S. Ct. 2738, 2751–52 (2007).

67. 438 U.S. 265, 289–90 (1978) (“The guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color.”).

68. 515 U.S. 200, 227 (1995).

might have seemed more normatively attractive to some people, or it might have seemed expedient rhetoric to those who opposed affirmative action on nonconstitutional grounds. (It does not seem to have arisen from historical research into the original understanding of the Equal Protection Clause.) Regardless, it is the color blindness view of meaning that we must consider in evaluating *Parents Involved*.

Color blindness explains some otherwise extremely puzzling aspects of the Court's current jurisprudence. If racial classification is the evil to be averted, affirmative action is just as suspect as segregation, and it is no surprise that the Equal Protection Clause prohibits most attempts to grant benefits to racial minorities. And if the evil is the classification, rather than its consequences, it makes sense that race-conscious measures falling short of overt classification are viewed more favorably,⁶⁹ and classifications themselves are more pernicious if more explicit.⁷⁰

This principle explains the different outcomes in *Gratz v. Bollinger*⁷¹ and *Grutter v. Bollinger*.⁷² The law school program (which survived) used a less obvious system of racial preferences than the undergraduate program. (It does, however, seem to introduce an asymmetry in the jurisprudence, in that established law holds that differential treatment on the basis of a characteristic other than race is just as prohibited if the intent and effect are to produce racially disproportionate results.⁷³) It also explains why the Equal Protection

69. In *Parents Involved*, Justice Kennedy suggested that school boards could pursue the goal of bringing together students of diverse backgrounds and races through other means, including strategic site selection of new schools; drawing attendance zones with general recognition of the demographics of neighborhoods; allocating resources for special programs; recruiting students and faculty in a targeted fashion; and tracking enrollments, performance, and other statistics by race. These mechanisms are race conscious but do not lead to different treatment based on a classification that tells each student he or she is to be defined by race, so it is unlikely any of them would demand strict scrutiny to be found permissible.

Parents Involved, 127 S. Ct. at 2792 (Kennedy, J., concurring).

70. Thus, for instance, Justice O'Connor's opinion in *Grutter* finds the law school's "holistic" evaluation system to be more narrowly tailored than a quota or the point system used by the undergraduate admissions. See *Grutter v. Bollinger*, 539 U.S. 306, 334–35, 337 (2003). "Narrowly tailored" here does not mean "admitting no more minorities than necessary," for by that standard a quota system is perfectly tailored. Instead, it must mean something like "giving race no more weight than is required to make a difference in the requisite number of cases." Of course, that sort of tailoring makes no difference to any individual applicant.

71. 539 U.S. 244, 268–75 (2003).

72. 539 U.S. 306, 344 (2003).

73. See, e.g., *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264–66 (1977); *Yick Wo v. Hopkins*, 118 U.S. 356, 373–74 (1886). Thus, established law tells us that Justice Kennedy's suggestions in *Parents Involved* should be analyzed as equivalent to an explicit racial classification, and if such schemes were used to exclude racial minorities they surely would not survive.

Clause will strike down race-based differential treatment that inflicts no harm on individuals beyond the differential treatment itself⁷⁴ and why it might spare an apparently race-based classification when some other explanation can be given.⁷⁵

But whatever its merits and demerits (and more on the latter shortly), color blindness is not the view of meaning at work in *Brown*. *Parents Involved* is inconsistent with *Brown* in terms of constitutional meaning. One might say that it overrules *Brown*, except that the overruling was accomplished earlier, in cases like *Adarand* and *Croson*. (Of course, from this perspective one would also say that *Brown* does not overrule *Plessy*.) To get a good view of *Parents Involved*, we need to think about it in the context of these later cases.

C. *Parents Involved* as a Successor to *Grutter*

Parents Involved and *Grutter* share a color blindness view of constitutional meaning. They differ largely in how deferential the Court is at the third stage of the model I have described, that of applying doctrine to facts. *Grutter* is deferential to what the University of Michigan Law School says about the feasibility of alternatives and the significance of its interests.⁷⁶ *Parents Involved* shows no similar deference to the school boards.⁷⁷ In short, the relationship between *Grutter* and *Parents Involved* is, in a formal sense, quite like the relationship between *Plessy* and *Brown*, or between *Brown* and *Cooper*.

But there is an important difference. The Court's abandonment of deference in *Brown* and *Cooper* was clearly justified. The progress from *Grutter* to *Parents Involved* makes much less sense. Once one adopts a color blindness reading of the Equal Protection Clause, as the Court has, governmental motive becomes irrelevant. Strict scrutiny is not justified as a means to smoke out invidious discrimination, but rather to balance away the harms of racial classification.⁷⁸ And if strict scrutiny is not a response to

74. See, e.g., *Shaw v. Reno*, 509 U.S. 630, 641, 650 (1993) (stating that plaintiffs challenging redistricting as race-based need not demonstrate vote dilution).

75. See, e.g., *Easley v. Cromartie*, 532 U.S. 234, 258 (2001) (upholding apparently race-based redistricting plan on the grounds that true classification is based on voting behavior). *Cromartie* is hard to reconcile with the cases asserting that race cannot be used as a proxy for other characteristics such as diversity or hardship—that is, that a racial stereotype is an impermissible justification. For commentary on *Cromartie*, see, for example, John Hart Ely, *Confounded by Cromartie: Are Racial Stereotypes Now Acceptable Across the Board or Only When Used in Support of Partisan Gerrymanders?*, 56 U. MIAMI L. REV. 489 (2002).

76. *Grutter*, 539 U.S. at 328–29.

77. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. ___, 127 S. Ct. 2738, 2751–61 (2007).

78. See *Rubinfeld*, *supra* note 50, at 438. The Court does, of course, say in some recent cases that the purpose of strict scrutiny is to determine whether an apparently benign

distrust of the state actor, deference at the third stage actually makes good sense.

The assertiveness of *Parents Involved*—its embrace of judicial supremacy—is thus much less justifiable than the assertiveness of *Brown* and *Cooper*. That is one strike against the decision. The second strike, which applies to the earlier cases too, is that the color blindness principle has serious problems as an account of constitutional meaning.

For one thing, its operation turns out to be inconsistent with the supposedly central principle that the Equal Protection Clause protects individuals, not groups.⁷⁹ If the state uses means short of an overt classification to achieve a particular racial result, all individuals are in exactly the same position as if the classification had been used: They have been granted or denied certain treatment because of their race. If there is a difference, it is that the overt classification inflames society.⁸⁰ That is, the interest being protected by banning the overt classification is a generalized, group interest, not the interest of any individual.

Perhaps more significantly, the color blindness principle is hard to reconcile with history. In the context of the debate over affirmative action, there have been arguments in the law reviews about the practice of the Reconstruction Congress, which seems to have included race-based preferences.⁸¹ Such laws, it is argued, demonstrate that the framers of the Fourteenth Amendment did not subscribe to color blindness.

But the argument can be made somewhat more strongly. The evidence about post-Civil War affirmative action may be murky, but it is quite clear that the framers of the Fourteenth Amendment did not think that the Equal Protection Clause prohibited racially segregated schools or bans on interracial marriage.⁸² Color blindness is therefore obviously inconsistent with the original understanding. (This is not to say that *Brown* is inconsistent with that understanding—I have argued above that it is entirely consistent with a

classification is in fact invidious. *See, e.g.,* *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989). But “invidious” here cannot have its traditional meaning of “intended to harm,” for there is no real dispute about the motive behind affirmative action plans—or at least, not a dispute over whether there is a hidden intent to harm either minorities or whites.

79. *See, e.g.,* *Parents Involved*, 127 S. Ct. at 2765 (summoning authority for this proposition).

80. *See id.* at 2797 (Kennedy, J., concurring) (noting divisiveness of racial classifications).

81. *See, e.g.,* Rubinfeld, *supra* note 50, at 430–31.

82. *See, e.g.,* Alexander M. Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1, 59 (1955) (“If the fourteenth amendment were a statute, a court might very well hold . . . that it was foreclosed from applying it to segregation in public schools. The evidence of congressional purpose is as clear as such evidence is likely to be . . .”). Michael McConnell has made an heroic, but not in my view successful, attempt to argue the contrary. Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947 (1995).

prohibition on invidious discrimination.) And indeed, if we attempt to put ourselves in the shoes of the Reconstruction Congress, surveying the systematic brutality of the Ku Klux Klan and the oppression of the Black Codes, certain thoughts will naturally come to mind. That all this would be acceptable if accomplished through race-neutral means is not one.

CONCLUSION

Parents Involved is indeed similar to *Cooper v. Aaron* in its thoroughgoing assertiveness, its embrace of judicial supremacy right down the line. The Court has announced the color blindness principle, and with *Parents Involved*, it has further announced that it will neither defer nor brook defiance with respect to the implementation of that principle. But color blindness is not the principle of *Brown* or *Cooper*, and *Parents Involved* is not the redemption of *Brown* but rather its strongest rejection.

Why has the Court done this? Supreme Court Justices are frequently accused of behaving willfully, of ruling based on their policy preferences rather than the law.⁸³ Typically this assertion is unverifiable, which is why I have argued it is generally unhelpful.⁸⁴ But *Parents Involved* is not a typical case. Unusually, it shows us Justices both largely ignoring what they have previously asserted is determinative with respect to constitutional meaning⁸⁵ and voting in line with what they have previously announced as policy preferences.

In *League of United Latin American Citizens v. Perry*, Chief Justice Roberts announced a distaste for racial classifications: “It is a sordid business, this divvying us up by race.”⁸⁶ In *Grutter*, Justice Thomas argued that admissions preferences were bad policy, tempting “overmatched students” to “take the bait, only to find that they cannot succeed in the cauldron of competition.”⁸⁷

These are surprising statements to find in Supreme Court opinions, because they are so clearly policy views. The Equal Protection Clause does not contain a prohibition of practices a Justice deems sordid. Nor does it exist to keep minority students from aspiring beyond what a Justice thinks is their station. If

83. See, e.g., MARK R. LEVIN, *MEN IN BLACK: HOW THE SUPREME COURT IS DESTROYING AMERICA* 12 (2005).

84. See ROOSEVELT, *ACTIVISM*, *supra* note 16, at 19.

85. The lack of attention to history by the originalist Justices Scalia and Thomas in the affirmative action cases is striking. In *Parents Involved*, Justice Thomas makes a brief reference to Reconstruction-era affirmative action, but seems not to understand that the benefits distributed did not go only to freed slaves. See 551 U.S. ___, 127 S. Ct. 2738, 2782 n.19 (2007) (Thomas, J., concurring).

86. 548 U.S. 399, ___, 127 S. Ct. 2594, 2663 (2006) (Roberts, C.J., concurring in part and dissenting in part).

87. *Grutter v. Bollinger*, 539 U.S. 306, 372 (Thomas, J., dissenting).

these views are the basis for the Justices' votes, as one might fairly infer, then some Justices are indeed voting based on their views of wise policy rather than law. We have a name for that. But it is not judicial supremacy. It is judicial activism.⁸⁸

88. I have suggested that we would be better off not using the phrase "judicial activism." See generally ROOSEVELT, ACTIVISM, *supra* note 16. But in the rare case where Justices have both announced policy preferences as if they were legal arguments and declined to offer argument based on their generally preferred method of constitutional interpretation, it seems appropriate.