Lethal Injection and the Problem of Constitutional Remedies

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INTRODUCTION

Death row inmates around the country have challenged the constitutional-ity of the lethal injection procedures by which they will be executed. This litigation often turns up serious problems, which create a significant risk that the inmate will suffer an excruciating death in apparent violation of the Eighth Amendment’s prohibition against “cruel and unusual punishment.” With a few notable exceptions, however, courts have been reluctant to intervene, explicitly deferring to state officials responsible for these procedures and upholding the execution protocols.

Judicial reluctance to strike down states’ lethal injection procedures is closely tied to judges’ anxieties about issuing an appropriate remedy should they find a constitutional flaw. Judges’ decisions upholding current procedures, in other words, often reflect less about those procedures’ safety and more about the difficulty of identifying a workable remedy. There are, of course, some lethal injection plaintiffs who are unable to identify plausible dangers. In such cases, judges are justified in upholding state procedures (assuming that the plaintiff has had access to the relevant records during discovery). But other lawsuits identify serious flaws, and courts still decline to interfere. Fearful that any remedy would appear to usurp the political branches’ province and exceed judges’ core competence, these courts let remedial concerns color their findings on the merits.

Several recent cases reflect these remedial anxieties. In the Supreme Court’s 2008 splintered decision in Baze v. Rees, for instance, the three-Justice plurality explicitly required the lethal injection plaintiff to proffer a “feasible, readily implemented” alternative as part of his affirmative case. It, therefore, conditioned the Eighth Amendment right on the existence of a workable remedy.

The plurality then drew further on remedial concerns, warning that judicial involvement in states’ lethal injection procedures would “threaten to transform courts into boards of inquiry charged with determining ‘best practices’ for exe-
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cutions.” The plurality argued that such a remedy—requiring states to adopt the “best practice”—would immerse the judiciary in an area best left to the political branches. But the plurality overstated the intrusion, ignoring the fact that a court finding an Eighth Amendment violation need not require the “best practice.” To the contrary, more modest remedies can cure a lethal injection procedure’s risks without interfering so much with the state’s prerogative. The Court, therefore, misconstrued the remedial issue and then used those remedial concerns to narrow the scope of the underlying Eighth Amendment right.

Lower courts have also cited and misconstrued remedial issues. One court identified serious flaws in a state’s lethal injection procedure but nevertheless declined to find a formal violation and issue a remedy because “under the doctrines of comity and separation of powers, the particulars of [a state’s] lethal-injection protocol are and should remain the province of the state’s executive branch.” Even confronted with the state procedure’s manifest problems, the court’s overriding concern was to “permit Defendants to proceed with Plaintiff’s execution as scheduled.” And that court at least did identify serious problems. More often, courts presented with lethal injection cases avoid engaging with the details of the procedure, explaining instead that the judicial “role is not to micromanage the executive branch in fulfilling its own duties relating to executions.”

Remedial concerns then shift the Eighth Amendment’s focus in method-of-execution cases from the inmate’s risk of pain to the difficulty the state might have reforming its method. Of course, some attention to remedy is appropriate, because the words “cruel and unusual” invite a comparative inquiry. Courts, however, have distorted this remedial inquiry, drawing false assumptions about remedial options and concluding that any remedy would necessarily be inappropriate. This distortion gives states incentives not to reform broken procedures but instead to argue that doing so would be too cumbersome. It also allows courts to uphold procedures that are not only dangerous but also the product of serious political process failures undeserving of judicial deference. Indeed, several states have given little attention to these procedures’ design, delegated the procedure to unqualified personnel, failed to consult experts, concealed the details of the procedure from the public, and obdurately refused to reconsider their practices even as serious problems have come to light.

In giving so much attention to remedial concerns and so much deference to the political branches, courts are often not distinguishing between disingenuous

4. Id. at 1531.
5. Id.
7. Id. at 975 (quoting Hickman, 415 F. Supp. 2d at 1047).
8. Lightborne v. McCollum, 969 So. 2d 326, 351 (Fla. 2007).
suits manufactured to delay the inevitable execution and legitimate complaints identifying serious flaws with a state’s method of execution. Courts, in other words, are adopting a blanket deference that makes it more difficult for even the strongest cases to get a fair hearing. Given some states’ lack of care and transparency in this area, such deference is unwarranted.

Part I of this Article introduces the three-drug lethal injection procedure used in most states. Specifically, it explains how haphazard practices and untrained, unqualified personnel greatly heighten the risk that the procedure will cause an excruciating death. It then summarizes the Supreme Court’s 2008 decision in Baze v. Rees upholding Kentucky’s three-drug protocol. Seven different Justices wrote separately in Baze, and no opinion garnered more than three votes. This Part explores the state of the law in light of this fractured decision.

Part II argues that remedial concerns figure prominently in recent lethal injection decisions, including Baze, and in fact often drive the outcome. Courts both explicitly and implicitly shape the scope of the Eighth Amendment right by looking to whether there might be appropriate remedies. In so doing, courts often incorrectly assume that any remedy would greatly burden the state. The remedial inquiry, then, is colored by a general reluctance to tell the political branches what to do, which grows out of more general discomfort with institutional remedies, particularly structural reform injunctions. While most courts do not explicitly equate lethal injection suits with structural reform litigation, lethal injection actions do inquire into the structure—the personnel, architecture, and processes—of states’ execution procedures. Accordingly, deep-seated judicial attitudes about invasive structural injunctions color courts’ approaches to lethal injection suits.

Part III argues that this judicial reluctance to impose remedies against the government is misplaced. Many states have not given much thought to the details of their lethal injection procedures. While respect for democracy might be an appropriate reason for courts to decline to intervene in some instances, it is not here, where there has been nothing democratic, deliberative, or transparent about the creation of execution protocols. Quite to the contrary, where states have delegated responsibility for their procedures to unelected, unqualified execution team members and then concealed the details of that procedure from the public, judicial interference is entirely appropriate.

Given that judicial intervention is necessary, Part IV argues that viable lethal injection remedies are more workable and less intrusive than many courts seem to assume. This Part suggests particular remedies that would help cure an execution protocol’s difficulties. It then contends that such remedies would be relatively modest compared with many public law injunctions and would not unduly burden the political branches. Calls for judicial deference, then, are overstated in this area.

This Article concludes that some courts have not been sensitive enough to the distinctions between different types of public law litigation. They have blindly assumed that any suit seeking an injunction to reform state practices is

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inherently intrusive. Courts should recognize that some injunctions reshaping public practices can be relatively unintrusive and wholly appropriate. Indeed, because remedial concerns often figure heavily in courts’ articulation of the constitutional right itself, it is crucial that judges appreciate these nuances in the early stages of an action. This appreciation is all the more important in the lethal injection context as courts address the scope of the Eighth Amendment right in light of the muddled Baze decision. In failing to account for these factors thus far, some courts have blessed dangerous state practices and surrendered their own constitutional responsibility to oversee the other branches.

I. An Overview of Lethal Injection

A. The Three-Drug Protocol

Over the past few years, litigation has uncovered numerous flaws in states’ lethal injection procedures. Lawyers typically bring these constitutional challenges under the Eighth Amendment, which reads, “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” Lethal injection plaintiffs typically do not claim that the death penalty is unconstitutional or that lethal injection is unconstitutional per se, but rather that the particular lethal injection procedure administered in a given jurisdiction violates the Eighth Amendment.

Courts agree that if a method of execution causes excruciating pain or the significant risk of such pain, it violates the Eighth Amendment whenever a fea-

10. An expert anesthesiologist has also identified numerous flaws in the federal lethal injection procedure, which is the subject of ongoing litigation. See, e.g., Heath Declaration, Roane v. Gonzales (D.D.C.) (No. 05-2337) [hereinafter Heath Roane Decl.] (recounting several problems with the federal lethal injection procedure). Challenges to federal and state procedures present similar factual and legal issues, although obviously federalism concerns differ. For ease of presentation, this Article refers to the defendants collectively as “states.”

11. U.S. Const. amend. VIII. Current Eighth Amendment jurisprudence consists of roughly four categories of cases: (1) the prohibition of certain punishments deemed to be painful and inhumane; (2) punishments that are unconstitutional because they are disproportionate to the crimes for which they are imposed; (3) “death is different” cases, which require special due process rules for death sentences; and (4) inhumane prison conditions cases. Youngjae Lee, The Constitutional Right Against Excessive Punishment, 91 Va. L. Rev. 677, 678-79 (2005). This Article focuses on the first category.

12. Note that while most method-of-execution challenges arise under the U.S. Constitution, some have been decided under state constitutional law or state statutory law. See State v. Mata, 745 N.W.2d 229, 261-62 (Neb. 2008) (holding Nebraska’s form of electrocution unconstitutional under the Nebraska constitution); Ohio v. Rivera, No. 04-69940, slip op. at 10 (Ohio Ct. Com. Pl. June 10, 2008) (holding that Ohio’s lethal injection procedure violated a state statute requiring that lethal injection be completed “quickly and painlessly”).

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sible alternative exists. Despite early Supreme Court cases reviewing the constitutionality of various methods of execution, the legal standard for such an Eighth Amendment lethal injection claim was unclear before the Court’s recent decision in Baze v. Rees and arguably remains unclear today. Nevertheless, although pre-Baze cases sometimes disagreed about the precise legal standard, parties and courts generally focused on whether a lethal injection procedure created an unnecessary risk of pain. This inquiry is unconcerned with the risk of unforeseeable accident.

Lethal injection is the sole or primary method of execution in thirty-six of the country’s thirty-seven death penalty states and for the federal government.

13. See Baze v. Rees, 128 S. Ct. 1520, 1531-32 (2008) (requiring a substantial risk of harm and a viable alternative for an Eighth Amendment violation); see also Evans v. Saar, 412 F. Supp. 2d 519, 524 (D. Md. 2006) (asking “whether an inmate facing execution has shown that he is subject to an unnecessary risk of unconstitutional pain or suffering”) (internal quotation marks omitted); Cooey v. Taft, 430 F. Supp. 2d 702, 708 (S.D. Ohio 2006); Morales v. Tilton, 465 F. Supp. 2d 972, 974 (N.D. Cal. 2006). The law recognizes and tolerates, however, that “[s]ome risk of pain is inherent in any method of execution—no matter how humane—if only from the prospect of error in following the required procedure.” Baze, 128 S. Ct. at 1529.


16. Resweber, 329 U.S. at 464; Taylor v. Crawford, 487 F.3d 1072, 1080 (8th Cir. 2007); Campbell v. Wood, 18 F.3d 662, 687 (9th Cir. 1994).

17. See Baze, 128 S. Ct. at 1526-27 & n.1 (2008). Nebraska is the only death penalty state specifying electrocution as the sole method of execution, but the Nebraska Su-
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The federal government and at least thirty states use the same three-drug sequence. The first of these drugs, thiopental (otherwise known as sodium pentothal), is an ultra-short-acting barbiturate anesthetic. The second drug, pancuronium bromide (Pavulon), is a paralytic that inhibits muscle movement, including that of the diaphragm. The third drug, potassium chloride, induces cardiac arrest.

It is undisputed that if a full dose of thiopental is successfully delivered to the inmate’s veins, that inmate will be fully anesthetized within two-and-a-half minutes. It is also undisputed that if the thiopental fails to take effect, the potassium chloride will cause excruciating pain as it sears its way through the inmate’s veins on the way to stopping his heart. If that were to happen, the inmate’s pain could be masked by the pancuronium. An inmate, then, could lie paralyzed, suffocating and experiencing intense burning in his veins, and yet appear peaceful.


See, e.g., Baze, 128 S. Ct. at 1527. It would be inaccurate to say that states use the same procedure, because the safety of the procedure turns in large part on how the drugs are administered. States using the same drugs can still have very different procedures. The words “protocol” and “procedure” in the lethal injection context are often used interchangeably. To the extent their meanings differ, “protocol” generally refers to the written document specifying the steps the State should take to administer the drugs, while “procedure” generally refers to the steps they actually take, including departures (either intentional or unintentional) from the written protocol.

18. See, e.g., Baze, 128 S. Ct. at 1527.


22. See Baze, 128 S. Ct. at 1527; Harbison, 511 F. Supp. 2d at 883-84; Suzanne C. Beyea, Addressing the Trauma of Anesthesia Awareness, 81 AORN J. 603, 605 (2005); Leonidas G. Koniaris et al., Inadequate Anaesthesia in Lethal Injection for Execution, 365 LANCET 1412, 1414 (2005).
If properly performed, the three-drug protocol will fully anesthetize the inmate for the duration of the execution. Such an execution would therefore be constitutional. The key question presented in these cases, then, is whether the first drug does take effect. The answer cannot be determined, however, by witnesses or execution personnel watching the inmate. First, there are different planes of anesthesia, and a partially anesthetized person may be unresponsive to light stimuli, like gentle shaking, but still be able to feel stronger stimuli, like excruciating pain.

Only a medical professional with training in anesthesiology sitting at a person’s elbow can accurately determine whether a person has reached a deep enough plane of anesthesia to be unresponsive to excruciating pain. Most states neither employ a professional with such training nor position their personnel so close to the inmate. Second, the administration of pancuronium paralyzes the inmate so that he looks serene even if he is not anesthetized. Lethal injection challenges thus often focus on the probability that the inmate will receive the full dose of thiopental in his veins and be fully anesthetized before the delivery of the second and third drugs.

That likelihood hinges on how the three-drug procedure is carried out in each state. Because pancuronium masks pain and because many states do not take toxicology reports measuring thiopental blood levels immediately after death, there is no reliable data on how many inmates have suffered painful deaths. But as details about various states’ procedures emerge, it seems increasingly probable that some states’ procedures have caused and will continue to cause torturous pain.

23. Baze, 128 S. Ct. at 1530 (plurality opinion). A properly performed three-drug procedure might still involve pain from the insertion of the IV catheter into the inmate’s veins, but assuming that no unusually painful measures are needed to insert the catheter, such as a cut-down procedure, that degree of pain would not amount to a constitutional violation. See id. (stating that an Eighth Amendment violation requires “something inhuman and barbarous, something more than the mere extinguishment of life” (quoting In re Kemmler, 136 U.S. 436, 447 (1890))).


27. See, e.g., Beyea, supra note 22, at 603; Koniaris et al., supra note 22, at 1414.

28. It is beyond the scope of this Article to provide a detailed summary of all the problems that have been uncovered in various states. For a more detailed discussion, see Professor Denno’s excellent articles. See generally Deborah W. Denno, The Lethal Injection Quandary: How Medicine Has Dismantled the Death Penalty,
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As an initial matter, it is important to note that death by lethal injection need not involve this combination of three drugs. The American Veterinary Medical Association (AVMA), for example, will not use the three-drug protocol when euthanizing animals, because the risk of pain is too great. Instead, it favors an overdose of the barbiturate pentobarbital that eliminates the risk of pain. If the injection of barbiturate fails to kill the animal, the veterinarian simply administers a second dose. Paralytics like pancuronium therefore play no role in animal euthanasia, and, indeed, have actually been statutorily banned in several states that nevertheless use those same drugs during the execution of humans. As Professor Alper puts it, “virtually all (97.6%) lethal injections in this country have taken place in states that have either implicitly or explicitly banned, for use in animal euthanasia, the same drugs that are used in those states during human executions.” Moreover, whereas veterinary consensus has resulted from decades of study, lethal injection procedures are not the products of any scientific review. To the contrary, they are often haphazardly conceived.
and performed, and this general lack of care creates the substantial risk that something will go wrong and cause severe pain.\textsuperscript{34}

Probably the most serious and complicated problem with many states’ lethal injection procedures is the use of untrained and unqualified personnel.\textsuperscript{35} The California District Court, for example, found that “[t]he [execution] team members almost uniformly have no knowledge of the nature or properties of the drugs that are used or the risks or potential problems associated with the procedure.”\textsuperscript{36} Such ignorance about the drugs is common. When executions take longer than expected in Virginia, the execution team inexplicably administers more pancuronium and potassium, but not more thiopental.\textsuperscript{37} In other words, Virginia re-administers not anesthetic, but the drugs that mask and cause pain. In Missouri, the executioners injected the drugs as quickly as possible,\textsuperscript{38} mistakenly believing that thiopental renders a person fully unconscious within fifteen seconds.\textsuperscript{39} In reality, it may take up to two and a half minutes for thiopental to take full effect.\textsuperscript{40} Compounding these problems, states do not adequately train their execution teams to make up for these deficiencies or even require their teams to read the execution protocol.\textsuperscript{41}

Such ignorance places special importance on the ostensible team leader. In Missouri, for instance, the only team member who claimed to understand the procedure was Dr. Alan Doerhoff (referred to in the litigation as “John Doe I”),

\begin{enumerate}
\item See, e.g., Denno, Quandary, supra note 28, at 56-58 (summarizing haphazard and “disturbing” details about states’ lethal injection procedures).
\item This discussion mostly characterizes the procedures as they existed in states during recent litigation. Some states have changed their procedures recently, although most such changes are minor.
\item Morales v. Tilton, 465 F. Supp. 2d 972, 979 (N.D. Cal. 2006); see also Harbison v. Little, 511 F. Supp. 2d 872, 888-90 (M.D. Tenn. 2007) (finding execution team members “largely ignorant” of the drugs’ risks).
\item Emmett v. Johnson, 532 F.3d 291, 296-97 (4th Cir. 2008).
\item See Deposition of Larry Crawford, Taylor v. Crawford at 129-31, 2006 WL 1779035 (W.D. Mo. May 23, 2006) (No. 05-4173) (containing explanation by DOC Director that drugs are injected in rapid succession).
\item Deposition of Dr. John Doe at 20, Taylor, 2006 WL 1779035 (W.D. Mo. June 5, 2006) (No. 05-4173) [hereinafter Doe Deposition].
\item See Henthorn Report supra note 20, ¶ 24.
\end{enumerate}
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the doctor heading the procedure.\footnote{Dr. Doerhoff’s identity was published several weeks after the trial by the \textit{St. Louis Post-Dispatch}. See Jeremy Kohler, \textit{Behind the Mask of the Mo. Execution Doctor}, \textit{St. Louis Post-Dispatch}, July 29, 2006, at A-1.} Doerhoff turned out to be incompetent or callous, lowering the amount of the thiopental and making other changes to the procedure without consulting any Department of Corrections (DOC) authorities.\footnote{See \textit{Taylor v. Crawford}, 2006 WL 1779035, at *7 (W.D. Mo. June 26, 2006); Doe Deposition, \textit{supra} note 39 at 96.} These actions belied Missouri’s public representations throughout litigation that it used five grams of thiopental during all executions.\footnote{See, e.g., Def. Crawford’s 9/12/2005 Answers to Plaintiff’s First Interrogatories at 8–9, \textit{Taylor v. Crawford}, No. 05-4173; Defs’ 5/17/06 Letter to J. Gaitan at 1, \textit{Taylor v. Crawford}, No. 05-4173.} In reality, the DOC’s chemical log showed that Doerhoff sometimes prepared only 2.5 or fewer grams.\footnote{Defs’ 5/17/06 Letter to J. Gaitan, \textit{Taylor v. Crawford}, No. 05-4173 (apologizing for the State’s misstatements to the court about the thiopental dose).} When asked about the discrepancy, Doerhoff admitted that he was dyslexic and never knew how much thiopental he mixed.\footnote{See \textit{Taylor}, 2006 WL 1779035, at *7 (“John Doe I also testified that he felt that he had the authority to change or modify the formula as he saw fit. It is apparent that he has changed and modified the protocol on several occasions in the past.”); Doe Deposition, \textit{supra} note 39, at 25 (“I am dyslexic and so . . . it’s not unusual for me to make mistakes.”).} The log therefore represented only his very rough approximations.\footnote{See \textit{Doe Deposition, supra} note 39, at 25; \textit{Taylor}, 2006 WL 1779035, at *4-6 (discussing the Doerhoff deposition).}

Dyslexia was hardly Doerhoff’s only problem. His deposition revealed several false assertions about a variety of medical issues, casting serious doubt on his professional competence.\footnote{See \textit{Taylor}, 2006 WL 1779035, at *7 (court indicating it was “gravely concerned” about Doerhoff’s competence); \textit{Taylor Trial Transcript, supra} note 25, at 29-57 (medical expert testifying that Doerhoff made several “100% backward,” “false,” and “very troubling” medical statements).} Additionally, Doerhoff’s surgical training gave him no background in the anesthesiological tasks crucial to the procedure.\footnote{See \textit{Taylor}, 2006 WL 1779035, at *7 (noting that facility with numbers may not be necessary for surgery, but “is critical when one is mixing and dissolving chemicals for a lethal injection”); \textit{Taylor Trial Transcript, supra} note 25, at 29-43 (anesthesiologist expert testifying that it is not “conceivable” than an anesthesiologist would make the mistakes Doerhoff made).}

Dyslexia was hardly Doerhoff’s only problem. His deposition revealed several false assertions about a variety of medical issues, casting serious doubt on his professional competence. Additionally, Doerhoff’s surgical training gave him no background in the anesthesiological tasks crucial to the procedure.
make matters worse, Missouri then lacked a written protocol, meaning that Doerhoff possessed “total discretion” for the procedure and that the whole team looked entirely to him for its responsibilities.\textsuperscript{50}

Unqualified personnel also create problems setting the intravenous (IV) catheter. If the catheter is improperly set, the drugs will not all be delivered successfully into the vein. Instead, they will infiltrate, spilling into surrounding tissues. Infiltration itself is painful, but, even more alarming is the possibility that it will result in inadequate anesthesia. For example, during the Florida execution of Angel Diaz, inadequate anesthesia resulted in the inmate writhing and gasping on the gurney for thirty-four minutes before dying.\textsuperscript{51} An autopsy later revealed infiltration at his IV site.\textsuperscript{52} Placing the IV catheter can often be one of the procedure’s most difficult steps, especially because some condemned inmates are obese or former intravenous drug users, and yet, some states rely on unqualified personnel to perform this critical task.\textsuperscript{53}

Other problems result from the execution chambers’ architecture. To conceal the identity of their executioners, many states place the inmate on a gurney in an execution chamber and staff in an adjacent execution support room where they are hidden from witnesses. After team members place the catheter in the inmate’s veins, they exit the room, leaving the inmate alone for the duration of the execution. The execution team then remotely administers the drugs,

\textsuperscript{50} Taylor, 2006 WL 1779035, at *7-8.

\textsuperscript{51} See Florida Commission Report, supra note 41, at 8; Phil Long & Marc Caputo, Lethal Injection Takes 34 Minutes To Kill Inmate, Miami Herald, Dec. 14, 2006, at 5B. Diaz’s is not the only execution to have visible problems. See, e.g., Kevin Fagan, The Execution of Stanley Tookie Williams, S.F. Chron., Dec. 14, 2005, at A12 (noting that the execution took “36 agonizing minutes”).

\textsuperscript{52} Mark J. Heath, Revisiting Physician Involvement in Capital Punishment, 83 Mayo Clinic Proc. 115, 116 (Jan. 2008) (“Diaz slowly died of the gradual absorption of infiltrated thiopental, pancuronium, and potassium. During a 34-minute interval, he gasped like a fish out of water.”) (internal quotation marks omitted).

It is important to emphasize that because of the pancuronium, the absence of visible pain during other executions is no indication that those executions were problem free. For example, paralysis is possible even where infiltration results in inadequate anesthesia. Although the thiopental dose is usually more than necessary to anesthetize the inmate, the overdoses of pancuronium are usually even larger. See, e.g., Atul Gawande, Better: A Surgeon’s Notes on Performance 134 (2007). As a result, infiltration might result in too little thiopental for anesthesia but enough pancuronium for paralysis and prolonged death by suffocation.

\textsuperscript{53} Morales v. Tilton, 465 F. Supp. 2d 972, 979 (N.D. Cal. 2006) (finding that the State’s personnel are “not adequately prepared to deal with” complications associated with setting the IV line); Gawande, supra note 52, at 136, 146 (describing a state prison warden who claimed that he did not need medical personnel to assist with executions and that he would start the IVs himself, even though he had never started one before).
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which travel in tubes from the support room through the wall into the execution chamber, up or down onto the gurney, and finally into the catheter.\(^{54}\)

The particulars of remote administration significantly heighten the risk of error that will lead to pain. For example, execution team members sometimes work in the dark to protect their identities. This precaution makes it harder for team members to identify which syringes contain which chemicals, therefore increasing the risk that they will administer them in the wrong order.\(^{55}\) Additionally, extra-long tubing is necessary to run from the plungers in the support room to the prisoner in the execution chamber. Such tubing can and has leaked, disconnected, or kinked.\(^{56}\) Furthermore, because such tubing generally runs through a hole in the wall, team members cannot see most of it and therefore will not know whether it has been compromised.\(^{57}\) Similarly, because a sheet usually covers the inmate, team members cannot see the catheter site and whether the IV has become dislodged.\(^{58}\)

Nor can the personnel tell whether the inmate has been sufficiently anesthetized before the second and third drugs are administered. Execution personnel often view the inmate through a window with partially drawn Venetian blinds. It is, therefore, “almost impossible” to observe the inmate’s anesthetic depth.\(^{59}\) Of course, even if the window afforded the execution team a better view of the inmate, judging anesthetic depth would be virtually impossible because anesthetic depth can only be measured competently at a patient’s elbow.

\(^{54}\) See Harbison v. Little, 511 F. Supp. 2d 872, 889 (M.D. Tenn. 2007) (describing difficulties of remote administration); Morales II, 465 F. Supp. 2d at 980 (identifying the challenges of remote administration).

\(^{55}\) See Taylor Trial Transcript, supra note 25, at 83 (expert anesthesiologist testifying that working in the dark is “ridiculous” and exacerbates the risk of complications).

\(^{56}\) See id. at 78 (expert explaining that extra-long tubing is prone to more problems); Romanelli et al., supra note 21, at 1433; Heath Roane Decl., supra note 10, at 19 (referencing leaking IV lines in Maryland).

\(^{57}\) See, e.g., Morales II, 465 F. Supp. 2d at 980 (explaining that tubes go through holes in walls and that IV bags hang from hooks, but that the execution team cannot verify if the equipment is properly working); Taylor Trial Transcript, supra note 25, at 78 (expert explaining that the “full extent of the IV tubing [should be] completely visible and laid out in a neat fashion so that [the team] can clearly see that the conduit through which the drugs will flow is working properly”); Gawande et al., supra note 25, at 450.

\(^{58}\) See Harbison, 511 F. Supp. 2d at 888 (noting that the State’s expert conceded that sometimes catheters fail and that the IV site should therefore be monitored); Taylor Trial Transcript, supra note 25, at 82 (explaining that the sheet covers the view of the catheter).

\(^{59}\) Taylor, 2006 WL 1779035, at *8. “Anesthetic depth” refers to the plane of anesthesia—that is, the degree to which a person is anesthetized. See supra note 24 and accompanying text.
by medical professionals with training in anesthesiology. Pancuronium-induced paralysis further exacerbates these difficulties.

Finally, some states have failed to adopt consistent, predictable procedures, leading to inconsistent behavior and recordkeeping. Poor recordkeeping, of course, makes it harder for the team to develop predictable patterns of behavior. That haphazardness, in turn, can create deviations from the standard procedure, make errors more likely, and render it harder to learn from past errors. And even if the team somehow were to discover problems, some states have no contingency plans to deal with them.

Of course, current procedures do further certain goals. They protect the executioners’ anonymity (e.g., the remote administration) and show the witnesses a serene execution (e.g., the pancuronium). The inmate’s pain, though, is a background issue to which many states have given only minimal thought.

Federal courts in California, Missouri, and Tennessee have found serious flaws with their states’ lethal injection procedures and required changes. More often, courts have granted minimal or no relief, despite some or many of the aforementioned problems. Still others have entered stays to learn more about apparently problematic procedures only to be reversed on other grounds. Litigation is still pending elsewhere.

60. See, e.g., Taylor Trial Transcript, supra note 25, at 71 (expert anesthesiologist explaining that anesthesiologists monitoring anesthetic depth during executions must “be physically in contact with the patient, standing right by their head and able to test various reflexes” and that because the Missouri doctor observed only through a window from an adjacent room and lacked important equipment, he could not “make any meaningful determination of anesthetic depth”); Dershwitz & Henthorn, supra note 19, at 949.

61. See Taylor, 2006 WL 1779035, at *3 (noting that Missouri was still trying to understand error in its own recordkeeping); Morales II, 465 F. Supp. 2d at 979 (describing California’s erratic recordkeeping).

62. See Taylor, 2006 WL 1779035, at *9 (ordering that Missouri put in place contingency plans in case problems develop during an execution); Heath Roane Decl., supra note 10, at 25 (explaining that federal protocol “made no provisions whatsoever for the foreseeable contingency of IV access failure”).

63. See Harbison, 511 F. Supp. 2d at 903; Taylor, 2006 WL 1779035, at *9; Morales II, 465 F. Supp. 2d at 978-84. The Missouri decision was subsequently reversed on appeal, and the case was subsequently dismissed on remand. See Taylor v. Crawford, 487 F.3d 1072, 1085 (8th Cir. 2007); Taylor v. Crawford, No. 07-4129, slip op. at 4-5 (W.D. Mo. July 15, 2008).

64. See, e.g., Brown v. Beck, No. 06-3018, slip op. at 6-7 (E.D.N.C. Apr. 17, 2006), aff’d 445 F.3d 752 (4th Cir. 2006) (permitting state to proceed with executions with minimal revision); Emmett v. Johnson, 511 F. Supp. 2d 654 (E.D. Va. 2007) (granting state’s motion for summary judgment), aff’d, 532 F.3d 291 (4th Cir. 2008); State v. Schwab, 995 So. 2d 922, 952 (Fla. 2008) (upholding Florida’s procedure).

65. See Boltz v. Jones, 182 Fed. App. 824, 825 (10th Cir. 2006) (vacating a stay issued by the Oklahoma district court due in part to the “State’s interest in the timely effec-
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B. The Supreme Court’s Fractured Decision in Baze v. Rees

The outcomes of these pending cases will depend in part on how courts interpret the United States Supreme Court’s 2008 decision in Baze v. Rees. Baze was the Supreme Court’s first case directly addressing the constitutionality of a state’s lethal injection procedure. The Court had already held in Nelson v. Campbell and Hill v. McDonough that death row inmates could bring an action under 42 U.S.C. § 1983 to challenge a state’s execution procedures and that such actions were not subject to habeas corpus’s more rigorous procedural gatekeeping requirements. But Baze was the Court’s first foray into the Eighth Amendment legal standard governing lethal injection cases.

Baze considered the constitutionality of Kentucky’s version of the three-drug protocol. Litigation in Kentucky had not revealed systemic problems of the sort discovered in Missouri, California, and Tennessee. Kentucky, in fact, had conducted only one execution by lethal injection, so the record was sparse. Moreover, the plaintiff received incomplete discovery, so there was no
evidence that Kentucky had ever had any problems with its procedure.\textsuperscript{70} There was no smoking gun—no equivalent of Missouri’s dyslexic doctor or Florida’s writhing inmate—and, in fact, little evidence at all. The limited record did indicate that Kentucky takes precautionary measures absent in other states, such as using a phlebotomist to insert the catheters, thus decreasing the risk of infiltration.\textsuperscript{71} Kentucky also requires wardens to remain in the execution chamber with the prisoner to watch for IV problems, including infiltration.\textsuperscript{72} Additionally, it requires its team to participate in at least ten practice sessions a year.\textsuperscript{73} In short, in comparison to other states, the Kentucky record was decidedly clean.\textsuperscript{74}

The Supreme Court’s decision upholding the procedure was extremely fractured; seven different Justices wrote opinions, and no single opinion garnered more than three votes. Chief Justice Roberts wrote the plurality opinion, which was joined by Justices Kennedy and Alito. In upholding the Kentucky procedure, the plurality tried to clarify the Eighth Amendment standard for method-of-execution claims. It required the plaintiff to establish both (1) that the current lethal injection procedure poses “a substantial risk of serious harm”\textsuperscript{75} and (2) that the state has refused to adopt a “feasible, readily implemented” alternative “significantly” reducing that risk.\textsuperscript{76} The plurality, thus, agreed with petitioners that the availability of a safer procedure was constitutionally relevant but emphasized that “a condemned prisoner cannot suc-

\textsuperscript{70} For example, the plaintiffs’ attorneys were unable to depose the executioners. See Reply Brief for Petitioners at 16, \textit{Baze} (No. \textit{07}-5439). Despite this limited record, the plaintiff represented in his petition for certiorari that the record was, in fact, uniquely complete in comparison to other lethal injection cases. See Petition for Writ of Certiorari at 24, \textit{Baze} (No. \textit{07}-5439) (“[T]his case presents the most succinct and complete record for this Court to address the important legal issues raised by challenges [to lethal injection.]”).

\textsuperscript{71} \textit{Baze}, 128 S. Ct. at 1533-34. A phlebotomist is an individual trained to draw blood and insert catheters into veins. At oral argument, the State contended that this phlebotomist “is probably literally the best qualified human being in the Commonwealth of Kentucky to place the IV line.” Transcript of Oral Argument at 28, \textit{Baze} (No. \textit{07}-5439).

\textsuperscript{72} \textit{Baze}, 128 S. Ct. at 1534.

\textsuperscript{73} \textit{Id.}

\textsuperscript{74} \textit{See id. at 1542 (Stevens, J., concurring) (noting that the question of whether the three-drug protocol can be practiced in other states could be answered differently in a state with a “more complete record”); id. at 1566 (Breyer, J., concurring) (indicating that the record in Kentucky provided “too little reason” to believe that additional safeguards were necessary); id. at 1567 (Ginsburg, J., dissenting) (favoring remand for additional factfinding).}

\textsuperscript{75} \textit{Id. at 1531 (plurality opinion) (quoting Farmer v. Brennan, 511 U.S. 825, 842 (1994))}.

\textsuperscript{76} \textit{Id. at 1532}. 
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A defendant successfully challenge a State’s method of execution merely by showing a slightly or marginally safer alternative.77 Instead:

the alternative procedure must be feasible, readily implemented, and in fact significantly reduce a substantial risk of severe pain. If a State refuses to adopt such an alternative in the face of these documented advantages, without a legitimate penological justification for adhering to its current method of execution, then a State’s refusal to change its method can be viewed as “cruel and unusual” under the Eighth Amendment.78

An inmate challenging a method of execution, then, must demonstrate both the shortcomings of the state’s existing procedures and the relative merits of an alternative.

The Kentucky plaintiffs failed to make either showing. Whereas plaintiffs in other states had uncovered problems that greatly heightened the risk that thiopental delivery would be compromised, the plaintiffs in Kentucky presented no such evidence. Indeed, they were not even permitted to depose the execution personnel, a denial of discovery that made it difficult to gather evidence about the true nature of the Kentucky procedure.79 Instead of evidence about how the procedure was carried out in practice, the Kentucky record included mostly details about the written protocol, which demonstrated that Kentucky had adopted particular safeguards to ensure successful thiopental delivery. The three-Justice plurality, therefore, rejected petitioners’ argument that they might not receive an adequate dose of thiopental.80

Nor did the Kentucky plaintiffs convince the Court that the use of pancuronium bromide to paralyze the inmates was itself problematic. Even though pancuronium makes it almost impossible to tell whether an inmate has been properly anesthetized (particularly given that laypeople often monitor anesthetic depth), the plurality concluded that the pancuronium prevented involuntary physical movements, and that the state “has an interest in preserving the dignity of the procedure, especially where convulsions or seizures could be misperceived as signs of consciousness or distress.”81

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77. Id. at 1531.
78. Id. at 1532.
79. Reply Brief for Petitioner at 16 n.2, Baze (No. 07-5439) (arguing that trial court’s denial of depositions was “inexplicable”).
80. Baze, 128 S. Ct. at 1533-34 (plurality opinion).
81. Id. at 1535. The plurality also argued that Kentucky’s continued use of the three-drug protocol could not be seen as posing an “objectively intolerable risk” when no other State has adopted the one-drug method.” Id. at 1535; see also id. at 1532 (noting that “it is difficult to regard a practice as ‘objectively intolerable’ when it is in fact widely tolerated”). It is not clear why a widespread practice should be considered presumptively valid, since a method of execution can cause excruciating pain but still be widespread. To be sure, a widespread practice might not be “unusual,” but the Eighth Amendment surely does not permit excruciating execution.
Significantly, the Kentucky plaintiffs also had failed to present to the trial court evidence about an alternative protocol. This failure left the Supreme Court “without any findings on the effectiveness of petitioners’ barbiturate-only protocol.” Given the plurality’s explicitly comparative approach—that is, given that the lethal injection plaintiff must demonstrate the existence of a “feasible, readily implemented” alternative procedure that “in fact significantly reduce[s] a substantial risk of severe pain”—the absence of findings demonstrating the superiority of the one-drug protocol or another alternative necessarily doomed the Kentucky plaintiffs.

As for future plaintiffs in different states with different evidence, Baze leaves the door open for lethal injection challenges alleging that a state has refused to change its method of execution notwithstanding a feasible, readily implemented, significantly safer alternative procedure. The Justices, however, disagreed about just how open the door remains. Chief Justice Roberts wrote that an inmate “must show that the risk [of severe pain] is substantial when compared to the known and available alternatives. A State with a lethal injection protocol substantially similar to the protocol we uphold today would not create a risk that meets this standard.”

One question in future cases, then, will be whether a given state’s procedure is “substantially similar” to Kentucky’s.

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82. Baze, 128 S. Ct. at 1534 (plurality opinion). The plurality also noted that Tennessee had rejected a proposal to adopt a one-drug protocol, thus demonstrating that the “comparative efficacy of a one-drug method of execution is not so well established.” Id. at 1535. Whether misinformed or disingenuous, this argument misses the mark, because a single Tennessee bureaucrat rejected the recommendation of a one-drug protocol presented by a committee charged with re-evaluating the State’s lethal injection policy. See infra notes 265-270 and accompanying text.

83. Baze, 128 S. Ct. at 1532.

84. Id.

85. Id. at 1537 (emphasis added).

86. Another reading of the plurality’s “substantially similar” language is that it refers only to the standard needed to obtain a stay. See id. at 1537 (explaining that “[a] stay of execution may not be granted on grounds such as those asserted here unless the condemned prisoner establishes that the State’s lethal injection protocol creates a demonstrated risk of severe pain” and, adding two sentences later, that a “substantially similar” protocol would not meet this standard). Under this reading, a court only need inquire whether a given state’s procedure is “substantially similar” to Kentucky’s if the inmate plaintiff would need a stay of execution for his litigation to continue.
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The plurality suggests that Baze resolves many challenges. But it is virtually impossible to know before discovery whether another state’s procedures are “substantially similar” to Kentucky’s. It is true that at least thirty states use the same three drugs Kentucky does. Two execution procedures, though, can hardly be deemed “substantially similar” merely because they use the same drugs. As litigation has demonstrated, the procedure’s safety hinges on how the drugs are administered. And while a state’s written protocol can lend some insight into that state’s practices, some states do not follow their own written protocols. Kentucky’s procedure was easy to uphold, because there was minimal evidence about how Kentucky’s procedures actually worked. “Only one Kentucky prisoner . . . has been executed since the Commonwealth adopted lethal injection,” and there were “no reported problems” at that execution. By way of contrast, serious problems have been documented in other states.

Given that the safety of a method of execution depends not just on the four corners of the written protocol but on the details of administration, a state’s procedure could not be deemed “substantially similar” to Kentucky’s without discovery into that state’s actual practices—the training and qualifications of its execution team, the suitability of the equipment, the architecture of the execution facilities, and so on. In other words, the “substantially similar” inquiry is necessarily a question of fact and, like all questions of fact, cannot be answered without fact-finding. Indeed, given states’ efforts to conceal the details of their procedure, discovery in lethal injection cases often requires particularly attentive judicial supervision.

Whether Baze will, in fact, be interpreted this way is less certain. Justice Alito’s concurrence emphasized that the plurality had erected a high hurdle for these claims and contended that Justices Stevens and Thomas were incorrect in

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87. See id. at 1537 (plurality opinion) (arguing that the plurality decision “resolves more challenges than [Justice Stevens] acknowledges”); id. at 1542 (Alito, J., concurring).
88. Id. at 1527 n.1.
89. See Emmett v. Johnson, 532 F.3d 291, 311 (4th Cir. 2008) (Gregory, J., dissenting) (“Merely using identical drugs, but in varying amounts and at varying times in the procedure, hardly yields ‘largely identical’ lethal injection protocols.”).
90. Baze, 128 S. Ct. at 1528 (plurality opinion).
91. See, e.g., Morales v. Tilton, 465 F. Supp. 2d 972, 982 (N.D. Cal. 2006) (noting that California had not fulfilled its discovery obligations despite court orders to do so); Oken v. Sizer, 321 F. Supp. 2d 658, 663 (D. Md. 2004) (noting that the State’s refusal to disclose execution protocol denied plaintiff a “minimal hearing”); Denno, Quandary, supra note 28, at 95 (explaining that “states never have been forthcoming about how they perform lethal injections” and adding that some states recently have retreated into “greater secrecy”).
perceiving that the decision would lead to substantial litigation. Emphasizing that the opinion must be read so as to avoid “litigation gridlock” and “a grave danger of extended delay,” Justice Alito would have set an especially low bar for finding another state’s procedure “substantially similar” to Kentucky’s. Justice Stevens’s concurrence disagreed, arguing that “[t]he question whether a similar three-drug protocol may be used in other States remains open, and may well be answered differently in a future case on the basis of a more complete record.” Justice Thomas, joined by Justice Scalia, agreed with Justice Stevens that more litigation was certain to follow, but, relying on his interpretation of the original understanding of the Eighth Amendment, would have found a constitutional violation only if the method of execution “is deliberately designed to inflict pain.”

The three remaining Justices—Souter, Ginsburg, and Breyer—all agreed on yet another Eighth Amendment standard: “whether the method creates an untoward, readily avoidable risk of inflicting severe and unnecessary suffering.” This standard would consider three interrelated factors—the degree of

92. Baze, 128 S. Ct. at 1538 (Alito, J., concurring). Of course, it is notable that the Chief Justice did not feel compelled to incorporate Justice Alito’s concerns into the plurality opinion.

93. Id. at 1542 (Alito, J., concurring).

94. Id. at 1542 (Stevens, J., concurring). Justice Stevens’s concurrence received significant attention, because even though he voted to uphold the Kentucky procedure, he also announced his conclusion that “the death penalty represents the ‘pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes.’” Id. at 1551 (Stevens, J., concurring) (quoting Furman v. Georgia, 408 U.S. 238, 312 (1972) (White, J., concurring)).

95. Justice Scalia, joined by Justice Thomas, also wrote his own dissent objecting to Justice Stevens’s views about the death penalty more generally. See id. at 1552-56 (Scalia, J., concurring).

96. Id. at 1563 (Thomas, J., concurring) (describing the plurality standard as “unworkable”).

97. Id. at 1556 (Thomas, J., concurring). Because of the attention to “evolving standards of decency,” history informs Eighth Amendment doctrine less than it does other constitutional areas. See Atkins v. Virginia, 536 U.S. 304, 311-12 (2002) (stating that the Eighth Amendment “must draw its meaning from the evolving standards of decency that mark the progress of a maturing society”) (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958)). Consequently, a method of execution that was once acceptable might be unconstitutional today, either because new evidence demonstrates that it creates a previously unknown unacceptable risk of excruciating pain or because new values reject that kind of punishment as inhumane. Justice Thomas’s reliance on history, while consistent with interpretation of other constitutional provisions, see, e.g., District of Columbia v. Heller, 128 S. Ct. 2783 (2008), is therefore mostly anomalous in Eighth Amendment jurisprudence.

98. Baze, 128 S. Ct. at 1563 (Breyer, J., concurring); see also id. at 1572 (Ginsburg, J., dissenting).
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risk, magnitude of pain, and availability of alternatives. “[A] strong showing on one reduces the importance of the others.”

However, whereas Justice Breyer could not find “sufficient evidence that Kentucky’s execution method poses” an unconstitutional risk of severe pain, Justice Ginsburg, joined by Justice Souter, would have vacated and remanded for further fact-finding.

Because Baze relied on an incomplete record and resulted in seven different opinions, it is difficult to know what the law is. It is true that “[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, ‘the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.’” Even to the extent, though, that the three-Justice plurality’s opinion may be viewed as the holding, it offers incomplete clarification. For instance, the plurality, citing a prison health case, stated that to amount to an Eighth Amendment violation, “the conditions presenting the risk [of pain] must be ‘sure or very likely’ to cause serious illness and needless suffering,’ and give rise to ‘sufficiently imminent dangers.’” This articulation appears to set an extremely high standard for a violation. Taken in isolation, this sentence implies that an execution procedure that more likely than not caused excruciating pain would not violate the Eighth Amendment unless pain were “very likely.”

Although courts have never quantified Eighth Amendment risk, this passage

99. Id. at 1568 (Ginsburg, J., dissenting); see also id. at 1563 (Breyer, J., concurring). By way of contrast, the plurality appears to have put particular weight on the degree of risk. See id. at 1532 (plurality opinion) (“[T]he proffered alternatives must effectively address a ‘substantial risk of serious harm’” (quoting Farmer v. Brennan, 511 U.S. 825, 842 (1994))).

100. Id. at 1563-64 (Breyer, J., concurring).

101. Id. at 1567 (Ginsburg, J., dissenting).

102. It is also difficult to know why the Court granted certiorari at all. One explanation is that the Court took Mr. Baze’s attorneys at their word when they claimed to have a complete record and granted certiorari before examining the record carefully. See supra note 70. Another theory is that Baze was an unfriendly grant, in which four pro-death penalty Justices deliberately selected a case with an undeveloped record, because such a case would make it easier to uphold the procedure and articulate a stricter legal standard. This theory is further bolstered by the fact that when the Court granted certiorari in Baze, it also had before it a petition for certiorari from the Eighth Circuit in Taylor. Notwithstanding the Eighth Circuit’s reversal of the district court and Mr. Baze’s claims to the contrary, Taylor unquestionably presented more evidence suggesting an Eighth Amendment violation. See supra notes 37-50 and accompanying text.


would seem to say that 95% chance of pain would amount to a constitutional violation, but 51% chance of pain would not.

Yet it is almost impossible to believe that five Justices on the Court would consciously approve a procedure they know causes excruciating pain more than half the time. Indeed, *Helling v. McKinney*, the case upon which the plurality relied to offer such a suggestion, held that a prisoner states a viable cause of action under the Eighth Amendment by alleging exposure to health risks (such as second-hand smoke) that very well may never result in illness or pain.105 *Helling*, then, does not seem to stand for the proposition that conditions need to be “sure or very likely” to cause suffering to trigger an Eighth Amendment violation. Moreover, the plurality’s further discussion suggests that it was *not* thinking in these terms, for, later on, it announced that a state violates the Eighth Amendment if it refuses to adopt an alternative procedure that “significantly reduce[s] a substantial risk of severe pain.”106 Phrased this way, the standard seems to focus less on the original procedure’s degree of risk and more on whether the alternative would significantly reduce that risk, so long as that initial risk is itself “substantial.” But “substantial” is a mushy word, so this language might well allow the finding of a violation for a state that refuses to switch from a procedure creating, for example, a 20% risk of pain to a procedure that would lower that risk of pain to 1%.107 In short, this muddle does little to provide guidance to lower courts.

II. Remedial Anxieties and Lethal Injection

A. How Remedy Constrains the Right

Generally speaking, courts before and after *Baze* have been reluctant to engage with lethal injection issues. In rejecting these claims, judges often employ the kind of rhetoric commonly used to criticize the imposition of constitutional remedies, sounding in themes of judicial restraint, federalism, and separation of powers. Many lower courts never reach the remedial issue as a formal matter, because they decline to find a violation at all. But although courts are imprecise about exactly how and why remedial concerns should limit the Eighth Amendment right, the problem of what remedy to impose nonetheless significantly

105. *Helling*, 509 U.S. at 33. It is also worth noting that prison health cases require a finding of deliberate indifference not required in method-of-execution challenges. *Compare id.* at 33 (requiring deliberate indifference in a prison health challenge), *with Baze*, 128 S. Ct. at 1525-38 (not requiring a finding of deliberate indifference).

106. *Baze*, 128 S. Ct. at 1532 (internal quotation marks omitted).

107. Of course, it is impossible to quantify precisely the risk of pain in these cases, but such a discussion helps identify ambiguities and inconsistencies in the plurality’s approach.
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colors these courts’ rulings. Courts, thus, move the focus from the right-holder—the plaintiff whose rights have been allegedly violated—to the defendant against whom the remedy would be imposed.

It is worth noting that some attention to potential alternatives is justifiable. After all, the Eighth Amendment’s prohibition on “cruel and unusual punishment” implicitly asks if the practice at issue creates a significant risk of pain compared to available alternatives. An Eighth Amendment standard premised on unnecessary risk of pain must consider, then, whether a different method could plausibly remove that risk. If not, the risk might be necessary.

That being said, painless methods of execution do exist, so the remedial inquiry should rarely be dispositive in cases in which the plaintiff has demonstrated a real risk of pain. Courts, however, typically have not thought through precisely what role the remedial inquiry plays in the larger Eighth Amendment analysis. To the contrary, many courts have failed to explore in detail the relative merits of different methods of execution. Instead, they have often sidestepped that important question to assert the danger of any judicially imposed remedy, regardless of the details.

It is odd to think that the possibility of any judicially imposed remedy should dispositively militate against finding an Eighth Amendment violation. As a formal matter, the primary focus at the rights stage should be (and prior to Baze often was) whether the execution procedure subjects the inmate to a significant or unnecessary risk of excruciating pain. Courts’ remedial inquiry,

108. Of course, remedies are not the only factor driving courts’ behavior here, but they are significant and overlooked in the scholarship.

109. See Susan Poser, Termination of Desegregation Decrees and the Elusive Meaning of Unitary Status, 81 Neb. L. Rev. 283, 323-24 (2002) (arguing that the remedial question changes depending on whether the court focuses on the plaintiff’s rights or steps the defendant has taken to comply with its legal duty).

110. U.S. Const. amend. VIII.

111. See, e.g., Timothy K. Kuhner, The Foreign Source Doctrine: Expanding the Role of Foreign and International Law in Interpreting the Constitution, 75 U. Cin. L. Rev. 1389, 1412 (2007) (“‘Cruel and unusual’ is a comparative phrase” begging the question “‘cruel and unusual compared to what?’”).

112. See infra Subsection IV.A.1.

113. The exception might be a case in which the plaintiff has refused to proffer an alternative. See infra note 123 and accompanying text.

114. See infra Section IV.A (arguing that courts have incorrectly assumed that any remedy would necessarily be onerous, intrusive, and therefore inappropriate); Subsections II.A.1, II.A.2 (arguing that courts have used remedial concerns to avoid engaging with the details of the challenged procedures, even when confronted with evidence of the procedures’ dangers).

115. See, e.g., Cooper v. Rimmer, 379 F.3d 1029, 1033 (9th Cir. 2004) (holding that the Eighth Amendment protects against “an unnecessary risk of unconstitutional pain and suffering”); Morales v. Tilton, 465 F. Supp. 2d 972, 973 (N.D. Cal. 2006)
then, has changed the very nature of the right, distracting attention away from the question of whether the existing method of execution is potentially painful.116

In a seminal article, Professor Levinson explains how undesirable remedial consequences can prompt courts to limit or extinguish rights to avoid those consequences.117 Constitutional rights, Levinson explains, “are inevitably shaped by, and incorporate, remedial concerns.”118 Rights are dependent on remedies not just for their real world application, but for their scope and “very existence.”119 Thus, as Professor Gewirtz explains, “[t]he prospect of actualizing
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rights through a remedy—the recognition that rights are for actual people in an actual world—makes it inevitable that thoughts of remedy will affect thoughts of right, that judges’ minds will shuttle back and forth between right and remedy.”

In other words, remedial concerns shape constitutional rights even if courts, as a formal matter, are not reaching the remedial inquiry and are making false assumptions about the remedial issues.

1. Remedial Concerns in Baze

In articulating a stringent Eighth Amendment standard, the Supreme Court in Baze relied heavily on arguments about the remedy. The second prong of the plurality’s standard required the plaintiff to show the existence of a “feasible, readily implemented” remedy that would “significantly reduce a substantial risk of severe pain.”

The right, in other words, explicitly incorporates a remedial inquiry.

Given that the Eighth Amendment’s words “cruel” and “unusual” seem to invite this kind of comparative examination, the plurality’s mention of alternative methods is unsurprising and appropriate. What is more noteworthy, however, is how the Chief Justice addressed the remedial issues. Given the gaps in the record and particular safeguards adopted by Kentucky, the plurality easily concluded that “the risks identified by petitioners are [not] so substantial or imminent as to amount to an Eighth Amendment violation.” Having found that the plaintiff failed to satisfy the first “substantial risk” prong of the standard, the plurality could have ended the case or merely articulated the second prong—the showing of a significantly better alternative. But not only did the plurality require this second prong, it explained at length why a rigorous remedial showing was essential. Specifically, the plurality argued that the finding of “an Eighth Amendment violation” without the showing of a significantly better alternative procedure “would threaten to transform courts into boards of inquiry charged with determining ‘best practices’ for executions, with each rul-


121. Baze v. Rees, 128 S. Ct. 1520, 1532 (2008) (plurality opinion); see supra notes 75-78 and accompanying text (summarizing the plurality’s two-prong standard).

122. See supra notes 110-111 and accompanying text.

123. In addition to implementing the Eighth Amendment’s comparative inquiry, the plurality’s requirement that the plaintiff proffer an alternative method also guards against disingenuous plaintiffs who challenge the current method with every intention of challenging any replacement method, no matter how safe. It is appropriate for courts to guard against such disingenuous litigation. However, to the extent these concerns seem to drive the plurality’s approach, the plurality seems not to trust lower courts’ abilities to distinguish between genuine actions challenging dangerous procedures from disingenuous ones challenging safe procedures. See infra notes 195-196 and accompanying text.

124. Baze, 128 S. Ct. at 1534 (plurality opinion).
ing supplanted by another round of litigation touting a new and improved methodology.125

The plurality thus tied the Eighth Amendment standard to remedial issues in different ways. First, the plurality insisted that the plaintiff must proffer an alternative method of execution that is more than “slightly or marginally safer” than the current method.126 It then rejected the Kentucky plaintiffs’ suit, because their affirmative case lacked that remedial presentation.127 Regardless of the safety of the Kentucky procedure, then, the plaintiffs would have lost for failing to present a remedial showing that, prior to Baze, had not been clearly required. The plaintiffs, however, had suggested alternative approaches in the proceedings below and had extensively developed the one-drug protocol’s advantages in their Supreme Court brief.128 The plurality ignored the one-drug proposal, finding that it had not been adequately developed in the lower courts.129 It is understandable that the plurality did not want to adopt a remedy on which there were only limited trial court findings, but it then proceeded to denigrate that same remedy’s viability.130 It thus made it harder for future plaintiffs to propose that remedy. In other words, the plurality used the absence of trial court factual findings on the plaintiff’s proposed remedy to dismiss the claim on the merits. It then sought to discredit that same remedial proposal, despite the inadequacy of the record below and extensive expert testimony in other cases that its advantages are significant.131

Second, the plurality warned that finding for plaintiff would force courts to issue a remedy requiring that the state replace its old method with the safest method available—that is, with the “best practice.”132 In other words, the plural-

125. Id. at 1531.
126. Id.
127. Id. at 1534.
128. See Petitioners’ Brief at 51-57, Baze 128 S. Ct. 1520 (No. 07-5439) (explaining the merits of the one-drug protocol).
129. Baze, 128 S. Ct. at 1534-35 & n.4.
130. See id. at 1535-36 (raising concerns about one-drug alternative); id. at 1538 (concluding with the observation that the one-drug alternative “has problems of its own”). But see infra Subsection IV.A.1 (explaining why the one-drug protocol remains viable after Baze).
131. See infra note 286 and accompanying text. The point is not that the plurality should have drawn different conclusions about the one-drug protocol, but that it should not have suggested that it had “problems of its own,” given the absence of “any findings” about it. See Baze, 128 S. Ct. at 1534, 1538. A more appropriate disposition would have been either to dispose of the case without the lengthy remedial inquiry or to remand for further factfinding, especially given that the plaintiff prior to Baze did not know that the Eighth Amendment standard required a remedial showing as part of the affirmative case. See id. at 1572 (Ginsburg, J., dissenting) (“I would therefore remand.”).
132. Baze, 128 S. Ct. at 1531 (plurality opinion).
ity feared that whenever a court struck down a lethal injection procedure, it would have had to “intrude on the role of state legislatures in implementing” the safest possible replacement procedure. To drive home the point, the Chief Justice cited Bell v. Wolfish, in which the Court reversed a structural injunction in a prison conditions case, thus reiterating that the “wide range of ‘judgment calls’ that meet constitutional and statutory requirements are confided to officials outside of the Judicial Branch of Government.” The plurality, therefore, emphasized that executive and legislative officials, not judges, should design states’ lethal injection procedures. Allowing lower courts to require the state to adopt the “best practice” (and then allowing them to do so repeatedly, as the “best practice” changed) would shift too much authority from the political branches to the judiciary.

Here the plurality once again contracted the Eighth Amendment right by drawing false assumptions about remedial issues. Contrary to the plurality’s arguments, the finding that a lethal injection procedure created a significant or unnecessary risk of pain would not require the state to institute the “best practice.” Of course, the “best practice” alternative would be one remedial option, but a court could also require that the state merely find a better, rather than the best, practice. The district court recognized this possibility in Morales when it offered the state two remedial options. The court did not care which remedy was best because both would have significantly reduced the risks posed by the status quo and almost certainly resulted in painless executions. Thus, even if a court decided that the risks of the three-drug protocol amounted to a constitutional violation, that court, even before Baze, need not have required the “best practice.” For example, if another alternative would significantly reduce the risk of pain (but not by as much as the best practice), a court may well be justified in requiring that other alternative, particularly if it were comparatively inexpensive, unintrusive, and easy to implement. Similarly, courts could issue a negative injunction allowing a state to craft its own remedy. In fact, contrary to the plurality’s representations, the petitioners never argued that they were entitled to a “best practice” remedy. Instead, they merely contended that the one-drug alternative was readily available and significantly preferable to the three-drug approach.

133. Id.
134. Id. at 1531-32 (quoting Bell v. Wolfish, 441 U.S. 520, 562 (1979)).
135. See infra Section IV.A.
137. See infra Subsection IV.A.2.
138. See generally Petitioners’ Brief at 51-59, Baze (No. 07-5439) (arguing that the adoption of “available alternatives” could reasonably prevent the risk of pain).
139. See Reply Brief for Petitioners at 19, Baze (No. 07-5439) (contending that a properly administered single dose of a barbiturate is “both lethal and far less dangerous than the three-drug” protocol).
Relatedly, the three-Judge plurality also emphasized that the “best practices” remedy would “embroil the courts in ongoing scientific controversies beyond their expertise,” thus “substantially intrud[ing] on the role of state legislatures in implementing their execution procedures.” These contentions are misplaced because the political branches have demonstrated no scientific understanding that courts lack and because many state legislatures have played virtually no role in designing execution procedures. It is worth emphasizing here that these arguments suggest that courts lack the institutional competence to consider a remedy at all. Concluding that it would be “substantially” intrusive for courts to entertain such remedial issues, the plurality then reasoned backwards that the Eighth Amendment standards proposed by the petitioner and dissent were improper and that a narrower legal standard was preferable.

In reality, neither the petitioner’s nor the dissent’s standards would have “substantially intrude[d] on the role of state legislatures” or required courts to impose a “best practice.”

What is perhaps most striking about the plurality’s approach is that this articulation of a difficult legal standard was unnecessary to the resolution of Baze itself. Baze was an easy case on the merits. Nevertheless, driven by its concern that courts in other cases not become “best-practices” boards of inquiry, the plurality chose not merely to affirm the lower court on the case’s limited record but also to articulate a legal standard that raised the bar for future lethal injection plaintiffs. By going further than it needed to in deciding this case, the plurality highlighted the extent to which it was uncomfortable with any court intruding on states’ prerogatives to design their own procedures.

2. Remedial Concerns in Other Lethal Injection Cases

Lower courts addressing these issues pre-Baze also allow a distorted view of the remedial issues to shape their approaches to the cases. This approach is most justifiable when a court actually finds serious problems with a procedure and therefore engages in a direct discussion of potential remedies. After all, courts imposing remedies on states ought to consider the impact those remedies will have and whether they might create new problems. The Northern District of California explored remedial issues in two different opinions in the

140. Baze, 128 S. Ct. at 1531 (plurality opinion).
141. See infra Section IV.B.
142. See Baze, 128 S. Ct. at 1531-32 (plurality opinion) (“Accordingly, we reject petitioners’ proposed ‘unnecessary risk’ standard, as well as the dissent’s ‘untoward’ risk variation.”); supra Section I.B (discussing the Baze plurality’s standard).
143. Baze, 128 S. Ct. at 1531 (plurality opinion).
144. See id. at 1569 (Ginsburg, J., dissenting) (agreeing with the plurality that proof of a slightly safer alternative is insufficient and arguing that the standard should ask whether “readily available measures can materially” reduce the risk of pain); infra Part IV.
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Morales case. Both times it warned against judicial encroachment and indicated that the dangers of the procedure could be addressed without placing an undue burden on the state. In his first order, Judge Fogel permitted California to proceed with its execution of Michael Morales provided that it either execute him with a dose of a single barbiturate or agree to allow a trained medical professional in anesthesiology to monitor the inmate’s consciousness before the delivery of the pancuronium and potassium chloride.\(^{145}\) California chose the latter option and secured the participation of two anesthesiologists.\(^{146}\)

Even as he required the state to change its practices, Judge Fogel took great pains to find a solution that would “place a substantially lesser burden on the State’s strong interest in proceeding” with the execution.\(^{147}\) Indeed, the district court explained that “under the doctrines of comity and separation of powers, the particulars of California’s lethal-injection protocol are and should remain the province of the State’s executive branch.”\(^{148}\) Morales is often cited as one of the few successful lethal injection challenges, but in fact, the court went to significant lengths to let the state carry out its sentence. It both declined to stay the execution and deliberately “fashioned a remedy that was intended to permit Defendants to proceed with Plaintiff’s execution as scheduled.”\(^{149}\)

When the issue returned to him, Judge Fogel once again found serious problems with California’s procedure.\(^{150}\) But instead of formally finding a violation and imposing a remedy, he “respectfully suggest[ed] that Defendants conduct a thorough review of the lethal-injection protocol.”\(^{151}\) He continued:

Because California’s next execution is unlikely to occur until the latter part of this year, the State presently is in a particularly good position to address these issues and put them to rest . . . . [U]nder the doctrines of comity and separation of powers, the particulars of California’s lethal-injection protocol are and should remain the province of the State’s executive branch. A proactive approach by Defendants would go a long


\(^{146}\) The anesthesiologists subsequently balked when they realized what was being asked of them, and the State was unable to carry out its execution. Morales v. Tilton, 465 F. Supp. 2d 972, 976-77 (N.D. Cal. 2006).

\(^{147}\) Morales I, 415 F. Supp. 2d at 1047.

\(^{148}\) Id. at 1046.

\(^{149}\) Morales II, 465 F. Supp. 2d at 975 (discussing Morales I); see also Taylor v. Crawford, No. 05-4173, slip op. at 1 (W.D. Mo. July 25, 2006) (explaining that an injunction against the State “was never intended to unreasonably delay Missouri’s execution of death row inmates”).

\(^{150}\) See Morales II, 465 F. Supp. 2d at 982 (explaining that the Court was “prepared to issue formal findings of fact and conclusions of law with respect to the deficiencies in the administration of California’s current lethal-injection protocol that have been brought to light in this case” but not doing so yet).

\(^{151}\) Id. at 975 (quoting Morales I, 415 F. Supp. 2d at 1046).
way toward maintaining judicial and public confidence in the integrity and effectiveness of the protocol.\textsuperscript{152}

So powerful was the court’s sense of judicial restraint that it allowed the state to proceed with executions on its own schedule. Indeed, Judge Fogel assured the state that “despite its critical assessment of Defendants’ performance to date, this Court has no intention of interfering with or delaying California’s implementation of a constitutional execution protocol. California’s voters and legislature repeatedly have expressed their support for capital punishment. This case thus presents an important opportunity for executive leadership.”\textsuperscript{153}

Writing about his ruling later, Judge Fogel reiterated, “[n]owhere in the Memorandum did I order, nor have I ever ordered, that the state take any specific remedial measure.”\textsuperscript{154}

At least Judge Fogel’s approach acknowledged the California procedure’s flaws.\textsuperscript{155} By contrast, other courts relying on similar remedial concerns have not only failed to find fault with their states’ procedures but also articulated legal standards higher than necessary to resolve the given case. In rejecting a plaintiff’s lethal injection claim, in \textit{Emmett v. Johnson}, the Eastern District of Virginia, for example, stated that “it is not the office of a federal court to dictate to the Commonwealth of Virginia the precise methodology it should employ in carrying out a lawful death sentence.”\textsuperscript{156} Accordingly, it was up to the Virginia General Assembly—not a court—to determine “[w]hether or not the procedure used should conform to prevailing medical standards of care, or whether there is a more humane execution procedure.”\textsuperscript{157}

One might think that to determine whether a constitutional violation has occurred, one should look at the facts and legal standard, while concerns about “dictating” a methodology to state government figure more heavily at the remedial stage. But the court used this deferential language to reject the plaintiff’s claim on the merits, as though merely considering the procedure’s constitutionality was just too meddlesome.\textsuperscript{158} Indeed, the court argued that the plaintiff had offered an “expansive interpretation” of the Eighth Amendment by arguing that the execution team’s training and qualifications were inadequate.\textsuperscript{159} The

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\item \textsuperscript{152} \textit{Id.} at 975-76 (quoting \textit{Morales I}, 415 F. Supp. 2d at 1046-47).
\item \textsuperscript{153} \textit{Id.} at 981-82.
\item \textsuperscript{155} \textit{Morales II}, 465 F. Supp. 2d at 978-81.
\item \textsuperscript{156} Emmett v. Johnson, 511 F. Supp. 2d 634, 639 (E.D. Va. 2007), aff’d, 532 F.3d 291 (4th Cir. 2008).
\item \textsuperscript{157} \textit{Id.}
\item \textsuperscript{158} Cf. Younger v. Harris, 401 U.S. 37, 41 (1971) (citing comity concerns and declining to interfere in state judicial proceedings).
\item \textsuperscript{159} \textit{Emmett}, 511 F. Supp. 2d at 641.
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plaintiff, of course, had good reason to link the safety of the procedure to the competence of the execution team members, but, from the court’s perspective, a ruling for the plaintiff would require the state to hire professionals with medical training, and this remedy was just too much to ask of Virginia.\(^\text{160}\)

The outcome in this case may well be correct; the Emmett plaintiffs arguably failed to present enough evidence for a court to find a violation. Nevertheless, the court’s articulated concerns reflected less about the evidence presented and more about its own remedial anxieties. In emphasizing these concerns, the court, much like the Supreme Court in Baze, created an onerous Eighth Amendment standard that was unnecessary for the resolution of the instant case.\(^\text{161}\)

Remedial concerns have also prompted some courts to backtrack on rulings finding serious constitutional problems. In North Carolina, a federal district court identified serious problems with the lethal injection procedure and conditioned the next execution on a qualified medical professional’s monitoring of anesthetic depth.\(^\text{162}\) The state responded instead by proposing a revised protocol using a bispectral index (BIS) monitor, a machine that some anesthesiologists use to help monitor a patient’s anesthetic depth.\(^\text{163}\) The plaintiff presented extensive, virtually unrebutted evidence that, although a BIS monitor may be helpful in assessing the effectiveness of anesthesia, it is not suitable as the sole indicator of level of consciousness.\(^\text{164}\) The district court, however, did not stand by its initial order. In “clarify[ying]” its ruling, the court did not alter its original findings that the state’s procedure was flawed but instead emphasized that the inclusion of an anesthesiologist to monitor anesthetic depth was just too burdensome.\(^\text{165}\) A BIS monitor, the court decided, cured the procedure’s flaws. In other words, the court decided that the remedy it had initially imposed asked too much of the state, even though it had not analyzed whether procuring

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160. See id. (arguing that the Eighth Amendment does not require that the execution team consist of medical professionals).

161. Id. at 642 (explaining that it would be too intrusive to require the States to observe “medical norms”).

162. See Brown v. Beck, No. 06-3018, 2006 WL 3914717, at *8 (E.D.N.C. Apr. 7, 2006) (permitting execution to proceed “on the condition that there are present and accessible to Plaintiff throughout the execution personnel with sufficient medical training to ensure Plaintiff is in all respects unconscious prior to and at the time of the administration” of the lethal drugs).

163. See, e.g., David E. Longnecker et al., Anesthesiology 85 (2007).

164. Brown v. Beck, 445 F.3d 752, 754-55 (4th Cir. 2006) (Michael, J., dissenting) (recounting extensive evidence that the use of a BIS monitor in isolation is inappropriate and that the State had offered “scant evidence” to rebut plaintiff’s compelling proffer).

165. See Brown v. Beck, No. 06-3018, slip op. at 4-5 (E.D.N.C. Apr. 17, 2006) (accusing plaintiff of trying to “force a conflict of medical ethics” and accepting the State’s proposed remedy instead of the court’s initial order).
the services of an anesthesiologist would, in fact, be difficult. Instead, it accepted a manifestly inferior remedy that, on its own, did not correct the dangers the court itself had identified.

Even though federalism concerns are heightened when federal courts review state procedures, such remedial anxieties are not limited to federal courts reviewing state execution procedures. Like the North Carolina district court in Beck, a Florida state court issued a remedy against the state only to change its mind. The lower court initially expressed concern that Florida’s revised lethal injection procedure did not “adequately address the events that took place during the Diaz execution.” The court ordered the state to revise its lethal injection procedures in numerous ways, such as improving training, including contingency plans, and periodically reviewing DOC procedures. When Florida objected and submitted a protocol with only superficial revisions, the court backed down and approved it. Indeed, the court backtracked on its initial factual assertions and denied that the Diaz execution had been botched, notwithstanding its previous ruling that the state had not adequately addressed the problems that had arisen during that execution. As in Beck, the court did not explain why the state’s minor revisions obviated the need for the remedy the court had initially ordered. Yet, by accepting the state’s suggested remedy and abandoning its own initial order, the court effectively limited the value of the Eighth Amendment right.

In affirming, the Florida Supreme Court emphasized the burden any court ordered remedy would impose. Rejecting the plaintiff’s argument that Florida’s training of personnel was inadequate, the court stated that its “role is not to micromanage the executive branch in fulfilling its own duties relating to executions.” Lest the court be tempted to supplant the political branches’ judgment with its own, it adopted a “presumption of deference” that “the methodology and the chemicals to be used are matters best left to the Department of Corrections.” In other words, remedial concerns were so powerful that the court presumptively deferred to the DOC without any evidence about the execution protocol itself. Such language indicated to future courts that judicial involvement in this area is presumptively illegitimate and that even future claims with more compelling evidence of serious risks and viable alternatives should be similarly dismissed.

Federal appellate courts also sometimes focus on remedial issues. After holding Missouri’s procedure unconstitutional, the district court in Taylor required that the state employ an anesthesiologist to monitor the inmate’s anes-
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The theory was that an anesthesiologist would know if an inmate has been sufficiently anesthetized before the administration of the pancuronium and potassium, thus protecting him from errors that might occur during the procedure. In imposing this remedy, the district court was not claiming that the Eighth Amendment always required the participation of an anesthesiologist. Instead, it reasoned that the state's haphazard approach to lethal injection created a significant risk of excruciating pain and that the inclusion of a trained professional was a reasonable requirement to protect the inmate from pain, especially given the misadventures of Dr. Doerhoff and the other unqualified, untrained team members. The remedy arose not directly from the Eighth Amendment but from the court's remedial discretion, which was triggered by particular facts giving rise to the constitutional violation.

The Eighth Circuit reversed, emphasizing the state's “broad discretion” to design execution procedures. Executions, the Eighth Circuit reminded the district court, are not medical procedures, and “no State can carry out an execution in the same manner that a hospital monitors an operation.” Thus, the Eighth Circuit explained, the requirement that Missouri use an anesthesiologist during its executions went far beyond what the Constitution required.

In emphasizing that the Constitution did not require the remedy imposed by the district court, the Eighth Circuit was stating a correct proposition of constitutional law, but it was also ignoring the applicable standard of review and the district court’s reasoning. In the Eighth Circuit and elsewhere, remedies imposed by trial courts are reviewed for an abuse of discretion, a standard of review the court of appeals did not mention once. In opting not to cite or follow the applicable standard of review, the Eighth Circuit not only indicated its determination to reverse the district court but also missed the point. Remedies imposed to correct constitutional violations are rarely constitutionally required in the abstract. To the contrary, trial courts exercise discretion to fashion

173. Id. at *7-8.
175. Id. at 1084 (citation omitted) (internal quotation marks omitted).
176. Id.; see also Workman v. Bredesen, 486 F.3d 896, 910 (6th Cir. 2007) (stating that the Constitution does not require the State to hire an anesthesiologist for each execution); McKenzie, 57 F.3d at 1469 (“[W]e are aware of no authority for the proposition that the prisoner is entitled, for example, to have a lethal injection administered by a physician.”); Hamilton v. Jones, 472 F.3d 814, 816 (10th Cir. 2007) (same).
remedies based on the nature of the violation. In other words, the anesthesiologist requirement might be inappropriate in a different state with different facts, but the district court determined that it made sense in Missouri. The Eighth Circuit ignored this argument, focusing instead on the correct but legally irrelevant proposition that the district court’s chosen remedy was not constitutionally required.

Interestingly, the Eighth Circuit transitioned from its rejection of the remedy to its factual conclusion that “Mr. Taylor has not adduced evidence at any stage of this litigation that carries his burden of proving a constitutional violation.” In reaching this conclusion, the Eighth Circuit nowhere explained why it found the district court’s factual conclusions unconvincing and again evaded the standard of review. Indeed, after perfunctorily citing in its introduction the “clear error” standard for a district court’s factual findings after a bench trial, the Eighth Circuit did not refer to it again. Instead, it leapt from its discussion of the district court’s remedy immediately to its single-paragraph announcement that the district court’s factual findings were wrong and that there was therefore no Eighth Amendment violation. This cursory discussion, however, ignored the district court’s actual findings, particularly its extensive analysis of the dangers posed by Dr. Doerhoff and his unqualified execution team. The court of appeals, thus, reversed the lower court by glossing over the very facts that had given rise to a violation.

This is questionable legal analysis, but it is also instructive, because it illustrates the extent to which remedial concerns inform courts’ rulings on the constitutional right. In this regard, the Eighth Circuit’s approach is hardly unusual. The Eighth Circuit felt that the remedy imposed by the district court was too burdensome on the state, and its discussion of the remedy necessarily colored its view of the right itself. Its leap from remedy to right may have been inart-

178. See, e.g., Hutto v. Finney, 437 U.S. 678, 686-87 (1978) (emphasizing that the district court has “ample authority” to fashion remedies based on the “severity” of established violations); Swann, 402 U.S. at 15 (“Once a right and a violation have been shown, the scope of a district court’s equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies.”).

179. Taylor, 487 F.3d at 1085.


181. The court focused instead on the written protocol’s vague assurance of a qualified team, even though the State never indicated it was adding qualified personnel to the team the lower court had already deemed unqualified. See Taylor, 487 F.3d at 1082-85 (arguing that the “written protocol” does not present unconstitutional risk of pain but ignoring facts about Missouri’s execution team).

182. Cf. Rutherford v. McDonough, 466 F.3d 970, 974 (11th Cir. 2006) (“[F]ederal courts considering equitable relief must be sensitive to the State’s strong interest in enforcing its criminal judgments without undue interference from the federal courts . . . .”) (quoting Hill v. McDonough, 547 U.S. 573, 584 (2006))).
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ful, but its conflation of the two was nothing extraordinary, sharply limiting the value of the Eighth Amendment in practice, without actually claiming to eviscerate the right. In short, “the threat of undesirable remedial consequences motivate[d] [the] court[] to construct the right in such a way as to avoid those consequences.”

3. Concerns About Delay

Closely related to remedies is the problem of delay. Sometimes § 1983 actions challenging the method of execution force a stay delaying the date of execution while the court hears the case. Courts are usually extremely sensitive to this concern. Telling the state to wait to carry out its sentence seems almost as invasive as ordering it to reform its institutional practices. Similarly, just as a court draws on its equitable powers in crafting a remedy, so too do equitable concerns guide its decision of whether or not to issue a stay delaying an execution. Predictably, then, just as courts are reluctant to exercise their equitable powers to impose a remedy telling states what to do, they are also cautious about issuing any order interfering with the expeditious execution of a death sentence.

Courts, though, are not precise about exactly what—the lawsuit itself, the contemplated remedy, or something else—would trigger the delay. Some suggest that merely permitting the litigation to go forward is itself a form of relief. These courts assume that the litigation’s sole or primary goal is to prolong the inmate’s life—particularly when the suit has been filed relatively soon before a scheduled execution—and they dismiss the case accordingly.

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183. Levinson, supra note 117, at 885.
187. See, e.g., Thompson v. Wainwright, 714 F.2d 1495, 1506 (11th Cir. 1983) (“Each delay, for its span, is a commutation of a death sentence to one of imprisonment.”).
188. See, e.g., Berry v. Epps, 506 F.3d 402, 404 (5th Cir. 2007) (“Our precedent requires the dismissal of ‘eleventh hour’ dilatory claims . . . .”); Grayson v. Allen, 491 F.3d
dismissal can effectively make it impossible for inmates to protect themselves against dangerous execution methods. It is true that these suits can cause delay, but death row inmates cannot realistically challenge their method of execution far in advance. Indeed, when inmates have tried to do so, the state has argued persuasively that such early challenges should be dismissed as unripe, because the state may change its own protocol before the plaintiff’s execution date.189 Plaintiffs thus confront a catch-22: early claims can be dismissed as unripe, later claims as dilatory.

Delay does impose costs on states, both financial (resulting primarily from renewed litigation) and political (resulting from the inability to execute a lawfully-imposed sentence). Given these costs, it is understandable that courts weigh delay when determining whether to grant relief, especially when inmates file claims just weeks or even hours before their scheduled executions. Nevertheless, courts often assume that these claims are disingenuous and treat them as though their sole or primary purpose is to delay. While this assumption may sometimes be correct, some courts seem to assume this motive before they look closely at the evidence. As a result, courts sometimes over-emphasize the significance of delay, treating it like a decisive factor rather than one cost to be

1318, 1326 (11th Cir. 2007) ("If Grayson truly had intended to challenge Alabama’s lethal injection protocol, he would not have deliberately waited to file suit until a decision on the merits would be impossible without entry of a stay or an expedited litigation schedule."); Harris v. Johnson, 376 F.3d 414, 418 (5th Cir. 2004) ("By waiting as long as he did, Harris leaves little doubt that the real purpose behind his claim is to seek a delay of his execution . . .").

There is some truth to the view that such litigation is sometimes a delaying tactic, but many lethal injection claims are brought by lawyers who are genuinely concerned about the protocols and appalled that the States have taken so few measures to understand or improve their methods. Indeed, the fact that several law firms have chosen to enter these cases in recent years lends credence to this position; law firms have little interest in expending valuable pro bono resources by pursuing delay for the sake of delay.

189. See Alley v. Little, 452 F.3d 621, 625 (6th Cir. 2006) (Martin, J., dissenting) ("Had [plaintiff] attempted to challenge his method of execution before the method had been chosen, or before he had even been presented with the choice under the State’s procedure, his challenge would clearly have faced issues of ripeness."); Worthington v. State, 166 S.W.3d 566, 583 n.3 (Mo. 2005) (finding that, because “it is unknown what method, if any, of lethal injection may be utilized by the State . . . [when] execution date and method are set, it is premature for this Court to consider whether a particular method of lethal injection violates the Eighth Amendment”); Gallo v. State, 239 S.W.3d 757, 780 (Tex. Crim. App. 2007) (holding that a lethal-injection challenge was not “ripe,” because there was no execution date and the “method in which lethal injection is currently administered is not determinative of the way it will be administered at the moment of appellant’s execution”); cf. Fed. R. Civ. P. 11(b)(3) (requiring that factual contentions have likely evidentiary support); Defs’ 11/8/2006 Motion To Strike, United States v. Higgs (D. Md. 2006) (No. 98-0520) (U.S. government arguing that plaintiff’s method-of-execution challenge was unripe because execution was not imminent).
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weighed equitably.\textsuperscript{190} To the extent that delay sometimes obstructs a court from ever considering the merits of a constitutional claim, this outcome is troubling: it is odd to think that such equitable concerns should necessarily trump constitutional ones. However, when courts dismiss lethal injection claims because of the delay they create without examining the extent of or reason for the delay or the potential merits of the action, they subordinate the Eighth Amendment right to non-constitutional equities. In so doing, courts dismiss potentially meritorious claims with barely a glance at the relevant facts and law.\textsuperscript{191}

Similarly, courts’ instinct to blame the plaintiff for any delay ignores the extent to which fault often lies with the state.\textsuperscript{192} As Justice Stevens pointed out, “[s]tates wishing to decrease the risk that future litigation will delay executions . . . would do well to reconsider their continued use of pancuronium bromide.”\textsuperscript{193} Stevens’s advice stems from the fact that, without the paralytic, it would be much easier to determine during an execution whether inmates were suffering pain. Pancuronium makes it probable that problems during an execution will go undetected. Without it, states could win these cases much more quickly by pointing to apparently peaceful executions as indication of unproblematic procedures.

Indeed, as Judge Fogel summarized, were states’ main objective to resume executions, “their unwillingness to see the situation for what it is and to be proactive is self-defeating.”\textsuperscript{194} Basic protocol changes would have avoided much litigation. The one-drug protocol, for example, is painless and therefore comparatively immune from a colorable Eighth Amendment challenge and its ac-

\textsuperscript{190} See, e.g., Berry, 506 F.3d at 404 (requiring dismissal for “eleventh hour” claim regardless of the merits or reasons for delay).

\textsuperscript{191} It is true that equitable concerns frequently guide courts’ approaches to cases (constitutional or otherwise), so it is understandable and appropriate that concerns about delay would be part of courts’ calculus and would even be decisive in the case of some last-minute actions. It is harder to understand, though, why an equitable factor like delay should receive so much weight that constitutional claims are treated sometimes as presumptively bogus, even in cases where the suit was not filed at the last minute or could not have been filed earlier, such as when an inmate challenges a recently adopted or revised execution procedure. See Lightbourne v. McCollum, 969 So. 2d 326, 328 n.2, 352 (Fla. 2007) (adopting the presumption that lethal injection claims are invalid in a case with no outstanding death warrant challenging Florida’s procedure after the State implemented changes to its execution protocol following the botched Diaz execution).

\textsuperscript{192} See, e.g., Cooey v. Taft, No. 2:04-cv-1156, 2007 WL 2607583, at *4 (S.D. Ohio Sept. 5, 2007) (“Any argument that the granting of an injunction would harm the State’s interest in fulfilling the judgment . . . in a timely manner is somewhat disingenuous, considering that but for the State’s interlocutory appeal, many if not all of the underlying issues would in all likelihood have been resolved by now.”).


companying delays.\textsuperscript{195} Death row inmates could, of course, challenge even this procedure, but such suits would probably be dismissed quickly. A bogus challenge to a painless procedure would take much less time than a serious challenge to the far more complicated and dangerous three-drug procedure.\textsuperscript{196} Many courts, however, seem to fear that, were they to intervene, they would be blamed for stopping executions.\textsuperscript{197} They therefore treat any delay as an unacceptable interference in state affairs, akin to constitutional remedies stipulating the specific allocation of state resources. In so doing, they implicitly limit the practical value of the underlying constitutional right.

\textbf{B. The Structural Injunction’s Shadow over Lethal Injection}

To make sense of why remedial concerns have so influenced courts in these cases, it is helpful to situate them in the broader context of public law litigation. Many judges today are acutely sensitive to accusations that courts tread too heavily on the democratic branches. This sensitivity is, in part, a result of a backlash against what has been seen as excessive judicial intervention in structural reform litigation and also a reflection of more restrained judicial values generally.

The structural reform suit is “one in which a judge, confronting a state bureaucracy over values of constitutional dimension, undertakes to restructure the organization to eliminate a threat to those values posed by the present institutional arrangements.”\textsuperscript{198} Structural reform litigation, then, often seeks to revamp the practices of large state bureaucracies. School desegregation and prison conditions actions are archetypal structural reform cases.\textsuperscript{199}

Lethal injection cases are not structural reform suits, and most courts do not say that they are. (Most courts do not reach the remedial stage of lethal injection litigation, so they are also not terribly precise about exactly how remedial concerns affect their decision-making.) There are, nevertheless, features of lethal injection actions that bring to mind courts’ concerns in more

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\item 195. Even skeptics of the one-drug protocol do not allege that it causes pain. See, e.g., \textit{Baze}, 128 S. Ct. at 1541 (Alito, J., concurring) (raising concerns about the one-drug protocol, but not that it causes pain); \textit{infra} notes 313-314 and accompanying text.
\item 196. See \textit{infra} Subsection IV.A.1 (discussing the one-drug alternative).
\item 197. See \textit{McNair v. Allen}, 515 F.3d 1168, 1172 (11th Cir. 2008) (“The Supreme Court has repeatedly admonished courts regarding their obligation to guard against litigation brought solely for the purpose of delay.”); \textit{Emmet v. Johnson}, 489 F. Supp. 2d 543, 551-52 (E.D. Va. 2007) (“To unsettle these expectations [in timely disposition of sentences] is to inflict a profound injury to the powerful and legitimate interest in punishing the guilty . . . .” (quoting \textit{Calderon v. Thompson}, 523 U.S. 538, 556 (1998)) (internal quotations and citations omitted)).
\item 199. See John C. Jeffries, Jr. et al., \textit{Civil Rights Actions: Enforcing the Constitution} 849-51 (2d ed. 2007).
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sweeping structural reform actions. For example, executions take place in prisons, a context in which courts usually are especially deferential because institutional security should be left to prison officials, not unknowledgeable judges. Additionally, the scientific and medical angle of lethal injection is far outside judges’ expertise. Although structural reform cases do not necessarily implicate scientific issues, they frequently do involve complicated policy determinations that, like scientific inquiries, are deemed beyond judicial expertise. There is also the aforementioned concern that the litigation will delay executions, thus interfering with the state’s substantive and democratic decision to have the death penalty. Furthermore, like much structural reform litigation, many lethal injection actions have multiple plaintiffs since all death row inmates in a state are affected by the litigation.

Some inmates have sought to intervene in ongoing lethal injection cases, while others have even banded together to file a class action.

200. See, e.g., Rhodes v. Chapman, 452 U.S. 337, 362 (1981) (“[C]ourts have been especially deferential to prison authorities in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security.”) (internal quotation marks omitted); Bell v. Wolfish, 441 U.S. 520, 547 (1979) (same); Procunier v. Martinez, 416 U.S. 396, 404-05 (1974) (“[F]ederal courts have adopted a broad hands-off attitude towards problems of prison administration . . . . [T]he problems of prisons in America are complex and intractable, and, more to the point, they are not readily susceptible of resolution by decree. Most require expertise, comprehensive planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government.”).


204. See, e.g., Clemons v. Crawford, No. 07-4129, slip op. at 1 (W.D. Mo. Sept. 4, 2007) (granting motion to intervene).

205. See Jackson v. Danberg, 240 F.R.D. 145, 147-49 (D. Del. 2007) (granting plaintiffs’ motion to be certified as a class action for their lethal injection suit); see also 2 Dan B. Dobbs, THE LAW OF REMEDIES: DAMAGES, EQUITY, RESTITUTION 350 (2d ed. 1993) (describing structural reform cases as tending to involve more parties).
Finally, and most importantly, lethal injection litigation, like structural injunction suits, seeks to reform the way a state carries out its duties and thus intrudes on the state’s policy-making prerogative. These cases implicate personnel, training, drugs, architecture, drug administration apparatuses, monitoring, recordkeeping, and contingency plans. Given lethal injection’s complicated design, some courts finding problems have retained jurisdiction to ensure compliance, a tactic commonly employed by courts in structural reform actions. To this extent, lethal injection suits implicate structural concerns, seeking to revise the very structures and processes by which the state carries out the death penalty. Thus, even though courts rarely suggest that lethal injection actions are a form of structural reform litigation, the judiciary’s general reluctance to impose structural injunctions in recent decades likely plays into its similar remedial anxieties in lethal injection cases. Indeed, as concerns about judicial involvement in public affairs have increased, there has been an increased tendency to regard with suspicion any constitutional remedy against the state.

This increased suspicion grows out of the large scope of many structural reform cases. The typical structural injunction case seeks to remedy alleged constitutional violations by reforming the everyday workings of large public institutions such as schools, prisons, or mental health hospitals. As then-Professor Fletcher explains, this litigation tends to be sprawling with many parties, and the finding of a constitutional violation is usually only a prelude to a prolonged, complicated process of devising an order directing the state to reform its institutions. Sometimes these remedial decrees are extremely detailed and stipulate, for example, the precise staffing ratios or types and quantities of food to be served in a prison. It is then easy to see why judicial involvement would at-

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206. See 2 Dobbs, supra note 205, at 349 (describing structural injunction cases as civil rights cases in which the plaintiffs attempt to halt wrongful practices by reforming social institutions).

207. See Taylor v. Crawford, No. 05-4173, 2006 WL 1779035, at *9 (W.D. Mo. June 26, 2006) ("The Court will retain jurisdiction over the State’s implementation of the lethal injection protocol for the next six executions or until the Court is satisfied that the protocol is being administered in a consistent fashion."); Morales v. Tilton, 465 F. Supp. 2d 972, 984 (N.D. Cal. 2006) (ordering California to advise the court within thirty days how long it will take to review and revise execution protocol); see also 2 Dobbs, supra note 205, at 350 (noting that structural injunctions often involve ongoing judicial administration).

208. See Poser, supra note 109, at 298 ("[T]hose who contend that courts should not be involved in institutional reform litigation, whether for capacity or legitimacy reasons, focus on the remedial phase of the litigation, as this is where judicial involvement strays from its traditional role.").

209. Fletcher, supra note 202, at 636.

210. Id. at 638.

211. Id. at 659.
tract criticism; such decrees intrude greatly into the daily operations of a public institution and judges have little to guide them beyond their own intuition with respect to such operations. This role moves the judge “far beyond the normal competence and authority of a judicial officer, into an arena where legal aspirations, bureaucratic possibilities, and political constraints converge, and where ordinary legal rules frequently are inapplicable.”

Unsurprisingly, then, by the late 1970s, many scholars, politicians, and judges began openly questioning whether decrees of this nature were within the scope of legitimate judicial power. Considered especially problematic was judicial intervention in “polycentric” problems, which are “complex problem[s] with a number of subsidiary problem centers, each of which is related to the others, such that the solution to each depends on the solution to all the others.” Polycentric problems often involve non-legal elements with consequences that extend far beyond the litigation and reach thousands of people. For example, litigation challenging the constitutionality of state prison conditions presumably seeks a judicial order requiring improvements to the prison system. But improvements cost money, and additional money spent on prisons necessarily siphons off money that might otherwise be spent elsewhere. Such judicial involvement is problematic in part because judges’ remedial decrees usually are guided by their sense of how to remedy the constitutional wrong, not by other non-legal problems that might arise from the imposition of a particular remedy. Even if sensitive to these concerns, a judge is unlikely to account for all of the different interests and expenses. That task is better left to the political branches, which, after all, manage the budget not just for prisons but for all social institutions.

There are, thus, good reasons for courts to exercise restraint issuing institutional decrees, and judges have become increasingly skeptical about the merits of structural reform litigation. In practice, this awareness has meant not only an increased reluctance to impose structural reform injunctions but also often a limitation of the right itself. If a court focuses on the plaintiffs’ rights, the remedial question becomes whether the defendant has taken the necessary steps to cure the constitutional violation. But “if the court focuses more on the remedial

212. Id. at 640-41.
213. See, e.g., Paul J. Mishkin, Federal Courts as State Reformers, 35 Wash. & Lee L. Rev. 949, 973 (1978) (calling for “heightened judicial sensitivity” to the implications of the “proliferation and regularization of broad institutional relief” issued by courts).
214. Fletcher, supra note 202, at 645 (internal quotation marks omitted).
215. Id. at 646; see also Mishkin, supra note 213, at 965 (“An institutional remedy inevitably involves allocation of state resources, at times in major amounts.”).
216. Fletcher, supra note 202, at 647.
issue, it will conceive of a remedy in terms of the duty and then consider it implemented when the defendants can demonstrate implementation, or at least a good faith effort to implement it as far as possible.\(^{218}\) The remedy, then, has become “part of the definition of the right.”\(^{219}\) Indeed, the more courts focus on remedial difficulties, the more likely it is that the underlying right will be constrained so that a finding of a violation will become less likely.

Of course, remedy can constrain right in numerous ways, and, in structural reform litigation, there was often an iterative process in which a series of judicial decisions fleshed out what a constitutional principle required of state actors.\(^{220}\) As we have seen, lethal injection cases have usually proceeded along a different track: remedial concerns limit the scope of the right in the first instance so that judges never find violations. This limitation is significant because when courts refer generally to remedial concerns in declining to find a constitutional violation, they are not being precise about exactly why there is no violation. Remedy, then, constrains the right by muddying courts’ analyses, inviting judges to point vaguely to remedial obstacles rather than to particular facts that might or might not create a significant risk of pain.\(^{221}\)

One should not overstate the importance of structural reform litigation’s history on lethal injection suits. Although some commentators conclude that structural reform litigation is “something that is over and done with,”\(^{222}\) the more accepted view is that structural reform injunction these days is not so much dead as different—narrower and less intrusive.\(^{223}\) To be sure, some courts have noted the similarities between lethal injection suits and structural reform suits,\(^{224}\) but for most courts, the backlash against structural reform injunctions provides not a direct analogy but a culture in which they approach public law litigation. Courts these days are hesitant to reach remedial questions, particu-

\(^{218}\) Poser, supra note 109, at 323-24.

\(^{219}\) Levinson, supra note 117, at 881.

\(^{220}\) See id. at 874-84 (discussing school desegregation, prison conditions, and apportionment cases).

\(^{221}\) See supra Section II.A.

\(^{222}\) Ross Sandler & David Schoenbrod, Democracy by Decree 10 (2003) (citing scholars holding this view).


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We will see, however, that the judicial remedies for the problems created by the death penalty may be more limited than one might hope. As we have seen, courts have been reluctant to force states to change the way they carry out executions, even when it appears that the state’s system is not consistent with the Eighth Amendment. This reluctance has been understandable, as courts have been reluctant to force states to change their procedures in politically charged cases. However, this reluctance has also been misplaced, as the cases involving the death penalty have not been as clear-cut as the courts have sometimes thought. As we shall see, the courts have misunderstood these cases and the remedial issues they present.

III. Political Process Failures and the Need for Judicial Intervention

If states took more care in designing their lethal injection procedures, courts’ inclination to defer to the political branches would have a great deal more merit. But many states have given little to no consideration to the method by which they carry out their most solemn duty. To the contrary, many states have haphazardly slapped together a procedure, blindly following other states, who themselves failed to give real thought to it in the first place. While these and related shortcomings do not themselves amount to an Eighth Amendment violation, they collectively result in a political process failure undeserving of judicial deference.

225. To some extent, this reluctance may be because some courts have not internalized the extent to which structural reform injunctions today can be “less intrusive . . . . [t]ypically avoid[ing] the ‘kitchen sink’ approach to institutional reform in favor of orders that identify goals the defendants are expected to achieve . . . .” Jeffries & Rutherglen, supra note 217, at 1411-12; see also Charles F. Sabel & William H. Simon, Destabilization Rights: How Public Law Litigation Succeeds, 117 Harv. L. Rev. 1016, 1019 (2004) (arguing that a new experimental injunction “combines more flexible and provisional norms with procedures for ongoing stakeholder participation and measured accountability”).

226. The following discussion summarizes common ways in which State governments have enacted lethal injection procedures; it does not argue that each State’s behavior conforms exactly to the general approaches summarized here.

227. By “political process failure,” I refer collectively to a series of legislative, executive, and administrative failings, including democratically elected legislative and executive officials’ failure to participate in the design of the procedure; delegation by those elected officials to unelected DOC officials; further delegation by unelected DOC officials to unelected, unqualified, and untrained execution team members; a failure by both elected and unelected officials to consult experts; a lack of oversight by both elected and unelected officials; a lack of transparency, including a refusal to share the details of the procedure with either litigants or the general public; harm to a “discrete and insular” minority group lacking political power; and a refusal to reconsider the protocol and subject it to normal administrative procedures, even as serious problems have come to light. I am, in other words, using the term “political process failure” in a broader way than it is used when referring to voting rights and other election-related issues.

It is also worth noting that while my discussion of “political process failures” exceeds the precise terms of footnote four of Carolene Products, see United States v. Carolene Prods. Co., 304 U.S. 144, 153 n.4 (1938), some lethal injection procedures arguably would receive heightened scrutiny under any of footnote four’s theories. First, the procedures trigger a specific provision of the Bill of Rights (the Eighth Amendment). Second, while some of the legislative and administrative
The basic narrative of the development of lethal injection in the United States is now well known. In 1977 Oklahoma became the first state to adopt lethal injection. State legislators consulted with Jay Chapman, the chief medical examiner for Oklahoma. Even though Chapman’s “first response was that [he] was an expert in dead bodies but not an expert in getting them that way,” he quickly changed course and declared, “[t]o hell with them: let’s do this thing.”

Chapman and two legislators then quickly drafted the statute, which focused on the types of drugs to use, not the details of administration. The resulting protocol did not require execution teams to include trained personnel. Nor was it ever scientifically studied.

Chapman today expresses shock that lethal injection is not performed by doctors but by individuals with little understanding of the dangers posed by the drugs. As he now puts it, “it never occurred to me when we set this up that we’d have complete idiots administering the drugs.”

The Oklahoma legislature passed the bill, and it was then copied—first by Texas and then by other states. From 1977 to 2002, thirty-seven state legislatures adopted Oklahoma’s brand of lethal injection, but they did so without conducting their own evaluation of the procedure’s risks. Instead, they delegated the procedure to unelected officials who mimicked Oklahoma’s choices without actually examining the advantages and disadvantages of the procedure. As Dr. Zimmers and Dr. Koniaris argue, “no research whatsoever—clinical, veterinary, medical literature search, or other—was ever performed” at
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any level of government when states adopted lethal injection.234 As one trial court summarized, “there is scant evidence that ensuing States’ adoption of lethal injection was supported by any additional medical or scientific studies. . . . Rather . . . the various States simply fell in line relying solely on Oklahoma’s protocol . . . .”235

Some states’ statutes reflect this haphazard adoption, failing even to state accurately the actual drugs used. Several state statutes, for instance, refer only to a barbiturate and paralytic, leaving out reference to potassium chloride, even though the protocol in practice does include potassium.236 Other state statutes vaguely authorize the use of lethal drugs without specifying which ones.237 South Dakota recently rewrote its statute along these lines to make it vaguer so as to give its corrections department more flexibility.238 When the legislature deliberately makes a statute vaguer in order to punt authority entirely to unelected prison officials, who themselves are unqualified and not inclined to seek expert advice,239 courts should not defer to that same legislature merely because it has been democratically elected. In such instances, Baze’s warning that a judicially imposed remedy “would substantially intrude on the role of state legislatures in implementing their execution procedures”240 rings hollow.


235. Baze v. Rees, No. 04-CI-01094, slip op. at 2 (Ky. Cir. Ct. July 8, 2005), aff’d, 217 S.W.3d 207 (Ky. 2006), aff’d, 128 S. Ct. 1520 (2008); see also Denno, Quandary, supra note 28, at 78-79 (providing a history of the development and spread of lethal injection in the United States).


239. See infra notes 270-272 and accompanying text.

Many states’ refusal to disclose the details of their own procedures compounds the problem. As recently as October 2007, only six lethal injection states provided what Professor Denno termed “complete” public protocols, and even those protocols did not give details about important information such as the qualifications and training of the execution team members. This lack of transparency makes it nearly impossible for the public to understand a lethal injection procedure’s risks, thereby insulating it from democratic revision.

Relatedly, states also routinely resist discovery in an effort to divulge as little information about the method by which they plan to execute the plaintiff. Courts are often complicit, reluctant to impose discovery burdens on states and sensitive to concerns about the executioners’ anonymity. While executioner anonymity is certainly a legitimate state interest, it is not a sound reason for denying plaintiffs’ discovery requests, since sensitive material can be redacted and subject to protective orders forbidding the public disclosure of information that might reveal an executioner’s identity.

When details do come to light, the record often highlights the failed processes and delegations by which the protocol was adopted and retained. In some states, neither elected politicians nor DOC officials played a role in designing

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241. Denno, Quandary, supra note 28, at 95. The States Denno cites are Colorado, Connecticut, Georgia, New Mexico, Oregon, and Washington. Id.

242. Id. at 96; see also Adam Liptak, After Flawed Executions, States Resort to Secrecy, N.Y. Times, July 30, 2007, at A9 (“In the wake of several botched executions around the nation, often performed by poorly trained workers, you might think that we would want to know more, not less, about the government employees charged with delivering death on behalf of the state.”).

243. See supra notes 79-80, 91 and accompanying text.

244. See, e.g., Moeller v. Weber, No. 04-4200, 2008 WL 1957842 (D.S.D. May 2, 2008) (denying in part plaintiff’s motion to compel discovery); Timberlake v. Donahue, No. 06-1859, 2007 WL 149150, at *3 (S.D. Ind. Jan. 16, 2007) (ordering that execution team members testify in a manner to preserve anonymity, and that “plaintiff will endeavor to eliminate or reduce the desired need for any such testimony”); Moore v. Rees, No. 06-22, 2007 WL 1035013, at *10 (E.D. Ky. Mar. 30, 2007) (granting plaintiff’s motion to depose the execution team, but noting defendant’s “strong interest in preserving the safety, and hence anonymity” of the team members); Taylor v. Crawford, No. 05-4173, 2006 WL 1236660, at *3 (W.D. Mo. May 5, 2006) (denying plaintiff’s motion to reconsider denial of discovery request for depositions and limit access to only six of sixty-six past execution records); Hill v. McDonough, No. 06-032, 2006 WL 2556938, at *2 n.5 (N.D. Fla. Sept. 1, 2006) (suggesting that because Florida State Court had already ruled on a lethal injection challenge in 2000, plaintiff was not entitled to discovery about the procedure as it existed in 2006).

245. See Fed. R. Civ. P. 26(c) (stating that court may issue protective orders); see also Moeller, 2008 WL 1957842, at *4 (allowing State to submit sensitive materials for in camera review); Taylor v. Crawford, No. 05-4173 (W.D. Mo. Oct. 31, 2005) (granting protective order).
the procedure, and yet often those same officials fought vigorously to retain the status quo. In Missouri, for example, Dr. Doerhoff boasted that he was responsible for the entire procedure because the DOC director “has no background” in either medicine or corrections and was therefore “totally dependent on me advising him what could and should and will be done.”

Furthermore, because Missouri had no written protocol, there were “no checks and balances or oversight” on Doerhoff’s capricious judgment. Doerhoff, an independent contractor, thus had complete discretion to change the procedure “at a moment’s notice.” This discretion included the authority to lower the thiopental doses, even though his dyslexia rendered him unable to calculate dosages accurately.

The Missouri legislature then delegated the matter to the DOC director, who in turn delegated it to Dr. Doerhoff. At no step along the way did Missouri inquire whether it was delegating the issue to someone with the requisite expertise.

Despite these serious problems and the accompanying lack of accountability, Missouri fought vigorously to retain its existing lethal injection procedure and never took the initiative to improve it. Even after Judge Gaitan required Missouri to submit a revised protocol, the new protocol was conceived not by DOC officials, execution team members, or medical experts, but by legal counsel. This approach reflects Missouri’s concern with secrecy over safety. By turning over the new protocol to lawyers, Missouri did not consult experts in a meaningful way, but it could claim that the details regarding the new procedure’s adoption were subject to attorney-client privilege.

Predictably, although the new product did include some improvements (at least it was in writing), it did not remove the fundamental flaws that had prompted the court to find a violation in the first place. Most bafflingly, Missouri refused to cut ties with Doerhoff, despite his admitted dyslexia, his unapologetic 

sua sponte changes to the procedure, and a public reprimand for failing to disclose more than twenty malpractice suits against him. Instead, the state actually argued that it should be permitted to keep Doerhoff, reiterating its...

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246. Doe Deposition, supra note 39, at 63-64. DOC officials confirmed that they “depended on [Doerhoff] heavily.” Taylor Trial Transcript, supra note 25, 367-68.


248. Id. at *7.

249. See id. at *5 (citing Doe Deposition, supra note 39); supra Section I.A.


251. Id.

252. See Taylor v. Crawford, No. 05-4173, slip op. at 2 (W.D. Mo. Sept. 12, 2006) (noting that Eighth Amendment standards can be met in various ways but that State’s revised protocols “fall short of those standards”).

253. See Missouri Proposed Execution Protocol 1 (July 14, 2006) (discussing execution team members and not renouncing Doerhoff); Kohler, supra note 42.
full “confidence” in his “capabilities.” When the DOC finally relented months later and announced that it would comply with the court’s ruling barring Doerhoff’s participation, it made no effort to find qualified people to take his place, even though the record made clear that nobody else on the Missouri execution team knew “anything about” the procedure. It would be a perverse theory of democracy that would afford the state deference under these circumstances.

California has a similar record, only ostensibly addressing problems that have come to light. After the state failed to set an intravenous line properly during one execution, it assured the district court that it had learned its “lesson” and that that error “will never occur again.” As the court later pointed out, though, California “did not take steps sufficient to ensure that a similar or worse problem would not occur,” choosing instead to “tweak” its procedure rather than engage in substantive revisions. The result was that “the questions [about the procedure’s safety] have become even more substantial.” The California execution team’s obdurate attitudes are perhaps best summed up by one team member’s reaction after an apparently botched execution: “shit does happen, so.” And yet its “tweaks” provided the illusion of real revision, thereby helping to protect the procedure from democratic review.

Indeed, even legitimate efforts to improve the procedure were made in secrecy without democratic deliberation. Following the court’s rulings, the California DOC began erecting a new execution chamber to correct some of its procedure’s problems. (California uses its old lethal gas chamber for lethal injection, creating unique architectural difficulties, such as IV bags placed too far from the execution chamber.)

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254. See Taylor Trial Transcript, supra note 25, at 353, 356, 360, 387-89 (testimony of DOC officials); Brief of Petitioner-Appellant at 45, Taylor v. Crawford, 487 F.3d 1072 (8th Cir. 2007) (No. 06-1397).

255. See Taylor v. Crawford, No. 05-4173, slip op. at 2 (W.D. Mo. Sept. 12, 2006) (barring Doerhoff); Letter from G. Anders to M. Gans, Clerk of Court, U.S. Court of Appeals for the Eighth Circuit (April 24, 2008) (discussing the State’s removal of Doerhoff without finding new personnel with medical qualifications); Doe Deposition, supra note 39, at 22.


256. See supra Section I.A.


258. Id. at 977-79.

259. Id. at 980.

260. Id. at 979 n.8.
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high on walls for the execution team to verify whether the equipment is properly working. But the DOC never informed the state legislature of these plans and expenses. When the legislature found out, it complained that it had not been informed, halting work on the new facility. Even if the DOC deserves some commendation for seeking to build an improved facility, its decision to keep secret its plans and bypass the California legislature further demonstrates that these procedures escape the usual democratic processes. In fact, it was not even clear that the newly designed facility would cure the problems identified by the district court. Judge Fogel, for his part, sought to address the transparency problem by placing responsibility with Governor Schwarzenegger, who promptly insisted on reviewing the protocol in secrecy.

Even when states agree to review their entire approach to executions, those efforts have often been cynical. In Tennessee, for instance, Governor Bredesen revoked apparently-problematic lethal injection protocols so that the Commissioner of Corrections could examine Tennessee’s three-drug procedure. Commissioner Little appointed a Protocol Committee, which consulted with two anesthesiologists, including Dr. Mark Dershwitz, a lethal injection expert who has testified as the states’ expert in several cases around the country. The Protocol Committee later presented a report summarizing the relative merits of different approaches and stressing the one-chemical protocol’s simplicity and reduced chance of error. Emphasizing physician unanimity on the one-drug protocol’s appropriateness and the three-drug protocol’s dangers, the committee recommended that Tennessee switch to the one-chemical protocol.

Commissioner Little rejected this proposal “within a day or two,” concluding that he did not want “Tennessee to be at the forefront of making the change

261. Id. at 980.
263. See, e.g., Testimony Before the California State Senate Public Safety Committee 5 (statement of Professor Ty Alper) (May 8, 2007) (“Despite the fact that a great deal of money has already been spent on the new construction, it is also not at all clear whether the new execution chamber even satisfies Judge Fogel’s concerns about the execution facilities, because the design plans for the partially-constructed chamber have not been made public.”).
264. See Denno, Quandary, supra note 28, at 122. Judge Fogel denied the Governor’s efforts to keep deliberations about the protocol secret. Id.
265. See Harbison v. Little, 511 F. Supp. 2d 872, 875 (M.D. Tenn. 2007) (recounting the creation of the committee).
266. Id. at 876 (citing the Protocol Committee’s report).
267. Id. at 876-78.
from the three-drug protocol to the one drug protocol. If Tennessee’s three-drug protocol were declared unconstitutional, it could then consider making the change. Commissioner Little, an unelected state official, thus rejected the proposal of a committee that had closely studied the relative merits of the different options. In so doing, he even chose not to add a step that would monitor the inmate’s consciousness, even though the committee had stressed that the three-drug protocol would likely require such a measure.

The Tennessee story is a perfect example of why courts should intervene. An unelected state official summarily vetoed the recommendations of a committee that had consulted experts and given careful thought to the matter. Moreover, he did so without consulting his own experts or offering any alternative theory of the evidence. Under such circumstances, none of the usual reasons for deferring to the political branches apply. Delegation to unelected officials is not necessarily inappropriate—legislatures delegate authority to administrative agencies all the time—but typically delegation promises some degree of agency expertise. Where unelected officials lack such expertise and fail to consult experts themselves, the delegation itself becomes problematic.

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268. Id. at 879-80 (quoting Commissioner Little). Little initially denied that the Protocol Committee had recommended a one-drug protocol, but he ultimately admitted that it had. Id.

269. Id. at 877, 886.

270. Even given the deference afforded to the policy determinations of administrative agencies, courts will engage in a “hard look” to ensure that such decisions were based on proper considerations. See Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co., 403 U.S. 29, 43 (1983) (“Normally, an agency rule would be arbitrary and capricious if the agency . . . failed to consider an important aspect of the problem . . . .”); Citizens To Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971) (holding that court must make a “searching and careful” inquiry to ensure that an agency “decision was based on a consideration of the relevant factors”).

271. See, e.g., Hampton v. Mow Sun Wong, 426 U.S. 88, 115 (1976) (stating that an administrative agency “has an obligation to perform its responsibilities with some degree of expertise”); Stephen G. Breyer, Breaking the Vicious Circle: Toward Effective Risk Regulation 61 (1993) (explaining that expertise is a virtue of bureaucracy and that agencies therefore typically should “understand th[e] subject matter at least well enough to communicate with substantive experts, to identify the better experts, and to determine which insights of the underlying discipline can be transformed into workable administrative practices . . . .”); Reuel E. Schiller, The Era of Deference: Courts, Expertise, and the Emergence of New Deal Administrative Law, 106 Mich. L. Rev. 399, 419-21 (2007) (explaining the central role of agency expertise in defining the deferential judicial role in administrative law).

272. See Baze v. Rees, 128 S. Ct. 1520, 1545 (2008) (Stevens, J., concurring) (arguing that DOC officials do not deserve deference when they lack expertise and fail to seek expert assistance).
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Even when states are ordered to reform flawed procedures, they sometimes adopt half-measures that purported to fix real problems but in fact do no such thing and, thus, compound the lack of transparency. As noted above, one trial court found that North Carolina needed to revise its protocol to provide an anesthesiologist to monitor the inmate. The state responded by buying a BIS monitor. The state’s action created the impression that it was addressing the problem, but anesthesiologists agree that BIS monitors should only be used in conjunction with, not instead of, other methods. Indeed, the BIS monitor is only useful if it is interpreted by a medical professional with training in anesthesia, which North Carolina did not employ. By purchasing a BIS monitor, then, North Carolina only appeared to address the trial court’s concern that the inmate may be insufficiently anesthetized. As Professor Denno argues, its objective was to approve a new protocol quickly as opposed to addressing the old procedure’s real problems. Yet, the illusion was convincing enough that the Fourth Circuit, without comment, let the execution proceed. Moreover, this illusion furthered the political process failure by creating the false impression that the state was carefully adjusting its procedure to mitigate dangers coming to light.

Even a state’s use of pancuronium to paralyze inmates contributes to the political process failure, as it creates the appearance of serenity, even where there is a torturous death. As a result, legislators and other state officials are far less likely to recognize problems that need to be corrected. Similarly, witnesses at executions usually report that the inmate died serenely.

274. See supra notes 163-164 and accompanying text.
276. Third Heath Affidavit, supra note 275, at 3.
277. Denno, Quandary, supra note 28, at 119.
278. See Brown v. Beck, 445 F.3d 752, 752 (4th Cir. 2006). Such half-hearted reforms are hardly limited to the States discussed in the text. See, e.g., Denno, Quandary, supra note 28, at 101 (“Florida’s nonexistent turnaround time in creating a revised protocol implicates the State’s lack of care and consideration of its execution process.”); id. at 100 (explaining that Ohio did not adopt changes it promised following a botched execution).
279. See, e.g., Beyea, supra note 22, at 603; Koniaris et al., supra note 22, at 1414.
280. See, e.g., Adam Buckman, Ted Koppel Saw a Man Executed and Thought . . . How Humane, How Painless, How Easy, How Simple . . . It Should Be Shown on TV, N.Y. Post, June 10, 2001, at 113 (“[W]hen it was over, I was shocked and horrified that
Pancuronium thus creates a false impression about the procedure’s safety that is difficult to dispel. The resulting misconceptions make it less likely that a state legislature or even DOC would bother revising the procedure; why would government officials fix something that few people perceive is broken?\(^\text{281}\)

From this perspective, pancuronium not only protects this particular method of lethal injection from attack but also helps preserve the death penalty itself. The general public pays little attention to lethal injection procedures, in part because they usually appear uneventful. One might surmise that if the procedure did not appear peaceful—if all inmates were to convulse and gasp as Diaz did—public support for the death penalty might suffer.\(^\text{282}\) As with certain kinds of speech restrictions, judicial intervention here could be viewed more as correcting political process failures rather than substantive meddling.\(^\text{283}\)

Were the pancuronium to minimize the risk of pain or even hasten death, its inclusion in the protocol might be justifiable, but it does not.\(^\text{284}\) As Justice Stevens argued, states’ asserted interest in “preserving the dignity of the procedure” is “woefully inadequate” and “vastly outweighed by the risk that the inmate is actually experiencing excruciating pain that no one can detect.”\(^\text{285}\)

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281. Misconceptions about the safety’s procedure also need to be overcome by plaintiffs litigating these claims. Even the most fair-minded judges are skeptical that a seemingly peaceful death is potentially torturous. See Fogel, supra note 154, at 736 (recounting by the judge that, when he first was assigned a lethal injection case, his immediate reaction was “extremely skeptical”).

282. Of course, it is impossible to say precisely how public attitudes towards the death penalty would change, but grotesque convulsions probably would affect at least some people’s views.

283. Cf. Stephen Breyer, Active Liberty: Interpreting Our Democratic Constitution 3-16 (2006) (proposing that the judicial role is to interpret the Constitution to further “active liberty” and to intervene most readily during political process failures); John Hart Ely, Democracy and Distrust: A Theory of Judicial Review 111 (1980) (“Where the evil the state is seeking to avert is one that is thought to arise from the particular dangers of the message being conveyed . . . the hazards of political distortion and judicial acquiescence are at their peak.”).


285. Id. at 1544 (Stevens, J., concurring). In other words, the “dignity of the procedure” should not constitute a “legitimate penological justification,” see id. at 1532 (plurality opinion), for refusing to adopt an alternative method in the face of documented advantages over the status quo.
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Given experts’ general agreement that the three-drug protocol as implemented in many states poses unnecessary risks of pain, the question must be asked why states cling so stubbornly the status quo.\textsuperscript{286} It is impossible to answer this question with certainty, but I can speculate. Perhaps some state officials do not like being told what to do, and their reflexive impulse is to litigate rather than reform. Perhaps some want death row inmates to suffer a painful death and even believe there is a democratic mandate for that position.\textsuperscript{287} More likely, perhaps officials fear that if they change their procedure, inmates will simply challenge the new method, resulting in endless rounds of litigation.\textsuperscript{288} Along similar lines, in some states, officials may fear that a changed procedure would require time-consuming legislative revision.\textsuperscript{289} Another possibility is that state officials, like most people, do not like giving too much thought to killing people. Some executioners, in fact, have admitted that their role in executions has taken a significant psychological toll.\textsuperscript{290}

Whatever the reasons, some states have failed to engage carefully with the complicated procedure they put in place. This failure, of course, creates the risk that condemned inmates will die an excruciating death, but it also raises serious concerns about how government behaves when it acts outside public view. The collective abrogation of responsibility—elected officials’ utter inattention to the protocol’s design; the delegation to unelected, unqualified personnel; the lack of transparency and related preference for illusory fixes over real revisions; the refusal to seek expert advice—amounts to a serious political process failure requiring judicial attention. As Justice Stevens argued in his Baze concurrence, “[i]n the majority of States that use the three-drug protocol, the drugs were selected by unelected Department of Correction officials with no specialized medical

\textsuperscript{286} See Harbison v. Little, 511 F. Supp. 2d 872, 876 (M.D. Tenn. 2007) (noting that the State’s expert, Dershwitz, recommended the one-drug protocol); Deposition of Dr. Mark Dershwitz at 52-53, 277-79, Jackson v. Danberg, 06-300 (D. Del. Sept. 10, 2007) (reporting from the State’s expert that a one-drug protocol would impose less risk on the condemned than a three-drug protocol); infra Subsection IV.A.1. Dr. Dershwitz’s opinions in favor of the one-drug protocol are especially significant because he has testified consistently as the States’ expert.


\textsuperscript{288} But see supra notes 194-197 and accompanying text.


\textsuperscript{290} See, e.g., Morales v. Tilton, 465 F. Supp. 2d 972, 979 (N.D. Cal. 2006) (noting that one execution team member was diagnosed and disabled with post-traumatic stress disorder and found his experience on the execution team to be “the most stressful responsibility a prison employee ever could have”).
knowledge and without the benefit of expert assistance or guidance. As such, their drug selections are not entitled to the kind of deference afforded legislative decisions.”

Quite simply, the states’ practices do not deserve judicial deference where, as here, “they are the product of ‘administrative convenience’ and a ‘stereotyped reaction’ to an issue, rather than a careful analysis of relevant considerations favoring or disfavoring a conclusion.”

Despite all these problems, courts both explicitly and implicitly treat these procedures as the province of the political branches and immune from judicial meddling. This approach is misguided, because some states consistently have proven unwilling and unable to engage with the details of their own procedures. As Professor Chayes explained, although public law litigation can be intrusive in that it commands affirmative action of political officers, it ordinarily merely adjusts the manner in which policy is carried forward. In this regard, its target is generally administrative rather than legislative, focusing on areas where usual political processes have failed. Such failure, Chayes observes, is more likely where the victims are prisoners or inmates of mental institutions, literally disfranchised persons with no access to normal legislative processes. Death row inmates, whatever one thinks of them, have no access “to the levers of power in the system” and yet bear the entire burden of the political process failures that have resulted in a broken process.

Indeed, death row inmates’ lack of political power helps explain the political process failure here. In part because inmates lack power, states have designed their procedures with primary attention to other interests, such as execu-

292. Id.
294. Id.; see also United States v. Carolene Prods. Co., 304 U.S. 144, 153 n.4 (1938) (suggesting that laws burdening “discrete and insular minorities” require a higher level of judicial scrutiny); Fiss, supra note 198, at 6 (discussing Carolene Products footnote 4 and arguing that judicial involvement is particularly appropriate when there is legislative failure such as the victimization of a discrete and insular minority).
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titioner anonymity and the witnesses’ experience. These are legitimate interests, but, unlike the inmate’s interest in a painless execution, they are not constitutional interests. Of course, courts often consider non-constitutional interests in striking the proper balance for a constitutional rule, but where the right-holder (in this case, the condemned) lacks access “to the levers of power” and where the state practice threatening the constitutional right is the result of serious political process failures, courts should not automatically defer to non-constitutional interests over constitutional ones. Excessive judicial deference is even more troubling here, because modest revisions could yield much safer protocols. In other words, where the right-holder seeks changes that would place a minor burden on the state and yet yield significant protection to the constitutional right, non-constitutional interests should not trump constitutional ones absent extraordinary circumstances not present here.

Given many lethal injection states’ failings, there is a lack of an effective alternative to judicial intervention. Writing about Taylor v. Crawford, Judge Gaitan explained that he knew he would need to intervene when he realized that the state, contrary to his initial assumptions, had taken no reasonable measures in designing the procedure. Interrelated institutional concerns such as federalism, separation of powers, and judicial competence are certainly important and legitimate, but not when judges invoke them to avoid confronting constitutional problems that will otherwise be ignored because the state actors have abdicated their responsibilities, concealed the details of the relevant policy, and applied that policy to a population lacking political power. Again, in the normal operation of divided government, norms of judicial restraint serve as crucial checks on judicial power, but, when taken too far, they inhibit judges from redressing violations of constitutional norms even when the political

296. See supra text accompanying note 62.
297. See supra note 116 and accompanying text.
298. See infra Part IV.
299. See Jeffries & Rutherglen, supra note 217, at 1422 (arguing that constitutional remedies are most justified by the “absence of effective alternatives”).
300. Judge Gaitan explained he had assumed “first, that the state of Missouri had a written execution protocol; second, that it had been subjected to due diligence before implementation; third, that this protocol was approved by either the legislative and/or executive (Department of Corrections) branches of the Missouri government; and fourth, that trained medical personnel implemented it properly and consistently. None of these assumptions proved to be true.” Gaitan, supra note 115, at 765.
301. See, e.g., Lawrence G. Sager, Fair Measure: The Legal Status of Underenforced Constitutional Norms, 91 HARV. L. REV. 1212, 1217-18 (1978) (arguing that federal courts are sometimes overly concerned with institutional concerns such as federalism and separation of powers and therefore are inhibited from redressing constitutional violations). But see Levinson, supra note 117, at 924 (arguing that, under Sager’s theory, all constitutional rights are under-enforced).
process cannot be trusted to do so. Of course, the political process failures recounted here do not amount to a constitutional violation, but they do belie arguments that courts should defer to the political branches in these cases.\textsuperscript{302}

Finally, it is worth emphasizing that courts’ deference to the political branches is particularly problematic in the Eighth Amendment context, because the Eighth Amendment’s legal standard explicitly incorporates other states’ practices.\textsuperscript{303} Judicial deference to the political branches in an Eighth Amendment case, then, actually encourages those political process failures to perpetuate elsewhere. Confronted with a decision about whether to revise its execution procedure, a state is likely to copy the common practice rather than to study the relative merits of the options. Consequently, courts’ unwillingness to confront the shoddy legislative and administrative procedures by which lethal injection has been adopted greatly compounds the political process problem, because it becomes more likely that other states will merely mimic a procedure that, although carelessly adopted, has already received court approval.\textsuperscript{304}

IV. The Modesty of Lethal Injection Remedies

The failed political processes of many states, then, give good reason for judicial intervention. This Part explores the related issue of why that intervention would be modest and not overly intrusive. Section A discusses particular remedies that courts could impose. In light of these available remedies, Section B argues that courts’ general reluctance to reach the remedial stage in lethal injection actions is misplaced, because these remedies are modest and respectful of the states. Judicial deference is, therefore, inappropriate—not just because of

\textsuperscript{302} See Fletcher, supra note 202, at 694 (“The only legitimate basis for a federal judge to take over the political function in devising or choosing a remedy in an institutional suit is the demonstrated unwillingness or incapacity of the political body.”).

\textsuperscript{303} See Baze v. Rees, 128 S. Ct. 1520, 1532 (2008) (noting “that it is difficult to regard a practice as ‘objectively intolerable’ when it is in fact widely tolerated”).

\textsuperscript{304} One could argue that the prevalence of a given procedure should instead cut in favor of additional judicial deference, especially given the Eighth Amendment’s incorporation of common practices. See id. But even if headcounting retains an important place in Eighth Amendment jurisprudence, it should not substitute for review of a method’s safety. To allow a mere headcount of states to confirm the constitutionality of a painful practice would effectively deny plaintiffs the benefit of new evidence, suggesting that methods once thought safe are now understood to cause pain. To this extent, “evolving standards of decency,” see Estelle v. Gamble, 429 U.S. 97, 102 (1976) (citation omitted), must include more than the day’s most common practice. Compare Roper v. Simmons, 543 U.S. 551, 563 (2005) (“[T]he Constitution contemplates that in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment.” (quoting Atkins v. Virginia, 536 U.S. 304, 312 (2002))), with Penry v. Lynaugh, 492 U.S. 302, 331 (1989) (“The clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country’s legislatures.”).
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the aforementioned political process failures, but also because of the relative modesty of the potential remedies.

A. Remedial Options

Should a court find that a lethal injection procedure runs afoul of the Eighth Amendment, it would have a substantial number of remedial possibilities from which to choose. For the judge in this position, these options are, of course, worth examining. But because courts determine the scope of the right in light of potential remedies, judges should also think about the remedial options at the outset of the case. It is, therefore, worth emphasizing that the remedial alternatives discussed here would not require wholesale revisions of existing procedures but rather modest adjustments, which would allow states to keep much of their existing processes in place.

1. Affirmative Injunctions

Affirmative injunctions order the offending government or official to take specific action to correct the violation. They are, therefore, generally seen as more intrusive than negative injunctions, which instead forbid the actor from continuing the unconstitutional practice. Whereas the negative injunction leaves it to government officials to decide how to correct the violation, affirmative injunctions dictate precise measures the officials must take.

Affirmative injunctions, though, have their advantages and have been used recently by some courts finding Eighth Amendment violations. In states where officials have purported to correct flawed procedures by adopting inadequate, superficial revisions, an affirmative injunction may actually better serve the state’s interest, because it provides concrete requirements and potentially expedites the creation of a constitutional procedure with which the state can resume executions.

There are two especially feasible lethal injection affirmative injunctions: (1) the one-drug protocol and (2) anesthesiologist monitoring. The one-drug protocol would replace the current three-drug procedure with a single, massive dose of a barbiturate like pentobarbital. (Experts agree that pentobarbital is a

305. See Fletcher, supra note 202, at 649-54 (discussing affirmative and negative injunctions).

306. Though affirmative injunctions have been historically disfavored, the distinction between negative and affirmative injunctions has less practical importance today, given courts’ willingness to grant affirmative decrees where some injunctive relief is warranted. Id. at 649-50; see also Sabel & Simon, supra note 225, at 1067-73 (describing new “experimentalist tendency” in courts’ approach to public law remedies). Additionally, to the extent that Baze requires the plaintiff to proffer an alternative, see Baze, 128 S. Ct. at 1532, the plurality contemplates that a court finding a violation could affirmatively order that that alternative be implemented.
better suited barbiturate for lethal injection than thiopental.\footnote{See, e.g., Hankins v. Quarterman, No. 4:04-cv-875-Y, 2007 WL 959040, at *20 (N.D. Tex. 2007) (citing expert testimony that a long-acting pentobarbital is the preferred barbiturate in veterinary euthanasia); Morales v. Tilton, 465 F. Supp. 2d 972, 983 (N.D. Cal. 2006) (citing pentobarbital as the preferable drug for the one-drug protocol); Amy L. Mottor, Note, Morales and Taylor: The Future of Lethal Injection, 6 APPALACHIAN J.L. 287, 307 (2007) (discussing the advantages of pentobarbital); Susi Vassallo, Thiopental in Lethal Injection, 35 FORDHAM URB. L.J. 957, 960-67 (2008) (discussing the disadvantages of thiopental).} The major advantage of a one-drug procedure is that it would eliminate the possibility of excruciating pain.\footnote{See, e.g., Harbison v. Little, 511 F. Supp. 2d 872, 879 n.4 (M.D. Tenn. 2007) (“No medical testimony supports the proposition that the one-drug protocol causes any suffering . . . .”); Morales II, 465 F. Supp. 2d at 983 (“[R]emoval of [pancurium bromide and potassium chloride] from the lethal-injection protocol, with the execution accomplished solely by an anesthetic, such as sodium pentobarbital, would eliminate any constitutional concerns, subject only to the implementation of adequate, verifiable procedures to ensure that the inmate actually receives a fatal dose.”); Dershwitz & Henthorn, supra note 19, at 956 (anesthesiologists arguing that a large dose of barbiturate poses “no risk whatsoever” of pain).} Whereas the barbiturate in the three-drug procedure theoretically anesthetizes the inmate so that he will not suffer pain from the other drugs, in a one-drug protocol, the barbiturate is the only drug. Even if something goes wrong, the inmate will not experience pain, because barbiturates do not cause pain. Of course, even a one-drug procedure would need to be properly administered, but the procedure would be much easier to administer and the consequences of maladministration far less severe. In short, the one-drug procedure significantly reduces both the chance of error and the pain suffered in the event of error without requiring many other changes from the state.

Some courts have already recognized the one-drug protocol’s advantages. The district court in Morales offered it as one of two possible remedies from which California could choose.\footnote{See Morales v. Hickman, 415 F. Supp. 2d 1037, 1047 (N.D. Cal. 2006) (giving the State the option of using “only sodium thiopental or another barbiturate or combination of barbiturates in Plaintiff’s execution”).} In Harbison, the trial court faulted Tennessee for not taking more seriously its own committee’s recommendation of a one-drug procedure.\footnote{See Harbison, 511 F. Supp. 2d at 896; see also supra notes 265-269 and accompanying text.} And, most recently, an Ohio state court found that Ohio’s three-drug procedure failed to comply with the state’s statutory requirement that lethal injection be completed “quickly and painlessly” and ordered that the state’s “protocol employ the use . . . of a single, anesthetic drug.”\footnote{Ohio v. Rivera, No. 04-65940, slip op. at 9 (Lorain County Ct. June 10, 2008).} A switch to the one-drug procedure would also not unduly burden states. States would have to make minor adjustments to accommodate the one-drug approach, but in so doing, they would greatly simplify executions. Such a
change would result in a safer, more easily administered procedure that would probably require less training and practice. Moreover, most states would not need to change their execution facilities or basic drug delivery systems.312

Notwithstanding these obvious advantages, Baze does somewhat complicate the matter. Although no Justice questioned the central point that the one-drug procedure is painless, some justices did raise concerns about it. Justice Alito pointed to one commentator suggesting that it is difficult to kill someone using a barbiturate and that a small percentage of such attempts resulted in “problems with completion.”313 Three separate opinions also noted that a muscle relaxant or paralytic is often used for lawfully assisted euthanasia in the Netherlands, thereby suggesting that the inclusion of pancuronium was defensible and possibly even desirable.314

These concerns do not foreclose the one-drug procedure so much as indicate that trial court factual findings would be needed before it could be judicially imposed. Given that the Baze record contained minimal evidence about the relative merits of the one-drug approach,315 the Justices’ comments on it were dicta. Moreover, Justice Alito’s concern that a single barbiturate had failed to kill a tiny percentage of euthanasia patients in the Netherlands is scant reason to reject this alternative.316 When euthanasia patients fail to die from the administration of a single barbiturate, it is because the drug has been improperly administered; properly administered, a large enough dose of a barbiturate will be fatal.317 In effect, Justice Alito is merely pointing out that a one-drug protocol could be improperly administered. He fails to explain, however, that the three-drug protocol can also be maladministered and with far graver consequences. He also fails to point out that by removing the second and third drugs, the state would be simplifying the procedure and minimizing the risk of problems of any sort. Similarly, he does not note that the largest thiopental dose used in the Netherlands is often only two grams, and that it is therefore not surprising that

312. By way of contrast, even though carbon monoxide poisoning would probably be another painless alternative, see Gaitan, supra note 115, in most states it likely would require a new airtight facility and therefore probably would be more intrusive and expensive.
314. Id. at 1535 (plurality opinion); id. at 1541 (Alito, J., concurring); id. at 1566 (Breyer, J., concurring).
315. See id. at 1534 (explaining that one-drug protocol was not proposed to state courts below).
316. See id. at 1541 (Alito, J., concurring) (noting that 5 out of 535 patients woke up).
317. See, e.g., Harbison, 511 F. Supp. 2d at 879 n.4 (“No medical testimony supports the proposition that the one-drug protocol causes any suffering or that it prolongs the pronouncement of death.”); Morales v. Tilton, 465 F. Supp. 2d 972, 983 (N.D. Cal. 2006) (noting that execution by anesthetic like pentobarbital need only ensure that the inmate “actually receives a fatal dose”).
such use was not always lethal. Finally, Justice Alito also fails to explain that were an inmate to survive an initial dose of a barbiturate, the contingency plan would simply be to administer another dose. The possibility that a painless drug would need to be re-administered in a small fraction of cases is hardly a sound reason not to use that method to replace an approach that creates a real risk of excruciating pain.

The Justices’ discussion of the one-drug procedure also glosses over some important distinctions. In particular, the comparison to euthanasia in the Netherlands is inapposite, because it is a different kind of procedure from lethal injection. Crucially, doctors take part in euthanasia in the Netherlands. It is, therefore, far more likely in the Netherlands that any pain masked by the pancuronium would be detected. By way of contrast, laypersons frequently administer American lethal injection procedures, and they are incapable of making such detections. Moreover, even where doctors are present during executions, they usually watch from an adjacent room and would not be able to detect pain from that distance. Additionally, Dutch euthanasia does not include the use of potassium chloride, which is the three-drug protocol’s painful chemical. The use of pancuronium in the Netherlands, therefore, poses far less danger of masking excruciating pain.

Of course, for a court to impose a one-drug protocol as a remedy, significant evidence of that procedure’s advantages and disadvantages would need to be developed at trial, and it is possible that problems will become more apparent. But assuming that current experts’ preference for the one-drug protocol continues to appear well-founded, this alternative offers courts an affirmative injunction that greatly reduces the risk of pain and simultaneously makes the state’s job easier.

318. Dershwitz & Henthorn, supra note 19, at 954.

319. Cf. Louisiana ex rel. Francis v. Resweber, 339 U.S. 459, 464 (1947) (holding that it is not cruel and unusual punishment to attempt to execute a person after the first execution attempt failed); Alper, supra note 29, at 836 (explaining the second-dose contingency plan in animal euthanasia).

320. See Agnes van der Heide et al., End-of-Life Practices in the Netherlands Under the Euthanasia Act, 356 New Eng. J. Med. 1957, 1958 (2007) (“In the Netherlands, euthanasia is defined as death resulting from medication that is administered by a physician with the explicit intention of hastening death at the explicit request of the patient.”). Assisted suicide, in which patients self-administer fatal drugs prescribed by a physician, also exists in the Netherlands but is far less common. Id. at 1958-61.

321. Justice Alito also neglects to mention that the same expert he cites to argue that American doctors lack experience killing people with an overdose of a barbiturate states in the same article that the use of a paralytic like pancuronium is “completely inappropriate” in executions. Compare Baze, 128 S. Ct. at 1541 (Alito, J., concurring) (discussing views of Dr. Truog), with Gawande at al., supra note 25, at 448 (Dr. Truog discussing, inter alia, dangers of pancuronium in lethal injection).
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Courts could also order an anesthesiologist to monitor the inmate’s anesthetic depth. This monitoring was what Judge Gaitan initially ordered in Missouri and one of the two options Judge Fogel presented to California. The major advantage of this remedy is that in one step it protects the inmate from other errors that might occur. We know that the three-drug protocol is painless if the inmate is properly anesthetized but excruciating if he is not. Various problems discussed above can result in insufficient anesthesia. But if an anesthesiologist monitors the inmate’s anesthetic depth, then any such problem can be detected and corrected before the pancuronium and potassium chloride are injected. The requirement that an anesthesiologist monitor anesthetic depth, therefore, obviates the need for more intrusive instructions regarding the various steps of the procedure.

There are, however, some complications. Due to medical ethics, it may not be easy for some states to find an anesthesiologist or nurse anesthetist willing to play such a substantial role in execution procedures. In fact, the American Medical Association (AMA), the Society of Correctional Physicians, and the American Nurses Association have all adopted statements that doctors or nurses should not participate in executions. The sentiments reflected by these associations, unsurprisingly, make it difficult for states to find willing anesthesiologists. California ran into this problem when the two anesthesiologists who had agreed to participate in the Morales execution balked after discovering the significant role they had been assigned. Along similar lines, following Judge Gaitan’s ruling, Missouri insisted (just days after sending out cold-call letters to some Missouri anesthesiologists) that it “is unable to comply with the Court’s


323. This advantage assumes that the anesthesiologist is competent and actually monitors the inmate’s anesthetic depth, and that he would delay the administration of the second and third chemicals if the inmate were insufficiently anesthetized by the thiopental.

324. Most experts agree that a nurse anesthetist would possess the training necessary to monitor the inmate’s anesthetic depth. See, e.g., Heath Declaration at 15, Walker v. Epps, No. 07-176 (N.D. Miss. Oct. 22, 2007) (anesthesiologist explaining that anesthesia can be administered by anesthesiologists and Certified Registered Nurse Anesthetists). For ease of presentation, this Article refers to them collectively as “anesthesiologists.”


direction to obtain and use a board certified anesthesiologist in its execution process."\(^{327}\)

While the restraint imposed by medical ethics is a substantial concern, it is not an insurmountable one. Although many doctors will not take part in executions, such ethics rules are typically not legally binding.\(^{328}\) Doctors, therefore, can depart from certain ethical guidelines without risking their licenses or other disciplinary measures.\(^{329}\) As the AMA Council on Ethical and Judicial Affairs itself puts it, “ethical obligations typically exceed legal duties. In some cases, the law mandates unethical conduct.”\(^{330}\)

From the AMA’s perspective, capital punishment law does mandate unethical conduct. Notwithstanding ethical concerns, many states want a medical presence during executions. Thirty-five of the thirty-eight death penalty states allow physician participation in executions, seventeen require it, and only two (Kentucky and Illinois) explicitly forbid it.\(^{331}\) To protect participating physicians from license challenges for violating ethics codes, states usually promise anonymity and provide legal immunity for such challenges.\(^{332}\) In fact, in at least one state with a law permitting physician participation in executions, the state medical board upheld against a challenge the license of a physician known to have participated in executions precisely because state law permitted that participation.\(^{333}\) Similarly, in North Carolina, a state court ruled that the North Carolina Medical Board cannot punish physicians for participating in execu-

\(^{327}\) Defendants’ 7/14/2006 Submission at 4, Taylor (No. 05-4173).

\(^{328}\) See, e.g., AMA Code of Med. Ethics, supra note 325, at xv (“The following Principles adopted by the American Medical Association are not laws, but standards of conduct which define the essentials of honorable behavior for the physician.”).

\(^{329}\) See, e.g., Gawande, supra note 52, at 132. Moreover, while the former president of the American Society of Anesthesiologists advised anesthesiologists to “steer clear” of executions, his words are, by his own account, advice only and lack any binding effect. See Dr. Orin F. Guidry, President, American Society of Anesthesiologists, Observations Regarding Lethal Injection (June 30, 2006), http://www.asahq.org/news/asanews063006.htm.

\(^{330}\) AMA Code of Med. Ethics, supra note 325, § 1.02.

\(^{331}\) Gawande, supra note 52, at 151; see also Neil Farber et al., Physicians’ Attitudes About Involvement in Lethal Injection for Capital Punishment, 160 Archives of Internal Med. 2912, 2913 (2000) (noting that states involve physicians in various ways such as providing technical advice, ordering drugs, supervising drug administration, and pronouncing death); Christopher J. Levy, Conflict of Duty: Capital Punishment Regulations and AMA Medical Ethics, 26 J. Legal Med. 261, 264 (2005).

\(^{332}\) Gawande, supra note 52, at 136. Although the identities of some doctors like Doerhoff are sometimes discovered anyway, see Kohler, supra note 42, no doctor has yet lost a license for participation in an execution, see Gawande, supra note 52, at 137.

\(^{333}\) See Gawande, supra note 52, at 142.
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This ruling makes sense. Even if state statutory law incorporates medical ethics’ rules regarding “professional conduct,” a more specific statutory provision allowing physician participation in executions must trump more general ethical rules.

Indeed, many doctors do not see medical ethics as a bar to their involvement in executions. Studies demonstrate that 25% of physicians would personally perform five or more steps of a lethal injection procedure, and 19% would be willing to administer the lethal drugs themselves. One anesthesiologist stated at a panel of the American Society of Anesthesiologists that he considered it an ethical duty to assist with lethal injection because prisoners “are suffering


It is also possible that a doctor’s national certifying board, such as the American Board of Anesthesiology (ABA), could seek to suspend certification for a doctor who participated in executions. Whereas state licensing is required for a doctor to practice medicine in a particular state, board certification is a voluntary process and is awarded to doctors by a national board in an individual specialty. See American Board of Medical Specialties, Board Certification Background 4-5 (Sept. 4, 2007), available at http://www.abms.org/news_and_events/media_newsroom/pdf/abms_editorialbackground.pdf). However, not all hospitals require board certification for anesthesiologists wishing to practice at that institution, Outcome Assessment in Advanced Practice Nursing 246 (Ruth M. Kleinpell, ed. 2001). Additionally, because the ABA’s disciplinary procedures commence with a referral from a state medical board, see The American Board of Anesthesiology, Inc., Booklet of Information §§ 5.02, 5.06 (2008), available at http://www.theaba.org/pdf/BOI-2008.pdf, cases like North Carolina Medical Board make it unlikely that the ABA would sanction a doctor whom the State medical board has not already disciplined. It is therefore doubtful that the hypothetical threat of suspended certification would make it much more difficult for a state to find an anesthesiologist to participate.

and I have the ability to help them.\textsuperscript{338} Nurses appear even more willing to participate.\textsuperscript{339} One state nursing board even permitted a nurse in that state to participate in executions so long as he did not actually push the plunger delivering the drugs.\textsuperscript{340}

It is, therefore, unsurprising that Missouri recently belied its earlier representations that it was impossible to find an anesthesiologist to take part in its lethal injection procedure and represented that it \textit{has} found one.\textsuperscript{341} Assuming that this anesthesiologist is competent and will in fact monitor the inmate’s anesthetic depth and intervene if necessary,\textsuperscript{342} this development is significant, effectively setting a new standard of care for lethal injection. Moreover, other states could solicit this same doctor’s assistance for their own procedures.\textsuperscript{343} Of course, this remedy would not be available in Kentucky and Illinois, which forbid physician participation, but those states are in the significant minority.\textsuperscript{344} Where available, this remedy is simple and un-intrusive. It permits a state to keep the same procedure but for the addition of one safeguard.\textsuperscript{345} And, in the grand scheme of things, it also would not be terribly expensive.\textsuperscript{346}

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\item[\textsuperscript{340}] Gawande, supra note 52, at 147.
\item[\textsuperscript{341}] See Defendants’ Reply to Plaintiffs’ Memorandum in Opposition to Defendants’ Motion for Reconsideration of the Order Compelling Discovery at 3, Clemons v. Crawford No. 07-4129 (W.D. Mo. May 1, 2008).
\item[\textsuperscript{342}] The state’s filing announcing the development was vague on the details. See id.
\item[\textsuperscript{343}] It is not uncommon for personnel participating in one state’s execution procedure to join another state’s team. Dr. Doerhoff, for example, participated on the federal and Arizona lethal injection teams even after Judge Gaitan had barred his participation in Missouri. See Kiefer, supra note 255; Weinstein, Doctors Barred, supra note 255.
\item[\textsuperscript{344}] See, e.g., 725 ILL. COMP. STAT. 5/119-5(d-5) (West 2008) (“The Department of Corrections shall not request, require, or allow a health care practitioner licensed in Illinois, including but not limited to physicians and nurses, regardless of employment, to participate in an execution.”); Ky. REV. STAT. ANN. § 431.220(3) (West 2008).
\item[\textsuperscript{345}] Of course, states with multiple, serious problems with their procedures should correct them, but the addition of an anesthesiologist would not require as close judicial scrutiny of each of those steps.
\item[\textsuperscript{346}] See infra notes 368-373 and accompanying text.
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While there is much to be said in favor of this alternative, *Baze* again presents an obstacle. Even though ethical guidelines typically lack binding authority, the *Baze* plurality and Justice Alito’s concurrence effectively treated them as mandatory. The justices overstated the case. First, *Baze* considered the protocol in Kentucky, one of only two states that have barred physician participation. Its comments on this topic, then, should be considered dictum in the thirty-five jurisdictions that permit physician involvement. Second, while the majority of the medical establishment does oppose physician involvement in executions, some doctors obviously are willing to participate. Third, as *North Carolina Medical Board* demonstrates, medical associations’ ethical opinions cannot trump contrary state law, and states, with court assistance, also shield their execution team members’ identities from the public. In short, an anesthesiologist’s participation is a feasible remedy that would cure most of the three-drug protocol’s dangers with little intrusion into the state’s affairs.

2. Negative Injunctions

Even if there are good reasons to impose an affirmative injunction, courts are often reluctant to order a state to take a specific course of action. By con-

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347. See *Baze v. Rees*, 128 S. Ct. 1520, 1536 (2008) (plurality opinion) (“[T]he American Society of Anesthesiologists’ own ethical guidelines prohibit anesthesiologists from participating in capital punishment.”) (internal citations omitted); see also id. at 1539–40 (Alito, J., concurring) (arguing that other medical associations’ guidelines prohibit or discourage participation in executions).

348. See, e.g., *Gawande*, supra note 52, at 150 (describing views of a doctor who knew AMA position but felt doctors have an ethical obligation to ensure condemned inmates are without pain in their dying moments); David Waisel, *Physician Participation in Capital Punishment*, 82 May Clin. Proc. 1073 (2007).

349. See, e.g., *Gawande*, supra note 52, at 131 (noting that *Morales* district court agreed to help California maintain anesthesiologists’ anonymity in response to ethical concerns). Whether the government should subvert the ethical principles of medical associations is, of course, another matter. See id. at 152 (arguing that society is worse off from such subversion); Jonathan I. Groner, *The Hippocratic Paradox: The Role of the Medical Profession in Capital Punishment in the United States*, 35 Fordham Urb. L.J. 883, 905 (2008) (arguing that the “individual physician harms his or her relationships with other patients by participating in an execution”).

350. If a court were to order this remedy and the State were to demonstrate that, despite a good-faith effort, it had failed to find an anesthesiologist willing to participate, the court could always order an alternative remedy, such as a negative injunction or the one-drug protocol. Given Missouri’s experience, though, it seems likely that a state making a good-faith effort would be able to find an anesthesiologist to participate.

trast, a negative injunction—ordering the state to cease executions until its pro-
cedure passes constitutional muster—is usually the preferred remedy, because it
can force constitutional compliance while remaining respectful of the state.352
Such an order would theoretically assure the court of the constitutionally re-
quired outcome: either the state must bring its execution procedure into com-
pliance with the Eighth Amendment or it must forgo executions. This option is
the approach chosen by the district court in Harbison, in which the court barred
Tennessee from executing the plaintiff under the existing protocol but left the
door open for a future execution with a revised protocol.353

The negative injunction is an important option, particularly for judges who
want to steer clear of dictating specific measures to the state. It is worth remem-
bering, though, that the efficacy of the negative injunction is less certain in the
lethal injection context, because state officials who failed to design a constitu-
tional procedure the first time around may be unwilling or unable to do so even
under court order. A negative injunction, then, might not give the state official
the guidance needed to genuinely reform the state’s procedure.354 Although offi-
cials in states with problems typically have given little care to their procedures,
there is no evidence that any intentionally have designed a dangerous proce-
dure. To the contrary, the finer points of lethal injection fall far outside their
core competence, and, burdened with other responsibilities, they do not give
sufficient attention to the complicated procedure. A negative injunction might
spur better behavior, but it also might merely prompt superficial or inadequate
changes, as in California and Tennessee.355 To this extent, a negative injunction
should be monitored closely by courts, particularly in jurisdictions with espe-
cially poor track records.

352. See Fletcher, supra note 202, at 649 (“The preferred form of injunction is to in-
struct the defendant not to do what it has been planning or to stop what it has
been doing.”).


354. This attitude might seem patronizing but is realistic given some states’ refusal to
seek expert assistance. See supra Section I.A; supra Part III.

355. See supra notes 261-270.
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3. Administrative Remedies

Yet another alternative is an administrative remedy through a state’s Administrative Procedure Act (APA). To receive such a remedy, a plaintiff typically must demonstrate that the procedures used to adopt the lethal injection protocol were inadequate under state administrative law. As a formal matter, this remedy is only available in certain states, though, because some states insulate their executions procedures or correctional facilities from otherwise generally applicable administrative law.

Still, in those states where such claims are colorable, an administrative challenge provides an important avenue for death row inmates. It also can provide a theoretical framework for judges who recognize that the procedures are problematic but are reluctant to issue a §1983 injunction. Admittedly, most APA actions are filed separately from §1983 attacks, so few judges finding problems with state lethal injection protocols are in the position of selecting between an administrative remedy and an injunction. But even where courts are not formally presented with APA claims, judges can draw more generally on admin-


359. These suits are typically filed separately because many state APA statutes require that APA suits be brought in state court, while many lethal injection challenges are brought in federal courts, which typically allow for more discovery. See, e.g., Del. Code Ann. tit. 29 §§ 10102, 10141 (2009); Mo. Ann. Stat. § 536.110 (West 2009).
Administrative law principles in reviewing and remedying those procedures. The political process failures contributing to the problem invite a judicial order requiring, at a minimum, transparent procedures, greater political accountability, and delegation to competent personnel. Since administrative failings by themselves rarely amount to a constitutional violation, a judge confronted with a § 1983 action will also have to look at the substance of the procedure. But where the evidence suggests real problems, administrative considerations should play a role in helping the court identify a violation and craft a meaningful, workable remedy.

Courts, in fact, should be well situated to rely on administrative principles in crafting a remedy. Some judges may be more comfortable ruling on procedural rather than substantive issues involving science or medicine. Similarly, an administrative remedy—or even a § 1983 injunction suggesting improved administrative procedures—might feel less intrusive to the judge than a traditional negative or affirmative injunction addressing the execution procedure’s details. Indeed, administrative law issues get to the heart of what is wrong with many states’ lethal injection protocols. The protocols have been poorly conceived in secret by people who know little about the drugs and who have not sought help from experts. These are not admirable administrative processes, and, one would hope, improved governmental decision making would yield safer protocols. 360

B. Remedial Modesty and the Case Against Judicial Deference

This discussion should make clear that workable remedies are more modest and readily available than courts assume. For many judges, however, fashioning a remedy is a significant obstacle. 361 Courts’ reluctance to engage with lethal injection remedies fall into three general categories of objections: concerns about intruding excessively on the political branches, 362 interrelated concerns about

360. See, e.g., Herbert Wechsler, Toward Neutral Principles of Constitutional Law, 73 Harv. L. Rev. 1, 9-10 (1959) (arguing that an attention to process is the best guarantor that courts will decide cases based on “neutral principles” and reach good results). But see Jenny S. Martinez, Process and Substance in the “War on Terror,” 108 Colum. L. Rev. 1013, 1025 (2008) (arguing that too devoted an attachment to legal processes “often obscures value judgments about the underlying substantive policies”).

361. See supra Section II.A.

362. See, e.g., Baze v. Rees, 128 S. Ct. 1520, 1531 (2008) (plurality opinion) (warning that imposing a remedy “would substantially intrude on the role of state legislatures in implementing their execution procedures”); Morales v. Hickman, 415 F. Supp. 2d 1037, 1047 (N.D. Cal. 2006) (“[U]nder the doctrines of comity and separation of powers, the particulars of California’s lethal-injection protocol are and should remain the province of the State’s executive branch.”); Lightbourne v. McCollum, 969 So. 2d 326, 351 (Fla. 2007) (stating that the judicial “role is not to micromanage the executive branch in fulfilling its own duties relating to executions”).
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the judiciary’s own institutional capacity, and concerns about relying on street-level subordinates to carry out a judgment. These sources of remedial concerns are legitimate and common in public law litigation, but they should carry less weight in lethal injection cases than many other contexts.

1. Concerns About Intruding on the Political Branches

To the extent courts’ refusal to reach the remedial stage suggests a discomfort with intruding on the political branches, they have not been sensitive to reasons why judicial intervention in lethal injection actions is more modest than judicially ordered relief in many other settings. By treating remedial concerns as high hurdles in these cases, courts implicitly exaggerate the extent to which a remedy would interfere with the internal operations of state institutions. For instance, contrary to some courts’ deferential assumptions, intrusion into lethal injection procedures would not interfere in more than a marginal way with day-to-day prison operations. Changes to the execution procedure certainly would not affect security.

Lethal injection is a discrete procedure involving only a few prison employees and one inmate at a time. It takes place in specially designated rooms removed from the rest of the prison population. Prison safety, then, would not be impacted by changing the drugs, or by requiring that a member of the execution team have particular medical training. Most members of the prison staff, in fact, have nothing to do with execution procedures.

Relatedly, a lethal injection injunction would not divert significant amounts of money from other government programs or even from within the prison. A negative injunction requiring only that the state cease executions until it has improved its procedure would allow the state to determine the most cost effective way to remedy its procedure. Even an affirmative injunction would

363. See, e.g., Baze, 128 S. Ct. at 1531 (warning against “embroil[ing] the courts in ongoing scientific controversies beyond their expertise”); Emmett v. Johnson, 511 F. Supp. 2d 634, 639 (E.D. Va. 2007), aff’d, 532 F.3d 291 (4th Cir. 2008) (“[I]t is not the office of a federal court to dictate to the Commonwealth of Virginia the precise methodology it should employ in carrying out a lawful death sentence . . . .”).

364. See Cal. First Amendment Coal. v. Calderon, 150 F.3d 976, 982-83 (9th Cir. 1998) (preparing to defer to state officials on security concerns involving viewing the lethal injection procedure absent substantial evidence that a prison regulation was an exaggerated response by prison officials); Abdur’Rahman v. Bredesen, 181 S.W.3d 292, 312 (Tenn. 2005) (noting deference owed to prison officials in a lethal injection case to enable them to manage their “tremendous responsibilities”); cf. Shaw v. Murphy, 532 U.S. 223, 229 (2001) (articulating a “unitary, deferential standard for reviewing prisoners’ constitutional claims”).

365. See Cal. First Amendment Coal. v. Woodford, 299 F.3d 868, 879-84 (9th Cir. 2002) (holding that a prison regulation barring public viewing of lethal injection execution procedures prior to actual administration of lethal injection was an exaggerated, unreasonable policy to protect safety and institutional security).
likely impose only modest cost. For example, a switch to a one-drug protocol
would not noticeably change the cost of lethal injection, as none of the drugs
used or contemplated are expensive. If anything, switching to a one-drug
protocol would make things easier for the states, which would only have to buy
one drug instead of three and would no longer have to worry about refrigerat-
ing the pancuronium.

Even the inclusion of an anesthesiologist would not impose excessive costs
on the state, especially when compared to costs imposed by structural injunc-
tions. For example, in Missouri v. Jenkins, the total cost for the educational pro-
grams ordered by the district court as part of its effort to desegregate Kansas
City schools exceeded $220 million. In Pennhurst v. Halderman, the Court
noted that the plaintiffs’ interpretation of the relevant statute would impose
“massive” financial obligations on the states. By contrast, Missouri’s Dr. Do-
erhoff was paid only $2,000 per execution, and Georgia’s execution team’s to-
tal compensation (including doctors and other personnel) was $18,000. No
state executes enough people for this cost to amount to a sizable annual sum;
even in a state like Texas, which executes more people than any other state,
these costs would be a small fraction of what the death penalty already costs.

366. See, e.g., Gawande, supra note 52, at 134 (explaining that drugs used in lethal in-
jection are “cheap and routinely available”); About Implementing Human Eutha-
HEPP/FAQ.html (last visited Mar. 9, 2008) (noting that average cost of pentobar-
barial to euthanize an animal would be $1.27); Phyllis Coleman, Man’s Best Friend
Does Not Live by Bread Alone: Imposing a Duty To Provide Veterinary Care, 12

367. See Harbison v. Little, 511 F. Supp. 2d 872, 876-77 (M.D. Tenn. 2007) (noting that
the refrigeration of pancuronium is a “con” for retaining the three-drug proto-
col).

case, but it provides a striking example of a remedy that asks a good deal of state
and local government.


370. See Kohler, supra note 42.

371. Gawande, supra note 52, at 151.

372. See Adam Liptak, At 60% of Total, Texas Is Bucking Execution Trend, N.Y. Times,
Dec. 26, 2007, at A1 (noting that executions have declined recently in states other
than Texas and that, in 2007, Texas executed twenty-six people and no other state
executed more than three).

373. Some scholars and state groups have tried to calculate the cost of the death pen-
alty. Illinois State Comptroller statistics, for example, show capital cases costing
an average of $13,5 million per year, expenses “significantly disproportionate to
the cost of processing homicide cases in which state’s attorney does not certify the
case for the death penalty.” Thomas P. Sullivan, Efforts To Improve the Illinois
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In short, lethal injection is not a very polycentric problem, so an injunction would be unlikely to have far-reaching public consequences.

2. Concerns About the Judiciary’s Shortcomings

Courts’ reluctance to reach the remedial stage also stems from their related sense of the judiciary’s own institutional shortcomings. This concern too carries less weight in lethal injection than other contexts, especially in light of states’ own failures to engage with their procedures. In other areas, such as prison condition cases, prison officials can convincingly argue that they understand security concerns far better than judges, and that judicial deference is therefore warranted.374 By way of contrast, many state officials do not understand the lethal injection procedure they administer and have not given the matter sufficient attention. Under such circumstances, government does not deserve the deference it enjoys when it has a genuine expertise over a subject matter.

By contrast, even though most judges also lack training in the relevant science, they will review extensive evidence on the issue. Doing so makes them better equipped to understand the dangers and potential remedies than most legislators or unelected, unqualified DOC officials.375 Even taking the judiciary’s
institutional limitations into account, then, many judges are probably more likely to engage with the science of the issue than legislators, who are driven by political considerations and are more likely to delegate the procedure to agency officials. Indeed, even if legislatures designed the procedures themselves, there would be little reason to defer to their scientific judgment. As one commentator argues:

[O]ne of the chief reasons for allowing legislatures to make findings of fact in disputed areas—that they are democratic, representative bodies—seems to have no applicability where issues of pure medical fact are concerned. Unlike those cases in which so-called social facts are involved, there is (or perhaps should be) no significant political element to the determination of medical fact. This is a fact-finding domain in which the interest in public participation and legislatures’ relative institutional competency are at their lowest.

Finally, it should be re-emphasized that the remedies contemplated in these cases are usually narrow. They do not require massive reforms from the state; they do not cost much; and they do not undermine the death penalty itself. Lethal injection plaintiffs can win a safer procedure, but they cannot escape execution—at least not through this litigation. In light of states’ problems with their own procedures, courts are comparatively well situated to deal with these issues.

3. Concerns About Relying on Street-Level Bureaucrats

Another potential judicial concern may stem from the perceived hopelessness of relying on street-level bureaucrats to carry out a judicial decree, particularly in the prison setting. Street-level bureaucrats are generally regarded as low-level employees, such as prison guards, but, as Professor Lipsky famously observed, they often make the decisions that “add up to agency policy.” Some commentators have emphasized the difficulties of achieving social and structural changes, including prison reform, through street-level bureaucrats.
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However, because lethal injection teams usually consist of only a few people with defined roles, a judicial order would more likely be followed. In something like the school desegregation context, or capital punishment more generally, moral responsibility is so diffuse that most involved are unlikely to see themselves closely connected to the violation. But where a small team of people, each with defined tasks, is putting a person to death, a court order is arguably more likely to create a culture of accountability and impact the personnel involved.

Indeed, if anything, the central role played by low-level execution team members renders the need for judicial involvement more pressing and appropriate. Street-level bureaucrats are less politically accountable than upper-level managers, so countermajoritarian concerns weigh less heavily than when courts controvert official agency policies. Additionally, and most importantly, given the proper mandate, higher-level DOC officials might do a better job ensuring street-level compliance if they knew that the court would not permit executions without cooperation and if a failure to comply might attract bad publicity.

Social psychologists have long studied the diffusion of responsibility and related concepts like the bystander effect. See Earl F. Martin, *Tessie Hutchinson and the American System of Capital Punishment*, 59 Md. L. Rev. 553, 562 (2000) (“[T]hough the interplay in capital cases between jurors, trial judges, and appellate judges gives the appearance of a system that squarely faces the gravity of its task, the diffusion of responsibility between these actors enables them, and us, to avoid having to experience fully the monumental decision to kill another human being.”); Stanley Milgram, *Behavioral Study of Obedience*, 67 J. Abnormal & Soc. Psych. 371 (1963) (suggesting that individuals minimize their own moral agency to the degree they believe they are simply following instructions).


As Professor Ely has explained, on hard issues most elected representatives “shrewdly prefer not to have to stand up and be counted but rather to let some executive-branch bureaucrat . . . ‘take the inevitable political heat.’” See generally *Lipsky*.
Conclusion

Several remedial options are available to fix lethal injection procedures without intruding excessively on the states. And yet, despite the significant risk of pain resulting from many states’ lack of transparency, care, and deliberation, most courts have assumed that any remedy would be onerous and have declined to find a violation. This restraint is excessive. It considers only the dangers of judicial meddling, not the dangers of judicial abdication.

The institutions in control of lethal injection have proven inattentive, incompetent, and nonetheless resistant to change, and courts are institutionally well situated to remedy the problem. Indeed, in such circumstances, courts are often the only institution that can secure necessary change. Professors Denno and Berman are correct in calling upon the political branches to re-examine their procedures, and, ideally, states will respond to these challenges. Unfortunately, though, some states have chosen to retain the status quo unless forced to do otherwise. Such obduracy and lack of transparency create an “immunity to political correction” necessitating judicial intervention.

Courts should also take into account the extent to which a remedy may have far-reaching consequences. When an injunction would affect many spheres of public life and prove very disruptive to non-parties, courts should be

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note 283, at 132 (quoting Lloyd N. Cutler & David R. Johnson, Regulation and the Political Process, 84 Yale L.J. 1395, 1400 (1975)). But when courts find fault with governmental policies, thereby drawing the media’s attention, elected officials are more likely to get involved to address the problem. See, e.g., Press Release, Office of the Governor, Governor Schwarzenegger Issues Statement on Lethal Injection Protocol (May 15, 2007), http://gov.ca.gov/index.php?/press-release/6237/ (Governor responding publicly to court-identified deficiencies in the lethal injection protocol).


385. See supra Part III.

386. Sabel & Simon, supra note 225, at 1064.

387. See Lewis v. Casey, 518 U.S. 343, 414 (1996) (Stevens, J., dissenting) (arguing that the more uncooperative the government is in correcting constitutional violations, the more necessary judicial intervention is); Fletcher, supra note 202, at 637 (concluding that the presumption of illegitimacy for structural injunctions is overcome “when the political bodies that should ordinarily exercise such discretion are seriously and chronically in default” and that in such cases “judicial discretion may be a necessary and therefore legitimate substitute for political discretion”); Jeffries & Rutherford, supra note 217, at 1389 (arguing that structural reform injunctions should be “presumptively available when it provides the only effective remedy for constitutional violations”); Mishkin, supra note 213, at 949-51 (arguing that institutional decrees are justified when there is a clear constitutional violation and they are the only available remedy).
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especially wary. But not all public lawsuits involve such polycentric problems. Accordingly, when a remedy is narrow and creates few subsidiary problems, it should not be treated like an invasive institutional injunction. These distinctions are especially important when courts’ misperceptions color not just the scope of remedial discretion but also the content of the constitutional right itself.

Many courts to date have mistakenly assumed that a lethal injection remedy would be overly invasive, but is well within their equitable powers to do a better job considering these issues. Indeed, our system reserves an important role for courts to oversee the other branches. Admittedly, it will not always be easy to gauge the state’s good faith (or lack thereof) or the degree to which a problem is polycentric. States in lethal injection cases, for instance, cite even minor reforms as evidence of good faith and, similarly, are likely to cry foul whenever a court imposes any remedy. Nevertheless, although these factors will not always be easily administered, it is important that they factor into judges’ deliberations. Given the extent to which remedial concerns color judges’ attitudes towards the merits, courts’ initial survey of the remedial issues should appreciate the multi-faceted nuances that favor and disfavor judicial intervention. Increased recognition of these issues is, admittedly, only a small step towards correcting the misperceptions that have plagued much lethal injection litigation, but such a step could help courts guard against a reactionary assum-

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388. See, e.g., Tenn. Valley Auth. v. Hill, 437 U.S. 153, 193 (1978) (“[S]ince all or almost all equitable remedies are discretionary, the balancing of equities and hardships is appropriate in almost any case as a guide to the chancellor’s discretion.”) (internal quotation marks omitted); Lemon v. Kurtzman, 411 U.S. 192, 200 (1973) (“In shaping equity decrees, the trial court is vested with broad discretionary power . . . .”); Swann v. Charlotte-Mecklenburg Bd. of Ed., 402 U.S. 1, 15 (1971) (“Once a right and a violation have been shown, the scope of a district court’s equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies . . . .”).

389. See, e.g., The Federalist No. 48, at 256-57 (James Madison) (George W. Carey & James McClellan ed., 2001) (arguing that unless these branches of government “be so far connected and blended, as to give to each a constitutional control over the others, the degree of separation which the maxim requires, as essential to a free government, can never in practice be duly maintained . . . .” and that, if left unchecked, the legislature will extend “the sphere of its activity, and draw[[ all power into its impetuous vortex”); Scott D. Gerber, The Court, The Constitution, and the History of Ideas, 61 VAND. L. REV. 1067, 1082 (2008) (citing Federalist No. 48 to argue that judicial review imposes an important check on the political branches that is necessary in a system of separation of powers).

390. Cf. Jones v. McAndrew, 996 F. Supp. 1439, 1450-51 (N.D. Fla. 1998) (holding that defendants’ good faith efforts to revise the electric chair protocol following botched execution demonstrated lack of deliberate indifference).

tion that any action requesting a public law injunction necessarily would require something intrusive and far-reaching.

Additionally, attention to these issues can help judges clarify when and why they should engage in self-restraint. Judicial restraint is an important constitutional value that quite appropriately arises at various stages of a case. When courts appeal to these values, however, they often do so as if restraint applies identically when determining the right and when issuing a remedy. But judicial restraint seems less appropriate when a court with jurisdiction hears evidence suggesting a constitutional violation. In such circumstances, excessive restraint can cause the judge to turn a blind eye to a serious infringement of rights. By way of contrast, at least in the lethal injection context, restraint may be more appropriate when a court has found a violation and is choosing between various remedies, some more intrusive than others. As lethal injection challenges continue to work their way through the judiciary, courts should therefore carefully consider the remedial questions at the outset of the case. It might be unrealistic to expect all courts to dramatically change their approaches to these cases, but self-awareness can yield substantial reforms.

392. See supra Section II.A.

393. See Jeffries & Rutherford, supra note 217, at 1411 (discussing courts’ imposition of narrower injunctions in part due to judicial restraint concerns); Sabel & Simon, supra note 225, at 1019, 1038 (discussing recent developments in constitutional remedies, including departures from command-and-control regime). In different contexts, commentators have argued that courts should be less deferential when formulating a remedy, because, at the remedy stage, it should focus on the harm suffered by the victims. See, e.g., Wendy Parker, The Supreme Court and Public Law Remedies: A Tale of Two Kansas Cities, 50 Hastings L.J. 475, 552 (1999) (“Deferral to the wrongdoer elevates the defendants’ interests to an explicit part of the remedial calculus, rather than keeping the remedy focused on redressing the rights of the victims.”); Poser, supra note 109, at 324-25 (“[A]lthough the Court continues to insist that the scope of the right determines the scope of the remedy, the separation of the two has resulted in a desegregation jurisprudence which is currently rooted in the purported limitations on equity rather than the opportunity of equitable remedies to correct rights violations.”).