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# Deference Determinations and Stealth Constitutional Decision Making

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# Deference Determinations and Stealth Constitutional Decision Making

*Eric Berger\**

*ABSTRACT: Courts deciding constitutional cases frequently have to make deference determinations—that is, decisions about whether to respect a political branch’s factual findings and policy judgments because of that branch’s institutional superiority. The U.S. Supreme Court’s approach to a wide range of these determinations, however, is inconsistent and under-theorized. Indeed, the Court’s difficulties with deference determinations mirror broader failures to resolve carefully and consistently a number of “stealth” determinations that recur in constitutional cases—determinations that fall outside the black-letter doctrinal framework but can still greatly impact a case’s outcome.*

*Rather than relying on pithy platitudes about each government branch’s strengths and weaknesses, courts should examine the actual behavior and processes of the relevant governmental institution before deciding whether deference is appropriate. This contextual, institutional approach would provide better incentives for Congress and administrative agencies to craft policy utilizing their expertise and reinforcing their political accountability. It would also offer a more searching, rigorous model for courts approaching other extra-doctrinal determinations, thus improving the legal status of both deference determinations themselves and stealth constitutional determinations more generally.*

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## INTRODUCTION

In *Board of Trustees v. Garrett*, a well-known, contentious decision, the U.S. Supreme Court invalidated provisions of the Americans with Disabilities Act (“ADA”), which authorized state employees to recover money damages from their state employers for violations of the Act.<sup>1</sup> Congress had sought to abrogate the states’ sovereign immunity from such lawsuits pursuant to its power under Section 5 of the Fourteenth Amendment.<sup>2</sup> In so doing, Congress made factual findings regarding the pervasiveness of discrimination against individuals with disabilities.<sup>3</sup> When the Court struck down that abrogation of sovereign immunity, it rejected the relevance of those findings, faulting Congress for not showing enough evidence of *state* discrimination against the disabled.<sup>4</sup> The full doctrinal picture is, of course, more complicated, but the Court was decidedly undeferential to Congress despite the factual record it had gathered.

The Court’s approach to evaluating congressional findings, however, is inconsistent, both in the Section 5 context and more generally. Indeed, just two years after *Garrett*, the Court in *Nevada Department of Human Resources v. Hibbs* was far more respectful of Congress’s findings in upholding the Family and Medical Leave Act’s (“FMLA”) abrogation of state sovereign immunity.<sup>5</sup> Breaking from *Garrett*’s undeferential approach, *Hibbs* emphasized the evidence Congress had amassed and found it sufficient to “justif[y] Congress’ passage of prophylactic § 5 legislation.”<sup>6</sup>

The FMLA findings the Court accepted in *Hibbs*, however, seem quite similar to the ADA findings rejected in *Garrett*. Both records, for instance, relied heavily on *private*-sector labor statistics, yet the Court did little to explain why such facts were inadequate in *Garrett* but sufficient in *Hibbs*.<sup>7</sup> In reality, the discrepancy is best explained not by Congress’s findings, but rather by doctrinal differences involving the standard of review for the underlying discrimination Congress sought to prevent.<sup>8</sup> But while those differences might help justify the divergent outcomes in the two cases, they neither reconcile the Court’s varying degrees of deference to congressional fact-finding nor justify the Court’s failure to explain those different levels of deference.

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1. *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 360 (2001).

2. *Id.* at 363–64.

3. *Id.* at 369 (quoting 42 U.S.C. § 12101(a)(2) (2000)).

4. *See id.* at 370.

5. *Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721 (2003).

6. *Id.* at 730.

7. *See id.* at 730 n.3 (conceding that Congress’s findings addressed “policies in the private sector,” but contending that such policies “differ[] little from those offered private sector employees”).

8. *See infra* notes 64–65 and accompanying text.

The discrepancy between *Garrett* and *Hibbs* is hardly anomalous. To the contrary, it reflects a pattern of judicial inconsistency on the question of deference—and not just in the area of congressional fact-finding. “Deference” is a poorly defined term, but as I use it here, it addresses the judiciary’s decision in a constitutional case to afford special respect to the determination of another branch of government due to that branch’s relative *institutional* strengths. When a court applies deferential rational basis review because a policy does not burden a suspect class, the court’s scrutiny is guided by *substantive* factors. However, when a court, say, affords special respect to a policy due to that government branch’s expertise, it is deferring on institutional grounds. Institution-based deference, in other words, differs from the tier of scrutiny triggered by substantive, doctrinal analysis and is narrower than constitutional deference writ large.<sup>9</sup> Of course, in practice the lines between institution-based deference and substantive doctrine are not always so neat, and the analyses can blur together.<sup>10</sup> That said, courts regularly invoke institutional factors when deciding whether to defer in constitutional cases and often justify that deference on the political—that is, nonjudicial—branches’ ostensible superior epistemic and democratic authority.<sup>11</sup>

The Supreme Court’s deference determinations in a wide range of constitutional contexts are often inchoate and under-theorized.<sup>12</sup> *Garrett* and *Hibbs* illustrate the problem nicely, because they deal with the same source of congressional power, but the Court’s approach to congressional fact-finding in other contexts is similarly erratic and poorly explained. The Court does no better when it is deciding whether to grant deference to other government institutions, like administrative agencies, based on their ostensible expertise or political authority. Even when the Court reviews

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9. See, e.g., Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1214–17 (1978) (explaining that judicial restraint rests “not upon analysis of the constitutional concept but upon various concerns of the Court about its institutional role” relative to other governmental institutions).

10. See *infra* Part I.B.

11. This Article does not address “deference” as it is used in other senses. For example, “deference” can refer to the Court’s general willingness to uphold challenged governmental policies unconnected to an institutional analysis. It also can refer to judicial respect for lower court factual findings or for agency decisions in administrative law cases. Those types of “deference” are beyond the scope of this Article.

12. See *Rostker v. Goldberg*, 453 U.S. 57, 112 (1981) (Marshall, J., dissenting) (claiming the Supreme Court’s deference decisions are mere “hollow shibboleths”); Eric Berger, *Individual Rights, Judicial Deference, and Administrative Law Norms in Constitutional Decision Making*, 91 B.U.L. REV. 2029, 2032 (2011) [hereinafter Berger, *Administrative Law Norms*] (arguing that judicial deference to administrative agencies in constitutional individual rights cases is “inconsistent and inchoate”); Paul Horwitz, *Three Faces of Deference*, 83 NOTRE DAME L. REV. 1061, 1095 (2008) (concluding that deference is highly “undertheorized and misunderstood,” due in part to the Supreme Court’s lack of explanation).

policies by “special” governmental institutions, like prisons, or in “special” contexts, like national security, its approach lacks a theoretical framework and is surprisingly inconsistent.

The Court’s lack of a meaningful methodology for determining when to defer largely results from its failure to closely examine the institution in question. Given that deference determinations supposedly acquiesce to an actor’s unique competence in a given area, one might think that a rigorous institutional analysis would shape courts’ approaches to these questions. In reality, the Supreme Court rarely engages in such analysis. To the contrary, its deference determinations are often poorly justified, resting less on careful consideration and more on pithy platitudes about each political branch’s strengths and weaknesses. Sometimes the Court simply announces its deference determination without providing any supporting legal analysis. And even when the Court does explain its reasoning, it often fails to reconcile its arguments with approaches to similar questions in previous cases, even though decisions to defer to the political branches can substantially shape the outcome of many constitutional cases.<sup>13</sup> Academics, too, have paid inadequate attention to these issues, focusing primarily on the tiers of scrutiny rather than institutional factors.<sup>14</sup>

Interestingly, the Court’s difficulties with deference determinations reflect a broader failure to carefully and consistently resolve a number of such “stealth” determinations—decisions that recur in constitutional cases but fall outside traditional doctrinal categories.<sup>15</sup> These stealth determinations share certain characteristics.<sup>16</sup> First, these determinations arise frequently in constitutional cases. Second, despite their common

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13. See Daniel J. Solove, *The Darkest Domain: Deference, Judicial Review, and the Bill of Rights*, 84 IOWA L. REV. 941, 953 (1999) (“The practice of deference has drastic effects on the outcomes of cases . . .”).

14. See Eric Berger, *In Search of a Theory of Deference: The Eighth Amendment, Democratic Pedigree, and Constitutional Decision Making*, 88 WASH. U. L. REV. 1, 4 (2010) [hereinafter Berger, *Theory of Deference*] (“Scholars . . . have focused little on the issue of deference outside the obvious context of the tiers of scrutiny.”); Horwitz, *supra* note 12, at 1061 (“Deference . . . has received surprisingly little . . . attention in constitutional scholarship.”). To the extent scholars have examined institutional deference, they have focused primarily on deference to congressional fact-findings rather than the broader array of relevant institutional contexts. See *infra* Part II.B.1.

15. Professors Eskridge and Frickey have used the term “stealth constitutionalism” in a different sense, referring to the Supreme Court’s practice of promoting under-enforced constitutional norms through clear-statement rules in statutory interpretation. See William N. Eskridge, Jr. & Philip P. Frickey, *The Supreme Court, 1993 Term—Foreword: Law as Equilibrium*, 108 HARV. L. REV. 26, 85 (1994). Professor Friedman has written about the dangers of “stealth overruling.” See Barry Friedman, *The Wages of Stealth Overruling (with Particular Attention to Miranda v. Arizona)*, 99 GEO. L.J. 1, 6–16 (2010). The focus of this Article, by contrast, is constitutional cases in which the Court makes important, extra-doctrinal determinations without sufficient explanation or consistency.

16. For more examples of stealth determinations, see *infra* Part I.C.

recurrence, the Supreme Court often fails to thoroughly explain its reasoning when making such determinations. Third, and consequently, these determinations typically are not reflected in black-letter constitutional doctrine. Fourth, the Court often fails to adequately reconcile the determinations across cases, so that its approach in one case often lacks precedential effect in another. Fifth, the Court also fails to explain just how central these determinations are to the resolution of some cases.

“Stealth” is, in some ways, an imperfect term to describe these determinations, many of which are made explicitly, such as when the Court announces that it is deferring to a certain government actor.<sup>17</sup> To this extent, the term “stealth” is misleading insofar as it connotes invisibility. But “stealth” is also defined as “intended not to attract attention,”<sup>18</sup> and indeed, the Court’s summary pronouncements in these areas seek to escape careful scrutiny. Even when the Court does acknowledge making such a determination, it usually provides little insight into *how* it did so. Indeed, when the Court makes stealth determinations, it often confidently announces its decision without elaboration and reference to the kinds of professional legal norms that usually guide judicial decision making in other areas.<sup>19</sup>

This Article’s goals are twofold. With respect to deference determinations specifically, this Article highlights how courts too often make institution-based deference determinations with scant attention to the actual behavior of the institution at issue. More diligent, consistent attention to such institutional matters will result in deference determinations that are both more deserved and more methodologically consistent. Indeed, though deference determinations are often short-changed by courts and scholars alike, they are crucial to the enterprise of constitutional decision making. Constitutional law often boils down to the question of “who decides,” and

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17. See, e.g., *Grutter v. Bollinger*, 539 U.S. 306, 328 (2003) (deferring to the educational judgment of a state university’s law school); *Turner v. Safley*, 482 U.S. 78, 90–91 (1987) (noting that “courts should be particularly conscious of the ‘measure of judicial deference owned to corrections officials’” and upholding a rule barring inmate-to-inmate correspondence (quoting *Pell v. Procunier*, 417 U.S. 817, 827 (1974))); *Goldman v. Weinberger*, 475 U.S. 503, 507 (1986) (“[C]ourts must give great deference to the professional judgment of military authorities . . .”).

18. MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 1221 (11th ed. 2004).

19. See LON L. FULLER, *THE MORALITY OF LAW* 63 (rev. ed. 1969) (“[C]larity represents one of the most essential ingredients of legality.”); JOSEPH RAZ, *The Rule of Law and Its Virtue*, in *THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY* 210, 212–19 (1979) (discussing the importance of openness, clarity, and stability in the law); Richard A. Posner, *The Supreme Court, 2004 Term—Foreword: A Political Court*, 119 HARV. L. REV. 32, 40–41 (2005) (discussing legal norms that usually guide judicial decision making); cf. Abbe R. Gluck, *Intersystemic Statutory Interpretation: Methodology as “Law” and the Erie Doctrine*, 120 YALE L.J. 1898, 1909–11 (2011) (questioning whether principles of statutory interpretation enjoy the status of law).

deference determinations get to the heart of that question.<sup>20</sup> Regrettably, the Court has never tried to address these determinations systematically. Not only is deference so “important and . . . omnipresent” that it deserves a “sincere effort to craft a principled doctrine,”<sup>21</sup> but lower courts also have great difficulty following the Supreme Court’s muddled guidance.

Through its discussion of deference determinations, this Article also illuminates the problem of stealth constitutional decision making more generally. Given that stealth determinations not only recur frequently but also can be outcome determinative, their importance rivals that of substantive black-letter doctrine, which is articulated in the tiers of scrutiny and other tests courts apply in areas like standing and the Commerce Clause.<sup>22</sup> But stealth determinations are not treated like full doctrine, as the Court’s pronouncements rarely carry precedential force. To be sure, this malleability and unpredictability is symptomatic of more general problems in constitutional jurisprudence,<sup>23</sup> but the problem is heightened when the Court makes these extra-doctrinal determinations.

The Article proceeds as follows. Part I discusses three different contexts in which varied, but related, forms of institutional deference arise: deference to congressional fact-finding; deference based on an administrative agency’s ostensibly superior epistemic or political authority; and deference to special government institutions, like prisons, or in special areas, like national security. The Court’s approach to deference in each of these circumstances is incomplete and inconsistent, raising difficult questions about how deference determinations interact with doctrinal tests and whether stealth determinations of this sort even enjoy the status of law. Part II argues that courts should approach deference determinations by considering each

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20. See NEIL K. KOMESAR, *LAW’S LIMITS: THE RULE OF LAW AND THE SUPPLY AND DEMAND OF RIGHTS* 162 (2001) (“Constitutional law raises the central issue of who decides who decides.”).

21. William D. Araiza, *Deference to Congressional Factfinding in Rights-Enforcing and Rights-Limiting Legislation*, 88 N.Y.U. L. REV. (forthcoming 2013) (manuscript at 4), available at <http://ssrn.com/abstract=2064890>.

22. See, e.g., *Turner Broad. Sys., Inc. v. FCC (Turner Broad. I)*, 512 U.S. 622, 641–42 (1994) (declaring that content-discriminatory speech restrictions are subject to strict scrutiny); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992) (identifying injury, causation, and redressability as the elements of Article III standing); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493–94 (1989) (plurality opinion) (suggesting that any discrimination based on race triggers strict scrutiny); *Katzenbach v. McClung*, 379 U.S. 294, 301–02 (1964) (applying the “substantial effects” test to find that Congress did have authority under the Commerce Clause to pass the Civil Rights Act).

23. See generally ERIC J. SEGALL, *SUPREME MYTHS: WHY THE SUPREME COURT IS NOT A COURT AND ITS JUSTICES ARE NOT JUDGES*, at ix (2012) (arguing that the Supreme Court’s constitutional decisions “reflect the personal values of the Justices”); Ray Forrester, *Supreme Court Opinions—Style and Substance: An Appeal for Reform*, 47 HASTINGS L.J. 167, 182–84 (1995) (criticizing justices for pretending that their value judgments are in fact legal judgments); Posner, *supra* note 19, at 39–54 (arguing that because the Supreme Court evaluates the Constitution, it is necessarily a political decision maker).



institution's actual behavior in a particular case before determining whether it deserves deference, rather than relying on generalizations about each institution's strengths and weaknesses. Part III considers advantages of and challenges to this approach. The Article concludes with broader observations about the Supreme Court's failure to adequately theorize many stealth determinations.

## I. STEALTH DEFERENCE DETERMINATIONS

### A. THREE BRANCHES OF JUDICIAL DEFERENCE: LEGISLATIVE, ADMINISTRATIVE, AND "SPECIAL" CONTEXTS

#### 1. Deference to Congressional Factual Findings

One form of institutional deference in constitutional cases is judicial respect for congressional fact-findings. In constitutional cases, the Supreme Court must sometimes decide whether to accept the legislature's presentation of facts or whether it should instead draw its own factual conclusions, on the basis of a trial court record, amicus briefs, or simply its own understanding of the world. This determination is institutional insofar as it sometimes rests on the Court's perceptions of Congress's relative institutional strengths.<sup>24</sup> Unlike courts, Congress can hold hearings, conduct investigations, and create committees to examine issues.<sup>25</sup> Collectively, these abilities give Congress a fact-finding capacity that courts lack, and presumably offer courts a sound reason to defer to Congress's findings.

As with many varieties of deference, however, the Court's method for determining when to defer to congressional factual findings lacks consistency.<sup>26</sup> The Court claims to give "considerable deference, in examining the evidence, to Congress' findings and conclusions,"<sup>27</sup> but it was

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24. See *Turner Broad. Sys., Inc. v. FCC (Turner Broad. II)*, 520 U.S. 180, 195 (1997) ("We owe Congress' findings deference in part because the institution 'is far better equipped than the judiciary to amass and evaluate the vast amounts of data bearing upon' legislative questions." (quoting *Turner Broad. I*, 512 U.S. at 665-66 (plurality opinion)) (internal quotation marks omitted)); *South Carolina v. Katzenbach*, 383 U.S. 301, 308-09 (1966) (deferring to Congress in part because it held extensive hearings and received testimony from numerous witnesses).

25. See Saul M. Pilchen, *Politics v. the Cloister: Deciding When the Supreme Court Should Defer to Congressional Factfinding Under the Post-Civil War Amendments*, 59 NOTRE DAME L. REV. 337, 363-67 (1984).

26. See, e.g., DAVID L. FAIGMAN, *CONSTITUTIONAL FICTIONS: A UNIFIED THEORY OF CONSTITUTIONAL FACTS*, at xii (2008) (referring to fact-finding in constitutional cases as a "slapdash affair"); Caitlin E. Borgmann, *Rethinking Judicial Deference to Legislative Fact-Finding*, 84 IND. L.J. 1, 13-16 (2009) (discussing courts' inconsistent treatment of legislative fact-finding).

27. *Turner Broad. II*, 520 U.S. at 199; see also *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 569, 579-81 (1990) (arguing that courts "must pay close attention to . . . the factfinding of Congress" and "give 'great weight to the decisions of Congress'" (quoting *Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 103 (1973))).

hardly deferential when it struck down the Violence Against Women Act (“VAWA”) in *United States v. Morrison*.<sup>28</sup> When Congress enacted VAWA in 1994, it supported the legislation with voluminous findings detailing the effects of violence against women on interstate commerce, including deterring victims from traveling interstate, transacting business, and engaging in employment.<sup>29</sup> Congress seemed wise to include such findings, given that just one year later the Court would point to the absence of such legislative findings when it invalidated the Gun Free School Zone Act as beyond Congress’s commerce power in *United States v. Lopez*.<sup>30</sup> Nevertheless, despite Congress’s inclusion of such findings in VAWA, the Court still concluded that VAWA exceeded Congress’s Commerce Clause authority,<sup>31</sup> cautioning that “the existence of congressional findings is not sufficient, by itself, to sustain the constitutionality of Commerce Clause legislation.”<sup>32</sup> Indeed, the Court determined that Congress’s findings in VAWA were “substantially weakened by the fact that they rely so heavily on a method of reasoning that [the Court had] already rejected.”<sup>33</sup> More specifically, the Court rejected Congress’s findings because they might “completely obliterate the Constitution’s distinction between national and local authority.”<sup>34</sup>

Most striking about this reasoning is that the Court attacked not so much the methodology or veracity of the findings, but their constitutional implications. The Court did not contend that Congress had used improper methods to find, for instance, that gender-motivated violence deterred victims from engaging in employment in interstate business. Nor did it retreat from its contention in *Lopez* that congressional findings were relevant to the commerce analysis, or contradict Congress’s ultimate conclusion that gender-motivated violence collectively might have national economic consequences. Rather, the Court contended that the findings “would allow Congress to regulate any crime as long as the nationwide, aggregated impact of that crime has substantial effects on employment, production, transit, or consumption.”<sup>35</sup> Congress’s findings were “substantially weakened,” then,

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28. *United States v. Morrison*, 529 U.S. 598, 627 (2000).

29. See H.R. REP. NO. 103-711, at 385 (1994) (Conf. Rep.), *reprinted in* 1994 U.S.C.C.A.N. 1801, 1853.

30. See *United States v. Lopez*, 514 U.S. 549, 562 (1995) (faulting Congress for not including findings “regarding the effects upon interstate commerce of gun possession in a school zone” (quoting Brief for Petitioner at 5–6, *Lopez*, 514 U.S. 549 (No. 93-1260))).

31. The government had sought to uphold the legislation under both the Commerce Clause and Section 5 of the Fourteenth Amendment. See *Morrison*, 529 U.S. at 619. The Court rejected both arguments. See *id.* at 618–19, 627.

32. *Id.* at 614.

33. *Id.* at 615.

34. *Id.*

35. *Id.*

because they would have authorized a broad national power that five justices were unwilling to permit.<sup>36</sup> The Court, in short, purported to reject Congress's findings, but in reality rejected the constitutional conclusions that flowed from those findings.

Regardless of whether this is wise federalism doctrine, the Court's analysis failed to offer any method for how it should approach congressional findings, especially findings with powerful constitutional implications. The Court's real attack appears to be on the "substantial effects" doctrine, which purportedly permits Congress to regulate matters substantially affecting interstate commerce.<sup>37</sup> It could well be that activity that did not "substantially affect" interstate commerce in 1788, such as violence against women, does "substantially affect" it today.<sup>38</sup> If so, then the "substantial effects" test, at least as applied pre-*Lopez* and *Morrison*, would likely broaden congressional power significantly beyond its original scope, because some activity that did not substantially affect interstate commerce in the late eighteenth century now does.<sup>39</sup>

But rather than suggesting that the "substantial effects" test be replaced with a test yielding less congressional power, the Court faulted Congress's findings. Such judicial sleight of hand is regrettable. It is true, of course, that questions of law and fact often blur together, but the Court's explicit repudiation of Congress's factual findings indicates that the Court will not accept factual findings yielding unpalatable constitutional results. The Court, however, offered no roadmap for lower courts or litigants to follow when assessing congressional findings.

Comparing two cases that address the same constitutional issue further highlights the Court's erratic approach to congressional findings. Congress has authority to abrogate (i.e., to strip) a state's Eleventh Amendment sovereign immunity under Section 5 of the Fourteenth Amendment,<sup>40</sup> but cannot do so using its Commerce Clause power.<sup>41</sup> Accordingly, whether Congress has properly abrogated state sovereign immunity in a given statutory scheme usually hinges on whether it has properly exercised its Section 5 power—that is, whether the abrogation is "congruent and

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36. See Araiza, *supra* note 21, at 17 & n.74 (arguing that *Morrison* disallowed "a role for congressional findings").

37. *United States v. Lopez*, 514 U.S. 548, 559 (1995).

38. See, e.g., Lawrence Lessig, *Translating Federalism: United States v. Lopez*, 1995 SUP. CT. REV. 125, 129–30 ("As commerce today seems plainly to reach practically every activity of social life, it would seem to follow that Congress has the power to reach, through regulation, practically every activity of social life.").

39. See *id.*

40. *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976).

41. *Seminole Tribe v. Florida*, 517 U.S. 44, 65 (1996).

proportional” to the targeted violation Congress sought to remedy.<sup>42</sup> Often, to determine whether a particular abrogation was appropriately “congruent and proportional,” the Court looks to Congress’s factual record supporting the legislation. Once again, the Court’s approach to these findings is inconsistent.

In *Garrett*, the Court determined that Congress had overreached in permitting state employees to recover money damages from state employers who had failed to comply with provisions of the ADA.<sup>43</sup> Congress held thirteen separate hearings on these issues and found that “historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem.”<sup>44</sup> The Court, however, dismissed the relevance of these findings, insisting that to abrogate state sovereign immunity, Congress needed not general evidence of discrimination against the disabled but evidence of such discrimination by states themselves.<sup>45</sup> Despite some such evidence in the legislative record, the Court found that the incidents compiled fell “far short of even suggesting the pattern of unconstitutional discrimination on which § 5 legislation must be based.”<sup>46</sup>

Indeed, the Court used Congress’s limited findings to help justify striking down the abrogation, noting that Congress had found that 43 million Americans have some disability and that states employ 4.5 million people.<sup>47</sup> Given these large numbers, the Court found it “telling” that “Congress assembled only such minimal evidence of unconstitutional state discrimination in employment against the disabled.”<sup>48</sup> The Court so held even though Congress probably could not have known such specific documentation would be required, given that the ADA was passed in 1990—before *Boerne’s* 1997 “congruent and proportional” requirement. The Court further refused to accept findings about state discrimination against the

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42. See *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 365 (2001); *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997).

43. *Garrett*, 531 U.S. at 369.

44. *Id.* (quoting 42 U.S.C. § 12101(a)(2) (2000)) (internal quotation marks omitted); see also Robert C. Post, *The Supreme Court, 2002 Term—Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 15 (2003).

45. See *Garrett*, 531 U.S. at 369 (“[T]he great majority of these incidents [compiled by Congress] do not deal with the activities of States.”); see also *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 90–91 (2000) (“Although we also have doubts whether the findings Congress did make with respect to the private sector could be extrapolated to support a finding of unconstitutional age discrimination in the public sector, it is sufficient for these cases to note that Congress failed to identify a widespread pattern of age discrimination by the States.” (emphasis omitted)).

46. *Garrett*, 531 U.S. at 370.

47. *Id.*

48. *Id.*

disabled unless they pertained specifically to employment and reflected the policies of the *state* (as opposed to state sub-divisions, like cities and counties).<sup>49</sup>

However, though the Court followed this undeferential approach in other abrogation cases,<sup>50</sup> it has sometimes accorded far more respect to congressional findings. For example, in *Hibbs* the Court was decidedly more deferential when it upheld the FMLA's abrogation of state sovereign immunity. The Court highlighted the importance of congressional findings, indicating that Congress had found sufficient evidence that state laws limited women's employment opportunities and reinforced gender stereotypes, thus "justif[ying] Congress' passage of prophylactic § 5 legislation."<sup>51</sup> More specifically, the Court cited the FMLA's legislative record, which reflected "that 37 percent of surveyed private-sector employees were covered by maternity leave policies, while only 18 percent were covered by paternity leave policies."<sup>52</sup>

These numbers certainly reflect gender-based stereotypes, but the Court's reliance on them suggests far more deference than *Garrett*. Whereas *Garrett* specifically faulted Congress for failing to identify enough instances of *state* discrimination against the disabled,<sup>53</sup> *Hibbs* drew on evidence largely from the private sector to conclude that abrogation was appropriate, because "stereotype-based beliefs about the allocation of family duties remained firmly rooted."<sup>54</sup> The Court, to its credit, also identified some public-sector evidence before Congress, but, as Professor Robert Post points out, collectively Congress's record supporting the FMLA was "far weaker" than the record deemed insubstantial in *Garrett*.<sup>55</sup> Indeed, the dissenting justices in *Hibbs* were skeptical, contending that the majority should have

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49. See *id.* at 368–69, 371 n.7 (rejecting relevance of discrimination by local governments and other findings because "[o]nly a small fraction" of them "relate to state discrimination against the disabled in employment").

50. See, e.g., *Kimel*, 528 U.S. at 90–91 (finding Congress's report insufficient to establish a "significant pattern of unconstitutional discrimination"); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 640–48 (1999) (concluding, after extensive review, that "Congress came up with little evidence" supporting the propriety of its Section 5 legislation).

51. *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 730 (2003).

52. *Id.*

53. See *Garrett*, 531 U.S. at 370.

54. See *Hibbs*, 538 U.S. at 730.

55. Post, *supra* note 44, at 16. Indeed, much of the important public-sector evidence in *Hibbs* was relegated to a footnote. See *Hibbs*, 538 U.S. at 730 n.3 (briefly summarizing a fifty-state survey demonstrating similarities between public- and private-sector leave policies). The Court also vaguely cited evidence indicating that even non-facially discriminatory laws "were applied in discriminatory ways," citing not compiled statistics, but a House Report and testimony of one witness in Senate labor hearings. See *id.* at 732.

relied on more than merely “a simple recitation of a general history of employment discrimination against women.”<sup>56</sup>

To be clear, the evidence in *Hibbs* may well suggest a substantial enough pattern of discrimination to justify abrogating state sovereign immunity.<sup>57</sup> But the Court never addressed why the congressional facts in *Hibbs* were sufficient while the facts in *Garrett* were not.<sup>58</sup> The *Garrett* Court, for instance, rejected approximately 300 examples of discrimination by state governments in the legislative record,<sup>59</sup> because those examples “were submitted not directly to Congress” but to a congressionally appointed task force.<sup>60</sup> The Court never explained why this distinction should be relevant to the deference determination, or why, in light of precedent, Congress’s view of the facts should not be given the benefit of the doubt.<sup>61</sup>

*Garrett* also rejected other evidence of “adverse, disparate treatment by state officials”<sup>62</sup> because it was merely “anecdotal.”<sup>63</sup> The Court, however, failed to address whether evidence of disability discrimination will usually be anecdotal, since such discrimination typically would not be explicit in a state’s policies. By contrast, in the FMLA setting, Congress could more easily examine a state’s written leave policies to identify sex discrimination. Perhaps anecdotal evidence is never to be trusted, but if that is the case, the Court’s approach makes it difficult for Congress ever to amass a sufficient record of certain kinds of discrimination. Significantly, the Court neither fully acknowledges nor justifies its decision to set such a high bar for Congress in certain kinds of discrimination cases.

There are, of course, other factors that can explain the different outcomes in *Garrett* and *Hibbs*. Whereas the FMLA addressed sex discrimination, which triggers intermediate scrutiny under the Constitution, the ADA addressed disability discrimination, which only triggers rational basis review and therefore requires that Congress show a “widespread

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56. *Hibbs*, 538 U.S. at 746 (Kennedy, J., dissenting).

57. *Id.* at 735 (majority opinion).

58. See Post, *supra* note 44, at 16 (arguing that, measured by the standards of *Garrett*, “the legislative record in *Hibbs* was virtually barren of specific allegations or examples of relevant unconstitutional state discrimination”).

59. Bd. of Trs. of the Univ. of Ala. v. *Garrett*, 531 U.S. 356, 379 (2001) (Breyer, J., dissenting).

60. See *id.* at 370–71 (majority opinion).

61. See *id.* at 382–83 (Breyer, J., dissenting) (“[I]f any state of facts reasonably can be conceived that would sustain’ challenged legislation, then ‘there is a presumption of the existence of that state of facts, and one who assails the classification must carry the burden of showing . . . that the [congressional] action is arbitrary.” (quoting *Pac. States Box & Basket Co. v. White*, 296 U.S. 176, 185 (1935))).

62. *Id.* at 370 (majority opinion) (quoting *id.* at 379 (Breyer, J., dissenting)).

63. *Id.*

pattern” of state discrimination.<sup>64</sup> Given that it is easier to assert a successful sex-discrimination claim, legislation passed to remedy such discrimination is more likely to be “congruent and proportionate” to the underlying violation.<sup>65</sup> However, while these distinctions may adequately account for the different outcomes in the cases, they do not fully explain the Court’s inconsistent consideration of congressional findings. Indeed, even if we agree that the Court appropriately demanded a more widespread pattern of discrimination in *Garrett*, that view still would not explain the Court’s rejection of the facts that Congress did gather to support the ADA.

The Court’s failure to adequately explain, let alone theorize, its approach to legislative fact-finding is so pervasive that at times it is not even clear within a single case whether it is deferring or not. In *Gonzales v. Carhart*, the Court upheld Congress’s Partial-Birth Abortion Ban Act, which prohibited certain abortion procedures.<sup>66</sup> The Court perfunctorily reiterated the deference it usually accords congressional findings,<sup>67</sup> but then asserted that Congress’s findings supporting the statute in question had included factual inaccuracies.<sup>68</sup> Therefore, the Court explained, “Uncritical deference to Congress’ factual findings in these cases is inappropriate.”<sup>69</sup> Nevertheless, despite the inaccuracies, the Court, relying largely on Congress’s factual record, proceeded to conclude, contrary to the trial court’s findings, that the medical community was evenly divided as to whether the banned abortion procedure was sometimes the safest for particular women.<sup>70</sup> As Professor Borgmann argues, “[T]he Court purported not to defer to Congress’s fact-finding, but its upholding of the federal abortion procedure ban was possible only because the Court in fact did implicitly defer to Congress on the key medical facts in dispute.”<sup>71</sup> Indeed, the Court in *Gonzales* is remarkably both critical of and deferential to Congress’s factual findings within just a few sentences.<sup>72</sup> Compounding the confusion, the Court also does not explain sufficiently why Congress’s findings deserved respect while the Nebraska legislature’s similar findings

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64. Compare Nev. Dep’t of Human Res. v. Hibbs, 538 U.S. 721, 728, 735–36 (2003), with *Garrett*, 531 U.S. at 366–67.

65. *Hibbs*, 538 U.S. at 737 (quoting *Garrett*, 531 U.S. at 374) (internal quotation marks omitted).

66. See *Gonzales v. Carhart*, 550 U.S. 124 (2007).

67. See *id.* at 165 (“[W]e review congressional factfinding under a deferential standard.”).

68. See *id.* (explaining that some of Congress’s findings were “factually incorrect”).

69. *Id.* at 166.

70. See Borgmann, *supra* note 26, at 28.

71. *Id.* at 15.

72. FAIGMAN, *supra* note 26, at 114.

on the same matter had commanded so little respect just seven years earlier in *Stenberg v. Carhart*.<sup>73</sup>

Even this brief survey illustrates that the Court's approach to congressional fact-finding is both inconsistent and inadequately theorized. Perhaps most strikingly absent is a careful analysis of why some legislative findings are worthy of respect while others are not. Similarly absent is a discussion of whether some findings are more "factual," whereas others merely assert the constitutional conclusion the legislature desires. The result is confusion.

## 2. Deference to Agency Action

The Court's approach to deference is similarly erratic where congressional action is not directly at issue.<sup>74</sup> Courts often defer to administrative agencies because of their epistemic or political authority.<sup>75</sup> While these rationales may subtly underlie deference to congressional factual findings as well,<sup>76</sup> it is also an independent reason when courts review agency action in constitutional cases.<sup>77</sup>

### a. Deference to Agency Epistemic Authority

Administrative agencies' primary institutional advantage is subject-matter expertise. Unlike legislatures, agencies administer policy within a limited area and employ expert, professional staff.<sup>78</sup> Indeed, the common wisdom is that agencies exist because they are institutionally situated to

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73. See *Stenberg v. Carhart*, 530 U.S. 914, 937–38 (2000) (finding insufficient evidence to support the assertion that a health exception to Nebraska's abortion law was medically necessary, despite the state legislature's apparent findings to the contrary).

74. See generally Berger, *Administrative Law Norms*, *supra* note 12, at 2038–54 (discussing the Court's inconsistent approach to deference in individual rights cases involving administrative agencies).

75. Courts have better fleshed out deference in administrative law cases, but even in constitutional cases, judicial deference can be predicated on epistemic authority. The author argues elsewhere that the administrative law norms guiding the Court in those cases can also help guide judicial deference in constitutional cases. See *id.* at 2054–79.

76. See Borgmann, *supra* note 26, at 19 ("The courts have sometimes tied Congress's allegedly superior competence to certain fact-finding contexts.").

77. This discussion focuses on cases in which the Court must determine whether an agency has violated the Constitution and therefore puts to the side issues that might obstruct a ruling on the merits, such as immunity, standing, and exhaustion doctrines. It also does not consider procedural due process cases, in which the agency's procedural shortcomings themselves can amount to a constitutional violation. See Berger, *Administrative Law Norms*, *supra* note 12, at 2033–34, 2038–47, 2067–70.

78. See PETER L. STRAUSS, ADMINISTRATIVE JUSTICE IN THE UNITED STATES 135 (2d ed. 2002) (describing agencies' expert staff).



provide an expertise and focus that legislatures cannot.<sup>79</sup> In practice, however, not all agencies possess this presumed proficiency over all the subjects before them, and the Court is not always as sensitive as it should be to variations in agency competence.

*Baze v. Rees* provides a helpful example.<sup>80</sup> The *Baze* plaintiffs argued that Kentucky's lethal injection procedure created a substantial risk of excruciating pain in violation of the Eighth Amendment's prohibition against "cruel and unusual punishment."<sup>81</sup> In rejecting the plaintiffs' challenge, the plurality emphasized that judicial intervention would be inappropriate because the relevant Kentucky officials possessed a certain epistemic authority that the judiciary lacked.<sup>82</sup>

While *Baze's* attention to the relative expertise of the Kentucky Department of Corrections ("DOC") is certainly appropriate, closer inspection calls into serious question the plurality's assumptions about the agency's actual expertise in this case. In failing to question whether the DOC's supposed epistemic authority was deserving of deference, the Court incorrectly assumed that the administrative officials designed and implemented the procedures with some degree of expertise and professionalism.<sup>83</sup> As some lower courts have recognized, though, many states have adopted lethal injection procedures with neither.<sup>84</sup> Indeed, at the time *Baze* was decided, many states' procedures, including Kentucky's, were executed in secret by prison guards lacking a basic understanding of the drugs they were administering.<sup>85</sup> In Kentucky's case, the execution team even lacked appropriate training about the drugs' potential to cause

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79. See, e.g., JERRY L. MASHAW, *DUE PROCESS IN THE ADMINISTRATIVE STATE* 12–29 (1985) (explaining that much of the impetus for the creation of administrative agencies is the desire for expert rather than lay or political judgment).

80. *Baze v. Rees*, 553 U.S. 35 (2008) (plurality opinion). Consistent with Court precedent, this Article treats Chief Justice Roberts' *Baze* plurality opinion as the Court's holding. See, e.g., *Marks v. United States*, 430 U.S. 188, 193 (1977) ("When 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 . . .'" (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976) (plurality opinion))).

81. U.S. CONST. amend. VIII; *Baze*, 553 U.S. at 47 (plurality opinion).

82. See *Baze*, 553 U.S. at 51 (noting that judicial intervention "would embroil the courts in ongoing scientific controversies beyond their expertise").

83. See *id.* (noting states' scientific expertise).

84. See, e.g., *Morales v. Tilton*, 465 F. Supp. 2d 972, 980 (N.D. Cal. 2006) (describing California's "pervasive lack of professionalism" with regards to administering its lethal injection procedure); *Taylor v. Crawford*, No. 05-4173-CV-C-FJG, 2006 WL 1779035, at \*3–6 (W.D. Mo. June 26, 2006) (describing Missouri's failure to carefully design lethal injection procedure).

85. See *Baze*, 553 U.S. at 74–75 (Stevens, J., concurring) ("[T]he drugs were selected by unelected Department of Correction officials with no specialized medical knowledge and without the benefit of expert assistance or guidance.").

excruciating pain.<sup>86</sup> The plurality, then, deferred without considering whether the state agency possessed the very expertise that was the grounds for deference in the first place.<sup>87</sup>

*Baze* may be an especially egregious example of the Court deferring on undeserved epistemic grounds, but it is hardly anomalous. To the contrary, the Court often reflexively defers to administrative agents in constitutional cases based on those agents' ostensible expertise.<sup>88</sup> Of course, deference in such cases may be justified if the agency has particular expertise over the subject matter at issue. However, as in *Baze*, the Court often assumes such expertise without further inquiry.<sup>89</sup>

Further complicating the picture is the fact that the Court sometimes reviews more rigorously a constitutional challenge precisely because an agency appears to have been acting without expertise. In other words, the Court sometimes refuses to defer to an agency for epistemic failures similar to the ones it ignored in *Baze*. In *Hampton v. Mow Sun Wong*, for instance, the Court struck down a provision in Civil Service Commission Regulations that forbade the employment of legal alien residents partially because the agency had not made adequate use of its expertise.<sup>90</sup> Five Chinese legal resident aliens sued the Commission after they were denied federal government jobs for which they were qualified, because they were not United States citizens,<sup>91</sup> contending that the regulation violated the Equal Protection Clause.<sup>92</sup>

In ruling for the plaintiffs, the Court explained that “[t]he Civil Service Commission, like other administrative agencies, has an obligation to perform its responsibilities with some degree of expertise, and to make known the reasons for its important decisions.”<sup>93</sup> The Court was unimpressed with the Commission's performance, noting that “[t]here is nothing in the record before us . . . to indicate that the Commission actually made any considered evaluation of the relative desirability of a simple exclusionary rule on the one hand, or the value to the service of enlarging

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86. See *id.* at 73–75.

87. See Berger, *Theory of Deference*, *supra* note 14, at 59–65 (discussing *Baze's* failure to consider problems with state administration of lethal injection); Eric Berger, *Lethal Injection and the Problem of Constitutional Remedies*, 27 YALE L. & POL'Y REV. 259, 263–72, 283–86, 301–14 (2009) [hereinafter Berger, *Lethal Injection*] (discussing problems in lethal injection procedures that the *Baze* Court ignored).

88. See Berger, *Administrative Law Norms*, *supra* note 12, at 2040–47, 2084–91 (discussing *Grutter v. Bollinger*, 539 U.S. 306 (2003), *Korematsu v. United States*, 323 U.S. 214 (1944), and *Turner v. Safley*, 482 U.S. 78 (1987)).

89. See, e.g., *Korematsu*, 323 U.S. at 218–19 (deferring to military judgment that it was impossible to separate loyal from disloyal Japanese Americans despite evidence to the contrary).

90. *Hampton v. Mow Sun Wong*, 426 U.S. 88, 115–17 (1976).

91. *Id.* at 91–93.

92. *Id.* at 96.

93. *Id.* at 115.

the pool of eligible employees on the other.”<sup>94</sup> That is, the Commission had not diligently made use of its expertise in crafting the regulation. Had the Court in *Baze* similarly asked whether the DOC utilized its expertise, it surely could not have deferred on epistemic grounds.

*Baze* and *Mow Sun Wong*, obviously, involved numerous factors,<sup>95</sup> and certainly such different cases about different constitutional provisions should not be approached identically.<sup>96</sup> Nevertheless, the Court’s divergent approaches to deferring to agencies on epistemic grounds are hard to square. Regardless of which approach is preferable, neither provides adequate insight into why or how the Court made its determination.

*b. Deference to Agency Political Authority*

The Court also sometimes premises deference to agencies on their political authority.<sup>97</sup> At first glance, such deference is curious. Unlike elected legislatures and chief executives, many administrative agents are unelected and are not directly answerable to the people. Elected legislators may be less representative than many of us would like to think,<sup>98</sup> but, by virtue of their election, they are nonetheless more politically responsive than unelected federal judges.<sup>99</sup> By contrast, agencies’ political accountability is, at best, indirect.<sup>100</sup> It is true that administrative agencies reside within the “political”

94. *Id.*

95. See Berger, *Administrative Law Norms*, *supra* note 12, at 2038–40, 2047–49, 2052–53.

96. One obvious distinction between the cases is that *Baze* challenged state administrative action, whereas *Mow Sun Wong* challenged federal agency action. The Court, however, does not indicate in either opinion that this distinction should militate for different review. Indeed, given that the substantive constitutional provisions at issue (the Eighth Amendment and Equal Protection Clause) apply with the same force to both federal and state governments, that distinction seems inadequate to explain the discrepancy. See, e.g., *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 235 (1995) (“Our action today makes explicit [that] federal racial classifications, like those of a State, must serve a compelling governmental interest, and must be narrowly tailored to further that interest.”); Berger, *Administrative Law Norms*, *supra* note 12, at 2077–79.

97. Judicial deference to congressional fact-finding also rests partially on political-authority grounds. See *supra* Part I.A.1.

98. See Jane S. Schacter, *Political Accountability, Proxy Accountability, and the Democratic Legitimacy of Legislatures*, in *THE LEAST EXAMINED BRANCH: THE ROLE OF LEGISLATURES IN THE CONSTITUTIONAL STATE* 45, 47–48 (Richard W. Bauman & Tsvi Kahana eds., 2006).

99. See ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 17, 19–21 (1962).

100. See, e.g., *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 865 (1984) (“While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices . . .”).

(that is, nonjudicial) branches of government, but structural location alone should not confer democratic legitimacy upon an institution.<sup>101</sup>

Given courts' great anxiety that judicial review is counter-majoritarian,<sup>102</sup> it is surprising they would casually conflate elected officials with unelected administrative agents here.<sup>103</sup> Nevertheless, the Court sometimes does exactly that, granting agencies deference on their supposed political authority.<sup>104</sup> Once again, though, its approach is inconsistent.

*Baze* and *Mow Sun Wong* again provide an illuminating contrast. As noted above, the lethal injection procedures in *Baze* were designed and implemented by the Kentucky DOC.<sup>105</sup> The *Baze* plurality declined to subject the challenged execution procedure to rigorous review, arguing that doing so "would substantially intrude on the role of state legislatures in implementing their execution procedures."<sup>106</sup> Courts, *Baze* thus indicated, had no business interfering with democratically elected legislatures, whose political authority far exceeded courts'.<sup>107</sup>

*Baze*, however, rested on a false assumption about *whose* policy was at issue. Contrary to the Chief Justice's suggestion, the Kentucky legislature had little to do with the State's lethal injection procedure. The Chief Justice, in other words, conflated administrative and legislative action. In most states with capital punishment, including Kentucky, the state legislature delegates the lethal injection procedure to DOC officials, who typically design the procedures and instruct prison guards or independent contractors to execute them.<sup>108</sup> Lethal injection suits, like *Baze*, do not challenge lethal injection per se, but rather the details of the procedure as designed and implemented by the agency. The plurality, nonetheless, deferred to the state legislature's political authority, even though the unelected DOC officials actually responsible for the procedure's details did not enjoy such democratic legitimacy. Of course, the legislative delegation may demonstrate democratic support for the death penalty and lethal injection generally, but

101. Cf. STRAUSS, *supra* note 78, at 127–35 (discussing different kinds of administrative agencies).

102. See generally BICKEL, *supra* note 99, at 16–23.

103. See Berger, *Administrative Law Norms*, *supra* note 12, at 2032 (“[I]t is strange that the Court would defer reflexively to unaccountable administrative agents without inquiring into their underlying democratic legitimacy.”).

104. See *id.* at 2038–47.

105. *Baze v. Rees*, 553 U.S. 35, 51 (2008) (plurality opinion).

106. *Id.*

107. See *id.*

108. See Berger, *Lethal Injection*, *supra* note 87, at 302–03 (discussing delegation of lethal injection procedures); Deborah W. Denno, *When Legislatures Delegate Death: The Troubling Paradox Behind State Uses of Electrocution and Lethal Injection and What It Says About Us*, 63 OHIO ST. L.J. 63, 116–25 (2002) (same).

that general support does not necessarily translate into support for the challenged execution procedure's details.

Real attention to questions of political authority in *Baze* would have more precisely examined the procedure's details, as opposed to capital punishment or lethal injection generally. Doing so would have resulted in assessing the actual democratic legitimacy of the DOC. *Baze's* analysis was not so nuanced, summarily treating an administrative agency as though it had the same democratic legitimacy as the state legislature. Kentucky's lethal injection procedure may not have created great enough risk of pain to violate the Eighth Amendment, but given the state legislature's abdication of authority over the procedure's details, *Baze's* explicit deference to the political authority of the legislature was misplaced.

*Mow Sun Wong's* approach to these matters again provides a helpful counterpoint. Whereas *Baze* offered an administrative agency deference based on an illusory democratic legitimacy, *Mow Sun Wong* refused deference to an agency precisely because it lacked the same political authority that elected legislatures and chief executives enjoy. In ruling for the plaintiffs, the Court emphasized that it was "perfectly clear that neither Congress nor the President has ever required the Civil Service Commission to adopt the citizenship requirement as a condition of eligibility for employment in the federal civil service."<sup>109</sup> The Court struck down the policy,<sup>110</sup> explaining that the outcome may very well have been different had Congress or the President erected the challenged policy but that an administrative agency like the Civil Service Commission could not itself design policies raising serious constitutional concerns given its lack of political accountability.<sup>111</sup>

The Court therefore reviewed the employment rule more stringently precisely because it came not from an elected body but from an unelected agency. As Professor Sunstein summarized, *Mow Sun Wong* turned "on the idea that publicly accountable bodies should make the contested decision that was challenged."<sup>112</sup> Thus, whereas *Baze* deferred to the state agency as though it were the legislature, *Mow Sun Wong* gave heightened review precisely because an agency rather than the legislature was acting.<sup>113</sup> Much

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109. Hampton v. Mow Sun Wong, 426 U.S. 88, 105 (1976).

110. *Id.* at 116–17.

111. *Id.* at 103–05.

112. Cass R. Sunstein, *The Supreme Court, 1995 Term—Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 48 (1996).

113. Though the Court might have opposed the delegation particularly in the immigration context because Congress enjoys plenary power over immigration, it does not appear to have made that argument, perhaps because congressional plenary power over immigration has eroded as Congress increasingly has delegated immigration policy to executive officials. See Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law*, 119 YALE L.J. 458, 466 (2009).

more could be said to try to reconcile these discrepancies,<sup>114</sup> but taken together they point to a judicial analysis of deference that is wanting and inconsistent.

### 3. Deference to Special Government Institutions and in Special Contexts

The Court also sometimes extends considerable deference to particular governmental institutions, such as prisons, or in particular substantive areas, such as national security. The Court appears to treat deference in these areas as especially deserved and beyond what it would ordinarily accord on epistemic or political grounds. On closer look, however, this deference also is haphazard and under-examined.

#### a. Prisons as Special Government Institutions

The common wisdom is that the Court often defers to prisons,<sup>115</sup> suggesting that prisons are somehow a special institution deserving of heightened deference. Though there is substantial truth to this narrative, upon closer examination, deference to prisons is less consistent and explicated than one might expect. For example, *Turner v. Safley*<sup>116</sup> is often cited for the Court's deferential rational basis review of prison policies.<sup>117</sup> The Court there noted the peculiar institutional difficulties confronting prison officials, emphasizing that "[r]unning a prison is an inordinately difficult undertaking that requires expertise, planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government."<sup>118</sup>

Even *Turner* itself, however, demonstrates that deference in the prison context is more complicated than its own language might suggest. In *Turner*, the Court upheld a policy prohibiting inmate-to-inmate correspondence while striking down a policy prohibiting inmates from marrying absent the

114. See *supra* note 96.

115. See, e.g., *Rhodes v. Chapman*, 452 U.S. 337, 362 (1981) (Brennan, J., concurring) ("[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.'" (quoting *Bell v. Wolfish*, 441 U.S. 520, 547 (1979))); *Procunier v. Martinez*, 416 U.S. 396, 404–05 (1974) ("[F]ederal courts have adopted a broad hands-off attitude toward 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."), *overruled in part* by *Thornburgh v. Abbott*, 490 U.S. 501 (1989).

116. *Turner v. Safley*, 482 U.S. 78 (1987).

117. See Ozan O. Varol, *Strict in Theory, but Accommodating in Fact?*, 75 MO. L. REV. 1243, 1284 (2010) (noting *Turner*'s "deferential standard of review to prison officials").

118. *Turner*, 482 U.S. at 84–85.

prison superintendent finding “compelling reasons.”<sup>119</sup> Curiously, the Court failed to explain why the institutional pressures which usually militated for deference to prisons did not apply to the marriage regulation.<sup>120</sup> It could have resolved the apparent discrepancy by focusing on the fact that marriage is a fundamental right triggering heightened scrutiny, but it did not do that either.<sup>121</sup> One of the best known cases about deference to prisons, then, does not even consistently follow the rule it purports to announce.

*Turner*-style deference is, thus, hardly absolute. In *Johnson v. California*, for example, the Court applied strict scrutiny to racial segregation in prisons, expressly foregoing the deferential *Turner* standard.<sup>122</sup> In other words, the relevant tier of scrutiny sometimes trumps deference considerations, even though the Court has said that prison regulations allegedly infringing “constitutional rights are judged under a ‘reasonableness’ test less restrictive than that ordinarily applied to alleged infringements of fundamental constitutional rights.”<sup>123</sup> This less demanding approach can also extend to court-imposed remedies. While courts today are less likely to impose structural reform injunctions on prisons with poor conditions than they were several decades ago,<sup>124</sup> the Court in *Brown v. Plata* upheld an affirmative remedial order requiring California to reduce its prison population within two years.<sup>125</sup> The extreme facts in *Plata* may well justify the judicial intrusion,<sup>126</sup> but a remedial order mandating a reduction in prison population hardly suggests judicial deference. Cases like *Plata*, *Johnson*, and, indeed, *Turner* itself, therefore belie the oversimplified assertion that the Court always defers to prisons.

What is striking in all these cases is not just the Court’s inconsistent approach, but its failure to decide whether prisons are, in fact, a special kind

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119. *Id.* at 82–91.

120. *See id.*; Berger, *Administrative Law Norms*, *supra* note 12, at 2046–47.

121. *See Turner*, 482 U.S. at 97 (“[E]ven under the reasonable relationship test, the marriage regulation does not withstand scrutiny.”).

122. *See Johnson v. California*, 543 U.S. 499, 510 (2005) (“We have never applied *Turner* to racial classifications.”).

123. *O’Lone v. Estate of Shabazz*, 482 U.S. 342, 349 (1987); *see also infra* Part I.B.

124. *See, e.g., Hutto v. Finney*, 437 U.S. 678, 687 (1978) (upholding the district court’s remedy in a prison conditions case in which the trial court had found problems stemming from “the inmates’ diet, the continued overcrowding, the rampant violence, the vandalized cells, and the ‘lack of professionalism and good judgment on the part of maximum security personnel” (quoting *Finney v. Hutto*, 410 F. Supp. 251, 277 (E.D. Ark. 1976), *aff’d*, 548 F.2d 740 (8th Cir. 1977), *aff’d*, *Hutto*, 437 U.S. 678)); MALCOLM M. FEELEY & EDWARD L. RUBIN, JUDICIAL POLICY MAKING AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICA’S PRISONS 39–50 (1998) (discussing the “full stride” of the prison litigation reform movement and the subsequent retreat of that reform movement).

125. *Brown v. Plata*, 131 S. Ct. 1910, 1945–47 (2011).

126. *See id.* at 1923–24 (noting that California’s “prisons had operated at around 200% of design capacity for at least 11 years”).

of institution deserving a special kind of deference. *Turner* justified its deference, for instance, by emphasizing the government's superior expertise in both running prisons and allocating scarce resources.<sup>127</sup> However persuasive these arguments may be, they do not seem unique to the prison context. In many areas, the political branches presumably understand better than courts the difficulties associated with administration and budget constraints. Though the Court's language suggests that prisons receive special deference,<sup>128</sup> it is not clear whether prisons' peculiar administrative challenges militate for a consistent rule of deference unique to prisons or, instead, reflect a general judicial deference that often, but not always, applies to governmental endeavors. In short, we are left with the sense that the rules for prisons are different, but we are not quite certain precisely why, how, or when.<sup>129</sup>

*b. The Special Context of National Security*

Similarly confusing is the Court's deference that often applies in matters concerning national security.<sup>130</sup> This deference is institution-based insofar as the Court assumes that its facility with national-security issues is inferior to the institution whose policy is under review. However, while this deference may be more consistent than in the prison context, it is nonetheless insufficiently theorized across various national-security settings.<sup>131</sup> Indeed, even in cases solely involving the military (and not the

127. See *Turner v. Safley*, 482 U.S. 78, 85 (1987) (noting that “[w]here a state penal system is involved, federal courts have . . . additional reason to accord deference to the appropriate prison authorities” due to those authorities’ “expertise, planning, and the commitment of resources”).

128. See *supra* notes 115–18 and accompanying text.

129. Of course, the federal courts confront a great deal of prison litigation, the sheer volume of which may also incline judges to defer to prison officials. See Mariah L. Passarelli, *Broken Gate? A Study of the PLRA Exhaustion Requirement: Past, Present, and Future*, 47 CRIM. L. BULL. 95, 99–100 (2011) (discussing the enormous increase in prison litigation in the decades prior to the passage of the Prison Litigation Reform Act of 1996). For good reason, though, the Court has not premised its special deference to prisons on this basis.

130. See, e.g., *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2727 (2010) (“That evaluation of the facts by the Executive, like Congress’s assessment, is entitled to deference. This litigation implicates sensitive and weighty interests of national security and foreign affairs.”); Robert M. Chesney, *National Security Fact Deference*, 95 VA. L. REV. 1361, 1362 (2009) (“Should judges defer to factual judgments made by the executive branch in litigation involving national security? The executive branch frequently argues that judges should do precisely that, and though courts often express reservations, they often comply in the end.”). Deference in national-security cases, of course, is a vast subject that could easily consume an entire article, but a cursory look at some relevant cases can help illustrate the Court’s inconsistency. See generally Chesney, *supra*.

131. See, e.g., Chesney, *supra* note 130, at 1366 (“[L]itigants and judges lack a shared understanding of the nature of [national-security deference] claims and of the arguments that are relevant to resolving them.”); John Nelson Ohlweiler, *The Principle of Deference: Facial*



other several agencies charged with protecting national security), courts utilize a range of approaches to deference.<sup>132</sup>

This inconsistency is evident even if we just consider two prominent national-security cases decided since the terrorist attacks of September 11, 2001. In *Holder v. Humanitarian Law Project* (“HLP”), the Court followed its usual deferential approach, upholding 18 U.S.C. § 2389B, which prohibits the provision of “material support or resources” to foreign organizations engaging in terrorist activity, including speech facilitating only lawful, non-violent purposes of such groups.<sup>133</sup> In rejecting the plaintiffs’ First Amendment challenge, the Court emphasized Congress’s findings that “[f]oreign organizations that engage in terrorist activity are so tainted by their criminal conduct that any contribution to such an organization facilitates that conduct.”<sup>134</sup> The Court also cited the State Department’s related findings “that ‘[t]he experience and analysis of the U.S. government agencies charged with combating terrorism strongly support[t]’ Congress’s finding that all contributions to foreign terrorist organizations further their terrorism.”<sup>135</sup> The Court thus deferred to these legislative and executive findings that foreign terrorist organizations did not meaningfully segregate their support for legitimate activities from their support for terrorism, and, consequently, that the ban on material support in the form of speech to designated organizations was necessary to serve the government’s interest in preventing terrorism.<sup>136</sup>

In noting that the “sensitive and weighty interests of national security and foreign affairs” merited special concession,<sup>137</sup> the *HLP* Court was not merely deferring out of respect for the political branches’ expertise and democratic legitimacy, but instead based on unique concerns arising in the national-security context.<sup>138</sup> These concerns were apparently so powerful that the Court neglected to even cite *Brandenburg v. Ohio*, the modern

*Constitutional Challenges to Military Regulations*, 10 J.L. & POL. 147, 149–50 (1993) (arguing that the Supreme Court has never adequately described or explained its deference to the military).

132. See Steven B. Lichtman, *The Justices and the Generals: A Critical Examination of the U.S. Supreme Court’s Tradition of Deference to the Military, 1918–2004*, 65 MD. L. REV. 907, 929–37 (2006) (discussing courts’ different approaches to deference in cases involving conscientious objectors, soldier pay disputes, courts-martial, tort liability, and the Japanese relocation controversies).

133. *Humanitarian Law Project*, 130 S. Ct. at 2712.

134. *Id.* at 2724 (emphasis omitted) (quoting Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 301(a)(7), 110 Stat. 1214, 1247).

135. *Id.* at 2727 (alterations in original) (quoting Joint Appendix at 133, *Humanitarian Law Project*, 130 S. Ct. 2705 (Nos. 08-1498, 09-89), 2009 WL 3877534, at \*133).

136. *Id.*

137. *Id.*

138. See *id.* (“It is vital in this [national-security] context ‘not to substitute . . . our own evaluation of evidence for a reasonable evaluation by the Legislative Branch.’” (quoting *Rostker v. Goldberg*, 453 U.S. 57, 68 (1981))); *id.* at 2733 (Breyer, J., dissenting).

Court's leading case on speech inciting illegal activity.<sup>139</sup> In explaining this special deference, however, the Court lazily reiterated the explanations it offers in other institutional contexts. It emphasized the political branches' relative epistemic authority with respect to national-security matters, noting that "neither the Members of this Court nor most federal judges begin the day with briefings that may describe new and serious threats to our Nation and its people"<sup>140</sup> and that "when it comes to collecting evidence and drawing factual inferences in this area, 'the lack of competence on the part of the courts is marked.'"<sup>141</sup> Such respect, the Court explained, was appropriate because "national security and foreign policy concerns arise in connection with efforts to confront evolving threats in an area where information can be difficult to obtain and the impact of certain conduct difficult to assess."<sup>142</sup> On this reasoning, courts should not interfere with the political branches on national-security matters because the epistemic divide between the judiciary and the other branches is great and because the information the political branches do have is difficult to gather and prone to change.

While these explanations may offer sound reasons for judicial deference, it is less clear that they warrant *special* deference in national-security cases. Courts' relative epistemic shortcomings are always a reason for deference; they are not unique to issues of national security. While the government must enjoy flexibility to adapt to frequent changes in world affairs, many other areas in which government operates are also complicated and inconstant. Financial markets, for instance, change frequently, but it is hard to believe that courts would defer to legislative and executive fact-finders justifying limiting the speech of such market participants. Similarly, while the fluidity of world events perhaps justifies permitting national-security officials to act without demonstrating the existence of "specific facts,"<sup>143</sup> epistemic uncertainty is hardly unique to the realm of national security. It would be bizarre if courts relaxed otherwise applicable constitutional doctrine, for instance, to protect officials trying to address potential economic or environmental dangers. This is not necessarily to argue that national security does not deserve special deference, but rather that courts' explanations do not adequately capture what may be different about that area.

Perhaps because the judicial explanation for special national-security deference is wanting, judicial application of such deference is inconsistent.

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139. *See id.* at 2712–31 (majority opinion).

140. *Id.* at 2727 (quoting *Boumediene v. Bush*, 553 U.S. 723, 797 (2008)) (internal quotation marks omitted).

141. *Id.* (quoting *Rostker*, 453 U.S. at 65).

142. *Id.*

143. *See id.* at 2727–28.

Whereas *HLP* reflected substantial deference, the post-September 11 executive detention cases reflect a decidedly less deferential Court.<sup>144</sup> In *Boumediene v. Bush*, for instance, the Court rejected the government's argument that Congress could constitutionally strip Guantanamo detainees of the right to file petitions for habeas corpus in federal district court to challenge the legality of their detention.<sup>145</sup> The Court concluded that habeas jurisdiction extends to a military base over which the United States enjoys de facto sovereignty and is not limited, as the government had contended, to territories over which the country exercises de jure sovereignty.<sup>146</sup> In essence, the Court recognized that the United States exercised all practical control over Guantanamo and therefore rejected the government's formalistic approach.<sup>147</sup> The Court similarly rejected the government's argument that at common law habeas jurisdiction had not extended to non-citizens where the country lacked de jure sovereignty, because the historical evidence was inconclusive.<sup>148</sup>

Citing *United States v. Curtiss–Wright Export Corp.*, the Court purported to accord proper deference to the political branches,<sup>149</sup> but it is hard to think of *Boumediene* as deferential.<sup>150</sup> As Justice Scalia argued in dissent, the majority struck “a pose of faux deference to Congress and the President.”<sup>151</sup> Had the Court been truly deferential, it might have crafted an *HLP*-like opinion, emphasizing the dangers posed by terrorism, the government's relative institutional expertise in responding to those dangers, the burdens placed on the executive by permitting detainees to challenge their detention, and the government's epistemic superiority in understanding the history of executive detention. Such an approach may have inappropriately

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144. See *Boumediene*, 553 U.S. at 783 (“Where a person is detained by executive order . . . the need for collateral review is most pressing.”); *Hamdan v. Rumsfeld*, 548 U.S. 557, 640 (2006) (Kennedy, J., concurring in part) (affording less deference to the President's determination in an executive detention case); *Hamdi v. Rumsfeld*, 542 U.S. 507, 535 (2004) (plurality opinion) (“[T]he threats to military operations posed by a basic system of independent review are not so weighty as to trump a citizen's core rights to challenge meaningfully the Government's case and to be heard by an impartial adjudicator.”).

145. See *Boumediene*, 553 U.S. at 781–85.

146. See *id.* at 764 (concluding that de jure sovereignty is not “the only relevant consideration in determining the geographic reach of the Constitution or of habeas corpus”).

147. *Id.* at 755.

148. *Id.* (finding “scant” historical support for the proposition “that de jure sovereignty is the touchstone of habeas corpus jurisdiction”).

149. See *id.* at 796–97 (“In considering both the procedural and substantive standards used to impose detention to prevent acts of terrorism, proper deference must be accorded to the political branches.” (citing *United States v. Curtiss–Wright Exp. Corp.*, 299 U.S. 304, 320 (1936))).

150. It is easier, however, to think of *Boumediene* as ultimately relatively inconsequential. See *infra* notes 299–302 and accompanying text.

151. *Boumediene*, 553 U.S. at 830 n.1 (Scalia, J., dissenting).

denied the detainees access to federal court, but it would have been more consistent with the Court's precedent of deferring in national-security cases.

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Notwithstanding the common wisdom that courts defer to the government in prison and national-security cases, one can see that the reality is more complicated and lacks a clear justification for providing *heightened* deference in these contexts. Though the Court appears to grant special deference in these contexts, its bases for such deference are reminiscent of rationales it invokes in more conventional settings.<sup>152</sup> These rationales make sense—but only to a point. We expect, for instance, that the State Department and the CIA will better understand national-security threats than the judiciary. But, as discussed above, presumptions about the government's expertise are not always credible. As Justice Breyer argued in his *HLP* dissent, the record in that case provided little indication that Congress utilized any genuine expertise when it passed the challenged law.<sup>153</sup> Moreover, even when government does act with genuine expertise, that epistemic authority does not justify creating special categories of deference; many governmental institutions unconnected to prisons or national security possess expertise that courts lack.

In fairness, judicial deference on national-security issues is somewhat better theorized than it is to prisons. In addition to epistemic arguments, the Court also sometimes defers to the military on separation-of-powers grounds, emphasizing that the Constitution expressly vests Congress and the Executive with authority over military affairs.<sup>154</sup> It also often explains that the military is a separate community, subject to different rules than the rest of society.<sup>155</sup> However, while these arguments provide additional justification for special deference to the military, they do not necessarily apply to the

152. See *Turner v. Safley*, 482 U.S. 78, 84–85 (1987) (citing prison officials' expertise as justification for deference); Ohlweiler, *supra* note 130, at 153 (explaining deference to the military by "the perceived limits of judicial competence when dealing with the complexity of the military establishment"); *supra* notes 116–18, 137–42 and accompanying text.

153. See *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2735 (2010) (Breyer, J., dissenting) ("The Government has provided us with no empirical information that might convincingly support this claim."); *supra* Part I.A.2 (describing the Court's deference to agency action).

154. See *Chappell v. Wallace*, 462 U.S. 296, 301 (1983) ("It is clear that the Constitution contemplated that the Legislative Branch have plenary control over rights, duties, and responsibilities in the framework of the Military Establishment, including regulations, procedures, and remedies related to military discipline . . ."); Ohlweiler, *supra* note 131, at 152–53.

155. See, e.g., *Goldman v. Weinberger*, 475 U.S. 503, 507 (1986) ("[W]ithin the military community there is simply not the same [individual] autonomy as there is in the larger civilian community." (second alteration in original) (quoting *Parker v. Levy*, 417 U.S. 733, 751 (1974)) (internal quotation marks omitted)); Ohlweiler, *supra* note 131, at 153.

several other governmental entities tasked with protecting the national security. Perhaps other rationales could justify heightened deference in those other instances too, but the Court has yet to consistently provide any such explanation.<sup>156</sup>

B. *INTERACTIONS WITH THE TIERS OF SCRUTINY*

Deference determinations, as conceptualized in this Article, are institutional inquiries based on whether the relevant political actor's characteristics and behavior deserve presumptive respect from the judiciary. They are, thus, distinct from substantive grounds for deference, such as the tiers of scrutiny, which are rooted in black-letter constitutional doctrine. Race-based discrimination in equal-protection cases and content-based discrimination in free-speech cases, for instance, are both substantive factors that trigger strict scrutiny, a very undeferential standard of review. Institutional deference, in other words, is distinct from the tiers of scrutiny (and other substantive doctrinal constitutional analysis), but the two kinds of "deference" nevertheless interact in some cases.<sup>157</sup>

Accordingly, a discussion of deference in constitutional cases should acknowledge the tiers of scrutiny, which often determine the level of rigor with which the Court reviews the constitutionality of government actions. While there may be many reasons to criticize the tiers of scrutiny,<sup>158</sup> the Court nevertheless usually purports to adhere to them, such as when it determines whether a group is "suspect" for equal-protection purposes.<sup>159</sup> The Court, however, has not fleshed out how "doctrinal deference" interacts with "institutional deference" determinations. In other words, what should guide the Court's approach to deference in a case where the tier of scrutiny dictated by constitutional doctrine does not align easily with the level of deference suggested by institutional factors?<sup>160</sup>

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156. See *infra* Part II.B.3.

157. See Araiza, *supra* note 21, at 19–20.

158. See, e.g., Suzanne B. Goldberg, *Equality Without Tiers*, 77 S. CAL. L. REV. 481, 494–528 (2004) (discussing a number of flaws in tiered review, including: excessive rigidity, uneven application, and difficulty in determining whether a class is suspect); Jeffrey M. Shaman, *Cracks in the Structure: The Coming Breakdown of the Levels of Scrutiny*, 45 OHIO ST. L.J. 161, 172–77 (1984) (sharply criticizing the multi-tiered system of review as too rigid, inhibitive of actual analysis, and subject to inconsistent internal application).

159. See, e.g., *Lyng v. Castillo*, 477 U.S. 635, 638 (1986) (determining whether a group is a "suspect" class by inquiring whether that group's members have been subjected to discrimination, exhibit obvious or immutable characteristics, and are a minority or politically powerless).

160. In some cases, the Court might soften strict scrutiny due to institutional factors, thus silently bundling an amorphous institutional analysis into the application of the relevant tier of scrutiny. See, e.g., *Korematsu v. United States*, 323 U.S. 214, 216–17 (1944) (deferring to the political branches in times of war despite ostensible application of the "most rigid scrutiny"); NEIL K. KOMESAR, *IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND*

*Grutter v. Bollinger* provides a helpful example.<sup>161</sup> The Court in *Grutter* applied strict scrutiny to the University of Michigan Law School's affirmative action policy on the basis that it amounted to racial discrimination.<sup>162</sup> Notwithstanding the ostensibly high level of scrutiny, the Court, recognizing the Law School's superior institutional authority, deferred to the Law School's academic judgment and upheld the policy, declaring that diversity was a compelling government interest and that the challenged affirmative action program was an acceptable way to achieve that interest.<sup>163</sup> In other words, the Court's doctrinal analysis provided by the applicable tier of scrutiny militated for rigorous review, but its institutional analysis, based primarily on the epistemic authority of the Law School, militated for much more deferential review. In *Grutter*, the institutional analysis seemed to win out, as the Court deferred to the Law School and upheld the challenged admissions policy. Of course, other factors, such as the individualized nature of the admissions policy,<sup>164</sup> played a big role in the outcome of the case, so institutional deference was likely not the determinative factor. Nevertheless, the Law School's special institutional characteristics did seem to help soften the strict scrutiny that otherwise applied.<sup>165</sup>

The Court's approach in *Grutter* implies that institutional concerns can shape the appropriate level of deference afforded in practice, regardless of which tier of scrutiny applies. But *Grutter* did not explicitly embrace this conclusion, and the Court's approach in similar cases complicates the picture. For instance, in *Grutter's* companion case, *Gratz v. Bollinger*, the Court rejected the affirmative action program of the University of Michigan College of Literature, Science, and the Arts.<sup>166</sup> Whereas the Court found that the law school's admissions program considered applicants as individuals, the college in *Gratz* utilized a more mechanical, impersonal point system,<sup>167</sup> upon which the Court frowned.

The particulars of the admissions plans at issue in *Grutter* and *Gratz* obviously differed, and largely explain the two cases' disparate outcomes. That being said, the Court did not explain why the strict scrutiny triggered by the substantive, doctrinal issue (race discrimination) should figure more

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PUBLIC POLICY 254 (1994) (discussing *Korematsu* and the *Pentagon Papers* case as examples of cases in which institutional issues created a "variation" in the application of the otherwise applicable level of scrutiny); Berger, *Administrative Law Norms*, *supra* note 12, at 2042-45, 2087-91 (discussing the *Korematsu* Court's failure to consider administrative factors).

161. *Grutter v. Bollinger*, 539 U.S. 306 (2003).

162. *Id.* at 326-28 (applying strict scrutiny to all racial classifications, including affirmative action).

163. *See id.* at 328-33.

164. *See id.* at 334.

165. *See id.* at 328.

166. *Gratz v. Bollinger*, 539 U.S. 244, 251, 275-76 (2003).

167. *See id.* at 255.

prominently in *Gratz* than in *Grutter*, where institution-based deference seemed to soften the rigors of that scrutiny. While much more could be said about these decisions, the primary point here is that the Court has failed to adopt a consistent and explicit approach for reconciling its doctrinal deference determinations (guided by the tiers of scrutiny) with its more ad hoc institution-based deference determinations.<sup>168</sup> The Court clearly is considering institutional factors in some way, but it is not explaining how those factors affect the rest of the constitutional inquiry.

C. DEFERENCE DETERMINATIONS, STEALTH CONSTITUTIONAL DECISION MAKING,  
AND THE STATUS OF LAW

Though these examples of deference determinations differ in significant ways, they all require the Court to ask whether it should respect the judgment of a political branch on the basis of that branch's institutional characteristics. Given that constitutional law at its essence asks courts to determine "who decides," it is noteworthy that the Court's consideration of the institutional capabilities of the potential "deciders" is so haphazard.

Due to the Court's sparse rationales and contradictory approaches to deference determinations, it is unclear to what extent these determinations enjoy the status of law.<sup>169</sup> Deference determinations pretend to be law-like but in important ways lack the predictability, transparency, and rigor generally associated with law.<sup>170</sup> They therefore usually do not operate with the full force of precedent. Constitutional doctrine more generally may also be more lacking in this regard than other areas of law. Constitutional precedent, for instance, generally enjoys less respect than precedent-

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168. See also *Johnson v. California*, 543 U.S. 499, 509–10 (2005) (refusing to apply otherwise applicable institution-based deference analysis because race discrimination triggers strict scrutiny); *supra* notes 122–29 and accompanying text.

169. Cf. Gluck, *supra* note 19, at 1908 (arguing that "[t]he U.S. Supreme Court generally does not treat its [statutory interpretive] methodological statements as 'law'"); *supra* note 19 and accompanying text.

170. See, e.g., FULLER, *supra* note 19, at 63–65 (discussing clarity and the rule of law); RAZ, *supra* note 19, at 212–19 (describing features of the rule of law, including openness and stability); William N. Eskridge, Jr., *Norms, Empiricism, and Canons in Statutory Interpretation*, 66 U. CHI. L. REV. 671, 678 (1999) ("The rule of law requires that statutes . . . be applied in an objective, consistent, and transparent way to citizens and others subject to the state's authority."); Richard K. Greenstein, *Why the Rule of Law?*, 66 LA. L. REV. 63, 69 (2005) ("[T]he rule of law seems to require that law be knowable, i.e., that law's meaning be more or less transparent and its applications more or less predictable, so that anyone can consult the law both to determine what the law permits, prohibits, or requires, and to identify the limits, such as constitutional limits, on the coercive use of law."); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1179 (1989) ("Even in simpler times uncertainty has been regarded as incompatible with the Rule of Law.").

interpreting statutes.<sup>171</sup> Nevertheless, we generally have a good sense of the key inquiries and tests that apply under many constitutional doctrines. The tiers of scrutiny in equal-protection cases, for example, may be applied inconsistently and, properly understood, really exist on a spectrum rather than in three discrete levels.<sup>172</sup> But litigants are at least familiar with these basic tiers, and the Court itself usually purports to follow them.<sup>173</sup> Indeed, treatises and hornbooks sketch out the contours of constitutional doctrine, even if that doctrine is imprecise.<sup>174</sup> No such treatises do or could explicate the law of deference, or of any other stealth determination for that matter.

This is not to argue that deference determinations completely lack legal status. They seem to carry *some* precedential force. The Court, for instance, often repeats that it reviews Congress's factual findings deferentially,<sup>175</sup> suggesting that this "rule" is a precedent of sorts. But these recitations are sometimes ignored altogether.<sup>176</sup> Indeed, unlike black-letter constitutional doctrine or deference formulas in administrative law cases,<sup>177</sup> deference determinations in constitutional cases often share no common test bringing some semblance of order to the inquiry.<sup>178</sup> Even when the Court seems to be asking similar questions across cases, as in *Garrett* and *Hibbs*, its willingness to accept Congress's facts is strikingly irregular.<sup>179</sup> Deference determinations and other stealth determinations, then, seem to enjoy even less precedential respect than constitutional *doctrine*. In this regard, these stealth

171. *E.g.*, WILLIAM N. ESKRIDGE, JR. ET AL., *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 631–32 (4th ed. 2007); Jamie Darin Prenkert, *Bizarro Statutory Stare Decisis*, 28 BERKELEY J. EMP. & LAB. L. 217, 235–36 (2007).

172. *See* *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 98–99 (1973) (Marshall, J., dissenting) (“[T]his Court . . . has applied a spectrum of standards in reviewing discrimination allegedly violative of the Equal Protection Clause.”); ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 689 (4th ed. 2011) (summarizing critics contending that “although the Court speaks in terms of three tiers of review, in reality there is a spectrum of standards of review”); Sunstein, *supra* note 112, at 77 (“The hard edges [of tiered review have] softened, and there has been at least a modest convergence away from tiers and toward general balancing of relevant interests.”).

173. *See, e.g.*, CHEMERINSKY, *supra* note 172, at 686 (explaining that “all equal protection issues” boil down to three questions: “What is the classification? What level of scrutiny should be applied? Does the particular government action meet the level of scrutiny?”).

174. *See generally id.*

175. *See, e.g.*, *Gonzales v. Carhart*, 550 U.S. 124, 165 (2007); *Turner Broad. Sys., Inc. v. FCC (Turner Broad. II)*, 520 U.S. 180, 199 (1997); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 500 (1989).

176. *See supra* Part I.A.1.

177. *See, e.g.*, *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–45 (1984) (providing for deference to agencies' reasonable interpretations of ambiguities within the statutes they administer).

178. *See supra* Part I.A.

179. *See supra* notes 1–7, 42–65 and accompanying text.



determinations are perhaps more akin to canons of statutory interpretation, which also are commonly invoked but often ignored.<sup>180</sup>

The legal uncertainty resulting from the Court's haphazard and incomplete approach is especially problematic for lower courts, which struggle to faithfully follow the Supreme Court's directives.<sup>181</sup> Consequently, lower courts' deference case law is similarly inconsistent.<sup>182</sup> Given that the bulk of judicial decisions construing the U.S. Constitution are rendered not by the Supreme Court but state courts and lower federal courts,<sup>183</sup> these inconsistencies infect constitutional adjudication at all levels. The end result is a muddled constitutional law, which increases the public's distrust of the judiciary, especially in constitutional cases.<sup>184</sup>

This phenomenon of incomplete, under-theorized determinations that fall outside or at the margins of the black-letter doctrine but nonetheless frequently recur in constitutional decisions is hardly limited to deference determinations. Indeed, the Court makes a variety of such haphazard, stealth determinations. Very little constrains the Court when it decides, inter alia, whether and how to count state practices,<sup>185</sup> construe a question at a

180. See Gluck, *supra* note 19, at 1902 ("The U.S. Supreme Court generally does not treat its statements about statutory interpretation methodology as law.").

181. See Evan H. Caminker, *Precedent and Prediction: The Forward-Looking Aspects of Inferior Court Decisionmaking*, 73 TEX. L. REV. 1, 77-78 (1994) ("[L]ower court judges dislike being reversed on appeal."); William M. Landes & Richard A. Posner, *Legal Change, Judicial Behavior, and the Diversity Jurisdiction*, 9 J. LEGAL STUD. 367, 370 (1980) (noting that reversal "reduces the nonpecuniary income of [an inferior court judge's] job by destroying the precedential value of his decision"); Jonathan R. Macey, *The Internal and External Costs and Benefits of Stare Decisis*, 65 CHI.-KENT L. REV. 93, 111 (1989) ("[R]eversals by higher courts are embarrassing . . ."). But see Frank Cross, *Appellate Court Adherence to Precedent*, 2 J. EMPIRICAL LEGAL STUD. 369, 405 (2005) (concluding that "it appears unlikely that the risk of reversal plays a prominent role in circuit court decision making").

182. See, e.g., *Carhart v. Gonzales*, 413 F.3d 791, 796 (8th Cir. 2005) (declining to defer to congressional fact-finding because of a "lack of consensus . . . in the medical community"), *rev'd*, 550 U.S. 124 (2007); *Carver v. Nixon*, 72 F.3d 633, 644-45 (8th Cir. 1995) (declining to apply a *Turner Broadcasting I* level of deference to a state voter initiative); *United States v. Bishop*, 66 F.3d 569, 582-83 (3rd Cir. 1995) (deferring to congressional findings in a case challenging the constitutionality of federal carjacking law); *Independence Inst. v. Buescher*, 718 F. Supp. 2d 1257, 1275-76 (D. Colo. 2010) (finding that "the Court is not required to pay deference to the legislative findings" despite a general presumption of deference to such findings); *Russell v. Burris*, 978 F. Supp. 1211, 1226 (E.D. Ark. 1997) ("[F]ederal courts must be careful to not unnecessarily declare state laws invalid, whether enacted by legislature or by the voters themselves."), *aff'd in part, rev'd in part*, 146 F.3d 563 (8th Cir. 1998).

183. See Frederick Schauer, *Justice Stevens and the Size of Constitutional Decisions*, 27 RUTGERS L.J. 543, 559 (1996) ("The overwhelming majority of important constitutional decisions are made by state courts, lower federal courts, and federal, state, and local officials . . .").

184. See Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 STAN. L. REV. 817, 853-54 (1994) (noting that perceived legitimacy stems partially from consistency).

185. Compare *Graham v. Florida*, 130 S. Ct. 2011, 2015 (2010) (finding unconstitutional the imposition of life sentences without parole for juvenile offenders guilty of a nonhomicide crime even though "[t]hirty-seven States, the District of Columbia, and the Federal Government

broad or narrow level of generality,<sup>186</sup> borrow from another area of constitutional reasoning,<sup>187</sup> construe a challenge as facial or as-applied,<sup>188</sup> or even select a constitutional methodology.<sup>189</sup> To the extent the Court fails to articulate a consistent, reasoned approach to these determinations, much of its constitutional decision making is guided by factors outside the stated doctrine. Significantly, these various stealth determinations are more integral to constitutional meaning than judicial opinions would suggest. The project of teasing constitutional doctrine out of the document's text is not easy. But while familiar doctrinal tests reflecting the Court's efforts to do so are very significant,<sup>190</sup> most judges and many scholars have focused on them to the exclusion of other judicial determinations that fall outside black-letter doctrine but nonetheless contribute to the project of expounding the Constitution. Deference determinations, for example, are very much a part of the Constitution's meaning, getting to the heart of which governmental institutions enjoy the prerogative of deciding particular issues. Courts nonetheless have failed to systematically conceptualize how they work and how they interact with doctrinal tests.

In short, deference determinations and other stealth determinations ought to be treated more like other constitutional doctrine, however flawed it may be. The Court should explicate these determinations more carefully, render them more consistently, and articulate more precisely how they affect doctrinal inquiries. The Court, one senses, is not wholly unaware of these concerns, sometimes seeming to articulate an approach to deference determinations,<sup>191</sup> as though it too desires greater predictability. Courts should follow this instinct and try to confer greater legal status upon their

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permit sentences of life without parole for a juvenile nonhomicide offender"), *with* *Kennedy v. Louisiana*, 554 U.S. 407, 423 (2008) (striking down capital punishment for child rape in part because forty-four states have not made child rape a capital offense).

186. Compare *Lawrence v. Texas*, 539 U.S. 558, 567 (2003) (concluding that *Bowers* framed the question at too narrow a level of generality and failed "to appreciate the extent of the liberty at stake"), *with* *Bowers v. Hardwick*, 478 U.S. 186, 190 (1986) (framing the issue as a right to engage in homosexual sodomy). See generally Eric Berger, *Lawrence at Ten: Same-Sex Marriage and Stealth Constitutional Determinations*, 21 WM. & MARY BILL RTS. J. (forthcoming 2013).

187. See *Lawrence*, 539 U.S. at 572–75 (invoking equal-protection norms in substantive due process cases); *Emp't Div. v. Smith*, 494 U.S. 872, 881–82 (1990) (identifying precedent as "hybrid" cases involving free exercise and another fundamental right).

188. See Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third-Party Standing*, 113 HARV. L. REV. 1321, 1324 (2000) (arguing that the success of facial challenges is not "governed by any general formula defining the conditions for successful facial challenges" but rather turns on the underlying substantive claim).

189. See generally PHILIP BOBBITT, *CONSTITUTIONAL INTERPRETATION* 11–22 (1991) (discussing different modalities of constitutional interpretation).

190. See *supra* note 22 and accompanying text.

191. See *supra* note 27 and accompanying text.

determinations by addressing the institutional factors the inquiry purports to value in the first place.

## II. DEFERENCE DETERMINATIONS AND INSTITUTIONAL ANALYSES

### A. *THE INSTITUTIONAL-ANALYSIS APPROACH*

While substantive factors often play an important role in determining “who decides,” they should not be the only factors courts consult in making this decision.<sup>192</sup> Various considerations, including the political branches’ expertise, political authority, and diligence in performing their duties, should also play a role. The Court could improve the consistency and theoretical rigor of its deference determinations through an institutional-analysis approach that actually examines the institutional characteristics it purports to value. Given that the Supreme Court sometimes justifies deference on account of the special institutional characteristics of the political branches,<sup>193</sup> it is odd that the Court does not pay greater attention to the actual characteristics of those institutions.<sup>194</sup> To deal with this issue, courts should examine how the relevant political institution has behaved in a given case before deciding to defer. This institutional-analysis approach would encourage courts to do their due diligence when making deference determinations, drawing on the epistemic and democratic concerns that often fuel deference in the first place.

Much scholarly literature focuses on institutional choice more generally, often emphasizing courts’ inherent democratic and epistemic weaknesses in comparison to the political branches.<sup>195</sup> Instead of proposing

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192. See Thomas W. Merrill, *Preemption and Institutional Choice*, 102 NW. U. L. REV. 727, 727 (2008) (arguing that constitutional law scholarship is beginning to address “which institution should determine the content of the law—that is, [beginning] to ‘decid[e] who decides’” (quoting KOMESAR, *supra* note 160, at 3)).

193. See, e.g., *Turner Broad. Sys., Inc. v. FCC (Turner Broad. II)*, 520 U.S. 180, 195 (1997) (“We owe Congress’ findings deference in part because the institution ‘is far better equipped than the judiciary to amass and evaluate the vast amounts of data bearing upon’ legislative questions.” (quoting *Turner Broad. Sys., Inc. v. FCC (Turner Broad. I)*, 512 U.S. 622, 665–66 (1994) (plurality opinion)) (internal quotation marks omitted)); *Comm’r v. Engle*, 464 U.S. 206, 230 (1984) (Blackmun, J., dissenting) (“One reason for that deference is that the Commissioner is better able than any court, including this one, to assess the practical consequences of particular interpretations and to resolve statutory ambiguities in ways that minimize administrative difficulties.”); Horwitz, *supra* note 12, at 1074–75.

194. See, e.g., KOMESAR, *supra* note 160, at 196 (arguing that constitutional law is “about institutional choice”); ADRIAN VERMEULE, *JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION* 1 (2006) (“What decision-procedures should particular institutions, with their particular capacities, use to interpret this text?” (internal quotation marks omitted)).

195. See, e.g., VERMEULE, *supra* note 194, at 158 (discussing judges’ need to make “interpretive choices in the face of impoverished information” with “only limited capacity to generate the needed information”); Neil K. Komisar, *A Job for the Judges: The Judiciary and the*

a grand theory of institutional choice, the institutional-analysis approach proposed here cautions that the political branches' relative democratic and epistemic superiority will likely vary from case to case, depending on who within the government is acting and how they are doing their job. Similarly, courts' own capacity to competently review the decisions of the other branches also varies across cases. Accordingly, courts deciding whether to defer should assess the political branches' actual job performance in the case at hand, as opposed to relying on stereotypes about each branch's strengths and weaknesses.<sup>196</sup> Courts likewise must consider in context their own strengths and weaknesses relative to the institutions they review.<sup>197</sup>

Increased judicial attention to how political institutions function in practice will require greater attention at trial to the political branches' job performance.<sup>198</sup> Trial lawyers will need to review public documents and sometimes depose or examine witnesses to develop a record of government behavior. Where legislative action is at issue, this attention might require careful consideration of the Congressional Record, committee reports, and other indicators of fact-finding.<sup>199</sup> Similar judicial examination of the administrative record should also be possible in cases involving agencies.<sup>200</sup> Unlike administrative law cases, in which these questions take center stage, courts only sometimes examine these procedural factors in constitutional cases.

This inconsistency is regrettable. Though courts often focus their constitutional review on substantive issues, there are good reasons to think that questions of institutional procedure and behavior are also worthy of judicial scrutiny—perhaps even more so.<sup>201</sup> For one, substantive issues tend to yield profound disagreement, both among judges and between the different branches of government. Indeed, judges often disagree on which

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*Constitution in a Massive and Complex Society*, 86 MICH. L. REV. 657, 661–63 (1988) (discussing courts' lack of democratic legitimacy and the physical impossibility of courts examining an increasingly complex government); Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346, 1353 (2006) (arguing that one of the two major weaknesses of judicial review is its democratic illegitimacy).

196. Cf. Ittai Bar-Siman-Tov, *The Puzzling Resistance to Judicial Review of the Legislative Process*, 91 B.U. L. REV. 1915, 1974 (2011); Hans A. Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 197, 255 (1976).

197. See KOMESAR, *supra* note 160, at 197 (deriding institutional analysis that fails to compare the political branches with the judiciary itself); Neil K. Komisar, *The Perils of Pandora: Further Reflections on Institutional Choice*, 22 LAW & SOC. INQUIRY 999, 999 (1997) (“[I]nstitutional choice can be effectively approached only by employing *comparative institutional analysis*.”).

198. See *infra* Part II.B–C.

199. See *infra* Part II.B.1.

200. See *infra* Part II.B.2.

201. See generally Bar-Siman-Tov, *supra* note 196, at 1970–74 (arguing for judicial review of the legislative process).

normative substantive standards courts should use to announce what the law is.<sup>202</sup> Hence, judicial pronouncements on substantive matters of constitutional law are more likely to be highly controversial, potentially undermining the institutional legitimacy of the court.<sup>203</sup> By contrast, judges are somewhat more likely to agree on procedural and institutional issues, particularly where administrative agency action is at issue and administrative law can serve as a guide.<sup>204</sup> And while there is great disagreement over whether judicial review of Congress's internal procedures is appropriate, or even constitutional,<sup>205</sup> calling for courts to link *deference* to congressional fact-finding procedures should be less contentious, given that deference itself should hinge on institutional questions. Courts, then, would not be reviewing the propriety of congressional procedures themselves, but rather investigating the care and rigor of those procedures to determine whether the resulting fact-findings merit presumptive respect. In this regard, the institutional-analysis approach is substantially more modest than due-process-of-lawmaking calls for invalidating legislation enacted through inadequate procedures.<sup>206</sup>

In short, deference determinations should be more closely tied to the political branches' actual behavior. Importantly, such an institution-based deference determination should only be one step of the constitutional analysis. After deciding whether to defer, courts should (and typically do) proceed to analyze the substantive constitutional right at issue. Deference determinations, in other words, should not be the sum of the judicial inquiry but rather a lens through which courts should conduct the substantive constitutional analysis.<sup>207</sup>

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202. See *id.* at 1930; David Estlund, *Introduction to DEMOCRACY* 1, 6–7 (David Estlund ed., 2002).

203. See, e.g., John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 944–45 (1973) (suggesting that disagreement is an inevitable result of substantive constitutional decisions, and that such disagreement leads many to simply dismiss the Court's disfavored decisions as “Lochnering”).

204. See Berger, *Administrative Law Norms*, *supra* note 12, at 2054–58.

205. Compare Bar-Siman-Tov, *supra* note 196, at 1974 (arguing that judicial review of legislative procedure “is no less important and, in fact, is more justifiable than substantive judicial review”), and Catherine Fisk & Erwin Chemerinsky, *The Filibuster*, 49 STAN. L. REV. 181, 228–29 (1997) (arguing that the judiciary does and should review the constitutionality of Congress's law-making procedures), with Jesse H. Choper, *The Political Question Doctrine: Suggested Criteria*, 54 DUKE L.J. 1457, 1505–07 (2005) (arguing that “there is no justification for judicial review” of Congress's internal procedures), and Elizabeth Garrett, *Framework Legislation and Federalism*, 83 NOTRE DAME L. REV. 1495, 1530–39 (2008) (arguing that judicial involvement in Congress's internal procedures, if constitutional, would be “fraught with difficulty”).

206. See generally Bar-Siman-Tov, *supra* note 196; Linde, *supra* note 196.

207. E.g., Berger, *Theory of Deference*, *supra* note 14, at 75; Berger, *Administrative Law Norms*, *supra* note 12, at 2037, 2075.

B. INSTITUTIONALLY BASED DEFERENCE DETERMINATIONS

Part I discussed three institutional contexts in constitutional cases in which the Court is faced with the question of whether to defer to the political branches. This Subpart examines the institutional-analysis approach with respect to deference determinations in each of these situations. The inquiries proposed here would not only tether deference determinations more closely to the institutional questions underlying such determinations but also help bring greater consistency to courts' stealth constitutional decision making.<sup>208</sup>

1. Institutional Analysis of Congressional Fact-Finding

Congress may "have substantial staff, funds, time and procedures to devote to effective information gathering and sorting,"<sup>209</sup> but that does not mean it always makes use of these institutional strengths. The Court lacks any consistent approach for assessing whether Congress has made use of such capabilities. To improve the rigor of its deference determinations, the Court should consider more consistently whether Congress has taken advantage of its institutional strengths. More precisely, the Court should ask whether Congress's fact-findings were based on careful analysis and empirical study of relevant facts, or bald, self-serving assertions, or something in between.<sup>210</sup> This analysis would not only help reward Congress for diligence but would also help the Court more cleanly separate its deference determinations from its analysis of the substantive merits.<sup>211</sup>

It may well be true that Congress in theory is better equipped than courts to amass facts, but that does not mean that Congress always utilizes its institutional advantages when doing so. As scholars have noted, Congress often lacks strong incentives to use those resources to make a good-faith factual inquiry, choosing instead to use its fact-gathering procedures for

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208. Cf. Henry P. Monaghan, *Taking Supreme Court Opinions Seriously*, 39 MD. L. REV. 1, 25 (1979) ("If [judges'] justifications cannot be stated in the opinion, they should not be relied upon in entering the judgment."); Sunstein, *supra* note 112, at 22 (arguing that a judicial opinion "is supposed to explain the outcome of the case").

209. Robin Charlow, *Judicial Review, Equal Protection and the Problem with Plebiscites*, 79 CORNELL L. REV. 527, 578 (1994); see also F. Andrew Hessick, *Rethinking the Presumption of Constitutionality*, 85 NOTRE DAME L. REV. 1447, 1473 (2010) (noting that Congress has access to institutions like the Congressional Research Service to facilitate fact-finding).

210. See *supra* Part I.A.1. Though the principles suggested here may also be relevant to judicial review of state legislative fact-findings, this Article's focus is on deference to congressional fact-finding.

211. See Neal Devins, *Congressional Factfinding and the Scope of Judicial Review: A Preliminary Analysis*, 50 DUKE L.J. 1169, 1170-71 (2001).

political ends,<sup>212</sup> undermining the reliability of its “factual” findings. Motivated primarily by reelection, many members of Congress may be more invested in finding facts to support legislation desirable to their constituents and financial supporters rather than undertaking a good-faith exploration of the relevant policy area.<sup>213</sup> Members of Congress can, in fact, harm the veracity of a factual record by packing committees, choosing biased witnesses, and selectively presenting only a limited portion of findings to the whole Congress.<sup>214</sup> One should thus not assume that the congressional record is necessarily more trustworthy than judicially determined facts.<sup>215</sup>

Courts, therefore, should examine Congress’s fact-finding procedures for rigor and good faith. When Congress merely asserts “facts” it wishes to be true to support its legislative agenda, its fact-findings deserve less deference.<sup>216</sup> By contrast, when Congress carefully investigates an issue, compiles copious amounts of data,<sup>217</sup> and appears to be genuinely considering an issue from multiple perspectives, its factual record deserves

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212. See Araiza, *supra* note 21, at 6; Devins, *supra* note 211, at 1194–99 (discussing both Congress’s fact-finding capacities and the lack of incentives to use those capacities diligently in some situations).

213. E.g., Devins, *supra* note 211, at 1182; John O. McGinnis & Charles W. Mulaney, *Judging Facts like Law*, 25 CONST. COMMENT. 69, 91–92 (2008); Kate T. Spelman, *Revising Judicial Review of Legislative Findings of Scientific and Medical “Fact”: A Modified Due Process Approach*, 64 N.Y.U. ANN. SURV. AM. L. 837, 865 (2009). See generally LAWRENCE LESSIG, *REPUBLIC, LOST: HOW MONEY CORRUPTS CONGRESS—AND A PLAN TO STOP IT* 89–248 (2011) (arguing that financial campaign contributions distort Congress’s policy and distract legislators from addressing the public good).

214. E.g., Pilchen, *supra* note 25, at 367–68.

215. Professor Araiza contends that we should also be suspicious of congressional “facts” that conveniently fit existing constitutional tests, because they “raise[] . . . suspicion that Congress is attempting to wrest interpretive power away from the courts.” See Araiza, *supra* note 21, at 28–29.

216. See Elizabeth DeCoux, *Does Congress Find Facts or Construct Them? The Ascendance of Politics over Reliability*, Perfected in *Gonzales v. Carhart*, 56 CLEV. ST. L. REV. 319, 326 (2008) (“[P]olitical considerations have infected fact-finding to an increasing extent, to the point that almost all fact-finding in modern hearings is deliberately shaped so as to accomplish a political goal.”); Devins, *supra* note 211, at 1182 (“[I]t is certainly true that lawmakers are partisans and that congressional decision-making, including factfinding, is often about the pursuit of desired outcomes.”); Douglas Laycock, *A Syllabus of Errors*, 105 MICH. L. REV. 1169, 1175 (2007) (“[O]ften [Congress members] are locked into positions by ideology or political pressure before the hearing ever begins. Then the hearing is a charade.”); McGinnis & Mulaney, *supra* note 213, at 96 (“[Congress members] will be focused on creating a legislative record that will put the legislation in the most favorable light.”).

217. See, e.g., *Citizens United v. Fed. Election Comm’n*, 130 S. Ct. 876, 940 (2010) (Stevens, J., concurring in part and dissenting in part) (noting that Congress spent years developing a record of 100,000 pages); Lisa Barré-Quick & Shannon Matthew Kasley, *The Road Less Traveled: Obstacles in the Path of the Effective Use of the Civil Rights Provision of the Violence Against Women Act in the Employment Context*, 8 SETON HALL CONST. L.J. 415, 437–38 (1998) (describing the impressive detail and extent of the congressional record for the Violence Against Women Act).

more respect.<sup>218</sup> The spectrum of congressional care is obviously broad, and judges should accord greatest deference to the resulting fact-findings when Congress's methods are most rigorous.

It is, of course, not always easy for courts to discern congressional rigor and good faith, but it is possible, especially when Congress conducts sham proceedings to justify a pre-ordained outcome. For example, in *Planned Parenthood Federation of America v. Ashcroft*, a case challenging the constitutionality of Congress's Partial-Birth Abortion Ban Act, the trial court closely examined Congress's fact-finding procedures and carefully compared those findings with trial-court testimony.<sup>219</sup> The court's meticulous examination of the evidence Congress considered<sup>220</sup> led it to conclude that much of Congress's hearings had focused on "policy-based" rather than medical and scientific evidence.<sup>221</sup> As the court pointed out, the evidence Congress gathered contradicted its ultimate factual conclusion that there was medical consensus that "partial-birth" abortion procedures were "never medically necessary."<sup>222</sup> The court thus refused to defer, noting that "[i]f a legislature could make a statute constitutional simply by 'finding' that black is white or freedom, slavery, judicial review would be an elaborate farce."<sup>223</sup>

Despite the Supreme Court's subsequent reversal,<sup>224</sup> the trial court's approach, from a methodological standpoint, is praiseworthy.<sup>225</sup> In effect, the court was distinguishing between Congress's genuine effort to craft policy based on a careful examination of complicated facts and more cynical factual manipulation designed to support legislation pleasing powerful

218. See Kristen Clarke, *The Congressional Record Underlying the 2006 Voting Rights Act: How Much Discrimination Can the Constitution Tolerate?*, 43 HARV. C.R.-C.L. L. REV. 385, 396 (2008) ("The [*South Carolina v.*] *Katzenbach* Court deferred to congressional judgment, in part, because the congressional record and deliberative process preceding the Act indicated that Congress carefully studied the need for the [Voting Rights Act].").

219. *Planned Parenthood Fed'n of Am. v. Ashcroft*, 320 F. Supp. 2d 957, 1013-32 (N.D. Cal. 2004), *aff'd*, 435 F.3d 1163 (9th Cir. 2006), *rev'd sub nom.* *Gonzales v. Carhart*, 550 U.S. 124 (2007).

220. *Id.* at 1014.

221. *Id.* at 1017.

222. *Id.* at 1024; see also *id.* at 1025 ("Congress' very findings contradict its assertion that there is a consensus.").

223. *Id.* at 1032 (quoting *Lamprecht v. FCC*, 958 F.2d 382, 392 n.2 (D.C. Cir. 1992)) (internal quotation marks omitted).

224. See *Gonzales v. Carhart*, 550 U.S. 124 (2007); Reva B. Siegel, *Dignity and the Politics of Protection: Abortion Restrictions Under Casey/Carhart*, 117 YALE L.J. 1694, 1706 (2008) ("The *Carhart* decision emerged from the efforts of an antiabortion movement frustrated by its inability to overturn *Roe*.").

225. Of course, it may be difficult for those on either side of the abortion debate to separate the contentious constitutional issue from the institutional deference determination here, but my attention is solely to the issue of deference.



interest groups.<sup>226</sup> Through its scrupulous inspection of the legislative record, the trial court properly called into serious question the validity of Congress's "factual" findings, concluding "that Congress has not drawn reasonable inferences based on substantial evidence, and its findings are therefore not entitled to substantial deference."<sup>227</sup>

Some critics may pose separation-of-powers and political-authority objections to this kind of review and contend that courts' lack of democratic legitimacy and political accountability alone is reason enough to defer to Congress.<sup>228</sup> Such an approach implicitly contends that genuine expertise does not matter; instead, democratic legitimacy should trump other considerations, and elected legislators are far more politically accountable than unelected judges.<sup>229</sup> This separation-of-powers argument, while important, is overstated. If courts automatically deferred to legislative facts because legislators are elected, legislatures could exempt themselves from judicial review simply by finding convenient constitutional facts, thereby insulating its legislation from meaningful judicial inquiry. Such an outcome would sharply limit judicial review's important role in our system of separation of powers.<sup>230</sup> Thus, even if we accept that courts should generally give the elected branches' policy judgments the benefit of the doubt, this benefit should not necessarily require accepting even the most dubious of the political branches' findings.

Of course, while it is sometimes obvious that Congress has or has not gathered evidence carefully, the legislative record can be unclear. *Planned Parenthood Federation* is an extreme example, given the obvious disconnect between Congress's findings and the available medical evidence.<sup>231</sup>

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226. See, e.g., ESKRIDGE, JR. ET AL., *supra* note 171, at 47–81 (summarizing different theories of legislation).

227. *Planned Parenthood Fed'n*, 320 F. Supp. 2d at 1013–14.

228. See Note, *Judicial Review of Congressional Factfinding*, 122 HARV. L. REV. 767, 768 (2008) (objecting to judicial review of congressional fact-finding on separation-of-powers grounds).

229. See Jonathan R. Siegel, *The Polymorphic Principle and the Judicial Role in Statutory Interpretation*, 84 TEX. L. REV. 339, 371 (2005) ("The Constitution gives the legislative power to the politically accountable Congress; politically unaccountable judges have no business making policy choices of the kind that our Constitution entrusts to the political branches."); Emerson H. Tiller & Frank B. Cross, *A Modest Proposal for Improving American Justice*, 99 COLUM. L. REV. 215, 215 (1999) (reasoning that the life tenure of federal judges makes them politically unaccountable).

230. See THE FEDERALIST NO. 78, at 498 (Alexander Hamilton) (Robert Scigliano ed., 2000) ("If it be said that the legislative body are themselves the constitutional judges of their own powers, and that the construction they put upon them is conclusive upon the other departments, it may be answered, that this cannot be the natural presumption . . . . It is far more rational to suppose, that the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority.")

231. See *supra* notes 219–21 and accompanying text. Even the Supreme Court, in reversing the Ninth Circuit's affirmation of *Planned Parenthood Federation*, recognized the weakness of

Appellate courts, therefore, should also assess how much they trust both their own and lower courts' assessment of Congress's findings—that is, whether the judiciary's institutional analysis is likely to be correct, given its own institutional limitations and its competence to comprehend the sources it has reviewed.<sup>232</sup>

Significantly, substandard fact-finding would not render a statute automatically unconstitutional. Even when the Court concludes that Congress's facts are incorrect or have been gathered sloppily, it should still uphold legislation that is properly within Congress's powers and not otherwise unconstitutional. A judicial determination that Congress used flawed fact-finding processes would simply militate against deference, because facts found by a self-serving legislature are probably less trustworthy than those found by less partial trial courts.<sup>233</sup>

Far from constituting judicial overreaching, such deference determinations are inevitable in constitutional litigation. Our judicial system requires that legal questions be resolved in factual contexts,<sup>234</sup> and courts necessarily must decide which factual view of the world they accept. Consequently, where Congress has announced its view of the factual state of the world, courts necessarily must decide whether they should accept that view. To refuse deference to bogus congressional findings is not to insist on certain legislative procedures, but rather to recognize that deference to the legislature's epistemic authority makes no sense if the legislature does not have or use the expertise it is presumed to enjoy.

## 2. Institutional Analysis of Administrative Action

### a. *Institutional Analysis of Agency Epistemic Authority*

Just as courts should scrutinize the processes underlying congressional fact-finding before deferring to Congress's facts, so too should courts examine agency processes before deferring to administrative agencies on account of their epistemic authority. Often, an administrative agency will have expertise and make good use of it, in which case judicial deference on

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Congress's factual findings. See *Gonzales v. Carhart*, 550 U.S. 124, 166 (2007) (“Uncritical deference to Congress’ factual findings in these cases is inappropriate.”).

232. One danger with this approach is that Congress sometimes relies on sources that do not appear in the record. A. Christopher Bryant & Timothy K. Simeone, *Remanding to Congress: The Supreme Court’s New “On the Record” Constitutional Review of Federal Statutes*, 86 CORNELL L. REV. 328, 383 (2001). To this extent, courts should recognize that they may not always have a full picture of congressional processes.

233. See McGinnis & Mulaney, *supra* note 213, at 92–94 (explaining that, from the public-choice perspective on congressional fact-finding, legislators’ predominant interest is getting re-elected, thus creating a strong incentive to find facts that will help them remain in office).

234. See U.S. CONST. art. III, § 2 (stipulating that the judicial power of the United States extends to “Cases” and “Controversies”).

epistemic grounds is perfectly appropriate. However, as discussed above, sometimes the Court defers in constitutional cases on account of expertise where closer examination would have indicated that such expertise was in fact lacking.<sup>235</sup>

More rigorous judicial analysis of agency procedures is especially important where agency action might otherwise escape meaningful administrative review, as is the case with some state and federal administrative agencies that are explicitly or functionally exempted from administrative law procedures.<sup>236</sup> Many high-profile constitutional cases, in fact, involve administrative action escaping ordinary administrative review.<sup>237</sup> Agencies who know their actions are unlikely to be subjected to typical arbitrary-and-capricious review may be less inclined to adhere to standard administrative procedures, including requirements that they utilize their expertise.<sup>238</sup> Closer attention to agency competence, then, would help the Court avoid granting unwarranted deference based on ostensible epistemic authority.

Of course, agencies often do possess expertise worthy of deference. Administrative agencies exist, in large part, to address complicated problems with an attention to detail and a specialized expertise that the legislature usually cannot offer.<sup>239</sup> Whereas legislatures must deal with a diverse array of subjects, most agencies operate within a narrower sphere of competence. As a result, agencies often possess a technocratic, professional expert staff that legislatures typically lack.<sup>240</sup> Because they have fewer issues on their plate than Congress, agencies also can focus on their tasks with greater attention than can Congress, which must confront numerous problems simultaneously. Expertise, then, is central to agencies' identity and *raison d'être*.<sup>241</sup>

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235. See *supra* Part I.A.2.a.

236. See Adrian Vermeule, *Our Schmittian Administrative Law*, 122 HARV. L. REV. 1095, 1096 (2009) (arguing that administrative law contains a series of "black holes" explicitly exempting agencies from administrative law and "grey holes" which provide "constraints . . . so insubstantial that they pretty well permit government to do as it pleases"); *infra* notes 307, 349 and accompanying text.

237. See, e.g., *Baze v. Rees*, 553 U.S. 35, 51 (2008) (plurality opinion); *Grutter v. Bollinger*, 539 U.S. 306, 327–29 (2003); *Turner v. Safley*, 482 U.S. 78, 85 (1987); *Korematsu v. United States*, 323 U.S. 214, 218–19 (1944); Berger, *Administrative Law Norms*, *supra* note 12, at 2038–47.

238. See 5 U.S.C. § 706(2)(A) (2006).

239. See, e.g., MASHAW, *supra* note 79, at 19 ("[M]uch of the impetus for the creation of many prominent administrative agencies can be traced to a desire for the exercise of an expert rather than a lay or political judgment.").

240. See STRAUSS, *supra* note 78, at 135 (describing agency staffs as "professional rather than political in character").

241. E.g., Saul Zipkin, *Administering Election Law*, 95 MARQ. L. REV. 641, 679–80 (2012).

Nevertheless, agencies do not always act with the expertise they are supposed to enjoy, and when they do not, deference is less deserved.<sup>242</sup> Courts can determine the extent of agency expertise in constitutional cases by considering the same factors they examine when reviewing agency action in administrative law cases.<sup>243</sup> First, courts should consider whether the agency enjoys genuine epistemic authority over the relevant subject matter, and, second, whether it exercises that expertise with some degree of care and thoroughness.<sup>244</sup> While these factors should not themselves solely determine the outcome of cases, they should help shape deference. As the Supreme Court itself has said, an administrative agency has “an obligation to perform its responsibilities with some degree of expertise.”<sup>245</sup>

Courts do not always verify epistemic authority, but their general focus on technocratic competence in administrative law cases demonstrates a commitment to expert-based, agency decision making.<sup>246</sup> When agencies have no more facility with the facts than courts, there is no reason for courts to defer on epistemic grounds. To the contrary, given that courts frequently deal with facts outside their area of expertise, they may be better than agencies at understanding complicated areas to which they previously have been unexposed.<sup>247</sup> Relatedly, epistemic authority has little value if agencies do not make use of it.<sup>248</sup> Administrative law, therefore, generally requires that agencies not only understand the relevant topic but also that they consider all relevant evidence from a variety of angles.<sup>249</sup> As the Court has explained in the administrative law context, an agency acts arbitrarily and capriciously if it has:

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242. See Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2354 (2001) (“[N]ot all agency action entails the application of expertise, even when the action properly should do so.”).

243. See Berger, *Administrative Law Norms*, *supra* note 12, at 2058–74.

244. Cf. *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) (calibrating deference based on “the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade”).

245. *Hampton v. Mow Sun Wong*, 426 U.S. 88, 115 (1976).

246. See Kathryn A. Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 YALE L.J. 2, 15–29 (2009) (discussing the judiciary’s search for agencies’ technocratic expertise).

247. Cf. *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 597 (1993) (holding that the trial judge’s role as a “gatekeep[er]” of expert testimony is to ensure that the claimed basis for scientific testimony is valid).

248. See RICHARD S. MARKOVITS, *MATTERS OF PRINCIPLE: LEGITIMATE LEGAL ARGUMENT AND CONSTITUTIONAL INTERPRETATION* 217 (1998) (arguing that decision makers deserve less deference when they do “not actually investigate despite their capacity to do so”).

249. *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971) (requiring that the court determine whether an agency made a decision “based on a consideration of the relevant factors”).

entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.<sup>250</sup>

These kinds of inquiries require examining the administrative record and other indicators of agency decision making. While litigation does not always uncover all important information, it certainly can substantially narrow or even eliminate the epistemic gap between courts and other governmental institutions.<sup>251</sup> Nevertheless, though careful review of the administrative record is prominent in administrative law cases, courts and litigants do not always consider these issues in constitutional cases.<sup>252</sup> Under the institutional-analysis approach, they would start doing so. Moreover, where the administrative record is incomplete, litigants should use the Freedom of Information Act, state equivalents, and ordinary discovery rules to ascertain the agencies' underlying procedures.<sup>253</sup> After all, whereas litigants in administrative law cases are limited to the administrative law record, general civil litigants, including in constitutional cases, may pursue broader discovery.<sup>254</sup> To this extent, parties accessing this information usually need not employ litigation techniques different from what they already use.<sup>255</sup>

The fruits of this discovery can be crucial to the question of deference. To give just one example, in a case challenging the constitutionality of Missouri's lethal injection procedure, a deposition revealed that the State had delegated complete authority over the procedure to someone with no understanding of the relevant drugs and their potential to cause

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250. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

251. *See Chesney, supra* note 130, at 1407 ("Even if we assume that the executive branch as an initial matter has an informational advantage due to restraints on its ability to pass information through to the judge, this advantage could be offset thanks to information gathering advantages of the adversarial process.").

252. *See supra* Part I.A.2.a.

253. *See* 5 U.S.C. § 552 (2006) (providing for agencies to make information public subject to exceptions); FED. R. CIV. P. 26–37 (providing for disclosure and discovery rules in civil litigation); MODEL STATE ADMIN. PROCEDURE ACT § 2(a)(3)–(4) (1961) (requiring state agencies to "make available for public inspection all rules and all other written statements of policy," as well as "all final orders, decisions, and opinions").

254. *See infra* notes 347–50 and accompanying text.

255. To the extent sensitive material sometimes may arise, the government could seek to protect that information through in camera hearings or other protective measures. *See* FED. R. CIV. P. 26(c) (stating that courts may issue protective orders); *cf. Chesney, supra* note 130, at 1426–28 (suggesting that deference is not the best way of addressing secrecy concerns in national-security contexts).

excruciating pain.<sup>256</sup> Such evidence speaks directly to the State's epistemic incompetence and should militate strongly against deference. Nevertheless, these considerations are often shortchanged in lethal injection litigation.<sup>257</sup> Indeed, as discussed above, *Baze* assumed, without much inquiry, that Kentucky possessed epistemic authority worthy of deference, even though the experience in Missouri and other states demonstrated that state expertise should not be taken for granted.<sup>258</sup>

Given agencies' peculiar constitutional status, these kinds of inquiries are especially appropriate for judicial review of agency action.<sup>259</sup> Whereas some critics may posit that courts should never interfere with internal congressional procedures, courts already *do* closely monitor internal agency procedures in administrative law proceedings. Moreover, administrative law requirements that agency policies not be arbitrary and capricious stem, at least partially, "from the administrative agency's unique constitutional position."<sup>260</sup> Precisely because agencies cannot be "permitted unbridled discretion [lest] their actions . . . violate important constitutional principles of separation of powers and checks and balances,"<sup>261</sup> it makes sense for courts to scrutinize their expertise before affording deference on that ground.

It should be emphasized that expertise is necessarily relative, and courts must weigh the political actor's expertise against their own.<sup>262</sup> When an appellate court is particularly poorly suited to make factual findings on a given matter—perhaps because the trial record is sparse or because the subject matter is highly technical—it should be more inclined to defer to the agency's expertise, subject, of course, to that branch's own limitations. By contrast, if there is a developed trial record and good reason to think that courts would be competent at finding the kinds of facts at issue, less presumptive deference to the agency is appropriate in constitutional cases. Of course, the primary attention should be to the agency, and if there is good reason also to trust its findings, then some deference will often be

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256. See *Taylor v. Crawford*, No. 05-4173-CV-C-FJG, 2006 WL 1779035, at \*7 (W.D. Mo. June 26, 2006) (discussing doctor's deposition), *rev'd*, 487 F.3d 1072 (8th Cir. 2007); Berger, *Lethal Injection*, *supra* note 87, at 268–70 (discussing information yielded from deposition).

257. See *Taylor v. Crawford*, 487 F.3d 1072, 1082–85 (8th Cir. 2007) (failing to take full account of the DOC's epistemic incompetence and reversing the district court's holding that Missouri's lethal injection procedure violated the Eighth Amendment); Berger, *Lethal Injection*, *supra* note 87, at 301–14.

258. Berger, *Lethal Injection*, *supra* note 87, at 265–72 (discussing several states' lack of expertise with lethal injection procedures).

259. See *infra* Part II.B.2.b.

260. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 536 (2009) (Kennedy, J., concurring).

261. *Id.*

262. See KOMESAR, *supra* note 160, at 6–7 (arguing for comparative institutional analysis).

warranted, even if courts have reason to trust their own fact-findings. However, given that courts are implicitly deciding whether judges or other actors have superior expertise, they should not lose sight of the fact that their own epistemic competence will vary from case-to-case. Similarly, they should consider their own tendency to underestimate or (perhaps more likely) overestimate their own ability to weigh their institutional competence against the political branches.<sup>263</sup> While some judges may be better than others at this self-reflection, mere awareness of the matter should help some courts recognize that they are not necessarily the best arbiter of their own shortcomings.

*b. Institutional Analysis of Agency Political Authority*

Courts should also consider the actual political authority of government institutions before predicating deference on democratic legitimacy. Alexander Bickel famously argued that judicial review is problematic because it allows unelected judges to overturn the policies of elected, politically accountable legislatures or chief executives.<sup>264</sup> One might accordingly assume that judicial review would be less problematic when unelected, less accountable officials designed the challenged policies. While factors, such as separation of powers and federalism, may militate for deference in certain circumstances, courts ought not assume that unelected administrative officials enjoy democratic legitimacy equivalent to that of elected legislatures and chief executives.<sup>265</sup> Nevertheless, courts often ignore this distinction.

To better calibrate the deference due administrative agencies on political-authority grounds, courts should once again consider some norms from administrative law.<sup>266</sup> After all, much ordinary administrative law has its

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263. *Cf. id.* at 149 (“Valid institutional comparison calls upon courts to function when they can do a better job than the alternative . . . . More than other decision-makers, [judges] can be expected to evenhandedly and carefully . . . consider essential institutional realities.”); Joshua P. Booth & Larry I. Palmer, *ERISA Preemption Doctrine as Health Policy*, 39 HOFSTRA L. REV. 59, 69–70 (2010) (“Where a judge sees the courts as having little capability to decide important issues, the judge is likely to take a more formal approach to interpretation, leaving policy issues to the legislature. If, however, a judge perceives that the legislative and executive branches are either unable or unwilling to actively address policy questions, we might expect that judge to take a more active and inclusive approach to interpretation.”).

264. *See* BICKEL, *supra* note 99, at 16–17 (“[W]hen the Supreme Court declares unconstitutional a legislative act or the action of an elected executive, it thwarts the will of representatives of the actual people of the here and now; it exercises control, not in behalf of the prevailing majority, but against it.”).

265. *See* Berger, *Theory of Deference*, *supra* note 14, at 43 (arguing that judicial review is often “premised on political authority”); Horwitz, *supra* note 12, at 1078 (arguing that courts defer typically for “reasons of legal authority” (emphasis omitted)).

266. *See* Berger, *Administrative Law Norms*, *supra* note 12, at 2058–67.

roots in constitutional law,<sup>267</sup> so it makes sense that those constitutionally inspired administrative principles would help the Court flesh out the deference owed to administrative actions subject to constitutional challenge.<sup>268</sup> Current doctrine, indeed, sometimes acknowledges that agencies potentially lack political accountability. For example, courts sometimes look to the precision of congressional guidance to the agency before determining the legitimacy of the agency action. The unelected agency takes its instructions from the elected legislature, so the clarity of the legislative mandate can help courts determine the strength of the link between politically accountable officials and agency action.<sup>269</sup> Well-established doctrine, thus, requires that Congress delegate with a sufficiently “intelligible principle.”<sup>270</sup> By contrast, overly broad delegation requires little thought from elected officials, who can order an agency to address areas the legislature lacks the political stomach to address.<sup>271</sup> When policies result from such vague delegations, the responsible agencies, lacking a sufficient connection to the elected legislature, are less democratically legitimate and deserve less deference.<sup>272</sup>

Courts already consider these issues when they invoke “nondelegation canons,” under which they limit agencies’ ability to take constitutionally

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267. See Gillian E. Metzger, *Ordinary Administrative Law as Constitutional Common Law*, 110 COLUM. L. REV. 479, 490–97 (2010) (explaining the constitutional roots of much ordinary administrative law).

268. The principles addressed here should apply to federal court review of both federal and state administrative agencies. Even though federal courts could not strike down state agency action as *ultra vires*, due process principles should allow courts to examine procedures increasing the likelihood of constitutional violations. See, e.g., Berger, *Administrative Law Norms*, *supra* note 12, at 2077–79 (relying on due process principles to argue that federal courts can look at administrative law principles to calibrate deference to both state and federal administrative agencies); Henry P. Monaghan, *First Amendment “Due Process,”* 83 HARV. L. REV. 518, 551 (1970) (arguing that to protect constitutional rights adequately, “courts must thoroughly evaluate every aspect of the procedural system which protects those rights”).

269. See Edward L. Rubin, *Law and Legislation in the Administrative State*, 89 COLUM. L. REV. 369, 374 (1989) (describing modern legislation as instructions to administrative agencies).

270. *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 472 (2001).

271. See JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 133 (1980) (noting that “policy direction” is what should be required of legislatures); HENRY J. FRIENDLY, *THE FEDERAL ADMINISTRATIVE AGENCIES: THE NEED FOR BETTER DEFINITION OF STANDARDS* 21–22 (1962) (“[E]ven if a statute telling an agency ‘Here is the problem: deal with it’ be deemed to comply with the letter of [the Constitution], it hardly does with the spirit.”).

272. See, e.g., Stuart Minor Benjamin & Ernest A. Young, *Tennis with the Net Down: Administrative Federalism Without Congress*, 57 DUKE L.J. 2111, 2129 (2008) (arguing that the Constitution vests decision-making authority in Congress rather than agencies); Berger, *Administrative Law Norms*, *supra* note 12, at 2033–35 (arguing that courts should offer more deference to agencies adhering to administrative law norms); Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543, 545–46 (2000) (noting that despite agencies’ considerable power, they “are not directly accountable to the electorate”).



suspect actions without clear congressional authorization.<sup>273</sup> While the nondelegation doctrine is usually highly deferential to Congress with regard to whether Congress may delegate authority,<sup>274</sup> the Court uses nondelegation canons to limit agency authority, for example, to promulgate retroactive rules or preempt state law, even though Congress itself could pass statutes to the same effects.<sup>275</sup> Given that the Court constrains administrative authority when agencies, acting without clear congressional authorization, tread closely to certain constitutional boundaries, it should at least inspect the specificity of the legislative delegation in considering whether to defer to those agencies. Failure to consider the scope of the delegation would be tantamount to silently conferring upon agencies the same political authority the legislature enjoys.

Courts can also gauge an agency's democratic legitimacy by considering both the internal and external oversight of the relevant agency action. In our vast public bureaucracy, many government departments are so large that officials several steps removed from the chief executive's political appointees heading the department wield significant policymaking authority.<sup>276</sup> Consequently, to preserve political accountability, it is important to maintain a link both between the agency head and elected officials and among the various layers of administrative bureaucracy. Where some politically accountable entity maintains genuine oversight of an agency, the resulting agency action should have greater presumptive democratic legitimacy—and therefore be entitled to more deference—than when there is minimal oversight. Similarly, when the relevant agency policy emanates from far down the chain-of-command, courts should inquire whether agency superiors, including the legislative delegatee, have overseen the creation and implementation of the challenged policy.<sup>277</sup> While such attention to

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273. See Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 316 (2000) (discussing a set of nondelegation canons which “forbid administrative agencies from making decisions on their own”).

274. See *Am. Trucking*, 531 U.S. at 474 (“In the history of the Court we have found the requisite ‘intelligible principle’ lacking in only two statutes . . .”).

275. See, e.g., *Wyeth v. Levine*, 555 U.S. 555, 576 (2009) (rejecting preemption claim in part “[b]ecause Congress has not authorized the FDA to pre-empt state law directly”); *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) (“[A] statutory grant of legislative rulemaking authority will not . . . be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms.”); Ernest A. Young, *Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review*, 78 TEX. L. REV. 1549, 1603–06 (2000) (discussing nondelegation canons as a way to enforce constitutional values).

276. See STRAUSS, *supra* note 78, at 130 (explaining that “the detailed understanding and actual implementation of [many agency] programs occurs . . . at some remove from the political appointees”).

277. Cf. *United States v. Mead Corp.*, 533 U.S. 218, 231–32 (2001) (“[T]he terms of the congressional delegation give no indication that Congress meant to delegate authority to

executive control over agencies has limitations and may even sometimes threaten administrative epistemic authority,<sup>278</sup> examining internal agency hierarchy would help ensure accountability by encouraging the agency head, who is sometimes directly answerable to the chief executive, to participate in important decisions.<sup>279</sup> Such an approach helps promote political accountability by establishing a link between the public and the administrative bureaucracy.<sup>280</sup>

Courts should also consider the transparency of an agency's policies in assessing its political authority. Government accountability is premised on popular monitoring of government activities; if the people cannot know what their government is doing, accountability is severely compromised.<sup>281</sup> The risk of inadequate transparency is especially high in the agency setting, where officials are often unelected and where the bureaucratic hierarchy and technical subject matter can hide a department's affairs from public scrutiny.<sup>282</sup> Quite often the general public has little idea what agencies actually do.<sup>283</sup> While this is probably impossible to eliminate, transparency allows the people and legislators to monitor agency action more closely.

Given that transparency is generally important in our administrative structure, it should also be relevant to courts' deference determinations in

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Customs to issue classification rulings with the force of law."); David J. Barron & Elena Kagan, *Chevron's Nondelegation Doctrine*, 2001 SUP. CT. REV. 201, 201-02 (arguing *Chevron* deference should hinge on whether statutory delegates make decisions themselves or delegate such decisions).

278. See, e.g., Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 503-15 (2003) (arguing that excessive attention to presidential control shortchanges problems of agency arbitrariness).

279. See Barron & Kagan, *supra* note 277, at 237-40. Generally, agency heads are considered more politically accountable when they are removable by the chief executive. *Cf.* *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3151 (2010) (invalidating dual for-cause limitations on President's authority to remove Board members).

280. See Kagan, *supra* note 242, at 2331-46 (arguing that the presidential control model enhances agency accountability in various ways); Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 2-3 (1994) (contending that greater presidential authority over the administrative state will enhance accountability of agencies).

281. See ELY, *supra* note 271, at 125 ("[P]opular choice will mean relatively little if we don't know what our representatives are up to."); Peter M. Shane, *Legislative Delegation, the Unitary Executive, and the Legitimacy of the Administrative State*, 33 HARV. J.L. & PUB. POL'Y 103, 108 (2010) ("The essence of accountability lies in the transparency of government actions . . .").

282. See Glen Staszewski, *Reason-Giving and Accountability*, 93 MINN. L. REV. 1253, 1271 (2009) ("Not only are most voters unlikely to know or care about most administrative decisions, but they will routinely have difficulty accurately gauging responsibility for those decisions that subsequently prove unpopular.").

283. See Evan J. Criddle, *Fiduciary Administration: Rethinking Popular Representation in Agency Rulemaking*, 88 TEX. L. REV. 441, 448 (2010) ("[T]he American public generally knows little about even those regulatory initiatives that most directly affect their interests.").

individual rights cases involving administrative agencies.<sup>284</sup> Secretive administrative practices are less connected to the general public and thus should enjoy less presumptive democratic legitimacy than transparent ones. Courts should adjust the deference they accord agencies based on how open and forthcoming the agency was when enacting the challenged policy. Courts, of course, should treat transparency—like other factors—with common sense and flexibility. Secrecy may be desirable and therefore more justifiable in certain contexts, such as national security.<sup>285</sup> But absent a compelling government interest in secrecy, courts should review more skeptically policies designed behind closed doors.

It may not always be possible to calibrate any of these continuums—delegation, oversight, or transparency—perfectly.<sup>286</sup> Courts using an institutional-analysis approach will need to make judgment calls, which, admittedly, will inject uncertainty into their deference determinations. But courts currently often make such determinations without examining any factors carefully or systematically. However imperfect, close consideration of how agencies actually do their job is surely preferable to the status quo.

### 3. Institutional Analysis of Special Governmental Institutions and Governmental Institutions Acting in Special Contexts

Finally, the Court should more carefully scrutinize the justifications for offering heightened deference to particular governmental institutions and in special contexts. Rather than simply announcing that the government deserves deference when it acts through particular institutions, like prisons, or in particular contexts, like national security, the Court should examine if and why those institutions and contexts merit special respect. Deference in such situations may still be warranted, but would at least have a stronger theoretical foundation. As Professor Chesney explains in the context of national-security deference:

The government contends—and courts frequently agree—that the executive branch as an institution has a comparative advantage over the judiciary in terms of producing accurate judgments when it comes to at least some national security matters. Unfortunately, discussions of comparative accuracy all too often treat this inquiry superficially. Courts at times frame this question in a simplistic

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284. See Elizabeth Garrett, *Accountability and Restraint: The Federal Budget Process and the Line Item Veto Act*, 20 CARDOZO L. REV. 871, 924–25 (1999) (discussing the connection between transparency and accountability); Jane S. Schacter, *Ely and the Idea of Democracy*, 57 STAN. L. REV. 737, 755 (2004) (noting that “accountability requires transparency”).

285. See, e.g., Richard Moberly, *Whistleblowers and the Obama Presidency: The National Security Dilemma*, 16 EMP. RTS. & EMP. POL’Y J. 51, 89–121 (2012) (discussing rationales for secrecy in agencies charged with protecting national security); *infra* Part II.B.3.

286. See *infra* Part III.B.1.

manner, with “the executive” and “the judiciary” treated in unrealistically monolithic terms, and “accuracy” itself examined without reference to its constituent elements. A more appropriate inquiry would account for a number of complicating considerations . . . .<sup>287</sup>

In particular, the Court should not simply justify special deference on the judiciary’s relative epistemic deficit.<sup>288</sup> As discussed above, courts’ epistemic deficiency is certainly not unique to the national-security context, and blind deference on this basis fails to consider whether the government was even acting with any proficiency worthy of deference. As the *HLP* dissent pointed out, for instance, Congress failed to point to any “empirical information that might convincingly support”<sup>289</sup> the criminalization of speech used to train members of covered groups “on how to use humanitarian and international law to peacefully resolve disputes” and “how to petition various representative bodies such as the United Nations for relief.”<sup>290</sup> Thus, even if we accept the majority view in *HLP* that the political branches are more knowledgeable than courts about national-security issues, courts still should confirm that those branches have in fact utilized that knowledge.

Looking beyond epistemic authority, there are other rationales to justify the Court’s special deference in these contexts. These likely would make sense in some cases but not others. For example, the government probably does have good reasons to keep some material secret due to national-security concerns. However, the force of this argument would depend on the particular context and the strength of the government’s contention that secrecy is essential.<sup>291</sup> Moreover, even where the need for secrecy is compelling, it is not clear that judicial deference is the proper response.<sup>292</sup> Where the disclosure of information could potentially aid foreign enemies, judicial procedures can be shaped to minimize those risks, such as through

287. Chesney, *supra* note 130, at 1404–05 (footnotes omitted).

288. *See id.* at 1411 (“Superior access to information or expertise contributes nothing to accuracy, after all, unless the decisionmaker actually exploits them, and does so reliably.”).

289. *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2735 (2010) (Breyer, J., dissenting).

290. *Id.* at 2729 (majority opinion) (quoting *Humanitarian Law Project v. Mukasey*, 552 F.3d 916, 921 n.1 (2007) (internal quotation marks omitted), *aff’d in part, rev’d in part sub nom. Holder v. Humanitarian Law Project*, 130 S. Ct. 2705 (2010)).

291. *See generally* SISSELA BOK, *SECRETS: ON THE ETHICS OF CONCEALMENT AND REVELATION* 172–75 (1982) (arguing that while some governmental secrecy is “evil,” some is also justified); Athan G. Theorharis, *Introduction to A CULTURE OF SECRECY: THE GOVERNMENT VERSUS THE PEOPLE’S RIGHT TO KNOW* 4–13 (Athan G. Theorharis ed., 1998) (discussing culture of government secrecy in national-security issues).

292. *See* Chesney, *supra* note 130, at 1427–28.

in camera presentations of evidence to judges,<sup>293</sup> as in the *Pentagon Papers* case.<sup>294</sup> If constitutional rights can be litigated and vindicated without the public disclosure of sensitive information, secrecy is not a sound reason to defer.<sup>295</sup>

Another justification for heightened deference in both the prison and national-security contexts is that the stakes for the country's safety are just so high that we are less willing to tolerate judicial second-guessing of the political branches' expertise.<sup>296</sup> This argument, obviously, is more convincing in some contexts than others. Clearly, prison safety should be taken seriously, but if special deference rests substantially on the potential harm that could come to the public from overly intrusive judicial review, prisons probably deserve less deference than, say, agencies protecting the nation from calamitous terrorist attacks. Moreover, even though prison security certainly is a matter of public concern, some litigated issues presumably have only minimal impact on prison security. To be sure, some requirements of prison officials may be particularly onerous or intrusive, but such an argument calls for a case-by-case deference analysis rather than a separate category of special deference.

The "high stakes" justification for deference presumably would have greater traction when government plausibly could be said to be taking measures necessary to protect the national security. Such judgment calls nevertheless pose difficulties, because the government often invokes national security liberally, such as in *Boumediene*,<sup>297</sup> where the actual impact

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293. See FED. R. CIV. P. 26(c) (stating that courts may issue protective orders).

294. See *United States v. N.Y. Times Co. (Pentagon Papers)*, 328 F. Supp. 324, 326 (S.D.N.Y.) (referencing "*in camera*" proceedings at which the government presented sensitive material), *rev'd*, 444 F.2d 544 (2d Cir.) (en banc), *rev'd*, 403 U.S. 713 (1971) (per curiam).

295. See, e.g., Moberly, *supra* note 285 (discussing rationales for secrecy in agencies charged with protecting national security); Thomas G. Stacy, *The Constitution in Conflict: Espionage Prosecutions, the Right To Present a Defense, and the State Secrets Privilege*, 58 U. COLO. L. REV. 177, 245-53 (1987) ("Closure of those portions of the trial touching on national security secrets . . . protects the government's national security interests and a defendant's right to present a defense, obviat[ing] the necessity for making impossible choices between security and liberty."); cf. Robert P. Deyling, *Judicial Deference and De Novo Review in Litigation over National Security Information Under the Freedom of Information Act*, 37 VILL. L. REV. 67, 92-93 (1992) ("Judicial deference to agency claims that disclosure of information will cause damage to national security serves the public interest only if the results in actual cases inspire confidence that such deference is, in fact, justified. If the information that is ultimately revealed (either through litigation or negotiation) turns out to be obviously inconsequential, the public confidence in executive arguments for secrecy will be eroded.")

296. See *supra* Part I.A.3; cf. *Baker v. Carr*, 369 U.S. 186, 226 (1962) (declining to find a "political question" because deciding the case on the merits would not, inter alia, risk "grave disturbance at home").

297. See Brief for the Respondents at 45-46, *Boumediene v. Bush*, 553 U.S. 723 (2008) (No. 06-1195, No. 06-1196), 2007 WL 2972541, at \*45-46 (arguing for "highly circumscribed" review and deference to the military tribunal).

on national security was questionable. While the Court may not always strike the perfect balance, more careful attention to the specific institution and context should help it determine whether an asserted threat to national security requires deference.<sup>298</sup>

Interestingly, though these concerns are rarely addressed directly, perhaps the Court silently (or even unwittingly) accounted for them in *Boumediene*. Focusing on the potential threat to the nation in that case, it seems implausible that affording detainees after six years the opportunity to challenge their detention in limited federal court proceedings will impact the national security.<sup>299</sup> Thus, whereas the government could reasonably contend in some other cases that an adverse ruling may hinder military preparedness or aid enemies of the United States, those arguments seemed far less plausible in *Boumediene* and other enemy-combatant-detainee cases.<sup>300</sup> Indeed, *Boumediene*'s question was quite narrow, implicating only access to habeas jurisdiction, not the subsequent questions of how courts should consider the detainees' challenges. Some commentators, in fact, have argued persuasively that the D.C. Circuit's post-*Boumediene* rulings have eviscerated the procedural right recognized in that case, especially given the Supreme Court's recent refusal to review subsequent appellate decisions on the issue.<sup>301</sup>

For better or worse, then, *Boumediene* offered the detainees so little that the national-security stakes seem extremely modest. From this perspective, perhaps the Court denied deference because it concluded that special "high stakes" deference was not warranted.<sup>302</sup> In any event, a more searching institutional inquiry and a more candid evaluation of the gravity of the issues at stake would help the Court calibrate an appropriate level of deference in arguably special contexts.<sup>303</sup>

298. See Chesney, *supra* note 130, at 1426 (arguing that some potential disruptions to national security "are more serious than others").

299. If anything, one could even argue that permitting continued detention without legal hearing would perpetuate a Kafka-esque legal system that may weaken American legitimacy abroad and inadvertently assist al-Qaeda recruiting. *But see Boumediene*, 553 U.S. at 827–28 (Scalia, J., dissenting) (arguing that the Court's decision "will almost certainly cause more Americans to be killed").

300. Chesney, *supra* note 130, at 1427–28.

301. See, e.g., *Latif v. Obama*, 666 F.3d 746 (D.C. Cir. 2011), *cert. denied*, 132 S. Ct. 2741 (2012); *Al-Madhwani v. Obama*, 642 F.3d 1071 (D.C. Cir. 2011), *cert. denied*, 132 S. Ct. 2739 (2012); Stephen I. Vladeck, *The D.C. Circuit After Boumediene*, 41 SETON HALL L. REV. 1451, 1455–56 (2011) (arguing that several D.C. Circuit judges have subverted the Supreme Court's *Boumediene* decision).

302. It is doubtful that striking down the statute at issue in *HLP* would have created any more tangible a threat, but at least the *Partiya Karkeran Kurdistan* and *Liberation Tigers of Tamil Eelam* were active organizations that engaged in terrorist activity.

303. See Chesney, *supra* note 130, at 1432–34 (proposing a more detailed and coherent approach to deference in national-security cases).

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Collectively, the issues discussed here should guide whether the relevant political actor deserves judicial deference. If we are to take courts' stated justifications for deference seriously, courts should examine the institutions more critically within the contexts posed by particular cases before deciding whether to defer or not. Deference, of course, is not the entire constitutional inquiry, but it is a portion of the inquiry that should be approached with far greater care.

C. *THE INSTITUTIONAL ANALYSIS IN PRACTICE*

Courts applying these factors in constitutional cases will need to determine when and how rigorously to review the government procedures at issue. One could imagine a variety of approaches for determining when courts should defer. At one extreme, courts could review government processes and fact-findings as a preliminary inquiry in every case. At the other extreme, courts could examine government processes only if the plaintiff has made a threshold showing that there is good reason to question the government's diligence and rigor. Similarly, one can imagine a spectrum with respect to how carefully the court would review what the relevant political branch actually did, ranging from highly deferential review to an intrusive, *de novo* inquiry.

The institutional analysis proposed here takes a middle ground, demanding that courts ask these questions in every case and engage in a hard-look review of the legislative or administrative record.<sup>304</sup> Under this approach, litigants could examine the administrative or legislative record closely to see how carefully the relevant policy was designed.<sup>305</sup> Where such analysis suggests serious procedural inadequacies, or where substantial gaps in the record make it difficult to know how the policy was actually created, then further discovery, such as depositions and document requests, could be permitted.<sup>306</sup> Such discovery would be especially useful in cases involving

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304. See *Greater Bos. Television Corp. v. FCC*, 444 F.2d 841, 851 (D.C. Cir. 1970) (arguing that the court's "supervisory function" calls on it to intervene if "the agency has not really taken a 'hard look' at the salient problems, and has not genuinely engaged in reasoned decision-making" (footnote omitted)).

305. Cf. *Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). In some cases where an administrative agency acts in secrecy without good reason, greater discovery would be permissible. See Berger, *Administrative Law Norms*, *supra* note 12, at 2065-67.

306. For example, in *Taylor v. Crawford*, after earlier discovery had demonstrated problems in the State's lethal injection procedures, the judge permitted further discovery into Missouri's internal procedures, including a deposition of the execution team leader. See *Taylor v. Crawford*, No. 05-4173-CV-C-FJG, 2006 WL 1779035, at \*2 (W.D. Mo. June 26, 2006) (discussing the order granting motion to depose John Doe 1), *rev'd*, 487 F.3d 1072 (8th Cir. 2007); *supra* notes 252-58 and accompanying text.

agencies, like departments of corrections, universities, the military, and prosecutors' offices, which often operate outside traditional administrative law requirements.<sup>307</sup> Indeed, because those kinds of agencies are more likely to craft policy without the constraints of likely arbitrary-and-capricious judicial review,<sup>308</sup> more careful constitutional review is especially important in these cases. As for agencies already subject to the Administrative Procedure Act ("APA") or state equivalents, this approach would ensure that courts in constitutional cases make deference determinations with reference to the kinds of factors they review in administrative law cases.

Unlike a regime permitting detailed preliminary, *de novo* inquiries into government procedures in every case, the institutional-analysis approach would only marginally disrupt current judicial practices and would not raise the separation-of-powers concerns that more extensive intrusions into congressional and executive procedures might pose. Both legislatures and agencies usually keep detailed records of their proceedings,<sup>309</sup> and far from invading those branches' autonomy, scrutiny of such records *should* inform judicial deference. While this more modest approach may not catch all troubling procedural flaws, it would help attune courts, government actors, and litigants to these important issues. Significantly, under this approach, courts could not so easily issue stealth deference determinations that summarily grant or deny deference without first examining the factual and theoretical premises underlying that determination.

Of course, the precise contours of the analysis would differ from case to case, but, significantly, in no case would the courts be dictating procedures to the other branches of government. Courts would only be determining whether the procedures at issue merited deference, and even if they did not defer, the government action could still be constitutional.<sup>310</sup> Unlike procedural due process cases where procedural shortfalls themselves amount to a violation,<sup>311</sup> courts engaging in these institutional analyses would consider procedural issues primarily to determine whether the

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307. See, e.g., MINN. STAT. ANN. § 14.03 (West 2005) (exempting the University of Minnesota from Minnesota's APA); MO. ANN. STAT. § 536.010(6)(k) (West 2009) (exempting a "statement concerning only inmates of an institution under the control of the department of corrections" from the APA's definition of a "rule"); TENN. CODE ANN. § 4-5-102(12)(G) (2011) (exempting from the APA "[s]tatements concerning inmates of a correctional . . . facility"); Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 993 (2006) ("[T]he government faces almost no institutional checks when it proceeds in criminal matters."); Vermeule, *supra* note 236, at 1096 (explaining that much agency action escapes meaningful administrative law review); *infra* Part III.B.2.

308. See 5 U.S.C. § 706(2)(A) (2006).

309. See, e.g., *id.* § 552 (providing for public availability of agency procedures).

310. See *supra* notes 206–07 and accompanying text.

311. See, e.g., *Mathews v. Eldridge*, 424 U.S. 319, 334–35 (1976) (stating test for determining what process is due).



government acted carefully enough to deserve the benefit of the doubt. This approach still leaves government actors wide leeway to conduct their business while simultaneously making clear that courts will not defer to them without first assessing how those actors perform their jobs.

### III. ADVANTAGES AND LIMITATIONS

#### A. ADVANTAGES OF INSTITUTIONAL ANALYSIS

##### 1. Incentivizing Responsible Law Making

The institutional-analysis approach would serve several important purposes. Perhaps most obviously, it would provide incentives for policymakers to act with more careful attention to their own expertise and democratic legitimacy. Though legislatures and administrative agencies differ in most important respects, in theory both often are in a better position than courts to understand technical policy areas. Judicial attention to whether policymakers actually possess and utilize their supposed epistemic authority would make it more likely that they would try to gather and use facts more responsibly. Similarly, judicial attention to questions of democratic legitimacy would incentivize legislatures to build oversight and transparency mechanisms into agencies. While these norms are not always observed, they should play a prominent role in our system of representative government in which many issues are delegated to unelected officials.<sup>312</sup> Of course, this incentive would likely differ across actors and contexts, but generally speaking, most policymakers would be inclined to act in a manner more likely to trigger judicial deference.

Presumably, this attention to government procedures would sometimes result in better designed policy.<sup>313</sup> As Barbara Sinclair has noted, “a good process will, on average and over the long run, produce better policy.”<sup>314</sup> Political science and empirical research further suggests that poor political processes often result in flawed policy, vindicating interest group rent-seeking and distorting policy outcomes.<sup>315</sup> Congress does sometimes

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312. See Memorandum from Peter R. Orszag, Dir. of Office of Mgmt. & Budget, to Heads of Exec. Dep'ts & Agencies (Dec. 8, 2009), available at [http://www.whitehouse.gov/sites/default/files/omb/assets/memoranda\\_2010/m10-06.pdf](http://www.whitehouse.gov/sites/default/files/omb/assets/memoranda_2010/m10-06.pdf) (directing executive departments and agencies to implement “principles of transparency”).

313. See Bar-Siman-Tov, *supra* note 196, at 1928–29.

314. Barbara Sinclair, *Spoiling the Sausages? How a Polarized Congress Deliberates and Legislates*, in 2 RED AND BLUE NATION?: CONSEQUENCES AND CORRECTION OF AMERICA'S POLARIZED POLITICS 55, 83 (Pietro S. Nivola & David W. Brady eds., 2008) (internal quotation marks omitted).

315. See Bar-Siman-Tov, *supra* note 196, at 1928–29 (summarizing political science literature exploring the connections between government procedures and resulting policies).

carefully examine evidence to help it find a proper policy solution<sup>316</sup> but, with an agenda often driven by interest groups and lobbyists, Congress often knows its preferred outcome before it looks at anything.<sup>317</sup> An institutional-analysis approach would alert Congress that its factual findings will receive more judicial respect when it has actually considered evidence carefully rather than conducted sham proceedings to reach political ends.<sup>318</sup>

To be sure, some legislators will still attempt to use the system to make political statements rather than craft meaningful policy, and some may not even care if courts invalidate those policies. That being said, at least on the margins, linking deference to deliberateness should help encourage more responsible policymaking. While courts may not always be able to perfectly distinguish careful policymaking from self-serving, politically motivated factual manipulation, most judges are not entirely naïve about how Congress operates.<sup>319</sup> Accordingly, the legislative record will often give courts a better sense of whether and how Congress utilized its institutional capacity to examine the problem at hand.<sup>320</sup> As for administrative action, this approach should also help improve agency processes, especially for agencies otherwise escaping administrative review.<sup>321</sup>

316. See, e.g., Benjamin Michael Superfine, *New Directions in School Funding and Governance: Moving from Politics to Evidence*, 98 KY. L.J. 653, 678–85 (2010) (discussing congressional use of scientific and empirical evidence in its development of educational policy).

317. See Laycock, *supra* note 216, at 1175 (“[Legislative legitimacy] assumes that legislators are free to investigate the public good and to vote their consciences. Sometimes they are. But often they are locked into positions by ideology or political pressure before the hearing ever begins.”).

318. See *supra* Part II.B.1.

319. Cf. Pablo T. Spiller & Matthew L. Spitzer, *Where Is the Sin in Sincere? Sophisticated Manipulation of Sincere Judicial Voters (with Applications to Other Voting Environments)*, 11 J.L. ECON. & ORG. 32, 32–36 (1995) (arguing that many judges are sophisticated political actors).

320. Numerous theories of legislation exist, some nearly diametrically opposed. Legislators may be public-minded policymakers sincerely trying to further public good, or alternatively, special interests’ tools that only care about raising money for reelection. See LESSIG, *supra* note 213, at 89–171 (describing how the demand for campaign cash consumes most legislators and skews policy); Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223, 224, 230 (1986) (explaining public-choice theory of Congress in which special interest groups create strong incentives for politicians to enact legislation favorable to them); Richard J. Pierce, Jr., *The Role of the Judiciary in Implementing an Agency Theory of Government*, 64 N.Y.U. L. REV. 1239, 1245 (1989) (“[P]ublic interest’ theorists posit that legislators adopt regulatory legislation to further the public interest.”). Obviously, Congress’s responsiveness to the incentives provided by the theory of deference proposed here will hinge partially on which theory of legislation is more accurate. The competing theories all shed helpful light on how Congress operates, though some theories may be more illustrative for particular legislators and during particular Congresses than others. Still, to the extent that legislators sometimes seek good public policy, the institutional-analysis approach should help provide better incentives for careful fact-finding. Cf. Araiza, *supra* note 21, at 22–37 (offering principles of deference to congressional fact-finding).

321. See *supra* notes 236–38, 307 and accompanying text.

The current system does not consistently provide these incentives. Under the status quo, legislatures and other political actors do not know if courts will respect their factual findings and other judgments.<sup>322</sup> Nor do they know when their actions will trigger judicial respect in constitutional cases. The institutional-analysis approach places clearer expectations on political actors, incentivizing them to act with proper political and epistemic authority, which should, in turn, improve governmental performance.<sup>323</sup>

## 2. Promoting Democracy

Relatedly, attention to the processes of political institutions can also help promote democracy.<sup>324</sup> Administrative agencies, in particular, lack presumptive democratic legitimacy, and it is in this context that the institutional-analysis approach can improve the government's democratic legitimacy most significantly. The Court in constitutional cases sometimes treats administrative agencies' political authority as static and roughly comparable to that of the legislature or chief executive.<sup>325</sup> In reality, though, agency political authority varies considerably, hinging on various factors like legislative guidance, oversight, and transparency.<sup>326</sup>

When agencies receive clear congressional instructions and proper oversight, they are more directly answerable to the people and thus enjoy greater democratic legitimacy. Similarly, when an agency operates transparently, the public is much better positioned to observe agency action and make better-informed assessments of the government's performance. By linking deference more closely to actual accountability, courts could provide better incentives for agencies otherwise escaping judicial review to behave more responsibly. These incentives would also encourage legislatures to delegate to agencies more precisely and to monitor agency actions more closely.

Increased judicial attention to the behavior of governmental institutions should, then, provide incentives for greater democratic responsiveness from these governmental bodies. Whereas many critics consider substantive constitutional review problematic because it permits unelected judges to

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322. See, e.g., William W. Buzbee & Robert A. Schapiro, *Legislative Record Review*, 54 STAN. L. REV. 87, 147 (2001) (noting that legislative-record review provides no guidance for anticipating how a challenge will be resolved).

323. See Bar-Siman-Tov, *supra* note 196, at 1928–31 (reasoning that adherence to the rules governing the legislative process—procedures that legitimize a legislature's decisions—produces better laws and more accurate policy).

324. Cf. Sunstein, *supra* note 112, at 38–43.

325. See Berger, *Administrative Law Norms*, *supra* note 12, at 2034 (“[T]he Court downplays the constitutional ‘who,’ effectively treating the legislature, chief executive, and administrative officials all as roughly equivalent incarnations of ‘the government’ with the same democratic legitimacy.”); *supra* Part I.A.2.b.

326. See Berger, *Administrative Law Norms*, *supra* note 12, at 2059–67.

displace the legislature's majoritarian will,<sup>327</sup> a focus on institutional processes can *enhance* democratic rule. For example, if courts paid closer attention to the identity of political actors, they might be less likely to defer reflexively to administrative agencies—at least to agencies lacking proper guidance, oversight, and transparency. Current judicial practices often treat agencies similarly to legislatures in constitutional cases, even though elected legislatures should enjoy greater democratic legitimacy than unelected agency bureaucrats.<sup>328</sup> Greater attention to the identity and behavior of the government actor could help avoid that unnecessary conflation.

While this approach is likely to provide a stronger incentive for better democratic accountability in agencies by improving transparency and oversight, even attention to legislative processes could help further majority rule. As Professor Bar-Siman-Tov has argued, “The rules that govern the legislative process . . . are designed to ensure that the laws produced by the legislature reflect the will of the majority of its members . . . .”<sup>329</sup> Moreover, attention to legislative procedures can help foster transparency, thus providing citizens a way to observe the political process and increase democratic legitimacy.<sup>330</sup> Of course, legislative representatives are already elected and directly answerable to the people, so, to this extent, they are already usually more politically accountable than most administrative officials. Nevertheless, at least in the context of legislative fact-finding, improved attention to legislative processes should help encourage the legislature to find facts with more rigorous and transparent methods that can be scrutinized not just by courts but the public at large.

### 3. Promoting Legal Consistency and Predictability

Institutional analyses would also help imbue courts' deference determinations with greater predictability, rendering those determinations less “stealthy.” Linking deference determinations to the way the institution in question actually behaves would make it easier to follow the Court's reasoning by connecting the ostensible reasons for deference with the actual deference determination. Even more importantly, a more careful approach would help give clearer guidance to lower courts and parties for approaching such problems. Without such guidance, lower courts are left uncertain about how to approach questions of fact and democratic legitimacy. Given that constitutional adjudication often turns on factual considerations and decisions about courts' relationships to the other branches of government, the Court has left lower courts ill-prepared to

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327. See, e.g., BICKEL, *supra* note 99, at 16–23.

328. See Berger, *Administrative Law Norms*, *supra* note 12, at 2032–33, 2059–61.

329. Bar-Siman-Tov, *supra* note 196, at 1934.

330. See *id.* at 1934–35.

properly address important questions about deference on significant issues that recur in many constitutional cases.<sup>331</sup>

Engaging in institutional analyses, then, should result in greater constitutional clarity. Legal clarity, of course, is important not just so that the law is understandable and predictable,<sup>332</sup> but also because these types of stealth determinations implicate important constitutional questions. Constitutional law contains multiple, sometimes contradictory, values,<sup>333</sup> and the Court often tries to resolve these conflicts by concluding that one doctrine trumps another, without fully wrestling with the broader underlying tensions,<sup>334</sup> many of which arise through stealth determinations. Too often, stealth deference determinations receive attention only as litigation strategies, rather than more fundamental debates about who should decide important questions. Addressing these determinations more directly will help force judges to engage with deeper structural issues about how our Constitution allocates decision-making power.<sup>335</sup>

Closer attention to these issues may also improve black-letter constitutional doctrine. While generally more predictable than most stealth determinations, doctrinal inquiries, too, can be maddeningly erratic.<sup>336</sup> Some of this doctrinal muddiness, though, is closely tied to stealth determinations. As discussed above, *Grutter* and *Gratz* collectively hold that individualized, rather than mechanical, affirmative action admissions policies are more likely to pass constitutional muster, but together the cases send mixed signals about whether courts should respect universities' judgments about the benefits of racial diversity and the need for affirmative action plans to achieve those benefits.<sup>337</sup> More explicit deference determinations (and other determinations of this nature) would hardly

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331. See FAIGMAN, *supra* note 26, at 3 (“[T]he Court’s failure to account for the empirical world makes its decisions, at best, broadly aspirational, rather than specifically directional.”); *supra* note 181–82 and accompanying text.

332. See *supra* notes 169–74, 181–84 and accompanying text.

333. See Paul M. Bator, *The State Courts and Federal Constitutional Litigation*, 22 WM. & MARY L. REV. 605, 633 (1981) (“[T]he Constitution itself contains a multiplicity of various sorts of values, many in tension with each other: process values as well as substantive values, structural and institutional values as well as those embodying individual rights.”); Martha Minow, *Choice or Commonality: Welfare and Schooling After the End of Welfare as We Knew It*, 49 DUKE L.J. 493, 497–98 (1999) (recognizing the multiplicity of the Constitution’s values, and noting they “are not simply distinct and competing; they are also linked and interdependent”).

334. See, e.g., Eric Berger, *The Collision of the Takings and State Sovereign Immunity Doctrines*, 63 WASH. & LEE L. REV. 493, 593 (2006).

335. Cf. Mitchell N. Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1, 106 (2004) (arguing that many of our debates about political morality are couched in constitutional terms).

336. See SEGALL, *supra* note 23, at 21–166 (summarizing numerous doctrinal inconsistencies).

337. See *supra* notes 161–68 and accompanying text.

eliminate all problems with black-letter constitutional doctrine, but they would address some of these inconsistencies, clarifying how deference should interact with substantive doctrine.

#### 4. Encouraging Judicial Candor

Institutional analyses would also encourage courts to offer more thorough, candid explanations for their deference determinations. Judicial candor may not be the Court's priority these days, but it seems especially lacking when the Court makes deference and other stealth determinations. As discussed above, the Court makes these determinations with even fewer constraints than when it makes "doctrinal" decisions, so it is unsurprising that the Court provides little explanation. But judicial explanation and candor are essential if we are to have confidence in the judiciary's constitutional decisions. As H. Jefferson Powell argues:

[C]andor is essential if the justices . . . are to ask the rest of us to take them seriously where they cannot claim that their judgments are beyond dispute. Only if you and I understand the true grounds of a decision can we assent to its correctness or . . . to its validity as the outcome of our system even though we think it wrong in substance. . . . Candor is indispensable if the system is to retain its moral dignity . . . . The constitutional virtue of candor, therefore, goes beyond honesty about the meaning of cases and sincerity in the statement of viewpoint. It is the disposition to seek, and so far as possible to achieve, a congruity between the mind grappling with the constitutional issue before it and the language in which that struggle and its resolution is expressed . . . .<sup>338</sup>

Given that there is rarely a clearly "correct" answer in constitutional law and that reasonable people can disagree about the proper resolution of many constitutional cases, courts' decisions in such cases often hinge on value judgments as much as legal principles.<sup>339</sup> In a system where important questions are left to judicial tribunals and where the practical constraints on those tribunals are limited, it is probably inevitable that judges and justices would confront constitutional cases with a range of approaches and values.<sup>340</sup> What is regrettable is not that justices take such different

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338. H. JEFFERSON POWELL, *CONSTITUTIONAL CONSCIENCE: THE MORAL DIMENSION OF JUDICIAL DECISION* 90 (2008); see also SEGALL, *supra* note 23, at 3 (discussing judicial candor).

339. See Richard A. Posner, *The Jurisprudence of Skepticism*, 86 MICH. L. REV. 827, 891 (1988) ("[O]ften two or more outcomes will be reasonable, and the choice among reasonable outcomes is an open one . . .").

340. See SEGALL, *supra* note 23, at 4 ("When the Justices give meaning to phrases like *equal protection of the law* and *due process of law*, they are employing their own ideas of right and wrong formed by personal life experiences, not interpreting prior law."); Posner, *supra* note 19, at 40–

approaches, but rather the justices' pretention that their answer is objectively correct.<sup>341</sup>

As they currently exist, judicial deference determinations are so unconstrained that justices can quietly turn to them to help shape the outcome of a case, even when doctrinal factors may point in a different direction.<sup>342</sup> Moreover, the Court's approach to issues like epistemic authority and congressional findings is often a pretext for vindicating other values, like federalism in *Morrison* or anti-abortion sentiment in *Gonzales v. Carhart*.<sup>343</sup> Requiring courts to consider institutional factors may not necessarily result in a drastic change in how cases are resolved, but it would at least force judges to identify these factors while determining whether to defer. To the extent these factors sometimes conflict with one another, the Court would also have to candidly explain why it finds some more convincing than others, rather than simply ignoring inconvenient factors altogether.

No approach will eliminate a judge's discretion to ignore inconvenient factors at will. However, given that the institutional capacities of the other branches necessarily underlie many constitutional judgments, thorough institutional analyses should help improve courts' consistency and honesty in approaching such issues. Courts' failure to openly and consistently address deference determinations obscures important conversations about each branch's proper role in making factual determinations and constitutional pronouncements that are binding on us all. Improving the dialogue between courts and the political branches will foster a much-needed investigation into who should appropriately make certain kinds of constitutional determinations.<sup>344</sup> Institutional analyses would also help improve the public's faith in the judiciary, which suffers when the people suspect that judges may not believe their own explanations.<sup>345</sup> Finally, greater Supreme Court candor and rigor would help guide lower courts trying to make their own deference determinations.

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41 ("[I]t is rarely possible to say with a straight face of a Supreme Court constitutional decision that it was decided correctly or incorrectly.")

341. Cf. JEROME FRANK, *LAW AND THE MODERN MIND* 7 (1930) (arguing that "[m]uch of the uncertainty of law is . . . of immense social value" (emphasis omitted)).

342. See *supra* Part I.A.

343. See Buzbee & Schapiro, *supra* note 322, at 159–60.

344. See Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577 (1993); cf. STEPHEN G. BREYER & RICHARD B. STEWART, *ADMINISTRATIVE LAW AND REGULATORY POLICY* 363–64 (3d ed. 1992) (discussing structural requirements forcing agencies to explain their decisions).

345. See David L. Shapiro, *In Defense of Judicial Candor*, 100 HARV. L. REV. 731, 743 (1987) (arguing that judges lose public trust when their opinions are not candid).

*B. THE (LIMITED) LIMITATIONS OF INSTITUTIONAL ANALYSIS*

## 1. The Difficulties of Calibrating Deference

As with any proposal to enhance the efficacy of judicial decision making, the institutional-analysis approach does have its limitations. Perhaps the most potent criticism is that judges will not be up to the task of accurately assessing the institutional characteristics of the political branches.<sup>346</sup> Relatedly, courts' ability to assess their own institutional strengths vis-à-vis the political branches will likely vary. Even in ideal circumstances, accurately calibrating deference to the degree of expertise and political authority that a policymaker possesses is hardly a science, and judges themselves have widely varying degrees of political experience and savvy. From this perspective, the multi-factor institutional analyses proposed here may be clumsily applied, thus giving judges too much flexibility to manipulate the outcome of a case.

It is, however, worth emphasizing that judges today make deference determinations anyway without any consistent guiding principles. Institutional analysis is an improvement over the status quo insofar as it forces courts to identify and explain factors that should constrain their own decision making, thus encouraging greater judicial consistency. Admittedly, the sheer volume of relevant factors will result in some inconsistency, but merely theorizing deference better would be an improvement. By contrast, the Court's current approach to deference sometimes just announces a conclusion without offering much legal analysis at all.

Of course, if consistency were the only goal, this inquiry would be rather simple: courts could just always defer to the political branches in constitutional cases, or, alternatively, always engage in *de novo* review. Both approaches are too extreme. The former renders judicial review largely ineffective in many circumstances, and the latter fails to recognize that the political branches sometimes *do* enjoy epistemic or political authority worthy of respect. Given that the Constitution's text does not provide clear guidance on how to approach these institutional questions, it makes sense that the various branches' institutional strengths and weaknesses should play a role in deference determinations. The problem with the status quo is that these institutional factors are not considered more carefully and systematically, but an entirely deferential or undeferential approach would not consider them at all. In other words, a one-size-fits-all solution to deference may yield consistency, but it would ignore other important constitutional values and disrupt current approaches to deference. In comparison, institutional analysis seems the more practical and harmonious solution.

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346. See VERMEULE, *supra* note 194, at 155 (discussing judges' "bounded rationality").



## 2. Potential Doctrinal Obstacles

Certain legal doctrines could also potentially interfere with institutional inquiries in some cases. For example, under the APA, the parties must rely on the administrative record; they are not entitled to discovery into agency procedures.<sup>347</sup> However, those rules only apply in administrative proceedings and therefore would not necessarily foreclose discovery in civil constitutional litigation.<sup>348</sup> Such discovery may be especially important in constitutional cases lacking a developed administrative record, such as lethal injection cases in which departments of corrections sometimes design execution procedures without adhering to administrative law requirements.<sup>349</sup> Indeed, such discovery may be important in a variety of settings where state administrative agencies operate outside the ambit of administrative law requirements and therefore are more likely to utilize inadequate procedures heightening the risk of constitutional violation.<sup>350</sup>

Immunity doctrines are another potential doctrinal hurdle, especially in some suits for money damages. These doctrines often derail a plaintiff's case before she can even question how the government devised the challenged policy. Qualified immunity doctrine, for instance, protects many governmental officials from monetary liability unless that official's conduct violated clearly established law.<sup>351</sup> The doctrine therefore often allows a

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347. See, e.g., FED. R. CIV. P. 26(a)(1)(B)(i) (exempting from initial discovery disclosures "an action for review on an administrative record"); 3 KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE § 14.8 (2d ed. 1980) (explaining that the APA contains no discovery provisions and that the Federal Rules of Civil Procedure's discovery provisions do not apply to administrative proceedings).

348. See Michael Asimow & Lisl Dunlop, *The Many Faces of Administrative Adjudication in the European Union*, 61 ADMIN. L. REV. 131, 135 n.7 (2009) (noting that while discovery rules do not apply in administrative actions under the APA, they do apply in civil cases).

349. Some states specifically exempt departments of corrections from their administrative laws. See, e.g., MO. ANN. STAT. § 536.010(6)(k) (West 2009) (exempting "statement concerning only inmates of an institution under the control of the department of corrections" from the definition of a "rule"); TENN. CODE ANN. § 4-5-102(12)(G) (2011) (exempting "[s]tatements concerning inmates of a correctional . . . detention facility"). Departments of corrections in other states have similarly tried to develop lethal injection procedures without administrative law oversight. See *Morales v. Cal. Dep't of Corr. & Rehab.*, 85 Cal. Rptr. 3d 724, 731-32 (Ct. App. 2008) (faulting the State for developing lethal injection procedure without following state administrative law requirements); *Evans v. State*, 914 A.2d 25, 33-34 (Md. 2006) (same); see also *supra* notes 236, 307 and accompanying text.

350. See, e.g., *Freedman v. Maryland*, 380 U.S. 51, 60 (1965) (invalidating film censorship scheme because it created a significant possibility of discrimination against unpopular speech); Berger, *Administrative Law Norms*, *supra* note 12, at 2049-50, 2077-79; Monaghan, *supra* note 268, at 551 (arguing that "first amendment rights . . . can be destroyed by insensitive procedures").

351. See, e.g., *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (holding that governmental officials' qualified immunity may be overcome by showing that the officer violated "clearly established" law, of which a reasonable officer would have known).

court to dismiss an action on the basis of unsettled law without discovery and without clarifying the relevant legal norm.<sup>352</sup> Such doctrines could thus preempt a call for institutional analysis, disposing of any need to further inquire into governmental procedures.

There are, however, ways to allow courts to reach the merits of these questions without subjecting governmental officials to liability that might chill their job performance. Importantly, qualified immunity, by its own terms, does not apply where the official has violated clearly established law, thus limiting the pool of cases in question. Further, *Ex parte Young* actions for prospective injunctive relief do not trigger qualified immunity (or sovereign immunity), and many constitutional claims are, in fact, brought for injunctive relief.<sup>353</sup> And even in cases where the legal norms are unsettled, minor tweaks to existing doctrine could help courts resolve these cases on the merits. For example, as Professor Pfander has argued, by reviving the common law suit for nominal damages, courts could adjudicate constitutional questions without exposing governmental officials to actual or compensatory damages.<sup>354</sup> Such an approach would allow litigants to obtain immunity-free determinations of their constitutional claims without exposing officials to anything greater than nominal monetary liability.<sup>355</sup> Thus, neither qualified immunity doctrine nor the restrictions of administrative law should pose an insurmountable bar to more thorough institutional analysis of government action.

### 3. The Difficulties of Avoiding Value-Based Judging

Ultimately, any attempt to improve constitutional decision making must confront the criticism that Supreme Court opinions are simply driven by the justices' own politics.<sup>356</sup> As Professor Segall argues, judges' criteria in constitutional cases "are much more about subjectivity and taste than logic

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352. See, e.g., *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2079 (2012) (noting that the defendant filed a motion to dismiss based on absolute immunity and qualified immunity); James E. Pfander, *Resolving the Qualified Immunity Dilemma: Constitutional Tort Claims for Nominal Damages*, 111 COLUM. L. REV. 1601, 1602 (2011).

353. See *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 841 n.5 (1998) (noting that qualified immunity does not apply in actions "to enjoin future conduct, in an action against a municipality, or in litigating a suppression motion"); *Ex parte Young*, 209 U.S. 123, 159–60 (1908) (permitting a suit against a state official for injunctive relief notwithstanding the state's immunity from suit); Pfander, *supra* note 352, at 1609.

354. See Pfander, *supra* note 352, at 1606–07.

355. *Id.* at 1607 ("Although it would promise little by way of compensation, such a nominal damages claim could be an attractive option for plaintiffs who wish to secure a judicial test of their claims.").

356. See, e.g., Posner, *supra* note 19, at 40 ("Constitutional cases . . . can be decided only on the basis of a political judgment, and a political judgment cannot be called right or wrong by reference to legal norms.").

and reason.”<sup>357</sup> Empirical political science scholarship further suggests that values play a significant role in justices’ votes.<sup>358</sup> Moreover, justices sometimes have incentives to tolerate a poorly theorized determination within an opinion to keep together a coalition of five votes.<sup>359</sup> Consequently, calls for more rigor and consistency in deference determinations may be fruitless, because nothing can stop the justices from imposing their own values in constitutional cases and from failing to elaborate their reasons when terseness would better serve their strategic aims.<sup>360</sup>

It is, nevertheless, important to recognize that the Court’s approach to deference determinations is more ad hoc than to constitutional precedent more generally. While it is certainly true that many Supreme Court constitutional decisions seem value driven and inconsistent with precedent,<sup>361</sup> most black-letter constitutional doctrine proceeds with greater predictability than do deference determinations or other stealth determinations.<sup>362</sup> Constitutional cases in a given doctrinal area usually purport to ask the same questions, even if they answer the questions in different, sometimes seemingly irreconcilable, ways.<sup>363</sup> By contrast, deference and other stealth determinations ask no questions consistently.<sup>364</sup> However flawed constitutional doctrine may be, deference determinations would at least become more predictable and law-like if they demanded the same treatment as doctrinal constitutional inquiries.

This is not to say that more carefully theorized constitutional decision making would be easy. Even the most talented, earnest justice working in good faith will inevitably struggle when deciding many constitutional cases. Supreme Court constitutional cases are often hard, presenting multiple issues simultaneously and pitting competing constitutional principles against each other with little textual guidance. Moreover, constitutional opinions already tend to be too long, and including still more explanation would

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357. SEGALL, *supra* note 23, at 4.

358. See Daniel R. Pinello, *Linking Party to Judicial Ideology in American Courts: A Meta-Analysis*, 20 JUST. SYS. J. 219, 243 (1999) (synthesizing dozens of studies purporting to measure the connection between judicial ideology and behavior).

359. See Cass R. Sunstein, Commentary, *Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733, 1739 (1995).

360. See Posner, *supra* note 19, at 40 (arguing that constitutional cases are “not susceptible of confident evaluation on the basis of professional legal norms”).

361. See generally SEGALL, *supra* note 23, at 21–166 (providing numerous examples of the Supreme Court’s failure to follow its own constitutional precedents).

362. See *supra* note 170 and accompanying text.

363. Affirmative action and educational racial preference cases, for instance, purport to apply strict scrutiny, even if some decisions are difficult to square with each other. See, e.g., *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720 (2007); *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003); *Gratz v. Bollinger*, 539 U.S. 244, 270 (2003).

364. See *supra* Part I.A.

compound this problem further.<sup>365</sup> Thus, it is unsurprising that justices would silently resort to their own values to help resolve close cases. Even a justice deeply committed to impartiality is likely to answer close legal questions in accordance with her own worldview.<sup>366</sup> Indeed, some attention to values and norms may actually be necessary in constitutional adjudication, where the judiciary's institutional legitimacy may be more threatened by the judge who neglects cultural values than the one who ignores precedent.<sup>367</sup>

That being said, justices could also do a better job acknowledging the difficult tensions many cases present, rather than playing the role of an advocate intent on making her case. Chief Justice Roberts' professed view that deciding cases is like calling "balls and strikes" is symptomatic of a judicial culture steeped in the conventions of advocacy.<sup>368</sup> Lawyers, particularly litigators, spend their careers presenting their arguments as "the right answer" and trying to downplay counter-arguments. That litigators do this is understandable, given their professional obligation to represent their clients zealously.<sup>369</sup> But these lawyers often continue to write this way when they become judges.<sup>370</sup> The result is that most judicial opinions read a good deal like legal briefs, seeking to prove an argument by emphasizing strong

365. See Elliot E. Slotnick, *Media Coverage of Supreme Court Decision Making: Problems and Prospects*, 75 JUDICATURE 128, 132 (1991) ("Supreme Court opinions are not written for a lay or journalistic audience and justices rarely do anything to make them more accessible to such publics. Indeed, some jurists seem to go to great lengths to trump complex legal questions with complexities in their own prose."). See generally JOSEPH GOLDSTEIN, *THE INTELLIGIBLE CONSTITUTION: THE SUPREME COURT'S OBLIGATION TO MAINTAIN THE CONSTITUTION AS SOMETHING WE THE PEOPLE CAN UNDERSTAND* (1992).

366. See William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 324, 345-54 (1990) (discussing the hermeneutical and practical traditions in legal interpretations and the fact that "different values will pull the interpreter in different directions"); Lawrence C. Marshall, "Let Congress Do It": *The Case for an Absolute Rule of Statutory Stare Decisis*, 88 MICH. L. REV. 177, 203-04 (1989) (discussing the effect that personal views necessarily have on a judge's decisions).

367. See Post, *supra* note 44, at 10.

368. See Roberts: "My Job Is To Call Balls and Strikes and Not To Pitch or Bat," CNN (Sept. 12, 2005), [http://articles.cnn.com/2005-09-12/politics/roberts.statement\\_1\\_judicial-role-judges-judicial-oath?\\_s=PM:POLITICS](http://articles.cnn.com/2005-09-12/politics/roberts.statement_1_judicial-role-judges-judicial-oath?_s=PM:POLITICS) ("Judges are like umpires. . . . [I]t is a limited role. . . . And I will remember that it's my job to call balls and strikes and not to pitch or bat."); Eric J. Segall, *The Court: A Talk with Judge Richard Posner*, N.Y. REV. BOOKS (Sept. 29, 2011), <http://www.nybooks.com/articles/archives/2011/sep/29/court-talk-judge-richard-posner/?page=2> (discussing with Judge Posner Chief Justice Roberts' balls-and-strikes analogy in confirmation hearings).

369. See MODEL CODE OF PROF'L RESPONSIBILITY Canon 7 (1986) ("A lawyer should represent a client zealously within the bounds of the law.").

370. See Laura E. Little, *Hiding with Words: Obfuscation, Avoidance, and Federal Jurisdiction Opinions*, 46 UCLA L. REV. 75, 85-86 (1998) ("Repeated exposure to adversaries' arguments, set up as opposing poles, establish a habit of mind for judges who in turn write opinions as though they present a preordained correct answer, which embraces by necessity only one position or viewpoint. Opinions are frequently unequivocal, ignoring ambiguities in the law and the presence of compelling arguments against the court's decision.").

points and hiding weak ones. To this extent, stealth determinations reflect not an isolated phenomenon but the essence of a judicial culture in which it is difficult for the judge to abandon the litigant's mindset. The tone is argumentative, not reflective.

Greater reflection may be possible, but it is not easy to attain. Greater attention to the theoretical underpinnings of stealth determinations—and to our human inclination to avoid theoretical inquiries that may yield answers in tension with our own normative views—could help the Court consider such determinations more earnestly and less strategically.<sup>371</sup> This will not eliminate the problem, but it may encourage judges to engage more seriously and impartially with deference determinations. It is not easy to remove values from one's judicial rulings, but an awareness of one's natural propensities to rely on one's own normative views can help. In sharp contrast to Chief Justice Roberts' "balls-and-strikes" comment, then-Judge David Souter, when asked during his own confirmation hearings whether he would judge without reference to his own personal values, insightfully answered that "[w]e have no guarantee of success [of steering clear of our own values], but we know that the best chance of success comes from being conscious of the fact that we will be tempted to do otherwise."<sup>372</sup> While judges will still steer outcomes in directions they prefer, forcing judges to identify the institutional factors cutting in favor of and against deference can help improve their self-awareness, the quality of their written opinions, and the legal status of deference determinations as a whole.

#### CONCLUSION

Deference determinations shape much constitutional adjudication, and yet the Supreme Court provides little guidance on how it makes such determinations. When the Court reviews both legislative and administrative policies, its consideration of the relevant political actor's institutional characteristics is haphazard and inconsistent. To this extent, deference determinations share much in common with stealth constitutional determinations more generally—unpredictability, imprecision, and opacity.

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371. I should note here that while the Supreme Court deserves much of the criticism it receives, it is also far easier to criticize judicial opinions than to write them. See Daniel B. Bogart, *Games Lawyers Play: Waivers of the Automatic Stay in Bankruptcy and the Single Asset Loan Workout*, 43 *UCLA L. REV.* 1117, 1132 n.4 (1996) ("As my students are wont to point out, it is far easier to play armchair quarterback and criticize judicial opinions . . . than it is for the judge, participating in the rough and tumble of judicial practice, to render them."); Warren E. Burger, *School for Judges*, 33 *F.R.D.* 139, 142 (1964) ("Generations of lawyers and judges, and of course law teachers, have raised serious problems in judicial opinions but have found the problems easier to raise than solve.").

372. Janet Malcolm, *The Art of Testifying*, *NEW YORKER*, Mar. 13, 2006, at 79 (quoting then-Judge David Souter's Supreme Court confirmation hearings).

Far from being merely theoretical, these flaws pose difficulties for lower courts and litigants trying to follow the Supreme Court's approach to questions of institutional deference. The Court could greatly improve its analysis by paying greater attention to the actual institutional characteristics and processes of the political branch at issue in a particular case, rather than relying on generalizations about each branch's strengths and weaknesses. An institutional analysis would provide better incentives for the political branches to make policy responsibly and force courts to provide more thorough justifications for its deference determinations. Institutional analysis may help courts reconsider stealth constitutional decision making more generally and encourage courts to approach such determinations with greater consistency, candor, and theoretical rigor.