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UNCONSTITUTIONAL COURSES

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ABSTRACT

By now, we almost expect Congress to fail. Nearly every time the federal courts announce a controversial decision, Congress issues a call to rein in "runaway" federal judges. And nearly every time Congress makes a "jurisdiction-stripping" threat, it comes to nothing.

But if Congress's threats possess little fire, we have still been distracted by their smoke. This Article argues that Congress's noisy calls have obscured another potent threat to the "judicial Power": the Supreme Court itself. On occasion, this Article asserts, the Court reshapes and abuses the "judicial Power"—not through bold pronouncements or obvious doctrinal revisions, but through something more inconspicuous, more discreet: the prescription of unconstitutional decisionmaking procedures. These decisionmaking procedures—what this Article calls "unconstitutional courses"—have attracted little sustained attention; their unexpected source and their subtle form make these "courses" too easy to ignore. Yet where Congress has so often failed, the Court has quietly succeeded. By charting

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"unconstitutional courses," the Court has refashioned the "judicial Power" in an untenable way.

To show how, this Article examines what "unconstitutional courses" are, when the Court has charted them, and why these "courses" merit consideration. As a part of this analysis, this Article identifies two "unconstitutional courses," one historic and one contemporary. The first "course" grows out of *Swift v. Tyson*, a well-known (if long-derided) discussion of federal common law; the second emerges in *Williams v. Taylor*, a significant chapter in the story of contemporary habeas law. Both *Swift* and *Williams* illustrate the importance of how courts make decisions—what law they consider, what facts they ignore, what analytical steps they take. Both *Swift* and *Williams* demonstrate the impact a court's decisionmaking "course" may (and does) have in resolving individual disputes and in shaping the "judicial Power." And both *Swift* and *Williams* exhibit the need to examine the Court's less obvious threats to individual rights—and to itself.

INTRODUCTION

There is little new glory in the battle over federal court power. In each bloodless clash, the patterns grow more familiar, the rhetoric more timeworn. Legislators rally to repel judicial efforts to "redefine our history."[1] Famous names—Michael Newdow,[2] Terri Schiavo[3]—become code for judicial arrogance, emblems of supposedly "rogue" federal courts.[4]

All the while, the ground beneath the federal courts' relationship with Congress shifts. The relationship has never been easy.[5] Almost from the

1. Carl Hulse, *House Passes Court Limits on Pledge*, N.Y. TIMES, Sept. 24, 2004, at A17 ("'We can't let rogue judges redefine our history,' Representative Steve Chabot, Republican of Ohio, said.").

2. *See* Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1 (2004).

3. *See, e.g.*, Schiavo *ex rel.* Schindler v. Schiavo, 544 U.S. 957 (2005).

4. Hulse, *supra* note 1.

5. *See, e.g.*, Lawrence G. Sager, *Congress as Partner / Congress as Adversary*, 22 HARV. J.L. & PUB. POL'Y 85, 85–86 (1998). Article III of the United States Constitution invests the Supreme Court with "appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make." U.S. CONST. art. III, § 2, cl. 2. Congress's power to make "Exceptions" and "Regulations" to the Supreme Court's appellate jurisdiction has, at times, been construed quite broadly, see generally *Ex Parte* McCardle, 74 U.S. (7 Wall.) 506, 514 (1869), and though the "Exceptions and Regulations" clause says nothing about congressional control over *inferior* federal court jurisdiction, Congress's power to shape that jurisdiction has long been understood to be at least as expansive. *See, e.g.*, Sheldon v. Sill, 49 U.S. (8 How.) 441, 448–49 (1850) (acknowledging that Congress had no obligation to create lower federal courts in the first place, so it must have broad power to remove cases from their jurisdiction).

beginning, Congress and the courts have existed in a quarrelsome counterpoise, a state of anxious push-pull.[6] This inter-institutional anxiety is never more apparent than when federal courts issue controversial decisions—like *Newdow* or *Schiavo*.[7]

Some of these controversial decisions inspire angry legislative rhetoric, "threat[s]" intended to force "tactical [judicial] recessions."[8] Others prompt immediate popular discord[9]—occasionally so much so that we amend the Constitution.[10]

And many of these decisions provoke a now-predictable congressional response: legislative attempts to curb federal court jurisdiction.[11] The goal

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6. *See* JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 49 (1980) ("Almost two hundred years of judicial review show many periods of serious popular and political disagreement with the Court's work."); *id*. at 130; *see also* Peter L. Strauss, *Courts or Tribunals? Federal Courts and the Common Law*, 53 ALA. L. REV. 891, 894 (2002) ("We are again, at least ostensibly, in a [judicial] retreat phase.") (citation omitted); *cf*. Adrian Vermeule, *The Judicial Power in the State (and Federal) Courts*, 2000 SUP. CT. REV. 357, 361 (2000) ("Predictable and insistent cognitive pressures [] cause judges to press judicial prerogatives to implausible extremes.").

7. I use the term "controversial" to denote some significant level of political or cultural unpopularity, not to indicate incorrectness (or correctness) as a matter of law. *Cf*. Gerald Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 STAN. L. REV. 895, 896 (1984) (discussing "controversial federal court decisions").

8. *See* CHOPER, *supra* note 6, at 57; ALEXANDER BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS 94–95 (1970). For a brief discussion of a recent political "threat," see Editorial, *The Judges Made Them Do It*, N.Y. TIMES, Apr. 6, 2005, at A22, recounting Senator John Cornyn's claim that "distress about judges who 'are making political decisions yet are unaccountable to the public . . . builds up and builds up to the point where some people engage in' violence." Senator Cornyn's intemperate comments were widely criticized, but his remarks may reflect a strategy with a solid historical provenance.

9. *See generally* LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW chs. 1–3 (2004); CHOPER, *supra* note 6, at 128.

10. *See* Michael J. Klarman, *The Puzzling Resistance to Political Process Theory*, 77 VA. L. REV. 747, 776 (1991) ("[T]he prospect of constitutional amendments reversing Court decisions might have substantially ameliorated the countermajoritarian difficulty had obtaining such amendments proven as easy as the eleventh amendment's overruling of *Chisholm v. Georgia*. But this has not been the case; the *Chisholm* scenario has been repeated just three times in the Court's history, and on one of these occasions only a civil war made the amendment possible.") (citations omitted); JOHN HART ELY, DEMOCRACY AND DISTRUST 46 (1980).

11. Proposals to strip federal courts of jurisdiction surface "in virtually every period of controversial federal court decisions." Gunther, *supra* note 7, at 895–97 (listing jurisdiction-stripping efforts in the Marshall Court years, in the 1950s, and in more recent decades—the last in response to court decisions on "hot button" social issues like school prayer); *see also* David Currie, *The Three-Judge District Court in Constitutional Litigation*, 32 U. CHI. L. REV. 1, 5 (1964) ("[E]very important decision . . . has brought forth a rash of irresponsible proposals to limit the Court's jurisdiction. . . ."); David Luban, *The Warren Court and the Concept of a Right*, 34 HARV. C.R.-C.L. L. REV. 7, 9 (1999). It may still be true, of course, that "people talk about wholesale jurisdiction-stripping far more than [Congress] actually do[es] it." Gary Lawson, *Controlling Precedent: Congressional Regulation of Judicial Decision-Making*, 18 CONST. COMMENT. 191, 191 (2001). But when Justice O'Connor noted that the contemporary battles over the Court's jurisdictional reach are not "new," she could hardly have been standing on firmer historical ground. David Stout, *3 Justices Respond Personally To Criticism of U.S. Judiciary*, N.Y. TIMES, Apr. 22, 2005, at A18.

of these jurisdiction-stripping efforts is always the same: to scale back the power of federal judges.[12] But the fate of these bills has rarely varied, and nearly all have failed to become law.[13]

There may be a lesson in this history of congressional failure. The record may suggest that Congress's serial "jurisdiction-stripping" efforts are little more than political theater, an easy (if polemical) way for legislators to score political points.[14] It may even suggest that the federal courts are in no real danger, that the "judicial Power"[15] is unthreatened—at least by Congress.

But Congress is not the exclusive threat to the "judicial Power." A significant portion of that role, this Article contends, has passed to a rather unlikely source: the Supreme Court itself. The Court has not adopted this role casually or conspicuously; its self-abnegating efforts appear only like "shadows on cave walls."[16] But these "shadows" are far from illusive; they are real and powerful, perhaps even more so than Congress's direct and unambiguous attempts to curtail the power of the federal courts.

In the last decade, the Court has accomplished what Congress has long been unable—because of political inability and because of the Court's jealous protection of its own power[17]— to do itself: to shape the "judicial Power" in an untenable way. The Court has done so, unobtrusively enough, by prescribing unconstitutional decisionmaking *procedures*—that is, by charting what this Article calls "unconstitutional courses."[18]

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12. Not all of Congress's attempts to restrict jurisdiction are functionally identical: Some sweep broadly, seeking to scale back the jurisdiction of *all* federal courts; some aim to limit Supreme Court jurisdiction in a specific subset of cases; still others target only the jurisdiction of inferior federal courts.

13. *See, e.g.*, Gunther, *supra* note 7, at 897. The exception is *Ex Parte* McCardle, 74 U.S. (7 Wall.) 506 (1868).

14. *See, e.g.*, John A. Ferejohn & Larry D. Kramer, *Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint*, 77 N.Y.U. L. REV. 962, 969 (2002); *see also* Strauss, *supra* note 6, at 908 ("The spectre of judges who might run amok has a distinguished political history in this country. . . ."); Hulse, *supra* note 1, at A17.

15. U.S. CONST. art. III, § 1. *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 (1998).

16. John Hart Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693, 696 (1974).

17. *See generally* CHOPER, *supra* note 6, at 380–415.

18. I borrow this appellation from Justice Reed. *See* Erie R.R. Co. v. Tompkins, 304 U.S. 64, 91 (1938) (Reed, J., concurring) ("The 'unconstitutional' course referred to in the majority opinion is apparently the ruling in *Swift v. Tyson* that the supposed omission of Congress to legislate as to the effect of decisions leaves federal courts free to interpret general law for themselves."). Others have used the phrase "unconstitutional course" as well, though rarely in the way I use the term here—viz., as a metaphor for impermissible, Court-prescribed decisional methodologies. *See* Dennis J. Hutchinson, *"The Achilles Heel" of the Constitution: Justice Jackson and the Japanese Exclusion Cases*, 2002 SUP. CT. REV. 455, 464 (2002) ("Judicial commitments become recorded as precedents.

Over the last half-century, the legal academy has examined countless aspects of federal court jurisdiction—so much so that the discipline may be, in the words of Professor Van Alstyne, "choking on redundancy."[19] Some have engaged in famous dialectical exercises, drawing the parallel between "the power to regulate jurisdiction" and the "power to regulate rights."[20] Others have looked closely at the precarious nature of the Court-Congress partnership, reminding that "Congress is not entitled to make itself the Court's adversary."[21] Some have chronicled less obvious sources of congressional authority, spotting the many ways Congress "regulates the manner in which federal courts *exercise* their jurisdiction."[22] And still others have located the notion of "regulat[ing] rights" in broader institutional and historical context, stressing the "pointless[ness]" of judicial review in contexts where remedies are necessarily absent.[23]

But very little of this "mountain of scholarship"[24] examines the Court's (generally modern) tendency to enfeeble its own "judicial Power."[25] And none of this work explores the Court's occasional forging of "unconstitutional courses," Court-prescribed but constitutionally impermissible methods of federal court decisionmaking. This Article attempts to fill these notable gaps—and to show how the two gaps fit together.

The courts cannot be extricated from an unconstitutional course or unconstitutional principles rooted out of its practice merely by an election, as can be done in the case of the President or Congress."); Louise Weinberg, *The Article III Box: The Power of "Congress" to Attack the "Jurisdiction" of "Federal Courts*," 78 TEX. L. REV. 1405, 1409 (2000) ("I do not suggest that the Court will declare unconstitutional the 'course' it is 'pursuing.'") (quoting Robert H. Jackson, Undated Draft, Box 128 (on file with the Library of Congress, Manuscript Division)).

19. Professor Cole has made the same point in much the same way. *See* David Cole, *Jurisdiction and Liberty: Habeas Corpus and Due Process as Limits on Congress's Control of Federal Jurisdiction*, 86 GEO. L.J. 2481, 2481 (1998) (citing Gunther, *supra* note 7, at 897 n.9 (quoting a letter from Professor Van Alstyne to Professor Gunther (Feb. 28, 1983))). And as Professor Cole pithily noted, "[h]ere we go again"—as we do here, albeit in a different direction. *Id*.

20. Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1371 (1953).

21. Sager, *supra* note 5, at 86 (emphasis omitted); *see also* Lawrence G. Sager, Klein*'s First Principle: A Proposed Solution*, 86 GEO. L.J. 2525 (1998) [hereinafter Klein*'s First Principle*].

22. Lawson, *supra* note 11, at 191 (emphasis omitted) (referencing, *e.g.*, John Harrison, *The Power of Congress Over the Rules of Precedent*, 50 DUKE L.J. 503 (2000); Martin H. Redish, *Federal Judicial Independence: Constitutional and Political Perspectives*, 46 MERCER L. REV. 697 (1995)).

23. Richard H. Fallon, Jr., *Some Confusions About Due Process, Judicial Review, and Constitutional Remedies*, 93 COLUM. L. REV. 309, 369–70 (1993); *see also* Lawrence G. Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212 (1978).

24. Vermeule, *supra* note 6, at 358.

25. *See* Weinberg, *supra* note 18, at 1421 (noting the "hostility of courts to themselves . . . a kind of judicial self-loathing").

To that end, this Article puts forward two primary claims. The first claim is largely theoretical: I argue that the Court occasionally requires federal courts to make decisions in unconstitutional ways— to adopt, that is, "unconstitutionally wrongheaded"[26] decisionmaking procedures. With these "unconstitutional courses," the central concern is *not* necessarily the outcome reached. The principal concern is *how* the court makes decisions—what law it considers, what facts it ignores, what analytical steps it takes.

But if the problem is primarily one of process—if the Court's "shadows" reflect means, not ends—are unconstitutional courses truly problematic? Are these supposed "unconstitutional courses" real, detectable, *and* important?

This Article's second claim is that unconstitutional courses do more than raise trivial questions about form and methodology; they raise legitimate and important questions about the operation of the federal courts and the scope of individual rights. In support, this Article examines two unconstitutional courses, one historic and one contemporary—and both quite prominent. The historic example reaches back to *Swift v. Tyson*, a decision that invited inferior federal courts to create a kind of federal common law.[27] The more contemporary example concentrates on *Williams v. Taylor*, a decision that interprets central portions of the Anti-terrorism and Effective Death Penalty Act (AEDPA).[28] In both *Swift* and *Williams*, this Article contends, the Court designed unconstitutional decisionmaking systems. And in one (viz., *Williams*) more than the other, the Court raised serious concerns about federal court integrity, individual litigants' rights, and the Supreme Court's conception of the "judicial Power."[29]

A few comments about the scope of this Article should be made at the outset. To start, it is important to stress that this piece does *not* pretend to explore every "unconstitutional course" that the Court has charted. It merely attempts to take the first step in a more comprehensive examination of these "courses,"[30] using two salient examples to give the thesis more distinct shape.

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26. *See* Lawson, *supra* note 11, at 211.

27. Swift v. Tyson, 41 U.S. 1 (1842). *See also* Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).

28. 529 U.S. 420 (2000); *see also* 28 U.S.C. § 2254(d) (2000).

29. These functional, institutional, and structural ideas are explored at greater length, *infra* sections III and IV. *Cf.* Irons v. Carey, 408 F.3d 1165 (9th Cir. 2005) (ordering the government to "be prepared to give an indication" of section 2254(d)'s constitutionality "in light of Marbury v. Madison, 5 U.S. (1 Cranch.) 137 (1803), and City of Boerne v. Flores, 521 U.S. 507, 536 (1997)"); Irons v. Carey, No. 05-15275, order at 1-2 (9th Cir. May 18, 2005) (same).

30. Other "courses" may emerge in the Court's Fourth Amendment and qualified immunity

It is equally important to stress this Article's modest claim to originality in discussing the Court's recent habeas jurisprudence. Since its passage, AEDPA—and the seismic shift in habeas jurisprudence it represents[31]—has proven an unusually fertile ground for debate.[32] Thoughtful, often clever readings of the statute's text have been proposed;[33] the habeas "mousetrap" has been redesigned;[34] and AEDPA has been located in historical, social, and penological context.[35] This piece will not revisit much of that work. Nor does this piece intend to offer an exhaustive account of *Erie* doctrine, judicial misallocation of decisionmaking authority, or the rights-remedies chasm. Rather, this Article aims to tease out a narrow, if far-reaching, jurisdictional idea, a thesis that touches directly on fundamental constitutional concerns.[36]

This Article is separated into five parts. Part I develops the idea of an "unconstitutional course"—the notion that the Court has, on occasion, propounded impermissible and unconstitutional decisionmaking frameworks. As part I explains, not all contentious Supreme Court decisions blaze unconstitutional courses; indeed, very few do. But there exists a small subset of Supreme Court opinions that do more than require inferior federal courts to adhere to dubious—even subsequently

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doctrines. *Cf.* Ann Woolhandler, *Demodeling Habeas*, 45 STAN. L. REV. 575, 636 (1993) (discussing the "[a]doption of the reasonableness standard" in these—and other—contexts). *See also* Louise Weinberg, *When Courts Decide Elections: The Constitutionality of* Bush v. Gore, 82 B.U. L. REV. 609 (2000) (positing *Bush v. Gore* as a kind of "unconstitutional course"—albeit one without obvious ancestry or progeny).

31. *When* a petition will be reviewed on the merits, *how* it would be considered, *what claims* may be presented, *why* a state court's decision may be displaced—under AEDPA, the answers to all of these questions changed. *See, e.g.*, Evan Tsen Lee, *Section 2254(d) of the New Habeas Statute: An (Opinionated) User's Manual*, 51 VAND. L. REV. 103, 106–07 (1998).

32. *See, e.g.*, Cole, *supra* note 19, at 2481; Barry Friedman, *Under the Law of Federal Jurisdiction: Allocating Cases Between Federal and State Courts*, 104 COLUM. L. REV. 1211 (2004) (citing, *e.g.*, Barry Friedman, *Habeas and Hubris*, 45 VAND. L. REV. 797, 799–802 (1992); Barry Friedman, *Pas De Deux: The Supreme Court and the Habeas Courts*, 66 S. CAL. L. REV. 2467, 2467 (1993); James S. Liebman, *An "Effective Death Penalty?" AEDPA and Error Detection in Capital Cases*, 67 BROOK. L. REV. 411, 414 (2001); James S. Liebman, *Opting for Real Death Penalty Reform*, 63 OHIO ST. L.J. 315, 333–36 (2002)); *see also* Daniel J. Meltzer, *Habeas Corpus Jurisdiction: The Limits of Models*, 66 S. CAL. L. REV. 2507 (1993).

33. *See, e.g.*, Tsen Lee, *supra* note 31.

34. Tung Yin, *A Better Mousetrap: Procedural Default as a Retroactivity Alternative to* Teague v. Lane *and the Antiterrorism and Effective Death Penalty Act of 1996*, 25 AM. J. CRIM. L. 203 (1998).

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

36. One such concern is the lack of a direct *inter*-institutional check on the Court's *intra*-institutional efforts. *See infra* Parts I and IV; Lawson, *supra* note 11, at 195 (noting that there is very little Congress can do *"even if the courts' own methods for deciding cases . . . are unconstitutionally wrong"*).

changed—interpretations of substantive law. Decisions within this small subset affirmatively force courts to decide cases in unconstitutional ways—by ignoring things that should not be ignored, considering things that should not be considered, and asking questions that should not be asked.

Part II locates the idea of unconstitutional courses in historical context. To this end, part II briefly reviews *Swift v. Tyson*, exploring both the theoretical and the functional problems with *Swift*'s decisionmaking methodology. Part II then draws the analysis back to the broader unconstitutional course thesis, briefly noting the ways in which *Swift* is (and is not) a troubling decisional model.

Part III discusses a second unconstitutional course, one that governs a significant portion of contemporary habeas corpus law. As a part of this analysis, part III offers an opinionated review of *Williams v. Taylor*, the Court's recent interpretation of AEDPA's "state review" provision. Part III then explains how this interpretation requires courts to make decisions in impermissible ways—*and* how it forges a kind of constitutional purgatory, a doctrinal nether-region in which federal courts are required to ratify constitutional error.[37]

Part IV examines the more troubling aspects of unconstitutional courses, especially those of a modern stripe. Some of these unconstitutional courses, part IV explains, run impermissible means to impermissible ends; they force, that is, federal courts to reach unconstitutional outcomes.[38] As this happens, unconstitutional courses stray into precarious theoretical and doctrinal territory.[39] Part IV surveys this territory, asking (and briefly answering) a number of pressing "course-related" questions: Are there inter-institutional checks on Court-made unconstitutional courses? If not, how far may these courses go? May the Court redefine full categories of substantive protections simply by crafting "deferential" procedural models?

Part V closes this Article, noting that Congress's almost habitual jurisdiction-stripping efforts may continue to fall short—but that, in their

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37. Early v. Packer, 537 U.S. 3 (2002); Williams v. Taylor, 529 U.S. 420 (2000).

38. *See* Gunther, *supra* note 7, at 910.

> [V]irtually all the commentators agree that, even if Congress can withdraw jurisdiction from the federal courts in a whole class of cases, it cannot allow a federal court jurisdiction but dictate the outcomes of cases, or require a court to decide cases in disregard of the Constitution. That is a significant limitation.

Id. *See* Liebman & Ryan, *supra* note 15, at 886; Kent S. Scheidegger, *Habeas Corpus, Relitigation, and the Legislative Power*, 98 COLUM. L. REV. 888, 954 (1998).

39. *See* United States v. Klein, 80 U.S. (13 Wall.) 128 (1871).

noisy failure, they may obscure another potent threat to the "judicial Power."

I. UNCONSTITUTIONAL COURSES

Imagine that the Supreme Court required all civil rights claims to be decided by flipping a coin.[40] Or that all antitrust issues were to be resolved by consulting a "Delphic oracle."[41] Or even that all copyright questions were to be answered by "studying the entrails of a dead fowl."[42]

Something about these instructions seems—even *feels*—wrong, if still curiously close to reality.[43] But what about these instructions is so unacceptable? Nothing about the coin or the oracle or the entrails ensures that a court will reach the wrong *result* in any particular case, so what prohibits the Court from making such demands?

The answer,[44] of course, has to do with process—and the deep procedural flaws in these coin-flipping, oracle-consulting, and entrails-studying models.[45] "Procedure" has never been easy to define.[46] In some contexts, "procedure" is merely a collection of "decision rules," a set of baseline standards that shape the mechanics of adjudication;[47] in others, it is an alternative to (or bar against) consideration of the merits of a case;[48]

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40. *See, e.g.*, LaPine Tech. Corp. v. Kyocera Corp., 130 F.3d 884, 891 (9th Cir. 1997) (Kozinski, J., concurring) ("I would call the case differently if the agreement provided that the district judge would review the award by flipping a coin or studying the entrails of a dead fowl.").

41. *See, e.g.*, Jackson v. City of Chicago, 215 F. Supp. 2d 975, 977 (N.D. Ill. 2002) ("What is thus called for at this point is a divination of entrails, without even the benefit of an opaque pronouncement from any Delphic oracle.").

42. *LaPine*, 130 F.3d at 891 (Kozinski, J., concurring). Entrails of various types occupy a surprisingly prominent spot in federal doctrine. *See, e.g.*, Artway v. Att'y Gen. of N.J., 81 F.3d 1235, 1272 (3d Cir. 1996) ("Any efforts of the lower courts in the federal system to interpret the sometimes Delphic pronouncements from the Supreme Court can on occasion resemble (to mix metaphors) the divination of entrails."); Salem Nat. Bank v. Smith, 890 F.2d 22, 24 (7th Cir. 1989) ("Appellate opinions are not like the entrails of sheep, to be read for omens.").

43. *See, e.g.*, Reyes v. Seifert, 125 F. App'x 788, 789 (9th Cir. 2005) (finding no remediable injury where a juror "based his decision to vote guilty on the result of a coin flip").

44. Perhaps this answer is only the most obvious of many, but it is the one that matters here.

45. *See* U.S. CONST. amends. V, XIV; Martin H. Redish & Lawrence C. Marshall, *Adjudicatory Independence and the Values of Procedural Due Process*, 95 YALE L.J. 455, 472 (1986).

46. *See* Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181, 193 (2004).

47. *Id.* at 201 (citing Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625 (1984)). Perhaps the most famous heuristic for dividing procedural from substantive is Justice Harlan's "primary"-or-"secondary" test in Hanna v. Plumer, 380 U.S. 460, 475 (1965) (Harlan, J., concurring). This test has proven quite durable, see Schriro v. Summerlin, 124 S. Ct. 2519, 2523–24 (2004), but it is not without its critics. *See* Ely, *supra* note 16, at 699–700.

48. Retroactivity, adequate and independent state grounds, and procedural default all raise questions here, especially in the habeas context. In each, "procedure" seems to take a rather

in still others, it is whatever "substantive law" is *not*.[49] All of these definitions prove somehow accurate, if only partially so.[50]

And all of these definitions imply something unremarkable: Procedure *matters*. It matters enough, in fact, that *some* procedural errors face real (if imperfect[51]) doctrinal restraints.[52]

But not all types of procedure confront similar limits, even when they touch the heart of the adjudicative system. There is no robust restraint, for example, on the specific *decisionmaking* steps that courts take or the analytical procedures that courts follow. When federal courts make decisions in subtly[53] unconstitutional ways, in fact, there may be nothing to stop them.

But why is this so? Do the courts' *decisionmaking* procedures simply not matter? Do they matter only in extreme cases? Or might these decisionmaking procedures present real (constitutional) problems—even in cases *not* involving coins, oracles, or entrails?

To begin answering these questions, this section develops the idea of "unconstitutional courses." Subsection A offers an initial explanation of *what* these "courses" are and *why* these courses are so often overlooked; it also puts forward an (intentionally implausible) example of an impermissible decisionmaking procedure, attempting to draw the broader "unconstitutional course" idea into greater focus. Subsection B then describes what "unconstitutional courses" are *not*, carefully distinguishing these courses from other types of Court-made unconstitutionality.

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idiosyncratic form. *See* Anthony J. Bellia, Jr., *Federal Regulation of State Court Procedures*, 110 YALE L.J. 947, 996 (2001) ("Of course, what is procedure for purposes of retroactivity differs from what is procedure for purposes of what law emanating from another jurisdiction a forum state must enforce." (citing Walter W. Cook, *"Substance" and "Procedure" in the Conflict of Laws*, 42 YALE L.J. 333, 341–43 (1933))).

49. Some follow a kind of intuitionist's approach to the procedure-substance divide, believing that they will know procedure when they see it. *But cf.* Solum, *supra* note 46, at 194–95 (debunking this notion). But no matter what definitional framework one uses, the lines are quite "hazy." Erie R.R. Co. v. Tompkins, 304 U.S. 64, 92 (1938) (Reed, J., concurring). Even Professor Ely's famous taxonomy draws rather fine distinctions. *See* Ely, *supra* note 16, at 724–25 (Procedural rules are "designed to make the process of litigation a fair and efficient mechanism for the resolution of disputes"; substantive law is law governing a right granted for some purpose not related to "the fairness or efficiency of the litigation process.") (citations omitted).

50. *See* Solum, *supra* note 46, at 183.

51. *See* Stephen Reinhardt, *The Anatomy of an Execution: "Fairness" v. Process*, 74 N.Y.U. L. REV. 313, 320 (1999).

52. Errors in the appellate process, see, for example, Griffin v. Illinois, 351 U.S. 12, 16 (1956); errors in trial argument, see, for example, New York Cent. R.R. Co. v. Johnson, 279 U.S. 310, 312–13 (1929), and errors involving the jury, see for example, Miller-El v. Dretke, 545 U.S. 231 (2005); Johnson v. California, 545 U.S. 162 (2005), all fit this mold.

53. Coin-flipping, oracle-consulting, and entrails-studying are anything but subtle.

A. What They Are

So why do the courts' decisionmaking procedures attract so little attention? If it is truly "silly to say that the core of the judicial power is merely the power to reach a result," why is it so easy to ignore the analytical "process by which that result is reached"?[54]

Part of reason is the shrouded character of judicial decisionmaking—what Justice Cardozo called the mysterious "brew[ing]" of a "strange compound . . . in the caldron of the courts."[55] Since even judges labor to describe the "process[es] . . . followed" in deciding cases, it is no surprise that those processes often avoid sustained critical attention.

Another part of reason is a nearly compulsive focus on outcomes—a (powerfully consequentialist[56]) sense that it is *ends* that matter, not means.[57]

And another, more substantial part of the reason that courts' decisionmaking procedures attract scant attention is the unlikely source

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54. Lawson, *supra* note 11, at 211.

55. BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 9 (1931) ("Any judge, one might suppose, would find it easy to describe the [decisionmaking] process which he had followed . . . . Nothing could be farther from the truth."). There are, Justice Cardozo suggests, a number of ingredients added to the decisional "brew":

> What is it that I do when I decide a case? To what sources of information do I appeal for guidance? In what proportions do I permit them to contribute to the result? In what proportions ought they to contribute? If a precedent is applicable, when do I refuse to follow it? If no precedent is applicable, how do I reach the rule that will make precedent for the future? If I am seeking logical consistency, the symmetry of the legal structure, how far shall I seek it? At what point shall the quest be halted by some discrepant custom, by some consideration of the social welfare, by my own or the common standards of justice and morals?

Id. at 10. *See also* KARL N. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 53–54 (1960); Jerome Frank, *What Courts Do in Fact*, 26 U. ILL. L. REV. 645, 653–55 (1932); Joseph C. Hutcheson, Jr., *The Judgment Intuitive: The Function of the "Hunch" in Judicial Decisions*, 14 CORNELL L.Q. 274, 281–82, 285 (1929). For an illuminating discussion of these seminal works, see Linda Ross Meyer, *Is Practical Reason Mindless?*, 86 GEO. L.J. 647, 650–51, 675 (1998).

56. Or utilitarian. *See* Solum, *supra* note 46, at 185.

57. The goal of the adjudicative system is, after all, reliable *outcomes*. Callins v. Collins, 510 U.S. 1141, 1144–45 (1994) ("Courts are in the very business of erecting procedural devices from which fair, equitable, and reliable outcomes are presumed to flow.") (Blackmun, J., dissenting); Warren Burger, *Lawrence Cooke: A Tireless Judicial Administrator*, 53 FORDHAM L. REV. 147, 147 (1984) ("[T]he courts and their procedures, like the legal profession and the laws, are not ends in themselves but a means to an end—a tool—and the end is the proper administration of justice."). But there is still a rather sinister chapter in the consequentialist's story, one in which core procedural rights transform into fungible things, systemic "costs" easy enough to bargain away. *See* John C. Jeffries, Jr., *The Right-Remedy Gap in Constitutional Law*, 109 YALE L.J. 87, 87–88 (1999) (exploring the "gaps" that develop between rights and remedies); Sam Kamin, *Harmless Error and the Rights / Remedies Split*, 88 VA. L. REV. 1 (2002); Sager, *supra* note 23, at 1224 (discussing discrepancies in "the scope of the norms of the Constitution and the scope of their judicial enforcement").

from which the most sinister procedures sometimes emerge: the Supreme Court itself. On occasion, the Court will build unconstitutional decisionmaking frameworks, systems that require inferior federal courts—and, ultimately, the Court itself—to make decisions in unconstitutional ways. Most (if not all) of these Court-prescribed decisionmaking methods appear superficially innocuous and outcome-neutral:[58] No entrails are involved; no particular outcome is foreordained.

But the core constitutional problem with these decisional structures is not one of plainly absurd decisional techniques; nor is it one of (predetermined) ends. The central problem is one of discreet analytical *means*—of facts improperly ignored, of law impermissibly considered, of questions misguidedly asked. The central problem, in short, is the "unconstitutional course"[59] that the Court charts.

This is surely a bit too abstract.[60] To bring this "unconstitutional course" idea into greater focus, it may help to consider an example, one with a touch of exaggeration. So imagine (again) that the Supreme Court has required all civil rights claims to be decided by flipping a coin.[61] Imagine, too, that Plaintiff P has filed a civil rights claim in federal court.

As it happens, Plaintiff P's claim is a strong one, and it possesses more than ample factual and legal support.[62] Under the Court's coin-flipping model, however, the strength of Plaintiff P's claim does not matter. All that matters is what the coin says.

Of course, nothing about the Court's coin-flipping model guarantees an incorrect *substantive* result. The coin may provide the "correct" substantive answer in Plaintiff P's case; it may not.

But whatever outcome the coin generates, the court will have reached its conclusion in an impermissible *way*—through an untenable decisionmaking "course." As a part of this impermissible coin-flipping course, the court will have systematically disregarded important information (e.g., the specific facts and merits of Plaintiff P's particular claim). As a part of this coin-flipping course, the court will have ignored

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58. *Cf.* Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105, 1105 (1977).

59. *See* Erie R.R. Co. v. Tompkins, 304 U.S. 64, 91 (1938) (Reed, J., concurring). Compare what Professor Lawson has deemed, in a separate context, "unconstitutionally wrongheaded[] method[s] of decision-making." Lawson, *supra* note 11, at 211.

60. *Cf.* Laurence H. Tribe, *Structural Due Process*, 10 HARV. C.R.-C.L. L. REV. 269, 269 (1975).

61. *See, e.g.*, LaPine Tech. Corp. v. Kyocera Corp., 130 F.3d 884, 891 (9th Cir. 1997) (Kozinski, J., concurring).

62. Plaintiff P's claim, for example, runs into no qualified immunity bars. *See generally* Saucier v. Katz, 533 U.S. 194 (2001).

relevant sources of law while considering prohibited ones (e.g., the coin).[63] And as a part of this course, the court will have asked the wrong legal and factual questions (e.g., heads or tails?).

Things are rarely so blatant. Few of the Court's procedural "wol[ves]"[64] take such obvious and ominous form. But the absurdity of this coin-flipping example should not obscure its essential (if banal) lesson: *How* courts make decisions can be quite important. At times, in fact, *how* courts make decisions can be unconstitutional.

B. What They Aren't

But this paints only half of the necessary picture. It is surely important to specify what an unconstitutional course *is*. But it is just as important to specify what an unconstitutional course is *not*, if only to show that unconstitutional courses will not (conveniently) appear wherever one might hope to find them.

So what *isn't* an "unconstitutional course"?

An unconstitutional course is *not* simply a disagreeable decision of substantive law. In the process of interpreting the Sixth Amendment, for example, the Court may reach a debatable, subjectively problematic, or even subsequently-changed interpretation of the confrontation clause.[65] Academics and other federal judges (including other members of the Supreme Court) may disagree with the Court's final, controlling interpretation. These critics may even think that the Court's decision is "unconstitutional" inasmuch as it conflicts with their own measures of the meaning of the Sixth Amendment.[66]

But this type of substantive (interpretative) disagreement matters very little, at least in a narrow sense. When the Supreme Court says that the confrontation clause means X, X is what the confrontation clause means—officially, if not epistemologically.[67] X is, to echo a familiar maxim, "the

63. *See* Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842).

64. *Cf.* Morrison v. Olson, 487 U.S. 654, 699 (1988) (Scalia, J., dissenting) ("[T]his wolf comes as a wolf.").

65. *Cf.* Crawford v. Washington, 541 U.S. 36 (2004) (abrogating Ohio v. Roberts, 448 U.S. 56 (1980)). *Cf.* Lawrence v. Texas, 539 U.S. 558, 578 (2003) ("Bowers v. Hardwick[, 478 U.S. 186 (1986),] should be and now is overruled."); Brown v. Bd. of Ed., 347 U.S. 483, 494–95 (1954) ("Any language in Plessy v. Ferguson[, 163 U.S. 537 (1896),] contrary to this finding is rejected.").

66. Or, perhaps, the judges' own "good conscience." *See* Rico v. Terhune, 63 F. App'x 394 (9th Cir. 2003) (Pregerson, J., dissenting in part).

67. This oversimplifies the debate fairly significantly, but the relevant point remains: When a majority of Supreme Court Justice interprets a particular provision of substantive law to mean X, that is what the provision means.

law of the land."[68] An inferior federal court may not disregard the X-interpretation when applying the confrontation clause, even if the lower court thinks the clause *should* mean Y.[69]

Were the Supreme Court to reinterpret all of the Bill of Rights in a particularly insidious way, in fact, no "unconstitutional course" would necessarily emerge—not because the Supreme Court's authority to declare what the law "is" makes the institution intellectually infallible, but because that authority makes it substantively "right."[70]

When the Court *does* chart an unconstitutional course, the primary concern is not *substantive* law—whether the Sixth Amendment,[71] the Rules of Decision Act,[72] or otherwise. The central problem is *how* federal courts may (or must) go about making decisions: *how* the federal courts must systematically disregard important information;[73] *how* the courts must consider prohibited sources of law;[74] *how* the courts must contravene established definitions of substantive law; and *how* the courts must reach outcomes in a manner inconsistent with—and antithetical to—the Constitution itself.

In some contexts, this is more than problem enough. Since *how* a court answers a question can be as important as *what* it decides—Justice Cardozo's skepticism notwithstanding[75]—a flawed decisionmaking method raises serious analytical and constitutional concerns.[76] These

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68. *See* CHOPER, *supra* note 6, at 6.

69. *See* Richard H. Fallon, Jr., *Stare Decisis and the Constitution: An Essay on Constitutional Methodology*, 76 N.Y.U. L. REV. 570, 570–71 n.1 (2001) (citing, for example, Larry Alexander, *Constrained by Precedent*, 63 S. CAL. L. REV. 1, 4 (1989); Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 575 (1987)); *see also* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 113 (1978) (discussing the idea of "precedent"). Adherence to the "powerful" doctrine of *stare decisis* on matters of substantive law, however unpleasant, is simply the role of inferior federal courts—as well as the basis of a properly functioning judiciary. *See, e.g.*, Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 861 (1992) (O'Connor, Kennedy, and Souter, JJ.). Which is not to say that a *principled* theory of precedent exists. All we have—as Judge Easterbrook explains—is a "grand balancing test, [one] with no maximand nor weights to produce a decision where criteria are in conflict." Frank H. Easterbrook, *Stability and Reliability in Judicial Decisions*, 73 CORNELL L. REV. 422, 422 (1988); *cf.* CHOPER, *supra* note 6, at 148–55, and accompanying notes (discussing "[t]he substantial number of instances in which lower courts (state as well as federal) and law enforcement officials have sought to subvert [] [] Court[] decisions").

70. As Justice Jackson rather famously noted, the Court is "not final because [it is] infallible"; the Court is "infallible only because [it is] final." Brown v. Allen, 344 U.S. 443, 540 (1953) (Jackson, J., concurring).

71. U.S. CONST. amend. VI.

72. 28 U.S.C. § 1652 (2000).

73. *See* Swift v. Tyson, 41 U.S. (Pet. 16) 1 (1842).

74. The "brooding omnipresence in the sky" is likely the most recognizable—if now vilified—of these sources. *See* S. Pac. Co. v. Jensen, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting).

75. *See* CARDOZO, *supra* note 55, at 9; LLEWELLYN, *supra* note 55, at 53–54.

76. These concerns are discussed at length, *infra* Parts II, III, and IV.

concerns are evident, even obvious when the decisionmaking method involves flipping coins or studying entrails.

But these concerns are no less important, no less pressing when the decisionmaking method takes less conspicuous form. In *Swift v. Tyson*, the Court propounded just this type of flawed-but-inconspicuous decisionmaking system. It has done so again in *Williams v. Taylor*. The sections that follow examine and compare these unconstitutional courses. Neither *Swift*'s nor *Williams*' course is as manifestly peculiar as the flipping of coins or the studying of entrails.[77] But each course proves that the courts' specific decisionmaking structures merit serious inquiry—not simply as a nod to "procedure for procedure's sake,"[78] but as a critical record of the rise and fall of the "judicial Power."[79]

II. HISTORY'S MODEL: *SWIFT*'S UNCONSTITUTIONAL COURSE

Nearly every law student remembers something about *Swift v. Tyson*.[80] The question of New York banking law, the strained interpretation of the Rules of Decision Act,[81] the "breaching [of] the line between prescriptive and interpretive power"[82]—all of these things sound at least faintly familiar, if only as a prelude to *Erie Railroad v. Tompkins*.[83] To many of these students, *Swift* recalls a particular type of "bad"[84] law, one of those few cases eventually deemed so "intolerabl[e]" that the Supreme Court eventually reversed itself.[85]

But why is *Swift* burdened with this doctrinal scarlet letter?[86] If *Swift* really "marked [no] sudden and dramatic change from prior practice,"[87]

77. In one, however, there are oracles of a sort. *See infra* Part II.

78. *See* Redish & Marshall, *supra* note 45, at 472.

79. U.S. CONST. art. III, § 1.

80. 41 U.S. (Pet. 16) 1 (1842). *See also* TONY ALLAN FREYER, HARMONY & DISSONANCE: THE *SWIFT* AND *ERIE* CASES IN AMERICAN FEDERALISM chs. II–III (1981).

81. 1 Stat. 73, 92 (codified as amended at 28 U.S.C.A. § 1652 (1982)); *cf.* William Fletcher, *The General Common Law and Section 34 of the Judiciary Act of 1789: The Example of Marine Insurance*, 97 HARV. L. REV. 1513 (1984) (arguing that *Swift*'s decision was hardly as anomalous as generally believed).

82. J. Harvie Wilkinson, *Our Structural Constitution*, 104 COLUM. L. REV. 1687, 1694 (2004).

83. 304 U.S. 64 (1938).

84. Easterbrook, *supra* note 69, at 424.

85. Daniel J. Meador, *A Challenge to Judicial Architecture: Modifying the Regional Design of the U.S. Courts of Appeals*, 56 U. CHI. L. REV. 603, 639 (1989).

86. *See* NATHANIEL HAWTHORNE, THE SCARLET LETTER (Oxford Univ. Press 1990) (1850).

87. *See* Fletcher, *supra* note 81, at 1513, 1515 ("[L]ong before *Swift*, federal courts employed the general common law as an important part of their working jurisprudence.").

why is it so easy, to borrow Judge Easterbrook's phrase, to "see the virtue of abandoning" it?[88]

This section attempts to answer these questions. To that end, subsection A reviews some of the familiar critiques (both theoretical and functional) of *Swift*. Subsection B then addresses *Swift*'s oft-ignored but constitutionally problematic decisionmaking methodology. And subsection C locates *Swift*'s decisionmaking method within the broader unconstitutional course thesis, briefly noting the ways in which *Swift* is (and is not) a troubling decisional model.

A. Swift *in Context*

So why is it so easy to "see the virtue of abandoning" *Swift*, especially in hindsight? Part of the reason is novelty. Rarely does the Court declare one of its own decisions *philosophically* invalid.[89] When the Court does so—as *Erie* did to *Swift*—it typically causes quite a stir,[90] as well as a kind of retrospective vilification.[91]

Another part of the reason is jurisprudential theory. To many, *Swift* represents the apotheosis of an utterly misguided conception of law, a sophism of legal thought.[92] To these detractors, *Swift*'s very name evokes the long-discredited notion that the common law is a "self-sustaining body of normative authority, living through the articulations of the federal judiciary alone."[93]

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88. Easterbrook, *supra* note 69, at 424.

89. *Cf.* Lawrence v. Texas, 539 U.S. 558, 578 (2003) ("Bowers v. Hardwick[, 478 U.S. 186 (1986),] should be and now is overruled."); Brown v. Bd. of Ed., 347 U.S. 483, 494–95 (1954) ("Any language in Plessy v. Ferguson[, 163 U.S. 537 (1896),] contrary to this finding is rejected."). In *Lawrence*, the Court makes explicit that "Bowers was not correct when it was decided, and it is not correct today." 539 U.S. at 578. The *Erie* Court makes no comparable statement about *Swift*, but a similar point seems implicit in the Court's wholesale denunciation of Justice Story's opinion.

90. "The decision went unnoticed until Justice Stone wrote privately to Arthur Krock of the New York Times calling to his attention 'the most important opinion since I have been on the court.'" STEVEN YEAZELL, CIVIL PROCEDURE 224 (6th ed. 2004) (citations omitted).

91. *See, e.g.*, Easterbrook, *supra* note 69, at 424; *see also* FREYER, *supra* note 80, at chs. I–II and 2; Henry J. Friendly, *In Praise of Erie—and of the New Federal Common Law*, 39 N.Y.U. L. REV. 383 (1964); *see generally* EDWARD A. PURCELL, JR., BRANDEIS AND THE PROGRESSIVE CONSTITUTION: *ERIE*, THE JUDICIAL POWER, AND THE POLITICS OF THE FEDERAL COURTS IN TWENTIETH-CENTURY AMERICA (2000).

92. *See, e.g.*, Mark DeWolfe Howe, *The Positivism of Mr. Justice Holmes*, 64 HARV. L. REV. 529, 545–46 (1951) ("The danger to be feared in this effort to revive the concept of natural law is that it will lead us unconsciously back to the shop-worn absolutes of an earlier day."). Many others disagree with this uncharitable conception of natural law. *See, e.g.*, JOHN FINNIS, NATURAL LAW AND NATURAL RIGHT (1980); DWORKIN, *supra* note 69, at 126, 149.

93. Lawrence Lessig, *Understanding Changed Readings: Fidelity and Theory*, 47 STAN. L. REV. 395, 428 (1994) (citation omitted).

And part of the reason that *Swift* bears such a sullied mark is its long-lasting—and troubling—effect on federal court decisionmaking. In the last century, much has been written about *Swift*'s philosophical deficits.[94] In slightly more recent times, a great deal has been written about the paradigm-altering way *Erie* rejected *Swift*'s jurisprudential logic.[95] Lost in these important discussions, however, is a thoroughgoing examination of something more mechanical, more concrete: the problematic decisionmaking model that *Swift* erected and endorsed. This decisionmaking model was—as Justice Brandeis unequivocally concludes in *Erie*—itself unconstitutional.[96] This decisionmaking model is also the archetypal unconstitutional course.[97]

It is an archetype born in an unglamorous—even unremarkable[98]—setting. In a very narrow sense, *Swift* asked a pedestrian question about New York banking law: How many defenses did a "bill of exchange" carry?[99] In a slightly broader (more formal) sense, *Swift* presented a straightforward problem of lexicology: What does the word "laws" in the Rules of Decision Act (RODA)[100] mean? Does the word "laws" denote "rules and enactments promulgated by [state] legislature authority" *and* "decisions of local tribunals"—that is, "common as well as statutory law"—or does it signify statutory law alone?[101]

In an even broader (more jurisprudential) sense, of course, *Swift* involved more than semantics. Folded into *Swift*'s formal definitional exercise is a weighty philosophical question about the source and meaning of law generally: Does "positive," "obligatory" law exist exclusive of a sovereign source—i.e., is law *made* or *found*?[102]

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94. *See, e.g.*, Easterbrook, *supra* note 69, at 424; Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 51–52, 81–88, 108 (1923); Alton B. Parker, *The Common Law Jurisdiction of the United States Courts*, 17 YALE L.J. 1, 7 (1907).

95. *See, e.g.*, Jack Goldsmith & Steven Walt, Erie *and the Irrelevance of Legal Positivism*, 84 VA. L. REV. 673 (1998).

96. Erie R.R. Co. v. Tompkins, 304 U.S. 64, 79–80 (1938).

97. *Id.* at 78; *id*. at 91 (Reed, J., concurring).

98. *See* Fletcher, *supra* note 81, at 1513.

99. *Id.* at 1514 ("[*Swift* is] a decision on the law of negotiable instruments concerning the availability of defenses to a remote endorsee who had taken a bill of exchange in payment of preexisting debt.").

100. Section 34 of the Rules of Decision Act provided that "[t]he laws of the several states, except where the Constitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States . . . ." Ch. 20, § 34, 1 Stat. 73, 92 (codified as amended at 28 U.S.C. § 1652). According to Judge Fletcher, section 34 was an "afterthought" passed "without serious debate," Fletcher, *supra* note 81, at 1527, perhaps even as a "temporary provision." *Id.* at 1562.

101. Lessig, *supra* note 93, at 427.

102. *Id.*

To legal positivists[103]—whose day on the Court was yet to come—the answer to this philosophical question is plain: law is *made*, not found. There is no pre-existing body of law for courts to find; to quote Justice Holmes's famous maxim, there is "no brooding omnipresence in the sky."[104] All there is, Holmes assures, is "the articulate voice of some sovereign,"[105] whether legislative or judicial.

But to advocates of natural law—who held sway on the *Swift* Court[106]—the answer is just as plain, though precisely the opposite: law can indeed be *found*. An ethereal corpus of law does exist, just waiting to be divined.[107] And since state courts can claim no priority regarding the location and meaning of this "law"—no special faculty in divining this "omnipresence"—there is no reason to treat state court decisions as law binding on federal courts. Federal courts are, in the end, just as skilled at surveying this body of "natural" law—at playing the role, in Lord Blackstone's aphoristic phrase, of "living oracles."[108] Federal courts may even be *better* "oracles,"[109] so it makes sense that federal courts should *find* this law themselves.[110]

Swift adopted this strongly naturalistic position.[111] Lead by Justice Story, the *Swift* Court defined RODA's "laws" to include legislative

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103. *See generally* JEREMY BENTHAM, 5 THE WORKS OF JEREMY BENTHAM 233, 235 (J. Bowring ed. 1840); JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED I & V (1st ed. 1832). For two extended (and divergent) discussions of positivism generally, see H.L.A. HART, THE CONCEPT OF LAW 85–100 (1961), and DWORKIN, *supra* note 69, at 17–22.

104. *See* S. Pac. Co. v. Jensen, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting).

105. *Id.* Justice Holmes's imagery grew from solid meteorological stock. *See, e.g.*, P. DU PONCEAU, A DISSERTATION ON THE NATURE AND EXTENT OF THE JURISDICTION OF THE COURTS OF THE UNITED STATES 88 (1824) ("Like the sun under a cloud, it was overshadowed . . . ."). *See also* Fletcher, *supra* note 81, at 1517 (calling Holmes's brand of positivism both "time- and culture-bound," a far cry from nineteenth century conceptions of "a general system of jurisprudence . . . constantly hovering over [] local legislation and filling up its interstices") (citations omitted).

106. *See, e.g.*, 1 J. KENT, COMMENTARIES ON AMERICAN LAW 471–78 (1884); GERALD DUNNE, JUSTICE JOSEPH STORY AND THE RISE OF THE SUPREME COURT 406–08 (1970).

107. Jonathan T. Molot, *Principled Minimalism: Restriking the Balance Between Judicial Minimalism and Neutral Principles*, 90 VA. L. REV. 1753, 1766 (2004) (noting that a "natural law" judge would not dictate particular outcomes in future cases, but "would simply articulate principles that a subsequent judge inevitably would find on his own in the course of deciding a subsequent case").

108. WILLIAM BLACKSTONE, 1 COMMENTARIES 69 (U. Chi. 1979); *see also* Dennis Nolan, *Sir William Blackstone and the New American Republic: A Study of Intellectual Impact*, 51 N.Y.U. L. REV. 731 (1976).

109. Lessig, *supra* note 93, at 427–30.

110. *Id.*

111. Swift v. Tyson, 41 U.S. (16 Pet.) 1, 17 (1842). Some keen observers have attempted to recast *Swift* as a subtly pro-positivistic decision. *See, e.g.*, WILLIAM CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES (1953). Clever as these attempts may seem, however, they are surely more *post hoc* contrarianism than accurate description. *See* William Casto,

proclamations—that is, "positive" statements from legislatures—and nothing more.[112] To the *Swift* Court, state court decisions were mere "pronouncements" by judges, judicial conclusions reached through what Professor Lessig has called a process of "scientistic" adjudication—a relatively orderly investigation of some overarching, intangible body of "law."[113] Federal courts, *Swift* explained, need not accept these state-court "pronouncements" as binding authority, even when the law to be "found" involved a narrow question of state law. Indeed, since state courts possess no special talent in this empirical law-finding enterprise, federal courts may—perhaps *must*[114]—"find" "general federal common law" themselves.

Swift's extended denouement is well chronicled. In the near-century after the decision, *Swift* came to represent the triumph of a specific conception of common law, one in which state-court decisions were only "evidence" of the law, not law itself.[115] During this time, federal courts developed "some twenty-eight areas of [federal] common law jurisprudence."[116]

As time passed, however, cracks in *Swift*'s foundation started to expand.[117] Some of these cracks took practical (or structural) form. One such crack exposed a serious separation-of-powers defect, a kind of unsustainable *judicial* overreaching[118] that permitted federal *courts* to "declare federal law [even] on questions over which *Congress* could not

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The Erie *Doctrine And the Structure of Constitutional Revolutions*, 62 TUL. L. REV. 907, 918 (1988) (calling these efforts "anachronistic"). A tighter reconceptualization of *Swift* comes from Professor Horwitz, who has argued that Justice Story's decision was something of a stalking horse—a less than "serious[]" manipulation of "orthodox legal theory" intended to advance commercialism. MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780–1860, 245–50 (1977). Perhaps a deep pro-entrepreneurial spirit did motivate Justice Story; perhaps *Swift* really *was* a nod to business in the guise of natural law. But *Swift* has always *represented* something different, viz., a pinnacle of naturalistic legal reasoning.

112. *See* Lessig, *supra* note 93, at 427 (exploring the roots of Justice Story's decision to read "laws" narrowly).

113. *Id.* In this sense, Professor Lessig explains, *Swift* is a triumph of "Baconian empiricism," a system in which "[s]cience became the premise for common law studies . . . . Law was, in this view, a science, where jurists, like scientists, were seeking truth, and where this search for juristic truth could be separated from political ends." Lessig, *supra* note 93, at 428–30 ("We are likely to resist this description of jurists of the nineteenth century, in part because we misunderstand what they meant by 'science.'").

114. Under *Swift*, federal courts may even be *required* "to express [their] own opinion[s] of the true result of the [] law upon the [presented] question[s]." 41 U.S. at 19.

115. *Id.* at 18–19.

116. Lessig, *supra* note 93, at 426.

117. *Id.* at 430.

118. Professor Strauss has called this an over-extended "privilege of federal courts." Strauss, *supra* note 6, at 913.

legislate."[119] Another such crack revealed a deep federalism flaw, a kind of unsustainable *federal* overreaching that permitted a *federal* institution to exercise the power of *state* legislatures.[120]

As these more practical cracks widened, *Swift*'s philosophical deficits began to emerge as well. With *Swift*'s conception of common law came an entirely contestable—and increasingly contested[121]—naturalistic jurisprudential philosophy, a belief in some "brooding omnipresence in the sky."[122] In the near-century following *Swift*, this philosophy drew ever-increasing fire—not least from some members of the Court.[123]

Erie struck the decisive (judicial) blow in this contest. In *Erie*, *Swift*'s supposed philosophical "fallacy" was exposed, its specious dependence on a "transcendental body of law outside any particular State but obligatory within it" undercut.[124] To the *Erie* Court, *Swift*'s interpretation of the word "laws" was worse than wrong; it was itself unconstitutional—*not* "because the federal common law rules that had been developed under it were encroaching on areas of 'state substantive law' or 'state law governing primary private activity,'"[125] but because "nothing in the Constitution provided the central government with a general lawmaking authority of the sort" *Swift* condoned.[126] As the *Erie* Court understood it, *Swift*'s very existence depended on a profound misconception of the way law is spoken and understood.[127] Only by fundamentally "transform[ing]" this invalid discourse,[128] *Erie* concluded, could the Court's path be set aright.

B. Swift*'s Course*

For good reason, this exceptional shift in jurisprudential philosophy has attracted a great deal of academic attention. The triumph of a Holmesian type of legal positivism,[129] the scaling back of the judiciary's "prescriptive

119. *Id.* at 912–13; *see also* Wilkinson, *supra* note 82, at 1694.

120. *See* Lessig, *supra* note 93, at 431.

121. *Id.*

122. *See* S. Pac. Co. v. Jensen, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting).

123. *See, e.g.*, *id.*

124. Erie R.R. Co. v. Tompkins, 304 U.S. 64, 79 (1938) (noting that this law could be "changed by statute") (quoting Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S. 518, 533 (1928) (Holmes, J., dissenting)).

125. *See* Ely, *supra* note 16, at 702–04 ("[I]t is on precisely those areas that new federal domestic legislation inevitably encroaches.").

126. *Id.* at 703.

127. *See* Lessig, *supra* note 93, at 432 ("One discourse died, and another replaced it, and it is from this contestation in the discourse about law that *Erie* got its sanction.") (citation omitted).

128. *Id.*

129. *See, e.g.*, S. Pac. Co. v. Jensen, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting).

power,"[130] the power of *Erie*'s federalist theme,[131] the pattern of doctrinal change that *Erie* represents[132]—all have prompted detailed review.

But *Erie* did more than signal a shift in dominant legal philosophy, a repudiation of *Swift*'s conception of "law." *Erie* denounced *Swift*'s method (or means) of judicial decisionmaking; it condemned, that is, the impermissible analytical procedure—the "unconstitutional course"—that *Swift*'s naturalism condoned.[133] Put in more abstract terms, *Erie* rejected the *why* of *Swift*, *and* it rejected the *what* of *Swift* as well.[134]

To give content to this *why*-and-*what* notion, it is helpful to consider how an inferior federal court would decide a case using *Swift*'s decisional model. In generic terms, *Swift*'s decisionmaking system proceeds in two steps: The federal court must first determine if any germane, *Swift*-recognized "positive" law—that is, statutory law—guides resolution of the relevant question. If there is applicable statutory direction, the federal court must abide that law as "obligatory."[135] But if there is no applicable legislative pronouncement, the court may then *find* its own law, looking to a body of "transcendental" law for instruction—and consulting analogous state—court common law only as the federal court sees fit.

A slight twist on *Swift*'s facts offers a specific illustration of this (unconstitutional) two-step decisionmaking process. In this fictional example, the question before the federal court is how many defenses a "bill of exchange" carries—this time under New Jersey law.[136] Like New York (in 1841, at least), New Jersey lacks a statutory index of the relevant defenses, so, under *Swift*, there is no "obligatory," "positive" law to direct the court's analysis. As it happens, New Jersey's courts have already answered this precise question, exhaustively cataloguing the defenses available. But this state-court common law is, under *Swift*, of little moment. Such decisions are "at most evidence of what the laws are"; they are "not themselves laws."[137] It falls to the federal court, then, to determine for itself how many defenses exist—i.e., to "find" the answer by

130. Wilkinson, *supra* note 82, at 1694.

131. *See* Strauss, *supra* note 6, at 913.

132. *See* Lessig, *supra* note 93, at 432–33.

133. *Erie*, 304 U.S. at 78, 91.

134. *See* Lawson, *supra* note 11, at 210 ("One cannot decide cases without bringing to bear some decision-making methodology . . . .").

135. *Swift*, 41 U.S. at 17.

136. *See id*. The analogy is to *Swift* itself.

137. *Id.* at 18–19 ("Undoubtedly, the decisions of the local tribunals upon such subjects are entitled to, and will receive, the most deliberate attention and respect of this court . . . .").

consulting some "transcendental body of law outside any particular State but obligatory within it."[138]

In the end, the federal court may "find" ten defenses; it may find five. The court's decision may comport with existing state common law; it may not. The outcome may appear objectively correct on the facts; it may not.

What the particular outcome is, however, is not the essence of the constitutional problem. The source of the constitutional problem is *how* the federal court made its decision: how that decisionmaking process involved an untenable aggrandizement of *federal* power, how it depended on an untenable aggrandizement of *judicial* power, how it relied on an ephemeral "brooding omnipresence," and *how* it overemphasized empiric and scientistic adjudication.[139] These *how* problems do more than raise concerns of form and theory. They turn *Swift*'s decisionmaking process into an inherently unconstitutional enterprise, placing all *Swift*-abiding federal courts on an unconstitutional decisionmaking "course."

C. Swift*'s Dangers*

It bears emphasis that nothing about *Swift*'s decisionmaking "course" guarantees federal courts will reach incorrect—let alone unconstitutional—substantive *outcomes*. In some contexts, *Swift*-following federal courts will "find" "correct" substantive results; in some contexts, these courts will even reach conclusions consistent with state common law, partially ameliorating *Swift*'s significant federalism tension.

But even these "correct" and "consistent" decisions are constitutionally infirm because of the decisionmaking method used to achieve them. By attempting to "find" law, by consulting a "brooding omnipresence," by overextending both *federal* and *judicial* power, the federal court follows an unconstitutional decisional course—no matter what outcome the court reaches.

It likewise bears emphasis that this is a constitutional problem of the Court's own creation. In the abstract, the idea of Court-created unconstitutionality may seem—and may actually *be*—unexceptional. Every so often, the Court will change its interpretation of the Constitution, sometimes in ways that puzzle even the most meticulous of "fidelity"

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138. Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S. 518, 533 (1928) (Holmes, J., dissenting).

139. This adjudicative approach had plenty of other (sometimes more superficial) problems: It risked unnecessary inconsistency between state and federal courts within the same state, and it encouraged a rather cynical type of forum shopping. *See id.* at 533.

theorists.[140] These interpretive shifts occasionally require the Court to refute (or to undo entirely) existing precedent. As this happens, prior Court interpretations of the Constitution are reframed as themselves unconstitutional: *Brown v. Board*[141] deemed *Plessy v. Ferguson*[142] constitutionally invalid; *Lawrence v. Texas*[143] did the same to *Bowers v. Hardwick*.[144]

In significant ways, *Plessy*, *Bowers*, and *Swift* are birds of an unconstitutional feather. Each signifies a particular type of Court-made unconstitutionality—a particular type of "intolerabl[y]" "bad" law.[145] Each suffered reversal by subsequent Supreme Court doctrine.

But *Swift* is not a perfect partner to *Plessy* and *Bowers*. *Swift*'s constitutional invalidity has a different resonance, a different scope than *Plessy*'s and *Bowers*'. Where *Plessy* and *Bowers* announce dubious (and later rejected) interpretations of *substantive* law, *Swift* erects an unconstitutional *decisionmaking* apparatus. Where *Plessy* and *Bowers* (mis)construe specific portions of the Constitution, *Swift* allows federal courts to develop an entirely new (and relatively unconstrained) body of common law. And where *Plessy* and *Bowers* put inferior federal courts in the typical (if sometimes uncomfortable) position of adhering to *stare decisis*, *Swift* puts inferior federal courts in the remarkable position of making decisions according to an impermissible procedural framework—i.e., according to an unconstitutional course.

Rare as these unconstitutional courses may be, *Swift* demonstrates that they do, on occasion, develop. For some of these courses, the remedy is obvious and (perhaps) inevitable, the damage wrought more theoretical than real.[146] For other courses, however, the remedy is neither obvious nor easy, the damage neither abstract nor trivial. *Swift*'s unconstitutional course may well fit safely in the first category. *Williams v. Taylor*'s unconstitutional course seems to fit just as securely in the second.

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140. *See* generally Symposium, *Fidelity in Constitutional Theory*, 65 FORDHAM L. REV. 1247 (1997); Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165 (1993).

141. 347 U.S. 483 (1954).

142. 163 U.S. 537 (1896).

143. 539 U.S. 558 (2003).

144. 478 U.S. 186 (1986).

145. Meador, *supra* note 85, at 639.

146. *Erie* unraveled *Swift*'s "unconstitutional course." But even if the Court had refused to self-correct, *Swift*'s course could have been easily righted. Congress, for one, could have modified RODA. State legislatures, for another, could have made more "positive" law. This latter option, to be sure, elides many of *Swift*'s fundamental problems, but it did exist as a "fix" of sorts, however limited it might have been.

III. A MODERN TURN: *WILLIAMS*' UNCONSTITUTIONAL COURSE

In many ways, *Williams* is a modern-day *Swift*. Like *Swift*, *Williams* grows from deep historical roots.[147] Like *Swift*, Williams raises serious pragmatic and philosophical questions—about vague constitutional provisions[148] *and* cryptic statutory law,[149] about recondite Court doctrine[150] *and* federal court power.[151] And like *Swift*, *Williams* prescribes a specific decisionmaking procedure.

But *Swift* and *Williams* are far from a matched set. They address very different substantive legal questions. They make largely irreconcilable contributions to the federalism debate.[152] They invest federal courts with very different levels of decisional latitude. And they announce very different kinds of unconstitutional courses, *Williams*' version proving far more pernicious than its predecessor.

This section takes an extended look at *Williams*' unconstitutional course. Subsection A begins with a brief review of modern habeas corpus law, focusing in particular on the broader jurisprudential questions informing much of the habeas debate. Subsection B then situates this long-running debate within contemporary doctrine, examining the Court's interpretation of the AEDPA—and the Act's state-review provision in particular. In support of this discussion, subsection C highlights a few of the more salient flaws in Williams' AEDPA analysis. Subsection D follows with a detailed consideration of a particularly subtle but particularly important flaw, viz., *Williams'* prescription of an unconstitutional course.

A. Williams*' Context: Habeas Corpus*

Federal habeas review of state court decisions is a peculiar project. At once foreign and familiar, habeas seems to have a bit of everything,

147. *See* Larry W. Yackle, *The Habeas Hagioscope*, 66 S. CAL. L. REV. 2331, 2337 (1993) [hereinafter Yackle, *Hagioscope*].

148. Compare *Erie*'s cryptic constitutionalism, 304 U.S. at 78, with the Suspension Clause, U.S. CONST. art. I, § 9, cl.2.

149. *See, e.g.*, Yackle, *Hagioscope*, *supra* note 147, at 2431.

150. *See, e.g.*, Teague v. Lane, 489 U.S. 288 (1989); Penry v. Lynaugh, 492 U.S. 302 (1989); Butler v. McKellar, 494 U.S. 407 (1990); Wright v. West, 505 U.S. 277 (1992); Brecht v. Abrahamson, 507 U.S. 619 (1993).

151. *See, e.g.*, Cole, *supra* note 19, at 2481.

152. *Swift* inserted federal courts into an area of state law; *Williams* shields state-court errors of federal law.

"open[ing] a window on the workings of our national government."[153] For this reason, habeas has been the source of serious debates—or, to borrow Professor Yackle's more vigorous metaphor, pitched "ideological" "battle[s]"[154]—for decades.[155] Should habeas review upset typical rules of preclusion and deference? Is federal habeas review of state-court decisions irreconcilably inconsistent with federalism?[156] Does federal habeas review depend on an epistemological myth, a fiction that excuses potentially "endless" strings of collateral litigation because some "possibility of mistake always exists"?[157] The questions are myriad—and quite durable in the "long and distinguished" history of the "Great Writ."[158]

Over time, the responses to these questions have grown just as commonplace, if not altogether ossified.[159] To its staunchest critics, federal habeas review of state court decisions is (and has always been) a blatant affront to state autonomy. Habeas review, the critics observe, makes a state institution unnecessarily subordinate to a federal one, superimposing an inferior federal court as a kind of state appellate tribunal.[160] At most, these critics contend, federal habeas review should ensure that state courts abide baseline jurisdictional and process-based guarantees—what Justice Pitney once termed "established modes of procedure."[161] It should not

153. Yackle, *Hagioscope*, *supra* note 147, at 2331.

154. *Id.*

155. *See, e.g.*, Dallin Oaks, *Habeas Corpus in the States 1776–1865*, 32 U. CHI. L. REV. 243 (1965); Dallin Oaks, *Legal History in the High Court—Habeas Corpus*, 64 MICH. L. REV. 451 (1966); Scheidegger, *supra* note 38, at 928–33.

156. Federal habeas corpus has always confronted a kind of paradox. On the one hand, habeas corpus exists to allow prisoners to challenge—i.e., to "appeal"—putatively incorrect decisions of law, often those made by state courts. Yackle, *supra* note 35, at 409 (citation omitted). On the other hand, habeas is an extraordinary judicial remedy, not an opportunity to "relitigate [all] state trials." *Id.* at 411.

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

158. Yackle, *Hagioscope*, *supra* note 147, at 2337.

159. *Id.* at 2431 (noting that the debate is "charged by ideological differences that have changed very little over the years").

160. *Id.* at 2333.

161. *See* Frank v. Mangum, 237 U.S. 309, 326 (1915). Since 1867, this process-based limit has been difficult to defend. Like the Acts that followed it, the Habeas Corpus Act of 1867, Act of Feb. 5, 1867, ch. 27, 14 Stat. 385 (amending Act of May 11, 1866, ch. 80, 14 Stat. 46), imposes no process limit and announces no exception for particular types of state-court decisions. Yackle, *Hagioscope*, *supra* note 147, at 2338; *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."). So, however valid this process, or jurisdiction-based limit might have been, it no longer holds much jurisprudential water. *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

open the door to federal reconsideration of every manner of constitutional claim,[162] for universal habeas review would only "bur[y]" the federal courts "in a flood" of (often meritless) habeas petitions.[163]

Advocates of more vigorous habeas review have long struggled to rebut the critics' claims—not least because the critics are, in some ways, quite right: federal habeas review of state-court decisions *does* imply a federal distrust of state power, often quite plainly.[164] Federal habeas review does smack of appellate review, contradicting ordinary preclusion doctrine and basic full faith and credit ideas.[165] And federal habeas review *does* raise epistemological questions about "correct" conclusions and "actual" right answers[166]—as well as practical concerns about meritorious substantive "needles" being lost in a "haystack" of "worthless" ones.[167]

But advocates of more expansive habeas review do have a powerful argument to make, one with solid theoretical and historical roots.[168] To these habeas advocates, federal habeas review does more than ensure that the state court's jurisdiction was valid—that it "act[ed]" properly "as a court."[169] Habeas allows federal courts to rectify state-court errors of federal constitutional law (process-based or not)[170] and to vindicate federal rights[171]—not as enforcers of some type of thinly veiled anti-federalism, but as guardians of a healthy federalist balance, as shepherds of recalcitrant states, and as holders of "the final say" (in Justice

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Fourteenth Amendment was the same narrowly circumscribed writ known at English common 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 protection national rights in a national forum"); *see also* Woolhandler, *supra* note 30, at 630.

162. Cole, *supra* note 19, at 2489.

163. *See* Brown v. Allen, 344 U.S. 443, 537 (1953) (Jackson, J., concurring); *see also* Scheidegger, *supra* note 38, at 940 (calling "federal habeas for state prisoners . . . an exercise in judge-shopping").

164. *See, e.g.*, Yackle, *Hagioscope*, *supra* note 147, at 2339 (discussing the "friction" caused by "plenary federal jurisdiction").

165. *See generally* 28 U.S.C. § 1738 (2000); *see also* Yackle, *supra* note 35, at 401; Tsen Lee, *supra* note 31, at 106–07.

166. Bator, *supra* note 157, at 446–47.

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

168. *See, e.g.*, Steiker, *supra* note 161, at 881, 888.

169. Yackle, *Hagioscope*, *supra* note 147, at 2340, 2346 (deeming a narrow understanding of due process "primitive").

170. *Id.* at 2345–46 (noting that, to Professor Bator, direct review and collateral review were not identical, for Professor Bator treated "due process" as "one thing on direct review of a state court judgment and another in habeas corpus") (citation omitted).

171. *See* Steiker, *supra* note 161, at 881, 888.

Frankfurter's words) on questions of *federal* law[172]—even at the price of a "haystack" of empty claims.[173]

For part of the last half-century, the Supreme Court subscribed to this catholic conception of habeas' role. In *Brown v. Allen*,[174] the Court set an unmistakable path of expanding and intensifying federal habeas review.[175] The Warren Court readily followed *Brown*'s lead, assuring that federal courts had a central role to play in the adjudication of federal constitutional questions—including those questions already decided by state courts.[176] In three post-*Brown* cases—a group pithily labeled "[t]he great trilogy of habeas corpus decisions"[177]—the Warren Court specified how federal district courts should conduct their habeas work,[178] how these courts should manage multiple petitions from a single petitioner,[179] and how petitioners should navigate habeas' often recondite procedural maze.[180] All four of these decisions envisioned a broad and powerful writ of habeas, an almost "omnipotent writ of error."[181]

And all four prompted a healthy measure of criticism. Some of this criticism came from the academy.[182] Some came, in time, from the Burger and Rehnquist Courts.[183] And some came from more overtly political sources, committees intent on revamping federal habeas law.[184] A few of these political efforts garnered considerable support, but nearly all failed

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172. *See* Liebman & Ryan, *supra* note 15, at 774.

173. Brown v. Allen, 344 U.S. 443, 537 (1953) (Jackson, J., concurring); *see also* Yackle, *Hagioscope*, *supra* note 147, at 2342.

174. 344 U.S. at 443.

175. Yackle, *Hagioscope*, *supra* note 147, at 2349 (arguing 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.").

176. *Id.* at 2343; *see also* Todd E. Pettys, *Federal Habeas Relief and the New Tolerance for "Reasonably Erroneous" Applications of Federal Law*, 63 OHIO ST. L.J. 731, 740–41 (2002).

177. Yackle, *Hagioscope*, *supra* note 147, at 2347.

178. Townsend v. Sain, 372 U.S. 293 (1963).

179. Sanders v. United States, 373 U.S. 1 (1963).

180. Fay v. Noia, 372 U.S. 391 (1963).

181. Roger Berkowitz, *Error-Centricity, Habeas Corpus, and the Rule of Law as the Law of Rulings*, L.A. L. REV. 477, 482 (2004). *See also* Robert M. Cover & T. Alexander Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 YALE L.J. 1035 (1977).

182. Professor Bator, for example, called for a return of a narrow process limit and a rejection of habeas-created redundancy. Bator, *supra* note 157, at 446.

183. This criticism came primarily in the form of gradual retreats from thoroughgoing habeas review. *See* Cover & Aleinikoff, *supra* note 181, at 1045.

184. As Kent Scheidegger has noted, Congress has come "tantalizingly close to abrogating the *Brown* rule" many times. Scheidegger, *supra* note 38, at 890. The Powell Commission was perhaps the most prominent of these committees. For a full text of the Powell Commission's report, see 45 THE CRIMINAL LAW REPORTER 3239 (1989).

to produce much (if any) change in the way federal courts reviewed habeas petitions from state prisoners.[185]

Until 1996, that is. In 1996, Congress passed the Antiterrorism and Effective Death Penalty Act.[186] An elaborate[187] and expansive effort, AEDPA alters 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; still another truncates the review process in certain capital cases.[188]

And one AEDPA provision addresses how federal courts review the merits of state court decisions. This state-court-review provision—AEDPA's section 2254(d)—has proven one of the Act's most prominent features. It has also presented AEDPA's deepest "interpretational problem[]."[189] 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—
>
> (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.[190]

At first blush, section 2254(d) appears to do very little work.[191] It seems merely to posit a set of standards of review, defining the manner in which federal courts assess the merits of particular state court decisions.[192] 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;[193] nor does it

185. Yackle, *Hagioscope*, *supra* note 147, at 2349–73.

186. Pub. L. No. 104-132, § 104(3), 110 Stat. 1214, 1219 (1996) (codified at 28 U.S.C. § 2254(d) (Supp. II 1996)).

187. *See* Yackle, *supra* note 35, at 381 ("The result . . . is extraordinarily arcane verbiage . . . .").

188. *Id.*; *see also* Tsen Lee, *supra* note 31, at 104 (citing 28 U.S.C. §§ 2244, 2254, & 2261–66).

189. Tsen Lee, *supra* note 31, at 104.

190. 28 U.S.C. § 2254(d) (2000).

191. For those that watch habeas law closely, of course, the very numbering of section 2254(d) draws attention. *See* Tsen Lee, *supra* note 31, at 107.

192. *Id.*

193. This is no small thing. *Whether* courts may review is itself an important question—and not

seem to undo habeas' noteworthy—if formally dubious—exemptions from ordinary preclusion doctrine and the full faith and credit statute.[194]

But section 2254(d) does seem to hint at something significant—as habeas scholars and inferior federal courts noted almost immediately.[195] Between 1996 and 2000, these observers labored to find section 2254(d)'s core. *If* section 2254(d) establishes a more deferential standard of review, both for questions of law and for mixed questions of law and fact;[196] *how much* (if at all) section 2254(d) raises the bar against granting habeas remedies;[197] *whether* section 2254(d) conflicts with Article III's central judicial vision[198]—courts and scholars engaged each of these questions, often quite comprehensively.[199]

Not until 2000, however, did the Supreme Court take a clear (if fractured) position on the meaning and effect of section 2254(d). It took that position in *Williams v. Taylor*.[200]

B. Williams *and the Court*

Like so many habeas cases, *Williams* tells a cheerless and protracted story. The story's legal chapter begins in 1986, when a Virginia state jury convicted Terry Williams of robbery and capital murder.[201] At the sentencing hearing that followed, the prosecution introduced evidence of a litany of Mr. Williams' prior offenses.[202] In response, Mr. Williams' counsel offered only a modicum of evidence, devoting most of his energy to "explaining that it was difficult to find a reason why the jury should spare Williams' life."[203] The jury found no such reason; instead, it found

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one with easy answers 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); I.N.S. v. St. Cyr, 533 U.S. 289 (2001) (though it is not impacted by the text of section 2254(d)).

194. Yackle, *supra* note 35, at 401–02.

195. *See, e.g.*, *id.*; Scheidegger, *supra* note 38, at 890 (noting that AEDPA "touched off a mad scramble"); Nevers v. Killinger, 169 F.3d 352, 357–62 (6th Cir. 1999), *cert. denied*, 527 U.S. 1004 (1999).

196. *See, e.g.*, Perez v. Marshall, 946 F. Supp. 1521, 1533 (S.D. Cal. 1996).

197. *See, e.g.*, Scheidegger, *supra* note 38, at 891 ("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.").

198. *See* Liebman & Ryan, *supra* note 15, at 864–84.

199. *Id.*

200. 529 U.S. 362 (2000).

201. *Id.* at 368.

202. *Id.* at 368–69 (noting that many of these prior offenses were violent).

203. *Id.* at 369 ("The evidence offered by Williams' trial counsel at the sentencing hearing consisted of the testimony of Williams' mother, two neighbors, and a taped excerpt from a statement by a psychiatrist."). In his opinion in Williams, Justice Stevens quotes defense counsel at length:

"a probability of future dangerousness" and "unanimously fixed Williams' punishment at death."[204] The trial court deemed the sentence "proper" and "just."[205] The Virginia Supreme Court affirmed—both on direct review and on review of a petition for state collateral relief.[206]

In 1997, Mr. Williams filed a petition for federal habeas relief under section 2254.[207] In his petition, Mr. Williams asserted, as he had in the state courts, that he had been deprived of effective assistance of counsel. The federal district court agreed, and it granted Mr. Williams' petition accordingly.[208] The Fourth Circuit reversed,[209] but the Supreme Court reinstated the district court's conclusion,[210] awarding Mr. Williams a rare victory on an ineffective assistance of counsel claim.[211]

But Mr. Williams' victory was also a Pyrrhic one, at least for future habeas petitioners.

In *Williams*, the Court elaborates an entirely "new constraint,"[212] a new (and severe) limit on federal habeas courts' "ability to review state court applications of law to fact."[213] This new limit derives, *Williams* contends, from section 2254(d) itself—the section's "contrary to" and "unreasonable application" clauses in particular.[214] These two clauses, *Williams* explains, have distinct meaning: To fit the "contrary to" standard, a state court decision must either follow the wrong rule or misread the facts blatantly.[215] To satisfy the "unreasonable application" standard, by

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> I will admit too that it is very difficult to ask you to show mercy to a man who maybe has not shown much mercy himself. I doubt very seriously that he thought much about mercy when he was in Mr. Stone's bedroom that night with him. I doubt very seriously that he had mercy very highly on his mind when he was walking along West Green and the incident with Alberta Stroud. I doubt very seriously that he had mercy on his mind when he took two cars that didn't belong to him. Admittedly it is very difficult to get us and ask that you give this man mercy when he has shown so little of it himself. But I would ask that you would.

Id. at n.2.

204. *Id*. at 370.

205. *Id*.

206. *Williams*, 529 U.S. at 370.

207. This timing is significant. Since Mr. Williams filed his petition in 1997, his case is governed by AEDPA, not by "the pre-1996 version of the federal habeas statute." *Id*. at 364.

208. *Id.* at 372–74.

209. Williams v. Taylor, 163 F.3d 860 (4th Cir. 1998).

210. 529 U.S. at 374.

211. *Id.* In the sixteen years after *Strickland v. Washington*, 466 U.S. 668 (1984), the Court found no instance of inadequate representation. *Cf*. William S. Geimer, *A Decade of Strickland's Tin Horn: Doctrinal and Practical Undermining of the Right to Counsel*, 4 WM. & MARY BILL RTS. J. 91 (1995).

212. *Williams*, 529 U.S. 411–13 (O'Connor, J.); *cf. id*. at 386 (arguing that section 2254(d) merely evinced a "'mood' that the Federal Judiciary must respect") (Stevens, J., dissenting in part).

213. Pettys, *supra* note 176, at 749.

214. *Williams*, 529 U.S. at 404.

215. The state court, that is, must apply "a rule that contradicts the governing law set forth in [the

contrast, a state court decision need *not* follow the wrong governing rule;[216] the state court need only *apply* that rule "*unreasonably* to the facts."[217]

What "unreasonable" means, of course, is far from clear—as the *Williams* Court readily acknowledges.[218] But what is clear, the Court assures, is what "unreasonable" does *not* mean: "[A]n unreasonable application of federal law is different from an incorrect application of federal law."[219] Had Congress meant "erroneous" or "incorrect," *Williams* concludes, 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, the Court suggests, Congress instructed federal courts *not* to issue "the writ simply because [a] court concludes . . . that the relevant state-court decision applied clearly established federal law erroneously or incorrectly."[220] Wrong is not enough. To issue the writ under section 2254(d)'s "unreasonable application" clause, a state court decision must be wrong *and* unreasonable; i.e., it must be unreasonably wrong.[221]

C. A Selection of Knots

There is something enticing about *Williams*' "unreasonably wrong" standard.[222] Judged by even the most forgiving measure,[223] habeas doctrine

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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. Under section 2254(d), the only relevant law is the "holdings, as opposed to the dicta, of th[e] Court's decisions as of the time of the relevant state-court decision." *Id.* at 412.

216. *Id.* at 408–09.

217. *Id*. at 407–08. *Williams* also noted that a state-court decision may be deemed "unreasonable" if it "unreasonably extend[s] a legal principle from [the Court's] precedent to a new context where it should not apply (or unreasonably refuse[s] to extend a legal principle to a new context where it should apply). . . ." *Id.*; *see also* Ramdass v. Angelone, 530 U.S. 156 (2000).

218. *Williams*, 529 U.S. 411–12. "[T]he term 'unreasonable' is no doubt difficult to define." *Id*. at 410.

219. *Id.* at 412 (emphasis removed).

220. *Id.* at 411.

221. This wrangling over the meaning of "unreasonable" may seem, at first glance, to be much ado about nothing: A straightforward application of the "contrary to" prong would seem to allow federal habeas courts to rectify *incorrect* state-court decisions; an incorrect decision is, after all, "contrary to" "the governing law set forth in [the Court's] cases." *Id.* at 405–06. But *Williams* refused to read "contrary to" in this seemingly obvious way. Instead, the Court narrowed the reach of the "contrary to" prong to cases in which state courts apply the wrong legal rule altogether or elide a precise fact analog. *Id.* In this way, the ostensibly clear connection between "incorrect" and "contrary to" is erased.

222. The shelter of reasonableness is always alluring. 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." Fallon, *supra* note 23, at 311. For this reason, courts have used the language of

has long been muddled—if not positively "Byzantine and unfathomable."[224] The Court's "unreasonably wrong" test seems, at first glance, to offer a promising response to a large part of that confusion.

But *Williams*' "unreasonably wrong" standard is a cure substantially worse than the disease. Far from resolving any of habeas' age-old riddles, *Williams* complicates them, adding a number of new knots to an already-tangled doctrine.[225]

One of *Williams*' new knots is its inadequate direction to lower courts. *Williams* may posit a novel "reasonableness" "constraint"; it may even describe what "*un*reasonable" does *not* mean.[226] But there is little useful guidance in *Williams*' negative definitions. In *Williams*, in fact, there is no "specific guidance" *at all* regarding "how [courts] should distinguish between reasonable and unreasonable [constitutional] errors."[227] There is only a (tacit) demand that inferior federal courts make that difficult—and crucial—determination themselves.[228]

"reasonableness" liberally, nowhere more prominently than in the qualified immunity context. *See, e.g.*, Wood v. Strickland, 420 U.S. 308 (1975); Mitchell v. Forsyth, 472 U.S. 511 (1985). Scholars, in turn, have posited this "reasonableness standard" as a cure to functional constitutional problems. *See, e.g.*, Kamin, *supra* note 57, at 7.

But "reasonableness" is no panacea. It often leaves courts in the position of under-enforcing constitutional rights—not because no constitutional violation occurred, but because the error was somehow unobjectionable. In taking its seemingly unobjectionable "reasonableness" step, in fact, *Williams* moves the courts from enforcing rights vigorously to enforcing very little at all. *See* Meltzer, *supra* note 32, at 2522 ("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 . . . .").

223. Barry Friedman, *Failed Enterprise: The Supreme Court's Habeas Reform*, 83 CAL. L. REV. 485, 487 (1995) (measuring the Court's habeas reform effort "by its own terms," not "against an independent normative perspective").

224. *Id.* at 486.

225. Some have gone so far as to describe the *Williams*' fallout as an "intellectual disaster area." Larry W. Yackle, *The Figure in the Carpet*, 78 TEX. L. REV. 1731, 1756 (2000). It is worth noting, too, that a host of (often labyrinthine) doctrinal mazes have developed in the habeas context, many in an effort to ameliorate AEDPA's draconian flavor. *See, e.g.*, Carey v. Saffold, 536 U.S. 214 (2002) (discussing, *inter alia*, the meaning of "pending").

226. *Williams*, 529 U.S. at 404. At first blush, this exegesis seems faithful to section 2254(d)'s text. Indeed, if Congress *wanted* a simple error-based standard, it could have *said* as much in the text of the statute. But this textualist argument only goes so far. Even if the text is our sole interpretive guide, the Court's gloss is still dubious. To reach *Williams*' end, one must presume that an incorrect decision is not "contrary to" clearly established Supreme Court doctrine. *Cf. The Supreme Court, 1999 Term—Leading Cases*, 114 HARV. L. REV. 179, 321–22 (2000).

227. Pettys, *supra* note 176, at 755 (citation omitted).

228. Ramdass v. Angelone, 530 U.S. 156 (2000), announced only three weeks after *Williams*, leaves all of these methodological and etymological questions open.

Another of *Williams*' knots is its curious theoretical pose, the Court's strange blend of two notions of legal indeterminacy.[229] In part, *Williams* implicitly disavows "the deterministic objectivism of formalism"[230]—the claim that all legal questions have a "right" answer[231] and that this "right" answer can be discovered through Herculean feats of deductive reasoning.[232] At the same time, *Williams* implicitly rejects the "indeterministic subjectivism of radical skepticism"[233]—the claim that legal questions have no objectively "correct" answers and that reasonable jurists will resolve difficult questions in radically different ways.[234] Somewhere between these two poles, *Williams* seems to suggest, sits a middle theory of indeterminacy, a perfect balance of "objectivism" and "subjectivism." But *Williams* takes this intriguing suggestion nowhere; it offers no coherent theory of adjudication, no way to define that supposed balance.[235] Instead, the Court asks a tautological question: "whether a state court's application was *objectively unreasonable*."[236]

As *Williams* presents it, of course, this "objectively unreasonable" question is simply what Congress intended.[237] If it is a tautology, the Court hints, it is one that the legislative history of section 2254(d) compels.

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229. Professor Pettys contends—rather convincingly—that the Court rejects both in *Williams*. *See* Pettys, *supra* note 176, at 776.

230. *See id.* at 776–79.

231. *See* DWORKIN, *supra* note 69, at 106; *see also* RONALD DWORKIN, A MATTER OF PRINCIPLE pt. 5 (1985) [hereinafter DWORKIN, PRINCIPLE].

232. *Id.*

233. *See* Pettys, *supra* note 176, at 734; *see also id.* at 779–85 (proposing a thoughtful, moderate version of "conventionalism" as a prospective theory of adjudication but conceding that a conventionalist approach provides scant guidance in "hard cases").

234. *See generally* Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976).

235. Not surprisingly, federal courts have struggled to fashion a workable solution to this riddle. *See, e.g.*, Neal v. Puckett, 239 F.3d 683, 695 (5th Cir. 2001), *reh'g granted*, 264 F.3d 1149 (5th Cir. 2001); Van Tran v. Lindsey, 212 F.3d 1143, 1151 (9th Cir. 2000) (discussing Williams), *cert. denied*, 531 U.S. 944 (2000); Francis S. v. Stone, 221 F.3d 100, 109 n.12 (2d Cir. 2000).

236. Lainfiesta v. Artuz, 253 F.3d 151, 155 (2d Cir. 2001).

237. In a short footnote, *Williams* contends that:

> The legislative history of § 2254(d)(1) also supports this interpretation. See, *e.g.*, 142 Cong. Rec. 7799 (1996) (remarks of Sen. Specter) ("[U]nder the bill deference will be owed to State courts' decisions on the application of Federal law to the facts. Unless it is unreasonable, a State court's decision applying the law to the facts will be upheld"); 141 Cong. Rec. 14666 (1995) (remarks of Sen. Hatch) ("[W]e allow a Federal court to overturn a State court decision only if it is contrary to clearly established Federal law or if it involves an 'unreasonable application' of clearly established Federal law to the facts").

Williams, 529 U.S. at 408 n.*. Senator Hatch's remarks are hardly illuminating; they simply emphasize the text and disjunctive nature of section 2254(d)'s text. Senator Specter's remarks seem, at first blush, more supportive of Williams' position, but even this quote says less than it may seem. All Senator Specter denotes is "the application of Federal law to the facts." He says nothing about the "contrary

But this reference to congressional motive is just another of *Williams*' analytical knots. Congress's intent is hardly as obvious as *Williams* casually suggests.[238] The Court may do less, in the end, to implement a congressional plan faithfully than to subvert that plan, tipping a "compromise solution"[239] heavily one way.

Very little of this legislative "solution" need—or should—be revisited here. Some of habeas' best scholars have already provided thoughtful, exhaustive accounts of section 2254(d)'s tortuous legislative path.[240] Still, two of that path's most significant turns merit brief consideration, if only to give context to the Court's (mis)interpretation of section 2254(d) in *Williams*.

The first turn came in the House of Representatives. In 1995, the House considered a proposal that would permit federal courts to grant habeas relief only where a state court decision was somehow "arbitrary or unreasonable"—whether in the interpretation of Supreme Court law or in the application of law to facts.[241] The use of the word "arbitrary" troubled many in the House[242]—so much so that, to secure passage of the bill, the proposal's sponsor excised the word. Under the bill passed by the House,

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to" prong of section 2554(d), and he says nothing about ratifying constitutional error. Some of his colleagues in the Senate were careful to do just the opposite. *See, e.g.*, 142 CONG. REC. 7792 (daily ed. Apr. 17, 1996) (statement of Sen. Levin) ("I believe the courts will conclude, as they should, that a constitutional error cannot be reasonable and that if a State court decision is wrong, it must necessarily be unreasonable."). *But cf.* Tsen Lee, *supra* note 31, at 112.

238. Of course, it never is. *See, e.g.*, ELY, *supra* note 10, at 136–42.

239. Yackle, *supra* note 35, at 422.

240. *See, e.g.*, Yackle, *supra* note 35; Tsen Lee, *supra* note 31; Meltzer, *supra* note 32; Liebman & Ryan, *supra* note 15, at 871–72; Scheidegger, *supra* note 38.

241. Representative Christopher Cox brought a new—though not entirely novel, see Yackle, *supra* note 35, at 432–34 (discussing the similarly-worded "Hyde Amendment")—proposal for habeas reform. As drafted, the "Cox Proposal" read:

> 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 decided on the merits in State proceedings unless the adjudication of the claim—
>
> (1) resulted in a decision that was based on an *arbitrary or unreasonable* interpretation of clearly established Federal law as articulated in the decisions of the Supreme Court of the United States;
>
> (2) resulted in a decision that was based on an *arbitrary or unreasonable* application of the facts of clearly established Federal law as articulated in the decisions of the Supreme Court of the United States; or
>
> (3) resulted in a decision that was based on an *arbitrary or unreasonable* determination of the facts in light of the evidence presented in the State proceeding.

Id. at 433 (citing 141 CONG. REC. H1424 (daily ed. Feb. 8, 1995)).

242. *Id.* at 435.

then, reasonable state court decisions could survive habeas review, even if wrong; arbitrary decisions could not.[243]

Williams unmistakably echoes this "reasonable but not arbitrary" gloss on section 2254(d). Were *Williams* explicating only the *House*'s proposed section 2254(d), the Court's "reasonableness" standard would surely be consistent with legislative intent—if still otherwise unsustainable.[244]

But the path of section 2254(d) took another turn before passage, this one in the Senate. As it considered the House's proposal, the Senate made a number of modifications to section 2254(d). Some of these alterations seem to be little more than quotidian editorial adjustments.[245] But one of these alterations exhibits more than a fastidious concern for precise diction. The use of the disjunctive "or" between the "contrary to" and "unreasonable application" clauses illustrates a significant substantive concession, a careful and intentional effort to collapse the (supposed) distinction between "unreasonable" and "wrong" state court decisions.[246] This concession was a painful one for the Senate's habeas detractors, critics who had had long sought[247] to require federal courts "to defer to 'reasonable' state court decisions on the merits—even if . . . the state judgment was in error."[248] But the concession was a real and necessary one; without it, AEDPA may not have survived the Senate[249]—a fact not lost on some of the more steadfast advocates of a "reasonableness" shield.[250]

As it left Congress, then, section 2254(d) clearly required *something*: It demanded that federal courts take "serious account" of the relevant state court decision.[251] But Congress's final version of section 2254(d) did *not* plainly establish a "general rule of deference to 'reasonable' state court decisions on questions of federal law."[252] Nor did it clearly impart a distinction between "unreasonable" and "wrong" state court decisions.

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243. *Id.*

244. *See, e.g.*, Liebman & Ryan, *supra* note 15.

245. Yackle, *supra* note 35, at 432–36.

246. *See id*. at 437–38. When viewed through a precise grammatical lens, the latter modification seems particularly clever. With a specific use of the disjunctive form, the Senate version seems to render the questionable "unreasonable" prong "superfluous."

247. *Id.*

248. *Id.* at 438.

249. Without these concessions, Professor Yackle concludes, the bill would have lacked sufficient votes for passage. *Id.*

250. *Id*. at 438, 422 (citations omitted); *see also* 142 CONG. REC. 7792 (daily ed. Apr. 17, 1996).

251. Yackle, *supra* note 35, at 383–84.

252. *Id.* at 384; *see also id*. at 443 (noting that such deep-kneed deference would constitute "flagrant interference with the federal judicial function"); *see also* Liebman & Ryan, *supra* note 15. The interplay of *Williams* and the "judicial Power" is discussed at length *infra* Part IV.

In *Williams*, however, this distinction reappears[253]—not through a simple elaboration of congressional intent or "gnomic congressional utterances,"[254] but through a subtle judicial misinterpretation of section 2254(d). In *Williams*, the Court installs an uneasy gap between "wrong" and "unreasonable"; in *Williams*, the Court compels deference to "reasonably unconstitutional" state-court decisions.

D. Williams*' Course*

But *how* does the Court separate "wrong" from "unreasonable"? And how does *Williams* enforce this separation, requiring federal courts to defer to incorrect state court decisions?

Williams does so, in short, through an impermissible *decisionmaking* model, its *Swift*-like unconstitutional course.[255]

Like *Swift*'s course before it, *Williams*' unconstitutional course proceeds in two steps.[256] Under *Williams*, the federal court must first review the terms of the relevant state-court decision, asking whether that decision somehow errs as a matter of "clearly established"[257] Supreme Court law. If there is no such error—i.e., if the state court correctly applied Supreme Court law to fact—the federal court's analysis is at an end; there is no state-court error to remedy, so the habeas petition must be denied.[258] But if there is a state court error—if the state court did misapply law to

253. Yackle, *supra* note 35, at 432–36.

254. LAWRENCE G. SAGER, JUSTICE IN PLAINCLOTHES: A THEORY OF AMERICAN CONSTITUTIONAL PRACTICE 31–33 (2004) (noting that statutes often represent a "legislative strategy of generality and incompleteness," the construction of a "broad legislative frame [that] . . . invite[s] the judiciary . . . to do much of the normative work").

255. The focus here is section 2254(d)'s "unreasonable application" prong.

256. Each step is necessary—as is the order in which they proceed. To detect threshold error, federal courts must first ask if the state-court decided a federal question incorrectly; to determine if that error is "unreasonable," federal courts must then attempt to quantify that error. *See generally* Thomas Healy, *The Rise of Unnecessary Constitutional Rulings*, 83 N.C. L. REV. 847, 855 (2005) (noting that this type of two-step decisional strategy informs qualified immunity, Fourth Amendment, and harmless error cases as well).

257. For a time, "clearly established" seemed to be a rather uncontroversial portion of section 2254(d). It was, as *Williams* noted, a *temporal* limit, capturing only the "holdings, as opposed to the dicta, of th[e] Court's decisions *as of the time of the relevant state-court decision*." *Williams*, 529 U.S. at 412. In *Lockyer v. Andrade*, however, the Court seemed to add a *clarity* limit to the temporal one, concluding that the relevant principle must also be relatively easy to divine. *See Andrade*, 538 U.S. 63, 72 (2003) ("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, Andrade changes the relevant test dramatically. It also calls a great deal of the Court's habeas jurisprudence into doubt, for very little of this doctrine can be described as a "model of clarity." *Williams*, quite obviously, cannot.

258. Under no standard, of course, will a federal court upset a *correct* state court decision.

fact—the federal court's analysis is not at an end. The federal court must instead attempt to quantify that error, to determine if the error is somehow "reasonable" and therefore worthy of deference.[259]

A slight variation on a familiar case—*Chambers v. Mississippi*[260]—offers a more specific illustration of how *Williams*' two-step course works. As in *Chambers*, the central question in this example is the constitutional legitimacy of a Mississippi rule of criminal procedure.[261] In this variation, however, Mississippi does not prevent all criminal defendants from impeaching their own witnesses.[262] Instead, Mississippi permits a defendant to impeach his own witnesses—*provided* the defendant calls at least two additional witnesses to challenge the impeached witness's credibility.

During his criminal trial, Defendant D could not locate two suitable "additional witnesses" to impeach deceitful Witness W. As a consequence, Defendant D was convicted for an offense someone else had repeatedly confessed to committing.[263] On state collateral review, Defendant D challenged his conviction, arguing that Mississippi's "additional witness" rule conflicts with the Sixth and the Fourteenth Amendments.[264] The Mississippi Supreme Court disagreed.

In its decision, the Mississippi court readily acknowledges that *Chambers* renders the "additional witnesses" rule inherently suspect.[265] But Chambers also recognizes a state's authority to bend the right to confront and the right to cross-examine when necessary "to accommodate other legitimate interests in the criminal trial process."[266] All the "additional witnesses" rule involves, the Mississippi court concludes, is

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259. It bears emphasis that this hurdle is entirely distinct from AEDPA's many plainly *procedural* limits (e.g., procedural default), all of which avoid or preempt consideration of the underlying merits question.

260. 410 U.S. 284 (1973). I use *Chambers* because of the relative paucity of Supreme Court doctrine (i.e., "clearly established" law) regarding this type of question.

261. *Id.* at 285.

262. *Id.* at 291–93.

263. Just as Mr. Chambers was. *Id.* at 290 n.3.

264. The challenges grow from the Confrontation Clause and the Due Process Clause. *Cf.* United States v. Scheffer, 523 U.S. 303, 307–08 n.3 (1998) ("He also briefly contends that the 'combined effect' of the Fifth and Sixth Amendments confers upon him the right to a 'meaningful opportunity to present a complete defense' . . . .") (citation omitted).

265. As *Chambers* makes clear, the right of cross-examination is "implicit in the constitutional right of confrontation," 410 U.S. at 295 (citing, *e.g.*, Dutton v. Evans, 400 U.S. 74, 89 (1970)), an "essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal." *Id.* (citing Pointer v. Texas, 380 U.S. 400, 405 (1965)) (internal quotation marks omitted).

266. *Id.* (noting that neither right is "absolute"—even if "its denial or significant diminution calls into question the ultimate 'integrity of the fact-finding process' and requires that the competing interest be closely examined") (citations omitted).

this type of permissible bending; it does not violate the Sixth or the Fourteenth Amendment.

To challenge this conclusion, Defendant D files a federal habeas petition. The petition is not procedurally defective,[267] so the federal court may reach the merits of Defendant D's Sixth and Fourteenth Amendment claims. And on these merits, the federal court concludes that the Mississippi court misapplied the governing standard (viz., *Chambers*) to the facts—i.e., that the state court decision was wrong.

Before the federal court may grant relief, however, *Williams* requires the court to ask a second question: whether the state court's erroneous decision was also "unreasonable."

How the court is supposed to identify this "unreasonableness" is uncertain.[268] But so, too, is the demonstrable "unreasonableness" of the Mississippi court's decision. Expedient and *wrong* as the Mississippi court's decision seems, it does not depend on an entirely *unreasonable* application of clearly established Supreme Court law. It merely depends on an *incorrect* application of that law, which is precisely the kind of state court error that *Williams* shields.[269]

In the end, the federal habeas court may find that the Mississippi court's decision was wrong *and* unreasonable; it may not. It may grant habeas relief; it may not. The *answer* to *Williams'* second question surely matters—not least to Defendant D.

But the very *asking* of that question matters as well, albeit in a less obvious way. It matters because *asking Williams*' second question compels federal courts to reach outcomes in an impermissible manner: It requires courts to seek a kind of constitutional *super*-error, not constitutional error alone; it forces courts to answer tautological questions of "objective unreasonableness"; it orders courts to toe an indistinct line between "deterministic objectivism" and "indeterministic subjectivism"; and it ties the federal courts' hands, preventing them from effectuating

267. *See generally* 28 U.S.C. §§ 2244, 2254, & 2261–66 (2000).

268. *See, e.g.*, Lainfiesta v. Artuz, 253 F.3d 151, 155 (2d Cir. 2001).

269. This logic leads in some rather troublesome directions. To make sense of our federalist system, one must assume that state courts are, in general, appropriate tribunals for federal questions. *See* Liebman & Ryan, *supra* note 15, at 876 (noting that state courts are, in theory, "entrusted [with] the . . . role of keeping state law in conformity with 'the supreme Law of the Land'"); Scheidegger, *supra* note 38, at 903 ("From the beginning, it has been understood that state courts were competent to decide federal questions."). But how much do we trust state courts? And does the fact that a state court has reached X conclusion make that conclusion *de facto* "reasonable"—no matter what the federal court decides? *See* Meltzer, *supra* note 32, at 2522.

their judgments—even *after* remediable "violat[ions of] the supreme law of the land"[270] have been located.

These problems do more than raise minor methodological concerns. They turn *Williams*' decisionmaking process into an unavoidably unconstitutional endeavor, placing *Williams*-abiding courts on an unconstitutional course.[271]

In this procedural sense, *Williams* is much like *Swift*: Each prescribes a specific, unconstitutional decisionmaking framework. Each directs the federal courts to reach outcomes in an impermissible way.

On close inspection, however, *Williams* is less a perfect reflection of *Swift* than it is an unappealing image in photonegative. Where *Swift* impermissibly increased *federal* power, allowing federal courts to disregard state court decisions of *state* law, *Williams* impermissibly diminishes federal power, forcing federal courts to defer to state court decisions of *federal* law. And where *Swift* impermissibly expanded the "*judicial* Power," allowing federal courts to create a body of general common law, *Williams* impermissibly shrinks that "Power," requiring federal courts to cede their decisional autonomy and to defer to incorrect state court decisions.[272]

These differences are neither trivial nor abstract. Under *Swift*'s course, means and ends maintained a healthy distance: Since *Swift*'s course left ample room for federal courts to "find" the "right" answer—if in the wrong way—there was no guarantee that some federal court *outcomes* would be *constitutionally* wrong.

Williams' course provides just that type of guarantee. Under *Williams*, there is no *Swift*-like decisional latitude, no room for federal courts to ensure correct constitutional outcomes. Under *Williams*, in fact, federal courts must stand ready to validate constitutional error.[273] They must, on occasion, stamp the imprimatur of the federal courts on incorrect decisions

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270. *See* Liebman & Ryan, *supra* note 15, at 876, 881–84.

271. One might argue that the Court has placed a kind of "unconstitutional condition" on the exercise of federal habeas jurisdiction. *See generally* Richard Epstein, *The Supreme Court, 1987 Term-Forward: Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 4 (1988); Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1421–28 (1989). As Professor Meltzer has thoughtfully reminded, however, the "unconstitutional condition" idea can only stretch so far, see Daniel Meltzer, *Harmless Error and Constitutional Remedies*, 61 U. CHI. L. REV. 1, 15 (1994) [hereinafter Meltzer, *Harmless Error*], and it does not apply cleanly here.

272. *See* Liebman & Ryan, *supra* note 15, at 870–75.

273. *Cf.* Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1733, 1777 (1991) ("[W]e do not dispute that *Marbury v. Madison* requires courts seised of jurisdiction to apply all relevant law and thereby avoid in-court violations of constitutional rights.") (citations omitted).

of federal law[274]—not because no constitutional error occurred or because the error is of a type that cannot be remedied, but because the error falls into *Williams*' purgatory, that constitutional nether-region in which "reasonably unconstitutional" state court decisions survive. This joins problematic *means* with problematic *ends*, running an unconstitutional course into unconstitutional outcomes. It also poses a serious threat to individual rights, to federal court integrity, and to the "judicial Power" itself.

IV. THE "UNCONSTITUTIONAL COURSE" GOES ASTRAY

To a skeptical eye, the last claim is a curious one. It is no small thing to suggest that a single Supreme Court decision raises questions about individual rights, federal court integrity, *and* the "judicial Power." It goes even a step further to claim that the decision does so simply by crafting a seemingly innocuous decisionmaking framework.

But *Williams*, through its carefully oblique unconstitutional course, does all of these things. This section examines a number of *Williams*' doctrinal and deontological shortcomings. Subsection A explores *Williams*' most prominent (if often overlooked) doctrinal impediment: the terms and limits of *United States v. Klein*.[275] Subsection B follows with a brief discussion of how *Williams*' model involves an unsound type of deference and an unsustainable separation of right from remedy. Subsection C then offers a preliminary consideration of *Williams*' broader rights- and judicial integrity-based problems, concentrating primarily on the Court's self-limiting misuse of the "judicial Power."

A. Williams *and* Klein

United States v. Klein is a difficult case—not quite, as Professor Sager reminds, Fermat's Last Theorem, but still far from "a model of clarity."[276] *Klein*'s story begins with the Abandoned and Captured Property Act (ACPA), a Civil War-era bill designed to remunerate property owners in insurrectionary states for the forced-sales of their property.[277] Under the APCA, Southern property owners could recoup the proceeds from these

274. *See* Liebman & Ryan, *supra* note 15, at 873–74.

275. 80 U.S. (13 Wall.) 128 (1871).

276. Sager, Klein*'s First Principle*, *supra* note 21, at 2525. *See also* Tsen Lee, *supra* note 31, at 134 n.122; Scheidegger, *supra* note 38, at 922.

277. The Abandoned and Captured Property Act, 12 Stat. 820 (1863).

forced-sales—provided those owners had offered no "aid or comfort" to the rebellion.[278]

On its face, the APCA presented no steep problem of application. The express terms of the Act made loyalty to the Union a prerequisite to recovery. Participation in "any" type of insurrectionary activity proved, without more, that a property owner was disloyal. The only pressing (fact) question, then, was whether the particular property owner committed any insurrectionary deeds, i.e., provided any "aid or comfort."

But a presidential proclamation greatly complicated the operation of the Act's seemingly simple "aid or comfort" standard. This proclamation extended to "persons who had been engaged in the rebellion a full pardon—specifically inclusive of the restoration of their rights of property—if they took and abided by an oath of allegiance."[279] In *United States v. Padelford*,[280] the Court read this pardon to "cleanse[]" all oath-takers of the sully of disloyalty;[281] even more, the Court interpreted the taking of the oath to prove actual loyalty to the Union. All oath-takers, then, could recover under the APCA—including those, like Mr. Padelford, who had provided some "aid or comfort" to the rebellion.[282] The APCA was thus turned on its head.

Not surprisingly, Congress found *Padelford* entirely indefensible—both in its treatment of presidential pardons and in its interference with the APCA. So, in response, Congress quickly passed three[283] measures: First, Congress attempted to undo the evidentiary impact of the pardons, declaring pardons inadmissible as proof of loyalty; second, Congress attempted to subvert the very thrust of the pardons, deeming the acceptance of a pardon conclusive proof "that the recipient had given aid and comfort to the rebellion"; and, third, the Congress attempted to insulate its efforts from judicial review, divesting both the Court of Claims and the Supreme Court of jurisdiction to hear cases in which the claimant had accepted a pardon—including those cases, like Mr. Klein's, that were already pending.[284]

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278. *Id.*

279. Sager, Klein*'s First Principle*, *supra* note 21, at 2525.

280. 76 U.S. (9 Wall.) 531 (1869).

281. *Id.*

282. *Id.*

283. This act actually offers four measures, see Act of July 12, 1870, ch. 251, 16 Stat. 230, 235, but the second and the fourth steps run together, as both purport to tailor the courts' jurisdiction in relevant cases. However many measures there are, any one of them may well have satisfied Congress's desire. *See* Liebman & Ryan, *supra* note 15, at 815, 817 (labeling Congress's overlapping measures a kind of "belt and suspenders" response, a "redundant means" of accomplishing a Congress's goal).

284. *Id.*

The Court rejected all three measures in *Klein*.

An important part of *Klein* focuses on Congress's failure to "give a presidential pardon the pervasive effect demanded by the Constitution."[285] "[T]he President's [pardon] power," *Klein* explains, "is not subject to legislation; [] Congress can neither limit the effect of his pardon, nor exclude from its exercise any class of offenders."[286]

But a more significant part of *Klein* touches on a different "separation of powers principle," one relating to Congress's interaction with the "Federal Judiciary,"[287] not the Executive. This second separation of powers principle, *Klein* observes, precludes Congress from prescribing a "rule of decision" in a case already before a federal court.[288]

Almost all congressional attempts to influence the outcome of pending—or already finalized[289]—legal actions raise judicial hackles.[290] Most are treated quite unkindly by the Court.[291]

But the "rule of decision" in *Klein* took an unusually insidious form: It attempted to force the Court to disagree with its own still-viable constitutional precedent.[292] Had Congress had its way, the Supreme Court would have been made to decide "against [the Court's] own best judgment on matters within its competence"[293]—indeed, on matters *already decided* as a function of that "competence." Then as now, the Court is acutely skeptical of this type of congressional tactic.[294]

On its facts, *Klein* may now seem almost trifling, a relic of zealous postbellum politicking. But *Klein* is far from *jurisprudentially* trivial, even

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285. *See* Sager, Klein*'s First Principle*, *supra* note 21, at 2526; *Klein*, 80 U.S. (13 Wall.) at 147–48; *see generally* Scheidegger, *supra* note 38, at 922 (suggesting that the statute's "most glaring defect" was "its unconstitutional nullification of the presidential pardon").

286. *Klein*, 80 U.S. at 141 (citation and internal quotation marks omitted).

287. Miller v. French, 530 U.S. 327, 329 (2000).

288. *See Klein*, 80 U.S. at 146–47. One should be careful not to overstate this point. Congress has prescribed rules of decision in pending cases before, and, on occasion, the Court has found no constitutional problem in such rules. *See* Robertson v. Seattle Audubon Soc'y, 503 U.S. 429, 434–37 (1992); Pope v. United States, 323 U.S. 1, 11–12 (1944). The larger concern—in both *Klein* and elsewhere—is whether the federal courts are precluded "from attending to the Constitution in arriving at decision of the cause." *See* Liebman & Ryan, *supra* note 15, at 775 n.362 (quoting Herbert Wechsler, *The Courts and the Constitution*, 65 COLUM. L. REV. 1001, 1006 (1965)).

289. *See, e.g.*, Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 240 (1995).

290. *See, e.g.*, *Miller*, 530 U.S. at 329.

291. Of course, "Congress tells courts how to decide cases, in a broad sense, every time it enacts a rule of substantive law." Scheidegger, *supra* note 38, at 909 (adding that "[t]his power can even be exercised by enacting a rule so narrow that it applies only to one pending case"—like Pennsylvania v. Wheeling & Belmont Bridge Co., 59 U.S. (18 How.) 421 (1856)).

292. *See* Redish, *supra* note 22, at 715–16.

293. Sager, Klein*'s First Principle*, *supra* note 21, at 2529.

294. *See, e.g.*, Martinez v. Lamagno, 515 U.S. 417 (1995); *Plaut*, 514 U.S. at 211; Robertson v. Seattle Audubon Soc'y, 503 U.S. 429 (1992).

if the facts seem historically quaint. At its core, *Klein* teaches that Congress may not demand that federal courts reach unconstitutional decisions.[295] When Congress makes such a demand, it does more than exercise a valid legislative prerogative. It threatens the courts' autonomy, their authority to decide cases "independently, finally, and effectively."[296] Worse still, it forces the courts to be complicit in their own repudiation,[297] to act at "deep conceptual odds with [their] foundational understandings of the Constitution."[298]

These "conceptual odds" are no less insistent, no less constitutionally problematic, when dictated by an institution other than Congress. *Klein*'s primary lesson is that the federal courts should never be "put in the position" of reaching or validating unconstitutional outcomes.[299] Nothing limits this principle to a specific inter-institutional dynamic; put more colloquially, nothing requires that Congress do the "put[ting]."

Nothing should. *Klein*'s fundamental principle can—and *should*—apply as readily to *Supreme Court* demands as it does to *congressional* ones. The principle *can* apply because the institutional dynamic is largely irrelevant; the focus falls on *what* the courts have been made to do, not *who* has made them do it. And the principle *should* apply because the

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295. When placed in broader jurisprudential context, *Klein* also demonstrates that the greater does not always include the lesser: Congress may exercise significant control over federal court jurisdiction; it may even, on occasion, remove whole classes of cases from the purview of the federal courts. But Congress may not leave jurisdiction in place only to demand that the Court reach unconstitutional outcomes. *See* Scheidegger, *supra* note 38, at 954 (agreeing that *Klein* "actually does reject a greater-includes- lesser argument"). *See also* Hart, *supra* note 20, at 1373 ("[I]f Congress directs an Article III court to decide a case, I can easily read into Article III a limitation on the power of Congress to tell the court *how* to decide it."); Lawson, *supra* note 11, at 201 ("Nor could Congress pass a general statute providing, for example, that in any case raising a question concerning the constitutionality of a statute restricting abortion, the court must rule for / against the plaintiff."); *see also* RICHARD FALLON ET AL., HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 368 (4th ed. 1996) ("[I]nvocation of the language of 'jurisdiction' is not a talisman, and . . . not every congressional attempt to influence the outcome of cases can be justified as the existence of a power over jurisdiction."). It is worth stressing that these outcomes are not unconstitutional in some inchoate or impressionistic sense; they are unconstitutional in light of what *the Court* itself has already said. *See* Daniel J. Meltzer, *Congress, Courts, and Constitutional Remedies*, 86 GEO. L.J. 2537, 2540 (1998) [hereinafter *Congress*] ("Congress may not compel the courts to speak a constitutional untruth.").

296. Liebman & Ryan, *supra* note 15, at 773, 822; *see also id*. at 820 ("On the independent interpretation point for which *Marbury* is famous, but which it only silently decided, *Klein* is explicit."); *see also* Loving v. United States, 517 U.S. 748, 757 (1996) ("Even when a branch does not arrogate power to itself . . . the separation-of-powers doctrine requires that a branch not impair another in the performance of its constitutional duties.").

297. *See* Sager, Klein*'s First Principle*, *supra* note 21, at 2529.

298. Sager, *supra* note 5, at 87–88; *see also Plaut*, 514 U.S. at 218 (noting that courts should not be made to exercise their jurisdiction in "a manner repugnant to the text, structure, and traditions of Article III").

299. *See* Sager, *supra* note 5, at 88–89.

resulting jurisprudential "charade"[300] is always the same: Federal courts have been allowed to address the merits of particular cases only to be compelled in some instances to reach incorrect (and unconstitutional) outcomes.[301]

This "charade" is no less pernicious when directed by the Court. It is, if anything, only more so.[302] Yet in *Williams* a version of this "charade" reappears—with the Court writing the script.[303] Like Congress did in *Klein*, *Williams* precludes federal courts "from attending to the Constitution" in arriving at some of their decisions.[304] In some cases, in fact, *Williams* affirmatively requires federal courts to validate incorrect (and unconstitutional) results—so long as those results are somehow "reasonable." Unlike Congress's efforts in *Klein*, however, *Williams*' demand appears subtly, taking a misleadingly innocuous *procedural* form. But the demand is still an insidious one—even in its discreet guise.

This guise is only more remarkable for the span of its influence. Under *Williams*, *state* courts *may* stray from binding Supreme Court authority, so long as they remain "reasonably" close to it.[305] *Federal* courts, in turn, *must* stray from binding Supreme Court authority, ratifying "reasonably unconstitutional" departures from Supreme Court law. This is what *Williams* requires. It is also what *Klein* prohibits.

B. Deference, Remedies, and How Williams *is Worse*

This does not mean, of course, that *Williams* is a complete jurisprudential anomaly. In some ways, *Williams* even seems familiar: Federal courts often defer to other adjudicative bodies, whether judicial or

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300. *See* Sager, Klein*'s First Principle*, *supra* note 21, at 2528.

301. Sager, *supra* note 5, at 88–89.

302. As Professor Fallon has noted, "[i]t would be pointless to uphold a constitutional right to judicial review when relief could not be granted even if the plaintiff should prevail on the merits." Fallon, *supra* note 23, at 370.

303. This fact alone distinguishes *Williams* from the more typical "judicial Power" case. *See*, *e.g.*, Vermeule, *supra* note 6, at 357–58 ("My subject is a common separation-of-powers claim: that a statute violates the constitutional grant of 'judicial power' to the courts.") (citing Hayburn's Case, 2 U.S. (2 Dall.) 409 (1792); United States v. Klein, 80 U.S. (13 Wall.) 128, 146–47 (1871), Crowell v. Benson, 285 U.S. 22, 51, 54–57 (1932), Plaut v. Spendthrift Farm, Inc., 514 U.S. 211 (1995), and Miller v. French, 530 U.S. 327 (2000)).

304. *See* Liebman & Ryan, *supra* note 15, at 775 n.362 (citation omitted).

305. For a truly trenchant study of a similar pressure, see Daniel Meltzer, *Harmless Error*, *supra* note 271, at 5 (explaining that Chapman v. California, 386 U.S. 18 (1967), is "best viewed as a rule of constitutional common law, born of the concern that state courts, if left free to apply their own harmless error standards, would dilute federal constitutional norms by too easily finding that constitutional errors were not prejudicial").

administrative.[306] Federal courts also leave some constitutional wrongs unremedied, both in the habeas context[307] and outside of it.[308] By these two analogical measures, *Williams* hardly looks unusual. Its deference to state courts may seem but an extension of a larger jurisprudential trend;[309] its "reasonably unconstitutional" standard may seem to pry a preexisting rights-remedies gap only a bit wider.[310]

But *Williams*' "charade" is more than a reprise of things seen elsewhere. *Williams*' deference, its conception of rights and remedies, its doctrinal disregard—all are unusual, and troublingly so.

Williams does not, for example, demand deference to alternative tribunals of superior competence, as do certain parts of administrative law doctrine.[311] Instead, *Williams* demands a ceding of federal court authority over *federal* questions (on the merits) to state *courts*[312]—none of which possesses any special decisional capacity.

Nor does *Williams* demand a pardoning of "intermittent *official* misconduct,"[313] as does qualified immunity. Instead, *Williams* demands a pardoning of state court *judicial* errors, an absolution of adjudicative mistakes made by state court *judges*.

And *Williams* does not simply uncouple right from remedy—as federal courts sometimes do.[314] Instead, *Williams* sketches a porous remedial line,

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306. *See generally* Pettys, *supra* note 176, at 765–69.

307. Because of, *e.g.*, AEDPA's many procedural hurdles. *See* 28 U.S.C. §§ 2241, 2244, 2261–66 (2000).

308. Because of, e.g., qualified immunity. *See* Healy, *supra* note 256; Fallon, *Some Confusions*, *supra* note 23, at 311 ("The dictum of *Marbury v. Madison* notwithstanding, there is no right to an individually effective remedy for every constitutional violation.").

309. *See* Woolhandler, *supra* note 30, at 636.

310. *See* Jeffries, *supra* note 57, at 87–88.

311. *Cf.* Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984). *See also* Neuborne, *supra* note 58; Gary Peller, *supra* note 161, 691 (noting that the idea that "state courts are as solicitous of federal claims as are federal courts[] lacks support . . . "); Jonathan Masur, *A Hard Look or a Blind Eye: Administrative Law and Military Deference*, 56 HASTINGS L.J. 441 (2005).

312. Liebman & Ryan, *supra* note 15, at 876 (discussing the "unconstitutional 'decision[s]' of . . . the 'judges in every State'"). In our fictional version of Mississippi, for example, the Sixth and Fourteenth Amendments *do* permit the additional witnesses rule.

313. Liebman & Ryan, *supra* note 15, at 876; *see also* Mitchell v. Forsyth, 472 U.S. 511, 526–27 (1985); Harlow v. Fitzgerald, 457 U.S. 800, 817–18 (1982); Shank v. Naes, 773 F.2d 1121, 1125–26 (10th Cir. 1985) (noting that courts do not expect police officers to make especially nuanced legal determinations); Arnsberg v. United States, 757 F.2d 971, 982 (9th Cir. 1985).

314. To borrow Professor Woolhandler's perfect summary, the "controverted issue is not whether there will be a gap between right and remedy, but rather, how wide that gap should be." Woolhandler, *supra* note 30, at 636; *see also* Fallon & Meltzer, *supra* note 273, at 1799 ("[B]oth the Supreme Court and 'inferior' courts often resolve constitutional questions without providing relief."). In the last decade, Professors Fallon and Meltzer have developed a "theory of constitutionally required remedies," a framework that builds from two "general principles":

prohibiting federal courts from employing a still-extant remedy in cases where that remedy is both available and appropriate.[315]

It has long been clear that neither Congress nor the Court need provide the "best" remedy for every wrong.[316] In the habeas context, there may be no *constitutional* requirement that petitioners receive any federal remedy at all.[317] So, should the Court (or Congress) wish to redefine the underlying right or to modify the attendant remedy, it may well have the power to do so quite dramatically.[318]

> First, a strong though not unyielding presumption that there should be individually effective redress for violations of constitutional rights—a presumption that can be outweighed by practical imperatives; and second, a more general, but also more unyielding, structural principle that constitutional remedies must be adequate to keep government generally within the bounds of law.

Meltzer, *Congress*, *supra* note 295, at 2559 (discussing Fallon & Meltzer, *supra* note 273, at 1787–89 ("Of the two functions performed by constitutional remedies, providing effective remediation to individual victims is the more familiar, but ensuring governmental faithfulness to law is, if not the more fundamental, at least the more unyielding.") (citation omitted)).

Habeas relief has never fit comfortably within this "constitutionally required" frame, in part because of history, see Fallon & Meltzer, *supra* note 273, at 1813 ("History marks federal habeas corpus as constitutionally gratuitous as a means of postconviction review.") (citations omitted), and in part because of "the availability of other[]" remedial forms, see Meltzer, *Congress*, *supra* note 295, at 2563 ("[T]he central point is that famously emphasized by Henry Hart—that the constitutionality of withdrawing particular remedies depends upon the availability of others.") (citation omitted), however "aleatory" those other forms may be. Woolhandler, *supra* note 30, at 642 ("Presumably, if the state court provides postdeprivation process but inappropriately denies relief for such violations, the only federal court remedy for the loss is direct review in the Supreme Court, a remedy that is aleatory at best."). *See also* John Harrison, *Jurisdiction, Congressional Power, and Constitutional Remedies*, 86 GEO. L.J. 2513, 2518–19 (1998) ("[T]he Court's assumption is that although the Constitution contains rules of conduct for federal officers and identifies people who are entitled to some kind of judicial remedy for violations of those rules of conduct, the Constitution does not, by itself, resolve the question of the appropriate remedy."); Walter E. Dellinger, *Of Rights and Remedies: The Constitution as a Sword*, 85 HARV. L. REV. 1532 (1972).

315. *See* Fallon, *supra* note 23, at 370.

316. *See generally* Henry P. Monaghan, *The Supreme Court 1974 Term, Forward: Constitutional Common Law*, 89 HARV. L. REV. 1 (1975). "The law of remedies," Professors Fallon and Meltzer have reminded, "is largely conventional, and what counts as a full or adequate remedy is scarcely less so." Fallon & Meltzer, *supra* note 273, at 1779–80 (citation omitted); *id*. at 1778 (asking if there must "be an effective remedy for every such violation—and if so, what, exactly, does 'effective' mean . . . "); *id*. at 1787 ("Even in cases in which the Constitution requires some remedy, Hart showed that it frequently leaves an element of discretion or flexibility about what that remedy should be.").

317. *Id.*; *see also* Woolhandler, *supra* note 30, at 636.

318. *Compare* Daniel Meltzer, *Congress, Courts, and Constitutional Remedies*, 86 GEO. L.J. 2537, 2554 (1998) (arguing that Congress is not "the exclusive institution with authority to furnish distinctively federal remedies for constitutional violations") (citation omitted), *with* Harrison, *supra* note 314, at 2519 ("The congressional power at issue under this analysis is the power to prescribe and limit the remedies available in federal court. The extent of Congress's structural remedial power is quite important in the case in which Congress has power over the remedy but not over the cause of action.").

But *Williams* changes neither the underlying right nor the attendant remedy, at least in a direct way.[319] Nor does it rework the basic connection between the two. Instead, *Williams* leaves the right in place and the remedy largely unmodified—and then deems habeas *sometimes* different.[320] Some violations of the Sixth Amendment, for example, will warrant habeas relief under *Williams*' test; others will not.

Worse than forcing habeas courts to treat analogous cases differently, this prohibits federal courts from effectuating a still-extant remedy in cases where that remedy is decidedly appropriate.[321] What seems like a slight expansion of an existing right-remedy gap proves, in truth, a significant recasting of the meaning and effect of constitutional error overall—in *some* cases.

C. Right Answers?

So *Williams* suffers some serious flaws. But are *Williams*' defects real? Are they meaningful theoretically *and* practically? Or do they depend on a hollow epistemological premise, an unsustainable belief that there is a "right answer" to be found—and that federal courts can find it?[322]

Much has been written in the last half-century about the so-called indeterminacy thesis, the notion that legal questions have no correct answers—or at least *unique* correct answers.[323] Some scholars advocate this indeterminacy thesis in its most potent form, arguing that the law inevitably fails to "provide concrete, real answers to particular legal or

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319. And at no point does *Williams* proclaim that habeas is simply different, entirely *sui generis* in the realm of federal litigation. One might say, of course, that this observation gets us nowhere, that *Williams* simply does what Congress could have accomplished by statute. Congress could, the argument runs, demand "unreasonableness," just as Congress could amend a statute—say, the Federal Tort Claims Act—to prohibit relief unless the relevant defendant's conduct was reckless. Such a change in the FTCA may be bad policy, but it would not be *unconstitutional*—and *Williams* seems to do much the same thing.

But *Williams* and the "reckless" standard differ in at least one important way: The "reckless" standard changes the substantive reach of one particular law. *Williams* does far more: It leverages "reasonableness" to change the reach of countless provisions of substantive (constitutional) law, and it does so in a way that keeps courts from applying law as otherwise prescribed. This is the *Klein* problem. Even if *Williams* does not seem to prescribe a rule of decision in any particular case, it does prescribe a broader, more insidious "rule of decision" in a category of habeas cases—and that rule precludes courts from effectuating still valid constitutional precedent.

320. This inter-habeas split may be worse than divesting courts of their habeas powers outright, a move that would be both obvious and dubious for other reasons.

321. *See* Fallon, *supra* note 23, at 370.

322. *See, e.g.*, Bator, *supra* note 157, at 446.

323. *See, e.g.*, BRIAN Z. TAMANAHA, ON THE RULE OF LAW: HISTORY, POLITICS, THEORY 86–90 (2004).

social problems."[324] Others stake a less doctrinaire position,[325] suggesting that the law is only indeterminate where it would seem to matter most—to wit, in "important cases."[326] And some disagree with this indeterminacy premise altogether, depicting the law "as a seamless web" with one "right answer" for every legal question.[327]

By now, the defects of this "right answer thesis" are well chronicled.[328] However viscerally powerful the right answer thesis may appear,[329] even the idea's modern architect seems to have withdrawn from it slightly, if not "jettisoned" it altogether.[330]

But the flaws of the right answer thesis have not deterred *the Court* from accepting it, if in a manifestly indirect way. "Governing doctrine," "controlling opinions," "binding precedent"—these phrases may be little more than elements in a "conventional discourse," empty words in cases

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324. Lawrence B. Solum, *On the Indeterminacy Crisis: Critiquing Critical Dogma*, 54 U. CHI. L. REV. 462, 464 (1987) [hereinafter On the Indeterminacy Crisis] (citing, *e.g.*, David Kairys, *Law and Politics*, 52 GEO. WASH. L. REV. 243, 244, 247 (1984); Joseph William Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1 (1984); James Boyle, *The Politics of Reason: Critical Legal Theory and Local Social Thought*, 133 U. PA. L. REV. 685 (1985); Gary Peller, *The Metaphysics of American Law*, 73 CAL. L. REV. 1151 (1985)).

325. *Id.* at 488–91 (defining "weak" indeterminacy as the "claim that all interesting or important cases are indeterminate").

326. *Id.*

327. *See* DWORKIN, *supra* note 69, at 331–38; DWORKIN, PRINCIPLE, *supra* note 231, at ch. 5; RONALD DWORKIN, *Pragmatism, Right Answers and True Banality in Pragmatism*, *in* LAW AND SOCIETY 359 (Michael Brint & William Weaver eds., 1991); STEPHEN GUEST, RONALD DWORKIN 137–43 (1991); Fallon & Meltzer, *supra* note 273, at 1759 ("Among contemporary jurisprudential writers, Ronald Dworkin might appear a spiritual heir to Blackstone. Like Blackstone, Dworkin depicts law as a seamless web, and he maintains that all legal questions have one right answer."). *See also* LAURENCE H. TRIBE & MICHAEL C. DORF, ON READING THE CONSTITUTION 24–30 (1991); Michael C. Dorf, *Legal Indeterminacy and Institutional Design*, 78 N.Y.U. L. REV. 875, 898 (2003) [hereinafter Dorf, *Legal Indeterminancy*]; Michael S. Moore, *Remembrance of Things Past*, 74. S. CAL. L. REV. 239, 246 (2000); Michael C. Dorf, Book Review, *Truth, Justice, and the American Constitution*, 97 COLUM. L. REV. 133, 150–51 (1997).

328. *See, e.g.*, Dorf, Legal Indeterminacy, *supra* note 327, at 898–900; David Luban, *The Coiled Serpent of Argument: Reason, Authority, and Law in a Talmudic Tale*, 79 CHI.-KENT L. REV. 1253, 1270 ("Dworkin's right-answer thesis, even if true, settles nothing."). For a related critique, see Richard Posner, *The Jurisprudence of Skepticism*, 86 MICH. L. REV. 827, 828 (1988), in which Judge Posner explores an "ontological skepticism" that impacts "legal factfinding [and] legal reasoning"—as well as "epistemological skepticism" that questions the existence of "invisible entities" like "justice" and "legislative intent."

329. *See, e.g.*, Charles Fried, *A Meditation on the First Principles of Judicial Ethics*, 32 HOFSTRA L. REV. 1227, 1243 (2004) ("I plead guilty as well . . . to being a long time adherent to what Ronald Dworkin over the years and in many essays has called the right answer thesis. . . .").

330. Ken Kress, Book Review, *Modern Jurisprudence, Postmodern Jurisprudence, and Truth*, 95 MICH. L. REV. 1871, 1888 (1997) (book review) ("Even Ronald Dworkin, who famously proposed the controversial right answer thesis in his early work, has backed away from it—Joseph Raz claims he has 'jettisoned' it—in more recent writings.").

where "reasonable minds" could disagree.[331] But even in the most difficult of cases, the Court has long required inferior federal courts to locate "right answers"—to "plumb the nuances of settled authorities," in Professors Fallon and Meltzer's apt terms, "*to reach 'correct' decisions*."[332]

By this measure, *Williams* runs precisely the wrong direction: It implies that, "in hard and disputable cases,"[333] federal courts cannot (and *need* not) find the "'correct'" answer—or at least that they may not consistently enforce this "'correct'" answer once they reach it. In so doing, *Williams* contradicts the federal court's duty "to reach 'correct' decisions" on matters of substantive law, and it turns federal courts into (sometimes reluctant[334]) institutional critics of legal determinacy.

But *Williams* also runs the wrong way *without* the "right answer thesis," albeit in a less obvious manner. It may be true that many cases are "hard,"[335] leaving courts without easy "right" answers. It may also be true that outcomes in these "hard" cases are truly indeterminate, leaving ample room for "reasonable" jurists to disagree.[336] And it may even be true that this indeterminacy is of a moderated kind, leaving courts a "range" of "reasonable" outcomes. From all of this, it may follow that *Williams* strikes an epistemologically valid chord,[337] landing safely between outright "determinis[tic] objectivism" and unfiltered "indeterministic subjectivism."[338]

But it does not follow that *Williams*' epistemological shrewdness works—as a matter of constitutional law or otherwise. It does not follow,

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331. *See* Fallon & Meltzer, *supra* note 273, at 1748 (discussing Butler v. McKellar, 494 U.S. 407 (1990)).

332. *Id.* at 1762.

> Practical concerns thus favor a conception of law and judging that calls for decisions to turn on the spirit of precedents, as best they can be understood, and that recognizes a judicial obligation of fidelity that extends beyond indisputable cores of settled meaning. . . . In other words, in the vast run of cases the Court joins Dworkin, Hart, and all but the most starkly positivist jurisprudential thinkers . . . .

Id.

333. *Id.*

334. *See, e.g.*, Van Tran v. Lindsey, 212 F.3d 1143, 1151 (9th Cir. 2000).

335. *See* Solum, On the Indeterminacy Crisis, *supra* note 324, at 470.

336. *Id.*

337. "After all," Professor Bator tells us:

> [t]here is no ultimate guarantee that any tribunal arrived at the correct result; the conclusions of the habeas corpus court, or of any number of habeas corpus courts, that the facts were X and that on X facts Y law applies are not infallible; if the existence *vel non* of mistake determines the lawfulness of the judgment, there can be no escape from a literally endless relitigation of the merits because the possibility of mistake always exists.

Bator, *supra* note 157, at 447.

338. Pettys, *supra* note 176, at 776–78.

in other words, that *state* courts should be empowered to resolve the "hard" cases, particularly on questions of *federal* law.[339]

Some have persuasively argued, of course, that "state courts . . . are the primary guarantors of constitutional rights, and in many cases they may be the ultimate ones."[340] If Congress retains "plenary power to limit federal jurisdiction," the logic runs, it must also hold the power to "force proceedings to be brought, if at all, in a state court."[341] This seems an inevitable (if also "naïvely blind" and "unthinkable"[342]) extension of the Constitution's federalist theme, at least when there is no federal court review.

But when there is federal court review, state courts are not the "ultimate" arbiters of federal law. The "judicial Power" of Article III assigns that role to *federal* courts—even when the federal review takes habeas form.[343] This "judicial Power" obligates federal courts to decide questions of federal law "*independently*, finally, and *effectively*."[344] In this sense, *Williams* turns the "judicial Power" on its head, inviting state courts to redefine the contours of federal rights.[345]

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339. *See* Steiker, *supra* note 161, at 888 (noting that the "transformation" of the writ between 1789 and 1868 "strongly supports the writ's role in protection national rights in a national forum").

340. Hart, *supra* note 20, at 1401.

341. *Id.* at 1363–64.

342. 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 & n.112, 250 (1985).

343. This argument runs quite closely to the "federal right / federal forum" theory, the notion that *all* federal questions merit federal court review. *See, e.g.*, Bator, *supra* note 157, at 507 (noting that, during a portion of his testimony before the Senate, Thurgood Marshall argued that "[f]ederal questions should be determined by the Federal judiciary") (citation omitted); Fallon & Meltzer, *supra* note 273, at 1813 nn.454–56 (discussing the Court's treatment of this theory). As Professor Meltzer has reminded, "the argument that federal rights should be litigated, sooner or later, in a federal forum can[not] alone carry the day." Meltzer, *supra* note 32, at 2509. So perhaps there are federal questions appropriately deprived of federal review—at least in certain contexts. Once federal review begins, however, it should be real and convincing, even if that review takes habeas form. *See* Bator, *supra* note 157, at 449 ("[T]here is no a priori reason why we should not decide that the most acceptable arrangement for the decision of such questions is that all such state-court determinations should be reviewed by a federal district court on collateral attack."); Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359, 1362 (1997); *cf.* Paul M. Bator, *The State Courts and Federal Constitutional Litigation*, 22 WM. & MARY L. REV. 605, 636 (1981) (distinguishing direct and collateral review carefully).

344. Liebman & Ryan, *supra* note 15, at 773, 822. To say that state courts should have the final say on these questions is to argue for the end of modern habeas law, not for the putatively modified version of habeas Williams purports to offer.

345. There is plenty to say in favor of state court participation in adjudication of federal rights. *See, e.g.*, 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); *but cf.* Frank B. Cross, *The Folly of Federalism*, 24 CARDOZO L. REV. 1 (2002); Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 U.C.L.A. L. REV. 903 (1994). But the famous

This process of redefinition may take place only at the margins—like Professor Monaghan's famous "federalism 'at the edges.'"[346] But this process promises a profoundly negative end, one that risks fragmenting *and* diminishing constitutional rights. Since *Williams* strips federal courts of the power to correct "reasonably unconstitutional" state court decisions, it opens a window (however slightly) for state courts to "upset well-defined expectations about the content" of federal rights.[347] As this window opens, federal rights will come to mean (somewhat) different things in different states. The resulting "patchwork without pattern"[348] will promise something worse than a tolerable level of rights-related inconsistency;[349] it will promise a recalibration—and ineluctable scaling back[350]—of *substantive* rights, all through the mechanism of a deferential *procedural* model.

There is, as Professor Vermeule has noted, a "mountain of scholarship" addressing the "common problem" of "*legislative* encroachment on judicial prerogatives."[351] Some of this scholarship recounts the Congress-Court tension in meticulous detail.[352] Some locates the Congress-Court dialogue in historical and social context.[353] And some offers hopeful

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states-as-laboratories notion, however philosophically attractive, does not itself excuse a whittling away of the federal judicial power, nor does it permit a disregard of the Court's authoritative interpretation of substantive constitutional provisions. *See* Alexander & Schauer, *supra* note 343, at 1362.

346. Monaghan, *supra* note 316, at 36.

347. *Id.*

348. ELY, *supra* note 10, at 146.

349. *See* 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 right from hostility or misunderstanding on the part of state courts."); *cf.* Steiker, *supra* note 161, at 865 ("[T]here is some reason to believe that the Framers designed the Suspension Clause principally to promote federalism—to ensure that Congress would not interfere with the power of *state* courts to afford habeas relief to *federal* prisoners.").

350. It is "wrong," Professor Chemerinsky is careful to note, "to presuppose that decisions in favor of [individual liberties] are preferable" to decisions in favor of "government interests." Erwin Chemerinksy, *Parity Reconsidered: Defining a Role for the Federal Judiciary*, 36 U.C.L.A. L. REV. 233, 258 (1988). But when state courts are permitted to stray from "clearly established" Court doctrine, the question is *not* whether rights *should* trump governmental interests. The question, rather, is whether rights *have* trumped government interests according to the Supreme Court. *Williams* 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.

351. *See* Vermeule, *supra* note 6, at 358.

352. *See, e.g.*, Symposium, *Exordium, Suspension and Supremacy, Judicial Power and Jurisdiction: The Availability and Scope of Habeas Corpus after AEDPA and IIRIRA*, 98 COLUM. L. REV. 695 (1998) [hereinafter COLUM. L. REV. Symposium]; Symposium, *Congress and the Courts: Jurisdiction and Remedies*, 86 GEO. L.J. 2445 (1998) [hereinafter GEO. L.J. Symposium].

353. Gunther, *supra* note 7, at 895–900.

solutions to this "common [inter-institutional] problem," cures that often depend on the judiciary's interest in self-protection.[354]

There are no such cures when the Court opts to self-enervate. When the Court derogates its own powers—as it does in *Williams*—there are no clear solutions.[355] At first blush, of course, *Williams*' decisionmaking system may not seem to demand a solution; it may seem an innocuous, even irrelevant decisional form, a curious inversion of *Swift*'s over-inflation of federal court power. But *Williams*' structure is far from harmless.[356] The integrity of the federal courts, the operation of those courts, the meaning of substantive-right guarantees—all are at increased risk because of *Williams*' unassuming decisionmaking model, its unconstitutional course.

V. CONCLUSION

It has been a long time since Senator William King called the Supreme Court "our 'Ark of the Covenant,'" our final "bulwark for the safety and protection of the States and the people."[357] It has been long enough, in fact, that political threats "to weaken or impair the power and the authority of . . . our judicial system" no longer "arouse grave apprehensions in the minds of all thoughtful Americans."[358] If anything, such threats now do precisely the opposite.[359]

Of course, these threats rarely materialize. However noisy they may be, the calls to rein in "runaway" federal courts are almost always more smoke than fire.

But smoke can be distracting, and it has obscured another potent hazard to the federal judiciary: the Supreme Court itself. In the last decade, the Court has itself "weaken[ed and] impair[ed] the power and authority" of the federal courts.[360] It has done so by reshaping its own "judicial Power"—not through bold pronouncements or obvious doctrinal revisions,

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354. *See*, *e.g.*, COLUM. L. REV. Symposium, *supra* note 352; GEO. L.J. Symposium, *supra* note 352.

355. "The Constitution [may] contemplate[] a judicial 'check' on the political branches," Fallon & Meltzer, *supra* note 273, at 1788, but it envisions no structural "judicial 'check'" on itself.

356. The "blinders" are no less troubling because the Court has "volunteer[ed]" to wear them. Liebman & Ryan, *supra* note 15, at 851.

357. *See* Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Four: Law's Politics*, 148 U. PA. L. REV. 971, 1041 n.317 (2000) (citing *Court Change Foes Hold Senate Lead*, N.Y. TIMES, Feb. 11, 1937, at 15).

358. *Id.*

359. *See* Editorial, *supra* note 8.

360. Court Change Foes Hold Senate Lead, N.Y. TIMES, Feb. 11, 1937, at 15 (quoting Sen. William H. King).

but through the prescription of unconstitutional decisionmaking procedures, the charting of unconstitutional courses.

It is easy to gainsay the importance of procedure, to think of procedure as nothing more than a means to an (appropriate) end. But there is nothing trivial about unconstitutional courses. Some of these courses await full exploration. Qualified immunity and Fourth Amendment doctrine, for example, merit scrutiny through an "unconstitutional course" lens. Some courses capture important historical and philosophical moments. *Swift*'s course, for example, helps chronicle the rise and fall of a natural-law theory of jurisprudence.[361] And some courses present real—if shrouded—dangers to individual litigants' rights, to federal court integrity, and to the "judicial Power" overall. *Williams*' course, for example, ties this "judicial Power" in intricate knots.[362]

These knots are real, but they are too readily overlooked. Their unexpected source and their subtle form make it too easy to ignore the Court's unconstitutional courses. Yet where Congress has so often failed, the Court has quietly succeeded: By charting unconstitutional courses, the Court has refashioned the "judicial Power" in an untenable way.

So there may well be a lesson in Congress's long record of jurisdiction-stripping failure. It may suggest that Congress's persistent efforts are mere political theater. It may suggest that the federal courts are in no real danger, that the "judicial Power" is unthreatened. Or it may suggest that the "judicial Power" is indeed threatened—but that we have been too busy watching the wrong fight to notice.

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361. *See supra* Part II.
362. *See supra* Parts III & IV.