FALL 2018 FEDERALIST SOCIETY PANEL DISCUSSION: STATE JUDGES, FEDERAL COURTS, AND JUDICIAL SUPREMACY

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On August 28, 2018, the Cumberland School of Law chapter of the Federalist Society hosted a panel discussion entitled "State Judges, Federal Courts, and Judicial Supremacy: Constitutionality of Roy Moore's Removals."[1] The Federalist Society held the discussion in the John L. Carroll Moot Courtroom at Cumberland School of Law. Both law students and faculty attended the discussion and had the opportunity to ask questions of the panelists.

The event began with a welcome and introduction of the panelists from Nelson Johnson, President of the Cumberland chapter of the Federalist Society. In his open remarks, Johnson described the discussion as an opportunity to facilitate open discussion and debate on current issues of constitutional law. Johnson then introduced the moderator, Judge William H. Pryor,[2] and two panelists, Judge John L. Carroll and Professor Josh Blackman.

The discussion centered on the constitutionality of Judge Roy Moore's removal from his position as chief justice of the Alabama Supreme Court in 2003 and suspension from that office in 2016. As the panelists discussed, Judge Moore was removed from office once in 2003 after refusing to comply with a court order requiring him to remove a depiction of the Ten Commandments from the rotunda of the judicial building.[3] In 2016, Judge Moore was suspended for issuing an administrative order to the probate judges in Alabama directing them to disregard a binding federal-court injunction relating to same-sex marriage.[4] Presenting the view of the constitutionality of the Judge Moore's removal was Judge John L. Carroll. Judge Carroll is a former dean and current professor of law at Cumberland

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[1] The panelists pointed out that Judge Moore was not twice removed from office; rather, he was removed once and suspended once. *See* Moore v. Judicial Inquiry Comm'n of State of Ala., 891 So. 2d 848, 862 (Ala. 2004) (holding "that [removal] was proper and that it [was] supported by the evidence of record"); Moore v. Alabama Judicial Inquiry Comm'n, 234 So. 3d 458, 488 (Ala. 2017) (holding "the charges were proven by clear and convincing evidence and there [was] no indication that the [suspension] imposed was plainly and palpably wrong, manifestly unjust, or without supporting evidence").

[2] Judge William H. Pryor serves as a judge on the U.S. Court of Appeals for the Eleventh Circuit and as the Acting Chair of the U.S. Sentencing Commission. Judge Pryor is also an adjunct professor at Cumberland School of Law.

[3] *See* Moore v. Judicial Inquiry Comm'n of State of Ala., 891 So. 2d 848 (Ala. 2004).

[4] *See* Moore v. Alabama Judicial Inquiry Comm'n, 234 So. 3d 458 (Ala. 2017).

School of Law.[5] Judge Carroll served as a United States Magistrate Judge in the Middle District of Alabama from 1986 to 2001.[6] Finally, presenting the unconstitutionality argument was Professor Josh Blackman. Professor Blackman serves as an Associate Professor of Law at the South Texas College of Law in Houston, specializing in constitutional law and the United States Supreme Court.[7]

The discussion began with opening statements by both panelists, beginning with Professor Blackman. By way of introduction, Professor Blackman quoted Article VI of the Constitution,[8] also known as the Supremacy Clause. His argument is that the text of Article VI governs the analysis of the Judge Moore issue. Professor Blackman suggests a construction of Article VI that distinguishes the responsibilities of "the Judges of every State" in Article VI, Clause 2 from the responsibilities of "all executive and judicial Officers, both of the United States and of the several States" in Article VI, Clause 3.[9] Because Judge Moore's 2016 suspension was based in part on his advisory letter and subsequent administrative order to the Alabama probate judges, Professor Blackman questioned the constitutionality of Judge Moore's removal because Judge Moore was operating in an administrative capacity as chief justice and not in his capacity as a judicial officer.

As a main premise, Professor Blackman argued that United States Supreme Court decisions themselves are not the supreme law of the land; rather, Article VI supremacy refers to the Constitution itself. This, he argued, limits the reach of a given decision as to third parties. In particular, a decision of the United States Supreme Court only binds the parties before it. Thus,

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[5] *Biography of Judge John L. Carroll*, SAMFORD UNIVERSITY, CUMBERLAND SCHOOL OF LAW, https://www.samford.edu/cumberlandlaw/directory/Carroll-John-L (last visited Sept. 2, 2018).

[6] *Id.*

[7] *Biography of Professor Josh Blackman*, THE FEDERALIST SOCIETY, https://fedsoc.org/contributors/josh-blackman (last visited Sept. 2, 2018).

[8] Professor Blackman quoted Article VI Clauses 2 and 3, which read as follows:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding. The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

U.S. CONST. art. VI, cls. 2, 3.

[9] *Id.*

leading up to the Supreme Court's decision in *Obergefell v. Hodges*,[10] Judge Moore's pronouncement to the probate judges was not unconstitutional. Professor Blackman argued that, even after *Obergefell*, the obligation of Alabama probate judges to comply with *Obergefell* was at least questionable given that they were not parties to that action.

Following Professor Blackman, Judge Carroll offered a rebuttal. Judge Carroll began with a brief factual recap of the Judge Moore case. His recount of the facts stated that United States Federal District Judge for the Southern District of Alabama, Callie Grenade, entered an injunction against the Mobile County Probate judge. Following this injunction, the United States Supreme Court decided *Obergefell*,[11] which expressly states that the holding applied "in all States."[12] It was following this decision that Judge Moore ordered probate judges in Alabama not to comply with the court order and not to issue marriage licenses to same-sex couples.

Judge Carroll responded to the argument that decisions only bind the parties before the Court, offering the Supreme Court's decision in *Cooper v. Aaron*[13] as support for the proposition that other courts are obligated to follow the decisions of the Supreme Court.[14] As a matter of practicality, Judge Carroll argued, the logical implication of binding only the parties before the Court would result in inefficiency, requiring multiple lawsuits ending in the same result. According to Judge Carroll, the Court's decision in *Obergefell*, once rendered, was binding on all states, and the states were required to comply with its holding. By failing to comply, Judge Carroll argued, Judge Moore violated the Cannons of Judicial Ethics, resulting in his suspension.

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[10] Obergefell v. Hodges, 135 S. Ct. 2584, 2607–08 (2015) (holding that "same-sex couples may exercise the fundamental right to marry in all States [and] that there is no lawful basis for a State to refuse to recognize a lawful same-sex marriage performed in another State on the ground of its same-sex character").

[11] *Id.* at 2584.

[12] *Id.* at 2607.

[13] Cooper v. Aaron, 358 U.S. 1 (1958).

[14] *Cooper v. Aaron* was a constitutional challenge to the State of Arkansas's failure to rapidly desegregate its schools, contravening the Supreme Court's decision in *Brown v. Board of Education*, 347 U.S. 483 (1954). In *Cooper*, the State of Arkansas argued that because it was not a party to *Brown*, it was not bound by its holding. In response, the Supreme Court stated:

[*Marbury v. Madison*] declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system. It follows that the interpretation of the Fourteenth Amendment enunciated by this Court in the Brown case is the supreme law of the land, and Art. VI of the Constitution makes it of binding effect on the States any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Cooper v. Aaron, 358 U.S. 1, 18 (1958) (quotations and citations omitted).

An interesting point of the discussion surrounded the difference in effect between the opinions of the Supreme Court and the Constitution. Judge Pryor asked the panelists to consider how the Supreme Court can overrule itself if its decisions are the same thing as the Constitution. He contended that those who argued *Plessy v. Ferguson*[15] was wrongly decided must have been operating under the assumption that the Constitution and the Court's decisions are not the same thing. Because in order for the Court to decide matters of constitutional law in the face of contravening precedent, the analysis must begin with the text of the Constitution—not a prior decision of the Court. If this view results in more constitutional litigation on the same issue, Professor Blackman argued that this is a necessary result because a correct operation of the Supremacy Clause requires disputes to actually be litigated. Both panelists agreed that the Supreme Court's decisions on matters of constitutional law are binding precedent for all courts. However, even where the decisions are applied as precedent, they are not the Constitution itself. Even to the extent that this view results in more litigation and inefficiency, Professor Blackman pointed out that that efficiency is merely prudential judgement—not constitutionally required.

[15] Plessy v. Ferguson, 163 U.S. 537 (1896), *overruled by* Brown v. Bd. of Ed., 347 U.S. 483 (1954).