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Individual Rights, Judicial Deference, and Administrative Law Norms in Constitutional Decision Making

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INDIVIDUAL RIGHTS, JUDICIAL DEFERENCE, AND ADMINISTRATIVE LAW NORMS IN CONSTITUTIONAL DECISION MAKING

ERIC BERGER*

INTRODUCTION	2031
I. THE COURT'S INCONSISTENT APPROACH TO ADMINISTRATIVE DISCRETION IN INDIVIDUAL RIGHTS CASES	2038
A. <i>Deference to Agency Action</i>	2038
1. Deference in <i>Baze v. Rees</i> and the Court's Puzzling Preference for Agency Action	2038
2. Deference in <i>Grutter v. Bollinger</i> : Whither <i>Bakke</i> ?	2040
3. Deference in <i>Korematsu v. United States</i> and the Complication of <i>Ex Parte Endo</i>	2042
4. Deference in Prison Conditions Cases and <i>Turner v.</i> <i>Safley</i> 's Internal Tensions.....	2045
B. <i>Heightened Review of Agency Action</i>	2047
1. <i>Hampton v. Mow Sun Wong</i> and the Fact and Nature of Administrative Action.....	2047
2. First Amendment Licensing Cases and the Problem of Unbridled Administrative Discretion	2049
3. <i>Boumediene v. Bush</i> and the Thoroughness of Administrative Procedures	2050
C. <i>The Significance of the Doctrinal Discrepancy</i>	2052
II. ADMINISTRATIVE LAW NORMS IN CONSTITUTIONAL DECISION MAKING.....	2054
A. <i>The Natural Intersections of Constitutional Law and</i> <i>Administrative Law</i>	2054
B. <i>Relevant Administrative Factors</i>	2058
1. Political Accountability	2059

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a. <i>Legislative Guidance and Non-Delegation Principles</i>	2061
b. <i>Oversight</i>	2063
c. <i>Transparency</i>	2065
d. <i>The Problem of Elected Administrative Agents</i>	2067
2. <i>Expertise</i>	2067
a. <i>Epistemic Authority</i>	2068
b. <i>Thoroughness</i>	2069
3. <i>Arbitrariness, Procedural Regularity, and the Rule of Law</i>	2070
a. <i>Formalized Procedures</i>	2071
b. <i>Reasoned Explanation</i>	2073
C. <i>The Factors' Place in the Constitutional Analysis</i>	2074
1. <i>Administrative Law Norms in Deference Determinations</i>	2074
2. <i>Applications to State Agency Policies</i>	2077
D. <i>Contextual Nuances</i>	2079
1. <i>Contextual Limitations</i>	2079
2. <i>When Accountability and Expertise Collide</i>	2080
III. <i>APPLICATIONS, ADVANTAGES, AND IMPLICATIONS</i>	2082
A. <i>Applications</i>	2082
1. <i>Deference Revisited</i>	2082
a. <i>Baze</i>	2082
b. <i>Grutter</i>	2084
c. <i>Korematsu</i>	2087
d. <i>Prison Condition Cases</i>	2091
2. <i>Other Applications</i>	2092
B. <i>Advantages</i>	2093
1. <i>Constitutional Adherence</i>	2093
2. <i>Democratic Accountability</i>	2094
3. <i>Recognition of the Variety of Agency Action</i>	2095
4. <i>Doctrinal Coherence</i>	2096
5. <i>Judicial Candor</i>	2097
C. <i>Implications for Constitutional Theory</i>	2098
CONCLUSION	2102

Administrative agencies play a crucial role in American government, so unsurprisingly, their actions sometimes threaten individual rights. Despite this threat, courts determining whether a constitutional individual right has been violated often ignore the fact and nature of administrative action. Indeed, in a wide range of cases alleging the violation of an individual right, the Supreme Court reflexively defers to the government without asking whether administrative officials or more directly accountable political representatives were responsible for the alleged infringement. Even when the Court identifies these distinctions, its treatment is inconsistent and inchoate.

This Article argues that courts should more consistently and carefully consider the nature of administrative discretion when determining whether an agency has violated a substantive individual right. Instead of casually

conflating administrative and legislative action, courts deciding such cases should identify the relevant constitutional actor. When that actor is an agency, courts should then draw on administrative law norms to examine whether the agency deserves deference. Such an approach would help courts avoid the unjustified deference they sometimes offer agencies in individual rights cases, thus encouraging constitutional adherence and assuring independent judicial evaluation of the alleged constitutional injury.

INTRODUCTION

In a famous, highly contested affirmative action decision, the United States Supreme Court in *Regents of the University of California v. Bakke* struck down the admissions procedure of the Medical School of the University of California at Davis.¹ In announcing the judgment of the Court, Justice Powell explained that the admissions policy benefiting racial minorities was problematic in part because it reflected not a legislative preference but the medical school's own judgment about the virtues of affirmative action.² "[I]solated segments of our vast governmental structures," Powell wrote, "are not competent to make those decisions [about affirmative action], at least in the absence of legislative mandates and legislatively determined criteria."³ The fact that an *administrative agency*, and not the state legislature, had crafted the challenged policy, then, played a significant role in the Court's ruling.⁴

Twenty-five years later, the Court confronted another high-profile graduate school affirmative action case, *Grutter v. Bollinger*.⁵ In *Grutter*, the Court upheld the University of Michigan Law School's affirmative action admissions plan.⁶ Unlike the Court in *Bakke*, the *Grutter* Court seemed unconcerned that the university, and not the state legislature, had designed the challenged policy. Indeed, far from following *Bakke's* reasoning, *Grutter* explicitly deferred to the "university's academic decisions,"⁷ even though California and Michigan had delegated similar authority to their universities.⁸ Whereas *Bakke* had

¹ *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 320 (1978).

² Though Justice Powell wrote only for himself, his opinion announcing the Court's judgment has since "served as the touchstone for constitutional analysis of race-conscious admissions policies." *Grutter v. Bollinger*, 539 U.S. 306, 323 (2003).

³ *Bakke*, 438 U.S. at 309.

⁴ State universities are generally considered state administrative agencies. *See, e.g.*, *Clay v. Tex. Women's Univ.*, 728 F.2d 714, 716 (5th Cir. 1984) (treating a state university as a state agency).

⁵ 539 U.S. 306 (2003).

⁶ A companion case, *Gratz v. Bollinger*, 539 U.S. 244, 270-76 (2003), invalidated the affirmative action plan of the University of Michigan College of Literature, Science, and the Arts. *See infra* Parts I.A.2, III.A.1.b.

⁷ *Grutter*, 539 U.S. at 328.

⁸ *See* CAL. CONST. art. IX, § 9(a) (delegating authority over the University of California to the "Regents of the University of California"); MICH. CONST. art. VIII, § 5 (delegating

faulted the State for permitting determinations with significant constitutional implications to be made by administrative agencies without legislative guidance, *Grutter* appeared to give special deference to those same agencies. Of course, a great deal more could be said about both cases, but *Bakke* and *Grutter*'s different approaches to administrative discretion is striking, especially because the Court fails to acknowledge, let alone justify, the discrepancy.

Far from being anomalous, this discrepancy reflects a deeper phenomenon in constitutional doctrine in which the Court's consideration of administrative discretion in individual rights cases is inconsistent and inchoate. Oftentimes this judicial insensitivity to the distinctions between actions taken by administrative agencies and by more directly accountable political representatives results in reflexive, unstudied deference to administrative actors. Given courts' and scholars' great anxiety that judicial review is counter-majoritarian,⁹ this casual conflation of elected officials with unelected administrative agents is surprising. Judicial review is problematic, Alexander Bickel famously argued, because it allows unelected judges to overturn the policies of elected, politically accountable legislatures or chief executives.¹⁰ One might accordingly assume that judicial review would be less problematic, perhaps even desirable, when unelected, less accountable officials design the challenged policies. Separation of powers, federalism, and other factors might still militate for some deference in some circumstances, but to the extent judicial deference in constitutional cases rests substantially on political-authority grounds, it is strange that the Court would defer reflexively to unaccountable administrative agents without inquiring into their underlying democratic legitimacy.¹¹

This concern is especially important to our constitutional scheme in the age of the administrative state. Administrative agencies play a crucial role in United States government,¹² and officials within these agencies often possess

authority over the University of Michigan to the "Regents of the University of Michigan"); *infra* note 342 and accompanying text.

⁹ See generally ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16-23 (1962).

¹⁰ See *id.* 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.").

¹¹ 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, 43 (2010) (arguing that judicial review is often premised on political authority); Paul Horwitz, *Three Faces of Deference*, 83 NOTRE DAME L. REV. 1061, 1078 (2008) (arguing that courts defer typically for reasons of "legal authority").

¹² See PETER L. STRAUSS ET AL., *GELLHORN AND BYSE'S ADMINISTRATIVE LAW: CASES AND COMMENTS* 9 (rev. 10th ed. 2003) (stating that almost everything the government does is agency action).

great discretion.¹³ The exercise of that discretion will sometimes intrude on various individual rights.¹⁴ Given that much of the injustice in our society results from the exercise of administrative discretion,¹⁵ the U.S. Supreme Court's failure to address these issues potentially under-protects important constitutional liberties. In deferring repeatedly to agencies in individual rights cases, the Court, despite bold pronouncements of judicial supremacy elsewhere,¹⁶ has at times effectively, if perhaps unwittingly, surrendered to agency bureaucrats its self-appointed prerogative of declaring constitutional meaning.

To the extent the Court does entertain these issues its approach has been erratic. Sometimes the Court denies deference because an *agency* has invaded individual rights.¹⁷ Sometimes it denies deference because unbridled administrative discretion creates too much risk for constitutional infringement.¹⁸ Even when the Court identifies these issues, however, it fails to develop a coherent, systematic approach.

Of course, more careful consideration of these administrative considerations does arise in certain kinds of cases. Procedural due process cases, for instance, focus on administrative procedures. Qualified and absolute immunity cases likewise determine when officials can be held liable for damages and thus consider the scope of administrative discretion.¹⁹ Such cases, however, are beyond my focus. My attention is to cases in which the Court must determine the scope of an (non-procedural due process) individual right and whether an administrative actor has violated that right.²⁰ In these cases, the Court's

¹³ Professor Davis offers a succinct definition of "discretion," explaining that "[a] public officer has discretion whenever the effective limits on his power leave him free to make a choice among possible courses of action or inaction." KENNETH CULP DAVIS, *DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY* 4 (1969).

¹⁴ See, e.g., Daniel P. Tokaji, *First Amendment Equal Protection: On Discretion, Inequality, and Participation*, 101 MICH. L. REV. 2409, 2409-10 (2003) ("The considerable discretion that many official decisionmakers wield raises the spectre that violations of equality norms will sometimes escape detection.").

¹⁵ See DAVIS, *supra* note 13, at 25 (suggesting that nine-tenths of injustice to individuals results from governmental discretion).

¹⁶ See, e.g., *Dickerson v. United States*, 530 U.S. 428, 437 (2000) ("Congress may not legislatively supersede our decisions interpreting and applying the Constitution.").

¹⁷ See *Hampton v. Mow Sun Wong*, 426 U.S. 88, 98-99 (1976); *infra* Part I.B.1.

¹⁸ See, e.g., *Forsyth Cnty., Ga. v. Nationalist Movement*, 505 U.S. 123, 133 (1992) ("The First Amendment prohibits the vesting of such unbridled discretion in a government official."); *infra* Part I.B.2.

¹⁹ See *infra* note 155 and accompanying text.

²⁰ By "individual rights cases," I refer to cases interpreting the substantive protections afforded individuals under the Bill of Rights and the Fourteenth Amendment – as opposed to, for instance, cases considering whether immunity doctrine shields an official from liability. I also include habeas corpus, because even though the Suspension Clause certainly can be considered an Article I structural provision, it also protects an individual right to

determination about whether to defer to administrative actors – and whether the nature of administrative discretion should affect the scope of the substantive right in particular circumstances – is decidedly haphazard.²¹

Phrased somewhat differently, when the Court decides whether to defer to administrative agencies in these individual rights cases, it often ignores both the fact and nature of administrative action. In so doing, the 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.²² In cases involving agencies, the Court also often shortchanges the constitutional “how,” ignoring whether the administrative officials’ behavior merits deference.

This Article contends that courts should consult ordinary administrative law norms before deciding whether to give deference to agencies in constitutional individual rights cases. By “deference,” I mean courts’ practice of constraining their review of governmental action based not upon an analysis of the substantive constitutional issue (e.g., free speech, equal protection) but rather upon institutional concerns regarding courts’ relationships with the other branches of government.²³ By “ordinary administrative law norms,” I refer generally to the statutory and regulatory inquiries that courts frequently pursue in cases decided under the Administrative Procedure Act (APA) and related doctrines or under canons of statutory interpretation commonly applied in

petition for judicial review of the legality of one’s detention. *See* Eve Brensike Primus, *A Structural Vision of Habeas Corpus*, 98 CALIF. L. REV. 1, 3-5 (2010) (summarizing but ultimately rejecting “a long tradition of understanding habeas review as a straightforward matter of individual rights”). Though my analysis draws on procedural due process norms, I do not focus on those cases, because they necessarily account for the nature of agency decision making and therefore address these issues more consistently than many other individual-rights cases. *See infra* note 106.

²¹ My analysis, therefore, puts to the side issues such as standing, immunity, exhaustion, and other obstacles that can interfere with challenges to official action.

²² *See* Nicholas Quinn Rosenkranz, *The Subjects of the Constitution*, 62 STAN. L. REV. 1209, 1210 (2010) (arguing that courts too often ignore the identity of the constitutional actor). In fairness, the Court does sometimes consider the constitutional “who,” such as in federalism cases regarding the scope of congressional authority. *See, e.g.,* *Lopez v. United States*, 514 U.S. 549, 564 (1995) (explaining that states, not the federal government, have historically been sovereign over areas like education, crime, and family law). My focus here is individual rights cases in which the governmental actor is a federal or state administrative agency as opposed to a legislature or chief executive.

²³ *See* Lawrence G. 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,” such as “the propriety of unelected federal judges’ displacing the judgments of elected state officials, or upon the competence of federal courts to prescribe workable standards of state conduct and devise measures to enforce them”).

cases involving administrative agencies.²⁴ Courts applying these norms in individual rights cases should ask, first, whether the relevant governmental actor is an administrative agency.²⁵ If it is, courts should then examine administrative law norms – namely, the agency’s political authority, expertise, and procedural regularity – before deciding whether to defer. Judicial deference to the agency in constitutional individual rights cases, as distinct from the familiar *Chevron* deference in statutory interpretation cases,²⁶ should then occur on a sliding scale, hinging on those inquiries. Indeed, unlike *Chevron* cases in which the agency has both presumptive expertise over the relevant subject matter and delegated authority to interpret the statute it administers, in constitutional cases agencies have no special claim to interpretive authority.²⁷ Accordingly, courts considering constitutional challenges to agency action should not defer reflexively without inquiring more carefully into the administrative framework within which the agency has operated.²⁸

²⁴ I refer to this administrative law as “ordinary” to distinguish administrative law rooted in statutory, regulatory, and other non-constitutional requirements from constitutional based requirements. See Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 527-33 (2003) (distinguishing between “ordinary” administrative law norms, such as notice-and-comment rulemaking, and constitutional-based administrative law norms); Gillian E. Metzger, *Ordinary Administrative Law as Constitutional Common Law*, 110 COLUM. L. REV. 479, 483 (2010) (referring to the “ordinary” components of administrative law as statutory and regulatory requirements, such as the APA, Executive Order 12,866, and associated administrative law doctrines). Ultimately, the distinction between “ordinary” and “constitutional” administrative law is not crucial to my argument, though the relevance of “ordinary” administrative law norms to constitutional individual rights cases might appear more provocative, insofar as the Court only sporadically explores these norms in individual rights cases.

²⁵ I define “agency” broadly to encompass federal, state, and local entities performing some kind of public or quasi-public function. My inquiry therefore addresses not just agencies, departments, bureaus, and the like but also other official actors, such as university administrators, prison officials, and so on. See, e.g., 5 U.S.C. § 701(b)(1) (2006) (defining “agency” broadly); PETER L. STRAUSS, *ADMINISTRATIVE JUSTICE IN THE UNITED STATES* 148 (2d ed. 2002) (“The scholarly view of administrative law has grown, with government, to embrace almost all adjectival subjects that can be connected with public administration.”).

²⁶ See *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844-45 (1984) (providing for deference to agencies’ reasonable interpretations of ambiguities within the statutes they administer).

²⁷ See *id.* at 865 (speculating that Congress might have “consciously desired the Administrator to strike the [proper policy balance] thinking that those with great expertise and charged with responsibility for administering the provision would be in a better position to do so”); *Mont. Chapter of Ass’n of Civilian Technicians, Inc. v. Young*, 514 F.2d 1165, 1167 (9th Cir. 1975) (“[F]ederal administration agencies have neither the power nor competence to pass on the constitutionality of statutes.”).

²⁸ My analysis does not address other kinds of “deference” that frequently arise in

Courts, in fact, are well equipped to engage in such inquiries, because they frequently apply them in administrative law cases. A core purpose of administrative law is to contain the discretion of administrative officials without debilitating them.²⁹ Administrative law factors, then, can help courts flesh out whether agencies deserve the deference the judiciary often reflexively grants them. Admittedly, courts will not always calibrate deference perfectly based on these factors, but given that they make deference determinations anyway, the proposed approach would make such inquiries more transparent and nuanced. Such an approach, though hardly the norm in constitutional rights cases, also would not be wholly anomalous. As we shall see, the Court occasionally does consider such factors and sometimes expresses concern when unconstrained official discretion heightens the risk of constitutional violation.

Scholars have paid surprisingly little attention to these concerns. Matthew Adler has examined Bickel's counter-majoritarian difficulty in light of the unique features of the administrative state,³⁰ and Gillian Metzger has explored the constitutional character of ordinary administrative law.³¹ But administrative law's relevance to constitutional individual rights cases remains under-explored. Given that administrative action allegedly inflicting injustice on individuals frequently escapes review under administrative law, this is a crucial facet of constitutional rights jurisprudence that has been neglected for too long.³²

To be clear, such deference determinations should not comprise the entire constitutional inquiry. Courts do and should also consider, among other things, the nature of the constitutional right at issue and the effect on the individual whose rights arguably have been violated. Courts also should consider contextual factors limiting the appropriateness of this inquiry in some circumstances. My theory, then, should be applied flexibly and should not displace current individual rights doctrine. Instead, I propose that courts take

administrative law cases, such as deference to an agency's factual record or deference to an agency's statutory interpretation.

²⁹ See, e.g., Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1676-88 (1975).

³⁰ See Matthew D. Adler, *Judicial Restraint in the Administrative State: Beyond the Countermajoritarian Difficulty*, 145 U. PA. L. REV. 759, 765-66 (1997) (arguing that the rise of the administrative state renders Bickel's account of the counter-majoritarian difficulty incomplete).

³¹ See Metzger, *supra* note 24, at 505-12 (discussing the "constitutional common law character of ordinary administrative law"); see also Gillian E. Metzger, *Administrative Law as the New Federalism*, 57 DUKE L.J. 2023, 2047-71 (2008) (discussing "administrative law as a federalism vehicle").

³² See Edward L. Rubin, *Law and Legislation in the Administrative State*, 89 COLUM. L. REV. 369, 409 (1989) (arguing that judicial supervision is necessary to ensure that legislatures and the agencies to which they delegate do not "oppress private persons" by violating individual rights).

account of the fact and nature of administrative action when they make their (often implicit) decision to defer to governmental actors on institutional grounds. After courts make the deference determination, they would then apply the substantive constitutional analysis, such as the relevant tier of scrutiny. Deference determinations, in other words, would provide one lens through which courts should conduct the rest of its constitutional analysis.

This approach would have several benefits. First, courts would make more careful deference determinations, paying greater attention to the particulars of the agency action at issue. Second, and relatedly, whereas reflexive deference leaves the meaning of the Constitution to administrative agents, who often lack the authority and expertise to make such pronouncements, a more careful approach to deference can help assure independent judicial evaluation of the alleged injury.³³ Third, attention to administrative law norms in individual rights cases would help create incentives for governmental actors to act responsibly when implementing policies that might infringe on individual rights. Given that the administrative state is so pervasive, that agency bureaucrats exercise such great discretion, and that administrative law itself sometimes does not constrain agency action, such institutional incentives are essential to maintaining a healthy balance between workable administrative processes and individual rights.³⁴ Fourth, this approach would encourage more accountable officials to make important decisions impacting constitutional rights, thereby promoting democratic accountability. Finally, my analysis highlights that administrative agencies play a crucial role, not only in setting policy but also in shaping constitutional norms.³⁵

The Article proceeds as follows. Part I surveys several Supreme Court constitutional individual rights cases involving administrative agencies. It begins with cases in which the Court reflexively defers to the agency responsible for the challenged policy, even though the Court does not always take such an approach in related cases. It then turns to cases in which the Court does not defer, for fear of giving agencies too much unbridled authority.

³³ See CHARLES L. BLACK, JR., *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* 89 (1969) (warning that unconsidered judicial deference to administrative pronouncements can allow those pronouncements to “establish[] themselves without any formal sanction at all from anybody authorized to state or establish the law of the land”); Henry P. Monaghan, *First Amendment “Due Process,”* 83 HARV. L. REV. 518, 522 (1970) (arguing that free speech principles require judicial, rather than solely administrative, evaluation of speakers’ rights).

³⁴ See, e.g., J. Harvie Wilkinson III, *Our Structural Constitution*, 104 COLUM. L. REV. 1687, 1706 (2004) (“[F]reedom and authority are forever in conflict, and it is mainly through the interlocking roles and parts of government that the tension is worked out. The failure to understand public structures, then, is a failure to understand the essence of either liberty or order.”).

³⁵ See WILLIAM N. ESKRIDGE JR. & JOHN FEREJOHN, *A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION* 29-74 (2010) (discussing administrative constitutionalism and agencies’ role in defining constitutional norms).

Part I concludes by acknowledging that different doctrines and circumstances largely account for the Court's different approaches but argues that the Court nonetheless fails to offer a coherent, consistent theory about how the fact and nature of administrative action affect its deference determinations.

Part II argues that courts should turn to administrative law norms to help determine when they should defer to administrative officials in individual rights cases. It opens by contending that ordinary administrative law sensibly could provide standards in such cases, because it is often constitutionally inspired and uniquely concerned with how administrative agencies exercise their discretion. Part II then proceeds to examine particular administrative law factors courts should consult, including political authority, expertise, and adherence to standard procedures. It concludes by explaining how these factors will operate within the doctrinal analysis and by discussing contextual limitations that will require judicial flexibility in some circumstances.

Part III considers applications, advantages, and implications of this proposal. In particular, Part III applies the theory to many of the cases discussed in Part I, thus demonstrating how the Court's analysis might have been more careful and nuanced had it kept these factors in mind.

I. THE COURT'S INCONSISTENT APPROACH TO ADMINISTRATIVE DISCRETION IN INDIVIDUAL RIGHTS CASES

A. *Deference to Agency Action*

The Supreme Court in the cases discussed here mostly ignored administrative law norms and deferred to the governmental actor.³⁶ Different factors may have driven the deference in different cases, but in each case the Court deferred to an administrative agency without fully exploring the processes underlying that agency's actions – and, sometimes, without even acknowledging that agency, rather than legislative, policy was at issue. Most curiously, the Court in these cases also failed to explain fully why deference was appropriate in light of less deferential approaches in similar cases. To this extent, the Court's deference determinations are poorly justified and inadequately theorized.

1. Deference in *Baze v. Rees* and the Court's Puzzling Preference for Agency Action

*Baze v. Rees*³⁷ demonstrates the Court's penchant in some situations for deferring reflexively without carefully examining the relevant governmental actors.³⁸ The plaintiffs argued that Kentucky's lethal injection procedure

³⁶ Part III revisits each of these cases in light of the theory proposed in Part II.

³⁷ 553 U.S. 35, 51 (2008) (plurality opinion).

³⁸ Consistent with the Court's precedent, this Article treats Chief Justice Roberts's plurality opinion in *Baze* as the Court's holding. See, e.g., *Marks v. United States*, 430 U.S.

created a substantial risk of excruciating pain in violation of the Eighth Amendment's prohibition against "cruel and unusual punishment."³⁹ In rejecting the plaintiffs' challenge, the Court emphasized the discretion states should enjoy when they implement execution procedures.⁴⁰

In so doing, *Baze* ignored the constitutional "who" and "how." It ignored the "who" by conflating state Departments of Corrections (DOCs) and prison guards with the state legislature. 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 then instruct prison guards or independent contractors to carry them out.⁴¹ The plurality, however, ignored this delegation, warning that courts should not "substantially intrude on the role of state legislatures in implementing their execution procedures."⁴² *Baze* thus afforded DOC officials and prison guards the same kind of deference the Court affords state legislatures. To be sure, the state legislature had deliberately delegated broad discretion to the DOC. But the *Baze* challenge contended that the lethal injection procedure *as implemented* carried an intolerable risk of excruciating pain, and DOC officials and prison guards, not legislators, implemented the procedure's details.⁴³ Regardless of whether the plaintiffs had a compelling case, deference predicated on the legislature's (minimal) involvement was badly misplaced given that the claim challenged the execution procedure's details.

Baze also ignored the "how" by assuming that the procedures were designed and implemented competently.⁴⁴ As some lower courts have recognized, many states have adopted lethal injection with neither expertise nor professionalism.⁴⁵ Indeed, many states' procedures, including Kentucky's, are carried out in secret by prison guards who lack expertise in the drugs and

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." (citations omitted) (internal quotation marks omitted)).

³⁹ U.S. CONST. amend. VIII; *see also Baze*, 553 U.S. at 47 (plurality opinion).

⁴⁰ *See Baze*, 553 U.S. at 51 (plurality opinion).

⁴¹ *See* Eric Berger, *Lethal Injection and the Problem of Constitutional Remedies*, 27 YALE L. & POL'Y REV. 259, 302-03 (2009); Deborah W. Denno, *When Legislatures Delegate Death: The Troubling Paradox Behind State Uses of Electrocuting and Lethal Injection and What It Says About Us*, 63 OHIO ST. L.J. 63, 116-25 (2002).

⁴² *Baze*, 553 U.S. at 51 (plurality opinion) (emphasis added).

⁴³ *See* Berger, *supra* note 41, at 266-72 (explaining that the constitutionality of a lethal injection procedure turns substantially on its risk of pain, which turns on how responsible officials in a given state administer the procedure).

⁴⁴ *See Baze*, 553 U.S. at 51 (plurality opinion) (citing states' scientific expertise).

⁴⁵ *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 lethal injection); Taylor v. Crawford, No. 05-4173, 2006 WL 1779035, at *3-6 (W.D. Mo. June 26, 2006) (describing Missouri's failure to carefully design lethal injection procedure).

guidance from professionals possessing that expertise.⁴⁶ The Court, nevertheless, failed to explore thoroughly the qualifications of the relevant personnel and the rigor of the administrative procedures used to adopt lethal injection. In short, the Court deferred without considering whether the State deserved deference.⁴⁷

Interestingly, in other death penalty cases, the Court engages in far more rigorous scrutiny. In Eighth Amendment capital proportionality cases, for instance, the Court views much more skeptically legislatively sanctioned capital punishments that are arguably disproportionate to the nature of the crime or particular characteristics of the criminal. For example, less than three months after *Baze*, the Court held in *Kennedy v. Louisiana* that capital punishment was disproportionately severe punishment for the rape of a child.⁴⁸ Other Eighth Amendment capital proportionality cases similarly seem to apply heightened scrutiny.⁴⁹ Whereas *Baze* deferred to the state agency responsible for lethal injection, proportionality cases like *Kennedy* more stringently reviewed state legislative action.⁵⁰

To be sure, various factors can explain the Court's different approaches, most notably differences between the Court's capital proportionality and method-of-execution doctrines.⁵¹ Nevertheless, the fact that the Court has developed an Eighth Amendment doctrine that is consistently deferential to administrative actors (in method-of-execution cases) but not deferential to legislatures (in capital proportionality cases) is striking. Whatever the potential justifications for this seemingly counter-intuitive result, the Court's failure to acknowledge, let alone justify, this discrepancy suggests a surprising inattention to the differences between administrative and legislative action.⁵²

2. Deference in *Grutter v. Bollinger*: Whither *Bakke*?

The Court also deferred to an administrative agency without ample explanation in *Grutter v. Bollinger*.⁵³ The petitioner, Barbara Grutter, was a

⁴⁶ See *infra* Part III.A.1.a.

⁴⁷ See Berger, *supra* note 11, at 59-65 (discussing *Baze*'s failure to consider problems with state administration of lethal injection); Berger, *supra* note 41, at 283-86, 301-14 (discussing remedial concerns and political process failures in lethal injection).

⁴⁸ *Kennedy v. Louisiana*, 554 U.S. 407, 446-47 (2008); Berger, *supra* note 11, at 12-27 (comparing *Baze* with *Kennedy*).

⁴⁹ See, e.g., *Roper v. Simmons*, 543 U.S. 551, 578 (2005) (finding unconstitutional the death penalty for individuals who were minors when they committed their capital crime); *Atkins v. Virginia*, 536 U.S. 304, 321 (2002) (finding unconstitutional the death penalty for the mentally retarded).

⁵⁰ See *Kennedy*, 554 U.S. at 444; Berger, *supra* note 11, at 3-4, 27-32.

⁵¹ See Berger, *supra* note 11, at 27-37 (identifying factors explaining the discrepancy between *Baze* and *Kennedy*).

⁵² See *id.* at 12-27.

⁵³ 539 U.S. 306, 328 (2003).

white Michigan resident who was denied admission to the University of Michigan Law School.⁵⁴ Grutter argued “that her application was rejected because the Law School uses race as a ‘predominant’ factor, giving applicants who belong to certain minority groups ‘a significantly greater chance of admission than students with similar credentials from disfavored racial groups.’”⁵⁵

Writing for the Court, Justice O’Connor applied strict scrutiny because the case involved race discrimination.⁵⁶ Accordingly, the Law School’s admissions plan would only be constitutional if “narrowly tailored to further compelling governmental interests.”⁵⁷ Despite this seemingly rigorous level of scrutiny, the Court deferred to the Law School’s judgment that diversity was a compelling governmental interest and that the Law School’s affirmative action program was narrowly tailored to the achievement of that interest.⁵⁸

The Court, to its credit, did recognize that the governmental actor was not the legislature but the Law School, emphasizing the Court’s own “tradition of giving a degree of deference to a university’s academic decisions.”⁵⁹ To this extent, *Grutter* was more sensitive to the constitutional “who” than, say, *Baze*. The Court also paid some attention to the constitutional “how,” distinguishing the Law School’s more careful admissions procedures in *Grutter* with the less individualized procedures used by the University of Michigan College of Literature, Science, and the Arts in the companion case *Gratz v. Bollinger*.⁶⁰

That being said, the Court failed to address other important issues relevant to the deference determination. For example, the Court did not adequately address universities’ roles within state politics at a more general level. Admissions criteria generally – and the role of race in admissions decisions more specifically – implicate important issues regarding education in our democracy and the structure of social opportunity.⁶¹ Despite the import of these issues, *Grutter* failed to address adequately who was making these decisions. Why should decisions so important to our democracy be left to a law faculty and not considered by the full legislature? Had the legislature delegated to the Law School faculty the authority to make this kind of

⁵⁴ *Id.* at 316.

⁵⁵ *Id.* at 317 (quoting the record).

⁵⁶ *See id.* at 326 (applying strict scrutiny to all racial classifications, including affirmative action). Interestingly, the four Justices joining Justice O’Connor’s *Grutter* opinion likely would have each applied a less rigorous standard of review. *See* Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1323 & n.313 (2007).

⁵⁷ *Grutter*, 539 U.S. at 326.

⁵⁸ *See id.* at 328-43.

⁵⁹ *Id.* at 328.

⁶⁰ *See id.* at 337 (comparing law school policy with undergraduate policy in *Gratz*); *Gratz v. Bollinger*, 539 U.S. 244, 270-76 (2003).

⁶¹ *See* Lani Guinier, *Admissions Rituals as Political Acts: Guardians at the Gates of Our Democratic Ideals*, 117 HARV. L. REV. 113, 143 (2003).

judgment? Were the views of the state legislature or population relevant? How much authority did the elected board of university regents enjoy over such matters?⁶² Did the law faculty use adequate and transparent procedures when adopting the policy? Did Michigan's decision to operate an elite, highly selective university affect the legitimacy of its decision also to employ race-conscious admissions policies?

These questions do not all yield easy answers, but given the ostensible application of strict scrutiny, the Court's failure to consider them is notable. Indeed, it is even more striking in light of Justice Powell's consideration of such issues in *Bakke*. Powell emphasized that "isolated segments of our vast governmental structures are not competent to make those decisions [about affirmative action], at least in the absence of legislative mandates and legislatively determined criteria."⁶³ *Bakke*, then, found the affirmative action program problematic in substantial part because the medical school lacked "authority and capability" to justify its racial classifications.⁶⁴ *Bakke*, in other words, turned partially on the constitutional "who." *Grutter*'s failure to explore carefully the democratic pedigree and administrative procedures underlying the challenged policy, then, is quite remarkable given that the arguably most relevant precedent, *Bakke*, did precisely that.

3. Deference in *Korematsu v. United States* and the Complication of *Ex Parte Endo*

*Korematsu v. United States*⁶⁵ is another famous case that ignored administrative factors relevant to the deference afforded governmental officials' decisions impinging individual rights. Fred Korematsu was convicted under a federal statute making it a crime to disobey a military commander with respect to entering or leaving a military zone.⁶⁶ Specifically, Korematsu was convicted of violating General John L. DeWitt's order that all Japanese Americans residing within certain "military zones" be relocated to internment camps.⁶⁷ DeWitt had issued the directive pursuant to Executive Order 9066, which authorized the military commander to exclude persons from sensitive military areas.⁶⁸ As Charles Black argues, however, that order was drafted in such general language that "no one reading [it] could have dreamt [that a racial exclusion policy] was afoot."⁶⁹ Consequently, neither Congress

⁶² See MICH. CONST. art. VIII, § 5 (providing for elections of board of regents).

⁶³ *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 309 (1978).

⁶⁴ *Id.* at 309-10.

⁶⁵ 323 U.S. 214, 219 (1944).

⁶⁶ *Id.* at 215-16.

⁶⁷ See Exec. Order No. 9066, 3 C.F.R. 1092 (1938-1943).

⁶⁸ *Id.*

⁶⁹ BLACK, *supra* note 33, at 81; see also PETER H. IRONS, JUSTICE AT WAR 38, 48 (1983) (discussing Executive Order 9066).

nor the President affirmatively adopted the racial exclusion policy or made a determination on the profound constitutional question at stake.⁷⁰

Nonetheless, the Supreme Court, ostensibly applying heightened scrutiny, deferred without examining the administrative procedures underlying General DeWitt's determination.⁷¹ Indeed, the majority opinion did not even mention General DeWitt by name, thus ignoring the question of *who* had designed the challenged policy.⁷² Instead, as in *Baze*, the Court treated the policy as though it were the product of the political branches, stating that it was "unable to conclude that it was beyond the war power of Congress and the Executive to exclude those of Japanese ancestry from the West Coast."⁷³

Justice Jackson identified this problem of the constitutional "who" in his dissent:

[T]he "law" which this prisoner is convicted of disregarding is not found in an act of Congress, but in a military order. Neither the Act of Congress nor the Executive Order of the President, nor both together, would afford a basis for this conviction. It rests on the orders of General DeWitt.⁷⁴

Justice Jackson further addressed the constitutional "how," contending that the Court had no "reasonable basis" for trusting DeWitt's assertions that the racial exclusion was necessary, given that "[n]o evidence whatever on that subject has been taken by this or any other court."⁷⁵ Whereas the Court blindly accepted "General DeWitt's own unsworn, self-serving statement, untested by any cross-examination, that what he did was reasonable,"⁷⁶ Justice Jackson would have considered the government's epistemic authority on the relevant question more carefully.⁷⁷ The Court, however, did not address these concerns and, despite the racial discrimination at issue, failed to ask whether General DeWitt's political and epistemic authority merited deference.⁷⁸

⁷⁰ See BLACK, *supra* note 33, at 81.

⁷¹ See *Korematsu*, 323 U.S. at 216 (subjecting racial classifications to "the most rigid scrutiny").

⁷² See *id.* at 215-24.

⁷³ *Id.* at 217. In fairness, the majority elsewhere referred to the policy as resulting from the "judgment of the military authorities," *id.* at 218, but its analysis did not seem to distinguish much between elected and unelected officials.

⁷⁴ *Id.* at 244 (Jackson, J., dissenting); see also *id.* at 228 (Roberts, J., dissenting) ("General DeWitt instituted the curfew for certain areas within his command . . .").

⁷⁵ *Id.* at 245 (Jackson, J., dissenting).

⁷⁶ *Id.*

⁷⁷ See *id.*

⁷⁸ More recent national security cases also apply a laxer review of administrative action. See, e.g., *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2727 (2010) (deferring to the Secretary of State's determination that all contributions to foreign terrorist organizations further those organizations' terrorism without examining the thoroughness of her analysis); *Munaf v. Geren*, 553 U.S. 674, 702 (2008) (deferring to the Solicitor General's representations of State Department determinations without examining the procedures

The unstudied deference in *Korematsu* is sometimes cited to emphasize the Court's great deference to the military in times of war, but, on the very same day it decided *Korematsu*, the Court also invalidated a related military detention in *Ex Parte Endo*.⁷⁹ Mitsuye Endo challenged her detention at the Tule Lake War Relocation Center, where she was moved after being evacuated from Sacramento, California pursuant to military orders.⁸⁰ The government conceded that Endo was "a loyal and law-abiding citizen" but argued nevertheless that "detention for an additional period after leave clearance has been granted is an essential step in the evacuation program."⁸¹

Whereas *Korematsu* deferred to the government, *Endo* held that the appellant "should be given her liberty."⁸² Admittedly, *Endo*'s holding was on statutory grounds, as the Court found that neither the relevant statutes nor executive orders authorized detention of a loyal citizen.⁸³ However, as Professor Gudridge persuasively argues, *Endo*'s statutory interpretation hinged substantially on constitutional norms.⁸⁴ Indeed, the Court emphasized the Constitution's "procedural safeguards surrounding the arrest, detention and conviction of individuals," including the Fifth Amendment, Sixth Amendment, and Suspension Clause.⁸⁵ In light of these constitutional concerns, the Court refused to imply the power to detain from either the statute or executive orders.⁸⁶ Thus, *Endo*'s robust review of the *detention* contrasts sharply with *Korematsu*'s deferential treatment of the *exclusion*.

Korematsu and *Endo*'s approaches to deference are difficult to square with each other. *Endo* finds the detention invalid in large part because the relevant administrative agency, the War Relocation Authority, had "no authority to subject citizens who are concededly loyal."⁸⁷ Given the constitutional norms at stake, the Court refused to imply such authorization to an administrative agency.⁸⁸ This approach certainly fits with longstanding presumptions that courts should interpret ambiguous statutes to avoid constitutional problems and that agency action closely skirting constitutional boundaries is disfavored absent clear congressional authorization.⁸⁹ But given *Endo*'s view that an

underlying those representations and determinations).

⁷⁹ 323 U.S. 283, 308 (1944).

⁸⁰ *Id.* at 284-85.

⁸¹ *Id.* at 294-95.

⁸² *Id.* at 297.

⁸³ *See id.* at 300-01.

⁸⁴ Patrick O. Gudridge, *Remembering Endo?*, 116 HARV. L. REV. 1933, 1939 (2003) ("*Endo* is just as much a part of constitutional law as *Korematsu* is.").

⁸⁵ *Endo*, 323 U.S. at 299.

⁸⁶ *Id.* at 300.

⁸⁷ *Id.* at 297.

⁸⁸ *Id.* at 302-04.

⁸⁹ *See, e.g.,* *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 348 (1936) (Brandeis, J., concurring); *infra* notes 173, 204-208 and accompanying text.

administrative agency's authority to detain should be read stingily lest that agency invade constitutional rights, it is strange that *Korematsu* would permit an administrative official to institute a race-based exclusion that was also not explicitly authorized by Congress. Indeed, *Endo* specifically noted that the detention at issue was problematic precisely because it came from an agency rather than "an Act of Congress or an order of the Chief Executive."⁹⁰ In contrast, *Korematsu* conflated an administrative official with Congress and the President and then deferred to that official's policy burdening individual rights. This discrepancy deserved explanation, but the Court offered little.

4. Deference in Prison Conditions Cases and *Turner v. Safley*'s Internal Tensions

The Court also often defers to administrative action in prison condition cases without adequately considering the nature of the administrative decision making.⁹¹ This deference appears to be mostly unstudied. Though the Court typically does acknowledge that the actor at issue is the prison (as opposed to the state legislature), it usually does not look behind the challenged regulation to see who has designed it or how it was adopted. Instead, as Professor Shay argues, the Court usually treats prison regulations as "an undifferentiated monolith, according them deference without asking how they are formulated."⁹² This unstudied approach to deference has been especially prevalent since the 1980s, when the momentum of prison reform litigation declined substantially.⁹³ Since then, the Court's prison conditions cases have followed a deferential rational basis test. In *Turner v. Safley*, for instance, the Court explained that "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests."⁹⁴ Applying this test, the Court then upheld a prison regulation prohibiting inmate-to-inmate correspondence.⁹⁵

⁹⁰ *Endo*, 323 U.S. at 299-300.

⁹¹ See, e.g., *Wilson v. Seiter*, 501 U.S. 294, 302-06 (1991) (holding that an Eighth Amendment violation arising from guard behavior during a prison riot required the guard to act "maliciously and sadistically"); *Rhodes v. Chapman*, 452 U.S. 337, 351-52 (1981) (holding that double celling inmates did not on its own violate the Eighth Amendment); Margo Schlanger, *Civil Rights Injunctions over Time: A Case Study of Jail and Prison Court Orders*, 81 N.Y.U. L. REV. 550, 622 (2006) ("Eighth Amendment law is extremely limited: It exempts from constitutional analysis many of the issues that matter most to prisoners."); Giovanna Shay, *Ad Law Incarcerated*, 14 BERKELEY J. CRIM. L. 329, 339 (2009) ("Supreme Court case law defers to correction officials and their policies.").

⁹² Shay, *supra* note 91, at 339.

⁹³ See MALCOLM M. FEELEY & EDWARD L. RUBIN, JUDICIAL POLICY MAKING AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICA'S PRISONS 46-47 (1998) (citing several factors for the decline of momentum).

⁹⁴ *Turner v. Safley*, 482 U.S. 78, 89 (1987).

⁹⁵ *Id.* at 91.

The Court justifies this deference by identifying the institutional concern 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 the government.”⁹⁶ Such institutional concerns, of course, appropriately guide judicial deference in many cases. But while this explanation may justify some decisions, it does not justify the Court’s “one-size-fits-all approach.”⁹⁷ Indeed, the Court’s blanket deference to the expertise of prison officials fails to appreciate that many prisons lack qualified personnel or professional standards.⁹⁸ Of course, different institutions sometimes need different policies, but the Court’s approach offers preemptive deference even to outlier policies adopted by rogue guards ignoring professional standards. The Court’s deference, in other words, is premised on institutional grounds without sufficient examination of the actual institutional practices at issue.

The usual great deference in prison conditions cases is even harder to explain in light of the Court’s failure to explain adequately its occasionally more rigorous approach. *Turner* itself reflects such inconsistencies. Whereas the Court there deferred to the prison’s correspondence regulation, it struck down a second regulation prohibiting an inmate from marrying unless the prison superintendent found “compelling reasons” to permit a marriage.⁹⁹ The Court explained its approach in part by observing that marriage is a fundamental right¹⁰⁰ but opted not to resolve the case on those grounds.¹⁰¹ Instead, the Court concluded that the marriage regulation lacked “[c]ommon sense” and was “not reasonably related” to the penological interests cited by the prison.¹⁰² The *Turner* Court, in fact, emphasized that the prison’s assessment of danger was “an exaggerated response to . . . security objectives.”¹⁰³

Turner, however, fails to explain why deference to the prison officials’ epistemic authority was appropriate for the correspondence but not the marriage regulation. Nowhere, for instance, did the Court examine the prison

⁹⁶ *Id.* at 84-85.

⁹⁷ Shay, *supra* note 91, at 341.

⁹⁸ See JOHN J. GIBBONS & NICHOLAS DE B. KATZENBACH, VERA INST. OF JUSTICE, CONFRONTING CONFINEMENT: A REPORT OF THE COMMISSION ON SAFETY AND ABUSE IN AMERICA’S PRISONS 77-78 (2006), available at http://www.prisoncommission.org/pdfs/Confronting_Confinement.pdf (discussing the variability of prison rules and employee qualifications and the need for better oversight of America’s prisons).

⁹⁹ *Turner*, 482 U.S. at 82.

¹⁰⁰ *Id.* at 95.

¹⁰¹ *Id.* at 97 (“[E]ven under the reasonable relationship test, the marriage regulation does not withstand scrutiny.”).

¹⁰² *Id.* at 97-98.

¹⁰³ *Id.*

officials' training or the administrative procedures used to adopt those particular policies, even though deference to prison officials is surely more deserving when those officials craft policies based on their genuine expertise with security issues. Had the Court clearly applied heightened scrutiny because a fundamental right was at issue, its analysis might have made sense, but the Court's determination that the prison marriage policy was *unreasonable* is hard to square with its explicitly deferential review of the correspondence regulation.¹⁰⁴ Even within a single case, then, the Court neglected inquiries that might have added much-needed rigor to its seemingly contradictory deference determinations.

B. *Heightened Review of Agency Action*

Though the Court often shortchanges administrative factors in individual rights cases, those factors occasionally become the focal point of the constitutional analysis. This attention to administrative law norms manifests itself in different ways. Sometimes, as in *Bakke* and *Endo*, the Court expresses concern that a policy emanated from an agency, rather than a more politically accountable body.¹⁰⁵ Sometimes it identifies the dangers that standardless administrative discretion poses for individual rights. Sometimes it links the scope of the constitutional right to procedural shortcomings injuring the plaintiff. While the Court's consideration of these factors is inconsistent and inchoate, its occasional reliance on them demonstrates that administrative law norms are sometimes explicitly relevant to the deference those agents receive in individual rights cases.¹⁰⁶

1. *Hampton v. Mow Sun Wong* and the Fact and Nature of Administrative Action

The plaintiffs in *Hampton v. Mow Sun Wong*,¹⁰⁷ five Chinese legal resident aliens, were qualified for available federal government jobs but were denied employment because they were not United States citizens.¹⁰⁸ They contended that the Civil Service Commission regulations forbidding the employment of legal resident aliens violated their equal protection and due process rights.¹⁰⁹ 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

¹⁰⁴ See *id.* at 99 (holding that the policy is "not reasonably related to legitimate penological objectives"); *supra* notes 95-98 and accompanying text.

¹⁰⁵ See *supra* Part I.A.2-3.

¹⁰⁶ My focus here again is individual rights cases other than procedural due process cases, which necessarily sometimes address administrative procedures.

¹⁰⁷ 426 U.S. 88 (1976).

¹⁰⁸ *Id.* at 91-92.

¹⁰⁹ *Id.* at 99-100.

for employment in the federal civil service.”¹¹⁰ Justice Stevens explained that the outcome may very well have been different had Congress or the President instituted the challenged policy, but an administrative agency like the Civil Service Commission could not itself design policies raising such serious equal protection concerns.¹¹¹ The Court therefore struck down the Commission’s policy,¹¹² indicating that it would review the employment rule more stringently precisely because it came from an agency.¹¹³

Mow Sun Wong also explored how the agency carried out its delegated powers. 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.”¹¹⁴ The Court was unimpressed with the Commission’s performance, stating 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 the pool of eligible employees on the other.”¹¹⁵

Given that the Court usually reviews federal immigration laws deferentially,¹¹⁶ the administrative problems appear fatal to the challenged policy in *Mow Sun Wong*. Indeed, the Court’s analysis suggests that the Commission had violated a core tenet of administrative law that agency decisions “be based on a consideration of the relevant factors.”¹¹⁷ Although the Court did not explicitly rely on administrative law or flesh out how those norms interacted with the constitutional claims at issue,¹¹⁸ administrative law norms played a substantial role in the Court’s constitutional reasoning.¹¹⁹

¹¹⁰ *Id.* at 105.

¹¹¹ *Id.* at 104-05.

¹¹² *Id.* at 116-17.

¹¹³ See Cass R. Sunstein, *Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 48 (1996) (describing *Mow Sun Wong* as a case “expressly founded on the idea that publicly accountable bodies should make the contested decision that was challenged”).

¹¹⁴ *Mow Sun Wong*, 426 U.S. at 115.

¹¹⁵ *Id.*

¹¹⁶ See, e.g., *Mathews v. Diaz*, 426 U.S. 67, 81-84 (1976) (applying deferential review in holding that Congress may condition an alien’s eligibility for participation in Medicare on a five-year continuous and permanent residence).

¹¹⁷ *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971); see also Lawrence Gene Sager, *Insular Majorities Unabated: Warth v. Seldin and City of Eastlake v. Forest City Enterprises, Inc.*, 91 HARV. L. REV. 1373, 1417 (1978) (arguing that the agency in *Mow Sun Wong* lacked the information, expertise, and discretion to enact its rule).

¹¹⁸ The Court did not seem to rest its holding on the argument that Congress has plenary power over immigration, perhaps because congressional plenary power over immigration has eroded over time as Congress has delegated some immigration policy to executive officials. See Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law*, 119 YALE L.J. 458, 466 (2009).

¹¹⁹ Interestingly, *Mow Sun Wong* has never directly controlled subsequent Supreme

2. First Amendment Licensing Cases and the Problem of Unbridled Administrative Discretion

First Amendment licensing cases present another example of administrative law norms factoring prominently into individual rights decisions. Perhaps most famously, in *Freedman v. Maryland*,¹²⁰ the Court struck down Maryland's film censorship scheme, in part because the censorship board's inadequate procedures created a significant possibility of delay and discrimination against unpopular speech.¹²¹ The Court emphasized not just free speech principles but also norms sounding in administrative law, stating that the statute "delegates overly broad licensing discretion to an administrative office."¹²²

Freedman is one of several free speech licensing cases in which the Court objected to an administrative scheme conferring too much discretion on an official to curb speech. In *Shuttlesworth v. City of Birmingham*,¹²³ for example, the Court invalidated an ordinance that conferred "virtually unbridled and absolute power to prohibit any 'parade,' 'procession,' or 'demonstration' on the city's streets or public ways."¹²⁴ Cities, of course, can place reasonable limitations on parades, but Birmingham's delegation gave too much unconstrained discretion to officials to restrict speech.¹²⁵

In these cases, the Court focused on the governmental procedures used to restrict speech.¹²⁶ Of course, the strong presumptions against prior restraints and content-based discrimination figured heavily, but the inadequate procedural safeguards heightened the agencies' ability to impose prior

Court decisions. See WILLIAM N. ESKRIDGE, JR. ET AL., *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 425-26 (4th ed. 2007).

¹²⁰ 380 U.S. 51 (1965).

¹²¹ See *id.* at 54-55.

¹²² *Id.* at 56.

¹²³ 394 U.S. 147 (1969).

¹²⁴ *Id.* at 150 (footnote omitted).

¹²⁵ See *id.*; see also *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 757 (1988) ("[T]he mere existence of the licensor's unfettered discretion, coupled with the power of prior restraint, intimidates parties into censoring their own speech . . .").

¹²⁶ One might even read these cases to incorporate a due process requirement into the Free Speech Clause. See Monaghan, *supra* note 33, at 518 ("[C]ourts have begun to construct a body of procedural law which defines the manner in which they and other bodies must evaluate and resolve first amendment claims – a first amendment 'due process' . . ."). To this extent, cases like *Freedman* and *Shuttlesworth* would differ from other cases discussed already in that the lack of adequate procedures could not itself have amounted to a constitutional violation in *Mow Sun Wong* (or *Baze* or *Grutter*), whereas it may have in the First Amendment licensing cases. That said, the Court in all these cases neglected to offer a thorough, systematic account of how administrative law norms affect the individual rights analysis.

restraints discriminating against disfavored content.¹²⁷ The Court did not directly cite administrative law in reaching these conclusions, but the Court's attempts to erect procedural safeguards and require that the censor explain his reasoning mirror features of administrative law.¹²⁸ The administrative shortcomings were problematic, then, precisely because they exacerbated the potential for violation of substantive rights.¹²⁹

3. *Boumediene v. Bush* and the Thoroughness of Administrative Procedures

The Court also considered administrative law norms in fleshing out the scope of the Suspension Clause in *Boumediene v. Bush*.¹³⁰ *Boumediene* asked whether Congress could constitutionally strip Guantanamo detainees of habeas access to U.S. federal courts without formally suspending habeas corpus pursuant to the Suspension Clause.¹³¹ The question boiled down to whether habeas extended to detainees held in American custody on a Guantanamo Bay military base, over which the United States enjoyed *de facto*, but not *de jure*, sovereignty.¹³² The Court held that non-citizens detained at Guantanamo were constitutionally entitled to file petitions for writs of habeas corpus challenging the legality of their detention.¹³³ Consequently, the Military Commissions Act¹³⁴ violated the Suspension Clause when it stripped Guantanamo detainees of this right.¹³⁵

Though much of the Court's opinion explored the history of habeas corpus,¹³⁶ the Court also considered the procedural deficiencies plaguing the

¹²⁷ See Monaghan, *supra* note 33, at 551 (“[F]irst amendment rights are fragile and can be destroyed by insensitive procedures . . .”).

¹²⁸ See Metzger, *supra* note 24, at 487-88 (discussing the Court's approach to licensing cases).

¹²⁹ Interestingly, even as anomalous a case as *Bush v. Gore* may similarly reflect concerns that inadequate procedural safeguards heighten the risk that government will treat equally situated citizens differently. See *Bush v. Gore*, 531 U.S. 98, 106-09 (2000) (holding that because “the standards for accepting or rejecting contested ballots might vary not only from county to county but indeed within a single county,” voters were denied “the rudimentary requirements of equal treatment and fundamental fairness”); Tokaji, *supra* note 14, at 2487-95 (likening *Bush v. Gore* to speech licensing cases).

¹³⁰ 553 U.S. 723 (2008).

¹³¹ See U.S. CONST. art. I, § 9, cl. 2 (“The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.”); *Boumediene*, 553 U.S. at 732.

¹³² *Boumediene*, 553 U.S. at 755.

¹³³ *Id.* at 771.

¹³⁴ Military Commissions Act of 2006, Pub. L. No. 109-366, § 7(a), 120 Stat. 2600, 2635 (2006) (codified in 28 U.S.C. § 2241(e) (Supp. 2007)).

¹³⁵ *Boumediene*, 553 U.S. at 792.

¹³⁶ See *id.* at 740-46 (exploring habeas corpus's eighteenth century extraterritorial

Combatant Status Review Tribunals (CSRTs), which the government had used to classify detainees as enemy combatants who could be held indefinitely until the cessation of hostilities.¹³⁷ In exploring the Suspension Clause's reach, the Court emphasized that "the procedural protections afforded to the detainees . . . [were very] limited, and . . . [thus fell] well short of the procedures and adversarial mechanisms that would eliminate the need for habeas corpus review."¹³⁸ The Court's analysis thus indicated that the constitutional question regarding the extraterritorial reach of habeas depended, among other things, on "the adequacy of the process through which [the detainee's] status determination was made."¹³⁹

Consistent with administrative law principles, *Boumediene* also found that the potential for appellate review of earlier proceedings could not itself wholly cure defects in those earlier procedures.¹⁴⁰ Though the Court in many individual rights cases involving agencies curiously ignores procedural due process norms,¹⁴¹ *Boumediene* explicitly analogized to them, explaining that "the necessary scope of habeas review in part depends upon the rigor of any earlier proceedings."¹⁴² In *Boumediene*, "the sum total of procedural protections afforded to the detainee at all stages, direct and collateral"¹⁴³ was collectively inadequate, so the Court concluded that the existing procedures did not offer sufficient procedural protections to warrant the withdrawal of habeas.¹⁴⁴

One could argue that the adequacy of the CSRT procedures should only be relevant *if* the detainees have a right to habeas at all. But the Court considered the CSRT procedures not only to determine whether "Congress has provided adequate substitute procedures for habeas corpus"¹⁴⁵ but also ostensibly to help

application).

¹³⁷ Even though some judges on the D.C. Circuit have treated CSRTs as "sui generis and outside the contemplation of the APA," *Bismullah v. Gates*, 514 F.3d 1291, 1294 (D.C. Cir. 2008) (Ginsburg, C.J., concurring in denial of rehearing en banc), CSRTs also can be thought of as a kind of agency. Cf. Adrian Vermeule, *Our Schmittian Administrative Law*, 122 HARV. L. REV. 1095, 1109 (2009) (remarking that certain judges in *Bismullah* did not treat the CSRTs as agencies, "despite the breadth of the statutory definition").

¹³⁸ *Boumediene*, 553 U.S. at 767.

¹³⁹ *Id.* at 766; see also Metzger, *supra* note 24, at 498 (arguing that *Boumediene* "repeatedly suggested that use of more robust internal procedural protections could lead to a different result").

¹⁴⁰ *Boumediene*, 553 U.S. at 767 ("[A]lthough the detainee can seek review of his status determination in the Court of Appeals, that review process cannot cure all defects in the earlier proceedings.").

¹⁴¹ See *supra* Part I.A.

¹⁴² *Boumediene*, 553 U.S. at 781.

¹⁴³ *Id.* at 783.

¹⁴⁴ See *id.* at 783-92 (discussing CSRT procedures and the appellate court substitute).

¹⁴⁵ *Id.* at 771.

determine whether the writ reached Guantanamo in the first place. Indeed, the Court stated that “the outlines of a framework for determining the reach of the Suspension Clause are suggested by” various factors, including the adequacy of the procedure through which the status of the detainee was initially determined.¹⁴⁶ Thus, inadequate governmental procedures heightened the likelihood of a constitutional violation, even though the Court technically reviewed not the propriety of those procedures but rather the statute limiting habeas jurisdiction.¹⁴⁷

C. *The Significance of the Doctrinal Discrepancy*

The Court’s decisions in these cases turn on multiple factors related to both context and the constitutional right at issue. The Court, for instance, may have been particularly suspicious of the government intrusion in the licensing cases because of the special status of free speech and the strong presumption against prior restraint.¹⁴⁸ The Court also tends to defer more readily to governmental institutions with ostensibly unique expertise and sensitive mandates, such as prisons, especially when unsympathetic plaintiffs occupy the federal courts with complaints against those institutions.¹⁴⁹ In other cases, the Court may also be particularly wary of infringing on state entities due to federalism concerns.

In addition, the Court likely considers itself more capable of curbing excessive discretion in some areas than others.¹⁵⁰ The problems of standardless discretion in the free speech licensing cases, for example, were relatively easy to cure because courts simply could require administrative officials to adopt specific rules for issuing licenses to speak.¹⁵¹ By contrast, in the prison conditions or lethal injection context, the Court may think it is more difficult to craft an appropriate remedy mitigating an injustice.¹⁵²

¹⁴⁶ *Id.* at 766.

¹⁴⁷ Other factors also figured into the scope of habeas corpus, including “the citizenship and status of the detainee,” “the nature of the sites where apprehension and then detention took place,” and “the practical obstacles inherent in resolving the prisoner’s entitlement to the writ.” *Id.*

¹⁴⁸ See FREDERICK SCHAUER, *FREE SPEECH: A PHILOSOPHICAL ENQUIRY* 7-8 (1982) (arguing that freedom of speech should receive special constitutional protection); KATHLEEN M. SULLIVAN & GERALD GUNTHER, *CONSTITUTIONAL LAW* 1118 (17th ed. 2010) (summarizing Blackstone’s view that free speech only protected against prior restraint).

¹⁴⁹ See, e.g., *O’Lone v. Estate of Shabazz*, 482 U.S. 342, 349 (1987) (discussing deference to prison officials); John L. Watts, *To Tell the Truth: A Qui Tam Action for Perjury in a Civil Proceeding Is Necessary to Protect the Integrity of the Civil Judicial System*, 79 TEMP. L. REV. 773, 817 (2006) (discussing courts’ concerns about numerous prisoner suits clogging courts).

¹⁵⁰ See Tokaji, *supra* note 14, at 2465-66.

¹⁵¹ See *id.*

¹⁵² See FEELEY & RUBIN, *supra* note 93, at 297-335 (discussing remedial issues in prison

These explanations help demonstrate that we should not be surprised that the Court treats divergent topics very differently. Certain administrative factors may have special constitutional resonance in particular cases. Moreover, many of these are difficult cases pitting competing values against each other, so it is perhaps inevitable that, taken as a whole, the Court's answers would seem contradictory in some respects. But the point here is not that the Court should have treated these cases more similarly – *of course* this wide range of cases would trigger different analyses. Nor is the objective to defend or criticize the outcome of these cases. Rather, the point is that the Court fails to provide an adequate account of how the governmental agency's identity and behavior is relevant to the Court's deference determination, even though the briefs sometimes raise these issues and, as we have seen, the Court sometimes suggests that these factors *are* relevant.¹⁵³ The Court, in short, has failed to develop a systematic approach in individual rights cases to questions regarding agency identity and behavior.¹⁵⁴

The one place where the Court does approach official discretion in a fairly consistent way is in the absolute immunity and qualified immunity contexts. These cases, however, determine not whether an official has violated the Constitution but rather whether the officials should be liable for money damages when they violate such rights. The doctrines generally favor governmental officials by offering them some protection from damages.¹⁵⁵ The deference afforded officials in these contexts, however, tells little about the deference they deserve when courts determine the scope of the right in the first instance and whether there has in fact been a constitutional violation.

The rest of this Article contends that the Court's individual rights doctrine should take more consistent account of these issues by examining the context

litigation); Berger, *supra* note 41, at 280-301 (discussing how remedial concerns shape lethal injection cases).

¹⁵³ See, e.g., Brief for Petitioners at 50, *Baze v. Rees*, 553 U.S. 35 (2008) (No. 07-5439) (arguing that Kentucky's Department of Corrections utilized haphazard administrative procedures in adopting its lethal injection protocol); Brief of Amicus Curiae Michigan Governor Jennifer M. Granholm at 13-14, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241, 02-516) (arguing that the Michigan Constitution granted unique status to the University of Michigan and that special deference to the university was therefore deserved); Brief for Appellant at 16-19, 35-46, *Korematsu v. United States*, 323 U.S. 214 (1944) (No. 22) (arguing that neither Congress nor the President authorized General DeWitt's actions and that the Court should therefore treat the General's actions less deferentially).

¹⁵⁴ Of course, the Court may have good reasons for not theorizing these issues more completely, see generally Cass R. Sunstein, *Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733 (1995), but the relationship between the administrative state and individual rights still deserves more careful treatment.

¹⁵⁵ See, e.g., *Wilson v. Layne*, 526 U.S. 603, 609 (1999) (holding that under qualified immunity doctrine governmental officials are liable only if they violate a "clearly established" constitutional right); *Nixon v. Fitzgerald*, 457 U.S. 731, 749-53 (1982) (holding that the President is absolutely immune from suit for actions taken in his official capacity).

and nature of agency action before deciding whether that action deserves deference. The Court only sporadically accounted for this context in the cases discussed above, and, even when it did, it usually failed to provide a rigorous, consistent analysis. As we shall see, the approach proposed here might lead to different results in certain cases, but even when it does not, it would help courts provide more completely theorized analysis. Such an approach would, then, encourage courts to confront complexity by embracing rather than shunning contextual nuances.¹⁵⁶

II. ADMINISTRATIVE LAW NORMS IN CONSTITUTIONAL DECISION MAKING

A. *The Natural Intersections of Constitutional Law and Administrative Law*

Judges and scholars have largely been inattentive to the problem of administrative discretion in individual rights cases. The Court could improve its analysis simply by asking at the outset, as Professor Rosenkranz does, “[W]ho has allegedly violated the Constitution?”¹⁵⁷ If the alleged violator is an administrative agency, the Court should then ask *how* that agency conducts its business.¹⁵⁸ The Court could then tailor the level of deference based on the answers to those questions.

The “how” question is far more complicated, but courts could approach it by turning to the kinds of factors that frequently guide ordinary administrative law.¹⁵⁹ The APA, after all, is a “super-statute” entrenching governmental structures and quasi-constitutional norms.¹⁶⁰ These norms are centrally

¹⁵⁶ See Cynthia R. Farina, *The Consent of the Governed: Against Simple Rules for a Complex World*, 72 CHI.-KENT L. REV. 987, 989 (1997) (“There are no simple rules for this complex world. Rather, we must necessarily look to a plurality of institutions and practices as contributors to an ongoing process of legitimizing the regulatory state.”).

¹⁵⁷ Rosenkranz, *supra* note 22, at 1290.

¹⁵⁸ The “constitutional how” question may also be relevant in other cases, such as when courts decide whether to defer to legislative fact-finding. See, e.g., *United States v. Morrison*, 529 U.S. 598, 608-19 (2000) (refusing to defer to congressional findings linking violence against women to interstate commerce). Nevertheless, given the democratic pedigree of the legislature and chief executive, courts usually do not closely examine legislative procedures, provided that the legislature has adhered to constitutionally-prescribed procedures for enacting legislation. See U.S. CONST. art. I, § 7, cl. 2 (requiring bicameralism and presentment); ESKRIDGE ET AL., *supra* note 119, at 409-46 (discussing due process of lawmaking). For fascinating discussions of these issues arguing in favor of enhanced judicial review of the legislative process, see generally Ittai Bar-Siman-Tov, *The Puzzling Resistance to Judicial Review of the Legislative Process*, 91 B.U. L. REV. 1915 (2011) and Hans A. Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 197 (1976).

¹⁵⁹ Professor Metzger has persuasively argued the related point that the Court should overtly identify the constitutional concerns underlying much ordinary administrative law. See Metzger, *supra* note 24, at 534.

¹⁶⁰ See ESKRIDGE & FEREJOHN, *supra* note 35, at 7-8 (discussing “superstatutes”); William N. Eskridge & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215, 1216 (2001) (“A

concerned with how to contain administrative discretion so that agencies “appropriately balance the simultaneous demands of political responsiveness, efficient administration, and respect for legal rights.”¹⁶¹ Courts are familiar with these inquiries from the APA and related doctrines, so they would not be exploring uncharted territory.¹⁶²

Moreover, many ordinary administrative law norms are themselves constitutionally mandated or inspired and thus naturally connected to constitutional inquiry. For example, administrative hearing requirements often exist to satisfy procedural due process.¹⁶³ Such hearing requirements may be controversial when a sub-constitutional, legislatively created “property” right is at issue (e.g., an asserted property interest in continued employment),¹⁶⁴ but where a constitutional liberty interest (e.g., speech) is at stake, the need for administrative hearings should seem more pressing. Under this view, administrative licensing requirements in cases like *Freedman* might be thought of as a kind of constitutionally required due process to protect free speech.¹⁶⁵ Other administrative procedural requirements, such as the requirement that an agency’s action in a formal adjudication be made on the record after opportunity for an agency hearing, also have roots in due process.¹⁶⁶

super-statute is a law or series of laws that (1) seeks to establish a new normative or institutional framework for state policy and (2) over time does ‘stick’ in the public culture such that (3) the super-statute and its institutional or normative principles have a broad effect on the law – including an effect beyond the four corners of the statute.”).

¹⁶¹ Jerry L. Mashaw, *Recovering American Administrative Law: Federalist Foundations, 1787-1801*, 115 YALE L.J. 1256, 1263-64 (2006).

¹⁶² See, e.g., 5 U.S.C. §§ 551-59, 701-06 (2006).

¹⁶³ See, e.g., *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542-45 (1985) (holding that due process requires that government provide a hearing before depriving someone of life, liberty, or property); Bressman, *supra* note 24, at 468 (recognizing the “possibility that the concern for arbitrariness, a staple of administrative law, actually emanates from the constitutional structure”); Metzger, *supra* note 24, at 487 (observing that administrative hearings “are often adopted to satisfy procedural due process’s requirements of notice and some opportunity to be heard”).

¹⁶⁴ See, e.g., *Loudermill*, 470 U.S. at 538 (explaining that “property” interests in continued employment are not created by the Constitution but are protected by due process once they exist); Martin H. Redish & Colleen McNamara, *Habeas Corpus, Due Process, and the Suspension Clause: A Study in the Foundations of American Constitutionalism*, 96 VA. L. REV. 1361, 1376 (2010) (describing as “controversial” the Court’s inquiries into “whether a statutorily created entitlement constitutes a ‘property’ interest” protected by procedural due process).

¹⁶⁵ See, e.g., Metzger, *supra* note 24, at 487-88 (discussing First Amendment licensing cases); Monaghan, *supra* note 33, at 522-24 (discussing *Freedman*’s “preference for judicial evaluation of [F]irst [A]mendment claims”).

¹⁶⁶ See 5 U.S.C. §§ 554(a), 554(c)(2), 556, 557; *Londoner v. Denver*, 210 U.S. 373, 385 (1908) (holding that Constitution imposes procedural due process requirements on adjudications).

But even where due process is less overtly implicated, procedural norms are often protected in our legal system through various constitutionally inspired (but not constitutionally required) administrative requirements.¹⁶⁷ For instance, *Motor Vehicle Manufacturers Ass'n v. State Farm's* famous requirement that an "agency must examine the relevant data and articulate a satisfactory explanation for its action[,] including a rational connection between the facts found and the choice made,"¹⁶⁸ likely goes far beyond what Congress intended when it enacted the Administrative Procedure Act.¹⁶⁹ Courts' "hard look" review¹⁷⁰ and corresponding expansive reading of the APA, then, likely reflect courts' constitutional unease with broad delegations of power to administrative agencies.¹⁷¹

The Court has also fashioned canons of interpretation reflecting constitutional concerns about excessive agency power. It has not struck down congressional delegations to agencies under the non-delegation doctrine since the 1930s,¹⁷² but it protects these principles in more subtle ways, such as the use of non-delegation canons disfavoring certain agency action without clear congressional authorization.¹⁷³ Even if not constitutionally required, such constraints are an important component of our constitutional checks and balances, protecting against excessive agency authority and the arbitrary agency action that sometimes accompanies such power.¹⁷⁴

¹⁶⁷ See Metzger, *supra* note 24, at 490-97 (discussing constitutionally inspired ordinary administrative law).

¹⁶⁸ *Motor Vehicle Mfr. Ass'n of the U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (internal quotation marks omitted).

¹⁶⁹ See Metzger, *supra* note 24, at 490-91 ("[A]rbitrary and capricious' review under *State Farm* is a far cry from the lenient scrutiny originally intended by the Congress that enacted the APA."); Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 STAN. L. REV. 1189, 1300-26 (1986) (describing the evolution of courts' "much closer scrutiny of agency decisions" and the emergence of "hard look" review).

¹⁷⁰ 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"), *cert. denied*, 403 U.S. 923 (1971).

¹⁷¹ Other administrative law and statutory interpretation doctrines can also be seen as constitutionally inspired, such as *Chevron's* deference to agency interpretations of ambiguous statutes, see *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984), or clear statement rules, see *Gregory v. Ashcroft*, 501 U.S. 452, 460-61 (1991). See Metzger, *supra* note 24, at 505-06 (arguing that doctrines like *Chevron* are constitutionally inspired though "the exact nature of their constitutional underpinnings remains unspecified").

¹⁷² See *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472-76 (2001) (summarizing history of non-delegation doctrine).

¹⁷³ See *infra* notes 202-209 and accompanying text.

¹⁷⁴ See Bressman, *supra* note 24, at 468-70 ("[E]arly models of administrative law were premised on a constitutional theory that understood the aim of constitutional structure as the

As Professor Metzger has demonstrated, some Justices have obliquely acknowledged this connection between ordinary administrative law and constitutional law.¹⁷⁵ In *FCC v. Fox Television Stations, Inc.*, Justice Kennedy observed that the administrative law requirements that agency policies not be “arbitrary and capricious” “stem from the administrative agency’s unique constitutional position.”¹⁷⁶ While the exact nature of this constitutional position is “delicate, subtle, and complex,”¹⁷⁷ agencies are simultaneously too important to abandon and too undemocratic to be given free rein. Thus, agencies cannot be “permitted unbridled discretion [lest] their actions . . . violate important constitutional principles of separation of powers and checks and balances.”¹⁷⁸ Constitutional law, then, has significantly shaped the contours of ordinary administrative law, adding bite to APA requirements and inspiring various doctrines of statutory interpretation that impose heightened obstacles for legislative delegations and resulting agency actions.¹⁷⁹

Constitutional law generally, and due process norms specifically, therefore clearly plays a role in animating both some individual rights decisions (like *Freedman*) and ordinary administrative law doctrine. But courts have not systematically examined either due process doctrine or ordinary administrative law to determine the procedures administrative officials must follow before intruding on individual rights other than due process. Indeed, despite its far-reaching consequences, the procedural due process inquiry is relatively limited in scope, usually asking whether the plaintiff has an interest qualifying as “life, liberty, or property,” and if so, what process is due.¹⁸⁰ Thus, to explore more fully how an agency has acted when allegedly violating a different (non-due process) individual right, courts should look beyond due process doctrine to ordinary administrative law concerns.

Phrased somewhat differently, the avenue between constitutional and administrative law should not be a one-way street. Constitutional law clearly has helped shape much administrative law. Now it is time to consider whether those constitutionally inspired administrative law norms have resonance in constitutional contexts, where they have been largely ignored. To be sure, the Supreme Court has disparaged the judicial development of administrative rules

protection of individual liberty from arbitrary governmental intrusions.”).

¹⁷⁵ See Metzger, *supra* note 24, at 492-93.

¹⁷⁶ *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1823 (2009) (Kennedy, J., concurring).

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ For an excellent and more thorough discussion of this phenomenon, see Metzger, *supra* note 24, at 486-512.

¹⁸⁰ See *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976) (formulating a test for determining what process is due); JERRY L. MASHAW, *DUE PROCESS IN THE ADMINISTRATIVE STATE* 8-29 (1985) (exploring consequences of the due process “revolution”).

beyond APA requirements.¹⁸¹ But courts have continued to impose rulemaking requirements exceeding APA specifications,¹⁸² and, furthermore, the proposal here pertains to constitutional cases where courts, whether they admit it or not, already make ad hoc deference determinations. Administrative law norms teach that agencies deserve less respect when they are unaccountable, unknowledgeable, and procedurally erratic. Given that such agencies usually would not receive deference in the administrative law context, they should not be afforded blanket deference in constitutional individual rights cases.

B. *Relevant Administrative Factors*

Administrative law is extensive and involves numerous factors. As a result, any list of administrative factors that may be relevant to constitutional decision making will likely be both under-inclusive and over-inclusive. The purpose of this discussion is not to etch in stone the particular administrative factors that judges should consider when making deference determinations. Rather, it is to provide examples of relevant inquiries that generally have been under-explored in individual rights cases.¹⁸³

It is important to note that even if courts adopted my approach, administrative law would still play a significant role in our system. Administrative law, after all, is the primary legal vehicle through which the legal system tries to shape agency action to improve social welfare and increase political freedom.¹⁸⁴ But administrative law cannot always adequately protect individual rights from arbitrary agency action, in part because administrative law does not reach all administrative action. Certain important administrative agencies and agents, such as police, prosecutors, prisons, schools, universities, the CIA, and the military, frequently escape meaningful administrative law review, either because they are explicitly exempted from federal or state APAs or because the practical legal constraints on them are extremely limited.¹⁸⁵ As a result, constitutional challenges may sometimes be

¹⁸¹ See *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 523-24 (1978) (holding that reviewing courts generally may not impose procedural requirements on agency rulemaking beyond what § 553 of APA requires).

¹⁸² See, e.g., Gillian E. Metzger, *The Story of Vermont Yankee: A Cautionary Tale of Judicial Review and Nuclear Waste*, in *ADMINISTRATIVE LAW STORIES* 125, 160-67 (Peter L. Strauss ed., 2006) (explaining that, despite *Vermont Yankee*, courts have continued to scrutinize agency actions closely and adopt “expansive accounts” of § 553’s “terse and minimal” requirements).

¹⁸³ See Adler, *supra* note 30, at 874 (“[T]he proper contours of judicial restraint cannot be specified independently of the particular democratic, epistemic or other features of administrative agencies . . .”).

¹⁸⁴ See STRAUSS ET AL., *supra* note 12, at 12-13.

¹⁸⁵ See Vermeule, *supra* note 137, at 1096 (arguing that administrative law contains a series of “black holes” explicitly exempting agencies from administrative law and “grey

the only means for an aggrieved individual to protect herself against an overreaching agency.

The following discussion divides factors into three broad categories: political accountability, expertise, and procedural regularity.¹⁸⁶ These categories are doubtlessly interrelated, and some factors could be placed under more than one heading. Agencies' structures and procedures also differ,¹⁸⁷ so courts should not (and likely would not) approach the inquiries with a robotic kind of checklist. Collectively, though, these factors should shape judicial review of agencies' exercise of discretion in individual rights cases on a sliding scale.

1. Political Accountability

We begin with one of agencies' primary weaknesses: their lack of democratic legitimacy. Democratic legitimacy rests in substantial part on the political accountability of governmental officials.¹⁸⁸ In the constitutional context, much anxiety over judicial review stems from the recognition that

holes" which provide "constraints . . . so insubstantial that they pretty well permit government to do as it pleases"); *see also* 5 U.S.C. §§ 701(a)(1)-(2) (2006) (providing that APA applies except to the extent that "statutes preclude review" or "agency action is committed to agency discretion by law"); MINN. STAT. ANN. § 14.03 (West 2005) (exempting University of Minnesota from Minnesota's APA); TENN. CODE ANN. § 4-5-102(10)(G) (2005) (exempting from Tennessee's APA "statements concerning inmates of a correctional or detention facility"); Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 993 (2006) ("[U]nlike the administrative law context . . . the government faces almost no institutional checks when it proceeds in criminal matters."); Jon D. Michaels, *The (Willingly) Fettered Executive: Presidential Spinoffs in National Security Domains and Beyond*, 97 VA. L. REV. 801, 885-87 (2011) (suggesting that "legal and political black and grey holes might be expanding," especially when the government contracts out responsibility to the private sector); Vermeule, *supra* note 137, at 1139 (explaining that military and foreign affairs actions are often exempt from the APA's procedural requirements).

¹⁸⁶ Though different administrative law issues arise in rulemakings and adjudications, my discussion, for ease of presentation, considers these factors together.

¹⁸⁷ This Article mostly does not distinguish between the different kinds of "administrative agencies," such as cabinet departments, bureaus, independent agencies within the executive branch, and independent regulatory commissions. *See generally* STRAUSS, *supra* note 25, at 127-35 (discussing distinguishing features of these units). Though there are important differences between these governmental bodies, they also share much in common, including their public procedures. *See id.* at 134-35. I treat them similarly here, but, to the extent there are sometimes meaningful differences, courts can account for those differences in their analyses.

¹⁸⁸ *See* BICKEL, *supra* note 9, at 17-19 ("[T]he policy-making power of representative institutions, born of the electoral process, is the distinguishing characteristic of the system."); JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 77-78 (1980) (characterizing the process of subjecting representatives to popular election as the "enforcement mechanism[]" used to guard against improperly wielded legislative power).

“judicial review is a counter-majoritarian force,” which allows unelected judges to override policy decisions made by government officials who answer to the people.¹⁸⁹ Consequently, judicial deference to governmental actors in constitutional cases is often premised on the political branches’ ostensible political accountability. But if public officials are not accountable, judicial deference to them rests on shakier ground.¹⁹⁰

It is therefore strange that courts sometimes defer to agencies in individual rights cases without assessing their political authority.¹⁹¹ Agencies usually are not directly answerable to the people. Even though in theory they answer to the politically accountable chief executive,¹⁹² in practice some agencies are largely unresponsive to public opinion. For example, while the existence of lethal injection procedures in some states may reflect democratic support for the death penalty, the particulars of those procedures are usually shrouded in secrecy, beyond the contemplation of state legislators and the general public.¹⁹³ Such insulation may or may not be desirable, but the resulting procedures clearly lack political accountability.

Administrative law is sometimes sensitive to agencies’ potential accountability deficit.¹⁹⁴ Nevertheless, courts in the constitutional context usually ignore these concerns, assuming instead that agencies possess the political authority that more directly elected political officials enjoy. Such conclusions may be theoretically justifiable. The “transmission belt” model of the administrative state, for instance, posits that elected officials control the discretion of administrative actors and that some degree of separation between the people themselves and governmental actors is inevitable and unproblematic in a republican government.¹⁹⁵ But courts do not explicitly embrace this

¹⁸⁹ BICKEL, *supra* note 9, at 16.

¹⁹⁰ Whether more genuine political authority is a satisfying rationale for deference is another matter beyond the scope of this project.

¹⁹¹ Cf. Matthew C. Stephenson, *Optimal Political Control of the Bureaucracy*, 107 MICH. L. REV. 53, 59 (2008) (summarizing the view that “bureaucratic policy should track majoritarian values and that this goal is best advanced by giving decision-making authority to the most politically accountable officials”).

¹⁹² See, e.g., *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 865-66 (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 . . .”).

¹⁹³ See, e.g., Berger, *supra* note 41, 301-14 (discussing lethal injection political process failures); Denno, *supra* note 41, at 116-25 (discussing state delegation of lethal injection protocols).

¹⁹⁴ Administrative law, however, rarely openly embraces political justifications for agency action. See Kathryn A. Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 YALE L.J. 2, 32-45 (2009) (arguing that political justifications should have a more pronounced place in administrative law).

¹⁹⁵ See, e.g., Stewart, *supra* note 29, 1675-84 (discussing, but ultimately rejecting, a theory of administrative law that “conceives of the agency as a mere transmission belt for

theory, and most theorists agree that “the transmission belt model’s invocation of democratic control over administrative judgments [is] rather ragged and worn.”¹⁹⁶ Moreover, even if some constitutional decisions might be read as implicitly embracing the transmission belt model, administrative law often does not so casually assume the democratic legitimacy of all administrative action.¹⁹⁷ We must then square constitutional law’s sometimes reflexive deference to political branch actors with administrative law’s anxiety about agencies’ lack of political accountability.

a. *Legislative Guidance and Non-Delegation Principles*

We can measure an agency’s democratic accountability by considering various factors, starting with legislative guidance to the agency. After all, the unelected agency takes its marching orders from the elected legislature, so the clarity and precision of those orders help determine the strength of the link between politically accountable officials and agency action.¹⁹⁸ Consequently, the whole legitimacy of delegation is premised on the legislature delegating with a sufficiently “intelligible principle.”¹⁹⁹ By contrast, overly broad delegation requires very little thought from elected officials, who can simply tell an agency, “go take care of this.”²⁰⁰ As Professor Ely argued, legislatures sometimes vaguely delegate matters to unaccountable lower-level officials precisely because they seek to escape “the sort of accountability that is crucial to the intelligible functioning of a democratic republic.”²⁰¹

Policies resulting from such vague delegations have less democratic pedigree. Whereas more precise delegation gives the agency some policy guidance from the legislature – and, through it, “the people” – vague delegation essentially confers upon agencies a blank check. Such delegations heighten the democratic deficit of administrative agencies, rendering them less deserving of deference.²⁰²

implementing legislative directives in particular cases”).

¹⁹⁶ MASHAW, *supra* note 180, at 18.

¹⁹⁷ See *supra* notes 163-180; *infra* notes 198-209 and accompanying text.

¹⁹⁸ See Rubin, *supra* note 32, at 374 (characterizing modern legislation as instructions to administrative agencies).

¹⁹⁹ *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 472 (2001).

²⁰⁰ See ELY, *supra* note 188, at 133 (stating that “policy direction” is what should be required of legislatures); HENRY 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.”).

²⁰¹ ELY, *supra* note 188, at 132.

²⁰² 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); Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543, 545-46 (2000)

Significantly, the law already takes account of these norms.²⁰³ While the non-delegation doctrine is usually highly deferential to Congress with regard to *whether* Congress may delegate authority,²⁰⁴ the Court applies a more robust variation of the doctrine in policing agency action pursuant to that delegation. For instance, as mentioned above, the Court has fashioned several non-delegation canons, which limit agency authority to take certain actions without express congressional authorization. Consistent with the canon of constitutional avoidance,²⁰⁵ these non-delegation canons give narrow constructions to statutory delegations raising constitutional concerns.²⁰⁶ Accordingly, without clear legislative guidance, agencies cannot promulgate retroactive rules, preempt state law, or create private causes of action, even though Congress itself could pass statutes with those effects.²⁰⁷ Additionally, the Court sometimes asks whether agency action is consistent with the scope of the agency's mandate, thus indicating that it will rein in agencies that exercise authority beyond Congress's delegation.²⁰⁸ The Court also gives less

(observing that despite agencies' considerable power, they are not "directly accountable to the electorate").

²⁰³ See, e.g., Sandra B. Zellmer, *The Devil, the Details, and the Dawn of the 21st Century Administrative State: Beyond the New Deal*, 32 ARIZ. ST. L.J. 941, 946-57 (2000) (discussing doctrines promoting agency accountability).

²⁰⁴ See *American Trucking*, 531 U.S. at 474 ("[I]n the history of the Court we have found the requisite 'intelligible principle' lacking in only two statutes . . .").

²⁰⁵ See, e.g., *Nat'l Labor Rel. Bd. v. Catholic Bishop of Chi.*, 440 U.S. 490, 500 (1979) (discussing different variations of the constitutional avoidance canon whereby courts construe statutes to avoid serious constitutional concerns).

²⁰⁶ See David Horton, *Arbitration as Delegation*, 86 N.Y.U. L. REV. 437, 496 (2011).

²⁰⁷ See, e.g., *Wyeth v. Levine*, 129 S. Ct. 1187, 1201 (2009) (rejecting a preemption claim in part "[b]ecause Congress has not authorized the FDA to pre-empt state law directly"); *Alexander v. Sandoval*, 532 U.S. 275, 291 (2001) ("[I]t is most certainly incorrect to say that language in a regulation can conjure up a private cause of action that has not been authorized by Congress."); *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) ("[A] statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms."); Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 315 (2000) (discussing a "set of nondelegation canons, which forbid executive agencies from making certain decisions on their own"); Ernest A. Young, *Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review*, 78 TEX. L. REV. 1549, 1605-07 (2000) (discussing nondelegation canons as way to enforce constitutional values).

²⁰⁸ See *Gonzales v. Oregon*, 546 U.S. 243, 270-75 (2006) (striking down the Attorney General's interpretive rule because it exceeded the scope of the statutory delegation); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000) ("[W]e are confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion."); *Kent v. Dulles*, 357 U.S. 116, 129-30 (1958) (concluding that statutes did not clearly delegate to the Secretary of State the authority to deny passports to alleged Communists).

deference where the legislature has not granted the agency authority to pass rules with the force of law.²⁰⁹

Courts could engage in similar types of inquiries in individual rights cases involving administrative agencies. More specifically, courts could explore whether the legislature clearly gave the agency the authority to create legal rules raising individual rights questions.²¹⁰ Agency action skirting close to constitutional boundaries, under this view, would be more problematic when the agency also skirts closer to the boundaries of its own authority and further from the clear instructions of politically accountable bodies.²¹¹

b. *Oversight*

Once legislatures have delegated authority to agencies, some political accountability can be maintained by proper oversight. Theories of the unitary executive notwithstanding,²¹² many governmental departments are so large that officials far down the chain of command – and far removed from the chief executive’s political appointments heading the department – wield significant policymaking authority that can impact individual rights.²¹³ As a result, to preserve political accountability, it is important to maintain a link not just between the agency head and elected officials but also among the various layers of administrative bureaucracy.

The structure of many agencies sometimes allows or even requires intra-agency oversight, thus permitting review of a given official’s decision by agency personnel at various levels, including the agency head, agency superiors, or even peers within the agency hierarchy.²¹⁴ Potential external oversight can come from both the legislature and the chief executive.²¹⁵

²⁰⁹ See *United States v. Mead*, 533 U.S. 218, 231-32 (2001) (holding that *Chevron* deference only applies where Congress intended to delegate force-of-law rulemaking powers to agencies).

²¹⁰ Of course, the legislature cannot constitutionally empower agencies to violate individual rights, but it can delegate authority to take actions potentially implicating constitutional concerns.

²¹¹ Of course, where the agency action is *ultra vires*, the agency’s lack of authority will settle the case, relieving the Court of the need to engage in a substantive constitutional inquiry. Cf. *Oregon*, 546 U.S. at 274-75 (denying Attorney General authority). Often, however, the scope of delegated authority is muddy, necessitating further inquiry.

²¹² See, e.g., STEVEN G. CALABRESI & CHRISTOPHER S. YOO, *THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH 8* (2008) (encouraging vigorous exercise of presidential power over the rest of the executive branch).

²¹³ See STRAUSS, *supra* note 25, at 130 (explaining that “the detailed understanding and actual implementation” of many agency programs occurs “at some remove from the political appointees”).

²¹⁴ DAVIS, *supra* note 13, at 142.

²¹⁵ See STRAUSS, *supra* note 25, at 82-83 (discussing important role of congressional committees overseeing agency functions); Watts, *supra* note 194, at 36-37 (summarizing ways in which Congress can oversee agency policymaking, including holding hearings,

Congressional committees oversee administrative agencies, a relationship both sides usually take seriously.²¹⁶ Congress itself has also created the Congressional Budget Office and the General Accountability Office to provide professional oversight of administrative agencies.²¹⁷ The Office of Information and Regulatory Affairs (OIRA) within the Office of Management and Budget provides executive branch oversight, reviewing proposed regulations and ensuring agency compliance with a president's larger policy agenda.²¹⁸ As for checks outside the political process, notice-and-comment requirements allow for popular participation in – and, thus, observance of – rulemaking procedures.²¹⁹ Oversight, then, is provided (albeit sometimes indirectly) by various legal and social structures.²²⁰

The norms animating these practices should also be relevant in individual rights cases involving agencies. Where some politically accountable entity maintains genuine oversight of agency actions, that agency action should have greater presumptive political authority than when there is minimal oversight, as is the case with some state agencies.²²¹ Similarly, when the relevant policy emanates from far down the agency chain-of-command, courts should examine whether agency superiors, including the legislative delegatee, have overseen the challenged policy.²²² This attention to internal agency hierarchy would help ensure accountability by requiring the agency head, who is sometimes directly answerable to the chief executive, to take part in important decisions.²²³ While such attention to executive control over agencies has

responding to alarms sounded by constituents, controlling agencies' financial resources, informally supervising agencies through various investigations, hearings, factfinding missions, and informal contacts with agency staff).

²¹⁶ STRAUSS, *supra* note 25, at 83.

²¹⁷ *Id.* at 85.

²¹⁸ See Rachel Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15, 31-37 (2010) (discussing oversight provided by OIRA).

²¹⁹ See, e.g., MASHAW, *supra* note 180, at 29-30.

²²⁰ One important exception would be some adjudications, where excessive political oversight and control would violate prohibitions against ex parte contacts. STRAUSS, *supra* note 25, at 273.

²²¹ See, e.g., Jack B. Weinstein, *Compensation for Mass Private Delicts: Evolving Roles of Administrative, Criminal, and Tort Law*, 2001 U. ILL. L. REV. 947, 977 n.127 ("New York state agencies enjoy less oversight than federal agencies.").

²²² Cf. David J. Barron & Elena Kagan, *Chevron's Nondelegation Doctrine*, 2001 SUP. CT. REV. 201, 201-02 (2001) (arguing *Chevron* deference should hinge on whether statutory delegates make interpretive decisions themselves or delegate such decisions).

²²³ See *id.* 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 the President's authority to remove Board members).

limitations,²²⁴ it promotes political accountability by establishing a link between the public and the bureaucracy.²²⁵

c. *Transparency*

Along similar lines, courts should consider the transparency of an agency's policy in assessing the agency's political authority. Governmental accountability is premised on popular monitoring of governmental activities; if the people cannot know what their government is doing, accountability is severely compromised.²²⁶ The risk of inadequate transparency is heightened in the agency setting, where officials are usually unelected and where the layers of bureaucracy and technical nature of the subject matter often shield a department's affairs from public scrutiny.²²⁷ Indeed, quite often the general public has little idea what agencies actually do.²²⁸ While this problem is probably impossible to eliminate, transparency allows the people and legislators to monitor agency action more carefully.

Various statutory requirements encourage administrative transparency. All federal and many state agencies must announce their intent to adopt a new rule in the Federal Register or state equivalent.²²⁹ Under the Government in Sunshine Act, the Federal Register must publish advance notice of the independent regulatory commissions' meetings, which must be public.²³⁰ Both state and federal agencies usually are subject to Freedom of Information Act

²²⁴ See, e.g., Bressman, *supra* note 24, at 503-15 (arguing that excessive attention to presidential control shortchanges problems of agency arbitrariness).

²²⁵ See Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2331-39 (2001) (arguing that presidential control model enhances agency accountability in various ways); Lawrence Lessig & Cass 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).

²²⁶ See ELY, *supra* note 188, 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 . . .").

²²⁷ 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.").

²²⁸ 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.").

²²⁹ See, e.g., 5 U.S.C. § 553(b) (2006) ("General notice of proposed rule making shall be published in the Federal Register . . ."); MICH. COMP. LAWS § 24.201 (2007) (providing for publication of "state agency rules, determinations, and other matters" in the Michigan register).

²³⁰ See 5 U.S.C. § 552b (2006).

requests requiring the disclosure of requested information.²³¹ And notice-and-comment rulemaking once again plays an important role, bringing the agency's decision making process into public view.²³²

Judicial review of agency action also contemplates that agency action should be transparent. As Professor Bressman has explained, the reasoned decision-making component of "hard look" review requires that an agency "reveal the factual and legal basis for its decision . . . in a common sense format, one that is accessible not only to judges but to members of Congress."²³³ In so doing, "hard look" review serves a monitoring purpose, requiring "agencies to filter information for ordinary consumption, minimizing informational asymmetries between administrator and legislator."²³⁴

Given that transparency and sunshine are generally important in our administrative structure, they should also be relevant to courts' deference determinations in individual rights cases involving administrative agencies.²³⁵ Secretive administrative practices deserve less presumptive deference than transparent ones. As with many of the factors discussed here, transparency exists on a continuum, and courts should therefore adjust the deference they provide agencies based on where on that continuum the challenged policy falls. Courts also should treat transparency, like the other factors, with common sense and flexibility. Secrecy may be desirable and therefore more justifiable in certain contexts, such as national security.²³⁶ But absent a compelling

²³¹ See *id.* § 552 (providing for agencies to make information public unless an exception applies); Electronic Freedom of Information Act Amendments of 1996, Pub L. No. 104-231, 110 Stat. 3049; 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" and making all orders, decisions, and opinions "available for public inspection").

²³² See 5 U.S.C. § 553; Lisa Schultz Bressman, *How Mead Has Muddled Judicial Review of Agency Action*, 58 VAND. L. REV. 1443, 1449 (2005) ("[N]otice-and-comment rulemaking best ensures the transparency, deliberation, and consistency that produce fair and reasonable laws."); Amanda Leiter, *Substance or Illusion? The Dangers of Imposing a Standing Threshold*, 97 GEO. L.J. 391, 415 (2009) (arguing that APA's notice-and-comment requirements "work to democratize agencies by increasing public involvement in the rulemaking process").

²³³ Lisa Schultz Bressman, *Procedures as Politics in Administrative Law*, 107 COLUM. L. REV. 1749, 1777, 1780 (2007).

²³⁴ *Id.*

²³⁵ 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, 756 (2004) (arguing that transparency is a "predicate for accountability").

²³⁶ It is no accident, for instance, that the "CIA is as free from administrative law constraints as a government agency can be." Michaels, *supra* note 185, at 806. It is beyond the scope of this Article to explore these concerns more thoroughly.

governmental interest in secrecy, courts should review more skeptically policies designed behind closed doors.

d. *The Problem of Elected Administrative Agents*

One factor complicating the political-authority inquiry is that some state and local administrative officials, such as attorneys general, treasurers, and regents for public universities, are themselves elected to office²³⁷ and therefore enjoy political legitimacy that many other administrative agents do not. When actions taken by these elected agents are at issue, some of the political-accountability considerations are less pressing. Legislative oversight, for instance, seems less necessary when the people themselves elect the responsible agent.²³⁸ Even elected officials' democratic legitimacy, however, should not be taken entirely for granted. State administrative officials are typically elected to perform a particular job, and if certain actions exceed that mandate, the democratic legitimacy for those actions weakens. Relatedly, true accountability requires some degree of transparency. Agents operating in secret cannot really claim to answer to the people. To this extent, elected state administrative agents presumably will score better than unelected agents on political accountability – but not necessarily.

2. Expertise

Whereas inquiries into political authority explore a weakness of administrative agencies, exploration of expertise gets at agencies' primary strength: their epistemic command of particular policy issues. Administrative agencies exist in large part to approach complicated problems with a specialized expertise that the legislature lacks.²³⁹ Agencies' structure and personnel reflect the significance of their purported expertise; most agencies have a small, politically-appointed leadership and a large, professional, expert staff.²⁴⁰ Expertise, then, is central to agencies' identity and *raison d'être*. As Professor Zipkin puts it, “[W]hy . . . allow agency action at all unless the agency is doing something that the legislature could not do itself?”²⁴¹

²³⁷ See, e.g., Christopher R. Berry & Jacob E. Gersen, *The Unbundled Executive*, 75 U. CHI. L. REV. 1385, 1399-1400 (2008) (explaining that most state and local governments provide for elections of many executive officials, including forty-three states who elect their attorneys general and thirty-eight states who elect their treasurers).

²³⁸ Cf. *id.* at 1394 (discussing the virtues of an “unbundled executive” in which executive officials elected to perform just one duty are more “electorally accountable than a single executive”).

²³⁹ See, e.g., MASHAW, *supra* note 180, at 19 (explaining that much of the impetus for the creation of administrative agencies is the desire for expert rather than lay or political judgment).

²⁴⁰ See STRAUSS, *supra* note 25, at 135 (describing agency staffs as “professional rather than political in character”).

²⁴¹ Saul Zipkin, *Administering Election Law*, 95 MARQ. L. REV. (forthcoming 2012)

Accordingly, deference to agency action in both the administrative and constitutional contexts is premised in substantial part on the agency's epistemic authority and its careful exercise of that authority.²⁴² But agencies sometimes lack expertise over matters before them or do not make use of the expertise they have. More careful inquiry into agency expertise is therefore needed.

a. *Epistemic Authority*

In deferring to the government in constitutional cases, courts often cite the government's superior epistemic authority, regardless of *who* within government is acting. Courts often assume that the political branches necessarily possess superior information, skills, and experience to evaluate relevant factual evidence and assess the given problem.²⁴³ This assumption is often correct when agencies act – but not always.²⁴⁴

Verification of agencies' epistemic authority is essential to the proper functioning of the administrative state. The Supreme Court itself has stated that an administrative agency has "an obligation to perform its responsibilities with some degree of expertise."²⁴⁵ Courts do not always verify epistemic authority, but their general focus on technocratic competence in administrative law cases demonstrates a commitment to expert-based decision making.²⁴⁶ "Arbitrary and capricious" review, in particular, is often a means for courts to examine whether the agency made its decision with sufficient expertise.²⁴⁷ Courts engaging in such review, then, consistently search "agency decisions to ensure they represent expert-driven, technocratic decisionmaking."²⁴⁸ Absent this expertise, agencies sometimes have no more facility with the facts than courts. Indeed, to the extent courts frequently deal with facts outside their area

(manuscript at 30) (on file with author).

²⁴² See Horwitz, *supra* note 11, at 1078.

²⁴³ See Daniel J. Solove, *The Darkest Domain: Deference, Judicial Review, and the Bill of Rights*, 84 IOWA L. REV. 941, 1003-09 (1999).

²⁴⁴ See Kagan, *supra* note 225, at 2354 ("[N]ot all agency action entails the application of expertise, even when the action properly should do so.").

²⁴⁵ *Hampton v. Mow Sun Wong*, 426 U.S. 88, 115 (1975).

²⁴⁶ See Watts, *supra* note 194, at 15-29 (discussing the judiciary's search for agencies' technocratic expertise).

²⁴⁷ See 5 U.S.C. § 706(2)(A), (E)-(F) (2006) (allowing courts to set aside agency action unsupported by substantial evidence or unwarranted by facts); *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (discussing judicial inquiry of agency action); Reuel E. Schiller, *The Era of Deference: Courts, Expertise, and the Emergence of New Deal Administrative Law*, 106 MICH. L. REV. 399, 419-21 (2007) (justifying deference on the basis of the agency's technical expertise).

²⁴⁸ Watts, *supra* note 194, at 19.

of expertise, they may be better than agencies at understanding complicated areas to which they previously have been unexposed.²⁴⁹

Interestingly, epistemic shortcomings are not wholly disconnected from democratic failings. Delegation without expertise lacks the implicit democratic support that other delegations enjoy; in an era of a pervasive administrative state, the general public assumes that legislatures should delegate to experts.²⁵⁰ Thus, as Professor Mashaw states, “Administrative legitimacy flows primarily from a belief in the specialized knowledge that administrative decisionmakers can bring to bear on critical policy choices.”²⁵¹

Attention to epistemic authority could also help courts distinguish more consistently between an agency’s factual determinations and its application of law to fact. Courts often give agencies deference in both contexts,²⁵² but it is not clear that they should. Where a court confirms that an agency has genuine epistemic authority, deference to the agency’s factual determinations makes sense. However, when constitutional questions are at issue, deference to agency application of law to fact seems less appropriate. After all, unlike the *Chevron* context, in which Congress delegates authority to agencies to interpret the statutes they administer, agencies possess no special competency or authority over constitutional questions.²⁵³ Accordingly, agencies should receive more deference when they utilize their expertise to make factual findings (e.g., racial diversity improves educational experiences) than when they apply law to facts (e.g., using race as a plus-factor in admissions is sufficiently narrowly tailored to satisfy strict scrutiny). Greater judicial attention to agencies’ epistemic authority could help courts be more sensitive to these distinctions.

b. *Thoroughness*

Epistemic authority has little value if it is not put to good use. Agencies, therefore, must generally show not just that they understand the topic but that they have considered all the evidence from a variety of angles. This attention

²⁴⁹ Cf. *Daubert v. Merrell Dow Pharms., 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).

²⁵⁰ See LOUIS KAPLOW & STEVEN SHAVELL, *FAIRNESS VERSUS WELFARE* 400-01 (2002) (“[C]itizens often expect government officials to act based on superior, expert knowledge . . .”).

²⁵¹ Jerry Mashaw, *Reasoned Administration: The European Union, the United States, and the Project of Democratic Governance*, 76 GEO. WASH. L. REV. 99, 117 (2007).

²⁵² See, e.g., *NVE Inc. v. Dep’t of Health and Human Servs.*, 436 F.3d 182, 182 (3d Cir. 2006) (holding that the FDA’s factual determinations and applications of law were both entitled to deference); ALFRED C. AMAN, JR. & WILLIAM T. MAYTON, *ADMINISTRATIVE LAW* 463 (1993) (“[C]ourts generally defer to the result reached by the agency when it applies . . . law to the facts before it.”).

²⁵³ See *supra* notes 26-27 and accompanying text.

to thoroughness is a hallmark of administrative law. Indeed, “arbitrary and capricious” review often asks if agencies have made their decisions “based on a consideration of the relevant factors.”²⁵⁴ As the Court explained in *State Farm*:

[T]he agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made. In reviewing that explanation, we must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, 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.²⁵⁵

This inquiry, of course, characterizes “hard look” review, under which courts scrutinize carefully the procedure behind agency decisions. As Judge Leventhal described, “The function of the court is to assure that the agency has given reasoned consideration to all the material facts and issues.”²⁵⁶

Once again, these common staples of administrative law are relevant to constitutional decision making. To be sure, courts should not deem agency action unconstitutional merely because the agency could have analyzed the relevant facts with more care. But courts should also not defer to administrative agencies in individual rights cases on account of their epistemic authority without checking whether they made use of that expertise.

3. Arbitrariness, Procedural Regularity, and the Rule of Law

Arbitrariness also is a significant judicial concern when administrative agencies exercise power.²⁵⁷ The term “arbitrary” is familiar in administrative law because of the APA’s provision instructing courts to “hold unlawful and set aside agency action, findings and conclusions found to be . . . arbitrary [and] capricious.”²⁵⁸ The term is rarely defined with precision,²⁵⁹ but arbitrariness often encompasses a failure to adhere to standard administrative

²⁵⁴ *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971).

²⁵⁵ *Motor Vehicles Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (citations omitted) (internal quotation marks omitted).

²⁵⁶ *Greater Bos. Television Corp. v. FCC*, 444 F.2d 841, 851 (D.C. Cir. 1970).

²⁵⁷ See Bressman, *supra* note 24, at 462-63 (arguing that administrative law scholars should focus more on problems of arbitrariness).

²⁵⁸ 5 U.S.C. § 706(2)(A) (2006).

²⁵⁹ See R. George Wright, *Arbitrariness: Why the Most Important Idea in Administrative Law Can’t Be Defined, and What This Means for the Law in General*, 44 U. RICH. L. REV. 839, 839 (2010) (“What arbitrariness means . . . is surprisingly elusive.”).

procedures.²⁶⁰ This section addresses this facet of arbitrariness – a concern that agencies adhere to the rule of law by following well-established procedures.²⁶¹

Agency arbitrariness can be dangerous not just because it results in bad policy but also because it enables agencies to intrude on individual rights.²⁶² By creating administrative agencies – and thus disrupting the original constitutional structure of government – Congress increased the potential for governmental intrusion in individual rights.²⁶³ Relatively formalized procedures and clear explanations of agency action serve to check vast administrative discretion and make it more difficult for agencies to encroach on liberties. A politically accountable, expert agency still does not deserve complete deference if its institutional practices are shoddy and it capriciously takes actions that impinge on individual rights without following commonly accepted procedures.²⁶⁴ The administrative law norms considered here, then, derive from “a constitutional theory that understood the aim of constitutional structure as the protection of individual liberty from arbitrary governmental intrusions.”²⁶⁵

a. *Formalized Procedures*

One method of checking agency arbitrariness is to consider whether an agency, acting either by rulemaking or adjudication, utilized commonly accepted, formalized procedures. Such an inquiry is particularly straight forward in the rulemaking context, where notice-and-comment rulemaking procedures are the norm.²⁶⁶ Though notice-and-comment rulemaking cannot guarantee the resulting policy’s constitutionality, it tends to further both

²⁶⁰ In focusing on such procedural, rule-of-law considerations, I do not suggest that “arbitrariness” may not also be defined to encompass other issues.

²⁶¹ Given this definition, problems of arbitrariness may be more likely to arise in agency adjudications, since agency rulemakings frequently follow notice-and-comment procedures, which force agencies to abide by certain procedures, respond to comments from outsiders, and explain their decisions. That said, the lethal injection procedure and affirmative action plan discussed above seem to be rules developed outside typical rulemaking procedures.

²⁶² Stewart, *supra* note 29, at 1680 (discussing checks on agencies that “promote formal justice in order to protect private autonomy”).

²⁶³ Bressman, *supra* note 24, at 467.

²⁶⁴ To be clear, the agency action may still be constitutional if there is no violation of a substantive constitutional right, but the procedural shortcomings should somewhat diminish the deference courts owe the agency on institutional grounds. *See id.*; *infra* Part II.C.1.

²⁶⁵ Bressman, *supra* note 24, at 470.

²⁶⁶ Notice-and-comment rulemaking is actually categorized by the APA as “informal rulemaking,” but its procedures are nonetheless relatively formalized. *See* 5 U.S.C. § 553(c) (2006); RICHARD J. PIERCE, JR., *ADMINISTRATIVE LAW AND PROCESS* 327 (2009) (distinguishing between “informal” notice-and-comment rulemaking and “formal” rulemaking, which includes adjudicatory procedures).

accountability and the rule of law by inviting interested parties to participate in the rulemaking process.²⁶⁷

The Supreme Court has recognized that agencies deserve greater deference when employing formalized procedures. As *United States v. Mead*²⁶⁸ observed, policies resulting from such formalized procedures tend “to foster the fairness and deliberation that should underlie a pronouncement”²⁶⁹ with force of law and therefore help reinforce rule-of-law values. *Mead* reasoned that more formalized procedures help produce greater predictability and discipline in agency decision making and are therefore more deserving of *Chevron* deference.²⁷⁰

In light of these principles, agencies should receive less deference in the individual rights context when they operate outside commonly accepted procedures. Of course, there are a wide range of acceptable procedures,²⁷¹ and some less formal procedures may still be sufficient to deserve deference in some contexts.²⁷² But administrative injustice probably most frequently occurs where few formalized procedural requirements constrain administrative discretion.²⁷³ Indeed, because agency decisions outside normal procedures often escape extra-agency oversight and the ambit of the APA, challenges to such policies’ constitutionality may be the only time a competent governmental official will review the legality of the policy.²⁷⁴ Such judicial review is therefore essential to a properly functioning democracy.²⁷⁵ Of course, procedurally suspect agency action may still sometimes pass constitutional muster; a regulation may be sloppily adopted without infringing upon any individual right. But courts should not blindly equate agency action

²⁶⁷ See Bressman, *supra* note 24, at 541-42 (“Notice-and-comment rulemaking, by its nature, facilitates the participation of affected parties, the submission of relevant information, and the prospective application of resulting policy.”); Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1511, 1515 (1992) (arguing that a model of civic republicanism provides an essential justification for the bureaucratic state because of the opportunities it provides for citizen participation in government).

²⁶⁸ 533 U.S. 218 (2001).

²⁶⁹ *Id.* at 230.

²⁷⁰ See *id.*; Barron & Kagan, *supra* note 222, at 225-26 (explaining how *Mead* rewards more formal decision making).

²⁷¹ Bressman, *supra* note 24, at 541.

²⁷² See, e.g., STEPHEN G. BREYER ET AL., ADMINISTRATIVE LAW AND REGULATORY POLICY: PROBLEMS, TEXT, AND CASES 494 (6th ed. 2006) (commenting that informal adjudications have no particular procedural requirements).

²⁷³ DAVIS, *supra* note 13, at v.

²⁷⁴ See *id.* at vi (stating that 80-90% of informal agency actions escape judicial review).

²⁷⁵ See Raoul Berger, *Administrative Arbitrariness and Judicial Review*, 65 COLUM. L. REV. 55, 57 & n.11 (1965) (quoting Justice Jackson as stating that “[t]o stand between the individual and arbitrary action by the Government is the highest function of [the Supreme] Court”).

that complies with accepted formalized procedures with agency action that does not.

b. *Reasoned Explanation*

Administrative law also helps reinforce the rule of law by requiring agencies to give reasoned explanations for their actions.²⁷⁶ This requirement serves interrelated goals. First, it facilitates judicial review of agency action by making clear precisely what the agency did and why. Second, the prospect of judicial review provides incentives for agencies to act carefully to avoid the “arbitrary and capricious” label.²⁷⁷ Third, the process of articulating a rationale itself can independently force officials to think through their actions more carefully, independent of the incentives provided by an external judicial check.²⁷⁸ Fourth, the requirement helps reinforce political controls by educating the legislature, chief executive, and general public of the agency’s actions.²⁷⁹ Fifth, because “an administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its actions can be sustained,”²⁸⁰ agencies must justify their actions in terms of the initial statutory delegation, thus reinforcing their own democratic legitimacy.²⁸¹ Finally, a reasoned explanation requirement can also help courts determine whether an agency has taken proper account of constitutional norms.²⁸² Where the agency apparently has failed to consider constitutional norms, presumptive judicial deference in a constitutional case would be inappropriate.²⁸³

²⁷⁶ See *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (“[An] agency must . . . articulate a satisfactory explanation for its action . . .”).

²⁷⁷ See Todd S. Aagaard, *Factual Premises of Statutory Interpretation in Agency Review Cases*, 77 GEO. WASH. L. REV. 366, 402 (2009) (explaining that agencies are cognizant that the prospect of judicial review looms over agency rulemaking decisions).

²⁷⁸ See Mark Seidenfeld, *Cognitive Loafing, Social Conformity, and Judicial Review of Agency Rulemaking*, 87 CORNELL L. REV. 486, 508-22 (2002) (describing accountability and other factors as enhancing the caliber of agency decision making); Glen Staszewski, *Rejecting the Myth of Popular Sovereignty and Applying an Agency Model to Direct Democracy*, 56 VAND. L. REV. 395, 443 (2003) (“The net result of APA procedures and hard look judicial review under *State Farm* is to encourage and enforce republican ideals of deliberation and reasoned decisionmaking in the administrative lawmaking process.” (internal quotation marks omitted)).

²⁷⁹ See Metzger, *supra* note 24, at 492.

²⁸⁰ *SEC v. Chenery Corp.*, 318 U.S. 80, 95 (1943).

²⁸¹ See Kevin M. Stack, *The Constitutional Foundations of Chenery*, 116 YALE L.J. 952, 958 (2007).

²⁸² See Bressman, *supra* note 24, at 474 (arguing that courts should and do prod “agencies to exercise their judgments in ways that recognized and safeguarded individual rights”).

²⁸³ Because agencies lack any special competence to interpret the Constitution, courts should not defer excessively to an agency’s constitutional judgments, even where the

Once again, this factor should also be relevant in constitutional cases. Where agencies threaten individual rights and are unable to provide a cogent explanation of their actions, courts should be stingier in affording deference. Of course, the extent to which courts expect a thorough explanation may depend on the nature of the issue and agency. Some factors, such as national security, might sometimes militate for less complete public explanations. In other words, like the other factors discussed here, courts should apply this factor with flexibility and common sense, but agencies generally deserve less deference when they fail to explain clearly what they have done and why.

In sum, the factors discussed here are not exclusive, and some may prove less relevant in certain cases. Collectively, though, they help provide a sense of whether an agency deserves the broad discretion that results from judicial deference.

C. *The Factors' Place in the Constitutional Analysis*

1. Administrative Law Norms in Deference Determinations

Having laid out the factors courts should consider, I now explain more precisely those factors' role in the constitutional analysis. Administrative factors under my theory speak primarily to the deference owed to governmental agencies due to institutional concerns. The factors thus inform judicial restraint based on concerns about courts' institutional role relative to the other relevant governmental actors, as opposed to restraint informed by substantive constitutional issues (e.g., race discrimination).²⁸⁴ This deference determination is complicated by the fact that it is often conducted in conjunction with a level of scrutiny (i.e., rational basis, intermediate scrutiny, or strict scrutiny), which is triggered by substantive doctrinal factors. In other words, when courts determine how rigorously to review a governmental policy, they (often silently) select a level of deference based on institutional concerns and (usually more explicitly) sometimes also apply a level of scrutiny triggered by the substantive constitutional issue.

Given that deference rests on institutional concerns, courts should actually examine the institutions at issue before making such determinations. Under my theory, courts would use the administrative law factors to examine the agency.²⁸⁵ The degree of deference would lie on a sliding scale, hinging on the agency's compliance with the factors discussed here. Of course, such

agency has considered constitutional norms.

²⁸⁴ See Adler, *supra* note 30, at 773-74 (distinguishing between an "analytic" argument for upholding an anti-abortion law, such as the fetus's moral right to life, and an "institutional" argument for upholding such a law, such as legislatures' epistemic superiority).

²⁸⁵ Litigants under this theory would also likely call more attention to agency behavior. While this new attention might increase discovery costs somewhat, it would also shine valuable light on some agencies' internal operations.

determinations should not be made mechanically without reference to context, but, in general, the greater the agency's compliance, the more deference the agency deserves.²⁸⁶

Once the Court determines the degree of deference, it should then use that level of deference as a lens through which to conduct the substantive doctrinal inquiry. This lens may influence the Court's view of the importance of the governmental interest, the necessity of the challenged policy to the achievement of that interest, and, more generally, the overall strength of the government's case. For example, in an intermediate scrutiny case, the administrative factors would help determine how readily the Court should defer to the agency's assertion that a particular interest was important and that the challenged policy was sufficiently narrowly tailored to achieve that interest.

The deference determination, then, will never be the sole constitutional inquiry. It should help courts – especially lower courts, which do most of our agency-monitoring²⁸⁷ – determine their willingness to grant the government discretion, but it will not by itself dictate the outcome. Laudable democratic pedigree would not save the constitutionality of racial segregation,²⁸⁸ and atrocious adherence to administrative law norms, similarly, would not render unconstitutional an execution procedure posing no risk of pain.²⁸⁹ That being said, the deference determination should help shape the way courts engage in the substantive inquiry, either by determining how the level of scrutiny is applied or by creating a general presumption for or against the government.²⁹⁰

²⁸⁶ Cf. William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 GEO. L.J. 1083, 1181 (2008) (providing a roadmap for deference to agencies in administrative law cases based on the outcome of multiple inquiries).

²⁸⁷ *Id.* at 1183.

²⁸⁸ See, e.g., *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (holding unconstitutional an anti-miscegenation statute).

²⁸⁹ See *Baze v. Rees*, 553 U.S. 35, 52 (2008) (plurality opinion) (requiring a “substantial risk of severe” pain for an Eighth Amendment violation).

²⁹⁰ A potential alternative to protect some of the values discussed here would be through non-delegation canons, under which the relevant statute would be interpreted so as not to delegate authority to agencies to take the challenged actions. See *supra* notes 172-174, 204-208 and accompanying text. However, many of the cases discussed here are brought as constitutional challenges, not challenges to the scope of an agency's authority. Moreover, non-delegation canons would likely be most relevant where the administrative shortcoming involved the scope of the delegation. Presumably, it would be more difficult – and less appropriate – to invoke a non-delegation canon where the statutory delegation was clear but the agency allegedly infringing on individual rights acted without expertise or standard procedures. Of course, if the agency *did* lack the delegated authority to take the action in question, the action would be invalid, and the constitutional question would be moot. See *supra* note 211.

Thus, even though the deference determination should not be the sole constitutional inquiry, in some cases it may significantly affect the outcome.²⁹¹

Of course, a criticism of my approach is that deference is notoriously difficult to calibrate appropriately. Many critics, for instance, question whether *Chevron* in practice actually invites a range of approaches only loosely tethered to the Supreme Court's formulation.²⁹² Recent empirical and political science scholarship further argues that judges in administrative law cases are often guided not by the rule of law but rather by their ideological preferences, suggesting that the factors I identify play less of a role than judges and some law professors would like to think.²⁹³ From this perspective, my proposal may do little to add clarity and rigor to judicial deference determinations.

These concerns are legitimate, but, whatever their institutional limitations, courts make deference determinations in constitutional cases anyway.²⁹⁴ Attention to the norms examined here will likely make those determinations more careful, principled, and nuanced. There likely will be some abuses and inconsistencies, as there always may be when courts apply multi-factor tests. On the whole, though, judicial attention to these factors should be an improvement over courts' current haphazard, ad hoc approach.

In addition to improving the status quo, my approach is also preferable to more extreme alternatives. One such extreme would be always to defer to the agency in constitutional cases. Doing so, however, would effectively cede constitutional meaning to administrative officials. Given that these officials enjoy neither the expertise nor the mandate to determine constitutional meaning, this result would be untenable.²⁹⁵ Another extreme – independent judicial review of all agency action – would be unsettling insofar as it strays far from current practices in which courts usually do afford agencies some

²⁹¹ See Solove, *supra* note 243, at 953 (“The practice of deference has drastic effects on the outcomes of cases . . .”).

²⁹² See, e.g., Jacob E. Gersen & Adrian Vermeule, *Chevron as a Voting Rule*, 116 YALE L.J. 676, 679 (2007) (“Doctrinally, there are many ambiguities and uncertainties about the nature of the inquiry at the first and second steps of *Chevron* . . .”); David Zaring, *Reasonable Agencies*, 96 VA. L. REV. 135, 137 (2010) (arguing that outcomes in administrative law cases do not turn on *Chevron* or the other rules as articulated by courts).

²⁹³ See, e.g., JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* 7-12 (2002) (arguing that Supreme Court Justices often vote in accordance with their preferred policy outcomes); Gersen & Vermeule, *supra* note 292, at 679 (“[R]ecent evidence suggests that *Chevron*’s effect varies markedly with the ideological and political preferences of the judges who apply it.”); Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of Chevron*, 73 U. CHI. L. REV. 823, 825-26 (2006); Connor N. Raso & William N. Eskridge, Jr., *Chevron as Canon, Not a Precedent: An Empirical Study of What Motivates Justices in Agency Deference Cases*, 110 COLUM. L. REV. 1727, 1784 (2010).

²⁹⁴ See *supra* Part I.

²⁹⁵ See *supra* note 33 and accompanying text.

measure of deference. Moreover, given that some agencies do enjoy genuine political and epistemic authority, independent judicial review may intrude too much on agencies' policymaking prerogative. While courts certainly should not cede the meaning of the Constitution to administrative agencies, they also must recognize their own institutional limitations relative to those agencies.

Ultimately, a more nuanced middle ground is preferable. Even if deference is impossible to calibrate perfectly, courts can greatly improve their current practices by focusing on the factors identified here, which speak directly to whether the agency has acted in a manner deserving respect. Furthermore, the very process of engaging in these inquiries can help courts recognize and steer away from their ideological leanings, thus improving their own institutional legitimacy. Judges might often vote in accordance with their own normative leanings, but probably most of them sincerely believe themselves to be following the rule of law.²⁹⁶ To this extent, inquiries that focus judges' deference determinations on certain factors may actually help mitigate the role of ideology in their decisions.²⁹⁷

2. Applications to State Agency Policies

This analysis should apply to deference determinations in cases involving both federal and state agency action. It is admittedly more controversial to apply my theory to state administrative action. States are not bound by either federal separation-of-powers doctrine or the federal Administrative Procedure Act, and federal courts since *Erie Railroad Co. v. Tompkins*²⁹⁸ usually do not look to see how state law was created.²⁹⁹ There are therefore reasons to think that federalism principles might militate for different approaches where state agency action is at issue. Nevertheless, while federal courts could not rule that a state agency lacked the requisite authority under state law to take particular action,³⁰⁰ they should still be able to consider administrative law factors in determining the deference due to a state agency subject to federal constitutional challenge.

²⁹⁶ See, e.g., Raso & Eskridge, *supra* note 293, at 1797 (believing the Justices' differences of opinion regarding *Chevron's* domain to be "sincere").

²⁹⁷ See *infra* Part III.B.

²⁹⁸ 304 U.S. 64 (1938).

²⁹⁹ See, e.g., *Bush v. Gore*, 531 U.S. 98, 112 (2000) (Rehnquist, J., concurring) ("[I]n ordinary cases, the distribution of powers among the branches of a State's government raises no questions of federal constitutional law."); *Parcell v. Kansas*, 468 F. Supp. 1274, 1277 (D. Kan. 1979) ("How power shall be distributed among its governmental organs is commonly, if not always, a question for the state itself.").

³⁰⁰ See *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 106 (1984) ("[I]t is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law.").

Significantly, the Due Process Clause of the Fourteenth Amendment applies most protections of the Bill of Rights against the states.³⁰¹ The power of federal courts to invalidate state laws burdening many federal constitutional rights, then, cannot seriously be questioned. It would therefore be strange for federalism principles to forbid judicial examination of how states erected policies allegedly infringing on those rights, especially when those state practices themselves threaten them. Indeed, due process principles should allow federal courts to examine procedures increasing the likelihood that state agents will violate individual rights, even though they could not invalidate the delegation to those state agents.³⁰² The free speech licensing cases followed this reasoning, recognizing that judicial examination of how state or municipal agencies operated was essential because inadequate administrative procedures exacerbated the risk of constitutional violation.³⁰³ As Professor Monaghan explains, to protect constitutional rights, “courts must thoroughly evaluate every aspect of the procedural system which protects those rights.”³⁰⁴

Indeed, far from being irrelevant to state administrative action, my theory should resonate especially strongly there. Though many states borrowed from the federal APA in designing their own administrative law systems,³⁰⁵ state administrative law sometimes lacks the rigor and formality of the federal APA.³⁰⁶ Moreover, state administrative law sometimes exempts important agencies from its ambit.³⁰⁷ Consequently, some state agencies escape meaningful oversight – sometimes by design, sometimes by accident. While procedural shortcomings are not unconstitutional by themselves, agencies may

³⁰¹ *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3034 (2010).

³⁰² *Cf. Berger*, *supra* note 275, at 88-89 (arguing that judicial review to insure protection against official action is a “matter of right” stemming from “1) the implications of the delegation of powers; 2) due process; and 3) the creation of the courts for the purpose, among others, of protecting the people from governmental excesses”).

³⁰³ *See Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 153 (1969) (“[A] municipality may not empower its licensing officials to roam essentially at will, dispensing or withholding permission to speak . . . according to their own opinions.”); *Freedman v. Maryland* 380 U.S. 51, 57 (1965) (faulting a censorship scheme for lacking “sufficient safeguards for confining the censor’s action to judicially determined constitutional limits”); Monaghan, *supra* note 33, at 524-25 (“[N]o procedure is valid which leaves the protected character of speech to the final determination of an administrative agency . . .”).

³⁰⁴ Monaghan, *supra* note 33, at 551; *cf. Crowell v. Benson*, 285 U.S. 22, 87 (1932) (Brandeis, J., dissenting) (“[U]nder certain circumstances, the constitutional requirement of due process is a requirement of judicial process.”).

³⁰⁵ Arthur Earl Bonfield, *The Federal APA and State Administrative Law*, 72 VA. L. Rev. 297, 297 (1986).

³⁰⁶ *See, e.g., JOHN H. REESE, ADMINISTRATIVE LAW: PRINCIPLES AND PRACTICE* 221 (1995) (indicating that in survey of some state APAs, no state “has rulemaking provisions that approach the formality of the federal APA”); *id.* at 260 (indicating that most states surveyed “do not specify that such [adjudication] procedures be ‘on the record’”).

³⁰⁷ *See supra* notes 185, 221 and accompanying text.

be less likely to consider constitutional norms carefully when they operate outside more formalized procedures. To this extent, some state agencies might pose heightened risk to individual rights.

From this perspective, the theory here is especially necessary in the state sphere because constitutional challenges sometimes may be the only practical option to protect individuals from overreaching agencies. It is not coincidental that many of the examples discussed here – *Baze*, *Turner*, *Grutter*, and the free speech licensing cases – address state agencies that, largely left to their own devices, designed or implemented policies raising serious constitutional concerns. To be clear, the proposal here would not permit federal courts to supplement state administrative law requirements.³⁰⁸ But courts already often make deference determinations in constitutional cases involving states. This implicit power to determine when deference is merited, coupled with due process norms through which courts can protect constitutional individual rights, should allow federal courts to inquire into the nature of state agency actions that pose heightened risk of constitutional violation.

D. *Contextual Nuances*

1. Contextual Limitations

The theory proposed here should be applied flexibly, with attention to context and the terrific variety of administrative action.³⁰⁹ Administrative law norms have been undervalued in individual rights cases involving administrative agencies, but some factors may have greater force than others in particular circumstances. For example, certain administrative agents, such as police, must make quick, on-the-spot decisions that preclude issuing simultaneous reasoned explanations. Other agencies, such as the U.S. Customs and Border Protection, must make certain determinations thousands of times annually, so it would be impractical to require for each decision the same kind of rigorous procedures expected of an agency issuing an important rulemaking.³¹⁰ Still other agencies like the military might want to insulate particular decisions from democratic scrutiny for national security reasons. While all these actions certainly should be subject to constitutional challenge, it would be unrealistic and foolish to expect these agents always to comply with the rigorous procedures we typically expect of agencies promulgating more ordinary rules.

In short, the factors here should be applied with common sense. If particular agencies have compelling reasons for not adhering to particular norms in

³⁰⁸ State courts making deference determinations in cases challenging the constitutionality of state agency action, of course, could draw on state administrative law requirements in determining the level of deference to grant the state agency.

³⁰⁹ See *United States v. Mead Corp.*, 533 U.S. 218, 236 (2001).

³¹⁰ See, e.g., *id.* at 233 (stating that forty-six different Customs offices issue 10,000 to 15,000 classifications each year).

particular contexts, courts should not thoughtlessly relax deference for failure to comply. Lower courts, in fact, sometimes may fashion their procedures to account for unique governmental interests while still remaining sensitive to individual rights. Trial courts, for instance, could permit the military to make *in camera* showings that certain challenged policies should not be public. In other words, the theory proposed here should be applied to strike a sensible balance between rights and discretion.

2. When Accountability and Expertise Collide

Courts should also be aware that factors might sometimes collide. When most or all of the administrative factors point in the same direction, determining the level of deference accorded to an agency will be relatively straightforward. The difficult deference determinations will be when the factors point in different directions, such as when an agency acts with political accountability or expertise but not both. For example, sometimes the White House puts political pressure on administrative agencies to adopt a particular policy, even if the technical evidence might point towards a different policy.³¹¹ In such instances, the agency's political accountability might actually interfere with its ability to make use of its expertise.³¹²

State Farm can be understood in these terms. The National Highway Traffic Safety Administration's (NHTSA) rescission of a rule requiring automatic restraints in automobiles clearly resulted from White House pressure.³¹³ As Professor Edley points out, politics's role here should not have surprised anyone; candidate Ronald Reagan had campaigned in 1980 on a deregulation platform and had specifically identified the automobile industry as over-regulated.³¹⁴ The NHTSA's rescission of the rule, then, was not based on evaluation of technical evidence regarding safety but rather was "all but ordained by the election results."³¹⁵ In *State Farm*, the Court ordered that the

³¹¹ See, e.g., *Tummino v. Torti*, 603 F. Supp. 2d 519, 544 (E.D.N.Y. 2009) (finding that the FDA's decision to make Plan B contraception available only to women over seventeen emanated from White House pressure and lacked usual, good faith agency procedures); Jody Freeman & Adrian Vermeule, *Massachusetts v. EPA: From Politics to Expertise*, 2007 SUP. CT. REV. 51, 55 (discussing "accounts . . . [that] as *MA v EPA* moved through the courts the [Bush] administration had been altering scientific reports, silencing its own experts, and suppressing scientific information that was politically inconvenient").

³¹² See, e.g., *Watts*, *supra* note 194, at 11-12 (describing the "political zigzagging" during the Bush and Obama administrations that resulted in numerous changes of direction on motor vehicle emissions).

³¹³ See *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 59 (1983) (Rehnquist, J. concurring) (ascribing the agency's altered standard to the election of President Ronald Reagan in 1980).

³¹⁴ See CHRISTOPHER F. EDLEY, JR., *ADMINISTRATIVE LAW: RETHINKING JUDICIAL CONTROL OF BUREAUCRACY* 64 (1990).

³¹⁵ *Id.* at 65.

matter be remanded to the NHTSA, in significant part because the agency had failed to give adequate explanation for rescinding the rule.³¹⁶ But while the outcome in *State Farm* is certainly defensible,³¹⁷ the Court did not resolve the larger question of how courts should approach agency decisions relying on political pressure rather than expert analysis.³¹⁸

Just as expertise may be compromised for political reasons, Congress sometimes insulates agencies from politics so that they can exercise their expertise without external pressure. For example, Congress deliberately structured the Federal Reserve to limit its political accountability, and many observers believe that such political insulation likely improves monetary policy.³¹⁹ Insulation of agencies, however, can also be pernicious. Sometimes legislatures protect agencies from oversight to conceal practices reflecting poorly on governmental officials. The story of lethal injection, for example, includes some state governments' efforts to hide serious problems with the procedures they designed.³²⁰ A difficult question, then, is how to treat delegations where the legislature deliberately insulates the agency from not just political pressure but also from administrative law more generally.

While it would be difficult to devise a systematic judicial approach to these issues, the decision to insulate particular policy from democratic review deserves less deference when it is motivated not by genuine policy concerns but rather by a desire to conceal governmental incompetence or malfeasance.³²¹ To this extent, courts should consider whether certain agency

³¹⁶ *State Farm*, 463 U.S. at 57 (“[I]t is the agency’s responsibility, not this Court’s, to explain its decision.”).

³¹⁷ See *id.* at 50 (rejecting the agency’s “*post hoc* rationalizations for agency action”); Stack, *supra* note 281, at 963 (discussing *State Farm* in light of *Chenery*’s rule that courts upholding agency decisions must do so in terms used by the agency itself).

³¹⁸ See Watts, *supra* note 194, at 33-39 (calling for greater coherence to administrative law’s vacillation between expertise and politics).

³¹⁹ See, e.g., Richard H. Fallon, Jr., *The Core of an Uneasy Case for Judicial Review*, 121 HARV. L. REV. 1693, 1717 (2008) (“[M]ost of us do not think it unfair to put control of interest rates and the money supply in the hands of an independent Federal Reserve Board . . .”). Of course, agency decision making can never be wholly immune from politics, see Barkow, *supra* note 218, at 23, and politics can affect even an independent agency like the Federal Reserve, whose Chairman is nominated by the President and confirmed by the Senate. See 12 U.S.C. § 241 (2006). Moreover, to the extent that Congress’s decision to limit the Federal Reserve’s political accountability arose from a democratic process, that decision was itself a political result. See Barkow, *supra* note 218, at 19 (“The main aim in creating an independent agency is to immunize it, to some extent, from political pressure.”).

³²⁰ See, e.g., Denno, *supra* note 41, at 116-18 (discussing “missing information” about states’ lethal injection protocols).

³²¹ See, e.g., Watts, *supra* note 194, at 56 (arguing that courts should be unwilling to view political arguments as rational considerations when they are driven by raw politics but should be more willing to accept political influences implementing “policy concerns and public values” tied to the statutory scheme).

responses to political pressures are more justifiable, such as when agencies try to implement public values.³²² Admittedly, it is not easy for courts always to distinguish political insulation driven by actual policy concerns rather than cynical politics. Courts, however, can sometimes distinguish public values from corruption or malfeasance and, in such cases, should do so.³²³ Nevertheless, because the level of deference under this theory exists on a sliding scale anyway, when the factors cut in different directions, the level of deference presumably would often be in the middle – neither especially rigorous nor especially forgiving. In such instances, the case’s outcome will more likely turn not on institutional issues but on the substantive constitutional inquiry.

III. APPLICATIONS, ADVANTAGES, AND IMPLICATIONS

A. *Applications*

1. Deference Revisited

The theory proposed here would have a significant effect on the analysis in cases in which the Court downplayed administrative law norms and ignored agency shortcomings. Consequently, while the application differs in each context, the theory here may often result in less deference to the agency than the Court’s current approach.

a. *Baze*

Attention to ordinary administrative law norms calls into serious question the deferential approach in *Baze*, which explicitly deferred to the Kentucky legislature’s execution procedure.³²⁴ Far from “implementing” the execution procedure, as the *Baze* plurality claimed, the Kentucky legislature had virtually nothing to do with it. Greater attention to the constitutional “who” would have helped avoid this inaccurate conflation.

Greater attention to the constitutional “how” would also have pointed against deference. With regards to the agency’s democratic legitimacy, the Kentucky legislature provided minimal guidance to the Department of Corrections (DOC), specifying neither the drugs nor the details of drug administration.³²⁵ Nor was there evidence that the legislative delegatee – the

³²² See Eskridge & Baer, *supra* note 286, at 1180 (arguing that judicial deference to agencies should turn in part on whether the agency acts consistent with larger public norms).

³²³ See Watts, *supra* note 194, at 9 (proposing that courts should accept political influences that “seek to further policy considerations or public values” but reject political influences that represent “partisan politics unconnected in any way to the statutory scheme being implemented”).

³²⁴ *Baze v. Rees*, 553 U.S. 35, 51 (2008) (plurality opinion).

³²⁵ See KY. REV. STAT. ANN. § 431.220(1)(a) (West 2006) (“[E]very death sentence shall be executed by continuous intravenous injection of a substance or combination of

DOC director – designed, implemented, or oversaw the procedure.³²⁶ To the contrary, DOC directors typically delegate the matter to prison officials, who then delegate it to prison guards and independent contractors.³²⁷

Moreover, Kentucky, like most states, kept secret its execution protocols from both the public and the condemned inmates.³²⁸ While states certainly have a legitimate interest in concealing the identity of their execution team members, their refusal to disclose information like drug doses, monitoring practices, and contingency plans merely hides the fact that execution procedures have been poorly designed.³²⁹ Thus, the responsible officials hardly enjoyed the kind of political accountability justifying deference.

Those officials also lacked the expertise we usually assume administrative agencies possess. Many team members responsible for executions lacked basic understanding of the drugs and their risks.³³⁰ Remarkably, though, the Justices largely missed this issue. Of the seven separate opinions in *Baze*, only Justice Stevens's concurrence, which no one else joined, addressed this problem, emphasizing that state officials "with no specialized medical knowledge and without the benefit of expert assistance or guidance" do not deserve "the kind of deference afforded legislative decisions."³³¹

As for rule-of-law concerns, Kentucky did not adopt its lethal injection procedures through formalized administrative procedures.³³² To the contrary,

substances sufficient to cause death."); *Baze v. Rees*, No. 04-1094, 2005 WL 5797977, at *3 (Cir. Ct. Ky. July 8, 2005) ("[P]ersons assigned the initial task of drafting the Commonwealth of Kentucky's first lethal injection protocol were provided with little to no guidance on drafting a lethal injection protocol[.]").

³²⁶ See *Baze v. Rees*, No. 04-1094, 2005 WL 5797977, at *5 ("Those persons who developed Kentucky's lethal injection protocol were apparently given the task without the benefit of scientific aid or policy oversight . . .").

³²⁷ In most states with developed records, the legislature remains disconnected from the creation and implementation of lethal injection procedures. To the extent the Kentucky record is silent on these matters, the Court should have remanded for more facts rather than assume these matters in the State's favor. See *Baze*, 553 U.S. at 114 (Ginsburg, J., dissenting) (arguing for remand); Berger, *supra* note 41, at 261, 303 (discussing gaps in Kentucky's record).

³²⁸ See *Baze*, 553 U.S. at 120 n.5 (Ginsburg, J., dissenting); Deborah W. Denno, *The Lethal Injection Quandary: How Medicine Has Dismantled the Death Penalty*, 76 FORDHAM L. REV. 49, 95 (2007) ("States never have been forthcoming about how they perform lethal injections.").

³²⁹ Berger, *supra* note 41, at 304-06.

³³⁰ See, e.g., *id.* at 268-70 (discussing problem of unqualified personnel in lethal injection procedures).

³³¹ *Baze*, 553 U.S. at 75 (Stevens, J., concurring). Justice Stevens was also the author of *Hampton v. Mow Sun Wong*, 426 U.S. 88 (1976), suggesting that he may have been more attentive to these concerns than other Justices.

³³² *Baze*, 553 U.S. at 75 (describing Kentucky and other states' development of lethal injection as a "stereotyped reaction to an issue, rather than a careful analysis of relevant

like many other states, Kentucky designed its lethal injection procedures in secret without the benefit of outside input that accompanies more formal procedures such as notice-and-comment rulemaking.³³³ The State also failed to justify the design it chose.

Had the plurality in *Baze* been accustomed to considering administrative norms in constitutional cases, it would have been less likely to ignore these shortcomings and offer blanket, unstudied deference to a state that had largely abdicated responsibility for its execution procedures.³³⁴ Perhaps the plaintiffs still would have lost for failure to present much evidence of danger, or perhaps federalism concerns might have militated for some deference.³³⁵ The holding, however, would not have rested on the canard that the challenged procedure represented the considered decision of the Kentucky legislature.

b. *Grutter*

Grutter also largely failed to engage rigorously with administrative norms that might have tempered or, alternatively, better justified the deference it offered. With regards to political accountability, the legislature played no role in the Law School's admissions policy. The Court did not address this lack of democratic pedigree, even though, as Professor Guinier has argued, "The task of constituting each class [at selective public universities] . . . implicates . . . the larger society's sense of itself as a democracy."³³⁶ *Bakke*, as we have already seen, expressed great concern that decisions so important to democracy and social mobility were left to administrative actors, but *Grutter* barely acknowledged the issue.³³⁷

Grutter also failed to account for the transparency of the admissions decisions. Indeed, somewhat surprisingly, the Court in *Grutter* deferred to the Law School's admissions policy, which concealed the precise role race played in admissions decisions, whereas in *Gratz* it struck down the undergraduate policy, which more candidly stipulated how many "points" race earned a candidate.³³⁸ The Court offered justifications for its approach,³³⁹ but it failed

considerations favoring or disfavoring a conclusion" (internal quotation marks omitted)).

³³³ See *Morales v. Cal. Dep't of Corr. & Rehab.*, 85 Cal. Rptr. 3d 724, 732-33 (Cal. Ct. App. 2008) (declaring the adoption of a lethal injection procedure invalid under California administrative law); *Evans v. Maryland*, 914 A.2d 25, 80-81 (Md. 2006) (same in Maryland); Berger, *supra* note 41, at 326.

³³⁴ See *Baze*, 553 U.S. at 51 (warning that judicial intervention would interfere with state expertise in lethal injection).

³³⁵ See Berger, *supra* note 41, at 279.

³³⁶ Guinier, *supra* note 61, at 135.

³³⁷ See *supra* Part I.A.2.

³³⁸ Compare *Grutter v. Bollinger*, 539 U.S. 306, 318-22 (2003) (summarizing complicated evidence regarding precisely how race figures into law school admissions), with *Gratz v. Bollinger*, 539 U.S. 244, 255 (2003) (explaining that the undergraduate admissions policy gave twenty points for "membership in an underrepresented racial or

to address fully its seemingly peculiar preference for the less transparent policy.³⁴⁰

Grutter also ignored a political-authority factor that might have helped it justify deference. As Governor Granholm argued in an amicus brief, “Michigan’s Constitution confers a unique autonomous status on its public universities” and thus vests “plenary authority over educational matters” to the university and its regents.³⁴¹ In other words, even though the Law School policy might have lacked the oversight, transparency, and legislative guidance typically necessary to trigger deference, the Court may have concluded that the university’s independence under the Michigan Constitution provided sufficient political authority. Moreover, to the extent an elected Board of Regents govern university policy, the Court could have further connected the challenged policy to the people of the state.³⁴² Once again, whereas Justices in *Bakke* explicitly addressed this issue,³⁴³ *Grutter* did not, thus failing to paint a complete picture of whether the policy deserved deference on political authority grounds.

The Court’s approach to the other administrative law inquiries was also incomplete. With regards to expertise, the Court failed to explore why deference to the university’s educational judgment was appropriate in *Grutter* but not in *Gratz*.³⁴⁴ If *Grutter* is correct that universities are uniquely

ethnic minority group” and that 100 points guaranteed admission).

³³⁹ See *infra* note 348 and accompanying text.

³⁴⁰ See *Gratz*, 539 U.S. at 297 (Souter, J., dissenting) (“[I]t seems especially unfair to treat the candor of the admissions plan as an Achilles’ heel.”); Guinier, *supra* note 61, at 194-95 (arguing that *Grutter* encourages admissions officials to make decisions with less transparency).

³⁴¹ Brief of Amicus Curiae Michigan Governor Jennifer Granholm at 13-14, *Grutter v. Bollinger*, 539 U.S. 306, 316 (2003) (No. 02-241, 02-516) (arguing that the university’s choice to enroll a diverse student body is entitled to deference under the Michigan Constitution).

³⁴² See *Gratz*, 539 U.S. at 252 n.2 (noting that the Michigan Board of Regents was the proper defendant in the case); *About the Board of Regents*, U. MICHIGAN, <http://www.regents.umich.edu/about/> (last visited December 21, 2010) (“The University is governed by the [elected] Board of Regents, [which has] . . . ‘general supervision’ of the institution.”); *supra* Part II.B.1.d.

³⁴³ Compare *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 309 (1978) (“[I]solated segments of our vast governmental structures are not competent to make those decisions, at least in the absence of legislative mandates and legislatively determined criteria.”), with *id.* at 366 n.42 (Brennan, J., concurring in part and dissenting in part) (“We . . . find nothing in the Equal Protection Clause that requires us to depart from established principle by limiting the scope of power the [elected] Regents may exercise more narrowly than the powers that may constitutionally be wielded by the Assembly.”).

³⁴⁴ Compare *Grutter*, 539 U.S. at 328 (“The Law School’s educational judgment that such diversity is essential to its educational mission is one to which we defer.”), with *Gratz*, 539 U.S. at 270 (rejecting admissions policy designed “to achieve the interest in educational

positioned to recognize the benefits that diversity brings to the educational experience,³⁴⁵ one would think that the same should have been true in *Gratz*. Of course, the discrepancy between the cases is largely explained by Justices O'Connor's and Breyer's votes, but the majority opinions themselves do not reconcile their apparently contradictory approaches to epistemic authority. Accordingly, *Grutter*'s deference to the university's epistemic authority seems superficial and, though justifiable, largely unjustified.³⁴⁶

This deference appears even more *sui generis* in light of *Parents Involved in Community Schools v. Seattle School District*, which just four years later refused to defer to school districts wishing to take race into account to achieve racially diverse public schools.³⁴⁷ Perhaps the Court might have concluded that the University of Michigan's expertise as to the educational merits of diversity exceeded that of the Seattle and Louisville school districts, but the Court failed to explore this distinction carefully in either case. The result, unsurprisingly, is that both opinions on the highly sensitive topic of educational racial diversity are inadequately theorized.

As for rule-of-law considerations, the discrepancies between *Grutter* and *Gratz* do reflect some attention to administrative process. Whereas the Court upheld the Law School's admissions policy in *Grutter* because it was sufficiently individualized, it rejected the undergraduate policy in *Gratz* because it mechanically added points to an application on the basis of race.³⁴⁸ The Court therefore did consider the care with which the admissions policies were implemented as part of its equal protection analysis. But it failed to look more generally at the processes by which the admissions policies had been adopted. Nor did it follow *Bakke*'s lead in examining whether the Law School's faculty possessed the authority to make such an important policy determination itself.³⁴⁹

diversity"). The Court also rejected Virginia's asserted educational judgment that single-sex education contributes to "diversity in educational approaches." *United States v. Virginia*, 518 U.S. 515, 535 (1996).

³⁴⁵ See *Grutter*, 539 U.S. at 328 (accepting that "complex educational judgments" underlying affirmative action lie "primarily within the expertise of the university").

³⁴⁶ Professor Horwitz persuasively justifies *Grutter*'s deference by emphasizing that courts are ill equipped to evaluate academic determinations made by universities, which are "First Amendment institutions . . . vital to public discourse." Horwitz, *supra* note 11, at 1128. However, as he explains, the Court failed to theorize adequately the deference in *Grutter* and other cases involving universities. See *id.* at 1128-39.

³⁴⁷ 551 U.S. 701, 724-25 (2007).

³⁴⁸ Compare *Grutter*, 539 U.S. at 334 (finding that the admissions committee properly considered race as a "'plus' factor in the context of individualized consideration of each and every applicant"), with *Gratz*, 539 U.S. at 271-72 (faulting the admissions policy for not providing sufficiently individualized consideration).

³⁴⁹ See *Grutter*, 539 U.S. at 314-15 (summarizing a faculty vote to adopt affirmative action plan); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 307 (2003).

Of course, while it sounds nobly democratic to allow the broader population to help shape the relationship between higher education and social mobility, such an approach might create other problems. For one, broader referenda seeking popular input on such questions have sometimes been confusing, resulting in disagreements about whether voters actually understood the questions presented.³⁵⁰ And even without such confusion, many voters may vote based solely on their perceived self-interest and not based on any vision of societal structure and mobility. Regardless of whether the resulting outcomes are preferable, a more democratic process does not necessarily lead to substantially more careful popular deliberation. That being said, such processes at least create more opportunity for democratic discourse.

Grutter's failure to engage with these important inquiries more carefully is regrettable and, in light of the discrepancies with *Bakke*, *Gratz*, and *Parents Involved*, confusing. Moreover, by not addressing these issues with any rigor, the *Grutter* majority left itself vulnerable to sharp criticism for deferring to the Law School notwithstanding the strict scrutiny it purported to apply.³⁵¹ *Grutter's* failure even to acknowledge *Bakke's* concern that it may be problematic for administrative agencies to make important decisions shaping the "allocation of opportunity and status"³⁵² indicates the shallowness of the constitutional analysis.

c. *Korematsu*

Korematsu is one of the more notorious decisions in constitutional history,³⁵³ but the Court might have avoided its regrettable decision had it more carefully considered the factors addressed here. Because the policy plainly discriminated on the basis of race, the Court applied heightened scrutiny to determine whether the policy violated the Equal Protection Clause.³⁵⁴ In

³⁵⁰ See, e.g., Michael S. Moses et al., *Investigating the Defeat of Colorado's Amendment 46: An Analysis of Trends and Principal Factors Influencing Voter Behaviors*, THE LEADERSHIP CONFERENCE ON CIVIL AND HUMAN RIGHTS 1 (September 9, 2010), <http://www.civilrights.org/publications/colorado-46/2010-11-12-defeat-of-amendment46-report-final.pdf> (discussing voter confusion resulting from poorly worded referendum ballot).

³⁵¹ See *Grutter*, 539 U.S. at 350 (Thomas, J., dissenting) ("Nor does the Constitution countenance the unprecedented deference the Court gives to the Law School, an approach inconsistent with the very concept of 'strict scrutiny.'").

³⁵² Guinier, *supra* note 61, at 140.

³⁵³ See, e.g., J.M. Balkin & Sanford Levinson, *The Canons of Constitutional Law*, 111 HARV. L. REV. 963, 1018 (1998) (discussing *Korematsu* as an anti-canonical case "that any theory worth its salt must show [is] wrongly decided").

³⁵⁴ Though *Korematsu* announced the doctrinal rule that race-based classifications trigger "rigid" scrutiny, *Korematsu v. United States*, 323 U.S. 214, 216 (1944), it would be inaccurate to say the Court applied contemporary strict scrutiny, which had not yet taken shape. See Fallon, *supra* note 56, at 1277.

ostensibly applying this level of scrutiny, however, the Court gave substantial deference to the military, accepting “the judgment of the military authorities . . . that there were disloyal members of that [Japanese] population, whose number and strength could not be precisely and quickly ascertained,” thus demanding “prompt and adequate measures be taken.”³⁵⁵ In other words, the Court deferred to the government’s expert determination that the detention of Japanese Americans was necessary for national security, because it was impossible to sort out the loyal from the disloyal.³⁵⁶

Had the Court looked more closely at administrative factors, it might have been less willing to defer to that determination.³⁵⁷ With regards to democratic legitimacy, a closer inquiry would have revealed that neither Congress nor the President created the policy or vested the military with specific authority to segregate Japanese Americans.³⁵⁸ The Court, then, deferred to General DeWitt, even though he may well have lacked legal authority to create a rule raising such serious equal protection concerns.³⁵⁹ Of course, the internment policy is offensive and almost certainly unconstitutional under current equal protection doctrine,³⁶⁰ so the Court’s deference to General DeWitt is only part of the problem with its analysis. But closer attention to administrative law norms may have made it clearer that the General lacked the authority to legalize racism.³⁶¹ Such an approach would have also been more in line with *Endo*, in which the Court emphasized that the agency in question had not been delegated authority to carry out its detention policy.³⁶²

³⁵⁵ *Korematsu*, 323 U.S. at 218 (quoting *Hirabayashi v. United States*, 320 U.S. 81, 99 (1943)).

³⁵⁶ See *id.* at 223 (arguing that *Korematsu* was excluded from the military area “because [the military] decided that the military urgency of the situation demanded that all citizens of Japanese ancestry be segregated from the West Coast temporarily”).

³⁵⁷ See Harlan Grant Cohen, “Undead” Wartime Cases: *Stare Decisis* and *The Lessons of History*, 84 TUL. L. REV. 957, 960 (2010) (explaining that *Korematsu* represents how “an overly deferential Court can unwittingly aid an overly aggressive Executive in unnecessary, panic-driven wartime attacks on civil liberties”).

³⁵⁸ See BLACK, *supra* note 33, at 81.

³⁵⁹ Cf. *Gonzales v. Oregon*, 546 U.S. 243, 274-75 (2006) (striking down an interpretive rule exceeding the statutory delegation).

³⁶⁰ See, e.g., *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 275 (1995) (Ginsburg, J., dissenting) (“A *Korematsu*-type classification . . . will never again survive scrutiny.”); Mark Tushnet, *Defending Korematsu?: Reflections on Civil Liberties in Wartime*, 2003 WIS. L. REV. 273, 296 (“*Korematsu* seems now to be regarded almost universally as wrongly decided.”).

³⁶¹ See *Korematsu*, 323 U.S. at 242 (Murphy, J., dissenting) (“I dissent . . . from this legalization of racism.”). The APA had not yet been enacted when the Court decided *Korematsu*, but the Justices certainly would have been familiar with the norms explored here.

³⁶² See *Ex parte Endo*, 323 U.S. 283, 300 (1944) (“Neither the Act nor the orders use the language of detention.”).

More careful consideration of expertise might also have counseled against such deference.³⁶³ In *Korematsu*, the Court took for granted the military's expertise and therefore accepted the necessity of the internment program. Closer inspection of the record, however, calls into serious question the necessity of the exclusion program.³⁶⁴ While General DeWitt was a military expert, he never established himself to be an expert on *that* particular question – that is, on the necessity of the internment program.³⁶⁵ To the contrary, as Justice Murphy pointed out in dissent, the military failed to marshal any reliable evidence showing that Japanese Americans posed any threat justifying their collective internment.³⁶⁶ Instead, DeWitt's "evidence" consisted of unsupported, racist assumptions that Japanese Americans were inherently treacherous.³⁶⁷ Further, DeWitt failed to explain why disloyal members of the Japanese community could not be separated from loyal ones.³⁶⁸ Indeed, the

³⁶³ See *supra* Part II.B.2.

³⁶⁴ Of course, it is easy to challenge the necessity of the plan with the benefit of hindsight and the comfort of having won the war. See Tushnet, *supra* note 360, at 287 ("[P]olicy-makers were acting in real time, when they did not know that the United States would win the war . . ."). Nevertheless, even at the time, significant evidence suggested that the policy was not necessary. See IRONS, *supra* note 69, at 201-02 (explaining that General DeWitt, in a confidential memorandum, conceded that "there was time to determine loyalty" before relocating people to internment camps).

³⁶⁵ See *Korematsu*, 323 U.S. at 239 (Murphy, J., dissenting) (arguing that the military determination rested on "an accumulation of much of the misinformation, half-truths and insinuations that for years have been directed against Japanese Americans by people with racial and economic prejudices"); Neil Gotanda, *The Story of Korematsu: The Japanese-American Cases*, in CONSTITUTIONAL LAW STORIES 249, 260 (Michael C. Dorf ed., 2004) (discussing Justice Murphy's review of the military actions taken by General DeWitt and how the "forced exclusion was the result . . . of racial guilt rather than bona fide military necessity").

³⁶⁶ See *Korematsu*, 323 U.S. at 236 (Murphy, J., dissenting) ("[N]o reliable evidence is cited to show that [Japanese Americans] were generally disloyal, or had generally so conducted themselves in this area as to constitute a special menace to defense installations or war industries, or had otherwise by their behavior furnished reasonable ground for their exclusion as a group."); Tushnet, *supra* note 360, at 288 (recounting historical record and concluding that "DeWitt . . . was a racist who simply assumed, without evidence, that Japanese Americans posed a threat of sabotage and espionage").

³⁶⁷ See *Korematsu*, 323 U.S. at 239 (Murphy, J., dissenting) (arguing that the justifications "for the forced evacuation . . . do not prove a reasonable relation between the group characteristics of Japanese Americans and the dangers of invasion, sabotage and espionage").

³⁶⁸ See *id.* at 241 (Murphy, J., dissenting) ("No adequate reason is given for the failure to treat these Japanese Americans on an individual basis by holding investigations and hearings to separate the loyal from the disloyal, as was done in the case of persons of German and Italian ancestry."); IRONS, *supra* note 69, at 201-02; cf. Joel B. Grossman, *The Japanese American Cases and the Vagaries of Constitutional Adjudication in Wartime: An Institutional Perspective*, 19 U. HAW. L. REV. 649, 656-67 (1997) (quoting General

evidence supporting the policy was so weak that several decades later, a federal district court reversed Mr. Korematsu's conviction, indicating that DeWitt's fear of Japanese Americans had been unfounded.³⁶⁹ Had the Court not taken epistemic authority for granted, it would likely have scrutinized the military's flimsy evidence and justifications for the internment program more carefully.

Of course, *some* deference may still have been appropriate. Probably more than any other agency, the military deserves deference on national security issues, especially in wartime.³⁷⁰ Furthermore, even though neither Congress nor the President authorized such blatant racial segregation, they certainly knew about it and did not prohibit it.³⁷¹ From this perspective, the administrative factors considered here probably would not have militated for the most rigorous review – though, of course, today the racial classification would trigger strict scrutiny.

Although some deference may have been appropriate, administrative law norms do not justify the Court's excessive deference to the military's determination that the exclusion of Japanese Americans was necessary. As *Endo* demonstrates, deference to the government on national security matters should not require courts to accept everything the government says.³⁷² When the Court blindly accepts governmental officials' assertions, people like Korematsu will never get "a responsible and competent judgment on the constitutionality of what has been done to him."³⁷³ Indeed, the Court in *Korematsu* deferred even though neither Congress nor the President had authorized a *race*-based exclusion. The Court, thus, not only deferred without examination to General DeWitt's highly questionable factual assertions that Japanese Americans threatened national security but also effectively ceded to him the meaning of the Equal Protection Clause. Such abdication of judicial responsibility to protect core constitutional values is unjustifiable, even in wartime.

These mistakes were avoidable. Attention to the poor democratic and administrative pedigree of the internment policy would have prompted closer

DeWitt's claim that "there isn't such a thing as a loyal Japanese and it is impossible to determine their loyalty by investigation").

³⁶⁹ See *Korematsu v. United States*, 584 F. Supp. 1406, 1420 (N.D. Cal. 1984).

³⁷⁰ See, e.g., *Rostker v. Goldberg*, 453 U.S. 57, 64-65 (1981) (explaining that the Court accords "Congress great deference" in the areas of "national defense and military affairs"); WILLIAM H. REHNQUIST, *ALL THE LAWS BUT ONE* 225 (1998) (arguing that law will "not be silent in time of war," but that it will speak with a "somewhat different voice").

³⁷¹ Elected officials had not reached agreement on how to deal with the situation. See IRONS, *supra* note 69, at 25-48.

³⁷² See, e.g., *Parhat v. Gates*, 532 F.3d 834, 848 (D.C. Cir. 2008) ("Lewis Carroll notwithstanding, the fact that the government has 'said it thrice' does not make an allegation true." (quoting LEWIS CARROLL, *THE HUNTING OF THE SNARK* 3 (1876))).

³⁷³ BLACK, *supra* note 33, at 78.

judicial inquiry into these issues and militated against the deference the Court reflexively granted. Given that the racial exclusion triggered heightened scrutiny, a less deferential approach very well could have resulted in a different outcome.

d. *Prison Condition Cases*

Prison condition cases refer to a class of cases, so the impact of the theory proposed here would turn on the particulars of each case. The Court, however, often utilizes a “one-size-fits-all approach” to deference that ignores different types of prison regulations and their contexts.³⁷⁴ In some cases, deference might be deserved. Prison officials, after all, can claim an epistemic authority over prison issues, justifying judicial deference to their “professional judgment.”³⁷⁵ But prison regulations are put in place with varying degrees of accountability, transparency, oversight, procedural regularity, and consideration of constitutional concerns. By shortchanging these multiple factors, courts exempt prison regulations from important accountability mechanisms, cutting off an inquiry that would determine whether the presumptive deference is deserved in given circumstances.³⁷⁶

Relatedly, the Court’s assumption that prison officials necessarily enjoy an expertise deserving of deference is questionable. Forty-three percent of the nation’s 1208 adult prisons remain unaccredited by the American Correctional Association, suggesting a lack of uniformity among prison practices, including hiring practices.³⁷⁷ While lack of hiring uniformity does not necessarily indicate incompetence, some prisons fail to employ qualified staffs and adhere to generally accepted standards.³⁷⁸ Indeed, a major commission report reviewing American correctional facilities strongly recommended strengthening professional standards, thus casting doubt on *Turner*’s assumption that experts necessarily craft prison policies.³⁷⁹ More careful review of the judicial deference offered in each prison case may not always change the outcome, but it would lead to more nuanced consideration of both the challenged regulations and the administrative pedigree behind those regulations.

Such attention would help the Court explain its (usually) relaxed review of prison conditions in recent decades.³⁸⁰ It would also have forced the Court to

³⁷⁴ See Shay, *supra* note 91, at 341.

³⁷⁵ Beard v. Banks, 548 U.S. 521, 525 (2006).

³⁷⁶ See GIBBONS & DE B. KATZENBACH, *supra* note 98, at 79-94 (discussing the pressing need for external oversight and internal accountability measures in prisons).

³⁷⁷ *Id.* at 88-89.

³⁷⁸ See *id.* at 70-73.

³⁷⁹ Compare *Turner v. Safley*, 482 U.S. 78, 84-87 (1987) (justifying deference to prison officials’ “expertise”), with GIBBONS & DE B. KATZENBACH, *supra* note 98, at 90-92 (recommending improved professional standards).

³⁸⁰ The Court’s recent decision in *Brown v. Plata* demonstrates the Court’s willingness to

justify more carefully both parts of *Turner*. Given that *Turner*'s seemingly contrary holdings partially rested on the Court's acceptance of the prison officials' expertise for the correspondence regulation and its rejection of that expertise for the marriage regulation,³⁸¹ a greater focus on administrative law norms would have helped the Court test its assumption that the prison administrators knew what they were doing in one context but not the other. Even if such inquiries did not yield a different outcome, they would have improved the judicial analysis by helping assure that judicial deference actually rested on an examination of the institution at issue.

2. Other Applications

As for the cases discussed in Part I.B, we see that the Court sometimes takes account of administrative law norms, albeit in a haphazard, inchoate way. The theory proposed here would call more systematic attention to the fact of administrative action. It would also make clear that agencies' decision-making structures necessarily affect individual rights and therefore should be considered when courts review agency actions allegedly infringing on those rights. Because cases such as *Mow Sun Wong*, *Freedman*, and *Boumediene* each considered some of these factors, my theory may not substantially affect the Court's approach in these cases. Nevertheless, greater attention to administrative law norms in those cases would have helped bring those factors into sharper focus, making them a more consistent and explicit feature of the doctrinal inquiry.

This theory could also impact other constitutional cases involving administrative officials. In the commercial-speech context, for instance, the factors explored here could help courts determine whether the relevant administrators weighed the proper factors while trying to regulate deceptive advertisements.³⁸² Similarly, in the criminal justice context, this theory could call more careful attention to the significant discretion courts often accord police and prosecutors.³⁸³ A fuller examination of this theory's relevance to

uphold dramatic remedial injunctions when states persistently fail to correct Eighth Amendment violations. See *Brown v. Plata*, 131 S. Ct. 1910, 1923-24 (2011) (affirming a remedial order requiring California to reduce its prison population within two years). Such judicial intervention, however, has more often been the exception rather than the norm in recent decades. See FEELEY & RUBIN, *supra* note 93, at 39-51; *supra* note 93 and accompanying text.

³⁸¹ See *supra* Part I.A.4.

³⁸² See, e.g., *Zauderer v. Office of Disciplinary Counsel of Sup. Court. of Ohio*, 471 U.S. 626, 651 (1985) (authorizing compelled disclosures on part of advertiser to avoid the possibility of deceiving consumers). But see *Ibanez v. Fla. Dep't of Bus. & Prof'l Reg.*, 512 U.S. 136, 143 (1994) (suggesting that government must demonstrate real harms rather than merely speculating that commercial speech is misleading).

³⁸³ See, e.g., Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869, 870 (2009) ("It is hard to overstate

these issues is beyond the scope of this article, but these types of inquiries could add greater nuance and depth to the Court's examination of various constitutional claims against administrative actors.

B. *Advantages*

1. Constitutional Adherence

The theory proposed here would encourage greater adherence to constitutional norms. In particular, it may encourage administrative officials to consider constitutional issues as they design and implement their policies.³⁸⁴ Agencies sometimes become tunnel-visioned, focusing so much on policy goals that they ignore other important values, including constitutional ones.³⁸⁵ By linking judicial deference in constitutional cases to agency behavior, courts would encourage agencies to consider constitutional values more carefully without substantially hampering their effectiveness. Given that administrative officials whose actions affect constitutional rights can function outside the scope of administrative laws, it is especially important to encourage agencies to take account of constitutional values.³⁸⁶

Additionally, this theory would remind courts that judicial deference to agencies should not extend to questions of constitutional law. Administrative agencies may enjoy superior epistemic authority to courts over many matters, but a court's "special claim to competency," as Professor Fiss put it, lies "in

the power of federal prosecutors."); Daniel S. Medwed, *The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence*, 84 B.U. L. REV. 125, 151-56 (2004) (contending that the electorate's capacity to hold prosecutors accountable for their actions is "more fiction than fact"); Daniel C. Richman, *Old Chief v. United States: Stipulating Away Prosecutorial Accountability?*, 83 VA. L. REV. 939, 963 (1997) ("The problem . . . is that even direct elections are not likely to prove an effective means of giving prosecutors guidance as to a community's enforcement priorities or of holding them accountable for the discretionary decisions that they have already made."); William J. Stuntz, *Substance, Process, and the Civil-Criminal Line*, 7 J. CONTEMP. LEGAL ISSUES 1, 12-13 (1996) (discussing the reasons courts delegate broad discretion to police and prosecutors).

³⁸⁴ Cf. Metzger, *supra* note 24, at 497-505 (discussing cases "encouraging agencies to take constitutional values and concerns into account in their decisionmaking").

³⁸⁵ See Eskridge & Baer, *supra* note 286, at 1174-75 ("[A]gencies tend toward tunnel vision, where they pursue their statutory mission with varying degrees of diligence, but often without sufficient regard to a larger normative framework such as the Constitution."); Seth F. Kreimer, *Exploring the Dark Matter of Judicial Review: A Constitutional Census of the 1990s*, 5 WM. & MARY BILL RTS. J. 427, 506-07 (1997) (arguing that bureaucracies' missions tend "to dwarf competing values" so that bureaucrats often ignore constitutional issues); Monaghan, *supra* note 33, at 523 (discussing "institutional 'tunnel vision'" in censors and labor boards).

³⁸⁶ Cf. Metzger, *supra* note 24, at 534 ("[U]sing ordinary administrative law to encourage administrative constitutionalism . . . represents an important tool for ensuring constitutional enforcement while also respecting political branch prerogatives.").

the domain of constitutional values.”³⁸⁷ By avoiding reflexive deference to agencies in constitutional cases, courts would be better able to provide independent judicial evaluation of the alleged constitutional injury.

2. Democratic Accountability

The theory here would also encourage elected legislatures and chief executives to take responsibility for policies. Legislatures often delegate difficult policy questions to agencies to avoid taking the political heat for controversial policy determinations. As John Hart Ely stated, “[T]he common case of nonaccountability involves . . . a situation where the legislature (in large measure precisely in order to escape accountability) has refused to draw the legally operative distinctions, leaving that chore to others who are not politically accountable.”³⁸⁸ If legislatures knew that courts would scrutinize more closely the constitutionality of agency actions where legislative input is minimal or vague, legislatures might be inclined to legislate more precisely and oversee more closely.³⁸⁹ Of course, given that legislatures punt to agencies to avoid accountability, more stringent review of agency action might not necessarily translate into greater legislative care. More rigorous judicial review, however, should encourage more careful delegations on the margins; even the most cynical politicians might fear that judicial invalidations of agency policies would eventually reflect badly on the legislators themselves. To this extent, the inquiries proposed here may be “democracy-forcing,” helping to ensure that “certain choices are made by an institution with a superior democratic pedigree.”³⁹⁰ Agency expertise is still often very valuable, but government generally functions better when elected officials are engaged.³⁹¹

Some critics might contend that current governmental policies are sufficiently democratic because a legislature’s failure to reverse agency policy constitutes tacit approval.³⁹² This argument overvalues legislative silence. Numerous veto-gates prevent the enactment of even some popular bills, thus

³⁸⁷ Owen M. Fiss, *The Supreme Court, 1978 Term – Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 34 (1979).

³⁸⁸ ELY, *supra* note 188, at 130-31.

³⁸⁹ Cf. John F. Manning, *Lessons from a Nondelegation Canon*, 83 NOTRE DAME L. REV. 1541, 1543 (2008) (“[N]ondelegation canons have the collateral benefit of promoting congressional responsibility for lawmaking . . .”).

³⁹⁰ Sunstein, *supra* note 207, at 317.

³⁹¹ See CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT 24 (1999) (arguing in favor of constitutional doctrines which “promote electoral control by helping to ensure that politically accountable actors make important decisions”).

³⁹² See BICKEL, *supra* note 9, at 19-20 (arguing that judges should exercise restraint when reviewing agency actions, because agency policies “are reversible by legislative majorities”).

sometimes obstructing democratic preferences.³⁹³ Moreover, in some instances, such as lethal injection, the legislature likely knows little about the policy.³⁹⁴ In other instances, the legislature's inaction likely results from political cowardice, not approval.³⁹⁵ Thus, as Professor Stewart contends, "Individual politicians often find far more to be lost than gained in taking a readily identifiable stand on a controversial issue of social or economic policy."³⁹⁶

3. Recognition of the Variety of Agency Action

The theory presented here also has the advantage of taking account of the numerous and complicated variables surrounding the exercise of governmental power. Critics might contend that a multi-factor inquiry like the one proposed here will only sow uncertainty into the law and give too much power to courts.³⁹⁷ But the world is complicated, and legal doctrine should be nuanced enough to appreciate important differences.³⁹⁸ In particular, agencies exist in many shapes and take many kinds of actions, and a one-size-fits-all approach to deference does not take proper account of those differences. As the Supreme Court explained, "Although we all accept the position that the Judiciary should defer to at least some of this multifarious administrative action, we have to decide how to take account of the great range of its variety."³⁹⁹ Thus, just as the Court in *Mead* reinvigorated *Skidmore v. Swift Co.* and allowed for judicial deference to agency action based upon "those factors which give [the agency] the power to persuade,"⁴⁰⁰ the theory proposed here allows courts to consider various factors cutting for or against deference.

³⁹³ See McNollgast, *Positive Canons: The Role of Legislative Bargains in Statutory Interpretation*, 80 GEO. L.J. 705, 720 (1992) (discussing numerous points at which congressional bills can be killed).

³⁹⁴ See Berger, *supra* note 41, at 311 (discussing lethal injection and "elected officials' utter inattention to the protocol's design").

³⁹⁵ See, e.g., ELY, *supra* note 188, at 131-32 ("[O]n most hard issues our representatives quite shrewdly prefer not to have to stand up and be counted but rather to let some executive-branch bureaucrat . . . take the inevitable political heat." (internal quotation marks omitted)).

³⁹⁶ Stewart, *supra* note 29, at 1695; cf. *Johnson v. Transp. Agency, Santa Clara Cnty.*, 480 U.S. 616, 672 (1987) (Scalia, J., dissenting) ("[V]indication by congressional inaction is a canard.").

³⁹⁷ See, e.g., *United States v. Mead Corp.*, 533 U.S. 218, 241 (2001) (Scalia, J., dissenting) (criticizing *Mead* for bringing uncertainty into administrative law by reinvigorating "th'ol' 'totality of the circumstances' test").

³⁹⁸ See Farina, *supra* note 156, at 989 ("There are no simple rules for this complex world.").

³⁹⁹ *Mead*, 533 U.S. at 236.

⁴⁰⁰ *Id.* at 250 (Scalia, J., dissenting) (quoting *Skidmore v. Swift Co.*, 323 U.S. 134, 140 (1944)).

Such an approach might be especially useful for constitutional challenges to state administrative action, given the great “variety among state administrative laws.”⁴⁰¹

Moreover, to the extent that the Court already offers deference to government agencies in some individual rights cases, this theory does not complicate the judicial inquiry so much as it encourages more systematic, consistent examination. While the numerous factors considered here admittedly will give judges flexibility that may result in uncertainty, the Court’s current approach to deference entertains numerous (sometimes unarticulated) factors and is far from predictable. More explicit attention to the variety of agency action, then, would encourage courts to discuss more transparently what they already do anyway.

4. Doctrinal Coherence

Relatedly, the theory here would also help bring some coherence to the Court’s approach to deference. Of course, doctrinal and contextual differences largely drive the various approaches in the cases discussed above, but the Court nevertheless fails to explore with any rigor or consistency administrative actors’ roles in individual rights cases. Nor do courts’ deference practices actually follow from their stated justifications for deference. Courts often justify deference on the basis of the agency’s political authority and epistemic authority,⁴⁰² but as we have seen, they nevertheless often defer to administrative agencies without examining either type of authority. Courts could then improve doctrinal coherence by practicing what they have preached.

Interestingly, the Supreme Court once paid more attention to these norms. In 1970s cases such as *Mow Sun Wong* and *Bakke*, the Court identified the fact of agency action and offered less deference precisely because agency, rather than legislative, action was at issue.⁴⁰³ As we have seen, more recent cases like *Grutter* and *Baze* have decidedly moved away from that model. While increased attention to administrative law norms might not change the outcome of these recent cases, it would help reconcile those decisions with important precedent.

Attention to administrative law norms in individual rights cases could also align such cases with other doctrine. As we have seen, under various non-delegation canons, agency action implicating particular constitutional concerns is disfavored, even though Congress itself could sometimes pass an identical measure.⁴⁰⁴ If agency action raising federalism or due process issues is presumptively invalid without clear legislative authorization, courts should, at a minimum, pay closer attention to agency action implicating free speech,

⁴⁰¹ WILLIAM F. FUNK & RICHARD H. SEAMON, ADMINISTRATIVE LAW: EXAMPLES AND EXPLANATIONS 20 (2001).

⁴⁰² See Horwitz, *supra* note 11, at 1078.

⁴⁰³ See *supra* notes 63-64, 107-119 and accompanying text.

⁴⁰⁴ See *supra* note 207 and accompanying text.

equal protection, and other individual rights. In other words, courts should review agency action allegedly infringing on individual rights in light of non-delegation canons, which view skeptically agency policies treading close to other constitutional boundaries.⁴⁰⁵

5. Judicial Candor

Finally, the theory here could help improve judicial candor. Though courts ostensibly grant judicial deference due to institutional concerns involving courts' relative democratic and epistemic shortcomings, the Court's haphazard approach suggests that its deference determinations may sometimes be shaped by normative value judgments about the rights at issue. Closer attention to the nature of administrative action can help courts more uniformly weigh institutional concerns and more cleanly separate such concerns from the substantive merits. Indeed, the Court's erratic approach to deference may result partially from its sloppy conflation of institutional-based analysis and substantive, rights-based analysis. While such conflation may be difficult to avoid at times, a more rigorous examination of the relevant administrative institution would help courts keep those inquiries distinct and more candidly acknowledge the normative judgments they sometimes make.⁴⁰⁶ Moreover, such an approach may reflect what courts already silently do anyway. Indeed, scholars have noted that notwithstanding *Chevron's* instructions, courts' actual deference determinations in administrative law cases hinge on a variety of functional and institutional inquiries.⁴⁰⁷

Increased judicial candor, of course, is not without its costs. As Professor Metzger explains, "A court's greater honesty about the concerns motivating its decisions may reveal unpalatable value choices, raise obstacles to securing the agreement of multimember bodies, or have worrying implications for future decisions."⁴⁰⁸ Nevertheless, those costs are likely outweighed by a better understanding of the role the governmental actor plays in constitutional decision making generally.⁴⁰⁹

⁴⁰⁵ See Sunstein, *supra* note 207, at 331-33 (discussing constitutionally inspired non-delegation canons).

⁴⁰⁶ See, e.g., Gillian E. Metzger, *Tradeoffs of Candor: Does Judicial Transparency Erode Legitimacy?*, 64 N.Y.U. ANN. SURV. AM. L. 459, 466 (2009) (discussing the Court's lack of candor when it makes normative judgments); *supra* notes 292-297 and accompanying text.

⁴⁰⁷ See Eskridge & Baer, *supra* note 286, at 1202 (summarizing the Court's complicated continuum of deference that it has assembled "mostly through inadvertence").

⁴⁰⁸ Metzger, *supra* note 24, at 535.

⁴⁰⁹ See Metzger, *supra* note 406, at 466 (criticizing the Court's lack of "overt, normative engagement with the real issues involved").

C. *Implications for Constitutional Theory*

The analysis here has important implications for constitutional theory. Perhaps most obviously, my approach suggests that the counter-majoritarian difficulty,⁴¹⁰ however persuasive when courts review statutes, has less presumptive force when they review agency action.⁴¹¹ Judicial deference to legislative action on the basis of legislatures' superior political authority may or may not be wise, but it is surely less appropriate during judicial review of an agency action without some closer examination of the democratic legitimacy underlying that particular action. Of course, deference might be appropriate on some other ground, such as expertise, but it should be clear by now that we need a separate theory of judicial deference for administrative agencies.⁴¹²

The theory here also builds on recent important scholarship on administrative constitutionalism, which recognizes that administrative and legislative officials are not only America's policy makers, but also often its "norm entrepreneurs."⁴¹³ Given that agency action is a dominant mechanism for the articulation and evolution of the country's fundamental normative commitments,⁴¹⁴ courts should be more sensitive to the important ways in which administrative agencies shape constitutional meaning.⁴¹⁵ Indeed, courts' inadequate recognition of the fact and nature of administrative action in constitutional cases suggests that judges do not sufficiently appreciate the significant role agencies play in guiding constitutional norms.

Relatedly, the theory here can also help determine when courts are justified in intervening in matters usually left to administrative agents. Judicial restraint is often premised on the belief that judges are not the proper decision maker to address certain kinds of institutional failures such as poor prison conditions.⁴¹⁶ In contrast to courts, legislatures can arrange hearings and investigations, seek advice, and balance resource expenditures against competing priorities.⁴¹⁷

⁴¹⁰ See *supra* notes 9-10 and accompanying text.

⁴¹¹ See Adler, *supra* note 30, at 806-07 (observing that different reasons for judicial restraint apply when courts invalidate agency action as opposed to the practice of invalidating statutes).

⁴¹² See *id.* at 768 (discussing judicial restraint and the administrative state).

⁴¹³ ESKRIDGE & FEREJOHN, *supra* note 35, at 33.

⁴¹⁴ See *id.*

⁴¹⁵ See, e.g., *id.* at 29-74 (discussing EEOC's role in reshaping the nation's attitudes towards sex discrimination); Sophia Z. Lee, *Race, Sex, and Rulemaking: Administrative Constitutionalism and the Workplace, 1960 to the Present*, 96 VA. L. REV. 799, 811-44 (2010) (discussing FCC implementation of and FPC rejection of equal employment rules).

⁴¹⁶ See, e.g., *Bell v. Wolfish*, 441 U.S. 520, 562 (1979) ("[U]nder the Constitution, the first question to be answered is not whose plan is best, but in what branch of the Government is lodged the authority to initially devise the plan."); FEELEY & RUBIN, *supra* note 93, at 47-48 (discussing the emergence of Supreme Court hostility towards prison reform litigation).

⁴¹⁷ Edward L. Rubin & Malcolm M. Feeley, *Judicial Policy Making and Litigation*

However, as Professors Rubin and Feeley explain, legislatures and agencies are often disinclined to act, so when confronted with grave problems, some judges believe that their imperfect judicial action is preferable to no action at all.⁴¹⁸ Others, of course, reject that model and posit that judicial intervention in agency affairs is rarely justified.⁴¹⁹

Significantly, without closer inspection of the agency at issue, judges in both camps are making these decisions without the benefit of important information that should not be difficult to obtain. The factors identified here could help judges better gauge the strengths and weaknesses of the agency at issue. This determination, in turn, could help courts decide whether the agency at issue deserves deference or, alternatively, whether judicial intervention is warranted. Indeed, consistent with recent scholarship focusing on different institutions' relative advantages for certain kinds of decisions,⁴²⁰ the theory here would help courts clarify the way administrative agencies are working in particular cases. Because constitutional law revolves around the question "who decides," it is crucial for courts to more closely examine the way relevant decision makers actually operate.⁴²¹

The analysis here also can help clarify the complicated relationship between individual rights and governmental structure and processes.⁴²² Some critics

Against the Government, 5 U. PA. J. CONST. L. 617, 630-31 (2003).

⁴¹⁸ *Id.* at 631-33.

⁴¹⁹ See, e.g., ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION 230 (2006) (arguing that judges in constitutional cases should "enforce clear and specific constitutional texts" but otherwise "eschew ambitious forays beyond this baseline"); Paul J. Mishkin, *Federal Courts as State Reformers*, 35 WASH. & LEE L. REV. 949, 972-73 (1978) (calling for "heightened judicial sensitivity" to the implications of "the proliferation and regularization of broad institutional relief" often issued by courts).

⁴²⁰ See, e.g., Joan MacLeod Heminway, *Rock, Paper, Scissors: Choosing the Right Vehicle for Federal Corporate Governance Initiatives*, 10 FORDHAM J. CORP. & FIN. L. 225, 262-64 (2005) (discussing the factors important in considering which institution should enact and enforce a federal rule of corporate governance); Thomas W. Merrill, *Preemption and Institutional Choice*, 102 NW. U. L. REV. 727, 746-47 (2008) (describing the relevant variables in determining which institutions are best suited to answering questions of federal preemption); Rubin & Feeley, *supra* note 417, at 619-25.

⁴²¹ 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."); Akhil Reed Amar, *On Impeaching Presidents*, 28 HOFSTRA L. REV. 291, 309 (1999) ("[T]he basic question in constitutional law is often 'who decides?'").

⁴²² Cf. *New York v. United States*, 505 U.S. 144, 206 (1992) (White, J., dissenting) ("[T]he entire structure of our federal constitutional government can be traced to an interest in establishing checks and balances to prevent the exercise of tyranny against individuals."); *Morrison v. Olson*, 487 U.S. 654, 727 (1988) (Scalia, J., dissenting) ("The purpose of the separation and equilibration of powers . . . was not merely to assure effective government but to preserve individual freedom."); *Clinton v. City of New York*, 524 U.S. 417, 450

may contend that consideration of administrative law factors in general and political accountability in particular should not help define the scope of individual rights, which, after all, serve as checks against democratic overreaching. Ronald Dworkin, for instance, contends that rights are “trumps” that prevent government from impinging on those rights.⁴²³ Thus, the argument goes, because individual rights check majoritarian impulses, the constitutionality of a given policy should not turn on its democratic pedigree.

This vision of rights as trumps against the tyranny of the majority certainly has an intuitive appeal, but it also oversimplifies the role rights play in our constitutional structure. While individuals can sometimes invoke rights to invalidate governmental policy, it seems reasonably clear that rights are *not* trumps that necessarily invalidate all governmental action impinging on them.⁴²⁴ To the contrary, courts usually identify the boundary between an individual right and governmental power as the point where government’s interests are no longer compelling enough to override the interests underlying the exercise of that right.⁴²⁵ This vision of constitutional law recurs most frequently in the familiar tiers of scrutiny, which allow government to intrude on certain rights if its reasons for doing so are sufficiently compelling and sufficiently related to the achievement of the governmental interest.⁴²⁶ Under

(1998) (Kennedy, J., concurring) (“Separation of powers was designed to implement a fundamental insight: Concentration of power in the hands of a single branch is a threat to liberty.”); AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* xii (1998) (arguing that the Bill of Rights relied on organizational structure to protect individual rights); Richard H. Pildes, *Why Rights Are Not Trumps: Social Meanings, Expressive Harms, and Constitutionalism*, 27 J. LEGAL STUD. 725, 734 (1998) (“[A] thinner line separates the rights side of constitutionalism from the structural side than we usually recognize . . .”); Wilkinson, *supra* note 34, at 1687 (“[T]he supposed dichotomy between rights and structure is never so stark as some would have it.”).

⁴²³ Ronald Dworkin, *Rights as Trumps*, in *THEORIES OF RIGHTS* 153, 153 (Jeremy Waldron ed., 1984); *see also* RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* xi (1977) [hereinafter DWORKIN, *TAKING RIGHTS SERIOUSLY*].

⁴²⁴ Indeed, even Dworkin recognizes that some consideration of governmental interests is necessary to define the scope of rights. *See* DWORKIN, *TAKING RIGHTS SERIOUSLY*, *supra* note 423, at 92 (arguing that the weight of a right is measured by its “power to withstand such competition”); Richard H. Fallon, *Individual Rights and the Powers of Government*, 27 GA. L. REV. 343, 369-71 (1993).

⁴²⁵ Scholars disagree as to whether this relationship is better characterized as “balancing” or as an assessment of the kinds of reasons that the political branches may not invoke in certain spheres. *Compare* Fallon, *supra* note 424, at 361-62 (“The definition of protected rights depends pervasively on a balancing of the interests underlying the rights against the interests supporting the recognition of governmental powers.”), *with* Pildes, *supra* note 422, at 733-34 (“[C]onstitutional law does not entail, as often as many think, ‘balancing’. . . [but instead] entails judicial efforts to define the *kinds of reasons* that are impermissible justifications for state action in different spheres.”).

⁴²⁶ *See* Pildes, *supra* note 422, at 734.

current doctrine, then, constitutional rights cease to protect the individual if government has a “good enough” reason for intruding.⁴²⁷

The Court in individual rights cases has tended to focus on the government’s articulated policy interest, but it has explored less carefully the government’s more general interest in preserving the discretion of unelected administrative agents. These governmental bureaucrats often work near the bottom of the policy-making totem pole but, nonetheless, play a significant role in crafting and implementing governmental policy. Left unchecked, this bureaucratic discretion increases the potential that a government official will intrude on an individual’s rights.⁴²⁸ Eliminating bureaucratic discretion, however, would make governance all but impossible, as no system of rules can fully accommodate the uniqueness of every particular situation.⁴²⁹ Given that these administrative agents perform much of the government’s day-to-day work, the degree of discretion they enjoy will have substantial implications for our constitutional system. Consequently, just as constitutional law considers more narrowly how particular governmental interests shape certain individual rights, so too should it more broadly consider how simultaneously to accommodate bureaucratic discretion and individual rights.⁴³⁰ Indeed, these connections are especially important, because administrative agents may be more likely to invade individual rights when they act without sufficient oversight, transparency, or procedural regularity.⁴³¹ A theory of deference linking the actions of the administrative agency to individual rights more precisely, then, could help minimize what Professor Davis called “unpleasant areas of discretionary determinations.”⁴³²

Such an approach is a compromise between those who question the constitutional validity of the administrative state and those who accept administrative agencies as permanent fixtures of our constitutional landscape.⁴³³ My theory admittedly presupposes the administrative state’s

⁴²⁷ See Stephen Gardbaum, *The Myth and the Reality of American Constitutional Exceptionalism*, 107 MICH. L. REV. 391, 430 (2008) (“[T]his structure means that legislatures are granted a limited power to override constitutional rights, which is validly exercised when the relevant burden of justification is satisfied.”).

⁴²⁸ See Tokaji, *supra* note 14, at 2409-10.

⁴²⁹ See DAVIS, *supra* note 13, at 17 (“Rules without discretion cannot fully take into account the need for tailoring results to unique facts and circumstances of particular cases.”).

⁴³⁰ See *id.* at 25 (“[E]very truth warning of dangers or harms from discretion may be matched by a truth about the need for and the benefits from discretion.”).

⁴³¹ See, e.g., *id.* at 77-80 (suggesting that agency determinations should not be sufficient to resolve individual rights questions); Bressman, *supra* note 24, at 493-503 (discussing the dangers of agency arbitrariness).

⁴³² See DAVIS, *supra* note 13, at 215.

⁴³³ Compare Benjamin & Young, *supra* note 202, at 2113-14 (expressing concerns about the constitutionality of the administrative state), and Gary Lawson, *The Rise and Rise of the*

legitimacy, but it also recognizes the unique dangers that state poses. Rather than abandoning the administrative state – which would wreak havoc on governmental structure and policy – or conceding to its whims entirely – which would be dangerous to democracy and liberty – this theory seeks to preserve constitutional principles in light of the special threats administrative bureaucracy sometimes poses.

CONCLUSION

The Court's individual rights jurisprudence pays sporadic and inadequate attention to administrative agencies' role in our constitutional structure. While the Court occasionally expresses concern over the fact or nature of agency actions intruding on individual liberties, it does so neither consistently nor systematically. This neglect is unfortunate. Administrative agencies play a crucial role in American law, and as the Court has recognized in other contexts, agency-made policy may raise constitutional concerns not raised by identical legislative policy. An inquiry into administrative law norms in individual rights cases involving agencies would help reconcile those cases with other doctrine that recognizes that agency action is different from action taken by the legislature or chief executive.

This inquiry would not effect a sea change in constitutional doctrine. Instead, it would help guide the level of deference courts would grant – that is, the lens through which courts would engage in the substantive constitutional analysis. Given the Court's neglect of these factors to date, this approach would likely result in more deference in several cases where the Court has paid scant attention to the fact and nature of agency action, but the exact level of deference would hinge on the particulars of each case. Indeed, the proposal here would encourage greater attention to the context of agency action, thus resisting the Court's haphazard approach. The result would be a more careful determination of whether an administrative agency deserves wide-ranging discretion in particular circumstances. Such a result would make practical sense and would help demonstrate that individual rights should be understood not in a vacuum but in reference to how the government actually functions.

Administrative State, 107 HARV. L. REV. 1231, 1253 (1994) (“If . . . one . . . follows the New Deal architects in choosing the administrative state over the Constitution, one must also acknowledge that all constitutional discourse is thereby rendered problematic.”), with Edward Rubin, *The Myth of Accountability and the Anti-Administrative Impulse*, 103 MICH. L. REV. 2073, 2074 (2005) (arguing that challengers to the administrative state’s legitimacy commit “intellectual sin” by “distract[ing] our attention from the government we actually possess”).