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Supreme Court Supremacy in a Time of Turmoil

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SUPREME COURT SUPREMACY IN A TIME OF TURMOIL: *JAMES V. CITY OF BOISE*

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Last Term's decision in James v. City of Boise *encapsulates the current civil rights turmoil and the legal system's inadequate response to it. In* James, *the U.S. Supreme Court reversed a decision in which the Idaho Supreme Court (1) awarded attorney's fees against a civil rights plaintiff despite her credible claim of excessive police force and (2) denied that it was bound by U.S. Supreme Court decisions interpreting the federal statute authorizing the award. Although the Court in* James *reaffirmed the state courts' well-settled duty to obey the Court's decisions on federal law, this article shows that the duty rests on precedent that is shallow—consisting almost entirely of dicta—and murky in defining the legal source of the duty. This article contributes to the scholarship by examining the Court's precedent in some detail and by proposing that even if state courts need not obey the Court's decisions interpreting the federal constitution, they do have a duty to obey the Court's decisions interpreting federal statutes.*

* Professor of Law, University of Idaho College of Law. I thank the following people who have reviewed or commented on drafts of this article: Katie Ball, Evan Caminker, Benjamin Cover, and Jim Pfander. I also thank Kaycee Royer for terrific research assistance. I served (pro bono) as an attorney for Melene James at the cert petition stage in the case that is the subject of this article, James v. City of Boise, 136 S. Ct. 685 (2016). The views expressed in this article are mine alone.

TABLE OF CONTENTS

INTRODUCTION

You'd have to go back to the 1960s and '70s to find civil rights turmoil like that of today. To match the current public outrage over police brutality against people of color, you'd have to revisit Oakland, California, in 1968, when Black Panthers chanted "Off the Pigs!"[1] To equal the current resistance by state and local officials to federal actions protecting gay and transgender folks, you'd need to recall state and local opposition to federal-court orders desegregating public schools.[2] The current turmoil shows up everywhere, including in the United States Supreme Court's decision last Term in *James v. City of Boise*,[3] which is the focus of this Article and which encapsulates the judicial system's ultimately unsatisfying response to the turmoil.

In *James*, the Idaho Supreme Court punished a civil rights plaintiff for pursuing a police brutality claim and, at the same time, seemingly denied the U.S. Supreme Court's authority to control how state courts enforce federal civil rights.[4] The U.S. Supreme Court summarily reversed the Idaho Supreme Court, reiterating the well-settled duty of state courts to obey the Court's decisions on federal law.[5] On the surface, the Court's opinion in *James* forcefully reaffirms the supremacy of the Court and its role in enforcing federal civil rights.

This Article goes beneath the surface in *James* to show the disturbing truths. To begin with, the legal basis for the state courts' duty to obey U.S. Supreme Court decisions on federal law is thinner and more uncertain than the Court in *James* suggests.[6] Furthermore,

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1. JOSHUA BLOOM & WALDO E. MARTIN, JR., BLACK AGAINST EMPIRE: THE HISTORY AND POLITICS OF THE BLACK PANTHER PARTY 113 (2013). The Black Panther Party rose to national prominence partly because of the rally it organized in response to the 1967 police shooting of an African-American man in North Richmond, California, a shooting that all too closely resembles more recent ones. *See* Steve Wasserman, *Rage and Ruin on the Black Panthers*, THE NATION, (June 24, 2013), https://www.thenation.com/article/rage-and-ruin-black-panthers.

2. *See* GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 78–88 (2d ed. 2008).

3. 136 S. Ct. 685 (2016).

4. James v. City of Boise, 351 P.3d 1171, 1171 (Idaho 2015), *rev'd* 136 S. Ct 685 (2016).

5. *James*, 136 S. Ct. at 685.

6. Several scholars have addressed in varying levels of detail the state courts' duty to obey U.S. Supreme Court precedent. *See* JAMES E. PFANDER, ONE SUPREME COURT 22–23, 42–44, 85–86 (2009) [hereinafter Pfander, ONE SUPREME COURT]; Richard M. Re, *Narrowing Supreme Court Precedent From Below*, 104 GEO. L.J. 921, 936–37 & n.79 (2016); James E. Pfander, *Federal Supremacy, State Court Inferiority, and the Constitutionality of Jurisdiction-Stripping Legislation*, 101 NW. U. L. REV. 191, 199, 228–30 (2007) [hereinafter Pfander, *Federal Supremacy*]; Amy

the Idaho Supreme Court's conduct on remand shows how easily state courts can defy the U.S. Supreme Court's decisions. Most disappointing of all, *James* shows that the Court's precedent actually undermines enforcement of federal civil rights, including the right to be free from excessive police force. Thus, though *James* got little press attention because of its summary disposition, the case deserves our attention for the troubling insights it yields into our current situation.

This Article examines *James* in five parts. Part I describes the *James* case and puts it into the broader context of the current civil rights turmoil. Part I's thesis is that the case merited the Court's attention, for in many ways it encapsulates the current turmoil. Part II examines the U.S. Supreme Court's opinion in *James* and other Court precedent on the state courts' duty to obey the Court's decisions on federal law. Part II's thesis is that, although the Court depicts that duty as long-settled and constitutionally rooted, the foundation for the duty in Supreme Court case law is surprisingly thin and obscure. Part III briefly discusses legal scholarship on the state courts' duty to obey Supreme Court precedent, and proposes an addendum to the scholarship that has particular pertinence for *James*. The proposal argues that, even if state courts have no duty to obey the Court's decisions interpreting the U.S. Constitution, they do have a duty to obey its decisions interpreting Acts of Congress. Part IV discusses the Idaho Supreme Court's actions on remand in *James*. Part IV's theses are that (1) the state court's actions on remand illustrate practical limitations on the Court's ability to make state courts obey its precedent; and (2) in any event, the Court's precedent undermines federal civil rights. Part V concludes the Article.

Coney Barrett, *The Supervisory Power of the Supreme Court*, 106 COLUM. L. REV. 324, 342–43 (2006); Anthony J. Bellia, Jr., *State Courts and the Making of Federal Common Law*, 153 U. PA. L. REV. 825, 862–877 (2005); John Harrison, *The Power of Congress over the Rules of Precedent*, 50 DUKE L.J. 503, 518–19 (2000); Donald H. Zeigler, *Gazing into the Crystal Ball: Reflections on the Standards State Judges Should Use to Ascertain Federal Law*, 40 WM. & MARY L. REV. 1143, 1151–52, 1169 (1999); Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedent?*, 46 STAN. L. REV. 817, 825 (1994); Daniel A. Farber, *The Supreme Court and the Rule of Law:* Cooper v. Aaron *Revisited*, 1982 U. ILL. L. REV. 387, 390 (1982). None of these scholars has focused exclusively on the Court's precedent on that obligation, as this Article does. Nor do these scholars discuss whether the state courts' duty to obey the Court's precedent on the U.S. Constitution differs from their duty to obey the Court's precedent interpreting federal statutes. This Article does so.

I. *JAMES* IN CONTEXT

Like many cases that land in the U.S. Supreme Court, *James v. City of Boise* has mundane facts: It's a dog bite case. Likewise, *James* seemingly presented a pedestrian legal issue: whether state courts must obey U.S. Supreme Court decisions interpreting federal statutes. But this Part shows that there is more to the *James* case than meets the eye. Section A describes the case, and Section B puts the case into the relevant context within which the Court no doubt viewed it. Together, these two parts show that *James* warranted the Court's attention, just as it warrants ours.

A. The Facts and Initial State-Court Proceedings in James

1. The Facts of *James*

The facts of *James* show that the mauling of an innocent person by a police dog could happen to anyone. In hindsight, Ms. James was not faultless, but the police acted precipitately and their actions caused her serious physical and emotional harm. Ms. James might not have deserved to win her later excessive-force claim. But nor did she deserve to have attorney's fees awarded against her for bringing it in a jurisdiction that had no relevant precedent supporting or rejecting it.

On Sunday, December 26, 2010, Melene James was a 49-year-old resident of Boise and worked as a denturist.[7] That afternoon, she had just finished cooking a holiday meal for her family when a friend called needing emergency work on a denture.[8] Ms. James walked half a block to the building where she leased space to run her small business, Renaissance Dental Lab.[9] She entered the building with her key and started work on the denture.[10] When she reached the point in her work where the repaired denture needed fifteen minutes to "cure," she left the building to smoke a cigarette.[11] Then she realized that she had locked herself out, having left her purse with her keys and cell phone inside the dental lab.[12] This mishap might have been alcohol

7. Clerk's Record on Appeal at 394, 700, James v. City of Boise, 351 P.3d 1171 (Idaho 2014), *rev'd*, 136 S. Ct. 985 (2016) [hereinafter Record].
8. Record, *supra* note 7, at 394, 700.
9. Record, *supra* note 7, at 391, 394, 701.
10. Record, *supra* note 7, at 394, 702.
11. Record, *supra* note 7, at 395, 701.
12. Record, *supra* note 7, at 395, 701.

related: Ms. James later admitted at her deposition that she had been drinking while cooking the holiday meal.[13]

Once locked out, Ms. James did not want to leave the immediate area to call her landlord, because her equipment was still running inside and posed a fire hazard.[14] She accordingly went to a window that was usually left unlocked to ventilate the dental lab.[15] While trying to open the window, her hand slipped, causing her elbow to hit the window and break it.[16] As she started to climb through the window, a neighbor who had heard the glass breaking came over and asked her if she needed help.[17] Ms. James told him that she'd locked her keys inside.[18]

The neighbor found Ms. James' behavior peculiar and called 911.[19] According to the neighbor's later account, he told the 911 operator that a woman who'd claimed to have left her keys inside the building was climbing in through a broken window.[20] In the meantime, Ms. James finished fixing the denture and went to the bathroom.[21] It was while she was in the bathroom that she was attacked by the police dog.[22]

While Ms. James was inside the building finishing the denture repair, police gathered outside the building. Within ten minutes after the neighbor's 911 call, the Boise police had created a perimeter around the building and radioed for a K-9 unit.[23] By then, they had also learned that someone was in the building; An officer had seen Ms. James through a window of the building; she was standing at a table with a dental tool in one hand and a can of malt liquor in the other.[24] The officer did not try to get her attention.[25] Instead, an officer went inside with the police dog after shouting warnings of his intention to

13. Record, *supra* note 7, at 394, 398.
14. Record, *supra* note 7, at 396, 701.
15. Record, *supra* note 7, at 396, 397, 701, 702.
16. Record, *supra* note 7, at 397, 702.
17. Record, *supra* note 7, at 397, 702.
18. Record, *supra* note 7, at 397, 702.
19. Record, *supra* note 7, at 410, 703.
20. Record, *supra* note 7, at 410, 801, 802.
21. Record, *supra* note 7, at 397, 398, 702, 703.
22. Record, *supra* note 7, at 555.
23. Record, *supra* note 7, at 410, 475, 705.
24. Record, *supra* note 7, at 414, 429.
25. Record, *supra* note 7, at 431.

do so.[26] The police shouted more warnings after entering the building, after which the dog-handling officer loosed the dog.[27]

The dog found Ms. James in the bathroom and, reflecting its "bite and hold" training, it bit her and held on until its officer-handler arrived shortly thereafter.[28] The officer-handler got the bathroom door open to find Ms. James lying on the ground with her pants pulled down below her knees.[29] She was then handcuffed, searched, and taken to the emergency room.[30]

At the emergency room, Ms. James was found to have a broken arm and multiple puncture wounds on her cheek, arm, and hand.[31] Her blood alcohol content was 0.27.[32] A later medical evaluation reported that, besides the injuries noted at the emergency room, Ms. James had a fractured spine and suspected nerve damage.[33]

2. The Initial State-Court Proceedings in James

Based on the police dog attack, Ms. James sued the City of Boise and four police officers in Idaho state court.[34] She asserted excessive-force claims against all the defendants under 42 U.S.C. § 1983, relying on the Fourth, Fifth, and Fourteenth Amendments.[35] She also asserted state-law claims.[36]

The state trial court granted summary judgment for the defendants and dismissed all of Ms. James' claims, including her excessive-force claim under Section 1983.[37] The court held that the police did not use

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26. Record, *supra* note 7, at 593, 594.
27. Record, *supra* note 7, at 593, 594, 710.
28. Record, *supra* note 7, at 555.
29. Record, *supra* note 7, at 648, 711.
30. Record, *supra* note 7, at 594, 711.
31. Record, *supra* note 7, at 603, 604, 596–600.
32. Record, *supra* note 7, at 366, 712.
33. Record, *supra* note 7, at 603, 604, 712.
34. Record, *supra* note 7, at 6.
35. Record, *supra* note 7, at 15; *See, e.g.*, Plumhoff v. Rickard, 134 S. Ct. 2012, 2020 (2014) ("A claim that law-enforcement officers used excessive force to effect a seizure is governed by the Fourth Amendment's 'reasonableness' standard."). 42 U.S.C. § 1983 (2012) says in relevant part:

> § 1983. CIVIL ACTION FOR DEPRIVATION OF RIGHTS
> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

Id.

36. Record, *supra* note 7, at 14–15.
37. *See* James v. City of Boise, 351 P.3d 1171, 1177 (Idaho 2015), *rev'd* 136 S. Ct. 685 (2016).

unconstitutionally excessive force; rather, their use of force was "objectively reasonable."[38] Alternatively, the court held that, even if the police did violate Ms. James' rights by using excessive force, they had qualified immunity because those rights were not "clearly established" when they acted.[39]

The Idaho Supreme Court affirmed the grant of summary judgment for the defendants on all of Ms. James' claims.[40] Unlike the state trial court, the Idaho Supreme Court did not decide whether the police violated Ms. James' constitutional right to be free from excessive police force.[41] Instead, the Idaho Supreme Court held that the officers had qualified immunity because their conduct did not violate Ms. James' "clearly established right[s]."[42] In determining whether Ms. James' rights were clearly established at the time of the attack, the Idaho court found no relevant case law in the U.S. Supreme Court or the Idaho Supreme Court.[43] Without binding precedent on her excessive-force claim, the Idaho Supreme Court looked to precedent of the U.S. Court of Appeals for the Ninth Circuit, which reviews federal district court decisions brought in Idaho.[44] The Idaho court determined that "[i]n light of" three Ninth Circuit cases, "it cannot be concluded that every reasonable official would have understood

38. Petition for a Writ of Certiorari at App. 83, James v. City of Boise, 136 S. Ct. 685 (No. 15–493) [hereinafter *James* Cert Petition]; *see also* Graham v. Connor, 490 U.S. 386, 397 (1989) ("[T]he 'reasonableness' inquiry in an excessive force case is an objective one: the question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them . . . .").

39. *James* Cert Petition, *supra* note 38, at App. 118; The Court described the doctrine of qualified immunity this way in a recent excessive-force case under 42 U.S.C. § 1983:

> The doctrine of qualified immunity shields officials from civil liability so long as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. A clearly established right is one that is sufficiently clear that every reasonable official would have understood that what he is doing violates that right. We do not require a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate. Put simply, qualified immunity protects all but the plainly incompetent or those who knowingly violate the law.

Mullenix v. Luna, 136 S. Ct. 305, 308 (2015) (per curiam) (internal quotation marks omitted).

40. *James*, 351 P.3d at 1193.

41. *Id.* at 1185.

42. *Id.*

43. *Id.*

44. *Id.* at 1181–85; *see* 28 U.S.C. § 41 (2012) (prescribing geographic scope of Ninth Circuit).

beyond debate that the conduct of the Police in this case violated a clearly established right."[45]

On appeal to the Idaho Supreme Court, the defendants sought an award of attorney's fees against Ms. James.[46] In seeking the fees that they had spent battling Ms. James' appeal on her excessive-force claim under Section 1983, the defendants relied on 42 U.S.C. § 1988(b).[47] Section 1988(b) says that in a case arising under Section 1983, "the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee . . . ."[48]

As the Idaho Supreme Court explained, the U.S. Supreme Court interpreted Section 1988(b) in *Hughes v. Rowe* to hold that "attorney fees could not be awarded to a prevailing defendant in a case brought pursuant to 42 U.S.C. section 1983 unless the plaintiff's action was frivolous, unreasonable, or without foundation."[49] The Idaho court

45. *James*, 351 P.3d at 1185 (referring to Miller v. Clark Cnty., 340 F.3d 959, 968 (9th Cir. 2003) (holding that police dog attack did not violate defendant's constitutional rights); Chew v. Gates, 27 F.3d 1432, 1447 (9th Cir. 1994) (holding that police officers had qualified immunity from excessive-force claim based on police dog attack); Watkins v. City of Oakland, 145 F.3d 1087, 1092 (9th Cir. 1988) (same)).

46. *James*, 351 P.3d at 1192.

47. Id.

48. 42 U.S.C. § 1988 (2012) states in relevant part:

§ 1988. PROCEEDINGS IN VINDICATION OF CIVIL RIGHTS

. . .

(b) Attorney's fees

In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92–318, the Religious Freedom Restoration Act, the Religious Land Use and Institutionalized Persons Act of 2000, title VI of the Civil Rights Act of 1964, or section 13981 of this title, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs . . . .

Id.

49. *James*, 351 P.3d at 1192 (citing Hughes v. Rowe, 449 U.S. 5, 15 (1980)). In contrast to the "stringent" standard that the Court in *Hughes* adopted for awarding fees to prevailing *defendants* under Section 1988(b) (*Hughes*, 449 U.S. at 14), the Court had earlier held that prevailing *plaintiffs* establishing civil rights violations "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 416 (1978) (internal quotation marks omitted). The Court has explained that the different standards for prevailing defendants and prevailing plaintiffs reflect the "quite different equitable considerations at stake." Fox v. Vice, 563 U.S. 826, 833 (2011):

When a plaintiff succeeds in remedying a civil rights violation, we have stated, he serves "as a 'private attorney general,' vindicating a policy that Congress considered of the highest priority." Newman v. Piggie Park Enters., Inc., 390 U.S. 400 (1968) (per curiam). He therefore "should ordinarily recover an attorney's fee" from the defendant—the party whose misconduct created the need for legal action. *Christiansburg*, 434 U.S. at 416 (internal quotation marks omitted). Fee shifting in such a case at once reimburses a plaintiff for "what it cos[t][him] to vindicate [civil] rights," Riverside v. Rivera, 477 U.S. 561, 577–578 (1986) (internal quotation marks omitted), and holds to account "a violator of federal law," *Christiansburg*, 434 U.S., at 418.

remarked that *Hughes* and the case on which *Hughes* was based—*Christiansburg Garment Co. v. EEOC*—"were appeals from cases in federal district courts."[50] The Idaho Supreme Court asserted that "[a]lthough the [U.S.] Supreme Court may have the authority to limit the discretion of lower federal courts, it does not have the authority to limit the discretion of state courts where such limitation is not contained in the statute."[51] The statute under analysis, Section 1988(b), does not on its face limit a court's discretion to award fees.[52] "Therefore," the Idaho Supreme Court concluded, "in cases filed in the Idaho state courts seeking to recover under 42 U.S.C. section 1988, the court has discretion in deciding to award attorney fees to the prevailing party, whether the prevailing party is the plaintiff or the defendant."[53]

Having disclaimed a duty to apply *Hughes* and *Christiansburg's* "frivolous, unreasonable, or without foundation"[54] standard, the Idaho Supreme Court in fact did not apply that standard.[55] Rather, it awarded fees against Ms. James under Section 1988(b) because "[i]t was clear that her claim would be barred by qualified immunity under the clearly established law of the ninth circuit, and the Plaintiff did not cite any law to the contrary."[56] In contrast, the court denied the defendants' request for attorney's fees under the two Idaho statutes that the defendants cited in seeking fees for the appeal on the state-law claims.[57] The court held that fees were not justified under Idaho Code § 12-117 because Ms. James' appeal on her state-law claims did not lack "a reasonable basis in fact or law."[58] The court further held that fees were not warranted under Idaho Code § 12-121 because her appeal on the state-law claims "was not brought or pursued

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In contrast to cases in which the plaintiff prevails, when the *defendant* in a federal civil rights suit prevails, awarding the defendant fees under the *Christiansburg/Hughes* "frivolous, unreasonable, or without foundation" standard implements Congress's intent in Section 1988(b) "to protect defendants from burdensome litigation having no legal or factual basis." *Christiansburg*, 434 U.S. at 420.

50. *James*, 351 P.3d at 1192 (citing *Christiansburg*, 434 U.S. 412).
51. *Id.*
52. *See* 42 U.S.C. § 1988 (2012).
53. *James*, 351 P.3d at 1192.
54. *Hughes*, 449 U.S. at 15; *Christiansburg*, 434 U.S. at 422.
55. *James*, 351 P.3d at 1192.
56. *Id.*
57. *See id.* at 1192–93.
58. *Id.* at 1192; *see* IDAHO CODE § 12-117 (2016).

frivolously, unreasonably, or without foundation."[59] The Idaho court's use of a standard identical to the *Christiansburg/Hughes* standard to *deny* fees under an Idaho statute made its failure to use that standard in *awarding* fees under Section 1988(b) conspicuous, and obviously deliberate.

In July 2015, the Idaho Supreme Court denied Ms. James' petition for rehearing on its award of fees under Section 1988(b).[60] As discussed in Part II, the U.S. Supreme Court granted certiorari and summarily reversed on this aspect of the Idaho Court's decision in January 2016.

B. The Context of James

At first blush, the Idaho Supreme Court's decision did not seem to warrant the U.S. Supreme Court's attention. The Idaho court's error was obvious. Every law student knows that state courts must follow U.S. Supreme Court decisions interpreting federal law. Indeed, in summarily reversing the Idaho Supreme Court's decision, the U.S. Supreme Court cited a 200-year-old case that every law student studies: *Martin v. Hunter's Lessee*.[61] Moreover, the Idaho Supreme Court's error might have been "a sport in the law"—i.e., a decision "inconsistent with what preceded [it] and what followed [it]."[62] After all, the Idaho Supreme Court had in two earlier decisions applied the *Christiansburg/Hughes* "frivolous, unreasonable, or without foundation"[63] standard in denying attorney's fees to prevailing defendants under § 1988(b).[64] What is more, no other state court had denied the binding nature of *Christiansburg/Hughes*.[65]

Finally, the U.S. Supreme Court "is not, and has never been, primarily concerned with the correction of error in lower court decisions."[66] The Idaho Supreme Court's decision was wrong, but it

59. *James*, 351 P.3d at 1192–93; *see* IDAHO CODE § 12–121 (2010).

60. *James* Cert Petition, *supra* note 36, at App. 133.

61. James v. City of Boise, 136 S. Ct. 685, 686 (2016) (citing Martin v. Hunter's Lessee, 14 U.S. 304 (1816)).

62. Screws v. United States, 325 U.S. 91, 112 (1945) (plurality opinion of Douglas, J.).

63. Hughes v. Rowe, 449 U.S. 5, 15 (1980); Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 422 (1978).

64. Nation v. State, Dep't of Corrections, 158 P.3d 953, 969 (Idaho 2007); Karr v. Bermeosolo, 129 P.3d 88, 93 (Idaho 2005).

65. *See James* Cert Petition, *supra* note 36, at 24–28.

66. Chief Justice Fred M. Vinson, *Work of the Federal Courts*, 69 S. CT. v, vi (1949).

was so obviously—and perhaps inadvertently—wrong that it hardly seemed to merit the Court's correction.

James has two features that nevertheless made it certworthy. First, the Idaho court's error was uninvited and deliberate; it was not a one-off. Second, the court's error was highly disturbing considering its timing and its factual and legal setting. Each feature is explored briefly below to expose the important issues that are at stake in *James* and that almost certainly prompted the grant of certiorari.

1. The Uninvited, Deliberate Nature of the Idaho Supreme Court's Error

The Idaho Supreme Court acted *sua sponte* when it held that neither it nor other state courts are bound by the U.S. Supreme Court's decisions in *Christiansburg* and *Hughes*.[67] For their part, the defendants recognized that the *Christiansburg/Hughes* "frivolous, unreasonable, or without foundation"[68] standard governed their request for attorney fees.[69] The dispute between the parties focused on whether or not fees against Ms. James were justified under the *Christiansburg/Hughes* standard. Thus, the Idaho Supreme Court injected the issue of whether it was bound by that standard for the first time when it issued its opinion awarding fees without applying that standard.

In doing so, the court acted not only *sua sponte* but deliberately. Ms. James advised the Court that it was bound by the *Christiansburg/Hughes* standard when she sought rehearing on the court's award of fees under Section 1988(b). She wrote in her rehearing petition that "[u]nder the Supremacy Clause of the United States Constitution, it is a fundamental notion that the decisions of the U.S. Supreme Court interpreting federal statutes and determining congressional intent are binding upon state courts."[70] The Idaho court could have deleted the problematic language from its opinion so easily that its failure to do so in response to the rehearing petition can only be understood as evidence that it was flouting the U.S. Supreme Court's interpretive authority.

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67. *James* Cert Petition, *supra* note 36, at App. 136–37.
68. *Hughes*, 449 U.S. at 15; *Christiansburg*, 434 U.S. at 422.
69. *See James* Cert Petition, *supra* note 36, at App. 136–37.
70. *James* Cert Petition, *supra* note 36, at App. 139.

2. The Disturbing Context of the Idaho Supreme Court's Error

The Idaho Supreme Court's defiance of the Court's authority was particularly disturbing in light of its timing and its factual and legal setting.

a. Timing

When the Idaho Supreme Court denied rehearing in July 2015, many state and local officials were openly defying the U.S. Supreme Court's June 2015 decision in *Obergefell v. Hodges*.[71] The defiance came not only from legislative and executive officials but also state judges. For example, Chief Justice Roy Moore of the Alabama Supreme Court said that *Obergefell* was "not in accordance with the Constitution."[72] He ordered Alabama probate judges to deny marriage licenses to same-sex couples on the ground that *Obergefell* bound only the parties to the case.[73] Justice Moore was not alone: A Mississippi Supreme Court justice agreed that *Obergefell* "has no basis in the Constitution or this Court's precedent."[74] State judges' opposition seemed to gain support from Justice Antonin Scalia, who not only dissented in *Obergefell*, but also reportedly said in a later speech that public officials have "no Constitutional obligation to treat as binding beyond the parties to a case rulings that lack a warrant in the text or original understanding of the Constitution."[75]

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71. Obergefell v. Hodges, 135 S. Ct. 2584, 2597–2605 (2015) (holding that laws in four states banning same-sex marriage were unconstitutional).

72. Charles J. Dean, *Moore: Gay Marriage 'Not in Accordance with the Constitution'*, PRESS-REGISTER (Alabama Media Group, Mobile, AL), July 1, 2015, at A10.

73. Third Supplement in Support of Complaint of the Southern Poverty Law Center Against Chief Justice Roy S. Moore at exh. C (Ala. Judicial Inquiry Comm'n) (filed Jan. 6, 2016), available at https://www.splcenter.org/seeking-justice/case-docket/judicial-ethics-complaint-alabama-chief-justice-roy-moore-and-same-sex.

74. Czekala–Chatham v. State *ex rel.* Hood, No. 2014-CA-00008-SCT, 2015 WL 10985118, at *193 ¶ 15 (Miss. Nov. 5, 2015) (Coleman, J., objecting to order with separate written statement) (quoting *Obergefell*, 135 S. Ct. 2584, 2612 (2015) (Roberts, C.J., dissenting)).

75. Matt Ford, *The Quixotic Adventures of Roy Moore*, THE ATLANTIC (Jan. 6, 2016), http://www.theatlantic.com/politics/archive/2016/01/alabama-marriage-order-moore/422931/. In the speech mentioned in the text accompanying this note, Justice Scalia might have been referring only to nonjudicial government officials. There is longstanding debate about whether a U.S. Supreme Court decision binds nonjudicial actors who aren't parties to the case. The Court took the position in *Cooper v. Aaron* that its decisions interpreting the U.S. Constitution do bind state and local nonjudicial, non-party officials. 358 U.S. 1, 18 (1958). Well-known legal scholars have criticized that position. *E.g.*, ALEXANDER M. BICKEL, THE MORALITY OF CONSENT 110–11 (1975); Philip B. Kurland, *"Brown v. Board of Education Was the Beginning"—The School Desegregation Cases in the United States Supreme Court: 1954–1979*, 1979 WASH. U. L.Q. 309, 327–28 (1979). The controversy has arisen again in the wake of *Obergefell*. *See, e.g.*, *Czekala–*

Resistance to *Obergefell* by state judges was joined by resistance from other quarters. State legislators and governors pushed bills and executive orders that would facilitate evasion of the decision.[76] In addition, some local officials—the most famous of whom was Rowan County, Kentucky, Clerk Kim Davis—refused to issue marriage licenses to same-sex couples.[77] A group of law school and university professors issued a "Statement Calling for Constitutional Resistance to *Obergefell v. Hodges*."[78]

Thus, when the Idaho Supreme Court issued its *James* opinion in summer 2015, resistance to the U.S. Supreme Court's supremacy was widespread.[79] You have to wonder if that widespread resistance emboldened the Idaho Supreme Court's defiance of the Court's precedent in *James*. Indeed, early commentators on *James* recognized the connection between Justice Roy Moore's position on his duty to follow *Obergefell* and the Idaho Supreme Court's position in *James*.[80] In any event, the timing of the Idaho court's decision almost certainly influenced the U.S. Supreme Court's decision to grant certiorari in the case.

b. Factual Context

James arose from the use of a dog to apprehend a criminal suspect. Although Ms. James is white,[81] the use of dogs as a weapon has historical links to the oppression of blacks. Slave owners in the

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Chatham, 2015 WL 10985118, at *14–*17 (Coleman, J., objecting to order with separate written statement) (discussing *Cooper v. Aaron* in explaining why state judges might not have to follow *Obergefell*).

76. *See* G.M. Filisko, *After Obergefell: The Supreme Court Ruling Settled the Issue of Marriage Equality—While Unsettling Other Legal Matters*, A.B.A. J., June 2016, at 57, 63 ("The American Civil Liberties Union notes that by the end of April [2016], nearly 200 anti-LGBT bills had been introduced in 32 states.").

77. Reuters, *Kentucky: Rowan County Clerk Kim Davis Is Again Rebuffed on Licenses*, N.Y. TIMES (Sept. 23, 2015), http://www.nytimes.com/2015/09/24/us/kentuckyrowan-county-clerk-kim-davis-is-again-rebuffed-on-licenses.html?_r=0.

78. *Statement Calling for Constitutional Resistance to* Obergefell v. Hodges, AM. PRINCIPLES PROJECT (Oct. 8, 2015), https://americanprinciplesproject.org/founding-principles/statement-calling-for-constitutional-resistance-to-obergefell-v-hodges%E2%80%AF/ *[hereinafter AM. PRINCIPLES PROJECT]*.

79. Terri R. Day & Danielle Weatherby, *LGBT Rights and the Mini RFRA: A Return to Separate But Equal*, 65 DEPAUL L. REV. 907, 911 (2016) (stating that "[t]he backlash to the *Obergefell* decision is real and palpable").

80. *Id.*

81. Clerk's Record on Appeal, *supra* note 5, at 210.

pre-Civil War South used bloodhounds to hunt for runaway slaves.[82] One hundred years later, southern sheriffs like Bull Connor used dogs against civil rights protestors in Birmingham, Alabama, and other places of unrest.[83] In the 1980s, police began using dogs to apprehend criminal suspects, a tactic often seen as a tool for abusing people of color.[84]

The historical and widespread use of dogs as a weapon—coupled with the rising number of well-publicized police shootings of black males in 2015—put the facts of *James* in a dark setting.[85]

c. *Legal Context*

In addition to its factual context, *James'* legal context heightened its importance. Ms. James sued under 42 U.S.C. § 1983, which authorizes private lawsuits challenging state action that violates federal constitutional or statutory rights.[86] Section 1983 "is by far the most important federal statute permitting civil actions against police officers."[87] For example, Section 1983 underlies nearly all of the

82. *See generally* CHRISTINE HATT, SLAVERY FROM AFRICA TO THE AMERICAS 33 (2007); David Doddington, *Slavery and Dogs in the Antebellum South, Sniffing the Past—Dogs & History*, SNIFFING THE PAST (Feb. 23, 2012), https://sniffingthepast.wordpress.com/2012/02/23/slavery-and-dogs-in-the-antebellum-south; Douglas U. Rosenthal, *When K-9s Cause Chaos—An Examination of Police Dog Policies and Their Liabilities*, 11 N.Y.L. SCH. J. HUM. RTS. 279, 281 & n.11 (1994) (documenting concern about use of police dogs against minorities in Los Angeles and other cities); Jim Newton, *L.A. Finds Mixed Results in Curbing Police Dog Bites*, L.A. TIMES (Mar. 1, 1996), http://articles.latimes.com/1996-03-01/news/mn-41895_1_dog-bite. The use of bloodhounds to hunt slaves is depicted in the iconic movie *Roots*. Alberto Nunez Garcia, *Whats Your Name "Kunta Kentei"*, YOUTUBE (Feb. 13, 2008), https://www.youtube.com/watch?v=ByhFz5e5Tno.

83. Jonathan K. Dorriety, *Police Service Dogs in the Use-of-Force Continuum*, 16 CRIM. J. POL'Y REV. 88, 90 (2005); Samuel G. Chapman, *Police Dogs Versus Crowds*, 8 J. POLICE SCI. & ADMIN. 316, 316 (1980); Jeremy Gray, *Bull Connor Used Fire Hoses, Police Dogs on Protestors*, AL.COM (May 3, 2013, 7:07 AM), http://blog.al.com/birmingham-news-stories/2013/05/bull_connor_used_fire_hoses_po.html ; Eamon Ronan, *Segregation at All Costs: Bull Connor and the Civil Rights Movement*, YOUTUBE (May 7, 2009), https://www.youtube.com/watch?v=j9kT1yO4MGg.

84. Rosenthal, *supra* note 75, at 281 & n.11 (reporting that "some officers referred to black suspects as 'dog biscuits.'"). *See generally* William G. Phelps, *Liability, Under 42 U.S.C.S. § 1983, for Injury Inflicted by Dogs Under Control or Direction of Police*, 102 A.L.R. FED. 616 (1991).

85. Jon Swaine et. al., *Young Black Men Killed by U.S. Police at Highest Rate in Year of 1,134 Deaths*, THE GUARDIAN (Dec. 31, 2015, 3:00 PM), https://www.theguardian.com/us-news/2015/dec/31/the-counted-police-killings-2015-young-black-men.

86. 42 U.S.C. § 1983 (2012), reproduced *supra* note 33.

87. ANN FAGAN GINGER & LOUIS H. BELL, *Police Misconduct Litigation–Plaintiff's Remedies*, *in* 15 AM. JUR., TRIALS 555, § 7 (1968).

excessive-force cases that have been decided by the U.S. Supreme Court.[88]

More broadly, Section 1983 has historic roots in federal efforts to force states to respect federal civil rights.[89] Section 1983 is the modern version of a statute enacted after the Civil War. As the U.S. Supreme Court said of Section 1983's predecessor, "A major factor motivating the expansion of federal jurisdiction through §§ 1 and 2 of the [Civil Rights Act of 1871] was the belief of the 1871 Congress that the state authorities had been unable or unwilling to protect the constitutional rights of individuals or to punish those who violated these rights."[90] Significantly for *James*, the "unable or unwilling" state authorities that concerned the 1871 Congress included "local courts."[91]

The concern endures, for some state courts continue to be hostile to actions under Section 1983 and other federal civil rights statutes. Their hostility has led to a series of U.S. Supreme Court decisions invalidating state-court refusals to hear federal claims. More recently, in 2009, the Court in *Haywood v. Drown* struck down a New York law that prevented state courts from hearing Section 1983 claims for money damages against prison guards.[92] The Court held that the New York law violated the Supremacy Clause.[93] Even as recently as in this 2009 case, the Court thought necessary to emphasize that "state courts as well as federal courts are entrusted with providing a forum for the vindication of federal rights violated by state or local officials acting

88. *See, e.g.*, Ross v. Blake, 136 S. Ct. 1850, 1855 (2016); Mullenix v. Luna, 136 S. Ct. 305, 307 (2015) (per curiam); Kingsley v. Hendrickson, 135 S. Ct. 2466, 2470 (2015); Plumhoff v. Rickard, 134 S. Ct. 2012, 2018 (2014); Tolan v. Cotton, 134 S. Ct. 1861, 1864 (2014) (per curiam); Brousseau v. Haugen, 543 U.S. 194, 194 (2014) (per curiam); Wilkins v. Gaddy, 559 U.S. 34, 34–35 (2010) (per curiam); Scott v. Harris, 550 U.S. 372, 375–376 (2007); Porter v. Nussle, 534 U.S. 516, 521 (2002); Booth v. Churner, 532 U.S. 731, 734 (2001); Bd. of Cty. Comm'rs of Bryan Cty., Okla v. Brown, 520 U.S. 397, 399–400 (1997); Johnson v. Jones, 515 U.S. 304, 307 (1995); Hudson v. McMillian, 503 U.S. 1, 4–5 (1992); Smith v. Barry, 502 U.S. 244, 245 (1992); Mireles v. Waco, 502 U.S. 9, 10 (1991) (per curiam); Graham v. Connor, 490 U.S. 386, 388 (1989); Brower v. Cty. of Inyo, 489 U.S. 593, 594 (1989); City of L.A. v. Heller, 475 U.S. 796, 797 (1986) (per curiam); Whitley v. Albers, 475 U.S. 312, 317 (1986); Kentucky v. Graham, 473 U.S. 159, 161–63 (1985); City of Oklahoma City v. Tuttle, 471 U.S. 808, 811–12 (1985); Wilson v. Garcia, 471 U.S. 261, 262–63 (1985); Hanrahan v. Hampton, 446 U.S. 754, 755 n.1 (1987); Ingraham v. Wright, 430 U.S. 651, 653 (1977).

89. *Dist. of Columbia v. Carter*, 409 U.S. 418, 423–29 (1973) (discussing history of 42 U.S.C. § 1983).

90. Patsy v. Bd. of Regents of Fla., 457 U.S. 496, 505 (1982).

91. *Id.* (quoting legislative history).

92. 556 U.S. 729, 729 (2009).

93. *Id.* at 736.

under color of state law."[94] The Court added that a state cannot "dissociate [itself] from federal law because of disagreement with its content or a refusal to recognize the superior authority of its source."[95] In saying so, the Court echoed words it had spoken almost a century before.[96]

Section 1983's importance has increased since 1976, when Congress enacted the provision currently codified in 42 U.S.C. § 1988(b) to authorize awards of attorney's fees to successful Section 1983 plaintiffs.[97] "As was true with § 1983, a major purpose of the Civil Rights Attorney's Fees Awards Act—which added the fee-shifting provision in 42 U.S.C. § 1988(b)—was to benefit those claiming deprivations of constitutional and civil rights."[98] "Congress viewed the fees authorized by § 1988 as an integral part of the remedies necessary to obtain compliance with § 1983."[99]

Just as some state courts have resisted hearing Section 1983 claims, several states argued as amici in *Maine v. Thiboutot* that state courts need not award fees under Section 1988(b) to prevailing plaintiffs in Section 1983 actions.[100] The Court rejected that argument,

94. *Id.* at 735; *cf.* Robb v. Connolly, 111 U.S. 624, 637 (1884) ("Upon the state courts, equally with the courts of the Union, rests the obligation to guard, enforce, and protect every right granted or secured by the constitution of the United States and the laws made in pursuance thereof, . . .").

95. *Haywood,* 556 U.S. at 736 (quoting Howlett v. Rose, 496 U.S. 356, 371 (1990)) (bracketed text added by Court in *Haywood*).

96. Minneapolis & St. Louis R.R. Co. v. Bombolis, 241 U.S. 211, 222 (1916) ("[W]here the general jurisdiction conferred by the state law upon a state court embraced otherwise causes of action created by an act of Congress, it would be a violation of duty under the Constitution for the court to refuse to enforce the right arising from the law of the United States because of conceptions of impolicy or want of wisdom on the part of Congress in having called into play its lawful powers."); *see also infra* note 166 (citing cases in which the Court has held that states cannot treat federal law as if it were the law of a foreign country).

97. Civil Rights Attorney's Fees Awards Act of 1976, Pub. L. No. 94–559, § 2, 90 Stat. 2641 (codified as amended at 42 U.S.C. § 1988(b) (2012)). Congress enacted the fee-shifting provision now codified as Section 1988(b) "[t]o provide the [legislative] authorization" that the Court held in Alyeska Pipeline Service Co. v. Wilderness Soc'y, 421 U.S. 240, 269 (1975), was "required for fee awards under Title VI of the 1964 Civil Rights Act, as well as under Reconstruction Era civil right legislation, and certain other enactments." Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Servs., 532 U.S. 598, 635 (2001) (Ginsburg, J., dissenting). (citations omitted). The Court's first decision construing Section 1988(b) arose from the 1969 execution of a search warrant in a Chicago apartment occupied by nine members of the Black Panther Party. Hanrahan v. Hampton, 446 U.S. 754, 755 n.1 (1980) (per curiam).

98. Maine v. Thiboutot, 448 U.S. 1, 9 (1980).

99. *Id.* at 11 (internal quotation marks omitted).

100. *Id.* at 10.

holding that "the fee provision is part of the § 1983 remedy whether the action is brought in federal or state court."[101]

Section 1988(b) has importance independently of Section 1983. Section 1988(b) authorizes fee awards in actions under many federal civil rights statutes besides Section 1983.[102] Those statutes include the Americans with Disabilities Act,[103] Title IX,[104] the Religious Land Use and Institutionalized Persons Act,[105] and Title IV of the Civil Rights Act of 1964.[106] Because it covers actions under many civil rights statutes, Section 1988 is the "most significant federal fee-shifting statute."[107]

In short, *James* arose under two federal statutes—Sections 1983 and 1988(b)—that protect federal civil rights and that states have resisted. This resistance could continue if state courts could construe Section 1988(b) independently of the U.S. Supreme Court, as the Idaho court in *James* held. The Court in *Christiansburg* and *Hughes* deliberately adopted a "stringent" standard for prevailing *defendants* to recover attorney fees under § 1988(b), which differed from the lenient standard it has adopted for awarding fees to prevailing *plaintiffs* under that statute.[108] The Idaho Supreme Court's decision in *James*, however, would allow a state court to adopt a less stringent standard than that of *Christiansburg/Hughes*. That would permit prevailing defendants in Section 1983 actions in *state* court to recover fee awards more easily than could prevailing defendants in Section 1983 actions in *federal* court. That disparity, in turn, would cause all but ignorant Section 1983 plaintiffs to avoid the state courts. In effect, this would free states from the obligation that the Court's precedent puts them under to entertain Section 1983 suits when their jurisdiction

101. *Id.* at 10–11.

102. *See* 42 U.S.C. § 1988(b) (2012), reproduced *supra* note 89.

103. 42 U.S.C. §§ 12101–12213 (2012).

104. 20 U.S.C. §§ 1681–1688 (2012) (banning discrimination "on the basis of sex" in college and university programs that receive federal financial assistance).

105. 42 U.S.C. §§ 2000cc–2000cc-5 (2012) (prohibiting religious discrimination in land use and against inmates).

106. 42 U.S.C. §§ 2000a–2000a-6 (2012) (prohibiting discrimination in places of public accommodation based on race, color, religion, or national origin).

107. Martin A. Schwartz, *Attorney's Fees in Civil Rights Cases–October 2009 Term*, 27 TOURO. L. REV. 113, 114–15 (2011).

108. *See* Fogerty v. Fantasy, Inc., 510 U.S. 517, 524–25 (1994) (declining to rely on "our fee-shifting decisions under the Civil Rights Act" to adopt similar "dual approach" to awarding attorney's fees under Copyright Act).

is otherwise adequate.[109] It would also produce a system in which Section 1983 litigation in state court regularly produced different outcomes from Section 1983 litigation in federal courts, a disparity that the U.S. Supreme Court has generally prohibited.[110]

C. Summary

This Part has shown why the Idaho Supreme Court's decision in *James* caught the U.S. Supreme Court's eye. A state supreme court held that the U.S. Supreme Court "d[id] not have authority" to make it obey a decision that interpreted a federal statute to impose "limitation[s] . . . not contained in the statute."[111] At the time of this holding, state judges and other officials throughout the country were refusing to follow *Obergefell* on the ground that it has no basis in the Constitution.[112] The Idaho court's decision denied the Court's supremacy in a case interpreting federal civil rights statutes that state courts have resisted enforcing. And the case involved a police tactic, the use of dogs, with a race-tainted history and modern status, occurring in a year that witnessed an alarming number of police killings of black men. *James* thus eminently deserved the Court's attention, as it deserves ours.[113]

II. THE U.S. SUPREME COURT'S DECISION IN *JAMES* AND OTHER COURT PRECEDENT ON THE DUTY OF STATE COURTS TO OBEY THE U.S. SUPREME COURT'S DECISIONS ON FEDERAL LAW

The Court's opinion in *James*—which summarily reverses the Idaho Supreme Court's award of attorney's fees to the defendants under 42 U.S.C. § 1988(b)—makes the case look easy.[114] *James* is indeed an easy case if you accept that state courts have a duty to obey

109. Howlett v. Rose, 496 U.S. 356, 375–81 (1990) (holding that a state court could not refuse to hear a claim under 42 U.S.C. § 1983 when it had jurisdiction to hear similar state-law claims).

110. Felder v. Casey, 487 U.S. 131, 141 (1988) (invalidating enforcement of state statutory requirement in state-court action under 42 U.S.C. § 1983 partly because its enforcement "will frequently and predictably produce different outcomes in federal civil rights litigation based solely on whether that litigation takes place in state or federal court").

111. James v. City of Boise, 351 P.3d 1171, 1192 (Idaho 2015), *rev'd*, 136 S. Ct. 685 (2016).

112. *See supra* text accompanying notes 71–79.

113. *See* SUP. CT. R. 16.1 (stating that after cert papers have been filed, Court can make a "summary disposition on the merits").

114. James v. City of Boise, 136 S. Ct. 685 (2016); *see also* Schweiker v. Hansen, 450 U.S. 785, 791 (1981) (Marshall, J., dissenting) ("A summary reversal is . . . usually reserved by this Court for situations in which the law is settled and stable, the facts are not in dispute, and the decision below is clearly in error.").

the Court's decisions on federal law. But, as this part shows, the precedent supporting that duty is shallower—and the legal source of the duty is murkier—than the Court in *James* would have us believe.

This part uses the *James* opinion as a springboard for exploring the state courts' duty to obey U.S. Supreme Court precedent. Section A discusses the *James* opinion. Section B discusses the case on which *James* principally relies: *Martin v. Hunter's Lessee.* Section C discusses other Court precedent on the state court's duty to obey the Court's federal law decisions.

A. The U.S. Supreme Court's Opinion in James

When the U.S. Supreme Court summarily reverses a lower federal court or state court decision, it typically issues a short per curiam opinion explaining that the court below erred.[115] The Court's opinion in *James* was short even for a per curiam opinion. The opinion's legal analysis consisted of one curt paragraph:

> Section 1988 is a federal statute. "It is this Court's responsibility to say what a [federal] statute means, and once the Court has spoken, it is the duty of other courts to respect that understanding of the governing rule of law." *Nitro–Lift Technologies, L.L.C. v. Howard,* 568 U.S. ___, ____ (per curiam) (slip op., at 5) (quoting *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 312 (1994) (internal quotation marks omitted)). And for good reason. As Justice Story explained 200 years ago, if state courts were permitted to disregard this Court's rulings on federal law, "the laws, the treaties, and the constitution of the United States would be different in different states, and might, perhaps, never have precisely the same construction, obligation, or efficacy, in any two states. The public mischiefs that would attend such a state of things would be truly deplorable." *Martin v. Hunter's Lessee,* 1 Wheat. 304, 348 (1816).[116]

Thus, the Court cites two modern cases for the relevant rule—i.e., state courts must obey the Court's precedent on federal law—and one well-known case that is supposed to supply the rationale for that rule: *Martin v. Hunter's Lessee.*[117]

115. *See* STEPHEN M. SHAPIRO ET AL., SUPREME COURT PRACTICE 350–51 (10th ed. 2013).
116. *James*, 136 S. Ct. at 686.
117. Martin v. Hunter's Lessee, 14 U.S. 304, 348 (1816).

It is understandable that the Court relied on *Martin v. Hunter's Lessee* for the rationale. *Martin* is a foundational case that every law student studies, and it establishes a power—i.e., the Court's power to review state court decisions resting on federal law—that almost no one today disputes. Thus, the Court's reliance on *Martin* in *James* sends a strong signal, even a rebuke, to the Idaho Supreme Court for ignoring a long-settled principle. *James* also warns a broader audience that it will brook no resistance of the sort that erupted in response to *Obergefell*. Indeed, as mentioned above, early commentators on *James* recognized the tie between *James* and resistance to *Obergefell*.[118]

As discussed in the next section, although the *James* Court's reliance on *Martin* is understandable, *Martin* does not support the result in *James* as strongly as the Court would have us believe.

B. Martin v. Hunter's Lessee *as Precedent for the State Courts' Duty to Obey U.S. Supreme Court Decisions on Federal Law*

The Court in *James* says that, in *Martin v. Hunter's Lessee*, Justice Story "explained" the "reason" for the state courts' duty to obey the Court's federal-law decisions: ensuring nationwide uniformity of federal law.[119] In reality, *Martin* never mentions that duty; at most, *Martin* implies its existence. Nor does *Martin* explicitly identify the legal basis for the duty.

To explore *Martin's* weakness as precedent for the state courts' duty to obey U.S. Supreme Court decisions on federal law, we first introduce terminology. Two different terms have been used to describe a court's duty to obey decisions of a "higher" (or "superior") court—i.e., a court that has authority to review (and revise) the first court's decisions. In a leading article on the subject, Dean Evan Caminker calls it the rule of "hierarchical precedent."[120] Other scholars refer to it as "vertical stare decisis."[121] This Article uses "vertical stare decisis" because it is more common.[122] And this Article discusses a specific

118. *See supra* text accompanying note 80.

119. *James*, 136 S. Ct. at 686.

120. Caminker, *supra* note 6, at 820.

121. *See, e.g.*, Adam N. Steinman, *To Say What the Law Is: Rules, Results, and the Dangers of Inferential Stare Decisis*, 99 VA. L. REV. 1737, 1774 (2013); Amy Coney Barrett, *Stare Decisis and Due Process*, 74 U. COLO. L. REV. 1011, 1016 n.17 (2003); Harrison, *supra* note 6, at 514.

122. Whereas vertical stare decisis means a lower court's duty to obey superior court precedent, "horizontal stare decisis" means a court's general policy of abiding by its own past decisions. *See,*

manifestation of vertical stare decisis: the duty of state courts to obey U.S. Supreme Court precedent.[123]

Martin was not about the state courts' duty to obey U.S. Supreme Court precedent. *Martin* concerned whether the "appellate jurisdiction" granted to the U.S. Supreme Court in Article III authorizes the Court to review the decisions of state courts.[124] The Court held in *Martin* that Article III's grant of appellate jurisdiction "does extend to cases pending in the state courts."[125] The issue of jurisdiction to review a state court decision in a particular case differs from the issue of whether the Court's decision in that case binds state courts in future cases. Therefore, if the Court in *Martin* had discussed the latter issue, its discussion would have been dicta.[126]

In any event, the Court in *Martin* did not discuss the issue. In the part of *Martin* on which the Court relied in *James*, Justice Story took pains not to deprecate state court judges' ability to decide issues of federal law.[127] He had said earlier in the opinion that "[t]he constitution has presumed . . . that state attachments, state prejudices, state jealousies, and state interests might sometimes obstruct, or control, or be supposed to obstruct or control, the regular administration of justice."[128] But Justice Story added that "[a] motive of another kind" . . . might [have] induce[d]" the Framers to give the

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e.g., Peter Wesley-Smith, *Theories of Adjudication and the Status of* Stare Decisis, *in* PRECEDENT IN LAW 81–82 (1987).

123. *But cf.* Mark Alan Thurmon, Note, *When the Court Divides: Reconsidering the Precedential Value of Supreme Court Plurality Decisions*, 42 DUKE L.J. 419, 437 n.89 (1992) (arguing that lower federal courts' duty to obey superior court precedent is not accurately described as vertical stare decisis because duty "derives from structural rules that are based on the hierarchical nature of the judicial system, not from the prudential considerations that underlie stare decisis").

124. Martin v. Hunter's Lessee, 14 U.S. 304, 323–24 (1816) (explaining that the Virginia Court of Appeals had held, in the decision before the Court, that "the appellate power of the [S]upreme [C]ourt of the United States does not extend to this court" and that the section of the Judiciary Act of 1789 providing otherwise "is not in pursuance of the [C]onstitution of the United States"). The underlying case was a land dispute, with one party, Martin, claiming the land based on treaties and the other, Hunter's Lessee, claiming the land based on Virginia law. In its first decision on the dispute, the Court upheld Martin's treaty-based claim. Fairfax's Devisee v. Hunter's Lessee, 11 U.S. 603, 625–27 (1813).

125. *Martin*, 14 U.S. at 351.

126. The discussion was dicta because it was not part of the *ratio decidendi* of the case. *See* JOSEPH RAZ, THE AUTHORITY OF LAW 183–84 (2d ed. 2009) (discussing *ratio decidendi*); A.G. GUEST, OXFORD ESSAYS IN JURISPRUDENCE 148 (A.G. Guest ed. 1961) (same); Michael Abramowicz & Maxwell Stearns, *Defining Dicta*, 57 STAN. L. REV. 953, 1044–76 (2005) (discussing various definitions of dicta and proposing their own).

127. *Martin*, 14 U.S. at 347.

128. *Id.*

Court appellate jurisdiction over state court decisions.[129] That possible "motive" was "compatible with the most sincere respect for state tribunals"; it was the "necessity for *uniformity* of decisions [on federal law] throughout the . . . United States."[130] Thus, Justice Story offered the uniformity rationale, upon which the Court relied in *James*, as a possible, face-saving justification for the Constitution's grant of appellate jurisdiction over state court cases—not as a basis for the state courts' duty to obey U.S. Supreme Court decisions on federal law. The Court never mentioned that duty.

True, the existence of that duty is implied by the Court's emphasis on the necessity for nationwide "*uniformity* of decisions"[131] on federal law. The implication arises from this chain of reasoning, which the Court in *James* apparently believed was implicit in *Martin*:

1. The Framers created the U.S. Supreme Court to ensure nationwide uniformity in the interpretation and application of federal law.
2. For the Court to achieve that uniformity, its decisions on federal law must bind the lower federal courts and state courts.
3. Therefore, the Constitution requires lower federal courts and state courts to obey the Court's decisions on federal law.

If the Court in *Martin* had expressly engaged in this reasoning to decide the issue, and the issue had been presented in the case, *Martin* would perfectly support the result in *James*.

By now, however, it should be clear that this is not what *Martin* addressed or said. As to the first premise, regarding the Framers' desire to create uniformity, the Court in *Martin* offers it only as a "motive" that "might induce" the grant of appellate jurisdiction to the Court.[132] As to the second premise, regarding the necessity of lower federal and state courts obeying the Court's decisions, this goes unstated in *Martin*.[133] Since the Court never mentions the state courts'

129. *Id.*
130. *Id.* at 347–48.
131. *Id.*
132. *Id.* at 347.
133. Moreover, the premise is dubious. In theory, the U.S. Supreme Court could maintain uniformity of federal law even if state courts had no duty to obey the Court's precedent under the doctrine of vertical stare decisis. Without that doctrine, uniformity would simply be harder to achieve. As Professor Paulsen wrote, "[t]he asserted need for 'uniformity' is not threatened, so long as the Supreme Court can review and reverse; only the costs of enforcing uniformity are new."

duty to obey the Court's decisions, the Court also never says the duty is constitutional, nor does it identify any other legal source for it.

Despite these lacunae, it is likely that the Court in *Martin* did presume that state courts have a duty to obey the Court's federal-law decisions. History confirms the Court's view that the Framers intended the Court to produce "*uniformity* of decisions [on federal law] throughout the whole United States."[134] This history is admittedly ambiguous about how uniformity was to be achieved, because the doctrine of stare decisis had not gelled at the time of the Framing in England or America.[135] Even so, Justice Story, author of the *Martin*

Michael Stokes Paulsen, *Accusing Justice: Some Variations on the Themes of Robert M. Cover's Justice Accused*, 7 J.L. & RELIG. 33, 87 (1990).

134. *Martin*, 14 U.S. at 347–48. Like the *Martin* opinion, the Federalist Papers contain several references to the U.S. Supreme Court's role in ensuring the uniform interpretation of federal law nationwide, but no explicit mention that state or lower federal courts would be bound by the Court's decisions on federal law, much less any suggestion that the Constitution compelled obedience. *See* THE FEDERALIST NO. 22, at 150 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (stating that "[t]o produce uniformity in these determinations [of federal law], they ought to be submitted, in the last resort, to one SUPREME TRIBUNAL"); THE FEDERALIST NO. 80, at 476 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("If there are such things as political axioms, the propriety of the judicial power of a government being coextensive with its legislative may be ranked among the number. The mere necessity of uniformity in the interpretation of the national laws decides the question. Thirteen independent courts of final jurisdiction over the same causes, arising upon the same laws, is a hydra in government from which nothing but contradiction and confusion can proceed."); THE FEDERALIST NO. 82, at 494 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (stating that an appeal from state courts in cases raising issues of federal law "will . . . naturally lie to that tribunal which is destined to unite and assimilate the principles of national justice and the rules of national decisions"). In The Federalist No. 78, Alexander Hamilton explained that the life tenure given to federal judges by the Constitution would attract people of ability who could study the "strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them." THE FEDERALIST NO. 78, at 471 (Alexander Hamilton) (Clinton Rossiter ed., 1961); *see* Thomas R. Lee, *Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court*, 52 VAND. L. REV. 647, 664 (1999) (suggesting that Hamilton's reference to binding nature of precedent in Federalist No. 78 might have been referring to vertical stare decisis). In addition to the Federalist papers, the papers of James Wilson, who was both a Framer and an original Justice on the Court, show that he strongly supported vertical stare decisis. JAMES WILSON, THE WORKS OF JAMES WILSON 149–50 (James DeWitt Andrews ed., 1896) (advocating pyramidal court structure with a "superintending tribunal" to resolve conflicting lower court decisions, and whose determinations "[u]pon future occasions . . . will be considered as an authority"). *See generally* Pfander, ONE SUPREME COURT, supra note 6, at 41 (explaining that England's Exchequer Chamber "provided the Framers with the tools they needed to construct a theory of vertical stare decisis"); Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 770 n.267 (1988) (stating that Framers were familiar with doctrine of precedent).

135. *See* Hart v. Massanari, 266 F.3d 1155, 1168 (9th Cir. 2001) ("The modern concept of binding precedent . . . came about only gradually over the nineteenth and early twentieth centuries."); CARLETON KEMP ALLEN, LAW IN THE MAKING 150 (1930) ("To sum up the position [in England] at the end of the eighteenth century: . . . no Judge would have been found to admit that he was 'absolutely bound' by any decision of any tribunal."); THEODORE F.T. PLUCKNETT, A

opinion, said in his 1833 treatise on the Constitution that lower federal and state courts have a duty to obey the Court's decisions on federal law.[136] Justice Story traced this duty to "the known course of the common law" and thought the Framers intended to preserve this course when they established a supreme court with broad appellate jurisdiction.[137] Accordingly, Justice Story concluded in his treatise that the Court's decisions were "conclusive upon the states."[138] Justice Story might have been wrong in his view that the Framers embedded in the Constitution the duty of state courts to obey Supreme Court precedent, but his 1816 decision for the Court in *Martin* suggests that his view had gained ascendancy.[139]

CONCISE HISTORY OF THE COMMON LAW 308 (1929) ("[I]t is only in the nineteenth century [in England] that the present system of case law with its hierarchy of authorities was established."); Michael Sinclair, *Precedent, Super-Precedent*, 14 GEO. MASON L. REV. 363, 377–78, 378 n.87 (2007) (noting that earliest English decision distinguishing horizontal from vertical stare decisis dates from 1837); Andrew T. Solomon, *A Simple Prescription for Texas's Ailing Court System: Stronger Stare Decisis*, 37 ST. MARY'S L.J. 417, 422 n.11 (2006) ("The modern theory of stare decisis began gradually in the 1800s with the establishment of stricter appellate court hierarchies and the standardization of case law reporting."); Thomas Healy, *Stare Decisis as a Constitutional Requirement*, 104 W. VA. L. REV. 43, 89 (2001) ("American commitment to precedent strengthened in the first half of the nineteenth century . . . ."); Lee, *supra* note 124, at 661 (stating that "most legal historians have agreed that the eighteenth and early nineteenth centuries marked an important point of transition" in doctrine of precedent); Frederick G. Kempin, Jr., *Precedent and Stare Decisis: The Critical Years, 1800 to 1850*, 3 AM. J. LEGAL HIST. 28, 50 (1959) ("[T]he formative period of the doctrine [of stare decisis in America] . . . was 1800 to 1850").

136. JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION 349 (1833) (posing question whether decision of the Court, "when made, is conclusive and binding upon the states"); *id.* at 349–50 (answering yes to that question).

137. Story states:

> [J]udicial decisions of the highest tribunal, by the known course of the common law, are considered, as establishing the true construction of the laws, which are brought into controversy before it. The case is not alone considered as decided and settled; but the principles of the decision are held, as precedents and authority, to bind future cases of the same nature. This is the constant practice under our whole system of jurisprudence. Our ancestors brought it with them, when they first emigrated to this country . . . .This known course of proceeding, this settled habit of thinking, this conclusive effect of judicial adjudications, was in the full view of the framers of the constitution. . . . It would seem impossible, then, to presume, if the people intended to introduce a new rule in respect to the decisions of the Supreme Court, and to limit the nature and operations of their judgments in a manner wholly unknown to the common law, and to our existing jurisprudence, that some indication of that intention should not be apparent on the face of the constitution. . . . If the judgments of the Supreme Court upon constitutional questions are conclusive and binding upon the citizens at large, must they not be equally conclusive upon the states?

STORY, *supra*, note 136, at 349–50.

138. STORY, *supra*, note 136, at 350.

139. Professor David Engdahl believes that Justice Story was wrong to assert a constitutional basis for stare decisis. David E. Engdahl, *What's in a Name: The Constitutionality of Multiple Supreme Courts*, 66 IND. L.J. 457, 502 n. 225 (1991) (arguing that "[n]otwithstanding the adamant and relatively early voice of Joseph Story, stare decisis has no proper place in constitutional law").

Nonetheless, considering how much you must read into the *Martin* decision to make it support the decision in *James*, *Martin* constitutes weak precedent. The Court in *James* was eliding, if not disguising, this weakness when it said that in *Martin* Justice Story "explained" the "reason" why state courts cannot be "permitted to disregard this Court's rulings on federal law."[140] Given the weakness of *Martin* as precedent for the result in *James*, you have to wonder why the Court relied on it: Didn't it have any better precedent?

As discussed in the next section, the answer is "not really." The other precedent is surprisingly shallow, and furnishes an uncertain legal basis for the state courts' duty to obey U.S. Supreme Court decisions on federal law.

C. Other U.S. Supreme Court Precedent on the State Courts' Duty to Obey U.S. Supreme Court Decisions on Federal Law

1. U.S. Supreme Court Decisions on the Court's Appellate Jurisdiction Over State-Court Decisions

Martin v. Hunter's Lessee is one of a quartet of early cases in which the U.S. Supreme Court held that its appellate jurisdiction under Article III authorizes it to review certain state court decisions. The other three cases in the quartet do not add much support for the existence of the state courts' duty to obey U.S. Supreme Court decisions on federal law.

The cases are *Cohens v. Virginia*,[141] *Dodge v. Woolsey*,[142] and *Ableman v. Booth*.[143] None of them presented the issue of whether state courts have a duty to obey the Court's decisions on federal law.[144]

This Article is agnostic about the accuracy of Justice Story's account. If the account is accurate, however, then vertical stare decisis might be most usefully understood as a constitutional backdrop, as Professor Sachs has argued. *See* Stephen E. Sachs, *Constitutional Backdrops*, 80 GEO. WASH. L. REV. 1813, 1863–66 (2012).

140. *James v. City of Boise*, 136 S. Ct. 685, 686 (2016).

141. 19 U.S. 264 (1821).

142. 59 U.S. 331, 350 (1855).

143. 62 U.S. 506 (1858).

144. In *Cohens*, Virginia contested the Court's jurisdiction to review a Virginia state court decision in which the defendants argued that the state law under which they were convicted (for selling lottery tickets) violated the U.S. Constitution. *Cohens*, 19 U.S. at 413. In *Dodge*, the defendants in a federal-court, diversity-of-citizenship case argued that the state courts had exclusive and final jurisdiction, despite the presence of an issue of federal law. *Dodge*, 59 U.S. at 346. In *Ableman*, the issue was whether a state court could grant habeas corpus relief to someone who was in federal custody for violating a federal criminal statute. *Ableman*, 62 U.S. at 514 (noting that

Moreover, none of them, with the arguable exception of *Dodge*, expressly addressed the existence of the duty or the legal basis for it.[145] They do, however, emphasize the importance of nationwide uniformity in the interpretation of federal law.[146] Since uniformity would be hard to achieve unless the Court's decisions on federal law bound state courts, the decisions imply that state courts have a duty to obey the Court's federal-law decisions. Like *Martin*, however, these decisions lack the "canonical language" recognizing the duty that one would expect from precedent on such a fundamental principle.[147]

The Court's decision in *Dodge* has two features that arguably make it stronger precedent than *Martin*, *Cohens*, and *Ableman*. First, the *Dodge* decision contains language that apparently alludes to the duty of state courts to obey the Court's precedent. The Court says that its decision in the case—which presented a federal constitutional challenge to an Ohio law that taxed state-chartered banks—will affect not only "[m]illions of money in that State" but also "millions upon millions of banking capital in other States."[148] Second, the decision lengthily argues that "the constitution itself" makes the Court the "final judge of the powers of the constitution [and] . . . the interpretation of the laws of Congress."[149]

Wisconsin Supreme Court "ordered their clerk to disregard and refuse obedience to the writ of error" issued by the U.S. Supreme Court to review the Wisconsin court's decisions).

145. *Ableman*, 62 U.S. at 518 ("It was essential . . . to [the federal government's] very existence" to establish "a tribunal . . . in which all cases which might arise under the Constitution and laws and treaties of the United States, whether in a State court or a court of the United States, should be finally and conclusively decided."); *Dodge*, 59 U.S. at 350 ("[O]ur national union would be incomplete and altogether insufficient for the great ends contemplated, unless a constitutional arbiter was provided to give certainty and uniformity, in all of the States, to the interpretation of the constitution and the legislation of congress."); *Cohens*, 19 U.S. at 416 ("[T]he necessity of uniformity, as well as correctness in expounding the constitution and laws of the United States, would itself suggest the propriety of vesting in some single tribunal the power of deciding, in the last resort, all cases in which they are involved.").

146. *See infra* text accompanying notes 148–58 (discussing *Dodge*).

147. Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 579 (1987); *see also* Larry Alexander, *Constrained by Precedent*, 63 S. CAL. L. REV. 1, 19 (1989) (stating that, in rule-based model of precedent, rule "must have a canonical formulation").

148. *Dodge*, 59 U.S. at 356. The *Ableman* opinion also arguably contains language suggesting that the Court's decisions on federal law bind state courts. It refers to the Court as the constitutionally designated tribunal in which federal questions "should be finally and conclusively decided." *Ableman*, 62 U.S. at 518. Yet this language is ambiguous; it leaves unclear whether the Court's decision is "final" only as to the parties to the case, or has broader effect. *See* David E. Engdahl, *supra* note 139, at 459 (stating that "[t]he word 'finality' alone . . . is insufficient to distinguish Supreme Court 'judicial review' . . . from simple res judicata").

149. *Dodge*, 59 U.S. at 351, 358.

Despite its two strengths, *Dodge* also has two weaknesses that make it problematic as precedent for the state courts' duty to obey the U.S. Supreme Court's federal-law decisions.

First, the constitutional analysis in *Dodge* is vague and muddled. The Court does not identify a particular part of the Constitution requiring state courts to obey the Court's decisions on federal law.[150] Rather, it meanders through much of the original Constitution, mentioning among other parts of it Article III's grant of appellate jurisdiction to the Supreme Court[151]; the States' implicit surrender of sovereignty through Article VII's provision for state-by-state ratification of the Constitution;[152] the Supremacy Clause;[153] and the Constitution's creation of a Supreme Court.[154] Perhaps the muddiness of the *Dodge* Court's analysis explains why the Court has never cited *Dodge* as precedent for the state courts' duty to obey the Court's federal-law decisions.[155]

The second problematic feature of *Dodge* is its aftermath. After the Court decided *Dodge*, the Ohio Supreme Court—whose decision was reversed in *Dodge*—held that it was not bound by the U.S. Supreme Court's decision![156] The Ohio Supreme Court's analysis is cogent (even if wrong) compared to *Dodge*'s.[157] Predictably, the U.S.

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150. *See id.* at 358 (asserting that the Court had "shown from the constitution itself that the framers of it meant to provide a jurisdiction for its final interpretation, and for the laws passed by Congress, to give them an equal operation in all of the States").

151. *Id.* at 347.

152. *Id.* at 348.

153. *Id.* at 348–49, 355.

154. *Id.* at 355–58.

155. *Cf.* Hawes v. City of Oakland, 104 U.S. (14 Otto) 450, 458–59 (1881) (stating that, in *Dodge* opinion, "it is impossible not to see the influence . . . of the fact that the only question on the merits of the case was one which peculiarly belonged to the Federal judiciary, and especially to this court to decide").

156. Jefferson Branch Bank v. Skelly, 66 U.S. 436 (1861).

157. The Ohio Supreme Court in *Skelly* said, "There is no constitutional nor legislative provision which makes the decision of the Supreme Court of the United States, in one case, binding, as a precedent for the decision of a similar case." 9 Ohio St. at 609. The Ohio court then addressed Justice Story's view, expressed in his Commentaries, that the state courts' duty to obey U.S. Supreme Court precedent flowed from the Framers' "tacit adoption" of the English system's rule of vertical stare decisis. *Id.*; *see also supra* text accompanying notes 136–38 (summarizing Justice Story's view in the Commentaries). The Ohio court in *Skelly* contended that the duty of lower courts in England to obey superior court precedent "without any inquiry into their correctness has been clearly admitted only in modern times." 9 Ohio St. at 610. Most legal scholars appear to agree. *See supra* note 135. Moreover, the Ohio court in *Skelly* argued that, for purposes of vertical stare decisis, state courts should not be treated as "inferior" to the U.S. Supreme Court because (at that time) Congress had not authorized the U.S. Supreme Court to review all state-court decisions resting on federal law. Instead, the U.S. Supreme Court could review a state-court decision only if the state

Supreme Court reversed the Ohio Supreme Court decision refusing to follow *Dodge*. That would have been the perfect time for the Court to address the squarely presented issue of the state courts' duty to obey the Court's precedent. But the Court voiced not a peep about that duty. Instead, the Court querulously remarked that it had already held the Ohio statutes unconstitutional three times before.[158] From the standpoint of the Court's supremacy over state courts in matters of federal law, *Dodge* ends not with a bang but a whimper.

So far we have discussed cases in which the Court has not expressly said that state courts have a duty to obey U.S. Supreme Court decisions on federal law. Next we turn to cases that do say so. As we will see, many of them have their own problems serving as precedent for this duty.

2. U.S. Supreme Court Decisions on the Court's Policy of Accepting State Supreme Court Interpretations of State Constitutions and Statutes

In many cases, the Court has held that it is generally bound by state supreme court decisions interpreting state constitutions and statutes.[159] In several cases, the Court has expressly said that, by the same token, state courts are bound by the U.S. Supreme Court's interpretation of the federal constitution and statutes. This section discusses three early cases to show that (1) the Court's decisions in these cases, unlike the *Martin* quartet, do expressly say state courts must obey the Court's decisions on federal law; (2) the statements are dicta; and (3) the cases do not agree on the legal source of the state courts' duty.

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court had *rejected* a federal claim or defense, and not if the state court had *upheld* the federal claim or defense. *Skelly*, 9 Ohio St. at 612 (stating that "the limited and qualified character of the appellate jurisdiction, conferred by the 25th section of the judiciary act [of 1789], does not countenance the idea . . . that Congress had in view a uniformity of decisions upon questions arising under the constitution and laws of the United States, and that the Supreme Court was the common arbiter for the decision of such questions").

158. *Jefferson Branch*, 66 U.S. at 448 ("It has been decided three times by this court . . . that the acts of Ohio, upon which the Supreme Court of Ohio has assumed the State's right to tax the State Bank of Ohio and its branches differently from the taxes stipulated for in the . . . [bank's] charter, were and are unconstitutional and void").

159. *See, e.g.*, Hortonville Joint Sch. Dist. No. 1 v. Hortonville Educ. Ass'n, 426 U.S. 482, 488 (1976) (accepting state supreme court's interpretation of state statute). The general rule stated in the text has exceptions. *See* Henry Paul Monaghan, *Supreme Court Review of State-Court Determinations of State Law in Constitutional Cases*, 103 COLUM. L. REV. 1919, 1924 (2003) (referring to "a deeply embedded understanding that state-court determinations of state law in federal cases are open to some reexamination by the [U.S.] Supreme Court").

The earliest case is *Elmendorf v. Taylor*.[160] In *Elmendorf*, the Court reviewed a Kentucky state court decision in a land dispute.[161] One issue before the Court was whether the plaintiff's entry onto the disputed land was "notorious" enough to satisfy relevant state statutes.[162] In an opinion for the Court by Chief Justice John Marshall, the Court said that "a considerable contrariety of opinion . . . would prevail" if the Court had to decide the issue itself.[163] That would be unnecessary, however, if the issue had been resolved by the courts of Kentucky, for their interpretation of Kentucky statutes would bind the U.S. Supreme Court:

> This Court has uniformly professed its disposition, in cases depending on the laws of a particular State, to adopt the construction which the Courts of the State have given to those laws. This course is founded on the principle, supposed to be universally recognized, that the judicial department of every government, where such department exists, is the appropriate organ for construing the legislative acts of that government. Thus, no Court in the universe, which professed to be governed by principle, would, we presume, undertake to say, that the Courts of Great Britain, or of France, or of any other nation, had misunderstood their own statutes, and therefore erect itself into a tribunal which should correct such misunderstanding. We receive the construction given by the Courts of the nation as the true sense of the law, and feel ourselves no more at liberty to depart from that construction, than to depart from the words of the statute.[164]

"On this principle," the Court continued, "the construction given by this Court to the constitution and laws of the United States is received by all as the true construction."[165] This clearly means that the Court's construction of the federal constitution and statutes binds "all," including state courts. It is dicta, however, because the issue was

160. 23 U.S. 152 (1825).

161. *Id.* at 157–59.

162. *Id.* at 158–59. (describing defendants' argument that law temporarily prohibiting the surveyor from giving copies of the surveyed land to anyone other than the land's owner of record "excludes the idea of that notoriety which is ascribed to a record," and plaintiff's "den[ial] that the notoriety attached to a record is dependent entirely on the right to demand a copy of it").

163. *Id.* at 159.

164. *Id.* at 159–60.

165. *Id.* at 160.

not before the Court, nor was the statement necessary to the Court's reasoning.

The second early case, *Green v. Neal's Lessee*, concerned the proper interpretation of two Tennessee statutes.[166] The Court in *Green* quoted *Elmendorf*'s holding that "the courts of the United States, in cases depending on the laws of a particular state, will, in general adopt the construction which the courts of the state have given to those laws."[167] The Court in *Green* also addressed, in dicta, the converse situation:

> On all questions arising under the constitution and laws of the union, this court may exercise a revising power; and its decisions are final and obligatory on all other judicial tribunals, state as well as federal. A state tribunal has a right to examine any such questions, and to determine thereon; but its decision must conform to that of the Supreme Court, or the corrective power may be exercised.[168]

In this passage, *Green* rests the state courts' duty to "conform to" the Court's federal-law decisions on the Court's "revising" (or "corrective") power—i.e., its appellate jurisdiction under Article III.[169]

Thus, *Green* and *Elmendorf* cite different grounds for the state courts' duty to obey the Court's federal-law decisions. Whereas *Green* relies on the Court's appellate jurisdiction under Article III, *Elmendorf* had relied on "the principle, supposed to be universally recognized, that the judicial department of every government . . . is the appropriate organ for construing the legislative acts of that government."[170] *Green* quotes this "principle" from *Elmendorf*, but only as the basis for the Court's acceptance of state supreme court interpretations of state statutes, and not as the basis for the state court's duty to obey U.S. Supreme Court precedent on federal law.[171]

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166. Green v. Neal's Lessee, 31 U.S. 291, 293–94 (1832). *Green*, like *Elmendorf*, was a land dispute. *Id.* at 292–93. The statutes at issue in *Green* were Tennessee statutes of limitations. *Id.* at 293.

167. *Green*, 31 U.S. at 297 (quoting *Elmendorf*, 23 U.S. at 159).

168. *Id.* at 298.

169. *Id.*

170. *Elmendorf*, 23 U.S. at 159; *see also id.* (stating that "[o]n this principle" the Court's decisions construing the Constitution and federal statutes "is received by all as the true construction").

171. *Green*, 31 U.S. at 297 (quoting *Elmendorf*, 23 U.S. at 152).

There is a problem with *Elmendorf*'s ground for the state courts' duty to obey U.S. Supreme Court decisions on federal law. The universal principle that it cites—i.e., "that the judicial department of every government . . . is the appropriate organ for construing the legislative acts of that government"[172]—comes from conflict-of-laws doctrine on proving the law of foreign nations.[173] As such, the principle treats state courts and federal courts as foreign to each other.[174] That treatment contradicts *Martin v. Hunter's Lessee* and other decisions holding that state and federal courts are *not* analogous to the courts of independent sovereigns.[175] Similarly, the Court has repeatedly rejected the notion that state courts can treat federal law as if it were the law of a foreign country.[176] Given the tension between *Elmendorf*'s rationale and the Court's other precedent, it is not surprising that this rationale does not reappear in *Green* or any other later decision.[177]

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172. *Elmendorf*, 23 U.S. at 159.

173. *Id.* at 160; *Green*, 31 U.S. at 297. *See also* Arthur Nussbaum, *The Problem of Proving Foreign Law*, 50 YALE L.J. 1018, 1032–33 n.84 (1941) (discussing "universal principle" expressed in *Elmendorf* as "a sound phase of the fact theory" of proving foreign law); Kermit Roosevelt III, *Resolving Renvoi: The Bewitchment of Our Intelligence by Means of Language*, 80 NOTRE DAME L. REV. 1821, 1891 n.225 (2005) (citing *Elmendorf* in stating that "[t]he basic idea that nation-states are authoritative interpreters of their own law occupies a . . . fundamental place in international law").

174. *See Elmendorf*, 23 U.S. at 159–60 (stating that "no Court in the universe, which professed to be governed by principle, would, we presume, undertake to say, that the Courts of Great Britain, or of France, or of any other nation, had misunderstood their own statutes, and therefore erect itself into a tribunal which should correct such misunderstanding").

175. *See Martin*, 14 U.S. at 344 (rejecting argument that state judges "possess an absolute independence of the United States"); *see also* Haywood v. Drown, 556 U.S. 729, 734–35 (2009) (stating that "courts of the two jurisdictions [i.e., state and federal] are not foreign to each other, nor to be treated by each other as such, but as courts of the same country") (quoting Claflin v. Houseman, 93 U.S. 130, 136–37 (1876)); Minneapolis & St. Louis R.R. Co. v. Bombolis, 241 U.S. 211, 222 (1916) (stating that Constitution "cause[s] the governments and courts of both the nation and the several states not to be strange or foreign to each other . . . but to be all courts of a common country").

176. Testa v. Katt, 330 U.S. 386, 389 (1947) ("[W]e cannot accept the basic premise . . . that [the Rhode Island Supreme Court] has no more obligation to enforce a valid penal law of the United States than it has to enforce a penal law of another state or a foreign country."); *see* Howlett v. Rose, 496 U.S. 356, 367 (1990) (stating that "[f]ederal law is enforceable in state courts . . . because the Constitution and laws passed pursuant to it are as much laws in the States as laws passed by the state legislature"); Mondou v. N.Y., New Haven & Hartford R.R. Co., 223 U.S. 1, 57 (1912) (stating that "[t]he United States is not a foreign sovereignty as regards the several states" (quoting *Claflin*, 93 U.S. at 136)).

177. *Cf.* Gelpcke v. City of Dubuque, 68 U.S. 175, 210 n.55 (1863) (Miller, J., dissenting) (citing *Elmendorf* in discussing Court's duty to follow state supreme court decisions construing state statutes and constitutions and the "correlative proposition that to this court belongs the right

In contrast, *Green*'s reliance on the Court's Article III appellate jurisdiction does appear in later decisions recognizing the state courts' duty to obey the Court's federal-law decisions. One later case, like *Elmendorf* and *Green*, is about the Court's acceptance of state supreme court interpretations of state statutes: *Provident Institute for Savings v. Massachusetts*.[178]

In *Provident*, the Court reviewed a decision of the Massachusetts Supreme Court rejecting a federal constitutional challenge to a state tax law.[179] The Court said that the Massachusetts Supreme Court's "construction of the . . . tax laws of the State [in past decisions] . . . ought to be regarded as authorities in this court."[180] On the other hand, the Court said, "State decisions involving questions re-examinable here"—i.e., questions of federal law—"can have no authoritative influence in this court, because the State courts in deciding those few questions act in a subordinate relation to the paramount jurisdiction of this court . . . ."[181] That subordinate relation flows from the Court's interpretation of its appellate jurisdiction in *Martin v. Hunter's Lessee*.[182] Thus, *Provident*, like *Green*, relies on the Court's appellate jurisdiction as the basis for the state courts' duty to obey the Court's decisions on federal law.

The Court followed *Green* and *Provident* in later decisions recognizing the state court's duty to obey its federal-law precedent. The decisions included ones that—like *Elmendorf*, *Green*, and *Provident*—addressed the duty in dicta when reaffirming the Court's policy of following state supreme court decisions construing state constitutions and statutes.[183] Next we turn to modern decisions discussing the state courts' duty outside that context.

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to expound conclusively, for all other courts, the Constitution and laws of the Federal Government").

178. 73 U.S. 611, 621 (1867).

179. *Id.* at 620–21.

180. *Id.* at 628.

181. *Id.*; *see also* Green v. Neal's Lessee, 31 U.S. 291, 298 (1832) (citing Court's "revising power" in explaining that the Court's "decisions are final and obligatory on all other judicial tribunals, state as well as federal").

182. 14 U.S. 304 (1816).

183. *See, e.g.*, Murdock v. City of Memphis, 87 U.S. 590, 632 (1874) (stating in dicta that the Constitution and federal statutes give the Court "the right to decide [federal] questions finally and in a manner which would be conclusive on all other courts, State or National").

3. Modern U.S. Supreme Court Decisions on the State Courts' Duty to Obey U.S. Supreme Court Decisions on Federal Law

After the 19th century, the Court continued to recognize the state courts' duty to obey the Court's decisions on federal law.[184] To the extent these modern decisions address the legal basis for this duty, they trace it to the Court's appellate jurisdiction under Article III, as construed in *Martin*. The modern cases, like the earlier cases, are remarkable for the almost total absence of cases in which the state courts' duty is directly at issue. Indeed, this author's research has uncovered only one decision before *James* that squarely presented the issue. That case was cited in *James*: *Nitro-Lift Technologies, LLC v. Howard*.[185] This subsection discusses *Nitro-Lift* and the precedent on which it relies.

In *Nitro-Lift*, the Court reviewed a decision of the Oklahoma Supreme Court declaring two noncompetition agreements invalid under Oklahoma law.[186] Although those agreements had arbitration clauses, the Oklahoma Supreme Court decided the validity of the agreements itself, rather than leaving the issue to the arbitrator.[187] The Oklahoma Supreme Court "chose to discount" decisions of the U.S. Supreme Court interpreting the Federal Arbitration Act (FAA) to require an arbitrator, not a court, to decide the validity of agreements with valid arbitration clauses.[188] The Oklahoma Supreme Court "acknowledged" these decisions, but concluded that "its '[own] jurisprudence controls this issue.'"[189]

The U.S. Supreme Court summarily vacated the Oklahoma Supreme Court's judgment in *Nitro-Lift*.[190] The Court held that its decisions interpreting the FAA, like the FAA itself, are equally applicable in, and binding on, the state courts and the lower federal courts:

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184. *E.g.*, South Carolina v. Bailey, 289 U.S. 412, 420 (1933) (stating on review in state-court habeas case that "it was the duty of [the state] court to administer the law prescribed by the Constitution and statute of the United States, as construed by this court").

185. 133 S. Ct. 500 (2012) (per curiam). *Nitro-Lift Technologies* is discussed in *James* Cert Petition, *supra* note 38, at 686.

186. *Nitro-Lift Techs.*, 133 S. Ct. at 502.

187. *Id.* at 503 (stating that the Oklahoma Supreme Court "assumed the arbitrator's role by declaring the noncompetition agreements null and void").

188. *Id.* at 502–03; *see* 9 U.S.C. §§ 1–16 (2012) (Federal Arbitration Act).

189. *Nitro-Lift Techs.*, 133 S. Ct. at 503 (quoting Oklahoma Supreme Court's opinion; bracketed text inserted by Court in *Nitro-Lift Technologies*).

190. *Id.* at 504.

> [T]he Oklahoma Supreme Court must abide by the FAA, which is "the supreme Law of the Land," U.S. Const., Art. VI, cl. 2, and by the opinions of this Court interpreting that law. "It is this Court's responsibility to say what a statute means, and once the Court has spoken, it is the duty of other courts to respect that understanding of the governing rule of law." *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 312 (1994).[191]

The Court cited the Supremacy Clause as the basis for the state courts' duty to obey the FAA, but not for their duty to obey the Court's decisions construing the FAA.[192] For the latter duty, it cited *Rivers v. Roadway Express, Inc.*[193]

In *Rivers*, a case from a lower federal court, the Court discussed the binding nature of its statutory-interpretation decisions when addressing the retroactive nature of those decisions.[194] Specifically, the Court said that, once it had authoritatively interpreted 42 U.S.C. § 1981 in *Patterson v. McLean Credit Union*,[195] earlier lower federal court decisions adopting a contrary interpretation "were *incorrect*."[196] The Court in *Rivers* explained, "They were not wrong according to some abstract standard of interpretive validity, but by the rules that necessarily govern our hierarchical federal court system."[197] Under that system, the Court concluded, "It is this Court's responsibility to say what a statute means, and once the Court has spoken, it is the duty of other courts to respect that understanding of the governing rule of law."[198]

Within the "hierarchical federal court system,"[199] the lower federal courts are "inferior" to the U.S. Supreme Court under the

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191. *Id.* at 503.

192. *Id.* The Court in *Nitro-Lift Technologies* might have avoided citing the Supremacy Clause to avoid invidious comparisons to *Cooper v. Aaron*, in which the Court relied on the Clause to equate its interpretations of the Constitution to the text of the Constitution. Cooper v. Aaron, 358 U.S. 1, 18 (1958).

193. *Nitro-Lift Techs.*, 133 S. Ct. at 503.

194. Rivers v. Roadway Express, Inc., 511 U.S. 298, 303 (1994) (noting that the Court was reviewing Sixth Circuit decision).

195. 491 U.S. 164 (1989).

196. *Rivers*, 511 U.S. at 312.

197. *Id.*

198. *Id.*

199. *Id.*

express terms of Article III of the Constitution.[200] In contrast, the state courts are inferior to the Court (when it comes to deciding issues of federal law) not under the express terms of Article III but under the Court's interpretation of Article III in *Martin v. Hunter's Lessee*.[201] Thus, *Nitro-Lift* indicates by its reliance on *Rivers* that the state courts' duty to obey U.S. Supreme Court decisions interpreting federal statutes ultimately rests on that Court's appellate jurisdiction under Article III, as construed in *Martin*. In this way, *Nitro-Lift* returns us to *Martin* as the primary precedent, weak as it is, for the state courts' duty to obey U.S. Supreme Court precedent.

4. Summary

Research reveals only one decision of the U.S. Supreme Court besides *James*—the 2012 decision in *Nitro-Lift, LLC v. Howard*[202]—that has *held*, and not just said in dicta, that state courts have a duty to obey the Court's decisions on federal law.[203] *Nitro-Lift*'s holding ultimately rests on *Martin v. Hunter's Lessee*, which does not expressly articulate that duty, even in dicta, but is nonetheless most reasonably read to imply the duty's existence.[204] Partly because *Nitro-Lift* can be traced back to *Martin*, *Nitro-Lift* seems to rest the state courts' duty on the Constitution: specifically, Article III's grant of appellate jurisdiction.[205]

In the almost 200 years between *Martin* and *Nitro-Lift*, the Court has repeatedly recognized the state courts' duty, but only in dicta. And

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200. U.S. CONST. art. III, § 1 (vesting judicial power in "one supreme Court, and in such interior Courts as the Congress may from time to time ordain and establish"); *see also* Caminker, *supra* note 6, at 828–38 (arguing that lower federal courts' duty to obey U.S. Supreme Court decisions is justified by Article III's use of terms "supreme" and "inferior," but state courts' duty to obey U.S. Supreme Court decisions "must rest on other grounds").

201. 14 U.S. 304, 325, 343–44 (1816) (stating that "the people had a right . . . to make the powers of the state governments, in given cases, subordinate to those of the nation" and, later in its opinion, that Court's exercise of appellate jurisdiction over state courts is consistent with provisions in Constitution that "restrain or annul the sovereignty of the states"); *cf.* Pfander, ONE SUPREME COURT, *supra* note 6, at 81–92 (arguing that, for certain matters, Congress can constitute state courts as Article I tribunals under U.S. Const. art. I, § 8, cl. 9, and that this would make them "inferior tribunals" obligating them to obey U.S. Supreme Court precedent; as to other matters, statutory developments have caused them to be treated more generally as inferior courts analogous to lower federal courts).

202. 133 S. Ct. 500 (2012) (per curiam).

203. As discussed above, the issue was squarely presented in Jefferson Branch Bank v. Skelly, 66 U.S. 436 (1861), but the Court passed it by. *See supra* notes 147–48.

204. *See* Martin v. Hunter's Lessee, 14 U.S. 304 (1816).

205. *See* Nitro-Lift Techs., LLC v. Howard, 133 S. Ct. 500 (2012).

although *Martin*'s author, Joseph Story, believed that this duty rested on common law, later decisions of the Court have suggested other legal bases for the duty, including a principle of international choice of law (in *Elmendorf*),[206] a congeries of constitutional provisions (in *Dodge*),[207] and, finally, Article III's grant of appellate jurisdiction to the U.S. Supreme Court (in *Green* and later cases).[208]

This discussion has shown that the precedent supporting the state courts' duty to obey U.S. Supreme Court precedent is shallow—in the sense that all but one of the decisions expressly addressing the issue do so in dicta, and others do so only implicitly—and is murky—in the sense that the decisions are not consistent in identifying the legal basis for the duty. It is not much of an oversimplification to say that state courts must obey U.S. Supreme Court precedent because U.S. Supreme Court precedent says so.[209]

This is not to say that the precedent is wrong.[210] Nor is it to say that the issue is easy. On the contrary, the difficulty of the issue is shown by the legal scholarship on the issue, which is discussed in the next part of this Article, along with a proposal that supplements the scholarship and addresses the specific issue presented in *James:* whether state courts must obey the Court's decisions interpreting federal statutes.

III. LEGAL SCHOLARSHIP ON THE STATE COURTS' DUTY TO OBEY THE U.S. SUPREME COURT'S FEDERAL-LAW DECISIONS; AND A MODEST PROPOSED ADDENDUM

Legal scholars have not done much better than the Court in establishing the existence and source of the state courts' duty to obey the Court's decisions on federal law. Scholars disagree on whether or

206. *See supra* text accompanying notes 160–65 (discussing Elmendorf v. Taylor, 23 U.S. 152 (1825)).

207. *See supra* text accompanying notes 148–58 (discussing Dodge v. Woolsey, 59 U.S. 331, 348–58 (1855)).

208. *See supra* text accompanying notes 166–69 (discussing Green v. Neal's Lessee, 31 U.S. 291, 293–94 (1832), and later cases).

209. *Cf.* Brown v. Allen, 344 U.S. 443, 540 (1953) (Jackson, J., concurring in result) ("We are not final because we are infallible, but we are infallible only because we are final."), cited in Rivers v. Roadway Express, 511 U.S. 298, 312 (1994).

210. To the contrary, I agree with Dean Caminker that, quite apart from any constitutional underpinnings, vertical stare decisis "has a plausible normative foundation" to the extent that it promotes "consistent interpretation and application of law," because that result serves "important values undergirding a government dedicated to the rule of law." Caminker, *supra* note 6, at 854.

not the duty exists.[211] Those who believe in the duty's existence disagree on whether or not it is compelled by the Constitution.[212] And those who believe the duty is constitutional disagree on the specific part of the Constitution from which it springs.[213]

It would take a separate article to weigh in on this debate comprehensively. This part instead proposes a modest addendum to the debate that might further the scholarly inquiry and that has special pertinence to the precise issue before the Court in *James*. The proposal makes a distinction that the scholarship to date has not made: namely, between the state courts' duty to obey the Court's decisions interpreting the federal *Constitution* and its decisions interpreting federal *statutes*.[214]

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211. Pfander, *Federal Supremacy*, *supra* note 6, at 197–99 & 232–34 (arguing that Congress has constituted state courts as "tribunals inferior to the supreme Court" under U.S. Const. art. I, 8, cl. 9, as a result of which they must obey Supreme Court precedent); Harrison, *supra* note 6 at 518 (stating that "it is not obvious . . . that [Art. III's grant to the Court of] appellate jurisdiction determines the scope of stare decisis"); Caminker, *supra* note 6, at 838, 865–66 (arguing that state courts' duty to obey Court's decisions is not compelled by Article III but that "the values that inhere in a uniform interpretation and application of law . . . strongly support inferior federal court (and state court) deference to Supreme Court rulings"); Engdahl, *supra* note 139, at 502 n.225 (arguing that "stare decisis has no proper place in constitutional law"); Farber, *supra* note 6, at 390 (arguing that "Court's decisions are at least a form of federal common law" that bind state courts "under the supremacy clause"); *see also* Paul L. Colby, *Two Views on the Legitimacy of Nonacquiescence in Judicial Opinions*, 61 TULANE L. REV. 1041, 1057–1058 (1987) (arguing that, "[f]rom the deductive perspective," "[t]he rules binding lower courts to adhere to precedent are . . . not compulsory but suasive").

212. Pfander, *Federal Supremacy*, *supra* note 6, at 197–99 & 232–34 (tracing state courts' duty to Congress's enacting legislation that constitutes state courts as "tribunals inferior to the supreme Court" under U.S. Const. art. I, 8, cl. 9); Caminker, *supra* note 6, at 838 (stating that although "the Constitution most plausibly requires inferior federal courts to defer to Supreme Court precedents, equivalent obligations demanding . . . state courts to follow federal court precedent must rest on other grounds"); Harrison, *supra* note 6, at 522 (stating that "the force of precedent came, not from anything intrinsic to the [Article III] judicial power, but from the common law rules of stare decisis"); Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction,* 65 B.U. L. REV. 205, 258 n.170 (1985) (tracing state courts' duty to obey Supreme Court precedent to "the mechanisms of review that Congress provides for"); Farber, *supra* note 6, at 408–11 (arguing that Supreme Court's decisions constitute "law" that binds state courts under the Supremacy Clause).

213. *See supra* note 200.

214. Many scholars have addressed the stare decisis effect of the Court's decisions interpreting the Constitution without addressing the stare decisis effect of the Court's decisions interpreting federal statutes. *See* David L. Shapiro, *The Role of Precedent in Constitutional Adjudication: An Introspection,* 86 TEX. L. REV. 929, 929, 930–40 (2008) (referring to the "outpouring" of scholarship "on the proper role of precedent in constitutional cases, and summarizing this scholarship). Other scholars have addressed stare decisis in general terms that do not distinguish between precedent interpreting the Constitution and precedent interpreting federal statutes. *See, e.g.,* Alexander, *supra* note 147, at 5 (separately discussing precedent in common-law decision making and precedent in constitutional and statutory interpretation); Charles L. Barzun,

The proposal argues that, even if the U.S. Supreme Court's decisions interpreting the Constitution do not bind the state courts, its decisions interpreting federal statutes do. To paraphrase a decision of the Court from a different context: When Congress enacts a statute that is vague or ambiguous about an issue that arises in a later lawsuit, Congress implicitly delegates to the federal courts, and ultimately the U.S. Supreme Court, the authority to resolve that ambiguity.[215] When a federal court exercises that delegated authority, the court is not just deciding the case before it; it is making law for future cases.[216] Specifically, the law made by a federal-court decision makes law for all courts within the deciding court's "jurisdictional ambit."[217] Thus,

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Impeaching Precedent, 80 U. CHI. L. REV. 1625, 1667–68 (2013) (arguing that weight of precedent should depend on whether it rested on nonlegal considerations, whether or not the precedent involved "constitutional adjudication"). Finally, many scholars have discussed whether the horizontal stare decisis effect of statutory interpretation decisions should be stronger than that of constitutional interpretation decisions, as the U.S. Supreme Court believes. *E.g.*, Amy Coney Barrett, *Statutory Stare Decisis in the Courts of Appeals*, 73 GEO. WASH. L. REV. 317, 317 (2005).

215. *See* Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984); *see also* HANS KELSEN, GENERAL THEORY OF LAW AND STATE 146 (1949) (discussing "fiction" that statutory gaps delegate authority to courts whose decisions construing those gaps make law in form of precedent). *Chevron* itself requires us to qualify the statement in the text accompanying this note. As *Chevron* explained, this delegation to the federal courts does not occur if Congress has charged an administrative agency with administering the statute. *Id.* at 843. When Congress delegates the task to an administrative agency, the legal force and effect of the agency's interpretation depends on whether "Congress delegated authority to the agency generally to make rules carrying the force of law," and, if so, whether "the agency interpretation claiming deference was promulgated in the exercise of that authority." United States v. Mead, 533 U.S. 218, 226–27 (2001).

216. The Court in *Chevron* recognized that courts make law when they interpret federal statutes, a recognition that is evident from the Court's citation to Roscoe Pound's THE SPIRIT OF THE COMMON LAW. *See Chevron*, 467 U.S. at 843 n.10. At the pages in Pound's book cited by the *Chevron* Court, Pound writes that when a court cannot resolve a statutory interpretation issue because of the lack of clear legislative intent, "[T]he courts, willing or unwilling, must to some extent make the law under the guise of interpretation." ROSCOE POUND, THE SPIRIT OF THE COMMON LAW 174 (1921); *see also* James B. Beam Distilling Co. v. Georgia, 501 U.S. 525, 549 (1991) (Scalia, J., concurring) ("I am not so naive (nor do I think our forebears were) as to be unaware that judges in a real sense 'make' law."); Mistretta v. United States, 488 U.S. 361, 417 (1989) (Scalia, J., dissenting) ("The whole theory of *lawful* congressional delegation is . . . that a certain degree of discretion, and thus of lawmaking, *inheres* in most executive or judicial action . . . ."). *But cf.* Evan H. Caminker, *Precedent and Prediction: The Forward-Looking Aspects of Inferior Court Decisionmaking*, 73 TEX. L. REV. 1, 24–28 (1994) (making cogent arguments about the conceptual difficulties of treating judicial decisions as positive law).

217. Schauer, *supra* note 147, at 592. By using the term "jurisdictional ambit" in the text accompanying this note, I mean to avoid the hard question whether the Supreme Court's decisions are binding precedent for federal executive branch officials. *See* Thomas W. Merrill, *Judicial Opinions as Binding Law and as Explanations for Judgments*, 15 CARDOZO L. REV. 43, 43–44 & n.3 & 71 n.127 (1993) (arguing that federal executive-branch officials should treat federal court decisions as explanations of judgments, rather than as legally binding precedent, but not endorsing comparable treatment of higher court precedent by lower court judges).

when a U.S. Supreme Court decision interprets a federal statute to resolve a case, the decision makes law binding on all lower federal and state courts. The Court's decision establishes a "law[] . . . made in Pursuance" of the Constitution and therefore the Supremacy Clause compels obedience by all other courts.[218] The statutory interpretation adopted in the decision is as binding "as if written into the statute[] itself."[219]

Under the analysis just proposed, the state courts' duty to obey the Court's federal-law decisions rests on (1) Congress's implicit

218. U.S. CONST. art. VI, § 1, cl. 2. Besides *Chevron*, the Court has recognized in other contexts that Congress can delegate law-making power to the federal courts through broadly worded statutes, and that federal court precedent interpreting those statutes can preempt conflicting state law under the Supremacy Clause. *See* Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 456–57 (1957) (holding that federal Labor Management Relations Act authorizes federal courts to fashion substantive federal law "from the policy of our national labor laws," and that this judge-made law can have preemptive effect); *see also* Alfred Hill, *The Law-Making Power of the Federal Courts: Constitutional Preemption*, 67 COLUM. L. REV. 1024, 1028–30 (1967) (discussing *Lincoln Mills*). Contrary to the distinction I suggest between U.S. Supreme Court decisions interpreting federal statutes and U.S. Supreme Court decisions interpreting the Constitution, one could argue that, in ratifying the Constitution, the people delegated to the Court the power to interpret the Constitution with binding effect. This argument, pointed out by Jim Pfander in personal correspondence (on file with the author), provides a delegation theory that would support *Cooper v. Aaron*, 358 U.S. 1 (1958). In a like vein, Evan Caminker pointed out in personal correspondence on file with the author that if Congress's delegation of interpretive authority to the U.S. Supreme Court does not depend on actual congressional intent to delegate—but instead inheres in the nature of enacting legislation that is bound to be ambiguous in certain applications—then one can similarly justify the Court's authority to interpret the Constitution.

219. Hebert v. Louisiana, 272 U.S. 312, 317 (1926) (making this statement with reference to state supreme court's interpretation of state statute); *see also* Elmendorf v. Taylor, 23 U.S. 152, 160 (1825) (stating that courts of Nation A "have no more discretion" to depart from Nation B's courts' interpretation of Nation B's statute "than to depart from the words of the statute"). As explained in the text, the proposal made here requires state courts to treat the Court's decisions interpreting federal statutes the same as the statutes themselves. Professor Merrill described this equation of a court's interpretation with the interpreted document as the "incorporation conception." Merrill, *supra* note 206, at 62. Professor Merrill criticizes the incorporation conception as a ground for requiring executive-branch officials to treat the Court's precedent as binding. *Id.* at 61–62. I take no position in this Article on whether the Court's precedent binds executive-branch officials. I recognize, however, that the proposal made in this Article might be thought subject to Professor's Merrill's criticism that the incorporation model "is an incongruous way of understanding judicial opinions." *Id.* at 63. I believe that criticism is well-founded, however, only to the extent that the incorporation conception is used as the basis for requiring federal executive-branch officials to obey the Court's precedent. In my view, it is not incongruous to say that state courts must treat U.S. Supreme Court precedent as having the same status as the Acts of Congress interpreted in that precedent. This is no more incongruous than to require executive-branch officials to treat the President's executive orders as having the same status as federal statutes, while recognizing that neither state courts nor federal courts must treat federal executive orders as having the same status as federal statutes. *See, e.g.*, Chamber of Commerce v. Reich, 74 F.3d 1322, 1332–39 (D.C. Cir. 1996) (holding that executive order conflicted with federal statute); Marks v. CIA, 590 F.3d 997, 1003 (D.C. Cir. 1978) (same).

delegation to the federal courts of law-making power when it enacts a federal statute; (2) the Court's appellate jurisdiction under Article III, as construed in *Martin*; and (3) the Supremacy Clause.[220] The proposed analysis admittedly leaves open many questions, and the author hopes to address them in a future work.[221] For now, we will turn to its application in *James*.

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220. This proposal can be criticized as spreading my bets by relying on multiple legal bases, none of which standing alone suffices to support the state courts' duty to obey Supreme Court precedent. For example, Dean Caminker and Professor Harrison have cogently argued that the Court's appellate jurisdiction cannot entirely account for vertical stare decisis. Dean Caminker points out that in civil law jurisdictions, higher courts have appellate authority to reverse lower court decisions but the decisions of those higher courts do not have binding precedential effect. Caminker, *supra* note 6, at 821, 826. Thus, the existence of appellate jurisdiction does not necessarily imply that the appellate court's decisions have vertical stare decisis effect. In addition, Professor Harrison writes that, "as late as 1914, the Court did not have appellate jurisdiction over cases in which a state court decided in favor of a federal claim"; this strongly suggests that "the rules of precedent do not simply follow from appellate jurisdiction." Harrison, *supra* note 6, at 518, 519. The Ohio Supreme Court made a similar point in an 1859 decision denying the binding effect of U.S. Supreme Court decisions. Skelly v. Jefferson Bank Branch of Ohio, 9 Ohio St. 606, 622 (1859).

221. The proposal's reliance on *Chevron*, for example, raises the question of the legal basis for *Chevron*, which is a source of continuing disagreement among legal scholars. *See* RICHARD HENRY SEAMON, ADMINISTRATIVE LAW 804–05 (2013). To the extent that *Chevron* reflects a canon of statutory interpretation, as scholars have suggested, *e.g.*, Abbe Gluck, Symposium, *What 30 Years of Chevron Teach Us About the Rest of Statutory Interpretation*, 83 FORDHAM L. REV. 607, 609 (2014), I'd argue that the proposal made here is more defensible as a canon of statutory construction than *Chevron* because the proposal implements the "political axiom[]" teaching "the propriety of the judicial power of a government being co-extensive with its legislative." THE FEDERALIST NO. 80, at 476 (Clinton Rossiter ed., 1961). True, "[n]o legislative history suggests that Congress has ever embraced the doctrine of hierarchical precedent." Caminker, *supra* note 6, at 839, but Congress surely has long legislated against a now-well-settled understanding of the state courts' duty to obey Supreme Court precedent. *See* Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 1006 (1992) (stating that "the norm of following precedent is ubiquitous in the Anglo-American legal system"); *see also*, *e.g.*, Astoria Fed. Sav. & Loan Ass'n v. Solimino, 501 U.S. 104, 108 (1991) (referring to "presumption" of statutory interpretation under which "Congress is understood to legislate against a background of common-law adjudicatory principles"). *Cf.* Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901, 990–1015 (2013) (reporting and discussing empirical evidence on congressional awareness of *Chevron* and related interpretive doctrines). Professor Benjamin Cover has suggested in personal correspondence on file with the author that *Chevron*'s delegation rationale for deferring to an agency's statutory interpretation depends on the existence of statutory ambiguity. No similar condition can exist under my theory for justifying the state courts' obligation to obey U.S. Supreme Court decisions interpreting federal statutes. That point is illustrated in *James* itself: The Idaho Supreme Court did not think it was bound by U.S. Supreme Court case law interpreting 42 U.S.C. § 1988 because, in the Idaho Supreme Court's view, U.S. Supreme Court case law conflicted with the language of the statute. *James*, 351 P.3d at 1192. To use *Chevron* terminology, the Idaho Supreme Court concluded that the U.S. Supreme Court's interpretation failed "*Chevron* step one." *E.g.*, Nat'l Cable & Telecomm Ass'n v. Brand X Internet Servs., 545 U.S. 967, 982 (2005). Professor Cover also has observed in personal correspondence on file with the author that potential separation-of-powers

In *James*, the Idaho Supreme Court did not claim the freedom to disregard *all* U.S. Supreme Court decisions on federal law. Rather, it claimed the freedom only to disregard certain Court decisions interpreting 42 U.S.C. § 1988(b). Specifically, the Idaho court claimed that it was not bound by *Hughes v. Rowe* or by the decision on which *Hughes* relied, *Christiansburg Garment Co. v. EEOC*.[222] One of the reasons it gave was specious.[223] The other was more substantial: The Idaho court emphasized that 42 U.S.C. § 1988(b) authorizes "the court" to award attorney's fees "in its discretion."[224] The Idaho court thought that the U.S. Supreme Court lacks authority to "limit the discretion of state courts where such limitation is not contained in the statute."[225] In short, the Idaho court interpreted 42 U.S.C. § 1988(b) to give state courts discretion that the U.S. Supreme Court cannot limit through nontextual limitations like the "frivolous, unreasonable, or without foundation" standard of *Christiansburg* and *Hughes*.[226]

The Idaho court was wrong under the proposal made here. Under that proposal, the U.S. Supreme Court's delegated authority to

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concerns arise from my delegation rationale for the state courts' duty to obey U.S. Supreme Court decisions interpreting federal statutes.

222. James v. City of Boise, 351 P.3d 1171, 1192 (Idaho 2015), *rev'd* 136 S. Ct. 685 (2016) (discussing Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978), and Hughes v. Rowe, 449 U.S. 5 (1980)).

223. The Idaho Supreme Court suggested that *Christiansburg* and *Hughes* do not bind state courts because they were "appeals from cases in federal district courts." *James*, 351 P.3d at 1192. Although the Court in *Christiansburg* described the standard that it adopted as the one that "should inform a *district court's* discretion," 434 U.S. at 417 (emphasis added), that description simply reflected one or more of three circumstances: (1) the case before it arose in a district court, *id.* at 415; (2) the case presented a question "about which the federal courts ha[d] expressed divergent views," *id.* at 414; and (3) at the time of *Christiansburg*, most actions under Title VII, whose fee-shifting provision was at issue in *Christiansburg*, were brought in federal courts, not state courts. As to the last circumstance, the Court did not decide until 1990 that state and federal courts have concurrent jurisdiction over Title VII actions. Yellow Freight Sys., Inc. v. Donnelly, 494 U.S. 820, 823–826 (1990). Moreover, neither *Christiansburg* nor *Hughes* presented a situation in which a decision of the U.S. Supreme Court does not bind a state court. For example, the decisions in *Christiansburg* and *Hughes* did not interpret a federal statute that applied only in the federal courts. *Cf.* Johnson v. Fankell, 520 U.S. 911, 916 (1997) (holding that Idaho Supreme Court was not bound by U.S. Supreme Court decisions interpreting federal statute governing appeals from lower federal courts). Nor did *Christiansburg* and *Hughes* rest on the Court's supervisory power over the lower federal courts. *See generally* Sanchez–Llamas v. Oregon, 548 U.S. 331, 345–46 (2006).

224. 42 U.S.C. § 1988(b) (2012), quoted in *James*, 351 P.3d at 1192.

225. *James*, 351 P.3d at 1192.

226. *Hughes*, 449 U.S. at 14 (quoting *Christiansburg*, 434 U.S. at 421). It is a hard question—and one beyond the scope of this Article—whether Congress could delegate to state courts final authority to construe federal statutes in cases within their jurisdiction—without the possibility of U.S. Supreme Court review. *Cf.* Bellia, *supra* note 6, at 862–77 (discussing whether Congress could constitutionally delegate power authorizing state courts to make federal common law).

interpret federal statutes with binding effect does not depend on whether its interpretation rests on specific statutory text. To conclude otherwise would deprive the Court's statutory interpretation decisions of binding effect in many cases, presumably including ones in which dissenting Justices claimed that the majority's decision lacked an adequate textual foundation.[227] The Idaho Supreme Court's decision in *James*, for example, would be vindicated by Justice Thomas's view that "*Christiansburg* mistakenly cast aside the statutory language to give effect to equitable considerations."[228] Justice Thomas might be right, but the erroneousness of a Court decision does not justify a lower federal or state court in disregarding it. Indeed, the whole idea of vertical stare decisis is that a lower court must obey a superior court's precedent even if the lower court thinks it is wrong.[229] Moreover, even if a method of statutory interpretation—say, a coin toss—could depart so far from accepted methods to warrant disregard of the Court's statutory-interpretation decisions, the Court's reliance on "equitable considerations" in *Christiansburg* (and *Hughes*)[230]—which it coupled with consideration of legislative purposes evident in legislative history[231]—did not disqualify the Court's decisions from constituting a "Law[] of the United States" binding on state courts under the Supremacy Clause.[232]

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227. The dissents in *Obergefell* were cited by a state supreme court justice who doubts that *Obergefell* binds state courts. Czekala–Chatham v. State *ex rel.* Hood, No. 2014-CA-00008-SCT, 2015 WL 10985118, at *17 (Miss. Nov. 5, 2015) (Coleman, J., objecting to the order with separate written statement) ("If the four dissenters are correct, then the United States Supreme Court in *Obergefell* arguably has done something it has no power under the Constitution of the United States to do.").

228. Fogerty v. Fantasy, Inc., 510 U.S. 517, 538 (1994) (Thomas, J., concurring).

229. *See* Caminker, *supra* note 6, at 818 (stating that under the doctrine of vertical stare decisis (or "hierarchical precedent," as Professor Caminker calls it), "a lower court judge must view herself 'as the simple (and perhaps simple-minded) enforcer of the Supreme Court's dictates, however wise or unwise they may appear to the hapless judge below.'") (quoting Sanford Levinson, *On Positivism and Potted Plants: "Inferior" Judges and the Task of Constitutional Interpretation*, 25 CONN. L. REV. 843, 845 (1993)).

230. *Christiansburg*, 434 U.S. at 418–19 (explaining that "equitable considerations" warrant interpreting Title VII's fee-shifting provision to impose different standards for fee awards, depending on whether the plaintiff or the defendant prevails); *see also Hughes*, 449 U.S. at 14 (stating that Court could "perceive no reason for applying a less stringent standard" than adopted in *Christiansburg* for awarding fees to prevailing defendants under 42 U.S.C. § 1988(b) (2012)).

231. *See* Fox v. Vice, 563 U.S. 826, 836 n.3 (2011) (explaining that decision in *Christiansburg* and other precedent on federal fee-shifting statutes reflected "legislative purposes").

232. U.S. CONST. art. VI, § 1, cl. 1. Relevant to the question of whether the Court's interpretive methods should ever disqualify its decisions from having precedential effect, some of the current opposition to the Court's *Obergefell* decision justifies disregarding it because it "lack[s] anything

Thus, the proposal made here reaches the same conclusion about the Idaho Supreme Court's decision in *James* as the U.S. Supreme Court did. Unlike the Court's decision, however, the proposal accurately reflects the narrow grounds on which the Idaho Supreme Court refused to be bound by the Court's precedent. Moreover, the proposal aims, like Dean Caminker's seminal article, to offer an alternative to thinking about vertical stare decisis as a unitary doctrine.[233] This is particularly important when the binding nature of the Court's decisions interpreting the Constitution—as distinguished from its decisions interpreting Acts of Congress—remains mired in controversy.[234]

The Court's current precedent, however, does not make this distinction. Consequently, the Court could not have adopted the proposal made here without granting plenary consideration in *James*. And, in that event, the Court probably would have had to acknowledge—in light of the shallowness and murkiness of its precedent—that, after all, *James* is not an easy case. The effort might have been worthwhile, considering the Idaho Supreme Court's response to the Court's curt summary reversal, which is the subject of the next (and last substantive) part of this Article.

IV. *JAMES* ON REMAND

If the U.S. Supreme Court's per curiam decision in *James v. City of Boise* was curt, the Idaho Supreme Court's response on remand was even curter, amounting to sullen silence. On remand, the Idaho Supreme Court withdrew its original opinion and issued a "substitute opinion."[235] The substitute opinion did not mention the Court's summary reversal. The substitute opinion simply omitted the language in the original opinion that denied the binding nature of

remotely resembling a warrant in the text, logic, structure, or original understanding of the Constitution." AM. PRINCIPLES PROJECT, *supra* note 78.

233. Caminker, *supra* note 6, at 822 (concluding that "no single rationale persuasively accounts for the entire doctrine" of hierarchical precedent).

234. *Compare, e.g.*, Monaghan, *supra* note 124, at 724 (arguing that "the original understanding [of the Constitution] must give way in the face of transformative or longstanding precedent"), *with* Gary Lawson, *The Constitutional Case Against Precedent*, 17 HARV. J.L. & PUB. POL'Y 23, 24 (1994) (arguing that "[t]he authority of precedent . . . in some of its most familiar applications, . . . is unconstitutional").

235. James v. City of Boise City, No. 42053, 2016 WL 1162984 (Idaho Mar. 23, 2016); *see also Idaho Supreme Court Civil Opinions*, IDAHO SUP. CT., https://isc.idaho.gov/appeals-court/isc_civil (last visited Aug. 1, 2016) (entry for release date of March 23, 2016, indicating release of "substitute opinion" in *James*).

Christiansburg and *Hughes*. It also omitted the language in the original opinion that explained why the court was awarding fees against Ms. James under 42 U.S.C. § 1988(b). Without explanation, the substitute opinion concluded, "The appeal regarding the dismissal of James's claim under 42 U.S.C. section 1983 was totally without foundation."[236]

The Idaho Supreme Court's actions on remand illustrate two ways in which the U.S. Supreme Court inadequately protects federal civil rights. First, state courts can easily avoid the Court's precedent. Second, the Court's precedent on the federal civil rights statutes at issue in *James* are reasonably read to permit punishment of civil rights plaintiffs like that imposed by the Idaho Supreme Court on Ms. James.

A. State Court Avoidance of U.S. Supreme Court Precedent

As described above, on remand the Idaho Supreme Court awarded fees against Ms. James on the ground that her appeal of her Section 1983 claim was "totally without foundation."[237] If the court had done this in its original opinion, it never would have attracted U.S. Supreme Court attention, even if it had grossly misapplied the Court's standard for fee awards. As legal scholars have pointed out, state courts have great freedom to ignore the Court's precedent.[238]

The freedom has two main sources. First, the Court reviews few state-court cases. In the most recent Term, it reviewed only twenty cases from the state courts.[239] Overall, the Court grants only about one

236. *James*, 2016 WL 1162984, at *55. Although the Idaho Supreme Court on remand reaffirmed the fee award against Ms. James, attorneys for the defendants had already withdrawn their request for those fees. Defendants-Respondents' Withdrawal of Memorandum of Costs and Attorney Fees, James v. City of Boise City, No. 42053, 2016 WL 1162984 (Idaho Mar. 23, 2016).

237. *James*, 2016 WL 1162984, at *55.

238. Jason Mazzone, *When the Supreme Court Is Not Supreme*, 104 NW. U. L. REV. 979, 980 (2010) (arguing that "there are areas of the law where state courts have, as a practical matter, the ability to determine what the Constitution means with little or no oversight by the Supreme Court"); Frederic M. Bloom, *State Courts Unbound*, 93 CORNELL L. REV. 501, 501 (2008) (arguing that state courts occasionally "disobey Supreme Court precedent," often because "the Court itself has invited them to"); Marc L. Miller & Ronald F. Wright, *Leaky Floors: State Law Below Constitutional Rights*, 50 ARIZ. L. REV. 227, 229–30 (2008) (arguing that state courts often interpret federal law to go both above and below the "floor" of federal constitutional rights).

239. *See Final October Term 2015 Stat Pack, Make-Up of the Merits Docket*, SCOTUSBLOG (June 29, 2016), http://www.scotusblog.com/2016/06/final-october-term-2015-stat-pack/. (indicating that the total appellate docket comprised eighty-six cases, twenty of which came from state courts).

percent of the certiorari petitions that it receives each term.[240] Second, state courts can write their opinions to avoid falling within that one percent. They can, for example, decide federal issues by mouthing the right words from the Court's precedent and limiting or omitting explanations.[241]

That is what the Idaho Supreme Court did on remand in *James*. And so, just as the U.S. Supreme Court's summary reversal sent a reproachful signal to the Idaho Supreme Court, the Idaho Supreme Court's action on remand sent a recalcitrant reply. And just as the U.S. Supreme Court's decision sent a broader signal to state courts everywhere reaffirming their subordinacy to the Court, the Idaho Supreme Court's action on remand, coupled with its original decision, sent a signal to Section 1983 plaintiffs: Stay out of the Idaho state courts. The Idaho court's action on remand reminds the rest of us of the reality that state courts often have the last word on the meaning of federal law.[242]

Given that reality, federal-rights claimants in state courts must depend on the competence, carefulness, and, perhaps most importantly, the good faith of those courts. As Professor Bator said:

> Ideally, we hope that state judges will conceive of the supreme federal law to be part of their own law, not an alien intrusion. We want state judges to think of themselves as really being charged, "*equally* with the courts of the Union," with an obligation to "guard, enforce, and protect every right granted or secured by the Constitution."[243]

To support that role, the Court might have done better in *James* by discussing the actual grounds on which the Idaho Supreme Court declined to follow two particular Court decisions. As explained above, the Idaho court did not broadly disclaim all obligation to obey the

240. RICHARD SEAMON ET AL., THE SUPREME COURT SOURCEBOOK 173 (2013); *see also* Harvard Law Review Editorial Staff, *The Statistics, The Supreme Court 2014 Term*, 129 HARV. L. REV. 381, 389, Table II(B) (2015) (reporting that Court granted 1% of all certiorari petitions filed during October 2014 Term).

241. *See* SUP. CT. R. 10 (stating that "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law").

242. *See, e.g.*, Anthony J. Bellia, *State Courts and the Interpretation of Federal Statutes*, 59 VAND. L. REV. 501, 1505–06 (2006) ("In reality, state court judgments resting upon the interpretation of federal statutes may—indeed, in the overwhelming majority of cases today, do—govern the rights and duties of parties subject to them without Supreme Court review.").

243. *See* Paul M. Bator, *The State Courts and Federal Constitutional Litigation*, 22 WM. & MARY L. REV. 605, 624 (1981) (quoting Robb v. Connolly, 111 U.S. 624, 637 (1884)).

Court's precedent.[244] The Court might also have acknowledged, and sought to supplement, its shallow and muddy precedent on the state courts' duty to obey its precedent.[245] These critiques, of course, benefit from hindsight and academic distance.[246] Even so, the point remains that the Idaho court's recalcitrance is understanding if not excusable.

The next section of this Article makes a similar point about the Idaho Supreme Court's award of attorney's fees against Ms. James. Even though the award was erroneous, it was understandable considering the Court's precedent, which poorly protects federal civil rights plaintiffs like Melene James.

B. U.S. Supreme Court Precedent Undermining Enforcement of Federal Civil Rights, and Its Application in James

Just as the Idaho Supreme Court's recalcitrance on remand was an understandable though improper response to the Court's summary reversal, the Idaho Court's award of attorney's fees against Ms. James was an understandable though erroneous ruling on the merits. To explain this conclusion, this section describes the basic precedent and then examines the Idaho Supreme Court's application of that precedent. In the latter effort, this section examines specific areas in which the U.S. Supreme Court's precedent is undeveloped or unclear. The thesis of this section is that this precedent inadequately protects federal civil rights.

1. U.S. Supreme Court Precedent on 42 U.S.C. §§ 1983 and 1988

U.S. Supreme Court precedent entitles defendants who prevail in suits brought against them under 42 U.S.C. § 1983 to get attorney's fees under 42 U.S.C. § 1988(b) if "the plaintiff's action was frivolous,

244. *See supra* text accompanying notes 45–54.

245. *Cf.* Alex Hemmer, *Courts as Managers: American Tradition Partnership v. Bullock and Summary Disposition at the Roberts Court*, 122 YALE L.J. 209, 223 (2013) (discussing danger that Court will use summary opinions "where they are simply inappropriate, because they make new law") (internal quotation marks omitted), http://yalelawjournal.org/forum/courts-as-managers-american-tradition-partnership-v-bullock-and-summary-disposition-at-the-roberts-court.

246. As one of the lawyers for Ms. James at the cert petition stage, I argued for summary reversal of the Idaho Supreme Court's decision. *See James* Cert Petition, *supra* note 36, at 39; Reply Brief for Petitioner at 8 n.2, James v. City of Boise, 136 S. Ct. 685 (2016) (No. 15–493). From the client's standpoint, this disposition was better than a grant of certiorari followed by plenary consideration. Only after the Court's summary reversal did I have the chance, as a law professor, to examine and reflect on the relevant precedent and scholarship. Thus, the remarks in the text questioning the wisdom of the Court's summary disposition do (try to) benefit from hindsight and academic distance.

unreasonable, or without foundation."[247] When the defendants in a Section 1983 suit are police officers, one way they can prevail is by successfully invoking qualified immunity. The Court's precedent on qualified immunity establishes a two-pronged analysis:

> Qualified immunity shields federal and state officials from money damages unless a plaintiff pleads facts showing (1) that the official violated a statutory or constitutional right, and (2) that the right was "clearly established" at the time of the challenged conduct.[248]

The Court's precedent allows lower federal and state courts to "decide which of the two prongs of qualified-immunity to tackle first."[249] The Court itself regularly decides qualified immunity cases under the second, "clearly established" prong, without reaching the merits of the underlying constitutional claims.[250]

Under the Court's precedent, qualified immunity has the avowed purpose and the regular effect of protecting officials even from meritorious constitutional claims. That purpose is reflected in Court decisions stating that qualified immunity protects officials unless they are "plainly incompetent or . . . knowingly violate the law."[251] The effect of qualified immunity is reflected in the cases in which the Court has upheld qualified immunity for officials whom, it has also found, violated the Constitution.[252] Thus, when a court rules that a defendant

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247. Hughes v. Rowe, 449 U.S. 5, 14 (1980) (quoting Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 421 (1978)).

248. Ashcroft v. al-Kidd, 563 U.S. 731, 735 (2011).

249. *Id.*

250. *E.g.*, Mullenix v. Luna, 136 S. Ct. 305, 308 (2015) (per curiam) (holding that police officers had qualified immunity from excessive-force claim without deciding "whether there was a Fourth Amendment violation"); Taylor v. Barkes, 135 S. Ct. 2042, 2044–45 (2015) (per curiam) (holding that prison officials sued for causing inmate's suicide had qualified immunity without deciding constitutionality of their conduct); Carroll v. Carman, 135 S. Ct. 348, 350 (2014) (per curiam) (holding that police officer had qualified immunity from Fourth Amendment claim without deciding whether Fourth Amendment violation occurred); *see also* Karen M. Blum, *Section 1983 Litigation: The Maze, the Mud, and the Madness*, 23 WM. & MARY BILL RTS. J. 913, 927–30 (2015) (discussing cases in which Court has decided qualified immunity issue without addressing whether constitutional rights were violated).

251. *Ashcroft*, 563 U.S. at 743 (internal quotation marks omitted). *Accord, e.g.*, *Mullenix*, 136 S. Ct. at 308.

252. *E.g.*, Lane v. Franks, 134 S. Ct. 2369, 2378–83 (2014) (holding that plaintiff's firing violated First Amendment, but defendant had qualified immunity from individual-capacity claims); Safford Unified Sch. Dist. No. 1 v. Redding, 557 U.S. 364, 379 (2009) (holding that strip search of public school student violated Fourth Amendment, but defendant schools officials were "nevertheless protected from liability through qualified immunity"); Wilson v. Layne, 526 U.S. 603, 605–06 (1999) (holding that officers violated Fourth Amendment by inviting media

has qualified immunity, that ruling signifies that the defendant did not violate the plaintiff's *clearly established* rights; the ruling does not, however, necessarily mean that the defendant did not violate the plaintiff's rights *at all*.

2. The Idaho Supreme Court's Application of U.S. Supreme Court Qualified-Immunity Precedent in *James*

In *James*, the Idaho Supreme Court concluded in its substitute opinion that Ms. James' appeal of her excessive-force claim under Section 1983 was "totally without foundation."[253] Although the substitute opinion does not explain the court's conclusion, in its original opinion the Idaho court determined that "[i]t was clear that [Ms. James'] claim would be barred by qualified immunity under the clearly established law of the ninth circuit, and [Ms. James] did not cite any law to the contrary."[254] As U.S. Supreme Court precedent permits, the Idaho Supreme Court never determined whether the police violated Ms. James' constitutional rights by using excessive force.[255] Instead, the Idaho court believed that when the challenged conduct occurred, Ms. James' rights clearly were not clearly established.

Supreme Court precedent makes it all too easy for a court to conclude that the rights asserted by a civil rights plaintiff clearly were not clearly established. That is because the Court's precedent on the "clearly established" standard is highly unclear.[256] For one thing, the precedent leaves unclear the level of generality at which courts should frame the right at stake when determining if that right was clearly established.[257] The precedent also leaves unclear what sources of law courts should consult to determine whether the right was clearly

representatives inside a private home to view execution of arrest warrant, but officers had qualified immunity).

253. James v. City of Boise, No. 42053, 2016 WL 1162984, at *55 (Idaho Mar. 23, 2016).

254. James v. City of Boise, 351 P.3d 1171, 1192 (Idaho 2015), *rev'd* 136 S. Ct. 685 (2016).

255. *Id.* at 1178 (noting that court will address only whether the right that defendants allegedly violated was clearly established when alleged violation occurred); *see also id.* at 1193 (Jim Jones, J., concurring) ("Because we hold that qualified immunity supported the dismissal on summary judgment of James' claim under 42 U.S.C. § 1983, it was not necessary to consider the merits of that claim.").

256. *See* John C. Jeffries, Jr., *What's Wrong with Qualified Immunity?*, 62 FLA. L. REV. 851, 852 (2010) (stating that "determining whether an officer violated 'clearly established' law has proved to be a mare's nest of complexity and confusion").

257. *See id.* at 854–58.

established.[258] Because of these and other flaws, Professor John Jeffries said, "The existing law of qualified immunity is complicated, unstable, and overprotective of government officers."[259]

These flaws infected the Idaho Supreme Court's decision in *James*. The Idaho court defined the right at stake in highly specific terms: It was the right to be free from "the use of a police dog to find and subdue by biting a suspected burglar in a dark basement after the suspect failed to respond to police announcements stating to surrender or a police dog would be sent that would find and bite him or her."[260] Not surprisingly, Idaho case law lacked precedent recognizing or rejecting this micro-right. The Idaho court relied on this lack of precedent plus supposedly contrary precedent in the U.S. Court of Appeals for the Ninth Circuit. The Idaho court did not consider case law in other federal circuits.[261]

The Idaho Supreme Court's qualified immunity analysis, though arguably supported and certainly not foreclosed by the Court's precedent, unjustly stacks the deck against Section 1983 plaintiffs. For one thing, the approach forces plaintiffs to find favorable precedent with nearly identical facts. This is a fool's game. After all, it is easy to imagine situations where the use of a police dog to bite and hold a suspect—a suspected jaywalker, for instance—would violate clearly established law even without controlling precedent so holding.[262] For another thing, just because the law is clearly established by case law within a circuit, or even in multiple circuits, that does not mean the law is correct.[263] Finally, the Idaho court did not even base the fee

258. *See id.* at 858–59.

259. John C. Jeffries, Jr., *The Liability Rule for Constitutional Torts*, 99 VA. L. REV. 207, 250 (2013) (footnote omitted); *see also* Blum, *supra* note 239, at 913–14 (stating that "[t]here is a growing consensus among practitioners, scholars, and judges that Section 1983 is no longer serving its original and intended function as a vehicle for remedying violations of constitutional rights, that it is broken in many ways, and that it is sorely in need of repairs").

260. *James*, 351 P.3d at 1179.

261. When they cannot find binding precedent, the Idaho courts often consult Ninth Circuit precedent but treat them only as persuasive. *See, e.g.*, State v. Hawkins, 363 P.3d 348, 355 (Idaho 2015) (stating that Ninth Circuit decision was "not controlling precedent"); State v. Abdullah, 348 P.3d 1, 93–4 (Idaho 2015) (declining to follow Ninth Circuit case law on federal constitutional issue).

262. *Cf.* United States v. Lanier, 520 U.S. 259, 271 (1997) ("There has never been . . . a section 1983 case accusing welfare officials of selling foster children into slavery; it does not follow that if such a case arose, the officials would be immune from damages [or criminal] liability." (internal quotation marks omitted)).

263. *See* Johnson v. Williams, 133 S. Ct. 1088, 1098 (2013) ("Disagreeing with the lower federal courts is not the same as ignoring federal law."); Buckhannon Bd. & Care Home, Inc. v. W.

award against Ms. James on its own, binding precedent—but instead relied on precedent that was merely persuasive—in concluding that it was "frivolous" for Ms. James to appeal a claim that binding precedent neither supported nor rejected—a claim whose sin, in the court's eyes, was its novelty.[264]

3. The Idaho Supreme Court's Application of the U.S. Supreme Court's Precedent on Fee-Shifting Provisions in Federal Civil Rights Statutes

By using the U.S. Supreme Court's highly restrictive qualified immunity precedent not only to reject Ms. James' excessive-force claim but also to award attorney's fees against her under 42 U.S.C. § 1988(b), the Idaho Supreme Court added insult to injury. This subsection briefly describes why U.S. Supreme Court precedent arguably supports this compounding of the injury but should not be interpreted that way.

At the time of *James*, it was unclear whether a court could consider the defendant's *defenses*, as well as the plaintiff's *claims*, in determining whether "the plaintiff's action was frivolous, unreasonable, or without foundation" and thus warranted awarding fees to a prevailing defendant under Section 1988(b).[265] The version of the Court's standard quoted in the last sentence—which comes from *Hughes* (quoting *Christiansburg*)—calls for evaluation of the plaintiff's "action," a term that means the entire lawsuit, including both claims and defenses.[266] But the Court has often—including in

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Virginia. Dep't of Health & Human Servs., 532 U.S. 598, 621 (2001) ("[O]ur opinions sometimes contradict the *unanimous* and longstanding interpretation of lower federal courts." (internal quotation marks omitted) (emphasis in original)).

264. Reflecting the perils of relying on another jurisdiction's precedent, the Idaho Supreme Court misunderstood Ninth Circuit precedent. Both before and after the Idaho court's decision in *James*, the Ninth Circuit held that police dog attacks can constitute excessive force. Lowry v. City of San Diego, 818 F.3d 840 (9th Cir. 2016) (en banc), *reh'g granted*, 2016 WL 4932643 (Sept. 16, 2016) (reversing summary judgment against plaintiff on his claim that use of police dog constituted excessive force); Smith v. City of Hemet, 394 F.3d 689, 700–04 (9th Cir. 2005). Beyond that, as Evan Caminker pointed out in personal correspondence on file with the author, there is a special irony in the Idaho Supreme Court's reliance on 9th Circuit precedent in its qualified immunity analysis, even while the Idaho court denied the binding effect of U.S. Supreme Court precedent in the standard for awarding attorney's fees under 42 U.S.C. § 1988!

265. *James*, 351 P.3d at 1192 (citing Hughes v. Rowe, 449 U.S. 5, 14 (1980)).

266. *Hughes*, 449 U.S. at 14; *see also* Fox v. Vice, 563 U.S. 826, 829 (2011) ("We have held that a defendant may receive such an award if the plaintiff's *suit* is frivolous." (emphasis added)). *See generally* BP Am. Prod. Co. v. Burton, 549 U.S. 84, 91–4 (2006) (construing statutory term "action" to mean judicial proceeding); *Action*, BLACK'S LAW DICTIONARY (7th ed. 1991) (defining "action" to mean "[a] civil or criminal proceeding").

Christiansburg—described the standard as applying only to the plaintiff's "claims."[267] Thus, Supreme Court precedent did not foreclose the Idaho Supreme Court's reliance in *James* on the qualified immunity defense to award fees against Ms. James under 42 U.S.C. § 1988(b).

Moreover, the Idaho court's approach gains support from a decision that the Court issued last Term after *James*: *CRST Van Expedited, Inc. v. EEOC*.[268] *CRST* involved the fee-shifting provision in Title VII, but it has relevance for cases involving 42 U.S.C. § 1988(b) because the Court has always construed the two statutes *in pari materia*.[269] After briefly describing *CRST* and why it can be read to support the Idaho Supreme Court's approach in *James*, this subsection will explain why *CRST* should not be so read.

CRST addressed how to determine whether a defendant is a "prevailing party" under Title VII's fee-shifting provision.[270] The precise question was whether the defendant can be a "prevailing party" only "by obtaining a ruling on the merits."[271] In *CRST*, the defendant CRST, a trucking company, won the suit filed against it by the EEOC because of the EEOC's failure to follow procedures that Title VII required the EEOC to follow before suing.[272] EEOC's failure to follow these pre-suit procedures was raised by the defendant CRST as a defense.[273] For purposes of its decision, the Court assumed that the judgment in CRST's favor dismissing the EEOC's suit was not a "ruling on the merits."[274]

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267. Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 422 (1978), quoted in CRST Van Expedited, Inc. v. EEOC, 136 S. Ct. 1642, 1646 (2016).

268. 136 S. Ct. 1642 (2016).

269. Buckhannon Bd. & Care Home, Inc. v. W. Virginia Dep't. of Health & Human Servs., 532 U.S. 598, 603 n.4 (2001) (stating that Court "ha[s] interpreted these fee-shifting provisions consistently"); *Hughes*, 449 U.S. at 14 (stating that, although *Christiansburg* construed Title VII's fee-shifting provision, and "arguably a different standard might be applied in a civil rights action under 42 U.S.C. § 1983," Court "perceive[d] no reason for applying a less stringent standard" for awarding fees against Section 1983 plaintiffs than *Christiansburg* adopted for awarding fees against Title VII plaintiffs).

270. 136 S. Ct. at 1646.

271. *Id.* (internal quotation marks omitted).

272. *Id.* at 1651 (stating that court of appeals' decision "preclud[ed] [CRST] from recovering attorney's fees when the claims in question have been dismissed because the Commission failed to satisfy its presuit obligations").

273. *Id.* at 1648–49.

274. *Id.* at 1650.

The Court held in *CRST* that a defendant can be a "prevailing party" without getting a judgment "on the merits."[275] Because the Court had not previously addressed the requirements for a defendant to be a "prevailing party," the Court relied on prior decisions in which it had addressed when a prevailing defendant should be awarded fees as a matter of discretion.[276] Thus, the Court in *CRST* examined the congressional policy underlying *Christiansburg*'s "frivolous, unreasonable, or without foundation" standard.[277] That policy was "to deter the bringing of lawsuits without foundation," thereby "sparing defendants from the costs of *frivolous* litigation."[278] The policy did not depend on "the distinction between merits-based and non-merits-based frivolity."[279] The Court explained in *CSRT* that although a defendant "might prefer a judgment vindicating its position regarding the substantive merits of the plaintiff's allegations," the defendant achieves its primary objective—i.e., to prevent "a material alteration" of its legal relationship to the plaintiff "to the extent it is in the plaintiff's favor"—"even if the court's final judgment rejects the plaintiff's claim for a non-merits reason."[280] Therefore, the Court concluded in *CRST*, "Congress must have intended that a defendant could recover fees expended in frivolous, unreasonable, or groundless litigation when the case is resolved in the defendant's favor, whether on the merits or not."[281]

The reasoning of *CRST* suggests that courts can consider defenses in determining whether a plaintiff's action is "frivolous, unreasonable, or without foundation."[282] The Court in *CRST* determined that a defendant can be a prevailing party even if the court does not vindicate the defendant's position on the "substantive merits" of the plaintiff's claims.[283] Logic suggests that "litigation" can also be "frivolous, unreasonable or groundless" even if the defendant does not prevail on

275. *Id.* at 1653 (concluding that "[n]either the text of the fee-shifting statute nor the policy which underpins it counsels in favor of adopting the Court of Appeals' on-the-merits requirement").

276. *Id.* at 1646.

277. *Id.* at 1651–53.

278. *Id.* at 1652 (quoting, respectively, Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 420 (1978) and Fox v. Vice, 563 U.S. 826, 840 (2011)).

279. *CRST Van Expedited, Inc.*, 136 S. Ct. at 1652.

280. *Id.* at 1651-52.

281. *Id.* at 1652.

282. Hughes v. Rowe, 449 U.S. 5, 14 (1980) (adopting "frivolous, unreasonable, or without foundation" standard for awarding fees to prevailing defendants under 42 U.S.C. § 1988(b)).

283. *CRST Van Expedited, Inc.*, 136 S. Ct. at 1652.

the "substantive merits."[284] And if a court must consider a non-merits-based defense to determine whether the defendant is a prevailing party, it is hard to argue that the court must then disregard that same defense in determining whether the "litigation" is frivolous.

As discussed above, a defendant can win a Section 1983 lawsuit based on qualified immunity even if the plaintiff's claim of a constitutional violation has merit.[285] *CRST* accordingly suggests that such a non-merits-based victory not only makes the defendant a "prevailing party" but should also be considered in determining whether the plaintiff's action was "frivolous, unreasonable, or without foundation."[286] Nonetheless, the availability of a successful qualified-immunity defense will seldom, if ever, be a proper basis for a fee award against a Section 1983 plaintiff, even if the ultimate success of that defense seems clear to a court in hindsight. This is so for three reasons.

First, reliance on qualified immunity to award fees against Section 1983 plaintiffs will deter Section 1983 plaintiffs from asserting meritorious claims of constitutional violations, especially novel claims. As Professor Chen has said, "Private enforcement of constitutional claims is driven in large part by the availability of attorney's fees."[287] If Section 1983 plaintiffs face a risk of not only not recovering their own attorney's fees but also having to pay the defendants' attorney's fees—which is a high risk because of the Court's current precedent on qualified immunity—many will go without remedies for their constitutional injuries. This is unjust.

Second, as would-be Section 1983 plaintiffs quail at the risk of paying the defendants' attorney's fees, meritorious constitutional claims not only go unremedied but also unadjudicated. Scholars have criticized the Court's current qualified-immunity precedent because it encourages courts to avoid adjudicating constitutional claims by finding the relevant law not "clearly established."[288] The resulting stagnation of constitutional law could only get worse if courts begin

284. *See id.* at 1651–52.

285. *See supra* text accompanying notes 236–41.

286. *CRST Van Expedited, Inc.*, 136 S. Ct. at 1651–52.

287. Alan K. Chen, *Rosy Pictures and Renegade Officials: The Slow Death of* Monroe v. Pape, 78 UMKC L. REV. 889, 914 (2010) (citation omitted).

288. *E.g.*, Aaron L. Nielson & Christopher J. Walker, *The New Qualified Immunity*, 89 S. CAL. L. REV. 1, 5 (2015) (stating that "[m]any scholars fear" that current precedent will cause constitutional law to "stagnate" and presenting empirical evidence supporting that fear).

relying on successful qualified immunity defenses to award fees against plaintiffs asserting constitutional rights.

Third, the qualified immunity defense differs from other defenses in ways that make it an improper basis for awarding fees against plaintiffs.[289] Qualified immunity aims to ensure that executive-branch officials make decisions without the fear of being sued.[290] The rationale is that this fear might prevent them from making wise decisions.[291] So, qualified immunity benefits the public at the expense of people whose rights the officials have violated. Even assuming—as the qualified immunity doctrine does—that it's fair to make them bear the cost of going without a monetary remedy for those violations, it's hardly fair to add the monetary burden of paying the officials' attorney's fees. This is especially unfair because those fees usually are incurred not by the officials but by their government employer.[292]

Ultimately, relying on qualified immunity as a basis for awarding fees against plaintiffs would "distort" the litigation of constitutional rights in a way that Congress could not have intended when it enacted 42 U.S.C. § 1988(b).[293] The common sense of this conclusion becomes apparent when you consider the result of a contrary conclusion in *James*. Because there was no precedent in the Idaho court system either supporting or defeating Ms. James' claim, the Idaho Supreme Court could have decided, contrary to its view of the state of the law

289. The Court has recognized qualified immunity's distinctiveness in contexts other than determining fee awards under 42 U.S.C. § 1988(b) (2012). *See* Camreta v. Greene, 563 U.S. 692, 700–09 (2011) (holding that, on petition for writ of certiorari filed by defendant official in § 1983 action, U.S. Supreme Court can review court of appeals' determination that official violated Constitution, even though court of appeals ruled in official's favor based on qualified immunity); Behrens v. Pelletier, 516 U.S. 299, 305–12 (1996) (allowing successive interlocutory appeals of district court rulings denying qualified immunity defenses if rulings turn on issues of law).

290. *E.g.*, Harlow v. Fitzgerald, 457 U.S. 800, 813–14 (1982).

291. *Id.* at 814. This rationale is undermined in the context of police conduct cases by empirical evidence that police officers are usually indemnified for any damages and attorney's fees awarded against them. *See generally* Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885, 891 (2014).

292. Dina Mishra, *When the Interests of Municipalities and Their Officials Diverge: Municipal Dual Representation and Conflicts of Interest in § 1983 Litigation*, 119 YALE L.J. 86, 88 (2009) (stating that "because many of the same facts and elements relate to § 1983 claims against municipalities as to § 1983 claims against municipal officials in their individual capacity, the same legal team frequently will defend both a municipality and its official in a § 1983 case"); John C. Jeffries, Jr., *In Praise of the Eleventh Amendment and Section 1983*, 84 VA. L. REV. 47, 50 (1998) ("In most jurisdictions, the state's readiness to defend and indemnify constitutional tort claims [against state officials] is a policy rather than a statutory requirement, but it is nonetheless routine.").

293. Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 419 (1978).

in the Ninth Circuit, that Ms. James' claim had merit: The police dog attack amounted to unconstitutional excessive force. Yet the Idaho court still could have held that the individual defendants clearly had qualified immunity, and ordered Ms. James to pay their attorney's fees. This is nonsense.[294]

V. CONCLUSION

Melene James was bitten twice: first by a police dog, and then by a state supreme court that had slipped the leash of vertical stare decisis. Metaphors aside, an examination of *James v. City of Boise* yields troubling insights into the U.S. Supreme Court's supremacy in a time of civil rights turmoil. The Court would have us believe that the state courts' duty to obey the Court's precedent is long-established and stands on a firm, constitutional footing. In reality, the Court's precedent is shallow—in the sense that only one of its decisions expressly recognizes the duty in a holding, as distinguished from dicta—and murky—in the sense that the Court's precedent leaves unclear what, if any, constitutional provision supports that duty. What is more, the state courts' compliance with this duty rests mainly on the good faith of state court judges, as shown in *James* by the proceedings on remand. Finally, and what might be most troubling, the Court's role in ensuring that state courts enforce federal rights is undermined by its precedent on two major federal civil rights statutes, 42 U.S.C. §§ 1983 and 1988(b).

294. My research has located only one decision by a federal court of appeals addressing whether a court should award attorney's fees against a civil rights plaintiff under the *Christiansburg/Hughes* "frivolous, unreasonable, or without foundation" standard. In that case, the Sixth Circuit held that the defendants' successful invocation of qualified immunity did not, standing alone, "compel[] an award of attorney fees in Defendant's favor." Schropshire v. Smith, Nos. 94-3098, 94-3101, 1995 WL 118983, at *3 (6th Cir. Mar. 20, 1995). In this Article, I do not argue that a court should never consider any type of defense in awarding fees against plaintiffs under Section 1988(b). On the contrary, it might be appropriate for a court to award fees against Section 1983 plaintiffs whose claims, from the outset, are clearly barred by mootness, state sovereign immunity, or state judicial immunity, as lower courts have held. C.W. v. Capistrano Unified Sch. Dist., 784 F.3d 1237, 1247–48 (9th Cir. 2015) (upholding fee award against Title VII plaintiff in part because "outcome [was] predetermined" by defendant's Eleventh Amendment immunity from money damages); EEOC v. Propak Logistics, Inc., 746 F.3d 145, 152 (4th Cir. 2014) (holding that fee award against Title VII plaintiff was proper under *Christiansburg* when suit was "moot at its inception"); Palazzolo v. Benson, No. 95-1067, 1996 WL 156699, at *3–4 (6th Cir. Apr. 3, 1996). (per curiam) (affirming award of fees against Section 1983 plaintiffs because "defendants pursued the challenged conduct in the course of their judicial duties and, thus, were clearly entitled to judicial immunity"). For reasons discussed in the text, the doctrine of qualified immunity is distinctive in ways that justify distinctive treatment when awarding fees against Section 1983 plaintiffs.