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STATE COURTS UNBOUND

Frederic M. Bloom†

We may not think that state courts disobey binding Supreme Court precedent, but occasionally state courts do. In a number of important cases, state courts have actively defied apposite Supreme Court doctrine, and often it is the Court itself that has invited them to.

This Article shows state courts doing the unthinkable: flouting Supreme Court precedent, sometimes at the Court's own behest. The idea of state court defiance may surprise us. It is not in every case, after all, that state courts affirmatively disobey. But rare events still have their lessons, and we should ask how and why they emerge. By unsettling constitutional substance and excusing state court errors, the Supreme Court has permitted—even encouraged—state courts to rethink critical portions of existing Court doctrine. It has written the story, that is, of “state courts unbound.”

To bring that story into focus, this Article examines how the unbinding process works, where we can see it, and why it warrants serious inspection. In the process, this Article carefully recounts three illustrative chapters in the tale of state courts unbound. One chapter grows out of Williams v. North Carolina, a long-ignored discussion of migratory divorce. A second chapter emerges in Lockyer v. Andrade, a more memorable study of California's “three strikes” law. And a third chapter appears in Roper v. Simmons, a controversial decision on the juvenile death penalty. All three of these chapters show how state courts can, and sometimes do, defy still-valid Supreme Court precedent. All three of these cases raise important questions about judicial motives, constitutional theory, and the balance of doctrinal power in our adjudicative system. And all three encourage us to rethink what may seem most familiar and to read carefully the story of state courts unbound.

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INTRODUCTION

State courts live by simple rules. One rule holds that state courts may adjudicate federal questions—or most of them, at least.¹ Another rule permits state courts to play a pivotal role in the “elaboration of federal constitutional principles.”² But still another rule says that state courts may not reject binding Supreme Court precedent³—or so we tend to think.

There are good reasons to believe this third rule still holds true. Venerable doctrine,⁴ long-enforced court hierarchies,⁵ and deep-seated fears of jurisprudential “chaos”⁶ all teach a now-familiar lesson:

¹ See, e.g., *Tafflin v. Levitt*, 493 U.S. 455, 459, 467 (1990) (holding that state courts typically have concurrent jurisdiction to hear federal claims).

² Paul M. Bator, *The State Courts and Federal Constitutional Litigation*, 22 WM. & MARY L. REV. 605, 637 (1981); *id.* at 627–29; see Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1511 (1987) (“[I]nterposition theorists were right in believing that states had a vital part to play in vindicating individual constitutional rights against federal encroachments . . .”); William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 502–03 (1977) (noting that state courts may “breathe new life” into moribund constitutional terms).

³ See *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997) (claiming an exclusive Court “prerogative” to correct its own doctrinal errors); see also *infra* Part V.

⁴ See *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 416 (1821); *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 352–53 (1816).

⁵ See Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 STAN. L. REV. 817, 818 (1994) (“[L]ongstanding doctrine dictates that a court is *always* bound to follow a precedent established by a court ‘superior’ to it.”).

⁶ See *id.* at 821. As Dean Evan Caminker notes, several scholars argue that “courts engaging in constitutional interpretation ought to renounce intracourt stare decisis and approach each case as if writing on a clean slate.” *Id.* at 820 (citations omitted). Some scholars have gone even further, arguing that “the practice of following [a court's own] precedent” is worse than “a bad idea; it is affirmatively inconsistent with the federal Constitution.” *Id.* (quoting Gary Lawson, *The Constitutional Case Against Precedent*, 17 HARV. J.L. &

state courts must abide Supreme Court doctrine on questions of federal law. This is a brute fact of adjudication, a now-standard legal refrain.⁷

But like any refrain too many times repeated, this one has grown a bit stale. So confident are we that state courts will not disregard Supreme Court doctrine that we scarcely notice when and why they actually do.

And state courts *do* flout Supreme Court precedent. In fact, state courts have done so very recently and very insistently, nowhere more clearly than in cases highlighting the Court's recent docket—like *Lockyer v. Andrade*,⁸ *Roper v. Simmons*,⁹ and *Smith v. Texas*.¹⁰

At first glance, these flashes of state court defiance may seem like mere hiccups, minor flukes in an otherwise stable system of precedent. After all, state courts seldom spurn their roles as “the simple (and perhaps simple-minded) enforcer[s] of the Supreme Court's dictates.”¹¹ But blind adherence to Court doctrine is a rule to which state courts are only sometimes faithful. Every so often, state courts “under-rule”¹² the Supreme Court on matters of federal law. Every so often, that is, state courts actively *disregard* binding Supreme Court prece-

PUB. POL'Y 23, 24 (1994)) (alteration in original). If there should be loyalty to anything, the logic runs, it should be to the Constitution alone. *See id.* at 820.

⁷ *See* Caminker, *supra* note 5, at 820 (“[T]he doctrine of hierarchical precedent appears deeply ingrained in judicial discourse—so much so that it constitutes a virtually un-discussed axiom of adjudication . . .”); Max Radin, *The Trail of the Calf*, 32 CORNELL L.Q. 137, 144 (1946) (placing this lesson in the “cantilena of lawyers”). Of course, familiarity may also breed contempt, *cf.* CONSTITUTIONAL STUPIDITIES, CONSTITUTIONAL TRAGEDIES (William N. Eskridge, Jr. & Sanford Levinson eds., 1998) (compiling essays on what some scholars consider to be the dumbest pieces of constitutional law), but the principle seems a modern orthodoxy all the same, *see* Sanford Levinson, *On Positivism and Potted Plants: “Inferior” Judges and the Task of Constitutional Interpretation*, 25 CONN. L. REV. 843, 843–45 (1993).

⁸ 538 U.S. 63 (2003).

⁹ 543 U.S. 551 (2005).

¹⁰ 127 S. CL. 1686 (2007).

¹¹ Levinson, *supra* note 7, at 845. “The cases in which lower courts actually disregard[] Supreme Court precedent, as opposed to merely stating a willingness to do so,” Professor Steven Bradford rightly notes, “are few[] in number.” C. Steven Bradford, *Following Dead Precedent: The Supreme Court's Ill-Advised Rejection of Anticipatory Overruling*, 59 FORDHAM L. REV. 39, 46 (1990). But these “few” can still be momentous. *Barnette* stands as one prominent instance of a federal court disregarding still-valid Supreme Court precedent. *See* *Barnette v. W. Va. Bd. of Educ.*, 47 F. Supp. 251, 252–53 (S.D.W. Va. 1942), *aff'd*, 319 U.S. 624 (1943). *Roper v. Simmons* may soon stand as a paradigmatic state court analog.

¹² *See* Michael Stokes Paulsen, *Accusing Justice: Some Variations on the Themes of Robert M. Cover's Justice Accused*, 7 J.L. & RELIGION 33, 82 (1989). State courts may also attempt to “anticipatorily overrule” the Supreme Court on matters of federal law. *See* Bradford, *supra* note 11, at 41.

dent—sometimes through clever bits of judicial “subterfuge”¹³ and sometimes in a far less timid fashion.¹⁴

But why would a state court ever ignore Supreme Court precedent? Taking such a step surely seems like a senseless gamble, a rash venture with an inevitably unhappy end. Ignoring Supreme Court precedent surely seems like a bet that state courts will invariably lose.

Yet not all state court defiance proves as impetuous or ill fated as we might at first suppose. Some state court defiance actually succeeds—not because these “grab[s] for power”¹⁵ are too well camouflaged to notice, but because they can claim a rather unexpected source of support: they have been invited by the Supreme Court.¹⁶

Not that the Court’s invitations are especially direct or conspicuous. Nearly all of these calls come in coded legal whispers—about strategically *unsettled* constitutional substance and *overgenerous* decision-making procedures—instead of dramatic doctrinal shouts.¹⁷ But quietly and methodically, the Supreme Court has encouraged state courts to ignore binding Court precedent—to act, in other words, as “state courts unbound.” We should hardly be surprised when state courts agree.¹⁸

¹³ Caminker, *supra* note 5, at 819 (explaining that some courts cloak their disagreement, “mouth[ing] the correct legal rules with ironic solemnity while avoiding those rules’ logical consequences” (quoting Justice O’Connor’s dissent in *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 500 (1993))).

¹⁴ See, e.g., *State v. Phillips*, 540 P.2d 936, 938 (Utah 1975) (overruling a Supreme Court opinion holding that the First Amendment is incorporated by the Fourteenth Amendment and thus binding on the states).

¹⁵ LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 249 (2004); see *id.* 249–53.

¹⁶ Not long ago, a batch of top scholars devoted significant attention to the idea of “anticipatory overruling.” See, e.g., Bradford, *supra* note 11, at 41; Charles J. Cooper, *Stare Decisis: Precedent and Principle in Constitutional Adjudication*, 73 CORNELL L. REV. 401, 402–04, 409–10 (1988); William N. Eskridge, Jr., *Overruling Statutory Precedents*, 76 GEO. L.J. 1361, 1371–72 (1988). Much of the fire seems to have gone out of this discussion, in part, no doubt, because of the Court’s seeming rejection of the core idea. See, e.g., *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484–85 (1989) (“[T]he Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.”). But there is surely great value in this now-abandoned line of thinking, and part of this Article’s goal is to show that the Court’s stern admonishment does not always mean what it superficially says.

¹⁷ If there are shouts, in fact, they point in precisely the opposite direction. See *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997).

¹⁸ See generally Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1401 (1953) (noting that in some contexts “state courts . . . are the primary guarantors of constitutional rights, and in many cases they may be the ultimate ones”); Brian M. Hoffstadt, *The Deconstruction and Reconstruction of Habeas*, 78 S. CAL. L. REV. 1125, 1150–53, 1167–69 (2005); *id.* at 1220 (“[S]tate courts . . . adjudicate issues of federal law with minimal review by the federal courts.”); Daniel J. Meltzer, *State Court Forfeitures of Federal Rights*, 99 HARV. L. REV. 1128 (1986) (examining the forfeiture of federal rights in state courts); cf. Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205, 237–38

What may startle is that the Court has asked state courts at all. For decades, we have pictured the Supreme Court as the “ultimate expositor of [] constitutional text,”¹⁹ our abiding (and often jealous) source of doctrinal answers. This image may be a naïve and misleading one, masking a swirl of deep but “conflicting commitments”;²⁰ it may even lull us into a dangerous kind of constitutional complacency.²¹ But the image of a Court “supreme” now seems “natural,” even “desirable”²²—so much so that the “principle of judicial supremacy [has come] to monopolize constitutional theory and discourse.”²³

In recent years, a number of top scholars have reignited the debate over the Supreme Court’s interpretive monopoly.²⁴ Some have

& n.112, 250 (1985) (explaining that the Framers did not intend to entrust protection of the Constitution to state courts). It is one thing to allow state courts to resolve certain federal questions; it is quite another to allow them to do so in ways that flout controlling Supreme Court precedent.

¹⁹ *United States v. Morrison*, 529 U.S. 598, 616 n.7 (2000); *see also* *Cooper v. Aaron*, 358 U.S. 1, 18 (1958) (proclaiming that “the federal judiciary is supreme in the exposition of the law of the Constitution”). *But see* Gary D. Rowe, *Constitutionalism in the Streets*, 78 S. CAL. L. REV. 401, 401 (2005) (“Several legal scholars have recently come to question this assertion, arguing that judicial supremacy deviates from the path of the Founders . . .”).

²⁰ *See* KRAMER, *supra* note 15, at 221–24.

²¹ *See id.*; Paul Brest, *Constitutional Citizenship*, 34 CLEV. ST. L. REV. 175, 175 (1986) (“We rely too heavily on the Supreme Court of the United States We give too much responsibility to the Court, and too little to other institutions”); *see also* MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* 57–66 (1999) (using the term “judicial overhang” to capture the notion that judicial review encourages others—including the political branches—to ignore matters of constitutional compliance); Robert Nagel, *The Role of the Legislative and Executive Branches in Interpreting the Constitution*, 73 CORNELL L. REV. 380, 382 (1988) (“[W]e are becoming accustomed to the idea that the direction, the emphasis, even the mood of Supreme Court opinions is a kind of official orthodoxy binding on everyone else in the society.”); Cornelia T.L. Pillard, *The Unfulfilled Promise of the Constitution in Executive Hands*, 103 MICH. L. REV. 676, 743 (2005) (“[I]t is striking how limited and court-centered the executive’s normative and institutional approaches to constitutional questions remain.”); Saikrishna Prakash & John Yoo, *Against Interpretive Supremacy*, 103 MICH. L. REV. 1539, 1559–66 (2005) (discussing judicial supremacy in interpreting the Constitution and the possibility of creating “departmentalist” precedent).

²² Larry D. Kramer, *Popular Constitutionalism, Circa 2004*, 92 CAL. L. REV. 959, 960 (2004).

²³ KRAMER, *supra* note 15, at 224.

²⁴ *See* Daniel J. Hulsebosch, *Bringing the People Back In*, 80 N.Y.U. L. REV. 653, 653 (2005) (reviewing KRAMER, *supra* note 15). Among the founding texts of this recent popular-constitutionalism revolution are KRAMER, *supra* note 15; SANFORD LEVINSON, *CONSTITUTIONAL FAITH* (1988); TUSHNET, *supra* note 21; JEREMY WALDRON, *LAW AND DISAGREEMENT* (1999); Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217 (1994); Robert C. Post, *The Supreme Court, 2002—Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4 (2003); and Keith E. Whittington, *Extrajudicial Constitutional Interpretation: Three Objections and Responses*, 80 N.C. L. REV. 773 (2002); *cf.* Matthew D. Adler, *Judicial Restraint in the Administrative State: Beyond the Countermajoritarian Difficulty*, 145 U. PA. L. REV. 759, 876–77 nn.330–31 (1997) (citing literature on departmentalism); Matthew D. Adler, *Popular Constitutionalism and the Rule of Recognition: Whose Practices Ground U.S. Law?*, 100 NW. U.L. REV. 719, 719–27 (2006).

worked to realign the interpretive planets, placing "We the People," rather than the Court, at the center of our constitutional universe.²⁵ Others have encouraged the Court to move only in small increments, cataloguing the virtues of "minimalist" and "incompletely theorized" decisions.²⁶ Some have suggested that we pull the Constitution out of the courts altogether, urging us to take our Constitution "back."²⁷ And still others have celebrated judicial supremacy's stabilizing nature, detailing how the Court's interpretive primacy serves a valuable "settlement function."²⁸

Yet for all of its impressive heat, this "judicial supremacy" debate has overlooked something that can shed important light. Missing from this powerful dialogue is an account of how the Court sometimes saps its own doctrinal power, how it subtly dislocates its own interpretive primacy and, in so doing, amplifies the doctrinal power of state courts.²⁹ This Article fills that significant gap, telling the vital story of state courts unbound.

Like so many legal stories, this state courts unbound account boasts an extensive cast. Part of this Article's goal is to unmask the state courts unbound ensemble, from its unmistakable lead performers to its subtler, often recondite supporting actors. Each of these players has its own lines to speak. But only together does this group tell a recurring (if strangely overlooked) tale of state courts free to spurn apposite Supreme Court precedent. This Article examines precisely how and when that story is told.

All good stories, of course, teach a durable lesson. Part of this Article's mission is to recount that lesson, to show what lasting risks and sturdy rewards the unbinding of state courts may have. To that end, this Article closely reviews and connects three illustrations of the

²⁵ See generally 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (1991) (describing "the people's" role in a dualist democracy); KRAMER, *supra* note 15 (positing "the people," not the Supreme Court, as the highest constitutional authority).

²⁶ CASS R. SUNSTEIN, *ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT* 3-14 (1999); Cass R. Sunstein, *Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733, 1735-36 (1995).

²⁷ TUSHNET, *supra* note 21, at 194.

²⁸ See Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359, 1371-72 (1997) [hereinafter Alexander & Schauer, *Constitutional Interpretation*]; Larry Alexander & Frederick Schauer, *Defending Judicial Supremacy: A Reply*, 17 CONST. COMMENT. 455, 468 (2000) [hereinafter Alexander & Schauer, *Defending Judicial Supremacy*]. See generally DANIEL A. FARBER & SUZANNA SHERRY, *DESPERATELY SEEKING CERTAINTY* 75-121 (2002) (criticizing populist scholars and their theories).

²⁹ It is worth emphasizing that this thesis does not directly implicate state court litigation prompted by the Eleventh Amendment, *cf.* *Alden v. Maine*, 527 U.S. 706 (1999), congressional decision making under political question doctrine, *see* *Nixon v. United States*, 506 U.S. 224 (1993), or agency adjudication under contemporary administrative law, *see* *Chevron, U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837 (1984). All of those doctrines may work to empower state courts, but they do so in importantly different ways.

state courts unbound theme—one historical and cautionary, two more contemporary and critical. The first is *Williams v. North Carolina*, a once-prominent portrait of the shadowy “ghost of ‘unitary domicile.’”³⁰ The second is *Lockyer v. Andrade*, a still-prominent assessment of California’s (in)famous “three strikes” law.³¹ And the third is *Roper v. Simmons*, a very recent evaluation of the juvenile death penalty.³²

At first glance, *Williams*, *Andrade*, and *Simmons* may seem to share very little. In age, form, and substance, the three speak in very different doctrinal tones. But in a slightly deeper register, *Williams*, *Andrade*, and *Simmons* strike the same revealing note: each case depicts a curiously empowered state court, a local tribunal free to proceed as if not tethered to Supreme Court precedent.

In this, *Williams*, *Andrade*, and *Simmons* are hardly alone. Other examples of unbound state courts exist, some in increasingly prominent areas of contemporary doctrine.³³ But the purpose of this Article is not to compile an exhaustive state courts unbound catalog. Nor is it the goal of this piece to rehearse (or pretend to improve on) more targeted studies of stare decisis,³⁴ federalism’s many “faces,”³⁵ or the populist benefits of “[o]ur [u]nsettled Constitution.”³⁶ This Article aims, rather, to expose and explain the apparent anomaly of unbound state courts. As it does, this Article hopes to add new and necessary texture to our dominant vision of doctrinal authority.

This Article proceeds in five steps. Part I develops the basic state courts unbound idea: the notion that state courts can—and occasionally do—defy binding precedent at the Supreme Court’s own subtle behest. To bring this thesis into clearer focus, Part I presents an (intentionally) oversimplified illustration of the unbinding process at

³⁰ 325 U.S. 226, 244 (1945) (Rutledge, J., dissenting).

³¹ 538 U.S. 63, 66 (2003).

³² 543 U.S. 551, 555–56 (2005).

³³ See, e.g., *Smith v. Texas*, 127 S. Ct. 1686 (2007).

³⁴ For a particularly enlightening discussion of this rich subject, see Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723 (1988); *id.* at 750 (“[T]he stability of our legal system depends on the doctrine of stare decisis.”); Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571 (1987). See also Thomas R. Lee, *Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court*, 52 VAND. L. REV. 647, 666 (1999) (differentiating between “vertical” and “horizontal” stare decisis); Caleb Nelson, *Stare Decisis and Demonstrably Erroneous Precedent*, 87 VA. L. REV. 1 (2001) (discussing the implications of “strong” versus “weak” stare decisis principles). “Strong” or “weak,” “vertical” or “horizontal,” “formalist” or “realist”—all are real stare decisis questions, and all are largely elided here. I elide some because they have been meticulously and exhaustively studied elsewhere, though I elide most because they are only peripheral to the “state courts unbound” idea. What matters here is *not* some controversial wrinkle of stare decisis nuance. What matters is the long-unquestioned idea that Supreme Court precedent always binds state courts.

³⁵ See Frank B. Cross & Emerson H. Tiller, *The Three Faces of Federalism: An Empirical Assessment of Supreme Court Federalism Jurisprudence*, 73 S. CAL. L. REV. 741 (2000).

³⁶ LOUIS MICHAEL SEIDMAN, *OUR UNSETTLED CONSTITUTION* (2001); see *id.* at 8–9.

work. Through this example, we can assess what explanatory merit the state courts unbound story holds, why state courts might behave so boldly, and where the Court might find reason to encourage them to do so.

Part II attempts to anchor the unbound story in historical context. To that end, Part II revisits *Williams v. North Carolina*, a long-neglected episode in the peculiar history of "migratory divorce." As Part II shows, *Williams* is no small legal trifle. Instead, *Williams* underscores a key part of the unbinding process, showing how substantive instability can aggrandize state court power. Part II then returns to the broader state courts unbound thesis, noting the ways in which *Williams* does (and does not) foreshadow later chapters in the state courts unbound tale.

Part III pulls this story forward, exploring a more modern, and potentially more ominous, illustration of the state courts unbound theme. For this, Part III reviews *Lockyer v. Andrade*, a centerpiece of the Court's recent encounter with California's "three strikes" law. As Part III explains, *Andrade* involves more than a perfunctory application of the Eighth Amendment's Cruel and Unusual Punishments Clause. It adds a second ingredient to the unbinding mix, blending *Williams*-like substantive instability with an immense procedural excuse: the power for state courts to get constitutional questions *wrong*. Part III shows how *Andrade* puts these pieces together.

Part IV then looks to *Roper v. Simmons*, the Court's most recent evaluation of the juvenile death penalty. As Part IV notes, *Simmons* may seem like a doctrinal oddity, a peculiar and isolated moment of state court insolence. But when viewed in proper context, *Simmons* is no aberration. It is a culmination, an almost inevitable next step on the "unbinding" path set by the Supreme Court.

Along this path, difficult theoretical questions arise—about judicial motivation, about constitutional philosophy, and about institutional "parity."³⁷ Part V more closely surveys these questions, assessing why the Court has ceded some of its interpretive authority, who this effort may please or perplex, and whether state courts can be trusted with the heady power to act as if unbound.

This Article then concludes, noting that recent pleas for state court disobedience carry plenty of frantic bluster—but also a kernel of important truth.

³⁷ See generally Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977) (criticizing the assumption that state and federal forums are equally competent to enforce federal constitutional rights).

I

UNBOUND STATE COURTS: A FIRST LOOK

The story of unbound state courts may seem like a puzzle, a mystery with its share of unexpected parts. In one part, a state court defines an inherently unstable bit of constitutional text.³⁸ In another, a state court selects among apparently incompatible, though equally valid, Supreme Court decisions.³⁹ In the next part, a state court brashly declares the Constitution in need of immediate updating.⁴⁰ And in still another, a state court buries its disobedience in the mud of arcane state law.⁴¹ Very little seems to link these doctrinal pieces. Even less suggests that they shape a discernable whole.

But if these pieces seem superficially disconnected, they soon reveal a common thread. What unites these state court opinions is almost hidden in plain sight: each decision reaches an outcome seemingly contrary to relevant Supreme Court precedent. Each state court goes, that is, precisely where the Court told it *not* to go.

Why would any state court think to do such a thing? Few legal turns seem quite as unpromising as disregarding apposite Supreme Court doctrine. So why would a state court ever think such a course appropriate—let alone endorsed by the Supreme Court?

And why, in turn, would the Supreme Court ever think to allow it? On matters of doctrinal power, after all, the Court rarely seems inclined to share.⁴² So we might wonder why the Court tolerates unbinding when it does. Is the answer bland logistics, a sensible Court hope that state courts will shoulder more of the doctrinal load?⁴³ Is it a nod to a particular constitutional theory—whether judicial federalism,⁴⁴ (Sunstein-esque) minimalism,⁴⁵ or “popular constitutional-

³⁸ See *Williams v. North Carolina*, 325 U.S. 226 (1945).

³⁹ See *Lockyer v. Andrade*, 538 U.S. 63, 68–71 (2003).

⁴⁰ See *Roper v. Simmons*, 543 U.S. 551, 568 (2005).

⁴¹ See *Smith v. Texas*, 127 S. Ct. 1686 (2007).

⁴² Congress and the Executive have both been caught in what some have termed the Court’s “grab for power.” See KRAMER, *supra* note 15, at 249; see also SEIDMAN, *supra* note 36, at 92 (deeming the Court’s insistence on settling the constitutional dispute in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), and its attendant fears of delegitimation, “simply a bugaboo”).

⁴³ Cf. LARRY W. YACKLE, RECLAIMING THE FEDERAL COURTS 121, 127 (1994) (noting that certain “formally neutral” benefits—like efficient adjudication—may attend state court litigation of federal claims).

⁴⁴ This judicial federalism may take the form of local autonomy and laboratory-like experimentation. See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 310–11 (1932); see also William Van Alstyne, *Federalism, Congress, the States and the Tenth Amendment: Adrift in the Cellophane Sea*, 1987 DUKE L.J. 769, 778 (1987) (discussing “perturbation[s]” of federalism).

⁴⁵ See CASS R. SUNSTEIN, RADICALS IN ROBES 27–31 (2005); cf. *id.* at 28 (“Minimalists celebrate the system of precedent . . . partly because respect for precedent promotes stability . . .”).

ism"?⁴⁶ Or is it substantive preference, a covert fondness for particular outcomes?⁴⁷ All of these potential motives warrant genuine analysis. All may play crucial, if unpredictable, roles in the unbinding tale. So, in time, we will review the Court's unbinding intentions, tracking both its reasons and its results.⁴⁸

But before we can understand the Supreme Court's motives, we must be careful to make sense of how and when unbinding works. This Part attempts to resolve those preliminary mechanical issues, developing the state courts unbound thesis as it goes. Subpart A first frames the unbound thesis in generic terms, using competing explanations for state court defiance to outline the core unbinding idea. Subpart B then posits an (intentionally exaggerated) example of the unbinding process at work, bridging the distance between abstract thesis and authentic case law.

A. What Unbinding Is (and Is Not)

So why might a state court disregard Supreme Court doctrine, boldly or otherwise? Supreme Court precedent typically issues a rather uncomplicated demand: it calls to be *followed*, no matter how unenthusiastic its followers may be.⁴⁹ So why would a state court ever ignore it, snubbing the highest of judicial commands?

⁴⁶ See KRAMER, *supra* note 15, at 8. Dean Kramer's vision of popular constitutionalism may well support even *more* state-court involvement than the "state courts unbound" thesis describes. At its most basic, popular constitutionalism aims to restore the Constitution to its rightful owners—viz., the People. See *id.* State courts are not perfect surrogates for the People, but they may be far better stand-ins than their federal cousins. Unlike federal judges, many state judges stand for popular election, *cf.* U.S. CONST. art. III, a process that introduces at least some political accountability to the judicial sphere, however imperfectly. See Wendell L. Griffen, Comment, *Judicial Accountability and Discipline*, 61 LAW & CONTEMP. PROBS. Summer 1998, at 75, 75.

⁴⁷ See, e.g., Barry Friedman, *Under the Law of Federal Jurisdiction: Allocating Cases Between Federal and State Courts*, 104 COLUM. L. REV. 1211, 1226 (2004) ("[T]here is the very real concern whether jurisdictional outcomes are . . . the product of naked ideology.").

⁴⁸ See *infra* Part V.

⁴⁹ See, e.g., *Brown v. Bd. of Educ.*, 349 U.S. 294, 298 (1955) (holding that "[a]ll provisions of federal, state, or local law requiring or permitting" racial discrimination in public education "must yield" to the principle that such discrimination is unconstitutional). There are, of course, certain decisions that the Court intends not to be followed. See *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 25 (2004) (Rehnquist, C.J., concurring in the judgment) ("[T]he Court may have succeeded in confining this novel principle almost narrowly enough to be, like the proverbial excursion ticket—good for this day only . . ."); *Bush v. Gore*, 531 U.S. 98, 109 (2000) ("Our consideration is limited to the present circumstances . . ."). And there are plenty of occasions during which enthusiasm for precedent wavers, even if interest in it never seems to wane. Among the many studies of precedent, a few stand out. See Ahkil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 810 n.191 (1994) ("This point may be especially important to those Justices who care most about precedent and stability."); William Douglas, *Stare Decisis*, 49 COLUM. L. REV. 735, 739 (1949) ("One measure of stability is the extent to which precedents are overruled."); Monaghan, *supra* note 34, at 750–51 ("[T]he stability of our legal system depends on the doctrine of stare decisis."); see also BENJAMIN N. CARDOZO, *THE GROWTH OF THE LAW*

One reason may be conscience—what Judge Niemeyer has called a “constant anchor” in our shared “human makeup.”⁵⁰ Some state courts, guided by an insistent normative sense of “what *ought* to be,” might choose to follow conscience’s path, even at the expense of more positive doctrinal demands.⁵¹

Another reason may be mere carelessness, a “sloppy or inept” state court approach to questions of federal law.⁵² The bug of judicial inattention has many ugly symptoms, from misreading Supreme Court precedent to overlooking it outright. State courts are hardly immune.⁵³

And still another reason may be opportunism, that “black art of specious [fact] distinction.”⁵⁴ Since no two cases are ever perfectly identical, some cynical state courts might distinguish precedent into “practical oblivion.”⁵⁵ After all, the familiar (if complicated)

2 (1924) (noting that in the law “[r]est and motion, unrelieved and unchecked, are equally destructive”); RONALD DWORKIN, *LAW’S EMPIRE* 88 (1986) (explaining that “[t]he practice of precedent, which no judge’s interpretation can wholly ignore,” tempers the differences between judges and presses their decisions toward convergence); ROSCOE POUND, *INTERPRETATIONS OF LEGAL HISTORY* 1 (1923) (“Law must be stable, and yet it cannot stand still.”); Richard Posner, *The Supreme Court, 2004 Term—Foreword: A Political Court*, 119 HARV. L. REV. 32, 40 (2005) (“[I]t is rarely possible to say with a straight face of a Supreme Court constitutional decision that it was decided correctly or incorrectly.”).

⁵⁰ Paul V. Niemeyer, *Law and Conscience*, 69 NOTRE DAME L. REV. 1011, 1012 (1994); cf. *Jaffree v. Bd. of Sch. Comm’rs*, 554 F. Supp. 1104, 1126 (S.D. Ala. 1983) (“Let us have faith in the rightness of our charter and the patience to persevere in adhering to its principles.”).

⁵¹ Niemeyer, *supra* note 50, at 1016 (emphasis added). The line between conscience and impudence can be a fine one. See ROBERT H. BORK, *THE TEMPTING OF AMERICA* 259 (1990); Charles Fried, *Impudence*, 1992 SUP. CT. REV. 155, 188 (1992); see also RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 235–36 (1990) (“[T]he enterprise, now several thousand years old, of establishing the existence and content of a natural law that underwrites positive law is hopeless under the conditions of modern American society.”); H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958).

⁵² See Larry W. Yackle, *The Figure in the Carpet*, 78 TEX. L. REV. 1731, 1763 (2000).

⁵³ State courts are hardly the only courts to exhibit such carelessness. See, e.g., Mark Tushnet, *“The King of France with Forty Thousand Men”: Felker v Turpin and the Supreme Court’s Deliberative Processes*, 1996 SUP. CT. REV. 163, 179–80 (1996) (discussing “spurious” judgments made by members of the Supreme Court).

⁵⁴ Maurice Kelman, *The Force of Precedent in the Lower Courts*, 14 WAYNE L. REV. 3, 4 (1967); see also *Ohio v. Robinette*, 519 U.S. 33, 39 (1996) (discussing the “endless variations in [] facts and circumstances” that can arise in doctrine (quoting *Florida v. Royer*, 460 U.S. 491, 506 (1983))); KARL N. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 84–87 (1960) (cataloguing ways to distinguish precedent).

⁵⁵ David B. Cruz, *“The Sexual Freedom Cases”? Contraception, Abortion, Abstinence, and the Constitution*, 35 HARV. C.R.-C.L. L. REV. 299, 327 (2000); see also Oona A. Hathaway, *Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System*, 86 IOWA L. REV. 601, 624 (2001) (“What constitutes precedent in a particular case is a flexible concept that is subject to interpretation, especially when considering cases that are not directly on point.”); David Lyons, *Formal Justice and Judicial Precedent*, 38 VAND. L. REV. 495, 499–500 (1985) (“Take any case that is to be decided and any other case that has already been decided. However similar they may be, in respects that may seem important, they will

charge to “treat like cases alike” matters very little for “unlike” cases.⁵⁶

All of these explanations tell us something. Surely *some* state court disobedience results from conscience-driven, sloppy, or opportunistic state courts. Perhaps even most state court disobedience does. But not all state court defiance grows from these obvious sources. Some state court defiance features a more curious wrinkle. Some state court defiance, in fact, follows a path set by the Supreme Court itself.

In generic terms, this unbinding path takes two steps. One step involves the unsettling of constitutional *substance*—a “shaking up”⁵⁷ of relevant law such that constitutional “answers” are unusually difficult to find. Of course, much of the law is muddled, if not entirely “wobbly [and] moth-eaten.”⁵⁸ Many legal terms are wrapped in hopeless “open-textured” uncertainty.⁵⁹ But some legal provisions depict more than passing or unavoidable ambiguity. They display an *intentional* judicial unsettling, a focused Court effort to render key phrases—like “full faith and credit”⁶⁰ and “cruel and unusual punishments”⁶¹—both confusing and confused.

A second unbinding step involves the use of generous *procedural* methods—an adoption of decision-making processes that shield even “incorrect” state court decisions from reversal.⁶² There is nothing especially novel, of course, about granting state courts some interpretive “wiggle room.”⁶³ Deference to lower courts, whether state or federal, is a familiar feature of modern appellate review. But there is something both strange and significant about permitting state courts to make blatant doctrinal errors and then forbidding other courts from correcting these missteps.⁶⁴ The Supreme Court has done both.

Even more, the Court has put unbinding’s two halves together. It has merged unsettled substance with an expansive procedural excuse.

also be different in some respects, and vice versa.”); Schauer, *supra* note 34, at 594 (“[I]t will always be *possible* to distinguish a precedent . . .”).

⁵⁶ See Schauer, *supra* note 34, at 595–96.

⁵⁷ Barbara Allen Babcock, *The Duty to Defend*, 114 YALE L.J. 1489, 1502 (2005).

⁵⁸ *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997) (citation omitted).

⁵⁹ See, e.g., JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 11–41 (1980).

⁶⁰ U.S. CONST. art. IV, § 1.

⁶¹ U.S. CONST. amend. VIII.

⁶² See Frederic M. Bloom, *Unconstitutional Courses*, 83 WASH. U. L.Q. 1679 (2005); see also Frederick Schauer, *The Supreme Court, 2005 Term—Forward: The Court’s Agenda—And the Nation’s*, 120 HARV. L. REV. 4, 46 (2006) (“[P]rocess . . . [is] an overused word that encompasses determinations of both who is to decide an issue and the procedures according to which an issue is to be decided.”).

⁶³ See Michael J. Klarman, *How Great Were the “Great” Marshall Court Decisions?*, 87 VA. L. REV. 1111, 1151 (2001).

⁶⁴ See Bloom, *supra* note 62, at 1723.

It has made correct doctrinal answers difficult to find and excused state courts from the sometimes burdensome task of actually finding them. In so doing, the Court has subtly depleted its own doctrinal power, thereby supplementing the doctrinal power of state courts. And in so doing, the Court has done much more than reiterate old jurisprudential truths about “wobbly” substance or deferential procedure. It has revealed how even the most cautious, careful, and morally neutral state court might come to believe itself unbound by Supreme Court precedent. And it has cast a penetrating light on its own furtive role in encouraging it.⁶⁵

B. A Simplified Example

Of course, even the most piercing light only reveals so much, especially when filtered through such an abstract lens. So to bring this unbinding puzzle into better focus, a more concrete (if fanciful) illustration of the unbinding process may help.

Imagine, then, that the Supreme Court has issued Decision A, an opinion holding that the imposition of a life sentence for overtime parking raises no Eighth Amendment concern.⁶⁶ Imagine, too, that comparable Case B eventually arrives before the Connecticut Supreme Court, asking whether a life sentence for *double* parking runs afoul of the Eighth Amendment’s Cruel and Unusual Punishments Clause.⁶⁷

At first glance, the state court’s task in Case B seems rather straightforward: It must follow Decision A.

Left to its own devices, of course, the state court may agree with Decision A’s interpretation of the Eighth Amendment; it may not. It may prefer to punish illegal parking in the way that Decision A allows; it may prefer something different altogether. But unless the state court is eager to start a (futile) judicial fight, what it agrees with or prefers does not matter. All that matters—or *seems* to matter—is what Decision A says.

As it happens, Decision A is not of especially recent vintage. Since announcing Decision A, the Court has penned two additional decisions, both relevant to Case B. One of these new decisions (Decision Y) calls the substance of Decision A into question, deeming Decision A “misguided under Eighth Amendment doctrine” and “dubious

⁶⁵ On extremely rare occasion, the Court is not quite so surreptitious. Both *Ferguson v. Skrupa*, 372 U.S. 726 (1963), and *Peyton v. Rowe*, 391 U.S. 54 (1968), seem to promote lower court disregard of precedent, albeit in contexts in which relevant precedent had been implicitly overruled.

⁶⁶ Cf. *Rummel v. Estelle*, 455 U.S. 263, 274 n.11 (1980) (“This is not to say that a proportionality principle would not come into play . . . if a legislature made overtime parking a felony punishable by life imprisonment.”).

⁶⁷ U.S. CONST. amend. VIII.

on its facts," if still somehow "good law."⁶⁸ The other (Decision Z) posits a new procedural rule, one that precludes federal courts from reversing "merely incorrect" state court decisions in certain contexts—including the one in which Case B arises.⁶⁹

Neither Decision Y nor Decision Z expressly requires state courts to reject Decision A; neither explicitly says that A is "overruled."⁷⁰ But both Y and Z do say something relevant to the state court's review of Case B—about what doctrine to consider, about what weight precedent carries, about what consequences will follow a mistake.

For the Connecticut Supreme Court, Decisions Y and Z may say plenty. Decisions Y and Z may convince the otherwise cautious state court to refute Decision A, or at least to turn a conveniently blind eye. Decision Y, after all, has deeply unsettled the substantive water, making the "correctness" of Decision A unclear.⁷¹ Decision Z, in turn, has curiously eased the state court's decision-making obligations, shielding even "erroneous" state court decisions from federal court reversal. So perhaps Y and Z will persuade the Connecticut court to cast dubious Decision A aside.

To the litigants in Case B, this state court choice will surely matter. The parking-ticket defendant in Case B would plainly prefer to see Decision A ignored.

For most others, however, Case B's particular outcome makes little difference. What matters more is that the state court's choice was not clearly foretold. In Case B, the state court could have tracked Decision A, toeing (perhaps) an ill-fated legal line.⁷² Or it could have defied Decision A, risking a suspect "brand of judicial activism."⁷³ Each option demands a steep price.

⁶⁸ In this sense, the Court has *not* implicitly overruled Decision A. Cf. *Solem v. Helm*, 463 U.S. 277, 303 n.32 (1983) ("Contrary to the suggestion in the dissent, our conclusion today is not inconsistent with *Rummel v. Estelle*").

⁶⁹ See generally Bloom, *supra* note 62 (examining contexts in which federal courts are prevented from remedying "incorrect" state court decisions).

⁷⁰ Cf. *Lawrence v. Texas*, 539 U.S. 558 (2003) (expressly overruling *Bowers v. Hardwick*, 478 U.S. 186 (1986)); *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938) (expressly overruling *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842)).

⁷¹ "[T]he most serious difficulty for the practice of precedent is the incidence of conflicting precedents—past decisions that provide, in effect, incompatible guidance for a judicial decision." Lyons, *supra* note 55, at 501 (noting that this makes it "impossible to follow all precedents"). Such doctrinal conflicts are often, though not *always*, a key ingredient in the state courts unbound recipe. See *infra*, Parts III, IV, V.

⁷² See, e.g., Evan H. Caminker, *Precedent and Prediction: The Forward-Looking Aspects of Inferior Court Decisionmaking*, 73 TEX. L. REV. 1, 73 (1994) (arguing that, in some narrow circumstances, inferior courts "should engage" in prediction); Michael C. Dorf, *Prediction and the Rule of Law*, 42 UCLA L. REV. 651, 715 (1995) (urging judges to "resist the temptation [to predict] because the prediction model undermines the rule of law . . .").

⁷³ *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 486 (1989) (Stevens, J., dissenting); cf. *Indianapolis Airport Auth. v. Am. Airlines, Inc.*, 733 F.2d 1262, 1272 (7th Cir. 1984) ("[A]n intermediate federal appellate court may properly decline to follow

But neither option should come as a great surprise, especially to the Court. With Decisions *Y* and *Z*, the Supreme Court did more than answer discrete legal questions. The Court sent important doctrinal signals, whispering hints about murky substantive answers and wider-than-normal procedural latitude. Not all state courts will respond to these signals in the same way. Not all state courts will opt to refute Decision *A*, no matter how “misguided” it may appear. But all state courts will receive the Court’s signals. And some state courts will choose to follow them—not because these courts feel especially audacious or antagonistic, but because the Supreme Court itself has quietly invited them to do so.

To a skeptical eye, of course, this example may seem rather self-serving and crude. Almost nothing the Court does is especially transparent; something as intricate as the unbinding of state courts seems an unlikely exception to that rule. But the (over)simplicity of Case *B*’s story should not obscure what it aims to show: Sometimes state courts openly disregard Supreme Court precedent. And sometimes it is the Supreme Court that encourages them to do so.

In many ways, this encouragement is strange enough. Since state courts typically abide time-honored rules, like “obey Supreme Court doctrine,” anything that undercuts these rules raises serious methodological and doctrinal concerns, even for judicial supremacy’s most dogged critics.⁷⁴ These concerns are pronounced, even magnified, when that process takes an exaggerated form, as it did in Case *B*.

But these concerns are no less acute when the unbinding process follows a less conspicuous path. The Parts that follow consider three subtler, entirely authentic state courts unbound portraits. *Williams v. North Carolina* outlines the first, highlighting the importance of unsettled constitutional substance. *Lockyer v. Andrade* frames the second, introducing the significance of pardoned state court mistakes. And *Roper v. Simmons* shapes the third, showing unbinding at full tide. None of these cases follows a path as transparent as Case *B*’s. None involves anything as banal as a parking mishap. But the complexity of these portraits bears its own significant reward: *Williams*, *Andrade*, and *Simmons* give shape and context to the state courts unbound thesis, explaining its relevance to cases confronting the Supreme Court even now. They also show that the state courts unbound story demands serious attention—not simply as a twist on a tired jurisprudential refrain, but as a critical account of precedent, interpretive authority, and state court power to declare Supreme Court decisions wrong.

a U.S. Supreme Court decision when convinced that the Court would overrule the decision if it had the opportunity to do so . . .”).

⁷⁴ See KRAMER, *supra* note 15, at 234–53.

II

UNBINDING IN HISTORY: *WILLIAMS V. NORTH CAROLINA*

We have nearly forgotten *Williams v. North Carolina*.⁷⁵ The dated parable of “deserted wives” and “wayward husband[s],”⁷⁶ the long struggle over “full faith and credit,”⁷⁷ the quiet triumph of “strict liability in the Supreme Court”⁷⁸—all sound rather distant to modern ears. So faint is *Williams*’s once-familiar ring, in fact, that the authors of our family law “canon” have opted largely to ignore it.⁷⁹

To be fair, *Williams* is not the easiest case to remember. Decades have passed since the “scandal”⁸⁰ of migratory divorce grabbed national attention. In that time, the matrimonial landscape shifted dramatically: marriage found its constitutional roots;⁸¹ divorce entered its no-fault era.⁸² All the while, *Williams* inched ever closer to obscurity.

But we should not let *Williams* slip out of memory too quickly. This Part attempts to show why *Williams* merits renewed attention, both as a cultural record⁸³ and as a window onto the idea of unbound state courts. To begin, subpart A revisits *Williams*’s unassuming legal story. Subpart B then highlights a wrinkle of *Williams* now almost universally ignored: the way unsettled substance enabled a state court to shape federal constitutional law at its whim. Subpart C then places this wrinkle in doctrinal context, assessing how *Williams* does and does not presage later iterations of legal uncertainty and unbound state courts.

⁷⁵ *Williams v. North Carolina (Williams II)*, 325 U.S. 226 (1945).

⁷⁶ Joseph Walter Bingham, *Song of Sixpence: Some Comments on Williams v. North Carolina*, 29 CORNELL L.Q. 1, 13 (1943). To be exact, *Williams* is also a story of a “deserted” husband and a “wayward” wife. See *Williams II*, 325 U.S. at 227. In many ways, the *Williams* case turned on issues of “domicil,” as we will see. See WALTER WHEELER COOK, *THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS* 194–210 (1942) (discussing domicil generally, as well as in the context of *Winans v. Winans*, 91 N.E. 394 (Mass. 1910), a once-prominent divorce case); Willis L.M. Reese, *Does Domicil Bear a Single Meaning?*, 55 COLUM. L. REV. 589, 589 (1955) (citing *Williams II* in discussing the importance of domicil in the context of divorce).

⁷⁷ U.S. CONST. art. IV, § 1.

⁷⁸ Alan C. Michaels, *Constitutional Innocence*, 112 HARV. L. REV. 828, 852 (1999).

⁷⁹ See Jill Elaine Hasday, *The Canon of Family Law*, 57 STAN. L. REV. 825 (2004); cf. Gerhart Husserl, *Some Reflections on Williams v. North Carolina II*, 32 VA. L. REV. 555, 555 (1946) (noting the story’s “familiar ring”).

⁸⁰ Cf. Note, *Divisible Divorce*, 76 HARV. L. REV. 1233, 1233 (1963); Husserl, *supra* note 79, at 555.

⁸¹ See *Zablocki v. Redhail*, 434 U.S. 374 (1978); *Loving v. Virginia*, 388 U.S. 1 (1967). As Professor Michaels notes, there is some dispute “about whether clear recognition of the right to marry as fundamental came in 1967 . . . or in 1978.” Michaels, *supra* note 78, at 856 n.146. Either way, the date comes well after *Williams* does.

⁸² See Helen Garfield, *The Transitory Divorce Action: Jurisdiction in the No-Fault Era*, 58 TEX. L. REV. 501, 501 (1980).

⁸³ See NELSON MANFRED BLAKE, *THE ROAD TO RENO: A HISTORY OF DIVORCE IN THE UNITED STATES* 181–88 (1962).

A. Reviving *Williams*

The story of *Williams v. North Carolina* started almost meekly. It opened in May of 1940, as Otis Williams and Lillie Hendrix began the long drive from North Carolina to Las Vegas.⁸⁴ Both Williams and Hendrix were in search of a divorce, though not from each other.⁸⁵ Hendrix hoped to split from a husband of twenty years, Williams from a wife of even longer.⁸⁶

At the time, Nevada law required that a person “reside[] [only] six weeks in the state before suit [for divorce could] be brought.”⁸⁷ So, between early May and late June, Williams and Hendrix waited together in a Nevada “auto-court for transients.”⁸⁸ As soon as the seventh week arrived, each claimed Nevada domicile and filed a petition for divorce in Nevada’s state courts.⁸⁹ On October 4, both petitions were granted.⁹⁰ And on October 4, Williams and Hendrix were married, this time to each other.⁹¹

Within days, the newlyweds returned to North Carolina.⁹² But if the pair had any hope of “happy domesticity,” their dreams were soon dashed.⁹³ Not long after the couple’s return, North Carolina indicted them for “bigamous cohabitation.”⁹⁴ Both were convicted by a state jury, notwithstanding Nevada’s seemingly valid divorce (and marriage) decrees.⁹⁵ Both were sentenced to three-year prison terms—

⁸⁴ *Williams v. North Carolina (Williams I)*, 317 U.S. 287, 289 (1942).

⁸⁵ See BLAKE, *supra* note 83, at 181–88.

⁸⁶ See *id.*

⁸⁷ *Williams I*, 317 U.S. at 290 n.3 (citation omitted). North Carolina had a more demanding standard at the time, and this mattered for Williams and Hendrix themselves. That it was more demanding is not what remains important, however. What remains important is that it was *different*—and that the Court permitted it to be.

⁸⁸ *Williams v. North Carolina (Williams II)*, 325 U.S. 226, 236 (1945).

⁸⁹ See *Williams I*, 317 U.S. at 289.

⁹⁰ *Id.* at 289–90.

A decree of divorce was granted petitioner Williams by the Nevada court on August 26, 1940, on the grounds of extreme cruelty, the court finding that the plaintiff has been and now is a bona fide and continuous resident of the County of Clark, State of Nevada, and had been such resident for more than six weeks immediately preceding the commencement of this action in the manner prescribed by law. The Nevada court granted petitioner Hendrix a divorce on October 4, 1940, on the grounds of wilful neglect and extreme cruelty and made the same finding as to this petitioner’s bona fide residence in Nevada as it made in the case of Williams. Petitioners were married to each other in Nevada on October 4, 1940.

Id. at 290 (citations and internal quotation marks omitted); see BLAKE, *supra* note 83, at 181 (noting that neither defendant—that is, neither *original* spouse—took any action in Nevada).

⁹¹ See BLAKE, *supra* note 83, at 181.

⁹² See *Williams I*, 317 U.S. at 290; BLAKE, *supra* note 83, at 181 (“On October 4, 1940, . . . [Hendrix] married Williams and the couple returned to North Carolina.”).

⁹³ BLAKE, *supra* note 83, at 181.

⁹⁴ *Williams v. North Carolina (Williams II)*, 325 U.S. 226, 227 (1945).

⁹⁵ See *id.* at 241.

even though, by then, "one of their former spouses was dead and the other had remarried."⁹⁶ Both appealed.⁹⁷

In a very narrow sense, the appeal in *Williams* presented an unexceptional question of criminal law: did Otis Williams and Lillie Hendrix violate North Carolina's prohibition against "bigamous cohabitation"—against marrying another, that is, while still being married?⁹⁸

In a slightly broader, more theoretical sense, *Williams* posed a chronic riddle of legal status: What does "true domicile" require?⁹⁹ Does it demand mere "physical presence"¹⁰⁰ for whatever "special or temporary purpose,"¹⁰¹ or does it entail something more durable—a more permanent "nexus between person and place"?¹⁰²

In an even broader structural sense, of course, *Williams* involved more than "truant lovers"¹⁰³ and "over-the-counter divorces."¹⁰⁴ Folded into *Williams*'s story of domestic disorder was a serious question of interstate comity and the workings of our federalist system: What respect should one state give to the judgments of another? Must a state abide *every* judgment of another state's courts, even when those judgments conflict with—or prove "repugnant" to—the state's own law?¹⁰⁵

To legal textualists, the answer to this question is plain: all judgments of one state command the full respect of every other, no matter how suspicious.¹⁰⁶ The bare terms of the Full Faith and Credit Clause make no exceptions, so even divorces granted "by mail or telephone . . . should enjoy coerced recognition anywhere."¹⁰⁷ Anything

⁹⁶ *Id.* at 266 (Black, J., dissenting); see Thomas Reed Powell, *And Repent at Leisure: An Inquiry into the Unhappy Lot of Those Whom Nevada Hath Joined Together and North Carolina Hath Put Asunder*, 58 HARV. L. REV. 930, 964 (1945) ("[N]either the acquiescence of earlier companions nor their later death or remarriage has any legitimate bearing on whether North Carolina can penalize what she has penalized here. . . . Punishment is the handmaiden of prevention . . .").

⁹⁷ See *Williams I*, 317 U.S. at 289–90.

⁹⁸ See *Williams II*, 325 U.S. at 227 & n.1; see also Michaels, *supra* note 78, at 835 (discussing bigamy as a strict liability crime).

⁹⁹ See *Williams II*, 325 U.S. at 231 (citing *Tilt v. Kelsey*, 207 U.S. 43 (1907)).

¹⁰⁰ *Sosna v. Iowa*, 419 U.S. 393, 424 (1975).

¹⁰¹ *Williams II*, 325 U.S. at 236.

¹⁰² See *id.* at 229.

¹⁰³ Bingham, *supra* note 76, at 2.

¹⁰⁴ Powell, *supra* note 96, at 932.

¹⁰⁵ See Larry Kramer, *Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception*, 106 YALE L.J. 1965, 1987 (1997) (asking whether one forum can refuse to recognize the decree of another "on the ground that it promotes a policy the [first] forum finds repugnant").

¹⁰⁶ See Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1, 42 (2006).

¹⁰⁷ Powell, *supra* note 96, at 930; see also Kramer, *supra* note 105, at 2003 ("To begin, the text of the Clause says that *full faith and credit shall be given* . . .").

less, Justice Rutledge cautioned, risked turning the Full Faith and Credit Clause into a “dead constitutional letter.”¹⁰⁸

To more “pragmatic” legal thinkers¹⁰⁹—or, to use Professor Powell’s pithier label, less “extreme libertarian[s]”¹¹⁰—the answer is neither so obvious nor so categorical: not every judgment in one state is conclusive and all-powerful in every other. The text of the Full Faith and Credit Clause may speak in broad and inclusive terms, but some state judgments are so suspect that a “sister-State” need not abide them. Some judgments are so infirm that they deserve no “constitutional sanctity” at all.¹¹¹

On *Williams*’s first trip to the Supreme Court, the Justices kept to the periphery of this difficult full faith and credit debate.¹¹² The Court did, in this first look, overturn the couple’s bigamy convictions, granting the pair a temporary reprieve.¹¹³ But any resolution the Court may have offered was strictly and expressly “limited”¹¹⁴—so much so that North Carolina promptly ignored Nevada’s decrees a second time, trying and convicting the couple again.¹¹⁵

Soon after this reconviction, *Williams* made a second visit to the Supreme Court. This time, the Court sided with North Carolina, af-

¹⁰⁸ See *Williams v. North Carolina (Williams II)*, 325 U.S. 226, 245 (1945) (Rutledge, J., dissenting). Congress may well have the power to alter this dynamic. Article IV, section 1 permits Congress to make “general Laws [that] prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.” U.S. CONST. art IV, § 1. This so-called Effects Clause may inspire exegetical nightmares, see Kramer, *supra* note 105, at 2001, but it may also permit Congress to untangle awkward byproducts of the Full Faith and Credit Clause.

¹⁰⁹ I use this term hesitantly. “Pragmatic” is an especially elastic label, one sufficiently amorphous to have been applied almost indiscriminately. Justices Holmes, Brandeis, Frankfurter, Jackson, Douglas, Brennan, Powell, Stevens, White, and Breyer have all been deemed pragmatists. See Richard A. Posner, *Pragmatic Adjudication*, 18 CARDOZO L. REV. 1, 2 (1996) (compiling this list). “Pragmatic” has even been applied to Justice Rutledge, the very voice of strong textualism in *Williams*. See Logan Everett Sawyer III, *Jurisdiction, Jurisprudence, and Legal Change: Sociological Jurisprudence and the Road to International Shoe*, 10 GEO. MASON L. REV. 59, 89 (2001) (“Justice Rutledge was selected largely on the recommendation of Felix Frankfurter, and his jurisprudential views were essentially pragmatic.” (citations and internal quotation marks omitted)). The label is no less ubiquitous “[a]mong theorists of adjudication.” Posner, *supra*, at 2. As Judge Posner notes, it has “been applied not only to those who call themselves pragmatists, of whom there are now quite a number, but also to Ronald Dworkin, who calls pragmatism . . . an intellectual meal fit only for a dog (and I take it he does not much like dogs).” *Id.*

¹¹⁰ Powell, *supra* note 96, at 930 (calling the antagonists of “extreme libertarian[s]” “doctrinaire . . . ritualists” prone to ceaseless reevaluation).

¹¹¹ See *Williams II*, 325 U.S. at 229; *id.* at 242 (Murphy, J., concurring).

¹¹² See *Williams v. North Carolina (Williams I)*, 317 U.S. 287, 302 (1942) (deeming a precise definition of North Carolina’s “power . . . to refuse full faith and credit to Nevada divorce decrees” unnecessary).

¹¹³ See *id.* at 292–93, 304.

¹¹⁴ *Id.*

¹¹⁵ See BLAKE, *supra* note 83, at 182.

firming the couple's bigamy convictions.¹¹⁶ And this time, the Court struck a deliberately practical full-faith-and-credit balance, forging a "necessary accommodation," in Justice Frankfurter's words, of the states' "conflicting interests."¹¹⁷

By its terms, this "accommodation" permitted little judicial second-guessing. Most aspects of Nevada's divorce decrees, *Williams* explained, were immune from reconsideration in North Carolina—no matter how dubious.

But not *all* reexamination was entirely "foreclosed."¹¹⁸ North Carolina could reconsider jurisdictional facts, those core matters (like "bona fide domicil"¹¹⁹) that invested Nevada with the authority to decide a case at all. More than that, North Carolina could apply a *different* domiciliary standard in this reassessment, imposing its own more rigorous measure of the couple's status *in Nevada*—regardless of what Nevada itself had done.¹²⁰ So when North Carolina reevaluated and disregarded Nevada's own finding of "domicil," it breached no full-faith-and-credit limit.¹²¹ And when North Carolina prosecuted Williams and Hendrix for bigamous cohabitation, it did nothing constitutionally wrong.¹²²

For Williams and Hendrix, this "necessary accommodation" brought a long legal voyage to an unhappy end. Because a North Carolina court could, and did, declare their divorce decrees invalid, the couple went to jail as bigamists, even though they remained lawfully wed elsewhere.¹²³

But for other couples and the Court itself, the odyssey of migratory divorce was nowhere near its finish. In the years that followed, a steady stream of divorce appeals reached the Supreme Court, each offering a new full faith and credit riddle to solve.¹²⁴ Over time, these cases folded together in a kind of "patchwork without pattern"¹²⁵—a

¹¹⁶ See *Williams II*, 325 U.S. at 226.

¹¹⁷ *Id.* at 231–32. "Practical," of course, does not mean simple. See *id.* at 232–33.

¹¹⁸ *Id.* at 230.

¹¹⁹ See *id.* at 227, 230–32.

¹²⁰ *Id.* at 241. It is worth recalling that this standard did not *need* to be more exacting. It could have been more rigorous or less, more exacting or less. But it could be *different*, and that is all that matters. Had North Carolina demanded residency of ten minutes or ten years, its constitutional latitude would have been equally robust, allowing it to make any kind of "domicil" conclusion—and, thus, full faith and credit decision—it liked.

¹²¹ See *id.* at 233–35.

¹²² See *id.* at 237–39.

¹²³ *Id.* at 247 (Rutledge, J., dissenting) ("So the marriage is good in Nevada, but void in North Carolina . . .").

¹²⁴ See BLAKE, *supra* note 83, at 183 (noting that Massachusetts, Florida, and New York happily picked up where North Carolina and Nevada left off).

¹²⁵ ELY, *supra* note 59, at 146.

“crazy quilt,” to borrow Justice Jackson’s metaphor, of American divorce laws.¹²⁶

As the Court added layers to this quilt, others made calls for legislative reform.¹²⁷ Many of these calls went unheeded—some because of flaws in the reforms, others because of doubts about the reformers.¹²⁸ But these political setbacks did not dull the demand for change. Less than thirty years after *Williams* fashioned its “necessary accommodation,” the reformers dramatically succeeded: No-fault divorce “burst” into national prominence, and permissive divorce laws swept into vogue.¹²⁹ Social forces—far more than doctrinal ones—wrote *Williams* off the page.¹³⁰

B. Accommodation and Instability

For good reason, this extraordinary cultural shift has drawn substantial academic attention. The turbulent history of “[d]ivorce [as] a legal act,”¹³¹ the steady evolution of “collusive and underhanded” alternatives,¹³² the sudden explosion of “permissive” divorce regimes¹³³—all have inspired thoughtful and detailed review.

But *Williams* did more than unleash a powerful surge of social energy. *Williams* also helped forge a curious legal framework, a decision-making structure with unexpected winners, habitual losers, and a strange array of litigants caught in between. *Williams* left, that is, a rather odd legal legacy.

Why should we care about this legacy, however strange? If *Williams* is now just another footnote in the long and winding history of American divorce, why should we care about preserving it, let alone paying it much heed?

Part of the reason is the law’s persistent echo. Old legal problems have a way of bouncing back, returning to relevance in slightly modernized form.¹³⁴ Yesterday’s debate about migratory divorce sounds much like today’s “national conversation” about same-sex marriage.¹³⁵

¹²⁶ *Rice v. Rice*, 336 U.S. 674, 680 (1949) (Jackson, J., dissenting).

¹²⁷ See, e.g., BLAKE, *supra* note 83, at 186–87.

¹²⁸ See *id.*

¹²⁹ See Lawrence M. Friedman, *Rights of Passage: Divorce Law in Historical Perspective*, 63 OR. L. REV. 649, 664 (1984) (“The old system collapsed completely; no-fault rushed into the vacuum.”).

¹³⁰ See *id.* at 664–69.

¹³¹ *Id.* at 649.

¹³² *Id.* at 662.

¹³³ See Katharine B. Silbaugh, *Marriage Contracts and the Family Economy*, 93 NW. U. L. REV. 65, 86 (1998).

¹³⁴ Cf. Robert H. Jackson, *Full Faith and Credit—The Lawyer’s Clause of the Constitution*, 45 COLUM. L. REV. 1, 14 (1945) (noting that some legal “books” are difficult to “close[]”).

¹³⁵ See Ann Laquer Estin, *Marriage and Belonging*, 100 MICH. L. REV. 1690, 1700–02 (2002) (“Striking parallels also exist between the campaign against same-sex marriage and

Faithful records of the former, like *Williams*, may well help make better sense of the latter.¹³⁶

Another part is jurisprudential mystery. Few constitutional provisions have proven as “baffling” and stubbornly undertheorized as the Full Faith and Credit Clause.¹³⁷ No landmark study cracks the Clause’s thick shell; no “luminous exposition by [Chief Justice] Marshall” sheds clarifying light.¹³⁸ What little explanatory evidence exists, then, has a rare value, even if part of now-anachronistic precedent.

And another part of the reason to remember *Williams* is the critical lesson it teaches about substantive instability and the power of state courts. Much has been written in the last quarter-century about “constitutional unsettlement”—the idea that deep uncertainty infects constitutional law. Some have praised this type of uncertainty.¹³⁹ Others have derided it.¹⁴⁰ Still others have deemed it jurisprudentially inevitable, a kind of “predictable unpredictability.”¹⁴¹ But not even unsettlement’s most rigorous students have examined how this instability subtly expands *state* courts’ doctrinal authority. Nowhere is this state-empowering instability more prominent than in *Williams*. Nowhere but *Williams*, in fact, is this uncertainty so clearly a kind of “constitutional policy.”¹⁴²

If *Williams* made uncertainty a “constitutional policy,” of course, the Court may have had good reasons. No full faith and credit frame-

the longstanding battle against divorce and polygamy.” (citation omitted)). See generally Tobias Barrington Wolff, *Interest Analysis in Interjurisdictional Marriage Disputes*, 153 U. PA. L. REV. 2215 (2005) (providing a history of same sex marriage, one that can be compared to the history of migratory divorce).

¹³⁶ Cf. Kramer, *supra* note 105, at 1965. For a thoughtful discussion of *Williams*’s lingering impact, see Joseph William Singer, *Same Sex Marriage, Full Faith and Credit, and the Evasion of Obligation*, 1 STAN. J. CIV. RTS. & CIV. LIBERTIES 1, 15 (2005).

¹³⁷ See Jackson, *supra* note 134, at 2 (citing BENJAMIN N. CARDOZO, *THE PARADOXES OF LEGAL SCIENCE* 67 (1928)); *id.* at 3 (“This clause is relatively . . . neglected . . .”).

¹³⁸ *Id.* at 3; see *id.* at 7 (“Not until 1813 was the Supreme Court called upon to consider the faith and credit clause . . .”); *id.* at 34; see also Jackson, *supra* note 134, at 3, 34; J.H.C. Morris, *Divisible Divorce*, 64 HARV. L. REV. 1287, 1288 (1951) (calling “it in the highest degree uncertain whether and in what circumstances the Supreme Court will intervene” in divorce-related full faith and credit debates). The Federalist Papers also leave this all-important clause relatively unaddressed. See THE FEDERALIST NO. 42, at 264, 266–67 (James Madison) (Clinton Rossiter ed., 1961).

¹³⁹ See SEIDMAN, *supra* note 36, 8–9 (touting unsettlement’s populist benefits); see also Tom Baker, Alon Harel, & Tamar Kugler, *The Virtues of Uncertainty in Law: An Experimental Approach*, 89 IOWA L. REV. 443, 445 (2004) (“[W]e argue that uncertain sanctions may be preferable on efficiency grounds . . .”).

¹⁴⁰ See Alexander & Schauer, *Constitutional Interpretation*, *supra* note 28, at 1372–73.

¹⁴¹ Brannon P. Denning, *Against (Constitutional) Settlement*, 19 CONST. COMMENT. 781, 782 (2002).

¹⁴² *Williams v. North Carolina (Williams II)*, 325 U.S. 226, 244 (1945) (Rutledge, J., dissenting).

work will ever be perfect.¹⁴³ By its nature, the Full Faith and Credit Clause seems to demand the unattainable: both “nationalist” authority and “federalist” autonomy,¹⁴⁴ both workable theory and “hard practicality,” both respect for out-of-state judgments and the reservation of certain decisions to individual states.¹⁴⁵ So if *Williams* appears analytically blurry,¹⁴⁶ and if the Court’s “accommodation” caught a few litigants unaware,¹⁴⁷ we may forgive the Court some of these flaws. We might even cheer the Court’s caution, commending it for going “no farther than [it should] go.”¹⁴⁸

But we may worry as well. On occasion, the Court’s prudence holds its own subtle perils. Some Court half-steps raise more questions than they answer. And some “minimalist” Court “nudges”—to borrow Professor Sunstein’s fitting term¹⁴⁹—unsettle more than they resolve.

Williams’s accommodating “nudge” did just that. Rather than resolving an urgent interstate conflict, the *Williams* Court simply sidestepped the fight. And though the intent of this judicial sidestepping may have been perfectly admirable, its effect produced something

¹⁴³ See Kramer, *supra* note 105, at 1968 (explaining that these systems will never be “neat or tidy”).

¹⁴⁴ See, e.g., Richard H. Fallon, Jr., *The Ideologies of Federal Courts Law*, 74 VA. L. REV. 1141, 1144–58 (1988) (assessing “Nationalist” and “Federalist” models of thought); Jackson, *supra* note 134, at 17.

¹⁴⁵ *Williams II*, 325 U.S. at 233; see Kramer, *supra* note 105, at 1967; *id.* at 1976 (“[T]he Full Faith and Credit Clause . . . looks on its face as if it were written for precisely this sort of problem.”).

¹⁴⁶ See Powell, *supra* note 96, at 930 (asking if the opinion “shed darkness rather than light”).

¹⁴⁷ The Court’s accommodation caught no one more unaware than Otis Williams and Lillie Hendrix. Compare *Williams II*, 325 U.S. at 238 (concluding that Williams and Hendrix “assumed the risk” that North Carolina would find that “they had not been domiciled in Nevada”), with *id.* at 276 (Black, J., dissenting) (“[T]he Court’s unjustifiable devitalization of the Full Faith and Credit Clause . . . makes the North Carolina statute an inescapable trap for any person who places the slightest reliance on another state’s divorce decree . . .”), and *id.* (Black, J., dissenting) (lamenting that the Court’s opinion makes liberty a “very cheap thing”). See also Van Alstyne, *supra* note 44, at 777–78 (“Consistent with this last check—the ‘checking effect’ of federalism—a state cannot smugly pursue its own agenda as though the state existed in a geographic vacuum, or as though the state were hermetically sealed at its borders. . . . [F]ederalism exerts its own leavening constraint on [all states].”).

¹⁴⁸ See Powell, *supra* note 96, at 930; see also *Williams II*, 325 U.S. at 243 (Murphy, J., concurring) (noting that the decision pushes “civilization [no closer] to an end” (citation omitted)); SUNSTEIN, *supra* note 45, at xiii (“Justice Felix Frankfurter was a distinguished minimalist.”).

¹⁴⁹ SUNSTEIN, *supra* note 45, at 30 (“The point is that all minimalists accept the following proposition: For judges, nudges are much better than earthquakes.”); see also Daniel A. Farber, *Earthquakes and Tremors in Statutory Interpretation: An Empirical Study of the Dynamics of Interpretation*, 89 MINN. L. REV. 848, 850–51 (2005) (positing the “tectonic model” of legal change); Sheldon Gelman, *The Hedgehog, The Fox, and the Minimalist*, 89 GEO. L.J. 2297, 2350 (2001) (declaring Professor Sunstein’s minimalism “less convincing than the old formalism”).

rather strange. With no clear or predictable full faith and credit standard,¹⁵⁰ state courts could manipulate full faith and credit at their whim. Each state court, that is, could determine what "full faith and credit" meant for itself.

What "full faith and credit" meant in any particular case was, after *Williams*, unclear. In fact, after *Williams*, "full faith and credit" could mean "everything and nothing"¹⁵¹ at once. It could demand complete (textualist) respect for out-of-state judgments in one case and nothing at all in the next; it could demand "one thing" in Case A and "quite a different thing" in comparable Case B.¹⁵² But where the Court assigned these important full faith and credit decisions was beyond any question: They belonged to *state* courts.

A state court made this decision in *Williams*. Applying its own strict domiciliary standard, a North Carolina court chose to disregard Nevada's divorce decrees, deeming them unworthy of full faith and credit—or any real "credit" at all.¹⁵³

And perhaps the *Williams* state court was right.¹⁵⁴ Perhaps the North Carolina court rooted out illicit litigant motives. Perhaps it protected the state's most sensitive policy interests and prevented a suspicious legal end run. Perhaps the state court even struck an ideal constitutional balance, capturing the essence—in Dean Kramer's phrase—of "what it means to be in a Union."¹⁵⁵

But the critical issue in *Williams* is not whether the state court got a specific decision right or wrong. The crucial issue is what *Williams* reveals about the link between unsettled constitutional substance and unbound state courts.¹⁵⁶ Had the *Williams* state court so preferred, it could have read "full faith and credit" broadly, extending unequivocal respect to the most dubious of out-of-state judgments. Or had the state court so preferred, it could have read the clause narrowly, converting *full* faith and credit into a system of "half good[s] and half bad[s]."¹⁵⁷ Either way, this pivotal choice was entirely the state court's

¹⁵⁰ *Williams II*, 325 U.S. at 276 (Black, J., dissenting).

¹⁵¹ Jorge Luis Borges, *Everything and Nothing*, in *Labyrinths* 248, 248 (Donald A. Yates & James E. Irby eds., James E. Irby trans., 1964).

¹⁵² *Baltimore v. Baltimore R.R.*, 77 U.S. (10 Wall.) 543, 551 (1870) ("The word expense may mean one thing in one case and quite a different thing in another.").

¹⁵³ See *Williams II*, 325 U.S. at 227.

¹⁵⁴ See David P. Currie, *The Constitution in the Supreme Court: The Preferred-Position Debate, 1941-1946*, 37 CATH. U. L. REV. 39, 66 (1987). If state juries are as capricious as they often appear, of course, some full faith and credit answers will almost inevitably be correct, if only by virtue of luck.

¹⁵⁵ Kramer, *supra* note 105, at 2006.

¹⁵⁶ See *Williams II*, 325 U.S. at 246 (Rutledge, J., dissenting) (explaining that state courts may not redefine "full faith and credit" at their whim). If the Court retained any supervisory function in this, it is one more porous than solid. See *id.* at 251.

¹⁵⁷ *Estin v. Estin*, 334 U.S. 541, 554 (1948) (Jackson, J., dissenting).

to make, not because the Constitution demands as much,¹⁵⁸ but because intentionally unsettled substance gave state courts the power to choose.

C. Uncertainty's Prevalence

Things could have gotten stranger still. Had they the chance, state courts might have turned the Full Faith and Credit Clause into a kind of constitutional "nulli[ty],"¹⁵⁹ using their expansive doctrinal power as a kind of ever-ready federalist weapon. But before that opportunity emerged, social forces intervened: no-fault divorce rose to national prominence, reframing the entire marriage debate from the inside.¹⁶⁰ As this happened, *Williams's* gravest risks seemed to dissipate: Fears of chaotic interstate rivalry lessened. Concerns about dramatic interstate disrespect faded away—or at least went into legal hibernation.¹⁶¹

But if *Williams's* perils came to very little, their promise should not be ignored. Behind *Williams's* parable of wayward wives and absconding husbands is a lesson worth repeating: Unsettled substantive law can and sometimes does permit state courts to "speak the last word"¹⁶² on pivotal questions of federal law. Odder still, unsettled substance may even *invite* state courts to disregard decisions the Court itself has already made. These invitations may arrive rather quietly, moving in accommodating "nudges" rather than judicial "earthquakes."¹⁶³ They may even look like laudable minimalist turns. But their impact can be quite momentous, and they are there for state courts to see.

This instability is also there for the Supreme Court to replicate. To students of the modern judiciary, of course, the idea of Court-made uncertainty may seem unexceptional, if not somewhat trite. Substantive uncertainty now seems almost ubiquitous—sometimes appearing in mazes of hopeless doctrinal confusion,¹⁶⁴ sometimes acting as a tool for reallocating constitutional power. In *United States v. Lopez*, for example, the Court used "legal uncertainty" to "restrict" Con-

¹⁵⁸ See *Williams II*, 325 U.S. at 245 (Rutledge, J., dissenting) ("[T]he Constitution has [not] confided to the caprice of juries the faith and credit due the laws and judgments of sister states.").

¹⁵⁹ *Id.* at 232.

¹⁶⁰ See Friedman, *supra* note 129, at 664.

¹⁶¹ See, e.g., Wolff, *supra* note 135 (discussing the reemerging debate over the meaning of "full faith and credit" in the context of gay marriage).

¹⁶² Akhil Reed Amar, *Parity as a Constitutional Question*, 71 B.U. L. REV. 645, 650 (1991).

¹⁶³ SUNSTEIN, *supra* note 45, at 30.

¹⁶⁴ See *Kassel v. Consol. Freightways Corp.*, 450 U.S. 662, 706 (1981) (Rehnquist, J., dissenting).

gress's regulatory reach.¹⁶⁵ In *Hamdi v. Rumsfeld*, the Court used "constitutional improvisation" to "increase" its own authority.¹⁶⁶

In this important sense, *Hamdi*, *Lopez*, and *Williams* seem like cases of a common stripe. All feature "legal uncertainty" of a kind. All depict careful Court attention and a subtle (re)distribution of power.

But if *Williams* resembles *Lopez* and *Hamdi* from a distance, it appears very different from up close. Where *Lopez* and *Hamdi* use legal uncertainty to consolidate Supreme Court power, *Williams* employs uncertainty to diffuse it. Where *Lopez* and *Hamdi* display entirely unsurprising "grab[s] for [Supreme Court] power,"¹⁶⁷ *Williams* shows a counterintuitive delegation to state courts. And where *Lopez* and *Hamdi* leave state courts on the constitutional sideline, *Williams* puts them in the doctrinal center, unbinding "local trier[s]" to make federal constitutional law anew.¹⁶⁸

In the end, of course, *Williams* may still strike us as somehow trivial, a forgettable relic of a cultural battle fought many years ago. But there are still pieces of *Williams* we should be careful to remember. We should remember *Williams*'s chronicle of a marital battle much like one being fought now. We should remember *Williams*'s gloss on a stubbornly undertheorized constitutional phrase. And we should remember *Williams*'s image of unsettled substantive law and empowered state courts.

On their own, each of these lessons warrants our attention and a firm place in legal memory, even when viewed through the dated prism of migratory divorce. But when joined by a second player, *Williams*'s lessons strike an even more insistent chord. This second player—viz., the procedural pardoning of state court errors—has much to say in the state courts unbound story. In *Lockyer v. Andrade*, this second player takes center stage.

III

UNBINDING YESTERDAY: *LOCKYER V. ANDRADE*

At first glance, *Williams* and *Andrade* seem an unlikely pair. One case speaks of migratory divorce and long treks to Nevada; the other tells of criminal recidivism and stolen videos. One case helped spur a

¹⁶⁵ 514 U.S. 549, 630 (1995) (Breyer, J., dissenting).

¹⁶⁶ 542 U.S. 507, 575 (2004) (Scalia, J., dissenting).

¹⁶⁷ KRAMER, *supra* note 15, at 249.

¹⁶⁸ *Williams v. North Carolina (Williams II)*, 325 U.S. 226, 246 (1945) (Rutledge, J., dissenting); see Alfred Hill, *The Judicial Function in Choice of Law*, 85 COLUM. L. REV. 1585, 1610–11 (1985) (noting the potential for "problems where none previously existed" when state courts "make law anew on the basis of fresh perceptions of governmental policies"). "[L]iberty [may] find[] no refuge in a jurisprudence of doubt," *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 844 (1992), but expanded state court power might.

significant cultural shift; the other provoked little change at all.¹⁶⁹ One case is now old enough to be all but forgotten; the other is still young enough for most to recall.¹⁷⁰

But if *Williams* and *Andrade* seem at first like only distant doctrinal cousins, they soon prove a very compatible match. Both recount joyless domestic struggles—as well as trips to state jail. Both raise serious questions about cryptic constitutional text and rich legal history.¹⁷¹ And both paint revealing portraits of empowered state courts, the second case adding to the lessons of the first.

This Part examines *Lockyer v. Andrade* in careful detail. Subpart A begins with an account of Leandro Andrade's luckless encounter with California's "three strikes" law. Subpart B places that encounter in substantive legal frame, exploring the *Williams*-like instability of modern Eighth Amendment "proportionality" jurisprudence. Subpart C reinforces that legal frame with an examination of unbinding's procedural side: modern habeas corpus law. Subpart D then reviews *Andrade* as a doctrinal whole, showing how unstable substance merges with deferential procedure to leave state courts effectively unbound.

A. Leandro Andrade

Leandro Andrade is no model of redemption. His life does count some cheerful moments, stretches of military service, and honest parenthood.¹⁷² But Andrade's defining feature is not growth or reflection. It is disappointment—and a stubborn tendency to relapse.

Andrade's most notorious relapse came in late 1995, when he stole a handful of videotapes from a California retail store.¹⁷³ Two weeks later, Andrade did it again.¹⁷⁴ Each time, he was spotted and detained by private security personnel.¹⁷⁵ Each time, he was arrested by local police.¹⁷⁶

These were not Andrade's first arrests. Since 1982, Andrade had been "in and out of state and federal prison" for misdemeanor theft, for first-degree residential burglary, for transportation of marijuana,

¹⁶⁹ See generally Erwin Chemerinsky, *The Constitution and Punishment*, 56 STAN. L. REV. 1049, 1065–67 (2004) (discussing studies showing that the state's three strikes law has had no measurable impact on California's crime rate).

¹⁷⁰ See *Lockyer v. Andrade*, 538 U.S. 63 (2003); *Williams II*, 325 U.S. 226 (1945).

¹⁷¹ See, e.g., Friedman, *supra* note 129, at 661–65; Kramer, *supra* note 105, at 1976–86.

¹⁷² Erwin Chemerinsky, *Cruel and Unusual: The Story of Leandro Andrade*, 52 DRAKE L. REV. 1, 1 (2003) (describing Andrade as "a nine-year Army veteran and father of three").

¹⁷³ *Andrade*, 538 U.S. at 66.

¹⁷⁴ *Id.*

¹⁷⁵ See *id.*

¹⁷⁶ See *id.*; see also Chemerinsky, *supra* note 172, at 1 ("Andrade . . . was caught shoplifting . . . *Snow White*, *Casper*, *The Fox and the Hound*, *The Pebble and the Penguin*, and *Batman Forever* . . .").

and for a state "parole violation."¹⁷⁷ So when Andrade stole his first videotape, he was already a repeat offender. And when he was convicted of two counts of "petty theft with a prior,"¹⁷⁸ he triggered the strict terms of California's "three strikes law."

California's three strikes law is unforgiving by design. Passed to "ensure longer prison sentences and greater punishment" for convicted offenders who commit additional felonies, the law mandates a sentence of "at least 25 years to life" for eligible third-strike crimes.¹⁷⁹ Andrade's two petty theft offenses qualified as separate "strikes," and the trial court sentenced him accordingly, prescribing "two consecutive terms of 25 years to life in prison."¹⁸⁰

On direct appeal, Andrade argued that his sentence violated the federal Constitution.¹⁸¹ In particular, he alleged that the Eighth Amendment prohibited such "grossly disproportionate" punish-

¹⁷⁷ *Andrade*, 538 U.S. at 66-67; see also Allan Ides, *Habeas Standards of Review Under 28 U.S.C. § 2254(d)(1): A Commentary on Statutory Text and Supreme Court Precedent*, 60 WASH. & LEE L. REV. 677, 727-28 (2003) (reviewing *Andrade's* facts).

¹⁷⁸ *Andrade*, 538 U.S. at 68. Under California law, "petty theft with a prior" is a so-called wobbler offense, a misdemeanor offense that can, at the prosecutor's discretion, "wobble up" to the status of a felony. See CAL. PENAL CODE § 666 (West 1998). The prosecutor opted to prosecute both of Andrade's video thefts as felonies, subjecting him to an especially—and perhaps incongruously—serious punishment. See Chemerinsky, *supra* note 172, at 15 ("[I]t is noteworthy that if Andrade's prior convictions had been for violent crimes, such as murder or manslaughter, his maximum punishment for the two acts of shoplifting would have been one year in prison.").

¹⁷⁹ CAL. PENAL CODE § 667(b) (West 1998). California's three strikes law actually consists of two substantively identical statutes, one enacted by the California legislature, see 1994 Cal. Stat. 71 (adding California Penal Code § 667(b)-(i)), the other passed by a ballot initiative, see Cal. Penal Code § 1170.12 (West 2004) (added by Initiative Measure (Proposition 184, § 1, approved Nov. 8, 1994)). See generally *In re Cervera*, 16 P.3d 176, 177 (Cal. 2001) (explaining the history and application of California's three strikes law). The law treats only "serious" or "violent" felonies as prior strikes, but the principal offense may be any felony under California law, not necessarily a "serious" or "violent" one. See CAL. PENAL CODE § 667(d)(1) (West 1998); *id.* § 667.5(c); *id.* § 1170.12(b)(1) (West 2004); *id.* § 1192.7(c); *id.* § 1192.7(c) (all defining "serious" and "violent"); see also *Ewing v. California*, 538 U.S. 11, 14 (2003) (noting that the purpose of California's three strikes law is to impose longer sentences on criminals who commit or have previously committed "serious" or "violent" felonies); *Riggs v. California*, 525 U.S. 1114 (1999) (opinion of Stevens, J., respecting denial of certiorari). See generally *Andrade v. Att'y Gen. of Cal.*, 270 F.3d 743, 747-48 (9th Cir. 2001), *rev'd*, 538 U.S. 63 (2003) (explaining the application of California's three strikes law to "serious" and "violent" felonies).

¹⁸⁰ *Andrade*, 538 U.S. at 68. Andrade's sentence precludes him from even filing a petition for parole for at least fifty years—twenty-five years for his first theft, twenty-five more for the second. In this sense, it is more precise (if ungainly) to say that Andrade has been sentenced to two consecutive life sentences, each without the possibility to petition for parole for at least twenty-five years. Awkward as this phrasing may be, it captures a nuance missing from the more-familiar "25 years to life" label, reminding that it is *not* the case that Andrade will be released, at the latest, after fifty years. Only then can he begin to *ask* to be discharged.

¹⁸¹ *Id.* Andrade's Eighth Amendment claim has proven the most memorable, but it was not the only one he raised. See *Andrade*, 270 F.3d at 750.

ment.¹⁸² Paying little attention to Supreme Court doctrine, a California appellate court disagreed.¹⁸³ The California Supreme Court refused discretionary review.¹⁸⁴

Not long thereafter, Andrade reasserted his Eighth Amendment claim in a petition for federal habeas relief.¹⁸⁵ The district court denied Andrade's petition.¹⁸⁶ A split panel of the Ninth Circuit reversed.¹⁸⁷ The Supreme Court then reversed again, reinstating the state court's decision and consigning Andrade to a life in state jail.¹⁸⁸

Reaction to the Court's *Andrade* decision was swift and often heated. A few defended the Supreme Court's decision; some praised *Andrade's* healthy "reluctance to interfere with States' administration of their criminal justice systems," even on such pitiful facts.¹⁸⁹ But most observers were far less sanguine. One lamented the Court's "dramatically inconsistent approaches to the Constitution and punishment."¹⁹⁰ Another accused the Court of "merely 'pricking the lines,'" of moving in ad hoc steps "when it comes to the question of when sentences are excessive."¹⁹¹ Still another warned that "[i]f Andrade's

¹⁸² See *Andrade*, 538 U.S. at 70.

¹⁸³ See Petition for Writ of Certiorari at 4, *Andrade*, 538 U.S. 63 (2003) (No. 01-1127) (citation omitted).

¹⁸⁴ See *Andrade*, 538 U.S. at 69.

¹⁸⁵ The petition arrived before the expiration of any applicable statute of limitations. See *Andrade*, 270 F.3d at 743-44.

¹⁸⁶ *Andrade*, 538 U.S. at 69.

¹⁸⁷ *Id.*

¹⁸⁸ See *id.* at 70. Much of the Court's decision sounds of turgid legalese, not least the opinion's very first sentence. In this sentence, what might have seemed a relatively straightforward issue of constitutional law—namely, whether the Eighth Amendment permits California to sentence Andrade to life in prison for his offenses—becomes an archetype of hypertechnical prose. The sentence:

This case raises the issue whether . . . the Ninth Circuit erred in ruling that the California Court of Appeal's decision affirming Leandro Andrade's two consecutive terms of 25 years to life in prison for a "third strike" conviction is contrary to, or an unreasonable application of, clearly established federal law as determined by [the Supreme] Court within the meaning of 28 U.S.C. § 2254(d)(1).

Id. at 66.

¹⁸⁹ Doyle Horn, Note, *Lockyer v. Andrade: California Three Strikes Law Survives Challenge Based on Federal Law that Is Anything But "Clearly Established,"* 94 J. CRIM. L. & CRIMINOLOGY 687, 687 (2004). Horn's interpretation of the phrase "clearly established" is, in this context, almost surely wrong. See *infra* note 199.

¹⁹⁰ Chemerinsky, *supra* note 169, at 1080; see also Richard S. Frase, *Excessive Prison Sentences, Punishment Goals, and the Eighth Amendment: "Proportionality" Relative to What?*, 89 MINN. L. REV. 571, 644-45 (2005) (agreeing with Justice Souter's dissent in *Andrade*); Youngjae Lee, *The Constitutional Right Against Excessive Punishment*, 91 VA. L. REV. 677, 695-98 (2005) (examining the Supreme Court's "disparate renderings of 'proportionality'"); Alice Ristroph, *Proportionality as a Principle of Limited Government*, 55 DUKE L.J. 263, 266-68 (2005) (discussing apparent inconsistencies in the Supreme Court's recent constitutional proportionality decisions).

¹⁹¹ Pamela S. Karlan, "Pricking the Lines": *The Due Process Clause, Punitive Damages, and Criminal Punishment*, 88 MINN. L. REV. 880, 920 (2004).

sentence is not grossly disproportionate, the principle has no meaning" at all.¹⁹² On both practical and theoretical levels, these critics implied, *Andrade* simply got it wrong.

And perhaps these critics are right. "[I]nconsistent approaches," "prick[ed] lines," hollowed constitutional "principle[s]"—each may fairly describe the Court's efforts in *Andrade*. Each may warrant a full measure of academic or judicial rebuke.

But there is something strangely absent from *Andrade*'s doctrinal postscript. What sealed Leandro Andrade's fate was not merely an abstract constitutional principle or a "fundamentally subjective" method of "judicial oversight."¹⁹³ What sealed Andrade's fate was an unbound state court, a California tribunal at liberty to reach any outcome it liked.¹⁹⁴

But *how* was this state court unbound in *Andrade*? If California's court could truly chart its own Eighth Amendment "path"¹⁹⁵—wise or foolish, right or wrong—why was this so?

Part of the answer comes from a now-familiar actor on the "unbinding" stage: unsettled constitutional substance, this time of an Eighth Amendment type.¹⁹⁶ Another part of the answer comes from a second unbound player, a strangely generous review procedure that prevents even "incorrect" state court decisions from being set aright. These two players conspire in *Andrade* to unfetter a state court, freeing that court to reach whatever Eighth Amendment decision it wished. And these two players merit careful review here, beginning with the one we now recognize: unstable substantive law.

B. Proportionality and Uncertainty

We have seen unstable substance before. In *Williams v. North Carolina*, unstable substance emerged in "full faith and credit" and "bona fide domicile," masking its volatility in prudent disguise.¹⁹⁷ In *Lockyer v.*

¹⁹² *Andrade*, 538 U.S. at 83 (Souter, J., dissenting).

¹⁹³ Karlan, *supra* note 191, at 883.

¹⁹⁴ *See id.* at 884 n.13. Professor Karlan puts it succinctly:

Indeed, the Court found its prior decisions so murky that it essentially foreclosed federal habeas review of sentence length Given the Court's prior decisions, which reached different outcomes on the basis of relatively small differences in the facts, it is probably always possible to show why the instant case is more like one case than another

Id.

¹⁹⁵ *See Andrade*, 538 U.S. at 70.

¹⁹⁶ Some of the academy's best scholars have already charted the "overly complex" twists and "absurdly arcane" turns of particular lines of Eighth Amendment doctrine. *See, e.g.,* Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355, 358 (1995).

¹⁹⁷ *See Williams v. North Carolina (Williams II)*, 325 U.S. 226, 228 (1945).

Andrade, it appears in recidivism and criminal punishment, revealing an uncertainty too pervasive to hide.

Nearly everything is unstable in *Andrade*. Constitutional text, legal history, Court doctrine, penological theory—all are “uncertain[],” as Justice O’Connor candidly admits.¹⁹⁸ Even the phrase “clearly established federal law” takes an ironically ambiguous turn, shifting from a long-recognized temporal limit into a novel check on substantive “clarity.”¹⁹⁹

At the root of this confusion is “proportionality,” the seemingly simple notion that some things should fit pleasingly with others.²⁰⁰ Proportionality is no stranger to the law. The term “proportion” appears twice in the Constitution,²⁰¹ its logic endures in the words of the Framers,²⁰² and the concept colors an array of modern doctrinal lines.²⁰³

¹⁹⁸ *Andrade*, 538 U.S. at 77 n.2.

¹⁹⁹ *Id.* at 71–72. This may seem an understandable mistake, for the difference may be one of mere emphasis: “clearly established” or “clearly established.” But the mistake is still a real one, and the issue is not as difficult as Justice O’Connor seems to suggest. Until *Andrade*, the meaning of “clearly established federal law” was narrow and uncomplicated: the term denoted the “holdings, as opposed to the dicta, of th[e] Court’s decisions *as of the time of the relevant state-court decision.*” *Id.* (quoting *Williams v. Taylor*, 529 U.S. 362, 412 (2000)) (emphasis added). The Court in *Andrade* misreads this simple chronological rule, mistakenly adding a clarity limit to the well-known temporal one. See 538 U.S. at 72 (“The difficulty with *Andrade*’s position, however, is that our precedents in this area have not been a model of clarity. Indeed, in determining whether a particular sentence for a term of years can violate the Eighth Amendment, we have not established a clear or consistent path for courts to follow.” (citations omitted)). In so doing, the Court unintentionally calls a great deal of its own doctrine into doubt.

²⁰⁰ See generally John Dewey, *ART AS EXPERIENCE* 45–48 (1934) (discussing the importance of proportion in art and elsewhere).

²⁰¹ Once in relation to “tax[es]” being “laid,” U.S. CONST. art. I, § 2, and again with regard to “representation” being “reduced,” U.S. CONST. amend. XIV, § 2.

²⁰² See, e.g., Letter from Thomas Jefferson to Samuel Kercheval (July 12, 1816), in *THE PORTABLE THOMAS JEFFERSON* 552, 553 (Merrill D. Peterson ed., Penguin Books 1977) (1975). Thomas Jefferson also discussed the concept of proportionality in notes that he wrote while in Virginia in 1781. See Thomas Jefferson, *Notes on the State of Virginia* (1781–1782), reprinted in *THE PORTABLE THOMAS JEFFERSON*, *supra*, at 23, 163.

²⁰³ Takings Clause case law, Dormant Commerce Clause decisions, and Fourteenth Amendment precedent all employ some sort of proportion-based logic. See, e.g., *City of Monterey v. Del Monte Dunes, Ltd.*, 526 U.S. 687, 702–03 (1999) (explaining that the rough proportionality test used by the Court of Appeals in deciding the Takings Clause issue was unnecessary to decide the case but relevant to the decision of the court nevertheless); *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994) (“We think a term such as ‘rough proportionality’ best encapsulates what we hold to be the requirement of the Fifth Amendment.”); see also Frase, *supra* note 190, at 598–621 (discussing examples of three proportionality principles—“limiting retributive proportionality, utilitarian ‘ends’ proportionality, and utilitarian ‘means’ proportionality”—in American constitutional law); Ristroph, *supra* note 190, at 293 (spotting proportionality in “familiar evaluative mechanisms” like “narrow tailoring”).

But familiarity has not eased all anxiety. Proportionality's legal status remains more fitful than faithful, especially when it concerns criminal punishment.

The problem is not lack of interest. Few ideas have attracted more sustained attention than that of "proportionate penalties." Some have thought this idea entirely natural, even intuitive—utilitarians, because it marks out the model line between "[t]he value of the punishment" and "the profit of the offence";²⁰⁴ "retributivist theorists," because it comports with the concept of "just deserts."²⁰⁵ Others have thought proportionality review entirely untenable because it undercuts political bargains²⁰⁶ and lures courts outside their narrow range of institutional competence.²⁰⁷ Yet the Supreme Court has long thought such review entirely possible, and it has located proportionality squarely in Eighth Amendment text. Since 1910, the Court has read the Cruel and Unusual Punishments Clause to require

²⁰⁴ JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 166 (J.H. Burns & H.L.A. Hart eds., Methuen & Co., Ltd. 1982) (1789); cf. ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 28–30 (1974); JOHN RAWLS, POLITICAL LIBERALISM 97 (1993) (reminding that the proportionality argument is "political and not metaphysical").

²⁰⁵ See Kyron Huigens, *Rethinking the Penalty Phase*, 32 ARIZ. ST. L.J. 1195, 1203 (2000) ("The question is only whether, roughly speaking, the punishment imposed is accurate with respect to the person's desert."); Ristroph, *supra* note 190, at 279–84; *id.* at 279 ("A principle of just deserts can . . . demand proportionality between *offense* and sanction . . ."). "Most arguments for proportionality review," Professor Ristroph explains, "are variants of the call for the 'constitutionalization' of substantive criminal law, a call famously made by Henry M. Hart almost 50 years ago and subsequently echoed by many others." *Id.* at 268 n.13 (citing Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401, 409–11 (1958)). In large measure, "[t]hese calls have gone unheeded." *Id.*

²⁰⁶ See *Harmelin v. Michigan*, 501 U.S. 957, 974 (1991) (Scalia, J., dissenting in part); see also Karlan, *supra* note 191, at 884 ("[T]he Rehnquist Court has been engaged in an implicit 'exit strategy[]' [from the use of a proportionality standard,] refining the constitutional test in a way that 'preserves the Court's ability to reenter the field should circumstances or doctrine or the Justices' view of the Constitution change,' while essentially foreclosing relief in contemporary cases." (quoting Pamela S. Karlan, *Exit Strategies in Constitutional Law: Lessons for Getting the Least Dangerous Branch Out of the Political Thicket*, 82 B.U. L. REV. 667, 687 (2002))); Posner, *supra* note 49, at 42–47; *id.* at 45 (arguing that political considerations exert a strong influence on "constitutional adjudication in the Supreme Court").

²⁰⁷ Put slightly differently, the use of proportionality review replaces objective judicial analysis with judge-specific whim. Cf. *Harmelin*, 501 U.S. at 998 (Kennedy, J., concurring in part and concurring in the judgment) ("[T]he fixing of prison terms for specific crimes involves a substantive penological judgment that, as a general matter, is properly within the province of legislatures, not courts." (citation and internal quotation marks omitted)). Proportionality's historical and textual provenance has been challenged as well. See, e.g., *id.* at 966–86 (Scalia, J., dissenting in part); *id.* at 977 (Scalia, J., dissenting in part) ("[T]o use the phrase 'cruel and unusual punishment' to describe a requirement of proportionality would have been an exceedingly vague and oblique way of saying what Americans were well accustomed to saying more directly.").

that criminal penalties be “graduated and proportioned to [the relevant] offense.”²⁰⁸

Between 1910 and 1980, this gloss on the Cruel and Unusual Punishments Clause seemed rather stable. In long lines of doctrine—and across generations of Justices—the Court repeatedly reaffirmed Eighth Amendment proportionality review.²⁰⁹ It even did so in “prison term” cases like *Andrade*.²¹⁰

But in 1980, the Court started to waver. And by the early 1990s, the Court’s prison-term proportionality doctrine was decidedly unsure.

The uncertainty did not appear all at once. Instead, it emerged in the span of three cases, each new decision compounding the confusion of the old. The first case was *Rummel v. Estelle*, where the Court first turned away from “strict” proportionality review²¹¹ and declared a life sentence permissible for a nonviolent recidivist who obtained \$120 by “false pretenses.”²¹² The second case was *Solem v. Helm*, where the Court deemed a life sentence impermissible for a nonviolent recidivist who “utter[ed]” a \$100 “no-account check.”²¹³ And the third case was *Harmelin v. Michigan*, where a deeply fractured Court proclaimed a life sentence permissible for a first-time drug offender.²¹⁴

For litigants like *Andrade*, this string of cases was surely perplexing. *Rummel*, *Solem*, and *Harmelin* all endorsed *some* kind of proportionality review, however halfheartedly.²¹⁵ And because no one case

²⁰⁸ *Weems v. United States*, 217 U.S. 349, 366–67 (1910); *id.* at 371 (“[T]he inhibition [of the Cruel and Unusual Punishments Clause] was directed not only against punishments which inflict torture, ‘but against all punishments which, by their excessive length or severity, are greatly disproportioned to the offenses charged.’” (quoting *O’Neil v. Vermont*, 144 U.S. 323, 339–40 (1892) (Field, J., dissenting))).

²⁰⁹ *See, e.g., Robinson v. California*, 370 U.S. 660, 667 (1962); *Weems*, 217 U.S. at 366–67.

²¹⁰ *See, e.g., Robinson*, 370 U.S. at 667 (“Even one day in prison would be a cruel and unusual punishment for the ‘crime’ of having a common cold.”); *Weems*, 217 U.S. at 380–81 (holding that a sentence of fifteen years in prison for the falsification of a public document was “cruel and unusual,” as some “degrees of homicide [] are not punished [as] severely”).

²¹¹ *See Harmelin*, 501 U.S. at 1001 (Kennedy, J., concurring) (“The Eighth Amendment does not require strict proportionality between crime and sentence. Rather, it forbids only extreme sentences that are ‘grossly disproportionate’ to the crime.” (citations omitted)).

²¹² 445 U.S. 263, 266, 285 (1980) (noting that the precise sum is actually \$120.75).

²¹³ 463 U.S. 277, 281–82, 303 (1983). In this case, “strong” proportionality review made a fleeting comeback—a sort of “last, brief stand.” *See Ristorph, supra* note 190, at 308. Perhaps the reason for this comeback is that Justice Harry Blackmun simply changed his mind between *Rummel* and *Solem*.

²¹⁴ *Harmelin*, 501 U.S. at 994–96. *Harmelin*’s possession offense was not trivial. When detained, he was in possession of 672 grams of cocaine—a truly astonishing amount. *Id.* at 961.

²¹⁵ *See, e.g., Rummel*, 445 U.S. at 274 n.11 (suggesting that the proportionality principle “would . . . come into play” in extreme cases, such as “if a legislature made overtime parking a felony punishable by life imprisonment”).

overturned any other, all three “life sentence” decisions remained good Eighth Amendment law.²¹⁶

But if there is any agreement among *Andrade*’s predecessors, it is agreement of the most superficial kind.²¹⁷ In these three cases, the Court develops no clear proportionality substance. No solid proportionality guidance emerges, and no stable analytical model takes form. Only the din of uncertainty does.²¹⁸

Over time, this uncertainty has earned its share of critics.²¹⁹ Some have complained that the Court’s proportionality doctrine lacks focus. Others have suggested that this case law is a project without a plan—utilitarian, retributivist, or otherwise.²²⁰ And still others worry that the Court’s Eighth Amendment doctrine is so jumbled as to be almost “meaningless”—a “mess[]” with no real message.²²¹

But there is more than aimless clatter in the Court’s proportionality noise. There is a subtle Court hint, a careful and quiet signal sent to attentive state courts. At first listen, this signal may seem insignificant, doing little more than blandly restating that there is no “clear or consistent” Eighth Amendment “path for courts to follow.”²²² But on additional listens, this signal confirms more than the existence of proportionality’s doctrinal mess. It confirms the odd effect that this proportionality mess has had: because the Court’s proportionality doctrine has grown so uncertain and unstable, state courts may forge Eighth Amendment paths all their own.

²¹⁶ Cf. *Solem*, 463 U.S. at 304 (Burger, C.J., dissenting) (“Today, the Court ignores its recent precedent and holds that a life sentence imposed after a *seventh* felony conviction constitutes cruel and unusual punishment under the Eighth Amendment. . . . Although today’s holding cannot rationally be reconciled with *Rummel*, the Court does not purport to overrule *Rummel*.”).

²¹⁷ Cf. SUNSTEIN, *supra* note 45.

²¹⁸ See *Lockett v. Andrade*, 538 U.S. 63, 77 n.2 (2003) (noting the “‘uncertainty’ of the scope of the proportionality principle”).

²¹⁹ See, e.g., Louis D. Bilionis, *Legitimizing Death*, 91 MICH. L. REV. 1643, 1648 (1993) (“To judge from the reviews, the Justices are at best making a serious mess of the Eighth Amendment”); see also Steiker & Steiker, *supra* note 196, at 359 (“The body of doctrine produced by the Court is enormously complex and its applicability to specific cases difficult to discern . . . [and] remains unresponsive to the central animating concerns that inspired the Court to embark on its regulatory regime in the first place.”).

²²⁰ See, e.g., Chemerinsky, *supra* note 169, at 1079–80 (“Unfortunately, . . . constitutional law concerning punishment has developed separately depending on the nature of the penalties. . . . The result has been dramatically inconsistent approaches to the Constitution and punishment.”).

²²¹ Steiker & Steiker, *supra* note 196, at 359.

²²² *Andrade*, 538 U.S. at 72. The “path” metaphor may be a bit hackneyed, but it is no more so than most other legal metaphors. See Note, *Implementing Atkins*, 116 HARV. L. REV. 2565, 2566 (2003) (calling the Court’s Eighth Amendment doctrine “a metaphorist’s playground,” one full of “thicket[s],” “maze[s],” “minefield[s],” and “morass[es]” (citations omitted)).

A state court forged a distinctly cynical Eighth Amendment path in *Andrade*. In careless and dismissive turns, a California court doubted the legitimacy of *any* Eighth Amendment proportionality review. It misread relevant Court opinions. And it disregarded two of *Andrade*'s still-valid doctrinal predecessors—all before declaring *Andrade*'s punishment constitutionally secure.²²³

And nowhere does the Supreme Court say that this clumsy state court decision was *right*.²²⁴ Instead, the *Andrade* Court quietly confirms something at once more curious and more momentous: It assures that the state court in *Andrade* could almost never have been wrong.²²⁵ Had it wished, the state court could have read Eighth Amendment proportionality broadly, demanding a tight fit between stolen videos and life in state jail. Or had it wished, the state court could have read Eighth Amendment proportionality narrowly, affirming prison sentences of virtually all types and lengths. Both options were left entirely open to the state court in *Andrade*, not because the Constitution plainly extends state courts both options, but because unstable substantive law left it to state courts to choose.

In this important way, *Andrade* clearly resembles *Williams*. Both cases exhibit unsettled constitutional substance. Both show how instability can increase the doctrinal power of state courts.

But where *Williams*'s chapter finishes, *Andrade*'s takes a crucial second turn. In both *Andrade* and *Williams*, confused *substance* allows state courts to select among an array of constitutional answers. But in *Andrade*, modern habeas *procedure* adds another layer: It excuses state courts from the often onerous task of making the right doctrinal choice.

²²³ See *Andrade*, 538 U.S. at 78 (Souter, J., dissenting).

²²⁴ See *id.* at 71 ("In this case, we do not reach the question whether the state court erred . . ."). In *Ewing v. California*, 538 U.S. 11, 14 (2003), the Court implies rather strongly that the state court's decision in *Andrade* was correct. See *id.* at 28 ("We do not sit as a 'superlegislature' to second-guess these policy choices. It is enough that the State of California has a reasonable basis for believing that dramatically enhanced sentences for habitual felons advance[] the goals of its criminal justice system in any substantial way." (citation and internal quotation marks omitted)). But the fact that *Ewing* indirectly affirms *Andrade*'s state court conclusion only highlights the oddity of the Supreme Court's state-friendly approach. Had the state court found *for* *Andrade* on his Eighth Amendment claim instead of *against* him, the Court would almost surely have affirmed nevertheless. Such was the instability of relevant law and the breadth of the state court's authority.

²²⁵ See 538 U.S. at 83 (Souter, J., dissenting) ("[T]he state court was left to ensure that the Eighth Amendment prohibition on grossly disproportionate sentences was met."); Karlan, *supra* note 191, at 884 n.13.

C. Unbinding's Second Step²²⁶

Habeas corpus is an awkward enterprise. At times, it can be especially revealing; at others, it can prove frustratingly opaque. Federal habeas review of state court decisions can "open[] a window on the workings of our national government."²²⁷ It can also pose a series of seemingly insoluble²²⁸ riddles: Is federal habeas review of state court decisions irreconcilably inconsistent with fundamental notions of federalism?²²⁹ Does habeas deserve an exception to formal rules of preclusion and deference? Is the whole habeas project dependent on an epistemological fiction, a myth that permits "endless" strings of collateral litigation because some "possibility of mistake always exists"?²³⁰

To habeas's many critics, of course, these are hardly impossible questions. Federal habeas review is, to these critics, a blatant affront to state autonomy, a pernicious way to make a state institution unnecessarily subordinate to a federal one.²³¹ All federal habeas review should do, the critics contend, is ensure that state courts abide baseline jurisdictional and process-based guarantees—what Justice Pitney once called "established modes of procedure."²³² Anything more,

²²⁶ I have written elsewhere about a distinct, if related, side of modern habeas corpus law. See Frederic M. Bloom, *Unconstitutional Courses*, 83 WASH. U. L.Q. 1679, 1702–09 (2005). My analysis here draws rather heavily from that work.

²²⁷ Larry W. Yackle, *The Habeas Hagioscope*, 66 S. CAL. L. REV. 2331, 2331 (1993); see Dallin H. Oaks, *Habeas Corpus in the States—1776-1865*, 32 U. CHI. L. REV. 243 (1965); Dallin H. Oaks, *Legal History in the High Court—Habeas Corpus*, 64 MICH. L. REV. 451 (1966).

²²⁸ Yackle, *supra* note 227, at 2431 (noting that the debate is "charged by ideological differences that have changed very little over the years").

²²⁹ There has always been a kind of paradox built into habeas review: On the one hand, habeas exists to allow prisoners to challenge—that is, to "appeal"—putatively incorrect decisions of law, often those made by state courts. On the other hand, habeas is considered an extraordinary judicial remedy, not an open-ended opportunity to relitigate state trials.

²³⁰ Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 447 (1963).

²³¹ Yackle, *supra* note 227, at 2333.

²³² See *Frank v. Mangum*, 237 U.S. 309, 326 (1915). This process-based limit has not been easy to defend—at least since 1867. The Habeas Corpus Act of 1867, Act of Feb. 5, 1867, ch. 27, 14 Stat. 385, imposes no process limit and announces no exception for particular types of state court decisions. See Gary Peller, *In Defense of Federal Habeas Corpus Relitigation*, 16 HARV. C.R.-C.L. L. REV. 579, 690–91 (1982) ("[U]ntil *Stone v. Powell*, the habeas statute consistently had been interpreted to provide federal habeas review for all constitutional claims regardless of the extent of prior state court litigation."); Yackle, *supra* note 227, at 2338. So, however valid this process or jurisdiction-based limit may once have been, it no longer withstands much jurisprudential pressure. See Jordan Steiker, *Incorporating the Suspension Clause: Is There a Constitutional Right to Federal Habeas Corpus for State Prisoners?*, 92 MICH. L. REV. 862, 881 (1994) ("[I]t is simply wrong to assert that the writ known to the framers of the Fourteenth Amendment was the same narrowly circumscribed writ known at English law, or perhaps even known to the Framers of the Suspension Clause."); *id.* at 888 (noting that the "transformation" of the writ between 1789 and 1868 "strongly supports the writ's role in protecting national rights in a national forum").

they say, would risk “bur[ying]” federal courts “in a flood” of often meritless habeas petitions.²³³

This argument has proven difficult to rebut, not least because, in many ways, the critics are entirely correct. Federal habeas review does imply a federal distrust of state power, often rather plainly.²³⁴ It does smack of appellate review, contradicting ordinary rules of preclusion.²³⁵ And it does raise epistemological concerns about “correct” conclusions and actual right answers,²³⁶ as well as practical questions about valid substantive “needles” being lost in a “haystack” of “worthless” ones.²³⁷

But habeas’s numerous advocates still believe the critics wrong. These advocates argue that federal habeas review should do much more than guarantee that state courts “act” properly as courts.²³⁸ It should allow federal courts to remedy state court errors of federal law, process based or not. Moreover, habeas should permit *federal* courts to vindicate *federal* rights—not because of some fundamentally anti-federalist judicial vision, but because doing so will maintain a vigorous federalist balance, rein in recalcitrant states, and give federal courts “the final say” (in Justice Frankfurter’s words) on the meaning of federal law.²³⁹

For much of the last half-century, the Supreme Court embraced this catholic image of habeas review. In *Brown v. Allen*,²⁴⁰ the Court laid the foundation for an expansive habeas writ,²⁴¹ and the Warren Court readily built on *Brown*’s base.²⁴² In three seminal habeas opinions,²⁴³ decisions that some have called the great habeas trilogy,²⁴⁴ the

²³³ See *Brown v. Allen*, 344 U.S. 443, 537 (1953) (Jackson, J., concurring).

²³⁴ See, e.g., Yackle, *supra* note 227, at 2339 (discussing the “friction” that “plenary federal jurisdiction” may cause).

²³⁵ See 28 U.S.C. § 1738 (2000).

²³⁶ Bator, *supra* note 230, at 446–47.

²³⁷ *Brown*, 344 U.S. at 537 (Jackson, J., concurring).

²³⁸ Yackle, *supra* note 227, at 2346 (deeming a narrow understanding of due process “primitive”).

²³⁹ See James S. Liebman & William F. Ryan, “Some Effectual Power”: *The Quantity and Quality of Decisionmaking Required of Article III Courts*, 98 COLUM. L. REV. 696, 774 (1998).

²⁴⁰ *Brown*, 344 U.S. at 443.

²⁴¹ Yackle, *supra* note 227, at 2347–48.

²⁴² *Id.* at 2349 (explaining that the Warren Court treated the writ of habeas corpus as the “procedural analogue of . . . [its] substantive interpretations of the Constitution—providing federal machinery for bringing new constitutional values to bear in concrete cases”).

²⁴³ *Sanders v. United States*, 373 U.S. 1 (1963); *Townsend v. Sain*, 372 U.S. 293 (1963); *Fay v. Noia*, 372 U.S. 391 (1963).

²⁴⁴ See, e.g., Jordan Steiker, *Restructuring Post-Conviction Review of Federal Constitutional Claims Raised by State Prisoners: Confronting the New Face of Excessive Proceduralism*, 1998 U. CHI. LEGAL F. 315, 324 (1998).

Warren Court fashioned an unmistakably forceful habeas tool, an almost omnipotent writ of error.²⁴⁵

The Court also inspired a great deal of criticism. Some of this criticism came from the academy.²⁴⁶ More came, in time, from the Burger and the Rehnquist Courts.²⁴⁷ And even more came from overtly political sources, committees charged with the task of revamping federal habeas law.²⁴⁸ A few of these political initiatives garnered considerable support; some even made moderate legislative headway. But nearly all failed to produce much change in the way federal courts reviewed habeas petitions from state prisoners²⁴⁹—until 1996, at least.²⁵⁰

In 1996, Congress passed the Antiterrorism and Effective Death Penalty Act.²⁵¹ An elaborate and expansive regulatory effort, AEDPA revises much of the preexisting habeas paradigm. One AEDPA section establishes new exhaustion rules; another erects more rigorous standards for successive petitions; one section sets a less generous statute of limitations; another truncates the review process in certain capital cases.²⁵² And one AEDPA provision addresses how federal courts should review the merits of state court decisions, such as the California state decision in *Andrade*. This state-court-review provision—AEDPA's § 2254(d)—has proven one of the Act's most prominent features. It has also presented AEDPA's deepest "interpretational problem[]."²⁵³ Section 2254(d) reads:

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

²⁴⁵ See generally Robert M. Cover & T. Alexander Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 YALE L.J. 1035, 1036 (1977) (discussing habeas's role in the broader context of "criminal administration").

²⁴⁶ Professor Bator, for example, called for a return of a narrow process limit and a rejection of habeas-created redundancy. See Bator, *supra* note 230, at 446–48.

²⁴⁷ Some of this criticism manifested in gradual doctrinal retreats from thoroughgoing habeas review. See Yackle, *supra* note 227, at 2355–57.

²⁴⁸ Congress has come quite close to undoing *Brown* many times. The Powell Committee pushed quite hard in that direction, and it was likely the most prominent of all of the relevant committees. See *id.* at 2368–72.

²⁴⁹ See *id.* 2349–73 (reviewing the history of habeas law in the United States).

²⁵⁰ Larry W. Yackle, *State Convicts and Federal Courts: Reopening the Habeas Corpus Debate*, 91 CORNELL L. REV. 541, 545–46 (2006) (recounting the conservative backlash against the expansion of federal habeas).

²⁵¹ Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 104(3), 110 Stat. 1214, 1219 (codified at 28 U.S.C. § 2254(d) (Supp. II 1996)).

²⁵² See 28 U.S.C. §§ 2244, 2254, 2261–66.

²⁵³ Evan Tsen Lee, *Section 2254(d) of the New Habeas Statute: An (Opinionated) User's Manual*, 51 VAND. L. REV. 103, 104 (1998).

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.²⁵⁴

At first blush, § 2254(d) appears to do very little. It seems simply to define the manner in which federal courts evaluate the merits of particular state court decisions.²⁵⁵ It does *not*, on its face, seem to undercut the power of federal courts to review the substance of state court decisions of federal law.²⁵⁶ Nor does it seem to undo habeas's noteworthy, if formally dubious, exemptions from ordinary preclusion doctrine and the full faith and credit statute.²⁵⁷

But § 2254(d) does hint at something significant, as scholars and inferior federal courts noted from the start.²⁵⁸ Between 1996 and 2000, these observers struggled to find § 2254(d)'s core. Does § 2254(d) establish a more deferential standard of review, both for questions of law and for mixed questions of law and fact?²⁵⁹ How much does § 2254(d) raise the bar against granting habeas remedies (if at all)?²⁶⁰ Does § 2254(d) conflict with Article III's central judicial vision? Each of these questions tested scholars and courts. Each garnered real, often comprehensive attention.²⁶¹

Not until 2000, however, did the Supreme Court take a position on the meaning and effect of § 2254(d). It took that position in *Williams v. Taylor*²⁶²—a kind of authentic Decision Z.

²⁵⁴ 28 U.S.C. § 2254(d) (2000).

²⁵⁵ *Id.*

²⁵⁶ This is no small thing. *Whether* courts may review is itself an important question—and not one with an easy answer in every case. *See, e.g., Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Rasul v. Bush*, 542 U.S. 466 (2004); *Rumsfeld v. Padilla*, 542 U.S. 426 (2004); *INS v. St. Cyr*, 533 U.S. 289 (2001). But it is not a question addressed by § 2254(d).

²⁵⁷ Larry W. Yackle, *A Primer on the New Habeas Corpus Statute*, 44 *BUFF. L. REV.* 381, 401 (1996).

²⁵⁸ *See Nevers v. Killinger*, 169 F.3d 352, 357–62 (6th Cir. 1999); Yackle, *supra* note 257, at 401.

²⁵⁹ *See, e.g., Perez v. Marshall*, 946 F. Supp. 1521, 1533 (S.D. Cal. 1996) (“The Court concludes, however, that the language of new § 2254(d)(1), on its face, clearly expresses the congressional intent[] to create a more deferential standard of review.”).

²⁶⁰ *See, e.g., Kent S. Scheidegger, Habeas Corpus, Relitigation, and the Legislative Power*, 98 *COLUM. L. REV.* 888, 891 (1998) (“Congress has plenary authority to determine the degree to which a state court’s judgment will preclude relitigation of the question . . . including [in] habeas corpus. Congress could prescribe total preclusion, de novo relitigation, or a middle ground.”).

²⁶¹ *See Liebman & Ryan, supra* note 239, at 864–84.

²⁶² 529 U.S. 362 (2000). Though “*Williams*” is the most common moniker for this case, it is one that will cause too much confusion here. I use “*Taylor*” instead.

As *Taylor* reads it, § 2254(d) does something dramatic: it announces an entirely “new constraint,”²⁶³ a novel and severe limit on federal habeas courts’ ability to review state court applications of law to fact. This new limit derives, the Court asserts, from § 2254(d)’s distinct “contrary to” and “unreasonable application” clauses.²⁶⁴ To fit the “contrary to” standard, a state court decision must either follow the wrong rule or blatantly misread the facts.²⁶⁵ To satisfy the “unreasonable application” standard, by contrast, a state court decision need not follow the wrong governing rule;²⁶⁶ the state court need only apply that rule “unreasonably to the facts.”²⁶⁷

What “unreasonable” actually means is far from clear, as the Court readily acknowledges.²⁶⁸ But what is clear is what “unreasonable” does *not* mean: “[A]n unreasonable application of federal law is different from an incorrect application of federal law.”²⁶⁹ Had Congress meant “erroneous” or “incorrect,” *Taylor* contends, Congress would have said so. But Congress made a careful lexical decision *not* to say “erroneous” or “incorrect”—and to say “unreasonable” instead. With this semantic choice, Congress instructed federal courts not to issue “the writ simply because that court concludes . . . that the relevant state-court decision applied clearly established federal law erroneously or incorrectly.”²⁷⁰ Wrong is not enough. To issue the writ under § 2254(d)’s “unreasonable application” clause, a state court decision must be wrong *and* unreasonable, i.e., it must be unreasonably wrong.

D. Unbinding’s Substance and Procedure Align

There may be something sensible about *Taylor*’s “unreasonably wrong” approach.²⁷¹ Judged by even the most charitable measure,

²⁶³ *Id.* at 412 (O’Connor, J., concurring in part); *see id.* at 411–13; *cf. id.* at 386 (Stevens, J., dissenting in part) (arguing that § 2254(d) merely evinces a “‘mood’ that the Federal Judiciary must respect”).

²⁶⁴ *Id.* at 404.

²⁶⁵ The state court, that is, must apply “a rule that contradicts the governing law set forth in [the Court’s] cases,” or it must “arrive[] at a result different from [Court] precedent” on a “set of facts that are materially indistinguishable from a decision” of the Court. *Id.* at 405–06.

²⁶⁶ *Id.* at 408–09.

²⁶⁷ *Id.* at 407–08. *Taylor* also noted that a state-court decision may be “unreasonable” if it “unreasonably extends a legal principle from [the Court’s] precedent to a new context where it should not apply (or unreasonably refuses to extend that principle to a new context where it should apply).” *Id.* at 407.

²⁶⁸ *Id.* at 410–12 (“The term ‘unreasonable’ is no doubt difficult to define.”); *see id.* at 410–12 (announcing the relevant meaning of “unreasonable”).

²⁶⁹ *Id.* at 410 (emphasis omitted); *see id.* at 410–12.

²⁷⁰ *Id.* at 410.

²⁷¹ Reasonableness surely seems an ever-inviting shelter. At the very least, it seems the best—and most realizable—way to “achieve, on average, a socially tolerable level of accuracy in the application of law to fact.” Richard H. Fallon, Jr., *Some Confusions About Due*

habeas doctrine has long been jumbled, if not entirely “Byzantine and unfathomable.”²⁷² *Taylor’s* “unreasonably wrong” standard might offer a hopeful response to a large part of this confusion.

But *Taylor’s* abstract promise comes at a steep practical price. More than imposing doctrinal “transition costs” or generating friction at habeas’s margins,²⁷³ *Taylor* subtly shifts the balance of doctrinal power, this time in a way friendly to state courts. It creates space for state courts to disregard binding Supreme Court precedent. On federal constitutional questions, that is, it gives state courts license to be *wrong*.²⁷⁴

In some contexts, this price may seem insignificant, a charge more theoretical than real. Where questions have uncomplicated²⁷⁵ substantive answers, state courts may have little room to be “reasonably incorrect,” let alone doctrinally bold.

But where federal law is not “clear or consistent,” where unstable substance ensures that right answers cannot be effortlessly found, *Tay-*

Process, Judicial Review, and Constitutional Remedies, 93 COLUM. L. REV. 309, 311 (1993). For this reason, courts have used the language of “reasonableness” liberally, nowhere more prominently than in the qualified immunity context. See, e.g., *Mitchell v. Forsyth*, 472 U.S. 511 (1985); *Wood v. Strickland*, 420 U.S. 308 (1975). But “reasonableness” is no panacea. It often leaves courts in the position of underenforcing constitutional rights, not because no constitutional violation occurred, but because the error was somehow unobjectionable. In taking its seemingly-unobjectionable “reasonableness” step, *Taylor* moves the courts from enforcing rights vigorously to enforcing little at all. See Daniel J. Meltzer, *Habeas Corpus Jurisdiction: The Limits of Models*, 66 S. CAL. L. REV. 2507, 2522 (1993) (“The *reductio ad absurdum* would be this: when habeas courts grant relief they are disagreeing with the state courts that upheld the conviction; when there is such disagreement, either position is presumptively reasonable; hence, every habeas petitioner necessarily . . . cannot obtain relief [] unless one of two exceptions applies.” (footnote omitted)).

²⁷² Barry Friedman, *Failed Enterprise: The Supreme Court’s Habeas Reform*, 83 CAL. L. REV. 485, 486 (1995) (measuring the Court’s habeas reform effort “by its own terms,” not “against an independent normative perspective”).

²⁷³ Cf. Michael P. Van Alstine, *The Costs of Legal Change*, 49 UCLA L. REV. 789, 793–95 (2002).

²⁷⁴ It is “wrong,” Professor Chemerinsky helpfully notes, “to presuppose that decisions in favor of [individual liberties] are preferable” to decisions in favor of “government interests.” Erwin Chemerinsky, *Parity Reconsidered: Defining a Role for the Federal Judiciary*, 36 UCLA L. REV. 233, 258 (1988). But when the Court permits state courts to stray from “clearly established” Court doctrine, the question is *not* whether rights *should* trump governmental interests. The question is whether rights *have* trumped government interests according to some still-valid Supreme Court decision. *Taylor* does not simply invite state courts to draw unexpected shapes on a clean constitutional slate. It allows them to ignore the shapes the Court has already drawn, coloring outside preexisting lines. Cf. Arthur D. Hellman, *The Shrunken Docket of the Rehnquist Court*, 1996 SUP. CT. REV. 403, 428 (1996) (“From the earliest days of the nation’s history, no function of the Court has ranked higher than the protection of federal rights from hostility or misunderstanding on the part of state courts.”).

²⁷⁵ Provided that *any* case has simple answers. See, e.g., BRIAN Z. TAMANAHA, *ON THE RULE OF LAW: HISTORY, POLITICS, THEORY* 86–90 (2004) (discussing legal indeterminacy); Lawrence B. Solum, *On the Indeterminacy Crisis: Critiquing Critical Dogma*, 54 U. CHI. L. REV. 462, 464, 470 (1987) (citations omitted).

lor's toll is not so easily gainsaid. In these contexts, correct state court conclusions become both elusive *and* unnecessary. For state courts, reaching correct doctrinal answers becomes a strenuous *and* avoidable chore.

In *Andrade*, substantive law was anything but clear or consistent. It was, and still is, a tangled doctrinal "thicket,"²⁷⁶ as Justice O'Connor very aptly noted. So when the *Andrade* state court misinterpreted longstanding constitutional "principle[s]," ignored obvious fact analogies, and brashly disregarded still-valid Supreme Court precedent,²⁷⁷ it surely did something at least marginally (and doctrinally) *wrong*. But the state court also did precisely what the Supreme Court permitted it to do.

The *Andrade* state court did not need to track the swings of long-running philosophical debates or plumb the nuances of "uncertain" constitutional doctrine—like *Rummel*, *Solem*, and *Harmelin*. Nor did the *Andrade* state court need to get *Andrade*'s Eighth Amendment question doctrinally *right*. The state court needed only to reach a conclusion that was somehow "reasonable," a standard that permits state courts to be wise *or* hasty, right *or* wrong.²⁷⁸

Not all state courts will make use of this permission. Not all state courts will accept the Court's license to make decisions that are "reasonably *incorrect*." But all attentive state courts will hear the Court's unusual cues. And all state courts will register the Court's curious invitation to chart autonomous doctrinal paths, to make "reasonable" constitutional errors, and to flout still-valid Supreme Court precedent.

So *Andrade* may begin with a mundane image of an irredeemable thief, but it ends with a picture far from commonplace. It ends with an intriguing portrait of an unbound state court, a California tribunal permitted to elide still-valid Supreme Court case law. Odd as this portrait may seem, it is not limited to *Andrade*'s narrow frame. Other cases cast comparable unbound images. Some of these cases predate *Andrade*, helping to set the unbinding stage. Other cases follow *Andrade*, inspiring quick, ardent, but still-incomplete debate. *Williams v. North Carolina* fits the first category. *Roper v. Simmons* fits the second.

IV

UNBINDING TODAY: *ROPER V. SIMMONS*

In some ways, the step from *Andrade* to *Roper v. Simmons* is easy enough. Like *Andrade*, *Simmons* features an unsympathetic defendant,

²⁷⁶ *Lockyer v. Andrade*, 538 U.S. 63, 72 (2003).

²⁷⁷ See Chemerinsky, *supra* note 169, at 1060–61.

²⁷⁸ Cf. Richard H. Fallon, Jr., *Judicially Manageable Standards and Constitutional Meaning*, 119 HARV. L. REV. 1275, 1284–85 (2006) (assessing "close enough is good enough" as a constitutional standard).

this one accused of capital murder. Like *Andrade*, *Simmons* involves confused constitutional substance, again of an Eighth Amendment type. And like *Andrade*, *Simmons* captures a state court willing to flout binding Supreme Court precedent.

In other ways, of course, the move from *Andrade* and *Simmons* may seem a touch forced. *Simmons*'s timing, the gravity of the prescribed punishment, and the case's procedural posture all differ from those in *Andrade*, as well as from those in *Williams*.

But *Simmons*, *Andrade*, and *Williams* overlap far more than they diverge. All three form pieces of the same doctrinal puzzle. All three help tell the story of state courts unbound. This Part shows precisely how these three seemingly unrelated cases fit together. To that end, subpart A traces *Simmons*'s litigation path, reviewing the case's legal history and positing some preliminary explanations for the state court's noteworthy turn. Subpart B then examines a still-overlooked piece of *Simmons*'s long path, connecting our more preliminary explanations to the larger theme of state courts unbound.

A. *Simmons* in the State Court

Roper v. Simmons is a disturbing case—sadly unexceptional in its horror, but still plenty gruesome to appall. The central event in *Simmons* is a murder, a grisly and premeditated crime that Christopher Simmons, then seventeen, boasted he could “get away with” because of his adolescent age.²⁷⁹ Upon arrest, Simmons readily confessed to the killing.²⁸⁰ A state jury convicted him of first-degree murder and sentenced him to death.²⁸¹ A motion to overturn the verdict was denied on direct appeal.²⁸²

Years later, Simmons filed a petition for state collateral relief.²⁸³ In his petition, Simmons asked a state court to declare his punishment inconsistent with the federal Constitution.²⁸⁴ As Simmons saw it, the Eighth Amendment's Cruel and Unusual Punishments Clause prohibited the execution of sixteen- and seventeen-year-old offenders.²⁸⁵

At first glance, Simmons's petition seemed destined to fail. In *Stanford v. Kentucky*, the Supreme Court answered an identical Eighth

²⁷⁹ 543 U.S. 551, 556–57 (2005) (noting that Simmons tied up his victim with electrical cable and then pushed her into a river to drown).

²⁸⁰ *Id.* at 557.

²⁸¹ *Id.* at 558–59.

²⁸² *Id.* (citing *State v. Simmons*, 944 S.W.2d 165, 169 (Mo. 1997) (en banc), cert. denied, 522 U.S. 953 (1997)).

²⁸³ *Id.* at 559.

²⁸⁴ *Id.*

²⁸⁵ *Id.*; cf. *Thompson v. Oklahoma*, 487 U.S. 815, 818–38 (1988) (plurality opinion) (declaring the execution of offenders age fifteen and younger constitutionally impermissible).

Amendment question, rejecting the very argument Simmons now remade.²⁸⁶ No Supreme Court opinion had since overruled *Stanford*, so the state court's task in *Simmons* seemed rather uncomplicated: it merely needed to abide *Stanford*, denying Simmons's petition without more.²⁸⁷

But the state court did not abide *Stanford*. Instead, the state court held that the imposition of the juvenile death penalty had "become truly unusual"—and thus *constitutionally* invalid—in the time since *Stanford* was decided.²⁸⁸ Simmons's death sentence was overturned accordingly. Apposite, seemingly binding Supreme Court precedent was cast deliberately aside.²⁸⁹

But what inspired the state court's brash and "flagrant"²⁹⁰ turn? Nothing about the court's decision seems especially careless or indifferent to the meaning of precedent. The state court did not even pretend to distinguish *Simmons* from *Stanford* on the facts. So why would the state court think the Eighth Amendment was so ripe to be updated—and that it should do the "'updating'"?²⁹¹

One reason may be prediction—a concerted state court attempt to "conform" today's law, *not* to yesterday's, but to tomorrow's.²⁹² This kind of judicial predicting is widely disfavored. In the context of Supreme Court precedent, in fact, lower courts have been firmly admonished not to try to "anticipator[ily] overrule."²⁹³ But perhaps the *Simmons* state court still decided to make a "prophec[y]," as Justice Holmes might say,²⁹⁴ boldly putting itself in the Supreme Court's doctrinal shoes.

²⁸⁶ 492 U.S. 361 (1989).

²⁸⁷ See Bradford, *supra* note 11, at 43–50 (discussing the Court's rejection of a regime that permits "anticipatory overruling" by lower courts).

²⁸⁸ *State ex rel Simmons v. Roper*, 112 S.W.3d 397, 399 (Mo. 2003) (en banc).

²⁸⁹ A slim Court majority affirmed without a word about the state court's "flagrant disregard of [Court] precedent." See *Simmons*, 543 U.S. at 628 (Scalia, J., dissenting).

²⁹⁰ *Id.* at 629 (Scalia, J., dissenting).

²⁹¹ *Id.* at 630 (Scalia, J., dissenting).

²⁹² See Bradford, *supra* note 11, at 43–48 (discussing the effect of anticipatory overruling on judicial efficiency, legal uniformity, and reputational integrity); Caminker, *supra* note 72, at 6.

²⁹³ See Caminker, *supra* note 72, at 5 & n.16 (noting the "overwhelming consensus" against prediction). As a general matter, the task of lower courts is to interpret where the superior courts' opinions *are*, not where these opinions *may go*. But this simple injunction does have its provisos. Some of these provisos arise "visibly and routinely"—as in the context of *Erie* doctrine's application of ambiguous state law. See *id.* Others move "sub silentio"—like an inferior court's hedge against "subsequent appellate reversal." *Id.*

²⁹⁴ Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457 (1897), reprinted in COLLECTED LEGAL PAPERS 167, 173 (1921). For another familiar Realist's take, see K.N. LLEWELLYN, *THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY* 59–76 (1960). Some positivists, like H.L.A. Hart, have been less charitable, calling prediction "unrealistic," Dorf, *supra* note 72, at 654, a mislabeled expression of some "internal point of view." H.L.A. HART, *THE CONCEPT OF LAW* 143 (1961); cf. Caminker, *supra* note 72, at 7 (advocating, in part, a "proxy" decision-making model over a "conventional precedent" one).

Another reason may be sheer audacity. Most attempts to buck Supreme Court authority end badly, at least from the perspective of those that try.²⁹⁵ Most, put simply, get reversed. But perhaps the *Simmons* state court still felt ready to act impulsively, risking the Supreme Court's ire and somehow surviving to tell the tale.

There is something useful in each of these explanations. Surely the *Simmons* state court felt at liberty to make a doctrinal prediction; this is, after all, precisely what the state court did. And surely the *Simmons* state court felt doctrinally daring, for it would not have ignored *Stanford* otherwise.

But if these two ideas prove partly instructive, they still leave an important explanatory hole. Why did the *Simmons* state court think that it could make a prediction, let alone that it should? And why did the state court feel this was a time to be doctrinally bold? To answer these crucial questions, we must do more than repeat old maxims about state court predictions or sporadic lower court insolence. We must reassess *Simmons*'s doctrinal context, connecting *Simmons* to the examples *Williams* and *Andrade* provide. We must read *Simmons*, that is, as a part of the story of state courts unbound.

B. *Simmons* Unbound

So how does the story of unbound state courts capture *Simmons*? Does the core unbinding process—of unstable substance and overgenerous procedure—even apply?

Unbinding's first piece applies to *Simmons* rather neatly, for *Simmons*'s substance was inherently unsure. At first glance, of course, *Simmons*'s substance might have seemed perfectly stable: *Stanford v. Kentucky* answered an identical Eighth Amendment question about an indistinguishable punishment for a comparable offender. From *Stanford* alone, then, it might have looked like *Simmons*'s result was both obvious and sure.

But the law's stability can be superficial, not least when undercut by the Court's own doctrinal turns. For *Simmons*, an unsettling turn came in *Atkins v. Virginia*,²⁹⁶ the Court's recent invalidation of the execution of mentally retarded offenders. On its surface, *Atkins*'s relevance to *Simmons* seems only passing: *Atkins* overrules *Penry v.*

²⁹⁵ See generally Amy Coney Barrett, *The Supervisory Power of the Supreme Court*, 106 COLUM. L. REV. 324 (2006) (exploring the justifications for the Court's supervisory power over other courts); James E. Pfander, *Jurisdiction-Stripping and the Supreme Court's Power to Supervise Inferior Tribunals*, 78 TEX. L. REV. 1433 (2000) (considering the Supreme Court's power to oversee inferior courts).

²⁹⁶ 536 U.S. 304 (2002).

Lynnaugh,²⁹⁷ not *Stanford*; the decision addresses the execution of mentally retarded defendants, not juvenile ones.

But there is more to *Atkins*'s decision than the rethinking of a discrete death-penalty judgment. There is a shifting of the Eighth Amendment's "cruel and unusual punishments" shadow, what Judge Posner has called its unconstraining "sponge."²⁹⁸ Even more, there is a signal to state courts that this Eighth Amendment shifting is not yet done.

As the Court has long reminded, the Cruel and Unusual Punishments Clause draws its meaning from "evolving standards of decency."²⁹⁹ From this, it follows that the Eighth Amendment asserts no "static" constitutional "command."³⁰⁰ And from this, it follows that the unstable substance in *Simmons* followed unbinding's path almost perfectly. In *Simmons*, the Eighth Amendment formed an inherently unsettled substantive base, much like full faith and credit did in *Williams* and proportionality did in *Andrade*. So like the state courts in *Williams* and *Andrade* before it, the *Simmons* state court had an array of constitutional options. And like the state courts in *Williams* and *Andrade*, the *Simmons* state court could look into an erratic substantive "mirror," to borrow Justice Scalia's term, and see whatever it wished to see.³⁰¹

It is true, no doubt, that unbinding's second piece does not apply so cleanly. This second piece involves a particular procedure—viz., modern habeas review—that *Simmons* itself avoids: *Simmons* reached the Supreme Court on direct appeal, not habeas review. The fuzziness of the Court's "reasonably wrong" standard, then, did not *directly* distort the state court's decision.

But if the *fit* of this second piece is slightly imperfect, the *effect* of overgenerous procedure is no less profound. Doctrinal indulgence in one setting can, and often does, influence many others.³⁰² Once the Court undercuts its own doctrine in one place—once it declares, to paraphrase Professor Meyer, that what it says does *not* always matter—it cannot expect its "dictates" to hold firm elsewhere.³⁰³ "Reasonable" mistakes in one setting may well lead to more direct and unflinching

²⁹⁷ 492 U.S. 302 (1989).

²⁹⁸ See Posner, *supra* note 49, at 42.

²⁹⁹ *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

³⁰⁰ *Roper v. Simmons*, 543 U.S. 551, 588 (2005) (O'Connor, J., dissenting). See generally Ernest A. Young, *Foreign Law and the Denominator Problem*, 119 HARV. L. REV. 148, 148 (2005) ("The Court's jurisprudence of 'cruel and unusual' punishments has both objective morality and practice components.").

³⁰¹ See *Simmons*, 543 U.S. at 629 (Scalia, J., dissenting).

³⁰² Cf. Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625, 631–32 (1984).

³⁰³ Cf. Linda Meyer, "Nothing We Say Matters": *Teague* and *New Rules*, 61 U. CHI. L. REV. 423, 423–25 (1994) (noting that, because *Teague* limits a habeas petitioner's reliance on

“errors” elsewhere, not because state courts should believe that such errors are permissible, but because they have been trained to think so all the same.³⁰⁴

Some state courts will be rather happy with this training. Some may be eager to receive it. Some, like the state court in *Simmons*, may even be ready to put it to self-indulgent or self-aggrandizing use.

And this may be cause for concern. We may be unhappy with how the state court acted in *Simmons*. We may think it better for the court to have followed *Stanford*'s preexisting rule, no matter how ill-fated *Stanford* might have seemed.

But the reason *why* the state court acted as it did in *Simmons* is at least as important as *whether* it should have. In *Simmons*, a state court did what has long seemed forbidden: It disregarded binding Supreme Court precedent, reinterpreting constitutional doctrine with little hesitation or apology. Lower court prediction and state court audacity surely inform how we understand this bold decision. But to understand *Simmons* completely, we must dig a bit deeper. We must read *Simmons* in the light cast by *Williams* and *Andrade*, and we must recognize it as a chapter in the story of state courts unbound.

V

MOTIVES, THEORIES, AND STATE COURT PARITY

There is a coda to this “unbound” story, a final segment left intentionally open when this telling began. This final Part adds no new doctrinal players, and it recounts no disquieting case narratives. Instead, it offers a necessary, if condensed, review of questions posed at the beginning: What has motivated the Court to allow—let alone endorse—the unbinding of state courts? Should we applaud the Court for its efforts? Should we worry? And can state courts effectively manage their unbound power, now that we know it is theirs?

This short Part raises and responds to these questions explicitly, if preliminarily. Subpart A assesses possible Supreme Court motives, noting that no single explanation will do. Subpart B then asks if state courts can effectively manage their unbound power, situating this

precedent to the specific fact patterns of prior Supreme Court decisions, the Court has limited the potency of its own holdings).

³⁰⁴ Even Justice Scalia, *Simmons*'s most adamant dissenter, thought the state court's conduct “understandable.” *Simmons*, 543 U.S. at 629 (Scalia, J., dissenting) (asking why any “earlier [Court] decision” would “control” a state court's later judgment given that the Eighth Amendment has been made a “mirror of the passing and changing sentiment of American society”). But this did not excuse *Simmons* from criticism by Justice Scalia and others. The specific targets of condemnation include *Simmons*'s core adjudicative model, the Court majority's discussion of international law, and its mathematical aptitude—particularly its counting skills. See, e.g., *id.* at 610–15 (Scalia, J., dissenting).

question in now-familiar debates about judicial "parity" and doctrinal "prerogative."

A. Supreme Court Motives

So why would the Court unbind state tribunals? If it is easy enough for the Court to *rebind* them,³⁰⁵ reclaiming the powers it has quietly given away, why might it prefer to leave things as they stand?

Reading the judicial mind is never easy.³⁰⁶ The task is only more complicated when that mind seems only intermittently focused, as it does with unbound state courts. So if no single reason seems capable of explaining all of the Court's unbinding behavior, we should evaluate the options all the same. There is some value in the list alone.

One entry on this list may be no reason at all. On occasion, unbinding may occur through mere accident. *Williams's* story of full faith and credit, for example, depicts a state court unbound, *not* as a part of some malicious or deliberate Supreme Court scheme, but as an unintended byproduct of a prudent "accommodation."³⁰⁷

Another entry may be simple resignation. Some legal substance may defy unerring certainty; some law, that is, may frustrate the Court's most resolute attempts to "settle[]" it.³⁰⁸ *Andrade's* and *Simmons's* tales of cruel and unusual punishment, for example, portray state courts unbound in part by the Court's struggles with a stubborn and unruly bit of constitutional text.³⁰⁹

And another entry may be deliberate Court strategy, a tacit and oblique attempt to scale back individual rights.³¹⁰ This is not a risk-free approach. It depends a great deal on conjecture—"rough guess[es]," in Professor Friedman's words, "as to which court system"

³⁰⁵ Perhaps the simplest way to rebind state courts is through immediate Supreme Court reversal. This is what the dissenting Justices demand in *Simmons*, see 543 U.S. at 593–94 (O'Connor, J., dissenting), and it is what skeptics of "unbound state courts" will surely propose. But there are reasons the Court may prefer unbound state courts, at least in certain contexts. And there are contexts in which modes of Supreme Court supervision have been so fundamentally revised that easy reversal is impossible. See *supra* Part IV.

³⁰⁶ See Caminker, *supra* note 72, at 16–19 (noting that while court opinions, public speeches, and general ideological commitments do provide some useful evidence, Court motives remain somewhat veiled and obscure, no matter how closely examined); Steven L. Winter, *Indeterminacy and Incommensurability in Constitutional Law*, 78 CAL. L. REV. 1441, 1500 (1990).

³⁰⁷ See *supra* Part II.

³⁰⁸ See generally Alexander & Schauer, *Constitutional Interpretation*, *supra* note 28, at 1367 (demonstrating that the fraught relationship between Congress and the Court makes settling some areas of law difficult); Alexander & Schauer, *Defending Judicial Supremacy*, *supra* note 28, at 468 (pointing out that much of the social agenda, fashioned as constitutional debates, is the subject of continuous dispute).

³⁰⁹ See ELY, *supra* note 59, at 13–14 (discussing the interpretive "invit[ation]" the Eighth Amendment extends).

³¹⁰ See YACKLE, *supra* note 43, at 41.

will reach preferred ends.³¹¹ But when the Supreme Court “funnel[s]” constitutional power to state courts, it does not always do so impartially. It may well do so “in the expectation that [constitutional] relief will be denied.”³¹²

Not every state court will meet this expectation, as *Simmons* plainly shows. When the Court opens the door to novel state court denials, after all, it may also clear the way for newfound state court grants. But unbinding may well have a substantive tilt, and the Court’s tolerance for unbound state courts surely depends on their delivery of specific constitutional results.³¹³

As may our own. What we make of unbound state courts may vary according to our fondness for particular outcomes.³¹⁴ If we are fans of severe criminal punishment, we may cheer *Andrade* and jeer *Simmons*. We may do the opposite if we are foes.

But the reasons for celebration or for worry do not end where the case law does. There is also a matter of theory, of determining whether unbound state courts merit our philosophical support.

Little such support is likely to come from “settlement” theorists—a group Dean Kramer has pejoratively branded members of the “cult of the Court.”³¹⁵ These settlement scholars prefer more certainty, not less; they advocate consolidated Supreme Court authority, not dispersed power. By these measures, unbound state courts look entirely (and normatively) upside-down: they introduce unpredictability, diversity, and instability where order, uniformity, and settlement might otherwise exist.³¹⁶

But where settlement theorists find ground for suspicion, some of their rivals might find reason for hope. One group of thinkers, popular constitutionalists, may support unbinding simply for its *dislocation* of interpretive power, its embrace of a (state court) counterpoint to

³¹¹ See Friedman, *supra* note 47, at 1226 (“Even if one is realistic about the relationship between ideology and law, one reasonably might wonder if it is healthy that the law of federal jurisdiction rests so apparently on a bare preference for outcomes . . .”).

³¹² YACKLE, *supra* note 43, at 41. In this way, the state courts unbound story offers an interesting historical counterpoint. Until 1914, the Supreme Court had jurisdiction to review *only* those state court decisions that denied a claim of federal right. See Helen Norton, *Reshaping Federal Jurisdiction: Congress’s Latest Challenge to Judicial Review*, 41 WAKE FOREST L. REV. 1003, 1032 n.118 (2006). Today, these are precisely the kind of decisions unbinding may quietly promote.

³¹³ Cf. YACKLE, *supra* note 43, at 121 (“Occasionally, at least, there are reasons for preferring state court treatment of matters initially (and properly) presented to the federal courts.”).

³¹⁴ See Friedman, *supra* note 47, at 1279.

³¹⁵ See KRAMER, *supra* note 15, at 243 (citing JOHN BRIGHAM, *THE CULT OF THE COURT* 43 (1987)).

³¹⁶ Cf. Abner S. Greene, *The Fit Dimension*, 75 FORDHAM L. REV. 2921, 2927 (2007). But see KRAMER, *supra* note 15, at 234 (“Uncertainty and instability will exist even in a regime of total judicial supremacy . . .”).

the Court's domineering constitutional voice.³¹⁷ Another group, judicial minimalists, may support unbinding simply for its puncturing of overarching constitutional principles, its shift from grand "fundamentalist" leaps to smaller incrementalist steps.³¹⁸ And still another group, federalists, may support unbinding simply for its interest in state autonomy, its move toward local independence and aggressive laboratory-like experimentation.³¹⁹ All of these thinkers may endorse unbound state courts, at least in part. All may embrace unbound state courts for what they symbolize and signal, if not for what they actually say. All may see great promise in state courts freed to rethink constitutional precedent.

And all will surely know that this promise does not come unencumbered. It is burdened by elusive, unpredictable, overlapping, and often dubious Court motives—whether inattention, prudence, resignation, or substantive preference. It may lead to state court decisions, like *Andrade* and *Simmons*, that certain Justices disdain.³²⁰ And it depends heavily on the skills and talents of individual state courts, the adequacy of which not everyone takes on faith.

B. Parity and Prerogative

From the very start, we have accepted a simple rule of state-court behavior: state courts may adjudicate federal claims—or most of them, at least. There are plenty of explanations for this rule. Some are based in logic, others in history.³²¹ But all build from the basic premise that adjudicating federal questions is a responsibility state courts can manage.

Can state courts also manage the heady responsibility of being unbound? If the Supreme Court has indeed unbound them, can state courts be trusted to wield this important power well?

Much has been written in the last half-century about judicial "parity," the notion that state courts are as able and willing to resolve federal questions as any other court. A great deal of this parity work has seemed polemical. Some have called parity a "dangerous" and "pre-text[ual]" "myth."³²² Others have claimed that parity can be philo-

³¹⁷ See, e.g., KRAMER, *supra* note 15, at 234 (assessing popular constitutionalists' fear of judicial oligarchy).

³¹⁸ See SUNSTEIN, *supra* note 45, at 27–31.

³¹⁹ See Van Alstyne, *supra* note 44, at 771–72 & n.9.

³²⁰ See, e.g., *Roper v. Simmons*, 543 U.S. 551, 630 (Scalia, J., dissenting) ("To allow lower courts to behave as we do . . . destroys stability and makes our case law an unreliable basis for the designing of laws The result will be to crown arbitrariness with chaos.").

³²¹ For a detailed discussion of this logic—and a portrait of this history—see *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816).

³²² Neuborne, *supra* note 37, at 1105–06.

sophically and empirically confirmed.³²³ Still others have reminded that *any* court “superiority” should not be casually assumed.³²⁴ But by now the parity debate has grown fairly tired.³²⁵ No one has supplied generally accepted parity criteria; no one has found an objective parity methodology.³²⁶ Even parity’s most renowned adversary has recently tempered his argument, if not refocused his attention altogether.³²⁷

If the parity debate remains (academically) undecided, of course, unbinding still falls on a particular side. Unbound state courts are active, if unwitting, champions of judicial parity.³²⁸ They assert their own interpretive priority rather than deferring to that of the Supreme Court. They doubt, amend, and update Court doctrine instead of applying it mechanically.

They also encroach on a “prerogative” the Court regularly claims to hold tight.³²⁹ In stark and emphatic terms, the Court has repeatedly said that no other court may reject Supreme Court precedent.³³⁰ On these doctrinal matters, the Court tells us, it has no judicial peer.³³¹

And, at times, the Court would surely like to be believed. But these forceful declarations of exclusive doctrinal prerogative are at least partially misleading, as the Court itself well knows. On occasion, the Supreme Court quietly but intentionally delegates this prerogative to others—not through a dramatic ceding of its doctrinal authority, but through the inconspicuous unbinding of state courts. On occa-

³²³ See MICHAEL E. SOLIMINE & JAMES L. WALKER, RESPECTING STATE COURTS: THE INEVITABILITY OF JUDICIAL FEDERALISM 42–55, 58–62 (1999).

³²⁴ See, e.g., William B. Rubenstein, *The Myth of Superiority*, 16 CONST. COMMENT. 599, 606–11 (1999) (using the experience of gay rights litigators to debunk the traditional notion that federal courts, as opposed to state courts, are invariably more hospitable to civil rights claims).

³²⁵ See Chemerinsky, *supra* note 274, at 235 (“The debate over parity continues with little sign of abatement or resolution.”). Worse than futile, in fact, “reliance on parity” has made “a mess of the law of federal jurisdiction.” Friedman, *supra* note 47, at 1223. A real cost of this “mess” is “doctrinal instability and inconsistency.” *Id.* at 1223 (citation omitted).

³²⁶ See MARTIN H. REDISH, FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER 3 (1980) (explaining that “it would be difficult to devise a system of measurement which could be used to answer” the question of whether “federal courts are, on the whole, better equipped to guard federal interests than their state counterparts”); Rubenstein, *supra* note 324, at 604–05; Michael Wells, *Behind the Parity Debate: The Decline of the Legal Process Tradition in the Law of Federal Courts*, 71 B.U. L. REV. 609, 611 (1991).

³²⁷ See Burt Neuborne, *Parity Revisited: The Uses of a Judicial Forum of Excellence*, 44 DEPAUL L. REV. 797, 803 (1995) (exploring why we “fail[] to use the best resources [available] to solve our most difficult legal problems”).

³²⁸ Consider, for example, the inattentive state court in *Lockyer v. Andrade*, 538 U.S. 63 (2003). See *supra* notes 181–84 and accompanying text.

³²⁹ See *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997) (stating that overruling a Supreme Court precedent is the Court’s sole prerogative).

³³⁰ See, e.g., *id.*

³³¹ See *id.*

sion, that is, the Court willingly permits state courts to disregard Supreme Court precedent. Many state courts are happy to oblige.

Of course, all of this could change quickly enough. A change among Justices,³³² a reworking of particular procedures,³³³ an exceedingly rash bit of state court defiance—all could significantly alter when (or *if*) state courts can make decisions like *Williams*, *Andrade*, or *Simmons*. But for now state courts can occasionally do what has long seemed entirely impossible: they can disregard valid, binding Supreme Court precedent. They can act as if unbound.³³⁴

CONCLUSION

Not long ago, Tom Parker wrote an open letter to his colleagues on the Alabama Supreme Court.³³⁵ The occasion was *Roper v. Simmons*, and the thesis was decidedly blunt: *Simmons*, Parker explained, is an immoral decision, one based on “ridiculous reasoning” and “foreign legal fads.” Worse still, *Simmons* is an “*unconstitutional*” decision, one that state court judges must stand against “without apology.”³³⁶

As it happened, the Alabama Supreme Court took no such stand. Far from flouting *Simmons*, the state court mechanically applied it.³³⁷ Parker was soon removed from office.³³⁸ His editorial was dismissed as a vain and “bilioous screed.”³³⁹

³³² See, e.g., Dorf, *supra* note 72, at 652 (“It would not have taken an especially astute Court-watcher to predict that Clarence Thomas would cast his votes as a Justice in a pattern different from that followed by Thurgood Marshall . . .”).

³³³ See, e.g., Yackle, *supra* note 250, at 544–45 (explaining how an inconspicuous procedural change has transformed the federal habeas adjudication).

³³⁴ As Professor Hart has reminded, state courts “are the primary guarantors of constitutional rights, and in many cases they may be the ultimate ones.” Hart, *supra* note 18, at 1401. But this reminder only goes so far. State courts are *not* the “ultimate” arbiters of federal law on matters the Court has already addressed—or at least we don’t often think them to be. So while “the argument that federal rights should be litigated, sooner or later, in a federal forum can[not] alone carry the day,” Meltzer, *supra* note 271, at 2509, it carries enough to show the peculiarity of unbound state courts; cf. Barry Friedman, *Valuing Federalism*, 82 MINN. L. REV. 317, 397–400 (1997) (discussing the states as laboratories of experimentation); Vicki C. Jackson, *Federalism and the Uses and Limits of Law: Printz and Principle?*, 111 HARV. L. REV. 2180, 2213–14 (1998); Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903 (1994).

³³⁵ Tom Parker, *Alabama Justices Surrender to Judicial Activism*, BIRMINGHAM NEWS, Jan. 1, 2005, at 4B.

³³⁶ *Id.* (emphasis added); cf. Spencer Roane, “*Hampden*” Essay I, RICHMOND ENQUIRER, June 11–22, 1819, reprinted in JOHN MARSHALL’S DEFENSE OF *MCCULLOCH V. MARYLAND* 106, 110–14 (Gerald Gunther ed., 1969).

³³⁷ See *Ex parte Adams*, 955 So. 2d 1106, 1107 (Ala. 2005).

³³⁸ Dahlia Lithwick, *Kennedy Made Me Do It*, SLATE, June 8, 2006, <http://www.slate.com/id/2143308>.

³³⁹ *Id.*

It is not an inaccurate label. With its frantic rhetoric and its “poorly reasoned” arguments, Parker’s column may well seem like so much nonsense.³⁴⁰

But there is more to Parker’s polemic than hollow spite. Beneath the angry bluster and the clumsy reasoning is a kernel of long-neglected doctrinal truth: State courts sometimes *do* “refuse[]” to follow prior Supreme Court doctrine. And sometimes they do so without fear of Supreme Court “rebuke.”³⁴¹

To many, this fact may be a bit threatening, the sign of a gratuitous assault on our system of “settled” precedent. To others, it may be quite welcome, a symbol of the triumph of federalist, minimalist, or popular constitutionalist theory. And to still others, the idea of doctrinal defiance may simply be startling, a strange anomaly in the operation of state courts. It is not in every case, after all, that state courts affirmatively choose to disobey.

But rare events still have their lessons, and we should remember how and why they emerge. By unsettling constitutional substance and excusing state court errors, the Court has permitted—even *encouraged*—state courts to reshape critical portions of existing Supreme Court doctrine. It has written the story of state courts unbound.

Some chapters in this story fall in neglected legal corners. *Williams*’s tale of unstable constitutional substance, for example, appears in an almost-forgotten parable of full faith and credit and migratory divorce.³⁴² Other chapters line the margins of grim biography. *Andrade*’s account of procedural pardons, for example, emerges in an unhappy account of three strikes punishment and stolen videos.³⁴³ Some chapters provoke swift and angry reaction. *Simmons*’s spark of state court disobedience, for example, drew pleas for a “slap on the [state court’s] hand.”³⁴⁴ And other chapters are still being written. The blunt state court defiance of *Smith v. Texas*,³⁴⁵ for example, is quite sure to be repeated.

We may find these chapters intriguing, provocative, or perplexing. We may think bold state courts admirable, curious, or entirely insolent. But if we are bothered by the state courts’ conduct, we should not be too startled that it occurs. Subtly but methodically, the Supreme Court has encouraged state courts to do the unthinkable: to ignore Court doctrine and to act as if unbound. This alone should

³⁴⁰ *Id.*

³⁴¹ Parker, *supra* note 335.

³⁴² See *supra* Part II.

³⁴³ See *supra* Part III.

³⁴⁴ *Roper v. Simmons*, 543 U.S. 551, 594 (2005) (O’Connor, J., dissenting); see *supra* Part IV.

³⁴⁵ 127 S. Ct. 1686 (2007).

make us doubt some of our most familiar rules—like “*state courts obey Supreme Court precedent*.” And it should remind us that not all of these rules hold perfectly true.