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LAW WITHIN LIMITS: JUDGE WILLIAMS AND THE CONSTITUTION

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If the Constitution of the United States means what the Supreme Court says it means—if judges swear oaths, not to support the Constitution, but to support "some body of law created by the Supreme Court"[1]—then the judges of the unfortunately named "inferior

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[1] *See* Josh Blackman, *Judge Posner on Judging, Birthright Citizenship, and Precedent*, JOSHBLACKMAN.COM (Nov. 6, 2015) [https://perma.cc/YX45-LT84] (statement of Judge Richard Posner); *cf.* Eric J. Segall, *The Constitution Means What the Supreme Court Says It Means*, 129 HARV. L. REV. F. 176, 176 & n.3 (2016) (attributing to Posner the remark "that following the Constitution does not mean adhering to its text but instead respecting Supreme Court interpretations of that text").

Courts"[2] must have little to do with it. However respected or talented they might be, the judges in such a world would be "bound down by strict rules and precedents" more tightly than Hamilton ever imagined.[3] Not only would they "close their eyes on the constitution, and see only the law," as Chief Justice Marshall warned in *Marbury v. Madison*;[4] they would close their eyes even on the law, and see only the decisions of courts.[5]

Many lawyers and judges experience something like this in their daily lives. Most judges are lower-court judges, most litigators spend their days in lower-court litigation, and most legal education, perhaps unwittingly, is aimed at lower-court practice. (Students might debate higher-court opinions in class, but their exams generally train them to take these opinions as fixed.) This focus makes it easy to confuse *law* with *lower-court law*, the blend of actual legal rules and intervening precedent that shapes much of a lawyer's ordinary experience. Yet in a legal system like ours, in which even higher-court judges may err, mistaking one sort of law for the other can blind us to our actual legal obligations.

Judge Stephen F. Williams did not make that mistake. Over the decades of his distinguished service on the U.S. Court of Appeals for the D.C. Circuit, he was hardly averse to "high-quality doctrinal analysis," to "reading a mass of cases" and "pulling them together into a coherent whole."[6] He praised such analysis,[7] criticized those who scorned it,[8] and was remarkably adept at carrying it out. But he never took it as the sum and substance of constitutional law. Rather,

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[2] U.S. CONST. art. III, § 1.

[3] THE FEDERALIST NO. 78, at 529 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

[4] 5 U.S. (1 Cranch) 137, 178 (1805).

[5] *See* Michael Stokes Paulsen, *The Irrepressible Myth of Marbury*, 101 MICH. L. REV. 2706, 2717 (2003).

[6] Stephen F. Williams, *"Legal" Versus "Non-Legal" Theory*, 17 HARV. J.L. & PUB. POL'Y 79, 84 (1994).

[7] *Id.*

[8] *Id.* at 85.

in his nonjudicial writings, Judge Williams understood the Constitution of the United States as binding law, enacted at a particular time with particular content, which content should be interpreted (whenever unclear) in light of the reasons for its original enactment.

As a judge on the D.C. Circuit, moreover, Judge Williams acted on these views: in cases of first impression, in filling the gaps between precedents, and in criticizing some of the Supreme Court decisions that he faithfully obeyed. He did so through a careful consideration of text and history, with an eye to the economic causes and consequences of legal doctrine, and with the fierce independence of mind that led him occasionally to write concurrences to his own majority opinions. And where he followed the reasoning of dubious precedent, he did so with the kind of intellectual precision and attention to the factual record familiar to anyone who knew him.

In so doing, he offered both lawyers and judges a model of intellectually serious adherence to law. Judge Williams should be honored for this adherence, for his honesty to his readers, and for his careful appreciation of the limits on his role.

I. THE PERILS OF LOWER-COURT LAW

Whatever one's constitutional theory, there may be few opportunities to apply it on an intermediate court of appeals. Constitutional theorizing is a luxury, usually reserved for academics and Supreme Court Justices. Originalism, for example, is said to be "a method of reasoning that only the nine Justices of the Supreme Court can apply with any regularity."[9] Unlike other judges, the Justices can control their own docket and devote more time to each case; can expect high-quality research and briefing by parties and amici; can resolve issues with lasting effect nationwide; and, most importantly, can decide the

[9] *Cf.* Darrell A.H. Miller, *Romanticism Meets Realism in Second Amendment Adjudication*, 68 DUKE L.J. ONLINE 33, 34 (2018).

way they think they *ought* to decide, without any meddling vertical precedent in the way.[10] As compared to other judges "bound down with strict rules and precedents,"[11] the Justices will find it far easier to formulate and act upon a consistent legal theory.

Each level of a legal system thus tends to encourage a different attitude toward the law. By way of illustration, consider the different levels of legal practice. Most ordinary citizens engage with the legal system at the level of *actual practice*. If the speed limit is 55 miles per hour, but no one gets ticketed for driving a few miles over, most ordinary citizens will treat driving 60 miles per hour as if it were lawful. If the drivers are unusually law-minded, they might consult a traffic lawyer, who could acquaint them with the *lower-court practice*—say, that traffic judges usually dismiss minor infractions if the driver contests them, or that ticketing police officers rarely take the trouble to testify in minor cases. And if the drivers are *very* law-minded, they might ask a big-firm lawyer about *higher-court practice*—and might learn, say, that the Supreme Court is unlikely to take their traffic-ticket case, as the pool clerk will brush off a pretextual-stop claim as "splitless," "factbound," and "oft-denied."

We see similar divisions in what the same lawyers might say about the law. A good traffic lawyer will tell you that the speed limit is 55, that "I was only going a few miles over" is not a valid defense, and that a police stop's being pretextual makes no difference under *Whren v. United States*[12]—even if many drivers who take the trouble to show up at traffic court would actually tend to win. The lower-court practice is not the same as the *lower-court law*, the set of legal rules which apply to the lower court and which restrict its freedom of decision. Likewise, a big-firm lawyer might tell the driver that not only that the Supreme Court is likely to retain *Whren* (a matter of

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[10] *See* Ryan C. Williams, *Lower-Court Originalism*, 45 HARV. J. L. & PUB. POL'Y 257, 270–74 (2022).

[11] THE FEDERALIST NO. 78, *supra* note 3, at 529.

[12] 517 U.S. 806, 813 (1996).

Supreme Court practice for court watchers and journalists to debate), but also that a call for *Whren*'s overruling might have an uphill battle given the traditional stare decisis factors—a matter of *higher-court law*. All this is distinct, of course, from the *actual law*, the underlying rules for which precedents are mere proxies, and which determine whether a case like *Whren* was rightly or wrongly decided under the Fourth Amendment.

Disentangling these threads is sometimes difficult, for discussions of law and practice tend to cover the same persons and institutions and are often intertwined. In advising a client, a good lawyer will usually have a duty to explain the practice: to say, as another former clerk of Judge Williams put it, that while "'[t]he Constitution plainly establishes Rule *X*, . . . the Supreme Court has interpreted it to establish Rule *Y* instead, and the Court is not going to overrule that interpretation.'"[13] At the same time, every lawyer "would understand the distinction that this statement draws, and relatively few would consider it completely artificial or incoherent."[14]

A good judge, too, must be able to identify not only the actual rules of law implicated in a case—whether imposed by common law, statute, treaty, or the Constitution—but also the rules that govern the particular case at bar. These latter rules, Judge Williams noted, might be imposed by "a higher court, or even prior rulings of the same court,"[15] panel or en banc—even if the Constitution or the statute plainly goes the other way. To the extent that the actual law also obliges courts to follow the precedents of the tribunals reviewing

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[13] Caleb Nelson, *A Critical Guide to Erie Railroad Co. v. Tompkins*, 54 WM. & MARY L. REV. 921, 937 (2013).

[14] *Id.*

[15] Williams, *supra* note 6, at 81.

their judgments,[16] it is these precedents, and not the actual law, that they must apply to the merits. Precisely because the Supreme Court cannot hear every case—and neither can the circuit courts en banc—our legal system depends, for uniformity and equal treatment of litigants, on judges faithfully following such precedents, most of the time.[17]

The difficulty is in keeping all these threads in one's head at once. Is small-time marijuana possession unlawful?[18] As a matter of actual practice, the answer in many states is mostly no: the state has legalized it, and neither the state police nor the FBI will interfere. As a matter of lower-court law, the answer is yes: any court that hears the question will respond that marijuana is a Schedule I substance under the federal Controlled Substances Act,[19] and that this prohibition was upheld as constitutional in *Gonzales v. Raich*.[20] As a matter of higher-court law, the question is less clear, and might turn partly on such considerations as whether *Raich* is "workab[le]" or "consisten[t] with other related decisions" or "developments since the decision was handed down."[21] And as a matter of actual law, the matter is murkier still, turning on the scope of Congress's powers to "regulate

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[16] *See, e.g.*, Belcher v. Chambers, 53 Cal. 635, 643 (1879) ("When our judgment must depend upon a question which may be reexamined by the Supreme Court of the United States on writ of error, we will follow the rule of law laid down by that Court."); *but see* Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 STAN. L. REV. 817 (1994) (questioning this obligation); Michael Stokes Paulsen, *Accusing Justice: Some Variations on the Themes of Robert M. Cover's Justice Accused*, 7 J.L. & RELIGION 33, 82–88 (1989) (arguing that higher-court decisions may be "underruled").

[17] *But cf.* Heather K. Gerken, *Judge Stories*, 120 YALE L.J. 529, 530 (2010) ("'They can't reverse everything,' [Judge Stephen Reinhardt] says with a glint in his eye.").

[18] The example is borrowed from Stephen E. Sachs, *The "Constitution in Exile" as a Problem for Legal Theory*, 89 NOTRE DAME L. REV. 2253, 2267 (2014).

[19] 21 U.S.C. §§ 812(c)(Schedule I)(c)(10), 841(a)(1), 844(a); *see* 76 Fed. Reg. 40,552 (2011).

[20] *See* 545 U.S. 1, 22 (2005).

[21] Janus v. AFSCME, Council 31, 138 S. Ct. 2448, 2478–79 (2018).

Commerce . . . among the several States," or to enact "Laws . . . necessary and proper for carrying [such powers] into Execution."[22]

The easiest response, then, both for judges of "inferior Courts" and for the lawyers who argue before them, is to stick to one's knitting, treating the Constitution as if it means what the Supreme Court says it means. Of course, few people take such vulgar-realist views literally—arguing, say, that if the Justices proclaimed themselves immortal god-emperors with the power to command the tides, then this would be what the Constitution really provides.[23] Rather, slogans like these are stand-ins for views, say, that Supreme Court decisions often fail to track preexisting legal principles, that such decisions predictably track the Justices' other ideological commitments, and that arguing about law is a fool's errand when the Justices are really paying attention to something else. For practical-minded lawyers and clients, and for judges not keen on reversal, these reasons are good enough. But for those who take legal argument seriously, as an intellectual matter, the slogans fall short: law is not just a summary of what powerful people will do, because it is possible for those powerful people to violate or mistake the law. (A Chicago where "Al Capone's word is law" is not the same as the actual 1920s Chicago, where Capone was an outlaw, albeit a powerful one.)[24]

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[22] U.S. CONST. art. I, § 8, cl. 3, *id.* cl. 18.

[23] *But cf.* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 867–68 (1992) (claiming the ability to "call[] the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution," and describing Americans' "belief in themselves as [a law-abiding] people" as "not readily separable from their understanding of the Court invested with the authority to decide their constitutional cases and speak before all others for their constitutional ideals"), *overruled*, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2242 (2022).

[24] *See* William Baude & Stephen E. Sachs, *Grounding Originalism*, 113 NW. U. L. REV. 1455, 1469 (2019).

A more sophisticated response, though also mistaken, is to treat the enacted Constitution as merely an inspiration for constitutional *doctrine*: to view the accumulated tradition of cases as the real law, and the Constitution's text as a source of convenient quotations to drop in as rhetorical support. Judicial doctrines are indeed the focus of what David Strauss calls "the day-to-day practice of constitutional interpretation";[25] as Paul Brest points out, they are among the "principal subjects that occupy professionals who 'do' constitutional law—lawyers, judges, law professors and law students—and are considered part of constitutional law by the media and by the lay public."[26] Thus, Strauss concludes, "in the courts and in general public discourse, the specific words of the text play at most a small role, compared to evolving understandings of what the Constitution requires";[27] and these understandings evolve through "a process akin to the common law, instead of as a matter of fidelity to an authoritative direction."[28]

But all this is largely an artifact of lower-court law. Courts do treat past decisions as part of an ongoing legal tradition: they synthesize new opinions into a broader doctrinal landscape, so that they can answer intermediate questions in ways that fit the existing cases, interpolating new fact patterns between fixed points set by precedent. But they do this at the instance of *separate rules* of vertical and horizontal precedent—and not because the decisions themselves were correct statements of constitutional law when they were decided, or because they somehow became correct retroactively as a result of other decisions that followed them. Whenever courts are less bound by rules of precedent, or whenever they have the choice to extend or

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[25] David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 877 (1996).

[26] Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 225 (1980).

[27] Strauss, *supra* note 25, at 877.

[28] *Id.* at 903.

limit a particular doctrine, then the substance of the law still matters, and not the doctrines only.

Likewise, the media and lay public do treat court decisions as part of constitutional law; but they do this *in the vulgar-realist sense*, the sense in which a single ruling by the Supreme Court might "dramatically change the law of abortion"[29] without doing any common-law evolutionary work (indeed, "as a matter of fidelity to an authoritative direction"[30]). When the Supreme Court issues decisions arguably contrary to the prior "evolving understandings"—say, *Citizens United v. FEC*,[31] or *District of Columbia v. Heller*,[32] or *Shelby County v. Holder*,[33] or *Dobbs v. Jackson Women's Health Organization*,[34] or what have you—lawyers, lower courts, and members of the media and the public start applying these decisions just as they do every other, without troubling themselves about the inconsistency; the rain falleth on the just and unjust alike. To the extent these decisions find a halting reception, that can be due to policy disagreement with their substance, to an expectation that they will be short-lived, or to the complexity of applying them to new facts. But once the legal profession is convinced that "the Court is not going to overrule that interpretation,"[35] they become as solid as any other precedents before them. (Or, if you reject these examples, choose your favorite ones instead—and if it is too difficult to think of the Supreme Court ever departing from evolving understandings, perhaps these

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[29] Erwin Chemerinsky, *A Challenge Before the Supreme Court Should Scare Believers in Reproductive Freedom*, L.A. TIMES (May 17, 2021) [https://perma.cc/AX49-ERF6].

[30] Strauss, *supra* note 25, at 903.

[31] 558 U.S. 310 (2010).

[32] 554 U.S. 570 (2008).

[33] 570 U.S. 529 (2013).

[34] 142 S. Ct. 2228 (2022).

[35] Nelson, *supra* note 13, at 937.

understandings evolve too easily, and indeed collapse back into vulgar-realist predictions of whatever the Supreme Court will do next.)[36]

By contrast, when courts or commentators speak at the level of actual law—when they talk publicly about what makes a doctrine or decision correct *ab initio*, its precedential force aside—they tend to emphasize very different factors. In American law, Strauss has noted regretfully, "the terms of debate . . . continue to be set by the view[s] that principles of constitutional law must ultimately be traced to the text" and "that when the text is unclear the original understandings must control."[37] That may be why, for example, treating the Constitution as a set of judicial doctrines "has not gained currency," for "it is not an approach we usually associate with a written constitution, or indeed with codified law of any kind."[38]

So, the "high-quality doctrinal analysis"[39] we expect from courts is necessary but also dangerous; it runs the risk of treating what lawyers usually do when arguing where they usually argue (that is, before lower courts) as if it were the whole of the law. If horizontal precedent has, as some argue, an "intrinsically corrupting influence"(because it requires departures from the correct constitutional theory, "[w]hatever one's theory" might be),[40] then fealty to vertical precedent can also corrupt, and absolute fealty to vertical precedent can corrupt absolutely. The proper response is not to disregard precedent (stare decisis, too, is part of the law),[41] but rather to keep it in its proper place. This requires judges to carry in their minds two

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[36] *See* Sachs, *supra* note 18, at 2293 ("To the extent that the common law method is really a method, in the sense of providing determinate legal constraints on decision making, it could easily find itself in exile. (Maybe, given the Court's sometimes cavalier treatment of doctrinal analysis, it already is.)").

[37] Strauss, *supra* note 25, at 878.

[38] *Id.* at 885.

[39] Williams, *supra* note 6, at 84.

[40] Michael Stokes Paulsen, *The Intrinsically Corrupting Influence of Precedent*, 22 CONST. COMMENT. 289, 289 (2005).

[41] *See* Caleb Nelson, *Stare Decisis and Demonstrably Erroneous Precedents*, 87 VA. L. REV. 1, 14–21, 32–37 (2001).

things at once: what the law is, and what the law requires those in their positions to *say* that the law is, at least for the moment. Academics have the luxury of choosing to address only the former; judges do not. Judge Williams, of course, always acted in both roles at once, as the occupant of a high government office and as a particularly independent thinker. And he was able to avoid, more than most, the perils of lower-court law.

II. CONSTITUTIONAL THEORY

A. AUTHORITATIVE RULES

To Judge Williams, lawyers and judges had no secret knowledge, no privileged insights into how to run a society. In making their decisions, they have much to learn from other fields, economics chief among them. What distinguishes the lawyer's reasoning from the reasoning made possible by these other fields is not any superior wisdom, but "the presence of authoritative rules": in many cases, "one does not get to any question in which economics or some other discipline might be helpful because one is told how to proceed by some rule," which might "solve the case without any opportunity for the consideration of economics or any similar 'non-legal' thought."[42]

These rules, and the materials in which lawyers find them, mainly take "the form of commands."[43] Whether derived from "the Constitution, the legislature, a higher court, or even prior rulings of the same court," it is still "an *instruction* the court is interpreting and trying to follow (or evade)."[44] Sometimes the work of interpretation is easy: the rules are "meant to be clear for those who must live under

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[42] Williams, *supra* note 6, at 81; *cf.* Frederick Schauer, *Formalism*, 97 YALE L.J. 509, 510 (1988) (describing these rules as "screening off from a decisionmaker factors that a sensitive decisionmaker would otherwise take into account").

[43] Williams, *supra* note 6, at 81.

[44] *Id.*

and apply them."[45] And when a rule is clear, concern for its unfortunate consequences, or for its author's desire to avoid such consequences, may never be used "to overthrow the meaning of an authoritative legal text."[46] Indeed, Judge Williams identified in "the intent mindset" a particular "sort of sloppiness," as in briefs that claim "'Congress said thus-and-so'—followed by a cite to a committee report."[47] If an interpreter "purports to seek legislative intent, the risk of his using the unenacted 'intent' not to construe but to overthrow the language is far greater."[48]

Consider, by way of example, the due process protections for "life, liberty, [and] property"[49]—sometimes described as among the "constitutional generalities" to which "[u]sage" may "impart changed content."[50] Today, what Justice Stevens called "the liberty clause"[51] has been taken as the font of a wide range of rights, including "the Constitution's promise that a measure of dignity and self-rule will be afforded to all persons"[52] (as exemplified, in Stevens's view, by *Planned Parenthood of Southeastern Pennsylvania v. Casey*).[53] In one early paper, however, then-Professor Williams embarked on an originalist analysis of the term "liberty" in the Fifth and Fourteenth

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[45] *Id.*

[46] *Id.* at 82.

[47] Stephen F. Williams, *Restoring Context, Distorting Text: Legislative History and the Problem of Age*, 66 GEO. WASH. L. REV. 1366, 1369 (1998) (footnote omitted) (citing ANTONIN SCALIA, *Common-Law Courts in A Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 31 (Amy Gutmann ed., 1997)).

[48] *Id.*

[49] U.S. CONST. amend. V; *id.* amend. XIV, § 1.

[50] Ray v. Blair, 343 U.S. 214, 233 (1952) (Jackson, J., dissenting); *cf.* BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 76 (1921) ("a concept of the greatest generality").

[51] McDonald v. City of Chicago, 561 U.S. 742, 864 (2010) (Stevens, J., dissenting).

[52] *Id.* (internal quotation marks omitted).

[53] *Id.* (citing 505 U.S. 833, 847 (1992)). For subsequent use of the "liberty clause," *see, e.g.*, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2322, 2325 (2022) (Breyer, Sotomayor & Kagan, JJ., dissenting).

Amendments,[54] arguing that their Due Process Clauses primarily concern physical freedom from incarceration, not the fundamental rights addressed (if at all) by the Fourteenth Amendment's Privileges or Immunities Clause.[55] In a companion paper, he criticized "the effort to stuff liberty full of every good thing, like a Christmas stocking," as "little more than a counsel to the courts to assume the role of a Council of Revision."[56] Creativity of that degree was off limits to judges: as he later wrote, "unless the 'living Constitution' theorist simply means that the Constitution is an invitation to the courts to improvise, he can hardly dispense with historical meaning."[57]

B. POLICY AND PRINCIPLE

But sometimes the rules are less clear; sometimes they require more interpretive effort. In these cases, Judge Williams urged consideration of the policies that lay behind the rules. Because each legal rule was chosen to "manifest some economic principle" or "a compromise of competing values," one should, if interpretation is required, "expect the interpretation to accord with the principle."[58] It may be "entirely legitimate," when "interpreting a genuine ambiguity," to consider the kinds of policy interests that justified the rule's adoption in the first place.[59] That a judge might put forward a "half-baked" analysis of policy consequences was less dangerous, in Judge

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[54] U.S. CONST. amend. V; *id.* amend. XIV, § 1.

[55] Stephen F. Williams, *"Liberty" in the Due Process Clauses of the Fifth and Fourteenth Amendments*, 53 U. COLO. L. REV. 117, 123–28 (1981) (Fifth Amendment); *id.* at 131–36 (Fourteenth Amendment).

[56] Stephen F. Williams, *Liberty and Property: The Problem of Government Benefits*, 12 J. LEGAL STUD. 3, 16 (1983).

[57] Williams, *supra* note 47, at 1367.

[58] Williams, *supra* note 6, at 81.

[59] *Id.* at 82.

Williams's view, than having those same judges do the same sort of consequentialism *sotto voce*, "in a quarter-baked way."[60]

This explicit consideration of policy may sound *outré* in some quarters, but it too comes with a rather long pedigree; both Madison and Marshall said much the same thing.[61] And Judge Williams's approach is miles away from a Posnerian pragmatism that looks first for "a sensible solution, without worrying about doctrinal details," and that asks only afterwards whether the "sensible solution" is "'blocked by some kind of authoritative precedent.'"[62] That kind of first-best policy analysis treats legal sources as constraints, but only at the edges: the judge's job is to do as much independent policy work as possible, while avoiding square contradiction from legal authorities. Judge Williams, by contrast, invoked policy considerations primarily as a means of implementing the preferences of the policymaker: what matters most is the compromise of competing values *reflected in the rule's adoption*, not the policy a reviewing judge might choose on a blank slate.

One example of this moderate consideration of policy was Judge Williams's theory of preemption. Rather than have courts apply an across-the-board presumption against preemption,[63] he suggested that they ask "why Congress has chosen to nationalize the issue

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[60] *Id.* at 83.

[61] *See* United States v. Fisher, 6 U.S. (2 Cranch) 358, 386 (1805) (Marshall, C.J.) ("[W]here great inconvenience will result from a particular construction, that construction is to be avoided unless the meaning of the legislature be plain, in which case it must be obeyed."); JAMES MADISON, The Bank Bill (Feb. 2, 1791), *in* 13 THE PAPERS OF JAMES MADISON: CONGRESSIONAL SERIES 372, 374 (Charles F. Hobson & Robert A. Rutland eds., 1981) ("Where a meaning is clear, the consequences, whatever they may be, are to be admitted—where doubtful, it is fairly triable by its consequences."); *accord* Evan Bernick & Chris Green, *The Oath Argument at Sea*, THE ORIGINALISM BLOG (May 21, 2020) [https://perma.cc/FQ38-EULW]; *see generally* Samuel L. Bray, *The Mischief Rule*, 109 GEO. L.J. 967 (2021) (describing the real, but limited, role for policy considerations in common-law statutory interpretation).

[62] Blackman, *supra* note 1.

[63] *See, e.g.*, Wyeth v. Levine, 555 U.S. 555, 565, 574–75 (2009).

involved (insofar as it has)."[64] If the preemption question is about how much Congress has nationalized, he wrote, "it seems basic to ask why it has nationalized it at all."[65]

Judge Williams based this inquiry in part on the Founders' concern for structure,[66] citing materials from the Philadelphia debates—including Gunning Bedford's resolution and Resolution VI of the Virginia Plan, which focused federal power on the collective-action problems that states could not solve on their own.[67] But because presumptions generally matter only when a statute is unclear as to its preemptive effect, he also argued for considering modern conditions. When the problem justifying the law was states' externalizing the costs of overly lax regulations—say, manufacturing states' ignoring cross-border pollution, the costs of which fell elsewhere—then it seems plausible that Congress enacted a nonpreemptive rule, letting each state regulate more if it so desired.[68] When the problem was states' externalizing the costs of overly *burdensome* regulations—say, consumer states' imposing on nationwide markets their own product liability standards, the costs of which also fell elsewhere—then it seems equally plausible that the federal rule was designed to promote uniformity, not just safety.[69] If Congress had failed to speak clearly to the nature of its choice, Judge Williams suggested that judges might try to analyze the interests themselves, to see what kinds of worries might have justified the rule's adoption.[70]

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[64] Stephen F. Williams, *Preemption: First Principles*, 103 NW. U. L. REV. 323, 326 (2009).

[65] *Id.*

[66] *Id.* at 331–32.

[67] *Id.* at 325–26 (first citing 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 21, 229 (Max Farrand ed., rev. ed. 1966) [hereinafter FARRAND]; and then citing 2 *id.* at 26; Robert Stern, *That Commerce Which Concerns More States Than One*, 47 HARV. L. REV. 1335 (1934)).

[68] *Id.* at 327.

[69] *Id.* at 328.

[70] *Id.* at 332.

These kind of readings might have been unnecessary in a world where goods and services were largely produced and consumed at home: "in a single, completely isolated jurisdiction, lawmakers would have considerable incentive to consider the impact of safety demands on price."[71] But in Judge Williams's view, a variety of social and legal changes since the Founding—the "way in which products and buyers wander among the states," the Supreme Court's weak oversight of "in personam jurisdiction" and "state choice-of-law decisions," and "modern courts' virtually complete indifference" to contracted-for limits on liability[72]—had heightened the need for uniform policy, and thus the likelihood that Congress was pursuing uniformity when it announced a federal rule. Where the legislation is "reasonably clear . . . , a court will have no need for a presumption"; but "where no clear answer emerges, it seems reasonable to impute to Congress goals that are consistent with federalism's overall structure and purpose."[73] So, "absent a fairly clear lead from Congress," Judge Williams encouraged "a strong presumption against a supposed effort to prevent a race to the bottom" as "most in keeping with reality and the overall purpose of the Constitution."[74]

Whether this treatment is legally correct turns in part on the source of the traditional presumption against preemption. If the presumption is itself a rule of law—of common law, say,[75] or a corollary of the Tenth Amendment's limitations on federal power and guarantee of state autonomy[76]—then it binds courts in construing statutes, as would any other default rule located elsewhere in the *corpus juris*.

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[71] *Id.* at 328.

[72] *Id.*

[73] *Id.* at 332.

[74] *Id.* at 331.

[75] *Cf.* William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 HARV. L. REV. 1079, 1110 (2017) (suggesting that the presumption against preemption might be a common-law "priority rule").

[76] *Cf.* Gary Lawson, *Dead Document Walking*, 92 B.U. L. REV. 1225, 1234 (2012) (identifying a presumption "against the existence of federal power and in favor of the existence of state power" (emphasis omitted)).

Just as courts cannot disregard the Dictionary Act "unless the context indicates otherwise,"[77] it would be beyond a court's power to relax the presumption in circumstances where Congress would have been wise to do so affirmatively, but did not. But to the extent that Judge Williams's approach is less a counter-presumption than a means of construing individual statutes in light of the "mischief" they targeted—looking to "what the statute responds to," or to "the problem that precedes the statute and the legal deficiency that allowed it" to continue—then it might have a very good pedigree indeed.[78]

C. ADAPTATION AND ANALOGY

Adapting the Framers' concerns to current conditions can sometimes go too far. With respect to the Fifth Amendment, for example, then-Professor Williams saw "no possibility of returning the [Due Process Clause] to its original intent,"[79] and he offered no better odds for the Fourteenth.[80] In such circumstances, he argued, the best an interpreting court could do would be to "take history quite seriously, expanding historically intended meanings only to fairly close analogues," so that it may "say with some justice that it has not altered the 'core' of the historical meaning."[81] In his view, when the government had denied a benefit (like public schooling) that was neither a liberty nor a property interest under the original Clause, a court might still intervene if the government had also "foreclose[d] substantially the private market substitutes on which the claimant might otherwise have relied," or had "force[d] the claimant . . . in effect to pay twice for the same good."[82] He was even willing to treat "access

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[77] 1 U.S.C. § 1.
[78] *See* Bray, *supra* note 61, at 973.
[79] Williams, *supra* note 56, at 18.
[80] *See id.* at 19.
[81] Williams, *supra* note 55, at 136.
[82] Williams, *supra* note 56, at 22.

at least to the first twelve years of public school" as "a property interest, under conditions currently prevailing"—though denying that "judges are (or should be) schoolmasters," and calling for "a great deal of deference to legislative or administrative judgment about appropriate procedures."[83]

To the theorist, this approach may sound like heresy, or perhaps a counsel of despair. Once we concede that the actual Due Process Clause is beyond us, are we just haggling over the price? Why draw any analogies to that lost world, instead of inventing new rules to better serve our present one? But perhaps such charges would be unfair. The point of these adaptations, in Judge Williams's view, was not to keep up appearances of fidelity to the past, but rather to regulate (as Judge Frank Easterbrook put it) "the allocation of power over time and among the living."[84] While a court might conceivably "banish history" and "invoke extra-historical principles as a guide," the "validity of such banishment" turned on how the "extra-historical principles" related to the "historical ones," so that the court's role would be "not only constructive but genuinely channeled."[85]

The more freedom of action the courts enjoy under the Due Process Clauses, the less that remains for elected legislatures and executives. The point of the historical analogies urged by Judge Williams was to keep the balance of power among the branches more or less the same. A modern court applying a "broader conception[] of liberty," then-Professor Williams wrote, should still derive its conception from "the constitutional and political discussions of the era"—"preserv[ing] the internal logic of the clause" and "the family resemblance between the original conception and its modern analogue,"[86] so as not to let the Clauses "degenerate into roving commissions for

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[83] *Id.* at 27.

[84] Frank H. Easterbrook, *Textualism and the Dead Hand*, 66 GEO. WASH. L. REV. 1119, 1120 (1998).

[85] Williams, *supra* note 55, at 136.

[86] Williams, *supra* note 56, at 18-19.

judicial intervention that rest solely upon the Justices' nonconstitutional value judgments."[87] Over the decades, legislatures had invented new forms of burdens and benefits, distinct from the property interests more familiar to the Founders. And just as judges might intervene to protect the Constitution's rules from circumvention, using means of enforcing the law as novel as the means governments have devised for evading it, then-Professor Williams urged them to "evolve a due process analysis . . . that corresponds more meaningfully to the framers' original intentions and to the interpretation established in the period 1897–1925," working by analogy "to the historically protected values of negative liberty and traditional property."[88]

Such analogies might be ill-considered, or just ill-founded, as a matter of law. If the rules enacted in the Due Process Clauses have never been properly amended, perhaps no court has any warrant to depart from them, even to counterbalance other changes in law or society, or to minimize the impact of other departures elsewhere.[89] But argument by analogy is hardly alien to the law; perhaps the "evol[ution]"[90] proposed here is no more drastic than the process by which we understand email and blogging as "speech" and "press."[91] In any case, whether or not faithful judges may pursue second-best answers in light of past errors by other courts, there is much to be said for Judge Williams's first-best theory of constitutional law.

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[87] *Id.* at 40.

[88] *Id.*

[89] *But see* Peter B. McCutchen, *Mistakes, Precedent, and the Rise of the Administrative State: Toward a Constitutional Theory of the Second Best*, 80 CORNELL L. REV. 1, 2-3 (1994); Adrian Vermeule, *The Supreme Court, 2008 Term – Foreword: System Effects and the Constitution*, 123 HARV. L. REV. 4, 7-8 (2009).

[90] Williams, *supra* note 56, at 40.

[91] U.S. CONST. amend. I.

III. JUDICIAL PRACTICE

In his work as a judge on a court of appeals, Judge Williams was rarely free to act on his constitutional views directly: he was required to apply the precedents of prior panels, of the en banc court, and of the Supreme Court as well. Some scholars, such as Ryan Williams, describe this forest of precedent as "plausibly lead[ing] one to question the practical significance" to "lower court judges" of first-order constitutional theories.[92] Yet in particular corners of the law, he notes—say, in "addressing [issues] of first impression," in "filling out gaps and ambiguities," and in "critiquing binding Supreme Court precedent"—the paths through the forest are left open.[93] In following these paths, Judge Williams put his constitutional theory and his analytical skill to very good use. And when forced aside, he proceeded carefully, with diligent, even exacting, attention to the facts and precedential landscape.

A. ISSUES OF FIRST IMPRESSION

Consider Judge Williams's opinion in *Nixon v. United States*,[94] on whether the courts could adjudicate a challenge to the Senate's procedures for an impeachment trial.[95] Some of the testimony in Judge Walter Nixon's trial had been heard by a Senate committee, rather than the full chamber, and he sought a declaratory judgment that he was still entitled to his salary and office.[96] Here was a question of first impression for the judiciary, on which the text arguably had little to say. On the merits, the Constitution had granted to the Senate the power to "determine the Rules of its Proceedings," as well as "the

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[92] Williams, *supra* note 10, at 274 (focusing on originalism).
[93] *Id.* at 275.
[94] 938 F. 2d 239 (D.C. Cir. 1991), *aff'd*, 506 U.S. 224 (1993).
[95] *Id.* at 240.
[96] *Id.* at 241.

sole Power to try all Impeachments"[97]—but could a court reach the merits in the first place?

Judge Williams sought the answer to the justiciability question in the Founders' *reasons* for committing impeachment trials to the Senate (and for keeping them away from the courts). Not "a single statement in either the framers' or ratifiers' debates allud[ed] even to the possibility of judicial review" of impeachment decisions, though judicial review was repeatedly invoked with respect to "ordinary legislative powers."[98] While this absence of evidence could be read either way, the core concern in the discussions of the impeachment clauses was that of "checks and balances": judges appointed by the President could not be fully independent when trying him, which is why the Senate was given the job instead.[99] Hamilton in *The Federalist* had "identified the impeachment power as *the* basis for constraining usurpation by judges"—making it rather unlikely that the same judges could declare reinstated a person the Senate had declared removed.[100] Thus, "[i]f the Constitution makes a 'textually demonstrable commitment' of *any* issue to 'a coordinate political department,' . . . it so commits the conduct of impeachment trials to the Senate."[101]

These structural concerns remain live concerns today. While judges "on so many issues have the last word," here they "must rely on the public as the ultimate check on impeachment, itself the Constitution's explicit check on their own excesses."[102] No matter how unusual the Senate's procedures might be, the Senators could be denied reelection—and, after the Seventeenth Amendment, could be

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[97] U.S. CONST. art. I, § 5, cl. 2; *id*. art. I, § 3, cl. 6.

[98] *Nixon*, 938 F. 2d at 243.

[99] *Id.* at 242 (citing 2 FARRAND, *supra* note 67, at 551).

[100] *Id.* (citing THE FEDERALIST NO. 79, at 532–33 (Alexander Hamilton) (Jacob E. Cooke ed., 1961); THE FEDERALIST NO. 81, at 545–46).

[101] *Id.* at 244 (quoting Baker v. Carr, 369 U.S. 186, 217 (1962)).

[102] *Id.* at 243.

"sanction[ed] at the ballot box" if not at the bench.[103] And if the Senate ever truly abandoned its role in impeachment trials—if it "should ever be ready to abdicate its responsibilities to schoolchildren, or, moved by Caligula's appointment of his horse as senator, to an elephant from the National Zoo"—then "the republic will have sunk to depths from which no court could rescue it."[104] By contrast, Judge Williams wrote, "[i]f the impeachment claims of a fellow judge were justiciable, the circle would be closed—the judiciary would have final, unreviewable power over the one procedure established to restrain excesses in all its other final and unreviewable powers: checkmate."[105] The Constitution would not permit this kind of structural singularity.

B. GAP-FILLING

Judge Williams also looked to the Founders and their reasoning when filling gaps between available precedents. Consider another case of judicial misbehavior, this time involving Judge John McBryde. Judge McBryde was reprimanded by a committee of the Fifth Circuit Judicial Council for his treatment of attorneys; he argued, among other things, that such reprimands violated the separation of powers, as they were conducted outside the impeachment process and infringed his judicial independence under Article III.[106]

The Supreme Court had spoken supportively of some related measures: of the formation of Circuit Judicial Councils "as administrative bodies,"[107] and of courts' adopting "backlog" rules to slow assignments to judges who fell behind on their dockets.[108] Yet it had not discussed whether such Councils could be given the power to

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[103] *Id.* at 246.

[104] *Id.*

[105] *Id.*

[106] McBryde v. Comm. to Review Circuit Council Conduct & Disability Orders, 264 F. 3d 52, 54–55, 64 (D.C. Cir. 2001); *id.* at 67–68 (describing the alleged misconduct).

[107] *Id.* at 85 n.7.

[108] Chandler v. Judicial Council of Tenth Circuit, 398 U.S. 74, 85 (1970).

decide on individualized sanctions, or whether imposing those sanctions on an Article III judge would violate judicial independence. Rather, as a prior D.C. Circuit panel had noted, "the precise limits to the powers that could constitutionally be exercised by the judicial councils and the Judicial Conference have yet to be judicially defined."[109] Earlier cases had also discussed "the great bulwarks of judicial independence," namely "the guarantees of life tenure and undiminished salary during good behavior,"[110] which promoted a "Judiciary free from control by the Executive and the Legislature,"[111] and even from "colleagues as well."[112] But as to "lesser sanctions,"[113] no one precedent controlled.

Here too, when authority seemed to be silent, Judge Williams turned to Founding-era choices of structure and rationale. Everyone agreed that the executive may reprimand executive officers without infringing Congress's exclusive powers of impeachment[114]—powers that apply equally to "all civil Officers of the United States," judicial as well as executive.[115] And while judges might enjoy protections from "removal and disqualification" outside the impeachment process,[116] the judiciary's protections were adopted "to safeguard the branch's independence from its two competitors[.]"[117] In Judge Williams's view, "the Hamiltonian concern for protecting the judiciary from other branches argues *for* internal disciplinary powers" with regard to "lesser forms of discipline."[118] Appeal and mandamus could

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[109] Hastings v. Judicial Conference, 770 F. 2d 1093, 1099 (D.C. Cir. 1985).
[110] *McBryde*, 264 F. 3d at 64.
[111] United States v. Will, 449 U.S. 200, 218 (1980).
[112] N. Pipeline Const. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 60 n.10 (1982).
[113] *McBryde*, 264 F. 3d at 65.
[114] *Id.* at 67.
[115] *Id.* (quoting U.S. Const. art. II, § 4).
[116] *Id.* at 65, 67.
[117] *Id.* at 65.
[118] *Id.* at 66.

correct certain kinds of judicial misbehavior but not others: "Counsel punched out by the judge could not even pursue a remedy by risking contempt, . . . since the punch involves no judicial order that he could disobey."[119] And Judge Williams saw "nothing in the Constitution requiring us to view the individual Article III judge as an absolute monarch, restrained only by the risk of appeal, mandamus and like writs, the criminal law, or impeachment itself."[120]

C. CRITIQUING PRECEDENT

When binding precedent did close off what Judge Williams took to be the proper path, he never lost sight of the court's proper destination. Though he recognized that "a circuit court should follow even heavily battered Supreme Court authority,"[121] he did not hesitate to comment when "the Supreme Court's unabandoned doctrine"[122] had been "significantly undermined"[123] or posed "serious risk[s]."[124]

In some cases, he might even write concurrences to his own majority opinions—first applying the prevailing doctrines, then roundly criticizing them. In one such case, after explaining in a detailed majority opinion why the Park Service could not ban leafleting on sidewalks near the Vietnam Memorial,[125] Judge Williams added a concurrence criticizing "'public forum' classifications" as "artificially complicate[d]," given that the court "would reach exactly the same result without public forum analysis."[126] Such a doctrine added "the

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[119] *Id.* at 68.

[120] *Id.*

[121] D.C. Common Cause v. Dist. of Columbia, 858 F. 2d 1, 12 (D.C. Cir. 1988) (Williams, J., concurring) (citing Olson v. Paine, Webber, Jackson & Curtis, Inc., 806 F. 2d 731, 741–42 (7th Cir. 1986)).

[122] *Id.* at 15.

[123] *Id.* at 12.

[124] *Id.* at 14.

[125] Henderson v. Lujan, 964 F. 2d 1179, 1181 (D.C. Cir. 1992).

[126] *Id.* at 1186 (Williams, J., concurring).

allure of seemingly discrete analytic steps" but "little in real predictability"; instead, "the main role of 'forum' analysis has been to extend the briefs."[127]

More biting was his concurrence in the judgment in a 1999 decision that rejected a Takings Clause claim for land near the National Zoo.[128] The District of Columbia had used historical preservation laws to stop an apartment building owner from developing a nearby lawn on Connecticut Avenue. The majority's rejection of the Takings Clause claim was "in general accord with the current opinions of the Supreme Court," and Judge Williams acknowledged that "[t]hose decisions are of course binding."[129] Yet he made clear that the Court's case law was not the last word, because it "tends to strip the Clause of its potential for fulfilling the framers' likely purposes."[130]

As Judge Williams put it, the "economist's justification for the Takings Clause" is that it stops the government from treating other people's property as a free lunch, "us[ing] more of the unpriced resource . . . than it would if required to pay."[131] The Founders may not have put their arguments "in economic terms," but their concern, too, was to "correct[] the incentives of the political branches," preventing "a non-landholding majority" from "invad[ing] landowners' rights."[132] Here, Judge Williams's portrayed the city's praise for the "open space" of the lawn as "[l]ittle more than a cloak by which the citizens of Upper Northwest Washington have secured some

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[127] *Id.*; *see also* Cmty. for Creative Non-Violence v. Turner, 893 F.2d 1387, 1396, 1398 (D.C. Cir. 1990) (Williams, J., concurring) (arguing that the "thicket" of public forum analysis merely duplicated the rules for "time, place, and manner" restrictions, which also involved "assessment of the compatibility of the forbidden speech with the government's interests in the space").

[128] Dist. Intown Props. Ltd. P'ship v. Dist. of Columbia, 198 F.3d 874, 884 (D.C. Cir. 1999) (Williams, J., concurring) (applying U.S. CONST. amend. V).

[129] *Id.*

[130] *Id.*

[131] *Id.* at 884–85.

[132] *Id.* at 885.

parkland on the cheap. Parks are good, but the Fifth Amendment says that taking them is not."[133]

In modern times, explicit seizures of property for government use are less common; most such rent-seeking takes place through regulations requiring the current owners to use it the way the government would—for example, to maintain a lawn as open space rather than to build on it. But the Court's "modern interpretation of the Takings Clause . . . impairs its role as a disincentive to wasteful government activities."[134] The modern case law treats partial takings much less seriously than total ones, applying a "nearly vacuous test" to the former;[135] and by treating adjacent parcels as a single piece of property,[136] it easily transforms total takings into partial ones instead. Because "the current cases give these arguments little purchase,"[137] Judge Williams was forced to concur in the judgment; but because these cases frustrated the founding aims of the Clause, he was also forced to disagree.

Judge Williams also registered his disagreement in a more controversial context in *Shelby County v. Holder*,[138] concerning a challenge to the coverage formula in § 4(b) of the reauthorized Voting Rights Act.[139] While he dissented from the panel opinion upholding the coverage formula (on which more below),[140] he also noted his constitutional concerns with the interpretation of § 5 of the Act, which forbids restrictions, on account of race or color, on citizens' ability "to elect their preferred candidates of choice."[141] Case law had interpreted this section to concern the "comparative ability of a minority *group* to

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[133] *Id.* at 889 (internal quotation marks omitted).
[134] *Id.* at 885.
[135] *Id.* at 886.
[136] *Id.* at 890.
[137] *Id.*
[138] 679 F.3d 848, 885 (D.C. Cir. 2012) (Williams, J., dissenting), *rev'd*, 570 U.S. 529 (2013).
[139] 52 U.S.C. § 10303(b).
[140] *Shelby*, 679 F.3d at 884 (Williams, J., dissenting).
[141] 52 U.S.C. § 10304(b).

elect a candidate of *its* choice,"[142] a shift in meaning Judge Williams found significant. While "[i]ndividuals" may "have preferred candidates," he argued, groups do not—except in the sense that the majority of the group is taken to speak for the whole, such that the voice of the "minority group's own minority" is stilled.[143] "In an open society that allows people freely to form associations," representatives of such associations might have permission to "speak with less than unanimous backing," but a "group constructed artificially . . . on the lines of race or ethnicity" derives no such permission from its members.[144]

Section 5 of the Act had been invoked to support the maintenance of majority-minority districts against retrogression.[145] Judge Williams found such line-drawing particularly concerning when performed under the auspices of the Fifteenth Amendment, which protects—and, in his view, was originally designed to protect—individual *citizens* against "any denial of their rights that may be based on the specified group characteristics."[146] While "deliberate voting rule manipulations aimed at reducing the voting impact of any racial group" were plainly forbidden, so too, he argued, were deliberate interventions "to assure the electoral impact of any minority's majority."[147] Indeed, he found it "hard to imagine language that could more clearly invoke universal individual rights," as part of the modern era's "permanent abolition of voting by estates."[148]

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[142] Georgia v. Ashcroft, 539 U.S. 461, 480 (2003) (emphasis added).
[143] *Shelby*, 679 F.3d at 903 (Williams, J., dissenting) (emphasis omitted).
[144] *Id.*
[145] *Ashcroft*, 539 U.S. at 468.
[146] *Shelby*, 679 F.3d at 904 (Williams, J., dissenting).
[147] *Id.* at 905.
[148] *Id.* at 904.

D. ATTENTION TO FACTS

In other circumstances, when compelled to follow precedent, Judge Williams might do so perhaps more faithfully than the precedent's authors expected. In a brief aside in an essay on the rule of law, he once discussed the phenomenon of the "'work to rule' strike, in which workers simply say that they will follow the rule book. The strike works pretty well if the rule book has such an encrustation of requirements that compliance brings production to a crawl."[149] While he may never have intentionally sought to undermine precedents by compliance, certain of his opinions give the impression that he looked forward to putting those precedents through their paces, holding them to the standards that they purported to impose.

In *Turner Broadcasting Systems v. FCC*,[150] for example, Judge Williams dissented from the three-judge district court's opinion upholding cable must-carry rules for local broadcasting content. He argued that giving "special privilege to one set of access seekers over another" was a content-based restriction that violated the First Amendment, especially when Congress could have used even-handed and "well-developed regulatory responses," such as ordering "[t]he 'bottleneck' holder . . . to serve all parties that meet neutral criteria for service."[151] The Supreme Court agreed with the panel majority that the rule was content-neutral and subject only to intermediate scrutiny, but it remanded for further factfinding.[152]

On remand, Judge Williams produced an enormous dissenting opinion—more than twice as long as the majority opinion and containing its own table of contents.[153] He conducted the fact-finding

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[149] Stephen F. Williams, *The More Law, the Less Rule of Law*, 2 GREEN BAG 2D 403, 405 (1999).

[150] 819 F. Supp. 32, 67 (D.D.C. 1993), *vacated*, 512 U.S. 622 (1994).

[151] *Id.* at 57, 66 (Williams, J., dissenting).

[152] *Turner*, 512 U.S. at 662, 664–69.

[153] *Compare* Turner Broadcasting Sys. v. FCC, 910 F. Supp. 734, 737–52 (D.D.C. 1995) (opinion of the court), *with id.* at 754–89 (Williams, J., dissenting); *see also id.* at 754 (Williams, J., dissenting) (table of contents).

required by the Supreme Court in exhausting detail, addressing such topics as revenue trends in the broadcast industry,[154] the number of broadcast stations,[155] the number and variety of local stations voluntarily made available to cable subscribers,[156] the degree of vertical integration among cable operators,[157] and the amount of excess channel capacity among cable operators.[158] It is difficult to read Judge Williams's opinion without agreeing not only that Congress's chosen approach was "substantially overinclusive,"[159] but that the Supreme Court got it wrong: this regulation was a classic example both of content-based regulation and of incumbent rent-seeking.

Another case in which Judge Williams let the record do rhetorical work was *Shelby County*.[160] In his nonjudicial writings, he had noted that "the Civil War Amendments" had "rest[ed] on the premise that some states pose exceptional risks of certain kinds of discriminations and deprivations," diverging from the standard model in which "there is no ranking of states" and "no notion that any is inferior to any other."[161] In a predecessor case, however, the Supreme Court had already announced that any "departure from the fundamental principle of equal sovereignty requires a showing that a statute's disparate geographic coverage is sufficiently related to the problem that it targets."[162] Judge Williams therefore proceeded to examine the Voting Rights Act's coverage formula, which both he and the panel

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[154] *Id.* at 761–63 (Williams, J., dissenting).
[155] *Id.* at 763–65.
[156] *Id.* at 770–71.
[157] *Id.* at 772–76.
[158] *Id.* at 781.
[159] *Id.* at 783.
[160] Shelby County v. Holder, 679 F.3d 848 (D.C. Cir. 2012), *rev'd*, 570 U.S. 529 (2013).
[161] Williams, *supra* note 64, at 326.
[162] Nw. Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193, 203 (2009).

majority took to be subject to the "congruent and proportional" standard.[163]

That formula asked whether, as of November 1, 1972, or various earlier dates, a jurisdiction had certain restrictions on the right to vote or a registration or turnout rate below fifty percent.[164] The same formula, as applied to current data, might produce very different results.[165] The panel majority (and later the Supreme Court dissent) understood the formula not as a test adopted on its own merits at the time of reauthorization, but essentially as a set of names in disguise; Congress had chosen, albeit through somewhat circuitous means, to select a particular group of states which in its view posed the greatest danger to voting rights.[166]

Judge Williams, however, understood the precedent to require an examination of the formula itself.[167] He undertook an extensive examination (replete with bar graphs), showing that many covered jurisdictions now fared better than noncovered ones, either on the original metrics or on other indicators of voting-rights success.[168] And he portrayed as a fallacy of division the argument that covered jurisdictions, overall, fared worse than noncovered ones: "A coverage scheme that allows two or three of the worst offenders to drag down other covered jurisdictions, whose continued inclusion is merely a combination of historical artifact and Congress's disinclination to update the formula, can hardly be thought 'congruent and proportional.'"[169]

Neither position in the case is free from doubt; the Fifteenth Amendment surely confers broad power, and good-faith interpreters

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[163] *Shelby County*, 679 F.3d at 859–60; *id.* at 885 (Williams, J., dissenting).

[164] *Id.* at 884–85 (Williams, J., dissenting).

[165] *Id.* at 890–91.

[166] *Id.* at 855 (opinion of the court); *see also* Shelby County v. Holder, 570 U.S. 529, 590–91 (2013) (Ginsburg, J., dissenting).

[167] *Shelby County*, 679 F.3d at 885 (Williams, J., dissenting).

[168] *Id.* at 889–98.

[169] *Id.* at 899.

might well disagree on how explicitly it requires Congress to legislate or how strict or long-lasting a means-ends correspondence it demands. Likewise, interpreters might disagree on the degree of burden imposed by the Act's preclearance requirement, the adequacy of its "bail-out" mechanisms, the availability of facial challenges, and so on. As it happens, Judge Williams's position was adopted by a majority of the Supreme Court, in an opinion that has been remembered primarily for its discussion of "equal sovereignty" and its statement that "[o]ur country has changed."[170] Whatever the merits of the Supreme Court's decision, it is unlikely that any decision invalidating a well-known provision of the Voting Rights Act would ever have gone without controversy. But one wonders whether such a decision might have been better received had it focused, to the same extent as Judge Williams's dissent, on the details of state-by-state statistics.

IV. RULE OF LAW

Where faithful judges are required to stand on certain legal questions depends in part on where they are required to sit. Different precedents apply in different places, whether those places are found in the geographical distribution of circuit courts or in the hierarchy of appellate review. Some scholars would seek to simplify matters by disregarding the precedents entirely;[171] others, by keeping the precedents and largely tossing away the written laws they construe.[172] Neither approach is adequate: there is no quick fix to the complexity of a multi-tiered legal system.

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[170] *Shelby County*, 570 U.S. at 535, 557.

[171] *See* Gary Lawson, *The Constitutional Case Against Precedent*, 17 HARV. J.L & PUB. POL'Y 23, 27–28 (1994) (arguing that courts must disregard precedents that contradict the Constitution's actual meaning); *accord* Paulsen, *supra* note 40, at 291.

[172] *See* Strauss, *supra* note 25, at 883 (arguing that legal practice gives priority to doctrine over text).

This complexity brings many benefits: for example, providing for uniform decisions within and across different court systems. But it also carries a cost. Judge Williams once wrote that "at some point the growth of the law has a tendency to shrink the rule of law. . . . As the commands of the state multiply, there is a corresponding decline in the fraction of those commands that people can be expected to comply with."[173] When this happens, "proliferation of rules means proliferation of lawlessness; the rules may be too numerous and complex for normal people to master."[174] And when the rules turn out to be "in conflict with one another," then "lawlessness is inevitable," and "[r]espect for the rule of law is undermined."[175]

Judge Williams was speaking of the burdens an overbearing legal system may place on ordinary citizens. But something much the same might be said for what an overbearing system of doctrine can do to lawyers and judges. The danger is that judges may be "bound down" with so many "strict rules and precedents" that they might forget the law from which those precedents stem. New generations of law students, raised on a diet of court decisions citing court decisions, may no longer see courts as institutions for adhering to rules rather than crafting them. Those expected to believe that ours is a "Federal Government of limited powers,"[176] and also that among these powers is a power to regulate growing wheat in one's own backyard,[177] may find it impossible to suspend their disbelief: the rules are inextricably "in conflict with one another," such that "lawlessness is inevitable."[178]

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[173] Williams, *supra* note 149, at 405.

[174] *Id.*

[175] *Id.*

[176] New York v. United States, 505 U.S. 144, 155 (1992).

[177] Wickard v. Filburn, 317 U.S. 111, 125 (1942) (finding such activity "within the reach of the power granted to Congress in [a] Clause" that addresses "Commerce with foreign Nations, and among the several States, and with the Indian Tribes," (citing U.S. CONST. art. I, § 8, cl. 3)).

[178] Williams, *supra* note 149, at 405.

When the judicial process has become like a ship's hull hidden by barnacles, so encrusted with precedents that the law can no longer be seen beneath them, then respect for the rule of law will suffer. The legal system might then have the flaw which C.S. Lewis attributed to Rome, "the tropical fertility, the proliferation, of *credenda*."[179] If relying on horizontal precedent necessarily involves "deviation[s] from the (by hypothesis) correct interpretation of the Constitution," as Michael Stokes Paulsen argues,[180] then vertical precedent does as well: it trains judges and lawyers to take false things as true. Sometimes the law does ask us to treat false things as true: sometimes we are obliged to pretend that a jury's findings are correct, that the argument a party forfeited was meritless, or that the preclusive judgment of a prior court was just. But there is a difference between judges' pretending that false propositions are true because the law temporarily requires that they do so, and their treating false propositions as true because they no longer recognize it as pretense—having concluded that "whoever hath an absolute Authority to interpret any written, or spoken Laws[,] . . . is truly the Law-giver, . . . and not the Person who first wrote, or spoke them."[181]

This is a danger Judge Williams warned against: "[t]he fact that there are dawn and dusk doesn't mean there is no day or night," and the fact "[t]hat 'the law' can't constrain judges in every case doesn't mean that it can't often constrain them."[182] Were we to "compare our system with ones where courts do not handle routine disputes impartially, honestly, and more or less expeditiously"—systems which, from his work on Russian history, he knew very well—"we can see

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[179] C.S. LEWIS, *Christian Reunion*, *in* CHRISTIAN REUNION AND OTHER ESSAYS 17, 20 (Walter Hooper ed., 1990).

[180] Paulsen, *supra* note 40, at 291.

[181] Benjamin Hoadly, THE NATURE OF THE KINGDOM, OR CHURCH, OF CHRIST 12 (London, James Knapton & Timothy Childe 5th ed., 1717) (emphasis omitted).

[182] Williams, *supra* note 149, at 403.

that 'the rule of law' is real."[183] But the continuing success of the rule of law was also something never to be taken for granted.

In this context, it is worth remembering something Judge Williams wrote about rent-seeking (plausibly the *bête noire* of his intellectual career). He argued:

> If I leave one thought with you today it is that we should not see rent-seeking as a mere wart on the body politic. It is a fundamental and perhaps fatal disease. Its characteristics are those of hierarchical patrimonialism, mobilizing the force of the state for private ends, and not those of an open access society. It has the potential to undo developments that over the last two hundred years have yielded unimaginable prosperity . . . . So far as I can see there is no magic bullet, no simple institutional tweak, that can constrain it. Only awareness and determined struggle.[184]

The perils of lower-court law are not nearly so great; they are unlikely to prove fatal to the legal system, much less the body politic, nor do they pose much threat to global prosperity. But they do threaten to replace something of an 'open access' legal system, one that is subject to democratic decision-making by legislatures and executives and that has been reasonably successful over time, with a closed system of doctrines generating doctrines, one that offers less prospect for ordinary political determination of the fundamental questions of American law. The long-term consequences of such changes are not necessarily clear, but they are also not necessarily good: courts may grow more politicized when there is less room to do politics outside them. [185] These consequences are likewise

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[183] *Id.*

[184] Stephen F. Williams, *Transitions Into – and Out of – Liberal Democracy*, 5 N.Y.U. J.L. & LIBERTY 268–69 (2010).

[185] *See* Stephen E. Sachs, *Supreme Court as Superweapon: A Response to Epps &*

susceptible to no "magic bullet"; only "awareness and determined struggle," to remember the preexisting rules and rationales and to apply them where one's role permits. This is the task that faced Judge Williams, and that he accomplished so well.

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A discussion of Judge Williams as a constitutional theorist cannot help but leave out much about him that is deeply admirable: his intellect and rigor, his incisive style, his keen sense of fairness and unfairness, his devotion to law and to liberty, and his fundamental kindness toward others. Those who hope to follow in his footsteps, whether as scholars or as citizens, could do far worse than seeking to imitate him—and we probably will.

Sitaraman, 129 YALE L.J. F. 93, 105–07 (2019); Ross Douthat, Opinion, *David Souter Killed the Filibuster*, N.Y. TIMES (Apr. 12, 2017) [https://perma.cc/T66Q-5CLC].